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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ELIZABETH HICKS, an Individual on  
behalf of herself and all others similarly  
situated and the general public,  
  
Plaintiff,  
  
v.  
  
GRIMMWAY ENTERPRISES, INC.,  
a Corporation with Headquarters in  
California; and DOES 1–100, inclusive,  
  
Defendants.

Case No.: 22-CV-2038 JLS (DDL)  
  
**ORDER DENYING DEFENDANT’S  
MOTION TO STRIKE**  
  
(ECF No. 3)

Presently before the Court is Defendant Grimmway Enterprises, Inc.’s Motion to Strike the First, Second, and Third Causes of Action in Plaintiff’s First Amended Complaint, and For Attorneys’ Fees, Pursuant to Cal. Code Civ. P. § 425.16 (“Mot.,” ECF No. 3). Plaintiff Elizabeth Hicks filed an Opposition to the Motion (“Opp’n,” ECF No. 11), and Defendant filed a Reply in support thereof (“Reply,” ECF No. 13). Having considered the Parties’ arguments and the law, the Court **DENIES** Defendant’s Motion.

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## BACKGROUND

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2 In this putative class action, Plaintiff alleges that Defendant, a California agricultural  
3 corporation, misrepresented the environmental impact of its farming practices through its  
4 advertising and “Inaugural Report on Environmental, Social and Governance Actions”  
5 (“ESG Report”). See First Amended Complaint (“FAC,” ECF No. 1-8) ¶¶ 1–4, 19–26.  
6 Specifically, Plaintiff alleges that Defendant’s statements about “regenerative farming”; its  
7 Environmental, Social, and Governance (“ESG”) commitments; and “preserving natural  
8 resources” were “false, deceptive, and misleading.” *Id.* ¶¶ 15–16. According to Plaintiff,  
9 Defendant’s “method of growing its goods is causing severe harm to the ecosystem, and to  
10 its neighbors and communities.” *Id.* ¶ 3.

11 Plaintiff purports to represent a class of consumers who “would not have purchased  
12 (or would not have paid a premium [for])” Defendant’s products had they known of  
13 Defendant’s allegedly misleading statements. *Id.* ¶ 16. The FAC asserts three causes of  
14 action: (1) false advertising in violation of California Business & Professions Code  
15 §§ 17500 *et seq.*, FAC ¶¶ 43–48; (2) “unlawful, unfair, or fraudulent” business practices in  
16 violation of California Business & Professions Code §§ 17200 *et seq.*, FAC ¶¶ 49–60; and  
17 (3) violation of the Consumer Legal Remedies Act (“CLRA”), California Civil Code  
18 §§ 1750 *et seq.*, FAC ¶¶ 61–69.

19 Plaintiff initiated this putative class action by filing a complaint in the Superior Court  
20 of San Diego County on September 29, 2022. ECF No. 1-3. Plaintiff filed the FAC in  
21 Superior Court on November 22, 2022. See FAC. Defendant removed the case to this  
22 Court on December 22, 2022. See Notice of Removal (“Not. of Removal,” ECF No. 1).  
23 On December 23, 2022, Defendant filed the instant Motion, arguing that “Plaintiff’s  
24 lawsuit should be dismissed under California’s anti-SLAPP framework.” Memorandum  
25 of Points and Authorities in Support of Defendant’s Motion to Strike (“Mem.,” ECF No.  
26 3-1) at 7.<sup>1</sup>

27  
28 <sup>1</sup> Pin citations refer to the CM/ECF page numbers electronically stamped at the top of each page.

1 **DEFENDANT’S MOTION TO STRIKE**

2 Defendant argues that Plaintiff’s three causes of action should be dismissed under  
3 California’s anti-SLAPP statute because “(a) [they are] impermissibly predicated on  
4 Defendant Grimmway’s exercise of its free speech rights (namely, political advocacy and  
5 statements of public interest), and (b) Plaintiff will fail to establish a probability of  
6 prevailing on the merits.” Mem. at 7. Plaintiff counters that “all of the language at issue  
7 is ‘commercial speech,’” which “does not receive [a]nti-SLAPP protections.” Opp’n at 8–  
8 9.

9 **I. Legal Standard**

10 Pursuant to California’s Anti-Strategic Lawsuit Against Public Participation (“anti-  
11 SLAPP”) statute, “a party may file a motion to strike a cause of action against it if the  
12 complaint ‘aris[es] from any act of that person in furtherance of the person’s right of  
13 petition or free speech under the United States Constitution or the California Constitution  
14 in connection with a public issue.’” *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595  
15 (9th Cir. 2010) (citing Cal. Civ. Proc. Code § 425.16(b)(1)). An “act in furtherance of a  
16 person’s right of petition or free speech under the United States Constitution or the  
17 California Constitution in connection with a public issue” includes:

- 18 (1) any written or oral statement or writing made before a  
19 legislative, executive, or judicial proceeding, or any other official  
20 proceeding authorized by law, (2) any written or oral statement  
21 or writing made in connection with an issue under consideration  
22 or review by a legislative, executive, or judicial body, or any  
23 other official proceeding authorized by law, (3) any written or  
24 oral statement or writing made in a place open to the public or a  
25 public forum in connection with an issue of public interest, or (4)  
26 any other conduct in furtherance of the exercise of the  
27 constitutional right of petition or the constitutional right of free  
28 speech in connection with a public issue or an issue of public  
interest.

27 Cal. Civ. Proc. Code § 425.16(e).

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1 “A court considering a motion to strike under the anti-SLAPP statute must engage  
2 in a two-part inquiry.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir.  
3 2003). First, the defendant must make an initial prima facie showing “that the challenged  
4 cause of action is one arising from protected activity.” *Navellier v. Sletten*, 52 P.3d 703,  
5 708 (2002). “A defendant meets this burden by demonstrating that the act underlying the  
6 plaintiff’s cause fits one of the categories spelled out in section 425.15, subdivision (e).”  
7 *Id.* (quoting *Braun v. Chronicle Publ’g Co.*, 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997))  
8 (internal quotation marks omitted). “The defendant need not show that the plaintiff’s suit  
9 was brought with the intention to chill the defendant’s speech; the plaintiff’s ‘intentions  
10 are ultimately beside the point.’” *Id.* (citing *Equilon Enters., LLC v. Consumer Cause,*  
11 *Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002)); *see also Dible v. Haight Ashbury Free Clinics, Inc.*,  
12 170 Cal. App. 4th 843, 851 (2009) (“If the actionable communication fits within the  
13 definition contained in the statute, the motive of the communicator does not matter.”  
14 (citation omitted)). “Similarly, the defendant bringing a motion to strike need not show  
15 that any speech was actually chilled.” *Vess*, 317 F.3d at 1110 (citing *City of Cotati v.*  
16 *Cashman*, 29 Cal. 4th 69, 75–76 (Cal. 2002)).

17 In federal court, the standard the court applies in the second step depends on whether  
18 the anti-SLAPP motion is founded on purely legal arguments or raises factual challenges  
19 to the complaint. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890  
20 F.3d 828, 834 (9th Cir. 2018), *concurrency amended*, 897 F.3d 1224 (9th Cir. 2018).  
21 “[W]hen an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim,  
22 a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and  
23 consider whether a claim is properly stated,” but “when an anti-SLAPP motion to strike  
24 challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56  
25 standard will apply.” *Id.*; *see also CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136,  
26 1143 (9th Cir. 2022).

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1 California Code of Civil Procedure § 425.17 lays out several exemptions from anti-  
2 SLAPP liability. Among them is § 425.17(c), the “commercial speech exemption.” *TYR*  
3 *Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1142 (C.D. Cal. 2009). Under  
4 this provision, causes of action arising from commercial speech are exempt from the anti-  
5 SLAPP law when:

6 (1) the cause of action is against a person primarily engaged in  
7 the business of selling or leasing goods or services;

8 (2) the cause of action arises from a statement or conduct by that  
9 person consisting of representations of fact about that person’s  
10 or a business competitor’s business operations, goods, or  
11 services;

12 (3) the statement or conduct was made either for the purpose of  
13 obtaining approval for, promoting, or securing sales or leases of,  
14 or commercial transactions in, the person’s goods or services or  
15 in the course of delivering the person’s goods or services; and

16 (4) the intended audience is an actual or potential buyer or  
17 customer, or a person likely to repeat the statement to, or  
18 otherwise influence, an actual or potential buyer or customer.

19 *See Simpson Strong-Tie Co. v. Gore*, 230 P.3d 1117, 1129 (2010).

## 20 **II. Discussion**

21 The Court will first analyze whether Defendant’s ESG Report is subject to the  
22 commercial speech exemption by addressing each of the four *Simpson Strong-Tie Co.*  
23 factors listed above. *Supra*. “If it is, the anti-SLAPP analysis ends. If not, the Court  
24 continues with the § 425.16 analysis.” *Weiland Sliding Doors & Windows, Inc. v. Panda*  
25 *Windows & Doors, LLC*, 814 F. Supp. 2d 1033, 1037 (S.D. Cal. 2011).

26 First, it is undisputed that Defendant is an entity primarily engaged in the business  
27 of selling or leasing goods. *See* Mem. at 8 (“Defendant Grimmway is a grower and shipper  
28 of carrots and organic produce . . .”).

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1 Second, the ESG Report contains several representations of fact about Defendant’s  
2 business operations and goods. The ESG Report boasts of Defendant’s “Environmental  
3 Stewardship,” ECF No. 3-4 at 9; “Leadership in Organics,” *id.* at 11; low-emission farm  
4 equipment, *id.* at 19; “Responsible Farming Practices,” *id.* at 26; and “Quality Assurance  
5 and Food Safety,” *id.* at 35, among other aspects of its business operations and goods. One  
6 section of the ESG Report is pointedly titled “Operations” and describes Defendant’s  
7 efforts to “increase productivity, food safety and quality, and accountability.” *Id.* at 31.  
8 Accordingly, the Court finds that the second *Simpson Strong–Tie Co.* factor is present here.

9 Third, the Court finds that the ESG Report was created, at least in part, to promote  
10 Defendant’s goods or services. The ESG Report repeatedly spotlights the safety and  
11 quality of Defendant’s goods. “Consumers can buy our products with confidence that they  
12 meet the industry’s most rigorous safety standards,” reads the ESG Report. *Id.* at 35.  
13 “Food safety and quality assurance are not simply check boxes,” the ESG Report continues.  
14 *Id.* “They preface every aspect of our multi-state operations from seed to store,  
15 encompassing planting, growing, harvesting, processing, packaging, and transportation of  
16 our products.” *Id.* The ESG Report also highlights Defendant’s “responsiveness to  
17 customers,” *id.*, as well as its certifications and best practices, *id.* at 36. Elsewhere,  
18 Defendant discusses steps it has taken to achieve its “mission to provide the world with  
19 high-quality, healthy produce.” *Id.* at 29. Taken in conjunction, the representations in the  
20 ESG Report advertise Defendant’s produce as fresh, safe, healthy, sustainable, and grown  
21 by a reliable and ethically responsible business organization.

22 The Court acknowledges that significant sections of the ESG Report discuss topics  
23 not strictly tied to Defendant’s goods and services. For example, the ESG Report also  
24 features information pertaining to “Employee Health and Wellness,” *id.* at 37; “Diversity,  
25 Equity, and Inclusion,” *id.* at 41; and various philanthropic initiatives, *id.* at 43–48. The  
26 overall message of the ESG Report, however, is that Defendant is an ethically responsible  
27 grower and seller of high-quality food products. As such, the ESG Report promotes

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1 Defendant's products and its brand more generally. Consequently, the Court finds that the  
2 ESG Report satisfies the third *Simpson Strong-Tie Co.* factor.

3 Finally, the ESG Report's audience consists of actual and potential customers, as  
4 well as organizations likely to influence potential customers. Defendant argues that the  
5 ESG Report was merely directed to "internal and external stakeholders like employees,  
6 policymakers, and advocacy groups." Mem. at 20. The ESG Report itself, however,  
7 defines the term "stakeholders" as including not only the groups that Defendant listed, but  
8 also "Consumers" and "Customers." ECF No. 3-4 at 53. Moreover, the ESG Report was  
9 distributed to "Chambers of Commerce," "various trade associations," and "the media," all  
10 of which are likely to influence potential customers. Declaration of Dana Brennan in  
11 Support of Defendant Grimmway Enterprises, Inc.'s Motion to Strike ("Brennan Decl.,"  
12 ECF No. 3-2) ¶ 11.<sup>2</sup>

13 The ESG Report was also published on Defendant's website, where direct customers  
14 and end-consumers could access it. *Id.* ¶ 12.<sup>3</sup> According to Dana Brennan, the Vice  
15 President for External Affairs & Corporate Responsibility for Defendant, the ESG Report  
16 was only published online so that Defendant could be eligible for a global corporate  
17 governance award and "was not put online for any sales-related purpose and was not  
18 directed to end-consumers." *Id.* Plaintiff, however, has submitted evidence that links to  
19 the ESG Report were widely circulated on Defendant's social media accounts. *See* ECF  
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22 <sup>2</sup> Plaintiff objects to this paragraph of Ms. Brennan's Declaration on the basis of lack of foundation.  
23 "Personal knowledge may be inferred from declarations that concern areas within the declarant's job  
24 responsibilities." *Silva v. AvalonBay Communities, Inc.*, No. LACV1504157JAKPLAX, 2015 WL  
25 11422302, at \*4 n.1 (C.D. Cal. Oct. 8, 2015). According to Ms. Brennan's Declaration, she is the Vice  
26 President for External Affairs & Corporate Responsibility for Defendant. Brennan Decl. ¶ 1. Such a  
27 showing is sufficient for the Court to infer that Ms. Brennan possesses relevant personal knowledge of the  
28 parties to whom the ESG Report was distributed. Consequently, the Court **OVERRULES** Plaintiff's  
objection.

<sup>3</sup> Again, Plaintiff objects to this paragraph of Ms. Brennan's Declaration on the basis of lack of foundation,  
as well as speculation. The Court **OVERRULES** the objections for the aforementioned reasons.



1 No. 11-9 at 2–3; ECF No. 11-11 at 7–22; ECF No. 11-12 at 2–17.<sup>4</sup> While Defendant may  
2 have initially published the ESG Report to its website with the global corporate governance  
3 award in mind, the subsequent promotion of the ESG Report to Defendant’s social media  
4 followers supports the conclusion that the ESG Report was used to target Defendant’s  
5 actual and potential customers.

6 Defendant argues that the commercial speech exemption does not apply here  
7 because the “Challenged Statements . . . were not ‘made for the purpose of obtaining  
8 approval for, promoting, or securing sales’ of Grimmway’s products.” Mem. at 20 (quoting  
9 Cal. Code. Civ. P. § 425.17(c)). Defendant’s attempt to limit the commercial speech  
10 exemption to the statements specifically referred to in Plaintiff’s Complaint fails. First,  
11 Plaintiff’s FAC cites specific statements contained within the ESG Report as *examples* of  
12 alleged false advertising, *see* FAC ¶¶ 2, 4; the statements identified in the Complaint do not  
13 represent all challenged representations. Moreover, when analyzing whether a given  
14 communication represents commercial speech, this Court and other federal and state courts  
15 have looked to the communication as a whole in order to give context to specifically  
16 challenged statements; viewing challenged statements in isolation would render toothless  
17 the *Simpson Strong–Tie Co.* factors. *See e.g., Gallagher v. Philipps*, 563 F. Supp. 3d 1048,  
18 1078 (S.D. Cal. 2021) (applying anti-SLAPP two-part inquiry to entire news articles and  
19 podcasts); *Weiland Sliding Doors & Windows, Inc.*, 814 F. Supp. 2d at 1037 (concluding  
20 press release, as a whole, constituted commercial speech); *Dossett v. Ho-Chunk, Inc.*, 472

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23 <sup>4</sup> The Court finds that Defendant’s social media posts were incorporated into the FAC by reference. “A  
24 court may consider documents external to the pleadings in a motion to dismiss under the incorporation by  
25 reference doctrine where the contents of the documents are alleged in the complaint and neither party  
26 questions the authenticity of the documents.” *Granite Outlet, Inc. v. Hartford Cas. Ins. Co.*, 190 F. Supp.  
27 3d 976, 983–84 (E.D. Cal. 2016) (citing *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)); *see also*  
28 *Tensor L. P.C. v. Rubin*, No. 2:18-CV-01490-SVW-SK, 2019 WL 3249595, at \*5 (C.D. Cal. Apr. 10,  
2019) (applying incorporation by reference doctrine in anti-SLAPP case); *Elliott v. Lions Gate Ent. Corp.*,  
No. 221CV08206SSSDFMX, 2022 WL 17408662, at \*2 (C.D. Cal. Nov. 8, 2022) (same). Here,  
Plaintiff’s FAC refers to statements made in Defendant’s “online advertising” and “marketing tools,”  
which would include Defendant’s social media posts. Moreover, Defendant has not objected to the  
authenticity of the social media posts.



1 F. Supp. 3d 900, 908 (D. Or. 2020) (analyzing full news articles in the context of anti-  
2 SLAPP motion); *Simpson Strong-Tie Co.*, 230 P.3d at 1129 (concluding advertisement, as  
3 a whole, did not constitute commercial speech).

4 Defendant also emphasizes the fact that the ESG Report discusses various issues of  
5 public interest and was distributed to legislative officials. Mem. at 15–19.  
6 Communications may, however, “constitute commercial speech notwithstanding the fact  
7 that they contain discussions of important public issues.” *Bolger v. Youngs Drug Prod.*  
8 *Corp.*, 463 U.S. 60, 67–68 (1983). Moreover, the distribution of the ESG Report to  
9 legislative officials does not negate the ESG Report’s commercial nature.

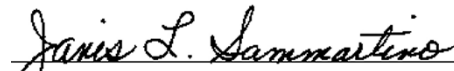
10 In sum, all four *Simpson Strong–Tie Co.* factors are present here, and the Court finds  
11 that the ESG Report constitutes commercial speech. Therefore, the ESG Report is exempt  
12 from anti-SLAPP protections pursuant to California Code of Civil Procedure § 425.17(c).

13 **CONCLUSION**

14 In light of the foregoing, the Court **DENIES** Defendant’s Motion to Strike the First,  
15 Second, and Third Causes of Action in Plaintiff’s First Amended Complaint, and For  
16 Attorneys’ Fees, Pursuant to Cal. Code Civ. P. § 425.16 (“Mot.,” ECF No. 3).<sup>5</sup>

17 **IT IS SO ORDERED.**

18 Dated: June 5, 2023

19   
20 Hon. Janis L. Sammartino  
21 United States District Judge

22 \_\_\_\_\_  
23 <sup>5</sup> In support of the Motion to Strike, Defendant requests that the Court take judicial notice of a complaint  
24 that Plaintiff filed against WM. Bolthouse Farms, Inc. in the Superior Court of California for San Diego  
25 County, in Case No. 37-2022-00035907-CU-BT-CTL. See Defendant’s Request for Judicial Notice in  
26 Support of Its Motion to Strike (ECF No. 3-6). As the Court has ruled on the Motion to Strike without  
reference to the proposed document, the Court **DENIES AS MOOT** Defendant’s Request for Judicial  
Notice.

27 Additionally, Plaintiff filed an Objection to Defendant’s “Supplemental” Declaration Providing New  
28 Evidence on Reply. See ECF No 15. As the Court did not rely on the challenged declaration in ruling on  
the Motion to Strike, Plaintiff’s Objection is **DENIED AS MOOT**.