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IN THE
SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

SUPREME COURT
FILED

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AFTER DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE
Case No. B264074

OPENING BRIEF ON THE MERITS

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THE ISSUE AS FRAMED BY THIS COURT IN ITS ORDER GRANTING REVIEW

1. In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of Code of Civil Procedure section 425.16, should a court take into consideration the commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech?

INTRODUCTION AND SUMMARY OF ARGUMENT

In the opinion below, the Second District Court of Appeal dramatically expanded the scope of subdivision (4) of California Code of Civil Procedure Section 425.16(e)(4) (the "catch-all provision").[1] Based on a highly attenuated chain of causal reasoning about potential downstream

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[1] California's anti-SLAPP statute is codified in Code of Civil Procedure section 425.16 *et seq.* (hereinafter, the "anti-SLAPP statute").

consequences of the allegedly protected activity, the lower court found that the sale of a purely private online advertising report constitutes protected speech in furtherance of a matter of public interest or concern. The court's departure from existing anti-SLAPP jurisprudence creates further confusion and uncertainty in the already nebulous area of defining an issue of public interest or concern under the catch-all provision of the anti-SLAPP statute. It also creates an enormous legal barrier to holding companies accountable for their false and misleading statements, even when that speech takes place entirely in secret and serves only private commercial interests. Such is not the purpose of the anti-SLAPP statute. This Court should reverse.

Plaintiff FilmOn.com, Inc. ("FilmOn") filed this action after it discovered that defendant DoubleVerify, Inc. ("DoubleVerify") had provided at least one of FilmOn's former clients with a confidential report that falsely accused FilmOn of displaying "adult content" and unauthorized copyrighted work on its websites. Those false and misleading statements caused FilmOn to lose advertising business, which led to this lawsuit for trade libel and other business torts. Though the libelous speech appeared in confidential business reports that were not shared with anyone except the specific paying DoubleVerify customer, DoubleVerify filed a special motion to strike. It argued that the contents of its reports constituted "protected activity" under the catch-all provision codified in subdivision (e)(4) of Code of Civil Procedure section 425.16.

The trial and appellate courts both agreed with DoubleVerify, finding that FilmOn's complaint arises out of protected activity. Under the guise of "broadly" interpreting California's anti-SLAPP statute, the courts below used the statute as a sledgehammer to dismiss a purely private trade libel dispute between two commercial businesses at its inception. In its opinion, the court of appeal erroneously dismissed the commercial nature of DoubleVerify's speech as legally irrelevant, holding, *inter alia*, the anti-

SLAPP statute "applies to private communications" and "[w]hether a statement concerns an issue of public interest depends on the content of the statement, not the statement's speaker or audience." (Typed Opn. 19-20.) In so doing, it gave DoubleVerify (and similar businesses) license to confidentially whisper absolutely anything about anyone for profit with impunity. The decision turns the intended purpose of the anti-SLAPP statute on its head and, unless reversed, will further confuse an already muddled area of law.

This Court should reverse and use this opportunity to clarify the meaning of the express statutory limitations on the scope of the catch-all provision in the anti-SLAPP statute. While this Court has yet to provide definitive guidance, other appellate courts have wisely held that that commercial speech "is entitled to less protection than other safeguarded forms of expression" under the anti-SLAPP statute. (*See, e.g., All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (*OASIS*) (2010) 183 Cal. App. 4th 1186, 1208.) This Court should resolve the jurisprudential confusion in the case law as exemplified by the decision below, and provide a conceptual framework for understanding the public interest requirement in the anti-SLAPP statute that distinguishes between cases involving commercial versus non-commercial speech. The decision below blurs that critical distinction.

Instead of relying on factually similar commercial speech cases, the appellate court below erroneously relied on distinguishable cases that involved statements by individuals about the identities and locations of specific people – alleged child molesters, registered sex offenders and others – who pose a risk of harm to children. Clearly, those cases implicate kinds of non-commercial speech that are of profound interest to local communities and further a public dialogue. "It would be helpful for the Supreme Court to issue a definitive statement of the application of section

425.16 to commercial speech." Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years* (2003) 34 McGeorge L. Rev. 731, 754-55.

With respect to the Issue Presented, this Court should hold that the identity of the speaker, the identity of the audience, and the intended purpose of the speech are all important considerations in determining whether speech is protected by the anti-SLAPP statute. There are good "reasons for the distinction between the protections given to commercial and noncommercial speech," *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal. App. 4th 39, 46-47, and "categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (*Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal. App. 4th 135, 140.) Based on these common-sense considerations, DoubleVerify simply cannot uphold its burden of showing that the libelous speech in its confidential business reports "arises from" any act in "furtherance of" the constitutional right of petition or the constitutional right of free speech "in connection with a public issue or a public interest[.]" (*See* Code Civ. Proc. § 425.16(e)(4).)

This Court should reverse for several reasons. First, DoubleVerify cannot demonstrate its purely confidential reports were intended to contribute to any public dialogue or otherwise "further" the exercise of free speech rights. Ordinary commercial speech about a particular business or product is entitled to less protection than other safeguarded forms of expression under the anti-SLAPP statute (*see, e.g., OASIS*, 183 Cal. App. 4th at 1208; *Nagel*, 109 Cal. App. 4th at 46; *Rezec,* 116 Cal. App. 4th at 140–41), especially where (as here) that speech is kept entirely confidential and not made public to any portion of the public.

Second, DoubleVerify's reports were not made in connection with an issue of "public interest." It is well established that a private business

dispute does not turn into a matter of public interest merely because it relates in some abstract way to a larger topic of interest to the public. *(See, e.g., Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal. App. 4th 913, 925 (affirming denial of anti-SLAPP motion in a libel case brought by an employee against a union, reasoning that union's argument that the allegedly libelous statements made about the specific employee related to a "generalized" concern about employment practices within the University of California system "sweeps to broadly" and the statements did not in fact further any public interest); *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal. App. 4th 595.) The mere fact that copyright infringement and the "presence of adult content on the Internet generally" may be of widespread concern to the public (Typed Opn. 15) does not convert DoubleVerify's purely private communications to clients about FilmOn's content into protected activity.

Third, FilmOn's underlying claims "arise from" wrongful conduct (*i.e.*, DoubleVerify's classification of FilmOn websites with "Adult Content" and "Copyright Infringement" tags), not protected speech. The mere fact that speech may be evidence in a case does not insulate otherwise tortious conduct from liability. Indeed, in the closest case to this one, the First District found a trade association's act of labeling particular products as "organic" did not arise out of or further free speech rights in connection with an issue of public interest. (*See OASIS*, 183 Cal. App. 4th at 1205-10.)

Although there is no dispute that the anti-SLAPP statute is to be considered "broadly," the statute has limitations. This case involves communications outside those limitations. The anti-SLAPP statute was enacted to prevent large and powerful interests from quashing speech by burying those who dared exercise their rights under an avalanche of legal fees. But under the decision below, the statute would allow large and

powerful interests to squash legitimate commercial suits in their infancy under the guise of free speech. Unfortunately, "[t]he cure has become the disease," and anti-SLAPP motions are "just the latest form of abusive litigation." (*Navalier v. Sletten* (2002) 29 Cal. 4th 82, 96 (J. Brown, dissenting); *see also Moore v. Shaw* (2004) 116 Cal. App. 4th 182, 200 n. 11 (finding anti-SLAPP motion to be frivolous and noting the "increasing frequency" of such motions and the burden imposed on opposing parties and the courts).) This Court should reverse.

STANDARD OF REVIEW

A court's ruling on an anti-SLAPP motion to strike is reviewed de novo as to both prongs. (*See, e.g., Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 269 fn. 3*; Flatley,* 39 Cal. 4th at 325.)

STATEMENT OF THE CASE

A. Factual Background.

1. DoubleVerify's Business.

DoubleVerify, a for-profit corporation, offers online tracking, verification and "brand safety" services to Internet advertisers. (AA 41, 63.) Clients that place pop-up and banner advertisements online hire DoubleVerify to assist them with their advertising strategy, with the objective of maximizing the value of the dollars spent on advertising over the Internet and protecting the client's brand. (RB 8-9.) Among other things, DoubleVerify assists clients in targeting their online advertisements to the desired target demographic, provides information to clients about potential advertising platforms, and monitors existing advertisements to ensure that those advertisements appear on-line and are visible as agreed, and provides information to clients about potential advertising platforms. (*Id.*) DoubleVerify provides these commercial services to some of the biggest companies in the world, including many Fortune 500 companies. (RB 9.) Thus, for a company like FilmOn that depends heavily on

advertising revenue (Typed Opn. 3), the information DoubleVerify supplies its clients about FilmOn's advertising platforms has the potential to make or break FilmOn's business.

As DoubleVerify admits, a typical client provides DoubleVerify its advertising goals, as well as any desired technical benchmarks (such as a goal to obtain a certain number of page views, to focus on a particular target demographic, or to foster desirable associations and avoid undesirable associations). (AA 63-65; RT 18:16-17.) For instance, a company like Red Bull may request that DoubleVerify assist it with selecting advertising platforms consistent with an "edgy adult oriented" demographic, while a company like Disney may ask DoubleVerify to help make sure its advertisements appear on more family-friendly websites. (RB 9 fn.1.)

DoubleVerify generates website reports that it refers to as "Impression Quality Reports" (hereinafter, "IQR Reports"), which are tailored to the needs of the individual client. These customized reports purport to provide accurate and reliable information about potential advertising platforms based on topics relevant to the client's advertising strategy. Its IQR Reports are designed to provide information about such topics as (1) the presence of "inappropriate content," (2) "geo-targeting" of advertisements, (3) "competitive separation," (4) "ad placement," (5) "fraud detection," and (6) "ad viewability." (Typed Opn. 3; AA 65, 138, 141 RT 18:19-28; 21:24-25.)

To create an IQR Report, DoubleVerify employs a "categorization algorithm [that] analyzes [a potential advertising] site from both a contextual and technical angle." (AA 66.) DoubleVerify then applies a "measurement code" to advertisements to track their appearance and location on the Internet. (AA 65.) DoubleVerify classifies websites based on these automated processes, and also relies heavily on manual Internet

searches of publicly available information by live people. (AA 65-71.) Based on the information that is collected, DoubleVerify generates IQR Reports that are designed to provide data in two columns: (1) one column that purports to show technical data concerning websites, ad placement and viewability; and (2) a second column containing tags designed to aid a given client in determining whether particular websites are consistent with the client's brand. IQR Reports do not contain any detailed analysis, but instead purport to contain raw data identifying particular websites, the number of impressions associated with those websites, and certain "tags" or classifications along with a standardized glossary that provides working definitions for the tags. (Typed Opn. 3.)

DoubleVerify's contracts expressly require clients maintain the confidentiality of IQR Reports. That is for a good reason. DoubleVerify's business model depends on the public not knowing what information it reports to an individual client. DoubleVerify sells the confidential IQR Reports to clients, which expect to obtain a competitive advantage over their competitors. If those IQR Reports were publicly available, clients would not need DoubleVerify's services or products. (Typed Opn. 17; RT 26:21-28.)

2. DoubleVerify's Confidential Reports About FilmOn Websites.

FilmOn provides web-based entertainment, including hundreds of television channels, premium movie channels, pay-per-view channels and over 45,000 video-on-demand titles. FilmOn distributes programming on various website domains, including filmon.com, demand.filmon.com, lenovo.filmon.com, omniverse.filmon.com, staging.filmon.com, ftth.filmon.com, us.filmon.com and samsung.filmon.com (collectively, the "FilmOn Websites"). (Typed Opn. 3.)

Prior to the filing of this action, FilmOn noticed an initially unexplained uptick in the number of clients cancelling advertising agreements with FilmOn. Subsequently, in late 2013, FilmOn learned from one of its former clients that DoubleVerify had provided an IQR Report containing false and disparaging classifications about one or more of FilmOn's websites. (AA 138-139, 149.) Those reports falsely classified the FilmOn Websites with the tags "Copyright Infringement: File Sharing" and "Adult Content." (AA 149.) According to its standardized glossary, DoubleVerify defines websites included in the "Copyright Infringement: File Sharing" category as "sites, presently or historically, associated with access to or distribution of copyrighted material without appropriate controls, licensing or permission; including but not limited to, sites electronically streaming or allowing user file sharing of such material." (AA 67.) DoubleVerify defines "Adult Content" as "Mature topics which are inappropriate viewing for children including explicit language, content, sounds and themes." (AA 144.) Other than these definitions and the tags, DoubleVerify's IQR Report about FilmOn did not contain any other information or analysis. (RT 18:19-28; 20:19-26.)

Although IQR Reports are confidential, one of FilmOn's former clients provided FilmOn with an excerpt from one such report about the FilmOn Websites. (AA 138-139, RT 21:24-28.) That excerpt displayed the following information:

Domain/Sub-domain	**Total IMP**	**Categories**
filmon.com	23,768	Copyright Infringement: File Sharing
demand.filmon.com	306	Copyright Infringement: File Sharing

lenovo.filmon.com	113	Copyright Infringement: File Sharing
omniverse.filmon.com	59	Copyright Infringement: File Sharing
staging.filmon.com	11	Copyright Infringement: File Sharing
ftth.filmon.com	5	Copyright Infringement: File Sharing
us.filmon.com	4	Copyright Infringement: File Sharing
samsung.filmon.com	4	Copyright Infringement: File Sharing

(AA 138-139, RT 18:19-28, 20:19-26, 21:24-28.) This IQR Report excerpt is the alleged speech or petitioning activity at issue in this case. (AA 42-43.) DoubleVerify's counsel confirmed that this excerpt, obtained by FilmOn, "[is] supposed to be confidential to the client." (RT at 21:24-25.)

On December 12, 2013, FilmOn sent a cease and desist letter to DoubleVerify in which it demanded that DoubleVerify remove its harmful tags and issue a correction. (AA 138-139.) Later, DoubleVerify disclosed it had included FilmOn in the "Adult Content" category, as well. (AA 64, 72.) In communications between the parties' counsel, DoubleVerify initially refused to confirm or deny that the "Adult Content" tag was tantamount to a claim that the FilmOn Websites contained pornography, which they do not. DoubleVerify later admitted that the "Adult Content" tag was something more akin to an "R" rating for a movie or a "TV-MA" (mature audiences) rating for a television show. (AA 7, 72; RB 14.) To date, however, DoubleVerify has never taken action to clarify to advertisers that FilmOn's content is not pornographic. Additionally, DoubleVerify has

refused to take any action to limit the application of its "Adult Content" tag solely to the channels on FilmOn's family of networks that arguably contain anything akin to "adult" content.

After supposedly conducting an investigation into the FilmOn "Copyright Infringement: Streaming or File Sharing" and "Adult Content" classifications, DoubleVerify elected to maintain those classifications. FilmOn has since been informed of additional reports of companies refusing to do business with it on account of DoubleVerify. (AA 186-187.) FilmOn, though letters, phone calls and meetings, attempted to provide DoubleVerify with information sufficient to demonstrate that DoubleVerify's designations were inaccurate. Those efforts failed. FilmOn sued DoubleVerify on October 27, 2014. (AA 242.)

B. Trial Court Proceedings.

On November 24, 2014, FilmOn filed an amended Complaint against DoubleVerify and AOL, Inc.[2] (AA 1-31.) In sum and substance, the amended complaint alleged that DoubleVerify falsely classified FilmOn Websites with the tags "Copyright Infringement" and "Adult Content," and then compounded that error by willfully refusing to adjust or explain its tags in light of evidence brought to its attention by FilmOn. FilmOn further alleges DoubleVerify makes false and misleading representations about the accuracy of its services. (*Id.*) It asserted causes of action against DoubleVerify for trade libel, tortious interference with contract, tortious interference with prospective economic advantage, unfair competition, false advertising, slander and libel. (AA 1-31.)

FilmOn alleges DoubleVerify classified the FilmOn Websites incorrectly and applied false and misleading tags in its IQR Reports. DoubleVerify's sale of – and profit from – those disparaging classifications, and the corresponding harm to FilmOn, is the basis of this

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[2] Pursuant to a settlement, AOL was dismissed on April 9, 2015.

action. FilmOn alleged DoubleVerify had "falsely classif[ied] the FilmOn Websites under the categories of 'Copyright Infringement-File Sharing' and 'Adult Content.'"[3] (Typed Opn. 4.)

On January 26, 2015, DoubleVerify filed an anti-SLAPP special motion to strike. (AA 32-54.) DoubleVerify argued its confidential reports provide information relating to matters of public interest and fall within the catch-all provision in the anti-SLAPP statute (AA48), which protects "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e)(4).)

DoubleVerify's motion also relied heavily on the argument that because FilmOn – or more particularly, the founder of FilmOn – was in the public eye, this dispute was one of public importance. (AA 41-42.) To support this argument, DoubleVerify submitted a 747-page appendix, consisting of general news articles about the topics of copyright infringement and adult content on the Internet, three news articles in *Fortune*, *Business Insider* and *The Hollywood Reporter* about lawsuits filed against FilmOn for copyright infringement, legal filings from that copyright

[3] For example, though certain FilmOn entities have been involved in copyright litigation in three different federal circuits regarding an on-line service that allowed FilmOn users to access free-to-air broadcast programming over the Internet, the district courts in those circuits reached different and conflicting opinions as to the legality of this service. (*See e.g., Fox Television Stations, Inc. v. AereoKiller, LLC* (C.D. Cal. 2015) 115 F. Supp. 3d 1152, 1154 (FilmOn is potentially entitled to a compulsory license as a cable system under Section 111 of the Copyright Act); *Fox Television Stations, Inc. v. FilmOn X, LLC* (D.D.C. 2015) 150 F. Supp. 3d 1, 32 (FilmOn is not entitled to a compulsory cable system license under Section 111 of the Copyright Act).) After the Ninth Circuit issued its opinion and oral arguments took place before two other appellate courts, the parties involved in the litigation reached a settlement. As a result, no court ever finally adjudicated the issue of copyright infringement.

litigation, and articles about the subjects of copyright infringement and adult content online. (*See id.*) Aside from an obscure one-page blog post that mentioned this lawsuit (AA 57), none of the materials submitted by DoubleVerify to the trial court referred to the facts giving rise to this action.

At the hearing on DoubleVerify's anti-SLAPP motion, the trial court seemed to be under the (false) impression that DoubleVerify's IQR Reports are published to the general public. Even though those reports are confidential, the trial court analogized DoubleVerify's IQR Reports to the well-advertised movie rating system used by the Motion Picture Association of America ("MPAA"). The trial court found that what DoubleVerify is "doing" is "not any different . . . than the Motion Picture Association putting ratings on movies[.]" (RT at 3:12-14.) Indeed, the trial court repeatedly analogized DoubleVerify's *confidential* reports to different kinds of *public* rating systems. (RT at 4:9-11 ("You know, we are all being rated. There is a website that rates judges."); RT at 4:10-13 ("You walk into a restaurant and you get an A, B or C, but you don't walk into a restaurant that gets a B or C. And it impacts on us, but I do think, if done correctly, it is a very valuable public function, and I think we are better for it."); RT at 3:18-21 ("I can only speak as a parent and grandparent, a parent of four and grandparent of eleven. I appreciate when I read adult content.").

On April 22, 2015, the trial court granted DoubleVerify's anti-SLAPP motion. (RT 3:18-21, 4:9-11, 4:10-13, 6:21-23; AA 217-230.) It found that "DoubleVerify has submitted evidence demonstrating the public interest in Plaintiff FilmOn's content, the lawsuits filed against it, and its founder Alkiviades David." (AA 224.) It further concluded that "DV's services advance the public interest in the regulation of internet content for children, transparency and accountability for advertiser, alerting the public of potential intellectual property theft and safety of the Internet from fraud,

malware and other concerns." (AA 223.) It thus dismissed the lawsuit on the basis that the IQR Reports constitute "protected activity" under the anti-SLAPP statute. (AA 224.)

C. Court of Appeal's Decision.

On appeal, FilmOn argued that DoubleVerify could not uphold its burden of showing that its IQR Reports constitute "protected activity" under the anti-SLAPP statute. FilmOn argued that DoubleVerify's confidential reports that classified FilmOn Websites with tags for "Copyright Infringement" and "Adult Content" were not made in connection with an issue of public interest and did not further the exercise of free speech rights.

On June 29, 2017, the Second District Court of Appeal affirmed the trial court's dismissal. Based on the legislative mandate that the anti-SLAPP statute be broadly construed, it held that "it is *irrelevant* that DoubleVerify made its reports confidentially to its subscribers." (*Id.* at 20 (emphasis added).) Relying on two defamation cases involving statements made "in closed meetings" or in "private[]" about an alleged child predator and a youth basketball coach, the court held that "the anti-SLAPP statute 'applies to private communications concerning issues of public interest.'" (*Id.* at 19-20 (quoting *Terry v. Davis Community Church* (2005) 131 Cal. App. 4th 1534; and discussing *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal. App. 4th 450.) Like the trial court, it went so far as to compare IQR Reports to movie ratings published by the MPAA, even though – unlike the MPAA's movie ratings – DoubleVerify's IQR Reports are kept confidential, and are not widely distributed. (*Id.* at 16.)

The appellate court reasoned that the public was interested generally in the presence of adult content online and "in the prevention of copyright infringement." (*Id.* at 20.) Based on this broad and amorphous public

interest and several press articles in *Fortune*, *Business Insider* and *Hollywood Reporter* that had commented on "FilmOn's legal entanglements" in copyright disputes, the court ruled that the IQR Reports constitute "a matter of public interest." (*Id.* at 15-16.) Additionally, the appellate court disagreed with the holding in *Wilbanks v. Wolk,* (2004) 121 Cal. App. 4th 883, that a "statement must in some manner itself contribute to the public debate" to be of "widespread public interest[.]" (*Id.* at 17.) Finally, the appellate court attempted to distinguish the First District Court of Appeal's decision in *OASIS.* (*Id.* at 15.)

ARGUMENT

A. The Anti-SLAPP Statute And Catch-All Provision.

The anti-SLAPP statute exists "to encourage continued participation in matters of public significance." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 59–60 (quoting Code Civ. Proc. § 425.16, subd. (a), as added by Stats.1992, *60 ch. 726, § 2, p. 3523).) The Legislature enacted section 425.16 to prevent and deter 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 278.)

The genesis of the anti-SLAPP statute arose when the legislature noted a disturbing rise in wealthy, powerful, and politically well-connected business interests filing suits to shut down dissent by less powerful and wealthy citizens or public interest groups by burying them in legal fees. As the state Assembly noted in enacting the bill: "SLAPP suits . . . are, typically, brought by a well-heeled plaintiff against a less well-financed defendant for the purpose of intimidating and, ultimately, silencing the defendant . . . . The obvious intent of the SLAPP suit is to discourage the citizen from "speaking," including statements made by the citizen at, and in, public forums, such as city council hearings and 'letters-to-the-editors.'"

(California Bill Analysis, S.B. 9 Assem., 7/14/1993); *see also Equilon Enterprises,* 29 Cal. 4th at 60 (discussing the kind of scenario the Legislature sought to prevent: "Intimidation will naturally exist anytime a community member is sued by an organization for millions of dollars even if it is probable that the suit will be dismissed.").)

California's anti-SLAPP statute provides that a cause of action arising from any act of a person in furtherance of that "person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16(b)(1).) Thus, a court's task in ruling on an anti-SLAPP motion is a two-step process.

"First, the court decides whether the defendant has met its burden of demonstrating that the "act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises,* 29 Cal. 4th at 67 (quoting Code Civ. Proc. § 425.16(b)(1)).) Section 456.16(e) identifies four categories of "protected activity" under the statute. Consistent with the heightened value traditionally associated with political speech and the exercise of first amendment rights to petition the government and to speak in public forums, the first three of these categories protect speech associated with government proceedings. The first two categories only protect statements "made in," or "in connection with an issue under consideration by[,]" "a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]" (Code Civ. Proc. § 425.16(e)(1), (2).) The third category is limited to statements

"made in a place open to the public or a public forum," *id.* § 435.16(e)(3), and therefore does not protect speech made in private.

Given that DoubleVerify's speech admittedly was not made in connection with governmental proceedings or in a public forum, the catch-all provision in subdivision (e)(4) – the fourth and final category of protected activity – is the only category at issue in this appeal. In 1997, the Legislature added the catch-all provision to section 425.16. (Code Civ. Proc. § 425.16(e)(4).) It "extends the protection of the anti-SLAPP statute beyond actual instances of free speech to '*all conduct in furtherance* of the exercise of the right of [petition or] free speech in connection with a public issue.'" *Collier v. Harris* (2015) 240 Cal. App. 4th 41, 51 (quoting Code Civ. Proc. § 425.16(e)(4)) (italics added). Although the Legislature stated that "this section shall be construed broadly" (Code Civ. Proc. § 425.16(a)), the catch-all provision is not without limit. A cause of action arises from protected activity within the meaning of the catch-all provision only "if the plaintiff's claims are predicated on conduct that is (1) in furtherance of the right of free speech, and (2) in connection with a public issue or issue of public interest.'" *Collier,* 240 Cal. App. 4th at 51 (quoting *Hunter v. CBS Broad., Inc.* (2013) 221 Cal. App. 4th at 1510, 1520).

Second, assuming the defendant meets its burden of demonstrating that the complained of activity is protected activity under the anti-SLAPP statute, then the court "determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Id.* at 67. "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 89 (italics in original).

B. DoubleVerify Cannot Uphold Its Burden To Show The Libelous Statements In Its Confidential Customized Reports Is "Protected Activity" Under The First Step Of The Anti-SLAPP Analysis.

DoubleVerify's motion to strike should have been summarily denied under the first step of the anti-SLAPP analysis. DoubleVerify's confidential reports are admittedly not made in or in connection with any governmental proceeding and are not made in any public forum. DoubleVerify relies solely on the catch-all provision, which protects "all conduct in furtherance of the exercise of the right of [petition or] free speech in connection with a public issue.'" (Code Civ. Proc. § 425.16(e)(4)).) To fall within the catch-all provision, however, DoubleVerify bears the burden of showing that defamatory statements about FilmOn's Websites contained in confidential reports distributed only to individual customers of DoubleVerify were made in connection with a matter of "public interest", "arise from" and "further" the exercise of the constitutional rights to petition or free speech. It simply cannot meet that burden.

This Court should rule that DoubleVerify's commercial speech about FilmOn's Websites in confidential reports provided to DoubleVerify's customers merely advances its own and its customers' private interests. The libelous statements cannot be fairly said to either "arise from" or "further" the exercise of free speech within the meaning of the anti-SLAPP statute. Additionally, DoubleVerify cannot satisfy the public interest limitation. The appellate court's decision below conflicts with other appellate decisions, and dramatically expands the catch-all provision to protect purely commercial speech about another business transmitted in private to an individual paying customer. It should be reversed.

1. DoubleVerify's Confidential Reports Constitute Commercial Speech and Do Not "Further" The Constitutional Rights Of Petition Or Free Speech.

This Court should "start [its] analysis with the recognition" that DoubleVerify's reports constitute commercial speech. (*Nagel,* 109 Cal. App. 4th at 46.) As other courts have wisely recognized, commercial speech is not entitled to the same protections under the anti-SLAPP statute as "other constitutionally safeguarded forms of expression." (*Id.* at 46 (internal citations omitted); *see also Rezec,* 116 Cal. App. 4th at 140–41.) This is because the plain text of the catch-all provision provides that conduct is protected only if it "further[s] [] the exercise of the constitutional right of petition or the constitutional right of free speech[.]" (Code Civ. Proc. § 425.16(e)(4).)

As the *Rezec* court observed, "'categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.'" (*Rezec,* 116 Cal. App. 4th at 140 (quoting *Kasky v. Nike, Inc.* (2002) 27 Cal. 4th 939, 960-61).) "In typical commercial speech cases, the *speaker* is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speakers goods or services, or persons acting for actual or potential buyers or customers . . . ." (*Id.* At 960 (italics added).) The *content of a message* is generally commercial where it "consists of representations of fact about the business operations, products, or services" for the purpose of facilitating a commercial transaction. (*Id.* at 946.) Additionally, speech that arises out of an "economic motivation" or is communicated in an "advertising format" is indicative of commercial speech. (*Id.* at 140, 141 (finding that a

motion picture studio's advertisements for a film "constitute commercial speech" and do not "further" the studio's "right of petition or free speech [arising] under the United States or California Constitution in connection with a public issue").)

Here, the first element in determining the type of speech—a commercial speaker—is satisfied because DoubleVerify is engaged in the business of selling reports concerning maximizing online advertising. The second element—an intended commercial audience—is met because DoubleVerify's IQR Reports were created at the direction of and distributed on a confidential basis only to its paying customers. And the factual content of those reports is commercial because DoubleVerify purported to provide its customers with valuable advertising data that they could use to implement their own advertising strategies. Finally, both DoubleVerify and its customers were economically motivated and the format and information in the IQR Reports themselves reveal their commercial character. Under these circumstances, DoubleVerify's confidential reports are clearly commercial speech and do not further DoubleVerify's constitutional rights to petition or free speech in connection with a public issue. (*See Rezec,* 116 Cal. App. 4th at 140 (finding that a motion picture studio's advertisements for a film "constitute commercial speech" and do not "further" the studio's "right of petition or free speech [arising] under the United States or California Constitution in connection with a public issue").)

Various appellate courts have properly concluded that ordinary commercial speech about a particular, company, product or service – like the defamatory statements made about FilmOn websites in DoubleVerify's IQR Reports – does not further the exercise of free speech or does not concern a matter of public interest. (*See, e.g., Nagel,* 109 Cal. App. 4th at 46-51 (a list of ingredients on bottle labels and on a company website "was

not participation in the public dialogue on weight management issues; the labeling on its face was designed to further Twin Labs' private interest of increasing sales for its products."); *Mann v. Quality Old Time Service* (2004) 120 Cal. App. 4th 90, 111 (overruled on other grounds) (statements about a plaintiff's specific business practices is not a matter of general public interest, even though "pollution can affect large numbers of people and is a matter of general public interest"); *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (N.D. Cal. 1999) 63 F. Supp. 2d 1127, 1130 (a business's statements "to the market" about competitors and their products were held outside the statute).) The court's decision cannot be reconciled with these commercial speech cases and will create unnecessary confusion in the existing jurisprudence.

Further, the appellate court erred when it asserted that "[n]either the identity of the speaker nor the identity of the audience" are relevant to the anti-SLAPP analysis. (Typed Opn. at 20.) Courts frequently consider the identity of the speaker, the identity of the audience and the purpose of the speech in determining whether speech concerns a matter of public interest and furthers the exercise of free speech rights. (*See, e.g., Commonwealth Energy Corporation v. Investor Data Exchange, Inc.* (2003) 110 Cal. App. 4th 26, 34 (a telemarketing pitch for a particular service marketed to a very few number of people" is not "about an issue of widespread public interest"); *Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1127-28 (a defendant's "private campaign" to discredit the plaintiff to a relatively small group of fellow token collectors by publishing an advertisement in a token collector newspaper, sending letters to other collectors and discussing allegations about plaintiff's alleged dishonesty and theft of a token at a token collector society meeting was not a matter of public concern); *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal. App. 4th 1561, 1569 (ruling that the anti-SLAPP statute did not apply

where the allegedly wrongful conduct and speech was committed in a business capacity and was directed at a competitor's associates and customers); *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (N.D. Cal. 1999) 63 F. Supp. 2d 1127, 1130 (finding a business's statements "to the market" about competitors and their products were held outside the anti-SLAPP statute).)

Additionally, the court below erred when it needlessly cast doubt on the decision in *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898.[4] Consistent with the purpose of the anti-SLAPP statute, *Wilbanks* wisely held that "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner contribute to the public debate." (*Wilbanks*, 121 Cal. App. 4th at 898.) This proposition was not invented out of whole cloth. Contrary to the false assertion that *Wilbanks* provided "no analysis" or legal authority to support this proposition (Typed Opn. 17-18), *Wilbanks* cited three well-established cases holding that the mere fact that speech may relate in some general way to an issue of public concern does not mean that the specific speech at issue is a matter of public interest. (121 Cal. App. 4th at 898 (citing *Rivero,* 105 Cal. App. 4th 913; *Consumer Justice,* 107 Cal. App. 4th 595; *Du*

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[4] Citing *dicta*, the appellate court mistakenly asserted that *Cross v. Cooper* (2011) 197 Cal. App. 4th 357 overruled *Wilbanks.* (Typed Opn. 17). In fact, *Cross* found the speech at issue "passes muster even under the *Wilbanks'* rule." (*Id.* at 382, n. 16.) Since *Cross*, courts have continued to cite *Wilbanks* with approval. (*See, e.g., Bikkina v. Mahadevan* (2015) 241 Cal. App. 4th 70, 84 (finding that allegedly defamatory statements made by an academic advisor about a former Ph.D. student's work was merely a "private dispute" and did not "contribute to the [broader] public debate" on the subject of global warning); *Kronemyer v. Internet Movie Data Base, Inc.* (2007) 150 Cal. App. 4th 941, 949–50.)

Charme v. International Brotherhood of Electrical Workers (2003) 110 Cal. App. 4th 107).)[5]

Unlike the MPAA's public movie ratings, DoubleVerify's ratings and classification system is only designed to allow advertisers who purchase DoubleVerify's services from associating their brand with the wrong target demographic, or a website that is unlikely to provide value for their advertising dollar. (AA 65.) Nothing from those reports is ever conveyed to the public. They thus do not inform the general public about the material available on FilmOn Websites. Because DoubleVerify's wholly confidential commercial reports are not shared with anyone except the specific customer who commissioned a specific report, those reports do not contribute to any public debate or otherwise "further" the exercise of free speech rights, this Court should reverse.

2. DoubleVerify's Confidential Reports Do Not Satisfy The Public Interest Limitation.

It is settled that the third and fourth categories of protected activity under Section 425.16(e) include an additional "express 'issue of public interest' limitation", which must be overcome to trigger anti-SLAPP protection. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1117.) "The Legislature intended this requirement to have a limiting effect on the types of conduct that come within the third and fourth categories of the statute." (*Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1132.)

The anti-SLAPP statute does not define an issue of public interest or public issue. While this Court has not adopted any bright-line test for the public interest limitation, courts have generally recognized "[a] few guiding principles . . . derived from decisional authorities." (*Weinberg,* 110 Cal. App. 4th at 1132.) "[A] matter of public interest should be something of

[5] *Rivero* and *Consumer Justice* are discussed in detail below.

concern to a substantial number of people" and "there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient." (*Id.* (internal quotations and citations omitted).) The Fourth District has construed an "issue of public interest" "to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal. App. 4th 468, 479.) Further, where the issue is of interest only to a limited but definable portion of the public such as a private group, organization, or community, "the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging *participation* in matters of public significance." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal. App. 4th 107, 119.)

Here, the appellate court below failed to follow these guiding principles. Rather than focus on the particular speech at issue, it erroneously found that DoubleVerify's reports constituted a matter of public interest merely because they related in a general way to larger issues of copyright infringement and adult content, even without though DoubleVerify's specific statements were not heard by anyone except the specific customer who commissioned a report. The appellate court mistakenly relied on inapposite cases involving statements about the identities and locations of specific people – alleged child molesters, registered sex offenders and others – who might pose a risk of harm to children. Clearly, those cases implicate kinds of non-commercial speech that are of profound interest to local communities and further a public dialogue.

a. The Courts Below Erred By Converting A Purely Private And Commercial Communication Into A Matter Of Widespread Public Interest.

In determining whether speech involves an issue of public interest, California courts have consistently rejected the "synecdoche theory of public issue in the anti-SLAPP statute. The part is not synonymous with the greater whole." (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal. App. 4th 26, 34.) While the general topics of copyright infringement and adult content on the Internet may be a matter of public interest that does not mean that DoubleVerify's particular speech about FilmOn's websites contained in a confidential business report is itself a matter of public interest. Such a highly attenuated and indirect chain of reasoning (resembling a "butterfly effect") has been repeatedly rejected by other appellate courts.

Rather than accept the defendant's word that the public interest limitation is satisfied in every case that may relate in some general way to a large or important topic, the courts must look to the particular speech forming the basis for a cause of action and determine whether that speech was on a matter of public concern. (*Id.*; *see also City of Industry v. City of Fillmore* (2011) 198 Cal. App. 4th 191, 217 ("The inquiry must focus on the content of the speech or other conduct, on which the cause of action is based, rather than generalities or abstractions.").) This distinction is grounded in sound public policy. Without it every trade libel complaint - which complaints almost by definition involve communication - would be the potential victim of an anti-SLAPP motion, so long as it was connected, however tangentially, to something the public might care about. And, perversely, the larger and more important the libel, the more likely the complaint would fall within the ambit of the anti-SLAPP statute.

The leading case in this area is *Rivero*, in which the court surveyed a number of anti-SLAPP cases and identified three categories of statements that frequently satisfy the public interest limitation. It described those statements as concerning (1) "a person or entity in the public eye," (2) "conduct that could directly affect a large number of people beyond the direct participants," or (3) "a topic of widespread public interest." (105 Cal. App. 4th at 924.) In that case, the plaintiff supervised eight janitors at the International House on the University of California at Berkeley campus. (*Id.* at 916.) The plaintiff sued the union for distributing documents describing accusations that the plaintiff solicited bribes, harassed those under his supervision, and favored certain employees. (*Id.* at 916-17.) The union argued that its statements concerning the plaintiff involved a public issue or an issue of public interest because the "'abusive supervision of employees throughout the University of California system is an issue of particular public interest because it impacts a community of public employees numbering 17,000.'" (*Id.* at 917, 919.) The appellate court rejected the defendant's attempt to extrapolate speech relating to a private workplace dispute into a matter of public interest, reasoning that the mere fact that a union published the challenged statement in a union newsletter did not turn an otherwise private matter into one of public interest. (*Id.* at 926.) While the union itself was in the public eye, the particular speech at issue was only intended to be read by fellow union members, and only of interest to a small subset of them. (*Id.* at 925-926.) That is, the court there wisely evaluated the nature of the speech, its intended audience, and its potential impact in determining whether it was in the public interest.

The same conclusion should have been reached by the court here. Even more so than the speech at issue in *Rivero*, the statements contained in DoubleVerify's IQR Reports had absolutely no potential to reach a broad

segment of society. They were not part of some larger goal to provide consumer protection information to the public. DoubleVerify has admitted that the public never sees or is aware of its IQR Reports; only the individual advertiser is. (AA 64-67; RT 26:21-27.) Further, DoubleVerify's own description of the purpose of its services makes that clear: it performs the ratings "so that an advertiser may determine if it wants its advertisements associated with the website and if the website appears to attract its target demographic." (RB 23.) Just as in *Rivero*, where the court rejected the argument that the mere fact that the AFL-CIO and the State University system are generally well known to the public, did not turn a private dispute into an issue of public interest, the mere fact that FilmOn has received public attention does not turn its private dispute with DoubleVerify into an issue of public interest. The public is not aware of DoubleVerify's ratings, and whether a given company chooses to advertise or not advertise on a given website based on information that it purchases from DoubleVerify merely reflects its own advertising strategy; the allegedly libelous statements in DoubleVerify's reports are not themselves a matter of public interest.

Consumer Justice is particularly instructive. There, the court applied *Rivero*'s logic to a commercial speech case involving the maker of an herbal supplement who was sued for fraud and false advertising. The defendant argued that the action involved a public issue because herbal dietary supplements are a matter of public interest. The court disagreed:

> Trimedica's speech is not about herbal supplements in general. It is commercial speech about the specific properties and efficacy of a particular product, Grobust. If we were to accept Trimedica's argument that we should examine the nature of the speech in terms of generalities instead of specifics, then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute.

(*Consumer Justice*, 107 Cal. App. 4th at 600.) It further reasoned that the "stated intent" of the anti-SLAPP statute is "'to encourage continued participation in matters of public significance.' No logical interpretation of this statement suggests that 'matters of public significance' include specific advertising statements about a particular commercial product, absent facts which truly make that product a matter of genuine public interest, as was the case in *DuPont*." (*Id.* at 602 (quoting Code Civ. Proc. § 425.16(a)).)

As in *Rivero* and *Consumer Justice*, "[c]ourts have generally rejected attempts to abstractly generalize an issue in order to bring it within the scope of the anti-SLAPP statute." (*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal. App. 4th 722, 733.) But that is exactly what the appellate court below did. It erroneously reasoned that the libelous statements asserting that FilmOn's Websites contain adult content and infringe copyrighted material constituted a matter of "widespread public interest" because copyright infringement and adult content on the Internet are generally matters of public concern. (Typed Opn. 20.) However, "[t]he fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements [under Section 425.16]." (*Dyer v. Childress* (2007) 147 Cal. App. 4th 1273, 1280.) In other words, the mere fact that the public may have a general interest in copyright infringement and "the presence of adult content on the Internet generally" (Typed Opn. at 15) does not mean statements about FilmOn's Websites in a confidential report provided to an online advertiser is itself a matter of public interest or furthers the exercise of free speech rights.

Moreover, the presence of a handful of news articles about FilmOn published in trade journals such as *The Hollywood Reporter* does not mean all subsequent defamatory speech about FilmOn is a subject of "widespread public interest." (Typed Op. 15-16.) While FilmOn and its founder have

been the subject of some media attention, that is not enough to trigger anti-SLAPP protection. There still has to be a showing that the public is actually interested in the specific speech or conduct at issue, *i.e.*, DoubleVerify's tags of the FilmOn Websites contained in its IQR Reports. For example, in *Albanese v. Menounos* (2013) 218 Cal. App. 4th 923, 936, a celebrity hair stylist brought a lawsuit against a celebrity television presenter, stemming from comments the television presenter made about plaintiff being a thief. Even though both the plaintiff and defendant qualified as being in the public eye, the court concluded that there statements at issue were not protected because "there is no evidence that the public is interested in the private dispute concerning her alleged theft." (*Id.*; *see also Donovan v. Dan Murphy Foundation* (2012) 204 Cal. App. 4th 1500, 1509 (accusation that board members of well-known non-profit entity had mismanaged millions of dollars' worth of assets was not one of public interest, even though entity was in the public eye and its services and donations effected millions of people because there was no showing that the public was interested in the accusations at hand).

The decisions in *Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4th 628, and *Annette F. v. Sharon S.* (2004) 119 Cal. App. 4th 1146, are distinguishable. Unlike DoubleVerify's confidential reports, the statements at issue in those cases were widely reported, in many cases made in the press, and themselves were the subject of widespread public interest. (*See Church of Scientology,* 42 Cal. App. 4th at 650-61 (the dispute itself had garnered widespread attention in the media and concerned the fundamental constitutional right of freedom of religion, and the statements were made in connection with governmental proceedings). (*Id.* at 650-51; *Annette F.,* 119 Cal. App. 4th at 1162 (finding that statements made to the press about a case involving a second parent adoption by a lesbian couple was of widespread public interest). By contrast, there is no

evidence here that the public is actually interested in this rather mundane trade libel dispute.

b. The Appellate Court Relied On A Trio Of Distinguishable Cases Involving Speech About Registered Sex Offenders, Child Predators And A Coach In A Youth Sports Program.

The appellate court relied heavily on three readily distinguishable cases involving speech about specific individuals who posed a risk of harm to an identifiable group of children: *Cross v. Cooper* (2011) 197 Cal. App. 4th 357, *Terry,* 131 Cal. App. 4th 1534, and *Hecimovich,* 203 Cal. App. 4th 450. To be sure, "protecting the public from sexual predators, including disclosing the identities of registered sex offenders, are public issues or an issue of public interest." (*Doe v. State* (2017) 8 Cal. App. 5th 832, 841.) But these cases are a far cry from a purely private quarrel between two businesses about the defamatory contents of a confidential report.

In *Cross*, a tenant was sued by her landlord for disclosing the identity and location of a registered sex offender in the tenant's neighborhood to a real estate agent who represented prospective buyers of the landlord's property. After extensively discussing Megan's Law and other legislation that requires public disclosure of information about sex offenders, the court found there is a "strong and widespread public interest in knowing the location of registered sex offenders[.]" (*Cross,* 197 Cal. App. 4th at 377.) It found that the tenant's speech – which "involved the location of a registered sexual offender" – "specifically and directly related to an issue of compelling and widespread interest." (*Id.* at 378-79, 375 (reasoning the tenant's "disclosure served [the] interests [in preventing child sexual abuse] by alerting prospective buyers of the potential risk to children posed by a registered sex offender who lived nearby").) Notably, the court distinguished other cases involving purely private disputes about

specific businesses or employment matters, which do not involve matters of public interest. (*See id.* at 378.)

Similarly, *Terry* involved non-commercial speech about the identity of two sexual predators. There, the pastor of a church disseminated a report by a church investigative committee to about 100 people, in which the committee substantiated complaints by a girl's parents that two adult youth group leaders had developed and pursued an inappropriate relationship with the girl. (*Terry,* 131 Cal. App. 4th at 1539.) An anonymous source mailed fliers to plaintiffs' neighbors. (*Id.*) The communications involved issues of public interest, because they involved the societal interest in protecting a substantial number of children from predators. (*Id.* at 1547.) It is beyond question that communications between concerned parents and community members about a sexual predator in a position of authority is of public interest.

Hecimovich involved non-commercial speech about whether a volunteer coach of a fourth-grade basketball team used "improper disciplinary tactics" and posed a safety risk to students. Citing *Terry*, the court concluded that the communications between members of the local parent-teacher organization, parents of the young team members and league officials constituted protected activity. (*Hecimovich,* 203 Cal. App. 4th at 467-68.) The court further observed that the media reported on the dispute, which further demonstrated public interest. (*Id.* at 468.)

Unlike speech shared within a community about the identities or locations of individuals who pose a danger to children, the purely commercial speech at issue in this case does not "specifically and directly related to an issue of compelling and widespread interest." (*See Cross*, 197 Cal. App. 4th at 378-79.) No concerned parent can view DoubleVerify's reports to steer her children away from age-inappropriate conduct. Nor is any segment of the public able to steer away from sites that may contain

unlawful activity such as copyright infringement because of DoubleVerify's reports. (AA 64-67.) That is because DoubleVerify is not in the business of providing information on topics that are of public concern. (AA 64-67.) The information only concerns whether that advertiser is getting advertisements that are placed as desired and is associating with companies likely to provide maximum value for its brand. As DoubleVerify readily concedes, in many cases an advertiser actually may want to be associated with content that others might consider bad or harmful to children. (RB 9 fn. 1.)

3. DoubleVerify's Classification Of FilmOn Websites With "Adult Content" And "Copyright Infringement" Tags Is Libelous Conduct And Does Not Arise Out Of Protected Speech.

The decision below erroneously insulates DoubleVerify's entire business model (as well as similar companies that are in the business of selling information) from any liability for their tortious conduct.

By its express terms, the anti-SLAPP statute requires that the challenged claims "aris[e] from" protected activity in which the defendant has engaged. (Code Civ. Proc. § 425.16(b).) To satisfy this textual requirement, a defendant bears the burden of showing a close nexus between the challenged claim and the defendant's allegedly protected activity. (*Park v. Bd. of Trustees of California State Univ.*, 2 Cal. 5th 1057, 1060 (2017).) "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity." (*Id.*) "Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at 1060.)

The decision in *OASIS* is illustrative. Like the instant case, *OASIS* involved a commercial dispute arising out of the defendant's business decisions to classify the plaintiff's products in a manner that caused harm to the plaintiff's business. The defendant trade association had developed an "organic" certification for personal care products. (183 Cal. App. 4th at 1191.) It also decided which products to certify as organic. (*Id.*) After the trade association declined to certify the plaintiff's product as "organic," the plaintiff sued for deceptive advertising and unfair business practices, alleging consumers "will be misled into buying these OASIS-certified products instead of personal care products manufactured and sold by [plaintiff]." (*Id.* at 1194.) The appellate court affirmed the denial of the trade association's anti-SLAPP motion. (*Id.* at 1191.) "While the act of formulating a proposed industry 'organic' standard may constitute protected activity," (*id.* at 1200), the court ruled the association's act of classifying particular products as organic did not arise out of and was not in furtherance of "OASIS's exercise of free speech in connection with a public issue." (*Id.* at 1205.) It wrote: "[t]he use of the 'OASIS Organic' seal" is not activity directed towards a public discussion of organic standards in general, but rather is speech about the contents and quality of [a particular] product." (*Id.* at 1209.) The court found that for-profit classifications that contain minimal information beyond the classification itself are not necessary to the exercise of free speech, and would effectively insulate any for-profit business activity as long as it can be loosely related to speech. *See id.*

The result *OASIS* sought to avoid is exactly what DoubleVerify seeks to protect here. DoubleVerify sells classification reports designed solely to allow advertisers to maximize advertising revenue. (AA 65; RT 26:21-27.) Those reports are not necessary to any exercise of free speech and do not themselves concern a matter of public interest.

The appellate court's clumsy attempt to distinguish *OASIS* is not at all persuasive. (*See* Typed Opn. at 15 (asserting that "FilmOn's business tort and trade libel claims are based *entirely* upon the message communicated by DoubleVerify's 'tags'," whereas the suit in *OASIS* was not based on the "content" of OASIS' communications). In fact, both DoubleVerify's tags and the "OASIS Organic" seal were clearly intended to communicate a message. The plaintiff's central argument in *OASIS* was that the "organic" label would convey the message that a competitor's products were superior (or healthier) when they were not. (183 Cal. App. 4th at 1194, 1205 (OASIS's membership application touted the communicative value of the OASIS Organic seal as follows: "The OASIS seal provides assurance to the consumer of credible value for organic and sustainable claims on OASIS products").) Likewise, DoubleVerify's tags also communicated a message – namely, that FilmOn Websites contain adult content and unauthorized copyrighted content. In other words, while the "OASIS Organic" seal serve as a seal of approval for a particular product, DoubleVerify's "Copyright Infringement and "Adult Content" tags was intended to act as a scarlet letter.

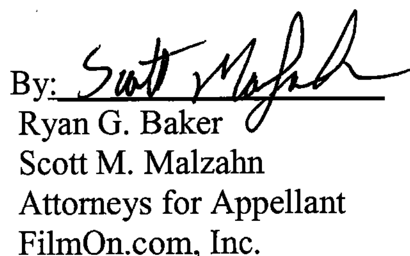
Further, like the "OASIS Organic" seal, DoubleVerify's reports about FilmOn Websites contain minimal, if any, analysis. (AA 65, 138, 141; RT 18:19-28; 20:19-28.) As DoubleVerify readily admits, its service simply generates a spreadsheet with impression numbers and terms. (AA 65, 138, 141; RT 18:19-28; 20:19-28.) The only thing that aids in the interpretation of these classifications is a glossary with basic definitions of the terms. (RT: 18:19-28; 20:19-28.) Such barebones classifications or certifications that contain little to no analysis or opinion are not constitutionally protected activity within the ambit of first step of the anti-SLAPP statute.

This Court should not construe the catch-all provision in the anti-SLAPP statute so broadly as to immunize entire businesses from liability simply because they may provide goods or services with an informational or communicative component. *See* California Bill Analysis, S.B. 515 Sen., 5/06/2003, at *4 (expressing a concern that "in recent years, a growing number of large corporations have invoked the anti-SLAPP statute to delay and discourage litigation against them by filing meritless SLAPP motions, using the statute as a litigation weapon. . . . This turns the original intent of one of the country's most comprehensive and effective anti-SLAPP laws on its head.").

CONCLUSION

DoubleVerify has not upheld its burden of showing that the allegedly libelous statements contained in its confidential IQR Reports constitute protected activity under Section 425.16(e)(4). This Court should reverse the Court of Appeal's Order.

DATED: January 11, 2018 BAKER MARQUART LLP



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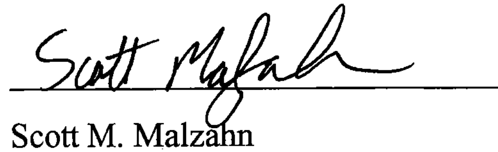

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 2029 Century Park East, 16th Floor, Los Angeles, CA 90067.

On **January 16, 2018**, I served true copies of the foregoing document(s) described as:

OPENING BRIEF ON THE MERITS

on the following:

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Hon. Terry A. Green, Judge Los Angeles County Superior Court Stanley Mosk Courthouse, Department 014 111 North Hill Street Los Angeles, CA 90012	Trial Judge (L.A.S.C. Case No. BC561987)
Clerk of the Court California Court of Appeal Second Appellate District, Div. 3 Ronald Reagan State Building 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013	Case No. B264074

[X] BY OVERNIGHT COURIER:

I caused the above-referenced document(s) to be delivered by FedEx for delivery to the above address (es).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 16, 2018,** at Los Angeles, California.

Tiffany Olson