Case No. S244157

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FILMON.COM, INC.,

Plaintiff and Petitioner,

v.

DOUBLEVERIFY, INC.,

Defendant and Respondent.

After Decision by the Court of Appeal,
Second Appellate District, Division Three
Case No. B264047

AMICI CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION AND FIRST AMENDMENT COALITION IN SUPPORT OF DEFENDANT AND RESPONDENT DOUBLEVERIFY, INC.

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TO THE HONORABLE CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amici Curiae MOTION PICTURE ASSOCIATION OF AMERICA, INC., THE HEARST CORPORATION, TEGNA INC., CALIFORNIA NEWS PUBLISHERS ASSOCIATION and FIRST AMENDMENT COALITION (collectively "Amici") respectfully submit this Amici Curiae Brief in support of Defendant-Respondent DoubleVerify, Inc. ("DoubleVerify").

As described in their Application, Amici and their members are actively engaged in the creation and dissemination of information to the public through news reports, motion pictures, biographies, and documentaries, as well as docudramas, historical fiction, and other creative works. They have a strong interest in protecting their work and combating the piracy that is an unfortunate part of today's media environment – including piracy occurring via the ubiquitous websites that traffic in pirated works. As part of their fight against piracy, Amici support efforts to ensure that sites and services engaged in rampant copyright infringement do not participate in the legitimate online advertising market. Companies like DoubleVerify, which conducts thorough research and provides legitimate brands and other participants in the online advertising ecosystem with

information they need to prevent their advertisements from being associated with and appearing on websites that have built their business model on the theft of intellectual property, are an important part of these efforts. This lawsuit threatens a key protection that the California Legislature intends to provide to DoubleVerify and companies like it – the ability to quickly and inexpensively obtain dismissal of meritless lawsuits designed to punish them for the important work they do in helping Amici and other companies combat piracy and avoid other inappropriate or undesirable speech on the Internet.

Meritless lawsuits have a pernicious effect on speech rights. As the U.S. Supreme Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution [of a lawsuit], unaffected by the prospects of its success or failure." Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Because of the high cost of litigation, publishers of expressive works "will tend to become self-censors" unless they "are assured freedom from the harassment of lawsuits[.]" Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966). See also Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003) ("[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable" (citations omitted)).

The California Legislature has recognized the danger posed by lawsuits arising from the exercise of First Amendment rights. In 1992, it enacted California's anti-SLAPP statute, C.C.P. § 425.16, to provide a mechanism for the "early dismissal of unmeritorious claims" that "interfere with the valid exercise of the constitutional rights of freedom of speech and petition." Five years later, responding to court decisions that narrowed its application, the Legislature amended the statute, declaring expressly that it "shall be construed broadly." C.C.P. § 425.16(a).

Notwithstanding this unequivocal mandate, and despite decisions from this Court re-affirming its intended breadth, Plaintiff/Petitioner urges an impermissibly narrow interpretation of the anti-SLAPP statute, which would deny its protection to all speech in a purported commercial setting. Consistent with the previous opinions of this Court – which have repeatedly recognized that the anti-SLAPP statute is to receive a broad construction – this Court should reject this restrictive reading of the statute, in favor of an interpretation more consistent with the statute's express language and legislative history, and with its underlying goal of providing broad protection for free speech rights.

I.

SUMMARY OF ARGUMENT.

DoubleVerify and companies like it provide a critical service to Amici and others that seek a robust online advertising ecosystem that supports legitimate commerce. Countless websites have built business models based on piracy and – much like legitimate websites – they rely on advertising dollars for their income. These websites can successfully monetize their piracy because many Internet advertisements are not placed via direct arrangements between the site and the advertiser, but instead through automated transactions, often involving multiple entities that stand between the brand seeking to advertise its products or services and the web site on which the ad ultimately appears.

Typically, the brand or its advertising agency does not manually select the individual web sites on which its ads appear. Instead, computer algorithms managed by entities known as digital advertising networks or exchanges determine where advertisements will be placed. One by-product of this practice is the possibility that ads get placed on sites with which the advertiser does not wish to be associated, because such sites are engaged in illegal or inappropriate activity, such as fraud, dissemination of malware, display of pornography, or copyright infringement, or the site contains content not otherwise appropriate for the advertiser (such as an

advertisement for a Disney animated film appearing on a website with adult content).

Along with other Digital Advertising Assurance Providers ("DAAPs"), DoubleVerify researches and analyzes millions of sites on the Internet to identify websites with illegal or undesirable content, so that companies know before they spend what their advertising dollars will support. This information allows brands and other participants in the online advertising ecosystem to make informed decisions – ensuring that their money does not inadvertently support or associate their brands with content that they deem harmful or inappropriate. Armed with the information DoubleVerify provides, brands can provide instructions to the digital advertising networks about where their ads should – and should not – appear.

Plaintiff FilmOn.com operates a website with which some companies may wish to avoid associating their brands. DoubleVerify's investigation determined that Plaintiff's website was associated with copyright infringement and adult content, and it reported this information to its clients. Not surprisingly, FilmOn objected to the transparency – and the ability to hold FilmOn accountable for its content choices – that DoubleVerify's report provided to FilmOn's potential advertisers. And so FilmOn sued. But California's Legislature has provided protection to

companies like DoubleVerify, to ensure that their work is not chilled by meritless lawsuits designed to punish them for speech that serves the public interest – California's anti-SLAPP statute, Code of Civil Procedure § 425.16.

FilmOn's attempts to escape the anti-SLAPP statute should be rejected. As an initial matter, the premise of its Petition for Review is simply wrong. DoubleVerify's reports are not commercial speech – speech "proposing a commercial transaction" or tied to "the economic interests of the speaker and its audience." Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 561, 562 (1980). They are not advertisements or other speech intended to promote the sale of products – they are the product, much like Amici's news programs and motion pictures are their products. FilmOn does not cite a single case extending the commercial speech label to speech similar to the informational reports that DoubleVerify provides to clients. This Court should not be the first. Indeed, FilmOn's proposed expansion of the commercial speech doctrine could deprive many speakers of the SLAPP protection the Legislature intends for them, including news subscription services and database-driven websites such as Facebook and Twitter. For this reason alone, the Court should reject FilmOn's arguments. Section II, infra.

The Court also should reject FilmOn's claims because they would drastically narrow California's anti-SLAPP statute, contrary to the Legislature's unambiguous directive that it be broadly construed. C.C.P. § 425.16(a). Since its inception, the anti-SLAPP statute has applied to speech in a commercial setting, so long as it meets the statutory requirements. E.g., Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994), disapproved on other grounds, Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002). While the Legislature chose to narrow the statute for some – but not all – commercial speech, at the same time it reiterated its intent that the anti-SLAPP statute be broadly applied to protect all speech that involves a public issue, or is in the public interest. FilmOn's decision not to invoke the Legislature's narrow exception to the anti-SLAPP statute, C.C.P. § 425.17(c), certainly was not an accident. FilmOn cannot meet its strict standards. It has given this Court no reason to create a new exception – one not intended by the Legislature – for speech that purportedly arises in a commercial setting. Section III, infra.

DoubleVerify's reports plainly are in the public interest. In today's complicated media environment, information that aids businesses in engaging in socially and fiscally responsible advertising decisions is vital. Recent boycott efforts – often focused on brands that advertise on websites offering content some consumers consider offensive – have highlighted the

importance of companies understanding, anticipating and being responsive to customer demands. Of particular interest to Amici, DAAPs give companies the background they need about websites that traffic in illegal or irresponsible content, so that Amici can avoid having their advertisements appear on those sites. For this and many other reasons, DoubleVerify's reports are entitled to the full protection of California's anti-SLAPP statute. Section V, infra.

II.

DOUBLEVERIFY'S REPORTS ARE NOT COMMERCIAL SPEECH.

FilmOn's arguments in this Court depend entirely on its assertion that DoubleVerify's reports are commercial speech, entitled to reduced First Amendment protection. They are not. This Court should reject FilmOn's arguments – and affirm the appellate court's decision – because the essential premise of its arguments is flawed.

In Kasky v. Nike, Inc., 27 Cal. 4th 939, 960 (2002), this Court adopted a three element, limited purpose test for deciding whether speech is commercial, directing courts to consider: (1) the speaker; (2) the intended audience; and (3) the content of the message. As the Court explained, generally, 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." Id. The intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services," or those acting on their behalf, "such as reporters or reviewers" who are "likely to repeat the message to or otherwise influence actual or potential buyers or customers." Id.

Finally – and critically – the content of the message must be commercial in nature. Id. at 961. Speech is commercial when it "consists of representations of fact about the business operations, products, or services of the speaker" and is "made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Id. (emphasis added). As the Court explained, "[t]his is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service." Id. (emphasis added; citing Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Ibanez v. Florida Dept. of Bus. & Prof. Reg., Board of Accountancy, 512 U.S. 136 (1994); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)). Concluding that this test is consistent with U.S. Supreme Court decisions that have focused on the speaker's promotion of products or services, the Court reiterated that an essential element of commercial speech, at least in the context of laws

aimed at protecting consumers, is a factual representation "about the business operations, products, or services of the speaker..., made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Kasky, 27 Cal. 4th at 961-62.

The Court's decision built on the United States Supreme Court's commercial speech jurisprudence. That Court consistently has held that commercial speech, at its core, is "speech proposing a commercial transaction." Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980); see also Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (commercial speech is "speech which does no more than propose a commercial transaction") (internal marks and citations omitted). Indeed, this "is what defines commercial speech." Board of Trustees v. Fox, 492 U.S. 469, 482 (1989). While the Court has acknowledged the potential relevance of other considerations, e.g., Central Hudson, 447 U.S. at 561, those considerations necessarily are tied to "the economic interests of the speaker and its audience" (id.).[1]

[1] In Beeman v. Anthem Prescription Management, LLC, 58 Cal. 4th 329 (2013), this Court explained that commercial speech is, at a minimum, "expression related solely to the economic interests of the speaker and its audience." Id. at 352 (citing Central Hudson, 447 U.S. at 561.) The compelled speech at issue there – requiring prescription drug processers to include pricing information in communications with clients – was commercial because it related to the economic interests of the sender and recipient, and was "linked inextricably to government-regulated health

Amici are aware of no other case in which a report, article, or other expressive work has been designated as "commercial speech," even if the author or creator is compensated for the work. And for good reason. It long has been the law that it is irrelevant whether the expression at issue is sold for profit. Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 678 (2010). In U.D. Registry, Inc. v. State of California, 34 Cal. App. 4th 107 (1995), for example, the appellate court held that the consumer credit reports at issue there were not commercial speech. Id. at 111. It explained that "[t]he fact that UDR sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech." Id. Indeed, "'[s]ome of our most valued forms of fully protected speech are uttered for a profit.'" Id. (citing Board of Trustees v. Fox, 492 U.S. at 482). See also Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa, 39 Cal. 3d 501, 511 (1985), disapproved on other grounds Kasky, 27 Cal. 4th 939 (fortune-telling for a fee is not commercial speech);[2] City of Alameda v. Premier Comm'n Network, Inc.,

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insurance transactions" enacted to prevent commercial harms. Id. Here, in contrast, as discussed below, the reports at issue are DoubleVerify's product, designed to aid businesses in ensuring that their advertising dollars do not support websites with inappropriate content. Section V, infra.

[2] Cf. Argello v. City of Lincoln, 143 F.3d 1152, 1153 (8th Cir. 1998) ("there is a distinct difference between the offer to tell a fortune ('I'll tell

156 Cal. App. 3d 148, 152 (1984) (First Amendment protects speech sold to subscribers – there, motion pictures, news and related information sold through television subscription service); Hilton v. Hallmark Cards, 599 F.3d 894, 905 n.7 (9th Cir. 2010) (greeting card with celebrity's likeness is not commercial speech because the "card is not advertising the product; it *is* the product. It is sold for a profit, but that does not make it commercial speech for First Amendment purposes" (original emphasis)).

The Eleventh Circuit's decision in Tobinick v. Novella, 848 F.3d 935 (11th Cir. 2017), is instructive. There, the Court dismissed Lanham Act claims against a doctor based on two blog posts criticizing another doctor. Id. at 949-52. In doing so, the Court rejected plaintiff's argument that the posts were commercial speech merely because the defendant profited from them, explaining:

> To be sure, neither the placement of the articles next to revenue-generating advertising nor the ability of a reader to pay for a website subscription would be sufficient in this case to show a liability-causing economic motivation for Dr. Novella's informative articles. Both advertising and subscriptions are typical features of newspapers, whether online or in-print. But, the Supreme Court has explained that "[i]f a newspaper's profit motive were determinative, all aspects of its operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted

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your fortune for $20.'), which is commercial speech, and the actual telling of the fortune ('I see in your future. ...') which is not" (quoting trial court)).

> with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." Indeed, "magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech. ... Even if Dr. Novella receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue.

Id. at 952 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)). Accord Commodity Futures Trading Comm'n v. Vartuli, 228 F.3d 94, 108-10 (2d Cir. 2000) (distinguishing between advertising for software program, which was commercial speech, and the statements generated and conveyed by the software itself, which were not commercial speech).[3]

Under the precedent discussed above, DoubleVerify's reports about the content of websites are unambiguously ***non***-commercial speech. Even if DoubleVerify and its client meet Kasky's "speaker" and "intended

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[3] See also Dex Media West, Inc. v. City of Seattle, 696 F.3d 952, 963-64 (9th Cir. 2012) (yellow page directories were non-commercial speech; "economic motive in itself is insufficient to characterize a publication as commercial" even where "commercial content is published alongside noncommercial content"); Browne v. Avvo, Inc., 525 F. Supp. 2d 1249, 1254 (W.D. Wash. 2007) (finding it "hard to imagine how an information clearinghouse and/or ratings service could be considered 'commerce'"); Stephens v. Am. Home Assur. Co., 23 Media L. Rep. 1769, 1995 WL 230333, *6 (S.D.N.Y. 1995) (annual ratings of insurance companies, distributed to subscribers, were protected by First Amendment privilege).

audience" elements, the content of the message plainly is not "commercial" as defined by this Court and the U.S. Supreme Court. The reports do not consist of representations of fact about the business operations, products, or services of DoubleVerify itself, or a competitor. Rather, they focus solely on FilmOn's (and millions of other sites') business operations, products, and services. Id. They do not propose a commercial transaction, nor are they designed to promote DoubleVerify through an influence campaign, or to increase the sales of its product (beyond any business' goal of providing a valuable service to its clients).

Instead, the reports are an amalgamation of information and data that DoubleVerify has gathered regarding third-parties, none of whom are customers, potential customers, or competitors. 1:AA:064-065, 072. DoubleVerify provides a service that, as discussed below, gives businesses critical information to help them decide where their advertising dollars should be spent – and therefore, which businesses, and business models, their money helps to advance. It is a personalized reporting service that assists its customers in making better business choices (e.g., where to advertise and where not to advertise).

A conclusion that these reports are commercial speech would vastly widen the scope of the third Kasky element, depriving a broad array of speech of the First Amendment protections that they currently enjoy.