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IN THE SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

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

PETITION FOR REVIEW

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ISSUES PRESENTED

In a published decision, the Second District Court of Appeal found DoubleVerify, Inc.'s ("DoubleVerify's") confidential reporting on websites protected activity within the meaning of California Civil Procedure Code section 425.16(e)(4) (the "catch-all provision"), although the confidential reports at issue contained allegedly false and defamatory statements. The court found these reports furthered the defendant's exercise of its free speech rights on a matter of "public interest," even though DoubleVerify expressly prohibits clients from disseminating its reports, which are customized for each client, to third parties. This case raises the following legal questions for review by this Court:

1. In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of the catch-all provision in the anti-SLAPP statute, 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?
2. Alternatively, should this Court grant review and hold this case pending its decision in *Rand Resources v. City of Carson* (2016) 247 Cal. App. 4th 1080, review granted September 21, 2016, S235735 ("*Rand Resources*"), in which this Court has been asked to interpret and apply the "public interest" requirement in the context of a private business dispute.

INTRODUCTION

In this case, the court dramatically expanded the scope of the anti-SLAPP statute's catch-all provision, finding that the sale of a purely private online advertising report constitutes protected speech on 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. This Court should reverse.

DoubleVerify sells the reports at issue, which are confidential customized reports to online advertisers to assist them with the placement of banner ads. DoubleVerify's confidential reports include a spreadsheet with advertising data (such as the length of time an ad is displayed on a website) and a tag or label classifying the website's content according to standards set by DoubleVerify. In certain of its confidential reports, DoubleVerify classified FilmOn.com, Inc. ("FilmOn") in the "Copyright

Infringement: File Sharing" and "Adult Content" categories. FilmOn disputed these characterizations. Courts had ruled differently regarding FilmOn's alleged infringement; and FilmOn disputes the characterization that is websites contain "adult content." FilmOn, however, never made it to the merits. The trial and appellate courts barred FilmOn from presenting its case. In so doing, those courts have given DoubleVerify (and similar businesses) license to confidentially whisper absolutely anything about anyone for profit with impunity.

This Court should grant review for two reasons:

First, this case presents the Court an ideal opportunity to clarify the meaning of the "in furtherance of" and "public interest" requirements in the anti-SLAPP statute's catch-all provision in the context of commercial speech. While this Court has yet to provide definitive guidance, some 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.)

The court 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.) As other courts have held in the anti-SLAPP context, however, 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.) Considering the conflict in the already nebulous anti-SLAPP jurisprudence, "[i]t 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.

Second, the court's published decision creates a conflict with other anti-SLAPP cases and adds to existing confusion in anti-SLAPP public interest jurisprudence. It was previously well-established that a private business dispute does not turn into a matter of public interest merely because it can analogized or related in some abstract way to a larger topic of interest to the public; or, as the First District Court of Appeal held in *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898, "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." The court's criticism and outright rejection of *Wilbanks* was clearly erroneous. The mere fact that the copyright infringement and the "presence of adult content on the Internet generally" may be of widespread concern to the public does not mean – as the court concluded (Typed Opn. 15) – that DoubleVerify's purely private communications to clients about the content available on plaintiff's websites are protected activity. This conclusion was reached even though no member of the public was interested or even aware of FilmOn and DoubleVerify's private quarrel concerning how FilmOn's website was rated for advertising purposes.

Indeed, in the closest case to this one, the First District found a trade association's act of labeling particular products as "organic" does not further free speech rights in connection with an issue of public interest. 183 Cal. App. 4th at 1205-10. The court's attempt to distinguish *OASIS* because the "organic" seal at issue did not communicate a message makes

little sense. Making matters worse, the court's reliance on inapposite cases involving speech about the identities and locations of child molesters, registered sex offenders and other individuals who posed a specific risk of harm to young children will create even greater confusion in anti-SLAPP jurisprudence. The court's legal errors and its failure to make proper factual distinctions between cases will have wide ranging effects beyond this dispute. Now that private commercial communications related to online advertising is considered speech on a matter of public interest, virtually anything can be similarly considered. Although there is no dispute that the anti-SLAPP statute is to be considered "broadly," the statute has limitations. This case involves communications outside of those limitations. This Court should grant review to resolve the conflict created by the published decision below and provide guidance as to the proper construction of the catch-all provision.

Alternatively, this Court should grant review and hold this case pending its decision in *Rand Resources*, which may determine whether the court erroneously decided this case. In that case, this Court is called to decide whether causes of action alleging fraud and intentional interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (the "NFL") stadium and related claims arise out of a public issue or an issue of public interest within the meaning of the catch-all provision. The lower court and all parties agreed that the development of an NFL stadium in Carson, California, was an issue of widespread public interest; however, it was not clear whether the business conduct related to that development was therefore also a matter of public interest. *Rand Resources*, 247 Cal. App. 4th at 1089, 1092-93. The court held that, absent a showing of public interest in the private dispute itself, the challenged business conduct around that development is not a matter of public interest. *Id*. at 1093-95. This Court should affirm

that decision. It should reverse this case for similar reasons – a purely private, commercial communication does not invoke a matter of public interest.

STATEMENT OF THE CASE

A. Factual Background

FilmOn, a leading web-based entertainment provider,[1] provides access to hundreds of television channels, premium movie channels, pay-per-view channels and over 45,000 video-on-demand titles and distributes programming on various website domains. (Typed Opn. 3.) Like many other online businesses, FilmOn relies on revenue from advertising as a substantial source of its income. (*Id*.)

DoubleVerify offers online tracking, verification and "brand safety" services to Internet advertisers. (AA 41, 63.) For a fee, DoubleVerify generates website reports referred to as "Impression Quality Reports" or "IQRs" that contain data or other information about advertising platforms on certain subjects (*i.e.*, inappropriate content, geo-targeting, competitive separation, ad placement, fraud detection, ad viewability), which are tailored to the needs of an individual client. (Typed opn. 3; AA 65, 138, 141 RT 18:19-28; 21:24-25.) The IQRs do not contain any detailed analysis, but instead purport to contain raw data identifying particular FilmOn websites, the number of impressions associated with those websites, and certain "tags" or classifications along with a glossary to define those tags. (Typed opn. 3.) DoubleVerify's standard agreement requires that its clients maintain the confidentiality of IQRs and expressly

[1] FilmOn distributes its 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").

prohibits distribution of those reports to third parties. (Typed opn. 17; RT 26:21-28.)

In late 2013, FilmOn learned DoubleVerify had published and distributed IQRs to certain its customers with false and disparaging classifications of one or more of the FilmOn Websites. (Typed opn. 4.) After receiving the IQRs, clients who had previously advertised on FilmOn's websites began to cancel their advertising agreements. (AA 138-139.) Filmon sued DoubleVerify for trade libel, slander, tortious interference with contract and unfair business practices. (Typed opn. 3.) FilmOn alleged DoubleVerify had "falsely classif[ied] the FilmOn Websites under the categories of 'Copyright Infringement-File Sharing'[2] and 'Adult Content.'"[3] (Typed opn. 4.) DoubleVerify filed a special motion to strike under the anti-SLAPP statute. (*Id*. at 5.)

B. The Trial Court's Decision

The trial court granted DoubleVerify's motion to strike. (Typed opn. 6.) That court found the public had a demonstrable interest in knowing what content is available on the Internet, especially with regard to adult content and potential copyright infringement. (*Id*.) The trial court analogized DoubleVerify's conduct to what the court described as "more publically visible media efforts…" such as movie ratings. (*Id*.) Furthermore, the trial court noted that FilmOn had generated a substantial amount of public interest, and in particular regarding the issue of copyright

[2] 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.)

[3] DoubleVerify defines "Adult Content" as "Mature topics which are inappropriate viewing for children including explicit language, content, sounds and themes." (Typed opn 4.)

infringement. (*Id*. at 7.) The trial court granted DoubleVerify's special motion to strike, finding DoubleVerify's activity qualified for anti-SLAPP protection under section 426.16(e)(4).

C. The Court's Decision

On appeal, the court considered whether DoubleVerify could uphold its burden under the first step of the anti-SLAPP analysis for the catch-all provision, which requires the court to decide whether the defendant made a *prima facie* showing that the acts of which plaintiff complains were taken in furtherance of defendant's constitutional rights of petition or free speech in connection with a public issue.

The court rejected FilmOn's argument that DoubleVerify's decision to classify FilmOn Websites with tags for "Copyright Infringement" and "Adult Content" failed to further DoubleVerify's exercise of free speech in connection with a public issue. After reciting various legal principles that guide the anti-SLAPP analysis, it attempted to distinguish the decision in *OASIS*, in which the First District Court of Appeal ruled that a trade association's certification decisions as to whether personal care products qualify as "organic" is not protected activity. (*See* Typed Opn. 15 (quoting *OASIS*, 183 Cal. App. 4th at 1203-04) (reasoning that the association's act of authorizing its members to use its "'OASIS Organic' seal" certification on certain "commercial products" is "not in furtherance of the association's exercise of free speech in connection with a public issue.'").)

In addition, the court rejected the longstanding principle that the statement in question cannot simply refer to a subject of widespread public interest, but must in some manner contribute to the public debate. The court flatly 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[.]" (Typed opn. at 17.) Instead, the court held that "where a statement concerns an issue of

widespread public interest, it need not also contribute in some manner to the public debate." (*Id*. at 19.) In other words, even where the statement could merely be related to an issue of widespread interest, it need not contribute to the debate, even if the statement at issue concerned purely private commercial communications. (*See id*. at 19-20.)

Even though the IQRs were published on a confidential basis to DoubleVerify's individual clients, the court found the reports "concerned an issue of public interest." (*Id*.) Based on the legislative mandate that the anti-SLAPP statute be broadly construed, the court held "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.) The court stated that "[n]either the identity of the speaker nor the identity of the audience affects . . . whether [the content of the communication] concerns an issue of public interest." (Typed Opn. at 20.)

The court found 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 general, 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 IQRs constitute "a matter of public interest." (*Id*. at 15-16.) It went so far as to compare the IQRs to movie ratings published by the Motion Picture Association of America ("MPAA"), even though – unlike the MPAA's movie ratings – DoubleVerify's IQRs are kept confidential,

and are not widely distributed. (*Id.* at 16.) In doing so, the court rejected FilmOn's contention that private confidential classifications generated by one party for only one other party in a commercial context are not of public interest under the meaning of the anti-SLAPP statute. (*Id.* at 17.) On July 25, 2017, the court elected to publish its opinion, after initially deciding to have the opinion unpublished. (*Id.* at Ex. A.) No party sought rehearing.

REASONS FOR GRANTING REVIEW

A. This Case Is An Ideal Vehicle To Clarify The Scope Of The Anti-SLAPP Statute's Catch-All Provision In The Context Of Commercial Speech.

California's anti-SLAPP statute "allows a court to strike any cause of action that arises from the defendant's exercise of his or her constitutionally protected right of free speech or petition for redress of grievances." (*Flatley v. Mauro* (2006) 39 Cal. 4th 299, 311-312.) Section 456.16(e) identifies four categories of protected speech under the statute. Consistent with the heightened value traditionally associated with political speech and the exercise of first amendment rights in public places, the first three of these categories protect speech associated with particular places. 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[.]" (*Civ. Proc. C.* § 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.* § 425.16(e)(3), and therefore does not protect speech in private places.

The catch-all provision in subdivision (e)(4) – the fourth and final category of protected speech – lies at the outer margins of the anti-SLAPP statute. It is the most susceptible to abuse. While the catch-all provision

does not expressly require that speech be associated with any particular place, it still requires that the challenged conduct be "*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*." *Civ. Proc. C.* § 425.16(e)(4). To date, the California Supreme Court has set no definitive standard for resolving the question as to what constitutes a "public issue" or an "issue of public interest," and what conduct "further[s]" the exercise of free speech rights. (*See Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1122 & n. 9; *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 658 ("[w]here the margins are drawn as to what constitutes an 'issue of public interest' ... has been one of the many subjects of anti-SLAPP jurisprudence which has garnered substantial judicial attention in the last several years.") Years ago, this Court predicted that, in the absence of a "bright-line" test, "confusion and disagreement about what issues truly possess public significance inevitably will arise, thus delaying resolution [of anti-SLAPP motions] and wasting precious judicial resources." (*Briggs*, 19 Cal. 4th at 1122.)

The absence of clear judicial standards has led to confusion, as is evident here. The 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. Various appellate courts have properly concluded that 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 and does not concern a matter of public interest, absent extraordinary circumstances. (*See, e.g., OASIS*, 183 Cal. App. 4th 1186; *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"); *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."); *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.

The decision below 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. (*See Nagel*, 109 Cal. App. 4th at 47-48 ("[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.").) Without clear guidance from this Court, the anti-SLAPP statute will continue to be abused and pushed far beyond what the Legislature intended. This Court should grant review to consider the limits of the catch-all provision as applied to commercial speech that takes place entirely in private, outside of any public forum.

B. The Court's Published Decision Conflicts With On-Point Authority And Will Sow Confusion In Anti-SLAPP Jurisprudence Over The Public Interest Requirement.

This Court should grant review to resolve conflicts in the case law created 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 court's published decision below blurs that critical distinction. Instead of relying on factually similar commercial speech cases, the court erroneously hitched its wagon to cases that involved statements made by individuals 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. Not only should this Court reverse the decision below, it should take this opportunity to make clear that commercial speech about a company, product or service does not further the exercise of free speech and does not concern a matter of public interest, absent extraordinary circumstances.

1. The Court's Decision Directly Conflicts With *Wilbanks* And Other Authority, And Instead Adopted A "Butterfly Effect" Approach To The Public Interest Requirement.

DoubleVerify's IQR reports were provided on a confidential basis to individual paying clients and could not have contributed to any public dialogue. Nevertheless, the court concluded that DoubleVerify's act of classifying FilmOn's websites as associated with copyright infringement and adult content constituted a matter of public interest because copyright infringement and adult content on the Internet are generally matters of public concern. (Typed Opn. 20.) This highly attenuated and indirect chain of reasoning (a "butterfly effect") has been repeatedly rejected by other appellate courts. The court largely ignored these cases and wrongly criticized *Wilbanks*.

In *Wilbanks*, 121 Cal. App. 4th at 898, the First District Court of Appeal 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." This proposition was not invented out of

whole cloth. Contrary to the court's false assertion that *Wilbanks* provided "no analysis" or legal authority to support this holding (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 v. AFL-CIO* (2003) 105 Cal. App. 4th 913; *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal. App. 4th 595; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal. App. 4th 107).)

Rivero is the leading decision in this area. There, the court rejected a defendant's attempt to extrapolate speech relating to a private workplace dispute into a matter of public interest. (105 Cal. App. 4th 913.) In that case, the plaintiff supervised eight janitors at the International House on the University of California at Berkeley campus. 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 court held that the plaintiff's supervision of eight custodians was hardly a matter of public interest. (*Id*. at 924.) In so holding, the court rejected the contention that all unlawful workplace activity or "labor disputes" automatically rise to the level of an issue of public interest. (*Id.* at 924, 929.) The court further stated that the fact that a union published the challenged statement did not turn an otherwise private matter into one of public interest. (*Id.* at 926.)

In *Consumer Justice Center,* 107 Cal. App. 4th at 601, the court applied *Rivero*'s logic to a commercial speech case. In this case, the maker of an herbal supplement was sued for fraud and false advertising. It 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.

(*Id*. 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 Cal. Code Civ. Proc. § 425.16(a)).)

The same conclusion should have been reached by the court here. Just as in *Consumer Justice* and *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. Indeed, DoubleVerify admitted that the public never sees or is aware of its IQRs; 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.) 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 its reading of data it pays for and its own advertising strategy is not an issue of public concern.

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. 15) cannot convert this otherwise private business dispute into a matter of public interest. Further, 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 truly a subject of "widespread public interest." (*See Bikkina v. Mahadevan* (2015) 241 Cal. App. 4th 70, 83 (papers published in trade journals are not sufficient to substantiate a showing of public interest in the dispute, even if the topic of those papers, in this case climate change, is a topic of public interest).) If other courts were to adopt the court's "butterfly effect" approach to the public interest, the decisions in *Rivero*, *Consumer Justice* and many other decisions[4] would all be overturned. If anything, the instant case is even easier to decide than those cases because – while the speech in *Consumer Justice* and *Rivero* was public to a certain extent – DoubleVerify's reports are confidential, and specifically tailored to only one individual company that orders it.

[4] *See, e.g., DuCharme*, 110 Cal. App. 4th at 107; *Donovan v. Dan Murphy Foundation* (2012) 204 Cal. App. 4th 1500, 1509 (ruling that accusations that a board member had embezzled millions at one of the most well-known non-profits in California that provided services to millions of Americans was not an issue of public interest); *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal. App. 5th 1098, 1105-06 (ruling that, while discussion of drug and alcohol rehabilitation services may be an issue of public interest, the licensing status of a specific rehabilitation facility is not).)

2. The Court's Decision Squarely Conflicts With *OASIS* And Other Commercial Speech Cases.

The court plainly erred when it failed to take into consideration the commercial nature of DoubleVerify's IQR Reports. In *Nagel*, 109 Cal. App. 4th at 46-51, the court reasoned that commercial speech is entitled to "less protection" than "other constitutionally safeguarded forms of expression" and do not contribute to the "public dialogue[.]" Additionally, the decision below unnecessarily created an irreconcilable conflict with the First District's 2010 decision in *OASIS* – a commercial speech case on all fours with this case. This Court should grant review to make clear that ordinary commercial speech about particular businesses or their products does not constitute protected activity within the catch-all provision.

In *OASIS*, 183 Cal. App. 4th at 1191, a trade association had developed an "organic" certification for personal care products. The trade association decided which products to certify as organic. (*Id*.) A nonmember sued the association 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 First District affirmed the denial of the trade association's anti-SLAPP motion. (*Id*. at 1191.) It ruled that, "[w]hile the act of formulating a proposed industry 'organic' standard may constitute protected activity," (*id*. at 1200), the association's act of classifying particular products as organic is commercial speech and "not in furtherance of OASIS's exercise of free speech in connection with a public issue." (*Id*. at 1205.) "The use of the 'OASIS Organic' seal" and DoubleVerify's "tags" is not activity directed to public discussion of organic standards in general, but is only speech about the contents and quality of the product." (*Id*. at 1209.) This logic compels the same conclusion here. While the plaintiff's complaint in *OASIS* was based on an

"organic" seal intended to convey to a seal of approval to consumers, DoubleVerify's "Copyright Infringement" and "Adult Content" tags also communicated a message – namely, a scarlet letter for certain advertisers.

The court's attempt to distinguish *OASIS* from this action because "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 is a gross and blatant misreading of the *OASIS* decision. (Typed Opn. 15.) Both DoubleVerify's tags and the "OASIS Organic" seal were clearly intended to communicate a message about particular products. (*See id*. at 1205 (stating that OASIS' 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").)

Further, the court should not have dismissed the "identity of speaker" and the "identity of the audience" as "irrelevant." (Typed Opn. 20.) As the Second District previously explained, "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).) Here, the IQRs published by DoubleVerify (a speaker engaged in commerce) to an audience of one customer (*i.e.*, a purchaser of an IQR) about the websites of other companies like FilmOn is unquestionably commercial in nature, which is further evidenced by the fee charged to its customers to receive these reports. 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. The services in question have no consumer protection role.

Indeed, courts frequently consider both the identity of the speaker and the audience in determining whether speech concerns a matter of widespread public interest. (*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).)

3. The 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 decision below 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. 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[.]" (*Id*. 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; *see also id*. at 375 (finding 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.)[5]

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. (*Id*. 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

[5] Contrary to the court's assertion that *Cross* overruled *Wilbanks* (Typed Opn. 17),[5] *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 Bikkina v. Mahadevan* (2015) 241 Cal. App. 4th 70, 84 (ruling that allegedly defamatory statements made by the former academic advisor of a Ph.D. student about the student's work on carbon sequestration at a scientific presentation 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 (citing *Wilbanks* with approval).)

communications between concerned parents and community members about a sexual predator in a position of authority is of public interest.

Finally, *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. (*Id*. 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 may 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.)

This Court should grant review to correct the erroneous decision, which will have a chilling effect on the filing of meritorious claims. The anti-SLAPP statute has been increasingly invoked by parties and under

circumstances that gave rise to a new trend – an explosion of anti-SLAPP motions used to "burden parties with meritorious claims and chill parties with nonfrivolous ones." (*Navalier v. Sletten* (2002) 29 Cal. 4th 82, 96 (J. Brown, dissenting).) Unfortunately, "[t]he cure has become the disease," and anti-SLAPP motions are "just the latest form of abusive litigation." (*Id*.; *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 review and reverse.

C. Alternatively, This Court Should Grant Review And Hold This Case Until The Court Decides *Rand Resources* Which Raises A Similar Issue Regarding The Scope Of Public Interest

This Court is authorized to grant review and "order action the matter deferred until the court disposes of another matter or pending further order of the court." (Cal. Rules of Court, rule 8.512(d)(2).) Because this case implicates issues similar to another case pending before this Court, the Court should exercise its authority to grant this petition and defer action pending the Court's decision in *Rand Resources,* 247 Cal. App. 4th 1080, review granted September 21, 2016

In *Rand Resources*, this Court is called to decide whether causes of action alleging fraud and intentional interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (NFL) stadium and related claims arise out of a public issue or an issue of public interest within the meaning of Code of Civil Procedure section 425.16. That is, even though all parties agree that the decision to develop a stadium is a matter of public interest, do private business communications connected or related to the development count concern a public interest or are they merely predicated on commercial conduct and not speech and petitioning?

The lower court in *Rand* recognized that, though bringing the NFL to Carson was an issue of public importance, two rivals seeking to be the City of Carson's agent in dealing with NFL presented no public issue. (*Rand Resources*, 247 Cal. App. 4th at 1097 ("this conduct arises from the [defendants'] private conduct of their own business, not their free speech or petitioning activities.").) In other words, even though the conduct at issue was bound up with an issue of public concern, it did not automatically become one for the purposes of the anti-SLAPP statute.

This case raises a similar issue. Namely, "the presence of adult content on the Internet generally" and "copyright infringement" may be issues of public concern, but the dispute turns on whether DoubleVerify's confidential commercial reports, and its dispute with FilmOn over those reports is protected speech or commercial activity within the meaning of the catch-all provision – are DoubleVerify's confidential business reports to one client automatically of public interest because the broad subject matter of those reports generally is?

Because this Court's decision in *Rand Resources* may determine whether the court erroneously decided this case, this Court should grant review and hold this case pending its decision in *Rand Resources*.

CONCLUSION

For the reasons explained above, this Court should either grant this petition outright, or grant this petition and defer action in the matter pending the Court's decision in *Rand Resources.*

DATED: September 5, 2017 BAKER MARQUART LLP

By:_____
Ryan G. Baker
Attorneys for Appellant
FilmOn.com, Inc.

CERTIFICATION OF WORD COUNT

I certify in accordance with California Rules of Court, rule 8.504(d)(1), that this brief contains 6,741 words as calculated by the Microsoft Word software in which it was written.

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

Dated: September 5, 2017

_____

Ryan G. Baker

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FILMON.COM, Plaintiff and Appellant, v. DOUBLEVERIFY, INC. Defendant and Respondent.	B264074 (Los Angeles County Super. Ct. No. BC561987) ORDER CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion in the above-entitled matter filed on June 29, 2017, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports.

[There is no change in the judgment.]

JOHNSON (MICHAEL), J.* EDMON, P. J. ALDRICH, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 6/29/17 FilmOn.com v. DoubleVerify CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FILMON.COM, Plaintiff and Appellant, v. DOUBLEVERIFY, INC. Defendant and Respondent.	B264074 (Los Angeles County Super. Ct. No. BC561987)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Baker Marquart, Ryan G. Baker, Jaime W. Marquart, Christian A. Anstett and Blake D. McCay for Plaintiff and Appellant.

Fox Rothschild, Lincoln D. Bandlow and Margo J. Arnold for Defendant and Respondent.

INTRODUCTION

Plaintiff FilmOn.com (FilmOn) is an Internet-based entertainment media provider. Defendant DoubleVerify, Inc. (DoubleVerify) provides authentication services to online advertisers. FilmOn sued DoubleVerify for trade libel, slander, and other business-related torts, alleging DoubleVerify falsely classified FilmOn's websites under the categories "Copyright Infringement-File Sharing" and "Adult Content" in confidential reports to certain clients that subsequently cancelled advertising agreements with FilmOn. DoubleVerify moved to strike the causes of action pursuant to the anti-SLAPP statute (Code Civ. Proc., § 425.16), arguing its reports accurately addressed issues of widespread public interest—namely, the existence of adult content and copyright infringing material on publicly available websites, such as FilmOn.[1] The trial court granted the motion.

FilmOn appeals from the order striking its causes of action against DoubleVerify. As its sole ground for appeal, FilmOn contends DoubleVerify failed to make the requisite threshold showing that the challenged causes of action arose from protected activity. We conclude the trial court properly found DoubleVerify engaged in conduct in furtherance of its constitutional right of free speech in connection with an issue of public interest. We affirm.

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[1] SLAPP is an acronym for strategic lawsuit against public participation. (See *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).) Statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTS AND PROCEDURAL BACKGROUND

1. *The Parties*

DoubleVerify provides authentication services relating to the quality of digital media for online advertising. Advertising agencies, marketers, publishers, ad networks and other companies hire DoubleVerify to detect and prevent waste or misuse of advertising budgets and to help take proactive measures to maintain brand reputation. To provide this service, DoubleVerify monitors websites designated by its clients and determines, among other things, if the websites have content the client may consider inappropriate. DoubleVerify compiles this information into confidential reports for each client. These reports consist of a spreadsheet with advertising data (such as the length of time an ad is displayed on a website and the regional location of the website's viewers) and a "tag" or label classifying the website's content. The report is accompanied by a glossary of definitions for each tag.

FilmOn is an Internet-based entertainment content provider. FilmOn's services include access to hundreds of television channels, premium movie channels, pay-per-view channels and over 45,000 video-on-demand titles. FilmOn distributes its programming through several different website domains (the FilmOn Websites). FilmOn derives a significant portion of its revenue from advertising.

2. *FilmOn's Lawsuit*

FilmOn sued DoubleVerify for trade libel, slander, tortious interference with contract, and other business-related torts, alleging DoubleVerify distributed reports to certain FilmOn advertisers with false and disparaging classifications of one or

more of the FilmOn Websites.[2] The complaint alleged DoubleVerify's reports "falsely classif[ied] the FilmOn Websites under the categories of 'Copyright Infringement-File Sharing' and 'Adult Content.' "

According to the complaint, DoubleVerify's accompanying glossary defined the category " 'Copyright Infringement: Streaming or File Sharing' " 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.' " The glossary defined the " 'Adult Content' " category as " '[m]ature topics which are inappropriate viewing for children including explicit language, content, sounds and themes.' " The complaint acknowledged that "some of FilmOn's programming may be properly characterized as R-rated," but alleged "the vast majority of the programming available on FilmOn does not fit within any definition of adult content."

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[2] FilmOn's seven-count first amended complaint asserted causes of action for (1) trade libel; (2) tortious interference with contract; (3) tortious interference with prospective economic advantage; (4) unfair competition; (5) false advertising; (6) slander; and (7) negligence. The causes of action for negligence and slander were asserted exclusively against AOL, Inc., which is not a party to this appeal. All other causes of action were asserted against DoubleVerify or all defendants.

With respect to each of the complaint's five causes of action against DoubleVerify, FilmOn alleged "the false statements made by [DoubleVerify] in [its reports] have caused . . . ad partners and potential ad partners of FilmOn to decline to advertise through their websites," resulting in lost profits and other consequential damages.

3. *The Anti-SLAPP Motion*

DoubleVerify responded with a special motion to strike the subject causes of action pursuant to the anti-SLAPP statute. With respect to the first prong of the anti-SLAPP analysis—whether the challenged causes of action arose out of protected conduct—DoubleVerify argued its reports concerned matters of public interest insofar as the prevalence of adult content and copyright infringing material on the Internet had received attention from both the public and government regulatory agencies. To support the contention, DoubleVerify submitted several press releases and reports concerning the Family Entertainment Protection Act and efforts by the Federal Trade Commission to address the marketing of violent entertainment to children.[3] With regard to copyright infringement, DoubleVerify submitted press reports concerning numerous lawsuits filed by media production companies against FilmOn. DoubleVerify's

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[3] The Family Entertainment Protection Act was proposed federal legislation to prohibit the sale of mature and adults-only video games to minors. The bill did not become law. Similar bills were passed in states such as California, prompted in part by public debate over sexually explicit content in several popular video games. These laws were ultimately ruled unconstitutional. (See Byrd, *It's All Fun and Games Until Someone Gets Hurt: The Effectiveness of Proposed Video-Game Legislation on Reducing Violence in Children* (2007) 44 Hous. L. Rev. 401, 405-410 & fn. 63.)

evidence also included the complaints filed and injunctions entered in a number of federal district courts against FilmOn for copyright infringement. With respect to the second prong—whether FilmOn could establish a probability of prevailing on its claims—DoubleVerify argued a "quick examination of FilmOn's website[s]" proved DoubleVerify's "classifications [were] entirely accurate."[4]

In opposing the motion, FilmOn argued the alleged misconduct did not concern a matter of public interest because DoubleVerify distributed its confidential reports to paying subscribers only. FilmOn also argued the "act of classifying or certifying certain products or services" was not conduct in furtherance of DoubleVerify's right of free speech. As for the merits of its claims, FilmOn maintained the district court injunctions were insufficient to establish copyright infringement because the law concerning the relevant technology was unsettled. It also argued DoubleVerify's "Adult Content" classification was unreasonably misleading.

4. *The Trial Court Order*

The trial court granted the motion to strike. The court found the public had a demonstrable interest in knowing what content is available on the Internet, especially with respect to adult content and the illegal distribution of copyrighted material. The court analogized DoubleVerify's conduct to more publicly visible media advisory efforts, observing it was "not any different,

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[4] In connection with the second prong, DoubleVerify submitted screen captures of the "categories of adult content listed in the Video on Demand ('VOD') section of Filmon.com's 'Hotties' content grouping." DoubleVerify also relied upon the district court orders and injunctions entered against FilmOn in a handful of copyright infringement cases.

really, than the Motion Picture Association putting ratings on movies." Further, in view of the "massive amount of attention" paid to FilmOn's business in the area of copyright infringement, the court concluded DoubleVerify's reports clearly concerned a matter of interest to the public. As for the merits of the challenged causes of action, the court found FilmOn failed to establish a probability of success because the undisputed evidence showed DoubleVerify's statements were essentially true and DoubleVerify did not make the statements with the intention to harm FilmOn's business.

CONTENTIONS

FilmOn contends the challenged causes of action did not arise out of conduct in furtherance of DoubleVerify's constitutional right of free speech. Specifically, FilmOn argues the statements contained in DoubleVerify's reports did not concern "a public issue" or "an issue of public interest," as required by section 425.16, subdivisions (b)(1) and (e)(4), because (1) the reports contained only "[b]asic classification and certification decisions" with "little to no analysis or opinion"; and (2) the reports were made "entirely in private, to individual companies that subscribe to [DoubleVerify's] services."

For the reasons that follow, we conclude the statements contained in DoubleVerify's reports, which formed the basis for FilmOn's causes of action, did concern issues of public interest, and the trial court properly found the threshold requirement for anti-SLAPP protection was met.

DISCUSSION

1. *Anti-SLAPP Procedure and Standard of Review*

The anti-SLAPP statute, section 425.16, provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235 (*Sipple*).) "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 0Cal.App.4th 1537, 1543 (*Hansen*); *Equilon, supra,* 29 Cal.4th at p. 67.)

The first prong of the anti-SLAPP analysis requires the court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) The defendant makes this showing by demonstrating the acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (§ 425.16, subd. (b)(1); *Equilon,* at p. 67.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier*).) "[T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

If the court determines the defendant has made the threshold showing, "it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier, supra,* 29 Cal.4th at p. 88; § 425.16, subd. (b)(1).) Here, however, we are concerned with only the first prong of the anti-SLAPP analysis, because FilmOn does not challenge the trial court's finding concerning FilmOn's probability of prevailing on its claims.

We review both prongs of the anti-SLAPP analysis de novo. (*Hansen, supra,* 171 Cal.App.4th at p. 1544.) "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, supra,* 29 Cal.4th at p. 89.)

2. *Issue of Public Interest Under the Anti-SLAPP Statute*

The trial court found that each cause of action asserted against DoubleVerify was based on the allegation that a "recently published [DoubleVerify] impression quality report incorrectly described and misclassified [FilmOn] and its related websites in the 'Copyright Infringement-File Sharing' and 'Adult Content' categories," which caused some of FilmOn's "advertising partners to pull advertising from FilmOn's websites." In its motion, DoubleVerify argued this alleged activity qualified for anti-SLAPP protection under section 425.16, subdivision (e)(4), which safeguards 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*." (§ 425.16, subd. (e)(4), italics added.) The trial court agreed, concluding DoubleVerify's conduct concerned issues of public interest—namely, the regulation of Internet content, the

presence of adult content on websites accessible to children, and intellectual property theft.

Section 425.16 does not define "public interest" or "public issue." "Those terms are inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371 (*Cross*); see *Rivero v. American Federation of State, County, and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913, 929 (*Rivero*); see also *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 (*Weinberg*) ["it is doubtful an all-encompassing definition could be provided"].) Indeed, some courts, paraphrasing Justice Stewart's famous quip, have suggested that " ' "no standards are necessary because [courts and attorneys] will, or should, know a public concern when they see it." ' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1122, fn. 9 (*Briggs*); *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1214-1215; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 117 (*Du Charme*); see *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (conc. opn. of Stewart, J.).)

Nevertheless, courts have expounded on principles that should guide the assessment of whether a statement concerns a matter of public interest. In *Nygård, Inc. v. Uusi–Kerttula* (2008) 159 Cal.App.4th 1027 (*Nygård*), the court observed that while section 425.16 does not define " 'public interest,' " it does mandate that its provisions " 'be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' " (*Id*. at p. 1039, quoting § 425.16, subd. (a).) The *Nygård* court explained that "[t]he directive to construe the statute broadly was added in 1997, when the Legislature amended the anti-SLAPP statute 'to address recent court cases that have too narrowly construed California's anti-SLAPP suit statute.' " (*Nygård,* at p. 1039; accord, *Briggs,*

supra, 19 Cal.4th at p. 1120.) Taken together, the *Nygård* court reasoned that the legislative history of the amendment and the cases that precipitated it "suggest that 'an issue of public interest' . . . is *any issue in which the public is interested*. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." (*Nygård,* at p. 1042; *Cross, supra,* 197 Cal.App.4th at pp. 372-373.)

Further, because the statute mandates broad construction, courts have determined, and the Legislature has endorsed the view, that section 425.16 "governs even private communications, so long as they concern a public issue." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 897 (*Wilbanks*); *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175 [the Legislature did not intend to exclude private conversations from protection under the statute]; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546 (*Terry*) [holding, § 425.16, subd. (e)(4) "applies to private communications concerning issues of public interest"].)

In *Rivero*, the court identified three non-exclusive and sometimes overlapping categories of statements that have been found to encompass an issue of public interest under the anti-SLAPP statute. (*Rivero, supra,* 105 Cal.App.4th at pp. 919-924; *Cross, supra,* 197 Cal.App.4th at p. 373.) The first category comprises cases where the statement or activity precipitating the underlying cause of action was "a person or entity in the public eye." (*Rivero,* at p. 924; see, e.g., *Sipple, supra,* 71 Cal.App.4th at p. 239 [national figure]; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651 (*Church of Scientology*) [church subject to intense public scrutiny]; *Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 807-808 [a television show of "significant interest to the public and the media"].) The second

category comprises cases where the statement or activity involved "conduct that could directly affect a large number of people beyond the direct participants." (*Rivero,* at p. 924; see, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 [home owners association's governance of 3,000 residents]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 [environmental effects of mall development]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 [potential safety hazards affecting residents of large condominium complex].) And the third category comprises cases where the statement or activity involved "a topic of widespread, public interest." (*Rivero,* at p. 924; see, e.g., *M. G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 [molestation of child athletes by coaches]; *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162 [second-parent adoptions, particularly in the gay and lesbian community]; *Terry, supra,* 131 Cal.App.4th at p. 1549 [inappropriate relationships between adults and minors].) "Courts have adopted these categories as a useful framework for analyzing whether a statement implicates an issue of public interest and thus qualifies for anti-SLAPP protection." (*Cross, supra,* 197 Cal.App.4th at pp. 373-374 [listing cases].)

In *Weinberg*, the court, citing federal cases, enumerated the following additional attributes of an issue that would make it one of public, rather than merely private, interest. (*Weinberg, supra,* 110 Cal.App.4th at pp. 1132-1133; *Cross, supra,* 197 Cal.App.4th at p. 374.) "First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.] Third, there should be some degree of

closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy . . . .' [Citation.] Finally, . . . [a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Weinberg,* at pp. 1132-1133.)

With these principles in place, we turn to FilmOn's specific contentions concerning DoubleVerify's statements, and whether those statements concerned a public issue or an issue of public interest under the anti-SLAPP statute.

3. *DoubleVerify's Statement that FilmOn Hosted Adult Content and Copyright Infringing Material on Its Website Concerned Issues of Public Interest*

FilmOn contends DoubleVerify's reports designating certain FilmOn Websites in the "Copyright Infringement-File Sharing" and "Adult Content" categories did not concern an issue of public interest. In that regard, FilmOn asserts "[b]asic classification and certification decisions that contain little to no analysis or opinion are not constitutionally protected activity within the ambit of the anti-SLAPP statute." To support this charge, FilmOn relies primarily upon *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.* (2010) 183 Cal.App.4th 1186 (*OASIS*).

In *OASIS*, a commercial trade association sought to develop an "organic" certification for use by its members with their personal care products. (*OASIS, supra,* 183 Cal.App.4th at p. 1193.) A nonmember competitor sued, arguing the certification was contrary to federal standards for the term "organic," and thus labeling the members' products with the association's

" 'OASIS Organic' " seal would constitute deceptive advertising and an unfair business practice. (*Id.* at pp. 1193-1194, 1195.) The trade association filed an anti-SLAPP motion, which the trial court denied on the ground that the association failed to meet its threshold burden of demonstrating the challenged conduct concerned a public issue under the anti-SLAPP statute. (*Id.* at p. 1197.) The trade association appealed, and the appellate court affirmed.

The *OASIS* court began by addressing what activity gave rise to the plaintiff's claims. (*OASIS, supra,* 183 Cal.App.4th at p. 1202.) The court rejected the association's assertion that it was "sued for its 'opinion as to what makes a personal care product "organic" ' or 'the articulation and dissemination of the ["OASIS Organic"] standard.' " (*Ibid.*) Rather, the court determined the association was sued for "authoriz[ing] its members . . . to use the 'OASIS Organic' seal on their products in the marketplace." (*Ibid.*) This distinction proved critical to the court's resolution of whether the challenged conduct concerned an issue of public interest. While the *OASIS* court acknowledged the association's "articulation and dissemination of a standard regarding what makes a personal care product 'organic' may constitute an exercise of its right of free speech on a matter of public concern," the court rejected the association's implicit assertion that "certification of commercial products—the activities that [the plaintiff] seeks to enjoin—are in furtherance of that speech." (*Id.* at p. 1203.) In reaching this conclusion, the court observed that the protected conduct—the articulation of an "organic" standard—would "necessarily be complete *before* [the association] certifie[d] any member product." (*Id.* at p. 1203.) Thus, the court reasoned the challenged conduct—authorizing members to use its " 'OASIS Organic' seal"—was unnecessary to the act of articulating the standard and, therefore, was not in

furtherance of the association's exercise of free speech in connection with a public issue. (*Id.* at p. 1204.)

OASIS does not support FilmOn's contention. In *OASIS*, the association's act of placing its seal on a member product communicated nothing about what standards should be used to judge whether a personal care product is organic. (*OASIS, supra,* 183 Cal.App.4th at p. 1204.) In this case, FilmOn's business tort and trade libel claims are based *entirely* upon the message communicated by DoubleVerify's "tags." Indeed, it is only because advertisers understand the message within DoubleVerify's tags that FilmOn can claim the tags caused "advertising partners to pull advertising from FilmOn's websites." And, it is only because advertisers understand that the public is interested in whether adult content or copyright infringing material appears on a website that these companies would modify their advertising strategies based on DoubleVerify's tags. Unlike the unfair business practice claims in *OASIS*, FilmOn's allegations are directly based on the content of DoubleVerify's communications. The trial court correctly found the claims were based upon conduct in furtherance of DoubleVerify's right of free speech.

We also agree with the court's finding that the conduct concerned issues of interest to the public. Apart from the advertisers' apparent view of whether the public has an interest in these issues, DoubleVerify's evidence demonstrated that the presence of adult content on the Internet generally, as well as copyright infringing content on FilmOn's websites specifically, has been the subject of numerous press reports, regulatory actions, and federal lawsuits. Among the publications that reported specifically about FilmOn's legal entanglements were readily recognizable press outlets such as *Fortune*, *Business Insider*, and *Hollywood Reporter*. Matters receiving extensive

media coverage through widely distributed news or entertainment outlets are, by definition, matters of which the public has an interest. (See, e.g., *Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1162 [press coverage of court decision concerning second-parent adoption by lesbian couple was a matter of public interest]; *Church of Scientology, supra,* 42 Cal.App.4th at p. 651 ["media coverage" established "Church [of Scientology] is a matter of public interest"].) Likewise, the public debate over legislation to curb children's exposure to adult and sexually explicit media content demonstrates DoubleVerify's reports identifying such content on FilmOn's websites concerned an issue of public interest. (See, e.g., fn. 3, *ante*.)

Common sense and experience also support the trial court's conclusion that these reports addressed matters of interest to the public. As noted, some courts have observed that there is no need to expressly define "public interest" under the anti-SLAPP statute, because courts applying their common sense and experience " ' "will, or should, know a public concern when they see it." ' " (*Briggs, supra,* 19 Cal.4th at p. 1122, fn. 9.) The trial court did so here. As the court pointed out, the Motion Picture Association of America (MPAA) engages in conduct quite similar to DoubleVerify's activities by rating movies concerning their level of adult content; and the MPAA does so, because the public cares about the issue. Similarly, the court reasonably recognized that federal district courts have entered injunctions against FilmOn's business because the public has an interest in the prevention of copyright infringement.

The trial court did not err in concluding FilmOn sued DoubleVerify for engaging in conduct in furtherance its right of free speech in connection with an issue of public interest.

4. *DoubleVerify's Confidential Reports Are Entitled to Anti-SLAPP Protection*

Alternatively, FilmOn argues DoubleVerify's reports could not have concerned an issue of public interest because they "were made entirely in private, to individual companies that subscribed to its services." FilmOn acknowledges that "preventing copyright infringement and children's access to adult content are issues of public concern," but argues DoubleVerify's conduct does not embrace these issues because its "reports are private statements made in a commercial context." We disagree.

FilmOn's argument rests on the flawed premise that to qualify as speech in connection with an issue of public interest, "the statement must itself contribute to the public debate." Though the public interest requirement "means that *in many cases* the statement or conduct will be a part of a public debate" (*Wilbanks, supra,* 121 Cal.App.4th at p. 898, italics added), an ongoing public debate is not a *sine qua non* for protection under the anti-SLAPP statute where the statement concerns an issue of widespread public interest. (See *Cross, supra,* 197 Cal.App.4th at p. 381, fn. 15.) To judicially impose such a requirement would impermissibly "narrow[ ] the meaning of 'public interest' despite the Legislature's mandate to interpret the anti-SLAPP statute broadly." (*Ibid*; see § 425.16, subd. (a); *Nygård, supra,* 159 Cal.App.4th at p. 1039.)

In *Cross*, the court rejected the proposition, first articulated in *Wilbanks*, that "even statements directly concerning issues of *widespread* public interest—i.e., the *Rivero* third category—do not qualify for protection unless there is some existing ongoing controversy, dispute, debate, or discussion about those issues *and* the statements contribute to that debate." (*Cross, supra,* 197 Cal.App.4th at p. 381, fn. 15, citing *Wilbanks, supra,* 121 Cal.App.4th at p. 898.) The *Wilbanks* court ruled that "it is

not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." (*Wilbanks,* at p. 898.) But, as the *Cross* court explained, "the *Wilbanks* court provided no analysis" for this ruling, and "simply cited, without further discussion," three cases that neither involved statements concerning issues of widespread public interest, nor suggested that this category should be further restricted. (*Cross,* at p. 381, fn. 15 [discussing, *Du Charme, Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595 (*Consumer Justice Center*), and *Rivero*.)[5]

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[5] In *Du Charme*, a union local posted a notice on its website informing members that a former business manager had previously been removed for mismanagement. (*Du Charme, supra,* 110 Cal.App.4th at pp. 113–114.) The *Du Charme* court ruled that "to satisfy the public issue/issue of public interest requirement . . . , *in cases where the issue is not of interest to the public at large*, but rather to a limited, but definable portion of the public (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." (*Id.* at p. 119, first italics added.) In *Consumer Justice Center*, the subject false advertising claim did not concern the general topic of herbal supplement efficacy, but rather alleged that the defendant "misrepresented the specific properties and benefits" of its particular herbal supplement. (*Consumer Justice Center, supra,* 107 Cal.App.4th at p. 601.) And, in *Rivero*, the subject defamation claim was based upon a union's statements about the supervision of eight custodians, not the issue of unlawful workplace activity generally. (*Rivero, supra,* 105 Cal.App.4th at p. 924.)

Moreover, FilmOn's insistence that statements concerning issues of widespread interest must also contribute to a public debate is contrary to the legislative mandate to broadly construe the anti-SLAPP statute in favor of protection. As the *Cross* court observed, the *Wilbanks* rule is "akin to the rule promulgated in [*Zhao v. Wong*] that narrowed 'public issue' to statements 'occupying "the highest rung of the hierarchy [*sic*] of First Amendment values," that is, to speech pertaining to the exercise of democratic self-government.' " (*Cross, supra,* 197 Cal.App.4th at pp. 381-382, fn. 15; *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1129, disapproved in *Briggs, supra,* 19 Cal.4th at p. 1123, fn. 10.) This narrow interpretation, the *Cross* court explained, was rejected by the Legislature when it "amended the anti-SLAPP statute to require that it be broadly construed in response to *Zhao*." (*Cross,* at pp. 381-382, fn. 15, citing *Nygård, supra,* 159 Cal.App.4th at p. 1039; see also *Briggs,* at p. 1120 ["The Assembly Judiciary Committee's analysis of the amendatory legislation confirms the amendment was intended specifically to overrule *Zhao v. Wong*"].) In view of the mandate for broad construction, we agree with the *Cross* court that, where a statement concerns an issue of widespread public interest, it need not also contribute in some manner to a public debate. (See *Cross,* at pp. 381-382, fn. 15; see also *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 [where public was "demonstrably interested in the creation and broadcasting of [a television] episode," act of using plaintiffs' names in early draft of episode script qualified for anti-SLAPP protection, even in absence of a public debate].)

In any event, FilmOn's implicit contention that the challenged activity must occur in public view, and thus advance a public debate, cannot be squared with the rule that the anti-SLAPP statute "applies to private communications concerning

issues of public interest." (*Terry, supra,* 131 Cal.App.4th at p. 1546.) Whether a statement concerns an issue of public interest depends on the content of the statement, not the statement's speaker or audience. Thus, in *Terry*, the court held statements alleging the plaintiffs had an inappropriate sexual relationship with a minor church member were entitled to anti-SLAPP protection, notwithstanding that the statements were made in an internal investigation report disseminated in closed meetings with the parents of youth group members. (*Id.,* at pp. 1543, 1545-1547.) Likewise, in *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, the court held that statements made privately by parents to the coordinator of a youth basketball program about a volunteer coach were protected by the anti-SLAPP statute because the statements concerned issues of public interest, such as "safety in youth sports" and "problem coaches/problem parents in youth sports." (*Id.* at pp. 465, 468.)

So too here; it is irrelevant that DoubleVerify made its reports confidentially to its subscribers, because the contents of those reports concerned issues of widespread interest to the public. Thus, for example, if an "R" rating for adult content is a matter of "public interest" when communicated by the MPAA to the public at large, it remains a matter of public interest when communicated by DoubleVerify in confidential reports to its clients. Likewise, if FilmOn's alleged copyright infringement is an issue of public interest when reported by the press, it remains so when included in DoubleVerify's confidential reports. Neither the identity of the speaker nor the identity of the audience affects the content of the communication, or whether that content concerns an issue of public interest. The trial court correctly found that DoubleVerify made a threshold showing that the challenged causes of action arose from protected activity.

DISPOSITION

The order is affirmed. DoubleVerify is entitled to its costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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 **September 5, 2017**, I served true copies of the foregoing document(s) described as:

PETITION FOR REVIEW

on the following:

Lincoln D. Bandlow FOX ROTHSCHILD LLP 10250 Constellation Blvd., Suite 900 Los Angeles, CA 90067	Attorneys for Defendant and Respondent **DOUBLEVERIFY, INC.**
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 **September 5, 2017,** at Los Angeles, California.

Tiffany Olson