Case No. S244157

SUPREME COURT
FILED
MAR 2 8 2018
Jorge Navarrete Clerk
Deputy

**IN THE
SUPREME COURT OF CALIFORNIA**

FILMON.COM,
Plaintiff and Petitioner,

vs.

DOUBLEVERIFY, INC.
Defendant and Respondent

After Decision By the Court of Appeal, Second Appellate District, Division Three
Case No. B264074

RESPONDENT'S ANSWERING BRIEF

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Respondent DoubleVerify, Inc. ("DoubleVerify") respectfully submits its Answering Brief in response to Petitioner FilmOn.Com, Inc.'s ("FilmOn") Opening Brief ("POB").

I. STATEMENT OF CASE

FilmOn's position in this appeal, that the speech at issue is commercial speech unprotected by California Code of Civil Procedure ("C.C.P.") Section 425.16, fails on the law and the facts. First, there is a specific statutory "commercial speech" exemption to anti-SLAPP protection (*i.e.*, Section 425.17(c)) ***and FilmOn never asserted it in this case.*** Thus, any argument that the speech is "commercial speech" has been waived.

Second, it is obvious why FilmOn did not so contend: DoubleVerify's speech cannot be deemed "commercial speech" by any stretch of the imagination. Rather, DoubleVerify, not unlike traditional forms of media such as newspapers and other news services, and much like such organizations as Consumer Reports and the Better Business Bureau, conducts extensive investigation and disseminates detailed reports about the content of millions of companies and websites. This is quintessential fully-protected speech that falls squarely under the well-established guidelines for speech that falls under Section 425.16.

FilmOn, however, seeks to muddy the otherwise clear waters of anti-SLAPP law by asking this Court to consider the "commercial nature of the speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech" in determining whether speech involves protected activity under Section 425.16 (sometimes referred to as the "Issue Presented"). In so doing, FilmOn omits any discussion regarding the commercial speech exemption codified in Section 425.17(c).

This omission is deliberate. FilmOn cannot feign ignorance of Section 425.17(c) because FilmOn cites that section's legislative history at

the end of its brief under the guise that this legislative history somehow concerns Section 425.16. FilmOn fails to discuss Section 425.17(c) because it is fatal to FilmOn's argument. The text and legislative history of Section 425.17(c) demonstrate that the Legislature enacted Section 425.17(c) to define all of the commercial speech that is exempt from Section 425.16(e).

In contrast, Section 425.16(e) focuses only on the content and/or context of the speech and this Court has repeatedly reiterated that protected activity is defined ***solely*** by that section. *See City of Montebello v. Vasquez* ("*Montebello*") (2016) 1 Cal.5th 409, 422. As this Court emphasized, it is improper to impose additional requirements to prove protected activity under Section 425.16.

Additionally, this Court in *Simpson Strong-Tie Co. Inc. v. Gore* ("*Simpson*") (2010) 49 Cal.4th 12, 22 explained that Section 425.17(c) is an exemption to Section 425.16 and, therefore, must be construed narrowly. In contrast, the Legislature amended Section 425.16 to explicitly state that the section should be construed broadly.

FilmOn's interpretation of Sections 425.16 and 425.17(c) would invert this rule of construction. FilmOn's definition of unprotected commercial speech is more expansive than the definition of exempt commercial speech in Section 425.17(c). FilmOn's definition of unprotected commercial speech under 425.16 would encompass any speech or conduct by a business to its customers made in the course of delivering its goods and services. This Court, however, specifically refused to interpret Section 425.17(c) in this manner (*see Simpson,* 49 Cal.4th at 26-29) and FilmOn provides no explanation as to why Section 425.16 should be interpreted to exempt such speech when Section 425.17(c) does not.

Additionally, FilmOn's interpretation of Section 425.16 would invert the burden of proof requirement for Section 425.17(c). FilmOn argues that

this Court should begin with the presumption that DoubleVerify's reports are unprotected commercial speech. But this Court has held that, as an exemption, the burden of proof is on the plaintiff to prove that Section 425.17(c) applies. *See Simpson,* 49 Cal.4th at 26.

Nor is FilmOn satisfied confining its brief to the Issue Presented. Instead, FilmOn advocates that Section 425.16(e)(4) does not extend to so-called private communications. Even assuming this case involves "private speech" (which it does not), FilmOn ignores the case law stating that Section 425.16(e)(4) was enacted for the express purpose of covering private communications. Indeed, FilmOn's interpretation would render Section 425.16(e)(4) mere surplusage because to qualify as protected activity, the statement or conduct would have to occur in a public forum (*i.e.*, conduct covered by Section 425.16(e)(3)).

FilmOn also argues that, even when the speech or conduct concerns a matter of widespread public interest under Section 425.16(e)(4), the speech or conduct must also "contribute to the public debate." No such requirement appears in the text of Section 425.16. Furthermore, the cases that cite this contention did not involve a matter of widespread public interest under Section 425.16(e)(4). Rather, those cases involved public forums, public figures, private disputes, homeowners' association disputes or never discussed how the speech or conduct contributed to the public debate at all. They are inapplicable here.

FilmOn also asks this Court to hold that "amorphous public interests" do not qualify for protection under Section 425.16(e)(4). But FilmOn cites this contention completely out of context and the cases only stand for the proposition that an "amorphous public interest" – **standing alone** – is insufficient. Where the speech, as here, has a "closeness" with the public interest asserted (*i.e.*, the "in connection" requirement), it is covered by Section 425.16.

Finally, FilmOn misapplies the "public interest" requirement. FilmOn seeks to shift the focus of the public interest inquiry from the content of DoubleVerify's reports to the reports themselves. But there is no requirement that the public must be interested in the specific speaker's speech or conduct. Rather, the focus is on whether the specific speech or conduct concerns a matter of public interest.

Stripped bare, it is evident that FilmOn's lawsuit is an attempt to punish DoubleVerify for speaking on a matter of public interest (*i.e.*, adult content on the internet generally and FilmOn's association with copyright infringement specifically). FilmOn did not even appeal the Trial Court's holding that FilmOn had no probability of prevailing on its claims, effectively conceding that FilmOn's website contains adult content and is associated with copyright infringement. Thus, FilmOn's meritless lawsuit is simply an assault on DoubleVerify's right to speak on matters of public interest.

Therefore, DoubleVerify requests that this Court affirm the Court of Appeal's decision that affirmed the Trial Court's decision to grant DoubleVerify's Anti-SLAPP Motion.

II. STATEMENT OF THE FACTS

A. DoubleVerify

Put simply, DoubleVerify is hired to appraise its customers of what information is being put out on the internet. Advertising agencies, marketers, publishers 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. (1:AA:063).[1] DoubleVerify accomplishes this through seven components: impression quality solutions, ad viewability, brand safety, fraud protection, ad prominence, impression

[1] The term "AA" shall refer to Appellant's Appendix.

delivery, and video impression quality. *Id.*

DoubleVerify monitors the websites that its clients advertise on, or may wish to advertise on, and then determines: (a) if each website has content that a client may consider inappropriate; (b) the regional location of the website's viewers; (c) whether competitor advertising appears on the website; (d) where the website actually places advertisements, and (e) how long the advertisement appears on the website.[2] (1:AA:064). Based on this information, DoubleVerify provides its 1,200-plus clients, many of which are Fortune 500 companies, with a report that allows the client to make informed choices about where to place its advertising and what websites with which to associate or to avoid. (1:AA:0063-065; RT:18:16-17).[3] This process requires DoubleVerify to examine millions of websites and billions of ad impressions each month. (1:AA:063).

B. FilmOn

FilmOn is an Internet-based television provider owned by FilmOn.TV Networks Inc., which was founded in 2006 by controversial figure Alki David. FilmOn claims that advertising and product placement are its primary sources of revenue. (1:AA:003). As part of its service, FilmOn provides free television content from a variety of sources, including the major television networks, CBS, ABC, NBC, and Fox Television. (1:AA:071).

According to lawsuits filed around the country, however, it appears

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[2] DoubleVerify does not "rate" or make value judgments about any websites, nor does it recommend or discourage the use of any websites. DoubleVerify simply provides information for clients to make decisions about which websites best suit their needs and interests. For example, Disney may take issue with running an advertisement on a website that contains "adult content" whereas Red Bull may have no such issue and, in fact, may find such a website desirable. (1:AA:065-066).

[3] The term "RT" shall refer to the Reporter's Transcript.

"free television content" should be replaced with "stolen television content." FilmOn is notorious for its "long history of violating copyright owner's exclusive rights." (1:RA:0031-0032).[4] Thus, it has been sued around the country by those television networks for copyright infringement.[5] (1:AA:006; 1:AA:071; 2:RA 0096–3:RA:0326). Indeed, even after courts have found that FilmOn engages in copyright infringement, this has not stopped FilmOn and its founder from continuing to stream infringing content, resulting in FilmOn being held in contempt of court. (1:RA:0024-0030; 1:RA:0044-0045).[6]

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[4] The term "RA" shall refer to Respondent's Appendix.

[5] *See CBS Broad. Inc. v. Filmon.com, Inc.* (S.D.N.Y. 2010) No. 10-7532; *Fox Television Stations, Inc. v. FilmOn X, LLC* (D.C.C. Sept. 5, 2013) No. 13-758 RMC, 2013 WL 4763414 *appeal docketed*, No. 13-7145 (D.C. Cir. September 17, 2013), *Fox Television Station Inc. v. BarryDriller Content Sys.*, PLC (C.D. Cal. 2013) 915 F.Supp.2d 1138 *appeal docked sub nom, Fox Television Stations, Inc. v. FilmOn X, LLC,* No. 13-55156 (9th Cir. argued August 27, 2013) and No. 13-55157, *NBCUniversal Media, LLC v. FilmOn X, LLC* (C.D. Cal. 2012) No. 12-6950-GW *appeal docketed*, No. 13-55228 (9th Cir. February 8, 2013); *see also* Request for Judicial Notice ("RJN"), Ex. A-C.

[6] In 2014, the U.S. Supreme Court held that Aereo, a company which provided identical services to that provided by FilmOn, was engaged in copyright infringement. *American Broad. Cos. v. Aereo, Inc.* (2014) 134 S.Ct. 2498. FilmOn then argued that its online streaming of content was comparable to a cable service provider, entitling FilmOn to the same compulsory licenses that such cable providers get to legally rebroadcast copyrighted works. The Second and Ninth Circuits rejected this argument and found that FilmOn continues to engage in copyright infringement. *CBS Broad. Inc. v. FilmOn.com, Inc.*, (2d Cir. 2016) 814 F.3d 91, 98-99; *Fox Television Stations, Inc. v. Aereokiller, LLC* (9th Cir. 2017) 851 F.3d 1002, 1015. Similar findings were made in Washington D.C. and Illinois. *Fox Television Stations, Inc. v. FilmOn X LLC* (D.D.C. Dec. 2, 2015) No. CV 13-758 (RMC), 2015 WL 7761052, at *16; *Filmon X, LLC v. Window to the World Commc'ns, Inc.* (N.D. Ill. Mar. 23, 2016) No. 13 C 8451, 2016 WL 1161276, at *13.

These lawsuits have been covered extensively by the press. (1:RA: 0008-0067; 1:AA:071). Moreover, FilmOn's CEO and billionaire owner, Mr. David, regularly injects himself in the public spotlight to discuss himself, his companies and the purported legality of FilmOn's services. (1:RA:0066-0095). Mr. David's antics have drawn massive attention to his company. (1:RA:0015-0019; 1:RA:0055-0057). Dubbed "one of Hollywood's biggest trouble makers" and a man who is "not the type to heed the advice of lawyers," (1:RA:0061-0065), Mr. David embraces his maverick label. After being called out for his copyright infringement by CBS, Mr. David set up a website called "cbsyousuck.com" and said "[i]t takes someone like me, who's a bit of an idiot, with money, to go and poke their finger in their eye." (1:RA:0066-0073). As set forth below, this present lawsuit was yet another of David's efforts to poke someone in the eye, this time jabbing DoubleVerify because it dared to point out the controversial nature of FilmOn's content.[7]

C. DoubleVerify's Investigation Of FilmOn And The Impression Quality Report

Typically, a client comes to DoubleVerify and gives DoubleVerify information about the client's media plan (*i.e.*, what websites that company has chosen to associate with and on which it has run advertising). (1:AA:065). In accordance with that plan, DoubleVerify evaluates billions of advertising campaign impressions, prepares a report regarding the websites where those advertisements ran, and then makes the reports available to DoubleVerify's clients. (1:AA:065; 1:AA:072). This verification service allows DoubleVerify's clients to make informed

[7] After filing this action, David brazenly admitted that the reason he filed it was not because it had any alleged merit, but "to shed light that [the people at DoubleVerify] are d-----bags." (1:RA:0046-0047; RT:23:27-28:6).

choices about where to place their advertising, avoiding such online advertising pitfalls as affiliating with inappropriate content, running advertisements on websites that have malware, etc. *Id.* For instance, DoubleVerify's client reports provide information about what websites have content that the specific client may deem inappropriate, about whether the website targets the audience the company seeks to attract, whether competing products are advertised on the website, and also whether the advertisement is actually noticeable. (1:AA:064).

In the course of preparing these reports, DoubleVerify evaluated FilmOn and its websites. DoubleVerify concluded that FilmOn should be classified with the designations "Copyright Infringement: Streaming or File Sharing" and "Adult Content," and these classifications were made available to DoubleVerify's over 1,200 clients. (1:AA:64; 1:AA:072).

1. FilmOn's Copyright Infringement Classification

Before a website is given a designation that it may be associated with copyright infringing activity, DoubleVerify performs a thorough investigation of the website's content and structure, the website's compliance with the requirements for online service providers mandated by the Digital Millennium Copyright Act (DMCA), and third-party information that is available about the website. (1:AA:066). Such was the case with DoubleVerify's investigation of FilmOn.com.

DoubleVerify defines "Copyright Infringement: Steaming or File Sharing" as "[s]ites presently or historically, associated with access to or distribution of copyrighted material without appropriate controls, licensing, or permission..." (1:AA:006; 1:AA:067). In its investigation, DoubleVerify found several indicators that FilmOn's websites meet this criteria. (1:AA:005). For example, FilmOn has an incomplete DMCA notice, it has no obvious notice of copyright holder permission to display

content, and there are several indicators the sites do not comply with guidelines and best practices policies set forth by the Interactive Advertising Bureau and Mobile Marketing Association Counsel. (1:AA:005).

FilmOn also has been sued for copyright infringement multiple times, planting it firmly within the category of being associated, either presently or historically, with copyright infringement. (1:AA:006). As of the time of the preparation of DoubleVerify's report, the Southern District of New York, the District of Columbia, and the Central District of California all agreed that FilmOn is a copyright infringer. (2:RA:0196-4:RA:0326). That conclusion has since been echoed by the U.S. Supreme Court and other courts. *See* Footnote 6, *supra*.

2. FilmOn's Adult Content Classification

DoubleVerify classifies "Adult Content" as including "[m]ature topics which are inappropriate viewing for children including explicit language, content, sounds and themes." (1:AA:007). By its own terms, this does not expressly or implicitly mean pornography. (1:AA:072). The FilmOn website unquestionably fits this classification. It offers a variety of channels that include adult content. FilmOn's "Most Watched videos" category yields a category called "Bikini Babes," which includes the channels "After Dark TV"; "Hooters' Calendar Girls"; and "Bikini Girls Show" (offering "[s]exy babes in bikini's [sic], all day everyday"). (5:RA 0327–6:RA:530). Indeed, FilmOn admits it has "programming [that] may be properly characterized as R-rated." (1:AA:007).

The Trial Court held that there was no real dispute about the propriety of these two classifications, stating that FilmOn essentially admitted that DoubleVerify was "right when they said it was adult content and [DoubleVerify] is right when they said [FilmOn] has this issue with copyright." (RT:7:7-9). Indeed, the Trial Court noted a number of times

that FilmOn did not "push back" in any substantial way on that showing. (RT:4:1-2; RT:5:10-11; RT:22:2-3). On appeal, FilmOn did not push back ***at all*** on this issue.

III. PROCEDURAL HISTORY

A. FilmOn's Lawsuit

After the classifications for the FilmOn website (among thousands of other websites) were made available to DoubleVerify's clients in the report, counsel for FilmOn sent DoubleVerify a cease and desist letter. (1:AA:007; 1:AA:072). In response, DoubleVerify conducted a full investigation into the classification of FilmOn and confirmed its findings. *Id.* Having been provided with such confirmation, FilmOn did nothing for over a year, ultimately deciding in October of 2014 to lash out at DoubleVerify's speech by filing the action that is the subject of this appeal.

B. DoubleVerify's Anti-SLAPP Motion

DoubleVerify filed a motion to strike all of FilmOn's causes of action pursuant to the Anti-SLAPP Statute on the grounds that DoubleVerify's review and categorizations were made in furtherance of its right to free speech and were connected with an issue of public interest – the public's interest in being aware about the content of websites, including such matters as what content is suitable for children or whether websites are believed to contain infringing material (referred to herein as "content awareness" or "content transparency"). The motion was supported by over 700 pages of exhibits, which FilmOn deceptively (and tellingly) omitted from its Appendix, including articles about the public's interest in FilmOn, issues pertaining to copyright infringement, and federal reports about keeping inappropriate content away from children. (*See generally* Respondent's Appendix).

In opposing the motion, FilmOn concentrated its arguments almost entirely on the fact that DoubleVerify's categorizations are only made

available to paid subscribers. It neglected to refute whether content awareness or content transparency are themselves matters of public concern. Moreover, FilmOn ignored the reams of evidence showing the great public interest in FilmOn, its founder and the nationwide litigation regarding FilmOn's rampant copyright infringement. Finally, as the Trial Court noted, FilmOn offered virtually no "push back" on the Anti-SLAPP second prong – FilmOn's burden to show there was a likelihood it could prevail on its claims. ***Importantly, FilmOn did not even plead (much less prove) that the "commercial speech" exemption of Section 425.17(c) applied in this case.***

C. The Trial Court Grants The Anti-SLAPP Motion

The Trial Court agreed that DoubleVerify's speech was in connection with important issues of content awareness and content transparency, especially when the areas concern material not suitable for children and infringing content. (1:AA:223). The Trial Court found that DoubleVerify's review and classification of websites was "not any different, really, than the Motion Picture Association putting ratings on movies." (RT:3:12-16). By commenting on FilmOn's adult-themed content and being associated with copyright infringement, DoubleVerify was serving "a legitimate and important public function." (RT:3:18-19).[8] By alerting people about websites that might have adult content, DoubleVerify was performing a "very legitimate function." (RT:4:4-5). Indeed, after noting that DoubleVerify's speech serves "a very valuable public function, and I think we are better for it" (RT:4:11-13), the Trial

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[8] For example, "if you are Disney and you're looking where to put advertising or programming or whatever, you're going to want to know a little about the place that you're placing this." (RT:6:13-16); (*see also* 1:AA:073) ("Many organizations have consulted DoubleVerify in developing their own guidelines for safe online advertising").

Court held that:

> there is no way that this kind of speech about these kind of interests -- and when you look at the massive amount of attention being paid to FilmOn and its founder for what it is doing and what its site entails, ***it's hard to imagine a good faith argument that this isn't in the public's interest*** as it stands.

(RT:19:3-12) (emphasis added).

D. The Court Of Appeal Affirms The Trial Court's Decision

FilmOn appealed the Trial Court's decision, but only as to the first prong (*i.e.*, whether DoubleVerify's report constitutes protected activity under Section 425.16(e)(4)). It did not dispute the Trial Court's findings that FilmOn did not have a probability of prevailing on its claims. Nor did FilmOn contend that Section 425.17(c) applied.

First, the Court of Appeal found that DoubleVerify's reports arose from an act in furtherance of protected speech under Section 425.16(e)(4) because:

> 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.

FilmOn.com v. DoubleVerify, Inc. (2017) 13 Cal.App.5th 707, 719 (emphasis in the original).

Moreover, the Court of Appeal rejected FilmOn's arguments that (1) Section 425.16(e)(4) does not extend to private communications; and (2) a matter of "widespread public interest" under Section 425.16(e)(4)

requires the conduct or speech to contribute to the public debate. *Id.* at 720-22. The Court of Appeal found these contentions to be legally unsound and contrary to the Legislature's intent that Section 425.16 be construed broadly. *Id.*

IV. STANDARD OF REVIEW

The standard of review of an anti-SLAPP is *de novo*. *Park v. Bd. of Trustees of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1067. Resolving the Issue Presented and FilmOn's remaining arguments require interpreting Sections 425.16 and 425.17(c). The standard of review for statutory interpretation is *de novo*. *Imperial Merch. Serv., Inc. v. Hunt* ("*Imperial*") (2009) 47 Cal.4th 381, 387.

V. ARGUMENT

A. Principles of Statutory Interpretation

"As in any case involving statutory interpretation, [this Court's] fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose." *Simpson,* 49 Cal.4th at 27. This Court "begin[s] with the text of the statute as the best indicator of legislative intent[.]" *Id.* The Court must interpret the words of the statute by giving them "their usual and ordinary meaning." *Imperial,* 47 Cal.4th 381, 388.

This Court has articulated several principles regarding interpreting the Anti-SLAPP statute. First, the legislative intent is "gleaned from the statute ***as a whole*** ... and should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118-19 (emphasis added). This requires giving "meaning to every word of [the] statute [and] avoid a construction making any word surplusage." *Id. at* 1118.

Second, Section 425.16(a) explicitly states: "this section shall be ***construed broadly***." (emphasis added). In contrast, this Court has held that

Section 425.17(c) "is a statutory exception to section 425.16 and should be ***narrowly construed.***" *Simpson,* 49 Cal.4th at 22 (emphasis added). Exceptions are to be "narrowly interpreted [Citation] lest it swallow the rule found in the anti-SLAPP statute." *Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319.

Third, the definition of protected activity is solely defined by Section 425.16(e) and courts should not resort to principles of constitutional law:

> [C]ourts determining whether a cause of action arises from protected activity are ***not*** required to wrestle with difficult questions of ***constitutional law***, including distinctions between federal and state protection of free expression. "The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct ... falls within one of the four categories described in subdivision (e), defining subdivision (b)'s phrase, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (*Equilon Enter., LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 66; *see Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17–18; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734; *City of Cotati v. Cashman* [("*Cotati*")] (2002) 29 Cal.4th 69, 78). As explained in *Schaffer v. City and Cty. of S. F.* (2008) 168 Cal.App.4th 992, ***courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions in section 425.16, subdivision (e).*** (*Schaffer,* at p. 1001; *accord, City of Costa Mesa v. D'Alessio Inv.* (2013) 214 Cal.App.4th 358, 372; *see Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1548–1549.)

Montebello, 1 Cal.5th at 422 (emphasis added).

Fourth, this Court has "construed the anti-SLAPP statute ... strictly by its terms." *Equilon,* 29 Cal.4th at 49. As such, "[t]his [C]ourt has ***no power to rewrite the statute*** as to make it conform to a presumed intention which is not expressed." *Id.* (emphasis added); *see also* C.C.P. § 1858 ("In

the construction of a statute ..., the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, ***not to insert what has been omitted, or to omit what has been inserted***; and ***where there are several provisions*** ..., such a construction is, if possible, to be adopted as will ***give effect to all***.") (emphasis added).

B. FilmOn Impermissibly Seeks To Import The Analysis For Section 425.17(c) Into The Analysis For Section 425.16

1. FilmOn's Interpretation Of Section 425.16 Is Unsupported By The Text Of The Statute And The Rules Of Statutory Construction

a. The Text Of Section 425.17(c) Directly Addresses The Issue Presented

The text of Section 425.17(c)[9] makes clear that "the commercial nature of the speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech" are already embodied in the statute.

The Speaker Element: The "identity of the speaker" element is embodied in the introductory language of Section 425.17(c). The speaker must be "a person primarily engaged in the business of selling or leasing goods and services[.]"

The Intended Audience Element: The "identity of audience" is embodied in Section 425.17(c)(2). The "intended audience" of the communication must either be: (1) "an actual or potential buyer or customer"; or (2) "a person likely to repeat the statement to, or otherwise

[9] For the Court's reference, the full text of Section 425.17 is attached as Appendix A.

influence, an actual or potential buyer or customer[.]"

The Purpose Element: The "intended purpose of the speech" is embodied in Section 425.17(c)(1). The "purpose" of the communication must be for "obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in the person's goods or services [or] was made in the course of delivering the person's goods or services."

The Content Element: The "commercial nature of the speech" is embodied in Section 425.17(c)(1). The commercial nature of the speech must involve a "statement or conduct consist[ing] of representations of fact about that person's or a business competitor's business operations, goods, or services[.]"

Taken as a whole, the text of Section 425.17(c) demonstrates the Legislature's intent to have Section 425.17(c) alone define the "commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech" that is exempt from Section 425.16.

b. <u>The Text Of Section 425.16 Does Not Support FilmOn's Interpretation</u>

In contrast, none of the language of Section 425.16[10] contemplates the "commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech." Rather, Section 425.16 focuses on the context and/or content of the speech at issue.

Context: Section 425.16(e)(1) defines protected activity as: "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]"

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[10] For the Court's reference, the full text of Section 425.16 is attached as Appendix B.

Under the text of the statute, the focus of the inquiry is on the context of the speech by examining the circumstances under which the speech occurred, specifically whether it was made during an official governmental proceeding.

Content: Section 425.16(e)(2) defines protected activity as: "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law[.]" Under the statute, the focus of the inquiry is on the content of the speech by examining whether the speech was about an issue that was considered in an official governmental proceeding. Section 425.16(e)(4) defines protected activity as "any other 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." The text of this section also focuses on the content of the speech or conduct by examining whether its content concerned a matter of public interest.

Context & Content: Section 425.16(e)(3) defines protected activity as "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest[.]" The text of the statute makes clear that the focus of the inquiry is on the context (by examining whether the speech occurred in a public forum) and the content (by examining whether the speech was made in connection with a matter of public interest).

Unlike the text of Section 425.17(c), the text of Section 425.16 does not include considerations of the commercial nature of the speech, the speaker's identity, the audience's identity or the purpose of the speech.

c. **<u>The Text Of Section 425.17(c) Demonstrates That Section 425.17(c)'s Analytic Framework Is Separate And Distinct From Section 425.16</u>**

As Section 425.17(c) explicitly states: "Section 425.16 ***does not apply*** [to the defined commercial speech] ***notwithstanding that the conduct or statement concerns an important public issue***." (emphasis added). Thus, if the speech or conduct at issue satisfies all the elements of Section 425.17(c), Section 425.16 is irrelevant, even if the speech or conduct would otherwise qualify as protected activity under Section 425.16(e).

As such, the text of 425.17(c) demonstrates that the analysis to determine exempt commercial speech (*i.e.*, the speaker's and audience's identities, along with the commercial content and purpose of the speech or conduct) is separate and distinct from the analysis to determine protected speech under Section 425.16.

d. **<u>FilmOn's Interpretation Construes Section 425.17(c) Broadly And Section 425.16 Narrowly</u>**

As discussed in Section V.A., Section 425.16 should be interpreted broadly and Section 425.17(c) should be interpreted narrowly.

FilmOn's interpretation would flip this on its head and construe ***Section 425.17(c) broadly*** and ***Section 425.16 narrowly*** in four ways: (1) shifting the burden of proof from plaintiff to defendant to prove the applicability of Section 425.17(c); (2) resurrecting the "delivery exemption" of Section 425.17(c); (3) utilizing principles of constitutional law to determine protected activity; and (4) imposing new requirements on defendants to show plaintiff's claims arise from protected activity.

i. **FilmOn's Interpretation Of Section 425.16 Impermissibly Shifts The Burden Of Proof Regarding Section 425.17(c)**

FilmOn argues "[t]his Court should start its analysis with the recognition that DoubleVerify's reports constitute commercial speech." POB, p. 20. In other words, commercial speech is presumed and the burden is on DoubleVerify to defeat this presumption.

FilmOn's position has been categorically rejected. In *Simpson*, this Court stated "[t]he burden of proof as to the applicability of [Section 425.17(c)] ***falls on the party seeking the benefit of it – i.e., the plaintiff.***" *Simpson,* 49 Cal.4th at 26 (emphasis added). In contrast, this Court held that the defendant's burden of proof is to make "a threshold showing that the challenged cause of action is one arising from protected activity" under Section 425.16. *Equilon,* 29 Cal.4th at 67.

FilmOn's argument directly conflicts with *Simpson* because it shifts the burden of proof regarding the applicability of Section 425.17(c) from the plaintiff to the defendant and establishes a presumption (that the defendant must defeat) that the activity is unprotected under Section 425.16.

ii. **FilmOn's Interpretation Of Section 425.16 Would Resurrect The Rejected "Delivery Exemption"**

In *Simpson,* this Court rejected interpreting Section 425.17(c) as containing two exemptions instead of one. *Simpson,* 49 Cal.4th at 27. In *Simpson*, the plaintiff advocated that the phrase "the statement or conduct was made in the course of delivering the person's goods or services" (*i.e.*, the "Delivery Exemption") and the phrase "[t]he statement or conduct

consists of representations of fact about that person's business competitor's business operations, goods or services." (*i.e.*, the "Content Exemption") created separate and independent exemptions. *Id.* at 26. This Court rejected this interpretation, holding that it "does not effectively fulfill the statute's purposes." *Id.* at 27.

> Under that construction, the Legislature can be seen to have carefully devised specific requirements in order to exempt a cause of action under the content prong—*i.e.*, the statement or conduct underlying the cause of action must (1) consist of representations of fact (2) about that person's or a business competitor's business operations, goods, or services, and (3) have been made for the purpose of obtaining approval for, promoting, or securing transactions in the person's goods or services. Yet, under *Simpson's* construction of the delivery prong, the Legislature apparently imposed no particular requirements—*i.e.*, a cause of action arising from ***any*** statement or conduct on ***any*** subject for ***any*** purpose is exempted from the anti-SLAPP statute, as long as it was made in the course of delivering goods or services.

Id. at 27-28 (emphasis in the original).

FilmOn's interpretation would resurrect the "Delivery Exemption." DoubleVerify's reports did not constitute representations of fact about its services or those of its competitor. Rather, DoubleVerify's reports were made in the course of delivering its services (*i.e.* the "Delivery Exemption").

Resurrecting the "Delivery Exemption" also violates "the rule of statutory construction *expressio unius est exclusio alterius* or 'to express or include one thing implies the exclusion of the other[.]'" *Imperial,* 47 Cal.4th at 389. Under this rule, "if exemptions are specified in a statute, courts may not imply additional exemptions unless there is a clear legislative intent to the contrary." *Id.*

This Court has already determined that Section 425.17(c) is an exemption from Section 425.16. *Simpson,* 49 Cal.4th at 22. The

Legislature made this clear in the text of Section 425.17(c) with the words "Section 425.16 does not apply" to commercial speech as defined in Section 425.17(c). Since the Legislature specifically addressed exempt commercial speech under Section 425.17(c) and not in Section 425.16, this Court cannot create a new exemption for commercial speech that applies to any conduct made during the delivery of goods or services. This applies with equal force to FilmOn's argument that economically motivated speech should be exempt from the definition of protected activity under Section 425.16. *See* POB, p. 20-21.

To read Section 425.16 as containing a "Delivery Exemption" or "Economic Motivation Exemption" would result in interpreting Section 425.16 narrowly and Section 425.17(c) broadly. *Simpson* does not countenance such a position.[11]

iii. <u>FilmOn's Definition Of Protected Activity Under Section 425.16 Impermissibly Utilizes Constitutional Law Principles</u>

As discussed in Section V.A., protected activity is defined by Section 425.16(e) – not by principles of constitutional law.

FilmOn seeks to violate this principle. *See* POB, p. 20-21. Specifically, FilmOn seeks to employ constitutional principles regarding commercial speech articulated in *Kasky v. Nike, Inc.* 27 Cal.4th 939, 960-61. *See* POB, p. 20. *Kasky* was ***not*** an anti-SLAPP decision; rather, it addressed the definition of commercial speech under the United States and

[11] In *Simpson,* this Court found that Section 425.17(c) did not apply ***because*** the speech did not involve representations of fact regarding the defendant's, or his competitor's, goods or services. *Simpson,* 49 Cal.4th at 30-32.

California constitutions.[12] *See Id.* at 960-69. As such, it cannot be employed to define protected activity under Section 425.16.

iv. FilmOn's Interpretation Of Section 425.16 Impermissibly Imposes New Requirements On Defendants

As discussed in Section V.A., the only requirements a defendant must prove to show its speech or conduct arises from protected activity are those set forth in Section 425.16(e). As explained in Section V.B.1.c.i, FilmOn's interpretation of Section 425.16 would rewrite the statute to require a defendant to also show its speech or conduct is not commercial speech or that Section 425.17(c) applies.

As it has done in the past, this Court should reject FilmOn's invitation to impose additional requirements on defendants to demonstrate a plaintiff's claims arise from protected activity. *See e.g., Navellier,* 29 Cal.4th at 94 (refusing to impose a "valid exercise of constitutional speech and petition rights" requirement); *Equilon,* 29 Cal.4th at 59 (refusing to impose a "intent to chill" requirement); *Cotati,* 29 Cal.4th at 75 (refusing to impose proof of "chilling effect" requirement); *Briggs,* 19 Cal.4th at 1118

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[12] *Kasky* concerned false statements by Nike that its shoes were not manufactured by child labor. As discussed in Section V.B.2.b., the *Kasky* decision was instrumental to formulating the definition of commercial speech under Section 425.17(c). *Kasky* did state that commercial speech is constitutionally unprotected when it is "false or misleading." *Kasky,* 27 Cal.4th at 953-54. However, in the anti-SLAPP context, this Court explained: "any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise ***and*** support in the context of the discharge of the plaintiff's secondary burden to provide a prima facie showing of the merits of the plaintiff's case." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 (emphasis in the original; brackets omitted). Because FilmOn failed to dispute the Trial Court's finding that FilmOn had no probability of prevailing on its trade libel and business tort claims, FilmOn concedes that DoubleVerify's reports are not false and misleading.

(refusing to impose a "public interest" requirement for Sections 425.16(e)(1-2)).

e. **<u>FilmOn's Interpretation Of Section 425.16 Would Impermissibly Render Section 425.17(c) Mere Surplusage</u>**

As discussed in Section V.A., this Court must "give effect and significance to every word and phrase of the statute" and "a construction making some words surplusage is to be avoided."

As discussed in Section V.B.1.a-c., the analytic framework for Sections 425.17(c) and 425.16 are separate and distinct. By importing commercial speech considerations to determine protected activity under Section 425.16, FilmOn effectively renders Section 425.17(c) redundant and mere surplusage because it would import the considerations articulated in Section 425.17(c) into Section 425.16. The text of Sections 425.16 and 425.17 is unambiguous and leaves only one interpretation of the statute: commercial speech is defined by and analyzed under Section 425.17(c) and protected activity is analyzed under Section 425.16(e).

2. **<u>FilmOn's Interpretation Of Section 425.16 Is Contrary To The Legislative History Of Section 425.17(c)</u>**

Should the Court consider the statutory language "susceptible [to] more than one reasonable interpretation, [it should] look to extrinsic aids" like "the legislative history" to determine the Legislature's intent. *See Torres v. Parkhouse Tire Serv., Inc.* (2001) 26 Cal.4th 995, 1003.

The legislative history of Section 425.17(c) dispels any doubt that the "commercial nature of the speech, including the identity of the speaker, the identity of the audience, and the purpose of the speech" are fully encompassed by Section 425.17(c) and are not considerations relevant to

Section 425.16.

a. **The Legislature Intended Section 425.17(c) To Exclusively Define Commercial Speech For Purposes Of The Anti-SLAPP Statute**

First, the Legislature stated that Section 425.17 is intended to define all commercial speech that is exempted from Section 425.16. The Senate Judiciary Committee that drafted Section 425.17 stated: "As proposed Section 425.17(c) would exempt lawsuits based on defendant's acts that would be ***categorized as commercial speech***." *See* Sen. Com. On Judiciary, Analysis of Senate Bill 515 (2003-2004 Reg. Sess.), dated May 6, 2003, p. 12 (emphasis added).[13]

The subsequent legislative history of the anti-SLAPP statute further emphasizes that Section 425.17(c) is intended to define all commercial speech that is exempt from Section 425.16. "A subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." *W. Sec. Bank v. Super. Ct.* (1997) 15 Cal.4th 232, 244.

In the 2005 legislative history for Section 425.18, the Legislature stated that "[e]xisting law provides that certain actions are not subject to a special motion to strike. They are ... b) a cause of action brought against a person primarily engaged in the business of selling or leasing goods or

[13] *See also* Sen. Com. On Judiciary, Analysis of Senate Bill 515 (2003-2004 Reg. Sess.), dated May 6, 2003, p. 8 (the bill "would make SLAPP motion[s] inapplicable to cases against a business where [the] cause of action arises from the business's ***commercial speech or activity***") (emphasis added); *Id.* at 11 (the bill provides that "that the anti-SLAPP special protections ... are not applicable to the ***specified type of commercial speech***.") (emphasis added).

services, arising from ***any statement or conduct of a commercial nature or purpose***. (Section 425.17)[.]" Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1158 (2005-2006 Reg. Sess.), dated Aug. 24, 2005, p. 2 (emphasis added).

b. The Legislature Explicitly Considered The Speaker's And Audience's Identity, Along With The Commercial Content And Purpose Of The Speech, In Section 425.17(c)

FilmOn argues that "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***." POB, p. 20 (quoting *Rezec,* 116 Cal.App.4th at 140; *Kasky,* 27 Cal.4th at 960-61) (emphasis added).

But the Legislature already codified these considerations in Section 425.17(c). "The bill closely tracks with *Kasky's* guidelines on ***commercial speech, focusing on the speaker, content of the message, and the intended audience***." Assem. Com. On Judiciary, Analysis of Sen Bill No. 515 (2003-2004 Reg. Sess.), dated July 1, 2003, p. 10 (emphasis added); *see also* Sen. Com. On Judiciary, Analysis of Senate Bill 515 (2003-2004 Reg. Sess.), May 6, 2003, p. 10 (Section 425.17(c) "indeed borrows from the *Kasky v. Nike* formulation of commercial speech[.]").

The Legislature set forth the rule from *Kasky* in the legislative history:

> When a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, ***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.***

> In typical commercial speech cases, ***the speaker*** is likely to be someone engaged in commerce – that is, generally, the production, distribution, or sale of goods or services – or someone acting on behalf of a person so engaged, and ***the intended audience*** is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers.
>
> Finally, the factual ***content*** of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the ***purpose*** of promoting sales of, or other commercial transactions in, the speaker's products or services.

Assem. Com. On Judiciary, Analysis of Sen Bill No. 515 (2003-2004 Reg. Sess.), dated July 1, 2003, p. 9-10 (emphasis added) (quoting *Kasky,* 27 Cal.4th at 960-61).[14]

The Legislature also explained how *Kasky's* principles are embodied in Section 425.17(c).

> Specifically, the bill would exempt from the anti-SLAPP motion only causes of action where the ***speaker*** is a person primarily engaged in the business of selling or leasing goods or services. The ***content*** of the covered speech under the bill is representations of fact about the person's or a business competitior's business operations, goods, or services, that is made for the ***purpose*** of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. Finally, the bill also considered the intended-

[14] The Legislature's inclusion of the language "false advertising or other forms of commercial deception" also indicates that it intended Section 425.17(c) to target those types of actions.

> audience element of the *Kasky* test. Under the bill, the ***intended audience*** must be an actual or potential buyer or customer, or a person likely to repeat the statement to or otherwise influence an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceedings, or investigation, notwithstanding that the conduct or statement concerns an important public issue, such as alleged illegal conduct by a corporation.

Assem. Com. On Judiciary, Analysis of Sen Bill No. 515 (2003-2004 Reg. Sess.), dated July 1, 2003, p. 10-11 (emphasis added).[15]

By codifying *Kasky's* principles in Section 425.17(c), the Legislature's intent is clear: the identity of the speaker, the identity of the audience and the commercial content and purpose of the speech are to be considered under Section 425.17(c), ***not Section 425.16***.

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[15] The Legislature's citation to *Kasky* also provides context to the phrase "notwithstanding that the conduct or statement concerns an important public issue" contained in Section 425.17(c)(2). In *Kasky,* this Court stated that it is false to assume that "speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy. As the United States Supreme Court has explained, commercial speech commonly concerns matters of intense public and private interest." *Kasky,* 27 Cal.4th at 964. Therefore, the language of the statute explicitly exempts speech that would ordinarily qualify as protected activity under Section 425.16 if it meets the criteria of Section 425.17(c). This point is further emphasized by the Legislature's intent to overrule *DuPont Merck Pharmaceutical Co. v. Sup. Ct.* (2000) 78 Cal.App.4th 562. *See* Sen. Com. On Judiciary, Analysis of Senate Bill 515 (2003-2004 Reg. Sess.), dated May 1, 2003, p. 8. As the Legislature noted, "the allegations relat[ed] to defendant's FDA activities" and "fell squarely within the 'petitioning' prong of the statute" and "also constituted a matter of public concern because the complaint itself admitted that the advertising involved 1.8 million users of the drug and involved very serious conditions." *Id.* The Legislature's reference to *DuPont* also explains the statutory language "the statement or conduct arose out of or within the context of a regulatory approval process, proceeding or investigation" in Section 425.17(c)(2).

3. FilmOn Relies On Outdated And Inapposite Case Law To Interpret Section 425.16

In support of its argument that commercial speech factors are analyzed under Section 425.16, FilmOn relies on numerous cases decided before the September 6, 2003 enactment of Section 425.17(c).[16] FilmOn's reliance on these cases is misplaced because they predate Section 425.17(c) and, therefore, could not address exempt commercial speech under Section 425.17(c) – let alone reconcile Section 425.17(c) with Section 425.16.

Second, FilmOn's reliance on the remaining purported "commercial speech" cases is misplaced because they were decided before *Simpson* on May 17, 2010,[17] which held that Section 425.17(c) must be "narrowly construed" and that the burden of proof is on the plaintiff to show that the exemption applies.[18] In all of these cases, the burden of proof was on the

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[16] *See* RJN, Ex. D; POB, pp. 20-22 and 28 (citing *Weinberg v. Feisel* (July 25, 2003) 110 Cal.App.4th 1122; *Commonwealth Energy Corp. v. Investor Data Exch., Inc.* (June 30, 2003) 110 Cal.App.4th 26; *Nagel v. Twin Lab., Inc.* (May 22, 2003) 139 Cal.App.4th 39; *Consumer Justice Ctr. v. Trimedica Int'l, Inc.* (March 27, 2003) 107 Cal.App.4th 595; *Globetrotter Software, Inc. v. Elan Comput. Grp., Inc.* (N.D. Cal. September 1, 1999) 63 F.Supp.2d 1127).

[17] *See Simpson,* 48 Cal.4th 12.

[18] *See All One God Faith, Inc. v. Organic And Sustainable Indus. Standards, Inc.* ("*OASIS*") (April 13, 2010) 183 Cal.App.4th 1186; *World Financial Group, Inc. v. HBW Ins. & Fin. Serv., Inc.* (April 16, 2009) 172 Cal.App.4th 1561; *Mann v. Quality Old Time Serv., Inc.* (June 30, 2004) 120 Cal.App.4th 90; *Rezec v. Sony Pictures Entm't, Inc.* (January 27, 2004) 116 Cal.App.4th 135. FilmOn's reliance on *Rezec* is particularly bizarre. *Rezec* involved film advertisements by a movie studio. The court held that the advertisements for films are commercial speech. *Rezec,* 116 Cal.App.4th at 141. But *Rezec* would not be decided the same way today due to Section 425.17(d), which states: "Subdivisions (b) and (c) do not apply to any of the following: … (2) Any action against a person or entity based upon the … advertisement, or other similar promotion of … a motion picture[.]"). Additionally, as explained below, the advertisement concerned

defendant to prove its speech did not constitute commercial conduct.

Third, with the sole exception of *OASIS,* all the cases cited by FilmOn involved speech or conduct concerning a business' representations of fact regarding ***its (or its competitors')*** goods and services to potential or actual customers (*i.e.*, the conduct described in Section 425.17(c)).[19]

4. FilmOn's Reliance On OASIS Is Misplaced

FilmOn's reliance on *OASIS* is misplaced for several reasons. *See* POB, pp. 34-35. First, the *OASIS* decision is flawed because the Court of Appeal found that the defendant's conduct did not qualify as commercial speech under Section 425.17(c), yet qualified as unprotected commercial speech under Section 425.16. *OASIS,* 183 Cal.App.4th at 1205-19. The Court of Appeal made no effort to reconcile its analysis under Sections

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speech related to the speaker's own product, not the product or service of a non-competitor third-party.

[19] *See Nagel,* 139 Cal.App.4th at 43 (cause of action arose from defendant's "product labels and Web site listing of the ingredients of its products[.]"); *Mann,* 120 Cal.App.4th at 104 (claims arose from defendants telling its competitor's customers that the competitor "used illegal carcinogenic chemicals in its cleaning process"); *Globetrotter,* 63 F.Supp.2d at 1130 ("these claims are based upon Globetrotter's statements to the market regarding [its competitors] and their products."); *Consumer Justice,* 107 Cal.App.4th at 602 (cause of action arose from defendant's representations of fact about its dietary supplement); *World Fin.*, 172 Cal.App.4th at 1572 (causes of action arose from statements made to plaintiff's customers regarding its competitor's products and business operations); *Commonwealth Energy,* 110 Cal.App.4th at 24 (causes of action arose from "telemarketing statements" that were about the defendant's services). FilmOn's citation to *Weinberg* (*see* POB, p. 22) is inapposite because it did not involve any arguments regarding commercial speech. Rather, the cause of action was brought by a merchant against a consumer who accused the merchant of criminal conduct. *See Weinberg,* 110 Cal.App.4th at 1127-28. Commercial speech played no role in the court's analysis of whether the defendant's conduct or speech arose from protected activity. *See Id.* at 1130-36.

425.16 and 425.17(c), despite acknowledging that Section 425.17(c) is an exemption that must be narrowly construed. *Id.* at 1212.[20]

Second, its interpretation of commercial speech was more expansive than *Kasky's* definition, which defined commercial speech as representations of fact about the business products and services. *Id.* at 1206-07, 1210. Rather, without any legal citation, the Court of Appeal found the defendant's speech was commercial because the defendant conceded: (1) "that its speech is commercial speech and that it seeks to promote its members' general business interest through the OASIS Organic seal"; (2) "that only the products of its paying members, who meet the standard, may advertise the OASIS Organic seal"; and (3) "that only those members who plan to use the seal are eligible to become voting members" of defendant. *Id.*

Third, *OASIS* is distinguishable because its holding does not extend to "true third-party endorsement or criticism, in the nature of consumer protection information[.]" *OASIS,* 183 Cal.App.4th at 1210. Here, DoubleVerify is a third-party (*i.e.*, not FilmOn's competitor) that analyzes FilmOn's content for consumers (or potential consumers) of advertising on FilmOn's website. (1:AA:003; 1:AA:005-6; 1:AA:0063-65; 1:AA:0072). DoubleVerify's content is ***not*** about itself – it is content about millions of ***other*** websites and companies. As such, *OASIS* is inapplicable.

Third, the conduct giving rise to the claims was distinguishable. The Court of Appeal in *FilmOn.com* explained this distinction:

> 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. [Citation]. In this case, FilmOn's business tort and

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[20] *OASIS* is also distinguishable from this present case because at least in *OASIS* the plaintiff asserted Section 425.17 – which FilmOn failed to do here.

> 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.

FilmOn.com, 13 Cal.App.5th at 719 (emphasis in the original).[21]

Insofar as *OASIS* found speech to be commercial despite the fact it did not involve representations of fact about the defendant's or its competitor's products and services, it was wrongly decided and must be disapproved.

C. DoubleVerify's Reports Do Not Satisfy Section 425.17(c)

1. FilmOn Has Waived Its Right To Assert That Section 425.17(c) Applies

In the Trial Court and Court of Appeal, FilmOn failed to raise Section 425.17(c) in its opposition to DoubleVerify's Anti-SLAPP Motion (1:AA:0116-134) and, therefore, waived its ability to argue

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[21] In *OASIS,* the majority held that OASIS' act of certification was not done "in furtherance" of formulating an organic standard for personal care products because the formulation of the standard occurred before the certification process and certification was granted only to paying members of the organization whose products met OASIS' standards. *OASIS,* 183 Cal.App.4th at 1203-05. Justice Simons dissented on the grounds the certification process was an act in furtherance of establishing such a standard. *Id.* at 1219-28 (Simons, J., dissenting). As such, the majority's opinion was also flawed for taking such a restrictive approach of the "in furtherance" requirement. *See* Section V.D.

DoubleVerify's reports are exempt under Section 425.17(c). *See N. Coast Bus. Park v. Nielsen Constr. Co.* (1993) 17 Cal.App.4th 22, 29.

2. FilmOn Cannot Meet Its Burden Under Section 425.17(c)

Even assuming FilmOn has not waived the argument (which it has), it cannot demonstrate that DoubleVerify's reports qualify as commercial speech under Section 425.17(c) because the reports did not contain "representations of fact about [DoubleVerify's] or a business competitor's business operations, goods, or services."

DoubleVerify is in the business of providing advertisers information on the content contained on third-party websites for purposes of online advertising. (1:AA:063-66; 1:AA:072). The reports at issue did not contain representations of fact about DoubleVerify's goods or services. (1:AA:005-7; 1:AA:064; 1:AA:067; 1:AA:072). Nor is DoubleVerify FilmOn's competitor. By its own admission, FilmOn's website is "a leading web-based entertainment provider" and does not provide analysis of third-party websites to advertisers. FilmOn's Petition for Review, filed September 5, 2017 ("Petition"), p. 6; 1:AA:003; 1:AA:0071.

As such, DoubleVerify's reports are not exempt from anti-SLAPP protection under Section 425.17.

D. The Analysis Under Section 425.16(e)(4)

Having fully addressed the Issue Presented, this Court need not examine FilmOn's remaining arguments. However, DoubleVerify will address FilmOn's remaining arguments and demonstrate why DoubleVerify's reports are protected activity under Section 425.16(e)(4).

Deciding anti-SLAPP motions involves a two step process: "First the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712). If the defendant makes the required showing, the burden shifts to the

plaintiff to demonstrate the merit of the claim by establishing a probability of success."[22] *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.

"The only means specified in section 425.16 by which a moving defendant can satisfy the arising from requirement is to demonstrate that ***the defendant's conduct by which plaintiff claims to have been injured*** falls within one of the four categories described in subdivision (e)." *Park,* 2 Cal.5th at 1063 (internal brackets omitted; emphasis in the original).

DoubleVerify asserts its reports fall under Section 425.16(e)(4). A defendant asserting protection under subdivision (e)(4) must show that plaintiff's claim: (1) "arises from"; (2) "conduct in furtherance of the exercise of ... the constitutional right to free speech"; (3) "in connection with"; (4) "a public issue or an issue of public interest."

The "Arises From" Requirement: "A claim ***arises from*** protected activity when that activity ***underlies or forms the basis for the claim.*** " *Park,* 2 Cal.5th at 1062 (emphasis added) (citing *Cotani,* 29 Cal.4th at 78; *Equilon,* 29 Cal. 4th at 66; *Biggs,* 19 Cal.4th at 1114). The entire claim need not be based on protected activity; rather "the Legislature indicated that particular alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion." *Baral,* 1 Cal.5th at 395.

The "In Furtherance" Requirement: "***Furtherance*** means ***helping*** to advance, ***assisting***." *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166 (emphasis in the original). Therefore, the "acts need not constitute speech; they merely need to help advance or facilitate the exercise of free speech rights." *Collier v. Harris* (2015) 240 Cal.App.4th 41, 53 ("registration of domain names assisted [defendant] in the exercise of his free speech rights) (citing *Lieberman,* 110 Cal.App.4th at

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[22] FilmOn did not dispute the trial court's analysis on the second prong on appeal and does not do so now.

166 (newsgathering activity was conduct in furtherance of free speech); *Hunter v. CBS Broad., Inc.* (2013) 221 Cal.App.4th 1510, 1521 ("selection of ... weather anchors ... to report the news on a local television newscast, 'helped advance or assist' [protected expression]"); *Tamkin v. CBS Broad., Inc.* (2011) 193 Cal.App.4th 133, 143 ("The creation of a television show is an exercise of free speech.")); *cf Montebello,* 1 Cal.5th at 423 ("leeway" is "provided by the 'in furtherance' term of the statute").

The "Public Issue" Requirement: "[A]n issue of public interest, within the meaning of section 425.16, subdivision (e)(3) is ***any issue in which the public is interested***. In other words, the issue need ***not be 'significant'*** to be protected under the anti-SLAPP statute – it is enough that it is one in which the public takes interest." *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042 (emphasis added and in original) (public interest in "a prominent businessman and celebrity of Finnish extraction"). *Nygard's* holding also applies to Section 425.16(e)(4) and is heavily cited by California courts to determine a range of public interests from the weighty to the light-hearted.[23]

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[23] *Brodeur v. Atlas Entm't, Inc.* (2016) 248 Cal.App.4th 665, 675-76 (the 1970s, Abscam controversy and author's articles on hazards of microwaves were each matters of public interest); *Hecimovich v. Encinal Sch. Parent Teacher Org.* (2012) 203 Cal.App.4th 450, 465-68 ("safety in youth sports" and "problem coaches/problem parents in youth sports" were matters of public interest); *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 199-200 ("contractors who fell asleep behind the wheel in two separate incidents, resulting in fatal collisions" was a matter of public interest); *Indus. Waste And Debris Box Ser., Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1148-51 ("limited landfill capacity and the environmental effects of waste disposal in landfills" were matters of public interest); *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 386 (motion picture "A Haunted House 2 was an issue of public interest."); *Tamkin,* 193 Cal.App.4th at 143 ("creation and broadcasting" of television episode was matter of public interest); *Chaker v. Mateo* (2012) 193 Cal.App.4th 1138, 1145-47 ("consumer information" is a matter of public interest); *Cross v. Cooper*

In *Rivero v. Am. Fed'n Of State, Cty. And Mun. Emp., AFL-CIO* (2003) 105 Cal.App.4th 913, 924, the Court of Appeal outlined three categories of statements or conduct that concern matters of public interest: (1) "a person or entity in the public eye"; (2) "conduct that could directly affect a large number of people beyond the direct participants"; and (3) "a topic of widespread, public interest."

In *Du Charme v. Int'l Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 119, the Court of Appeal added a fourth category: "[W]here 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[.]"

The "In Connection" Requirement: "There should be ***some degree of closeness between the challenged statements and the asserted public interest***; [Citation]; the assertion of a broad amorphous public interest is insufficient."[24] *Weinberg*, 110 Cal.App.4th at 1132; *see also* Section V.G.2.

(2011), 197 Cal.App.4th 357, 372-73, 377 ("public interest in knowing the location of registered sex offenders"). FilmOn seeks to distinguish *Cross, Terry* and *Hecimovich* from the present case by claiming those cases involved matters of public interest because they directly impacted children. *See* POB, 31-33. Aside from avoiding the fact that online adult content does directly impact children, FilmOn's argument is misplaced because it takes a restrictive approach regarding the definition of public interest and ignores the considerable authority stating that a matter of public interest "need not be significant" but merely "any issue in which the public is interested."

[24] As the Court of Appeal noted, *Weinberg* set forth guideposts to determine whether a matter concerns a public or private interest: (1) "public interest does not equate with mere curiosity"; (2) "a matter of public interest should be something of concern to a substantial number of people ... a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest"; (3) "there should be some degree of closeness

E. **<u>Section 425.16(e)(4) Protects So-Called Private Communications</u>**

The Court of Appeal correctly found that Section 425.16(e)(4) "governs even private communications, so long as they concern a public issue." *FilmOn.com,* 13 Cal.App.5th at 717 (quoting *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 993, 897; citing *Averill v. Super. Ct.* (1996) 42 Cal.App.4th 1170, 1175; *Terry v. Davis Cmty. Church* (2005) 131 Cal.App.4th 1534, 1535).

FilmOn argues that Section 425.16(e)(4) does not extend to private communications. *See* POB, pp. 25-27. FilmOn is wrong.

1. **<u>FilmOn's Argument Is Unsupported By The Text Of Section 425.16(e)</u>**

Section 425.16(e)(3) defines protected activity as "any written or oral statement or writing made ***in a place open to the public or a public forum*** in connection with an issue of public interest." (emphasis added). In contrast, Section 425.16(e)(4) does not contain the public forum or

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between the challenged statements and the asserted public interest [Citation]; the assertion of a broad and amorphous public interest is not sufficient"; (4) "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"; and (5) "[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Weinberg,* 110 Cal.App.4th at 1132-33 (internal brackets and quotes omitted). As the Court of Appeal also noted, *Weinberg* cited "federal cases" – not anti-SLAPP cases for these propositions. In light of this Court's recent holding that principles of constitutional law should not apply to determine protected activity under Section 425.16, some aspects of *Weinberg's* holding are in doubt. *See Montebello,* 1 Cal.5th at 422-23. Indeed, only the third factor, "closeness between the challenged statements and the asserted public interest" is supported by the text of Section 425.16(e)(4), which requires the conduct be made "in connection" with a matter of public interest.

public place language. Rather, it only requires "conduct in furtherance of the exercise of the constitutional right of petition or constitutional right of free speech in connection with a public issue or an issue of public interest." C.C.P. § 425.16(e)(4).

Even assuming DoubleVerify's reports are private communications, FilmOn's attempt to exempt private communications from qualifying as protected activity would render Section 425.16(e)(4) as mere surplusage (*see* Section V.A.) because, in order for the communication to reach the public, it would have to occur in a public place or a public forum (*i.e.*, be protected activity under subdivision (e)(3)). Further, it would create a new exemption that is unsupported by the text of Section 425.16. *See* Section V.B.c.ii.

2. <u>FilmOn's Argument Is Unsupported By The Legislative History And Case Law</u>

The original version of Section 425.16 passed in 1993 did not contain Section 425.16(e)(4). Rather, the Legislature added it in 1997, along with the language that Section 425.16 should be construed broadly. Sen. Rules Com. Off. Of Sen. Floor Analyses, Unfinished Business analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended June 23, 1997, dated June 23, 1997.

Prior to the amendment, the Court of Appeal in *Averill* held that Section 425.16 should be construed broadly and that Section 425.16(e)(3) applied to private communications. *Averill,* 42 Cal.App.4th at 1174-75 (citing *Wilcox v. Super. Ct.* (1994) 27 Cal.App.4th 809, 819-20); *see also Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 (private letter sent to twelve celebrities regarding whether charity proceeds were received satisfied Section 425.16(e)(3)).

As Courts of Appeal have recognized: "*Averill* was decided before the Legislature added subdivision (e)(4) to section 425.16, but lends

support to the supposition that subdivision (e)(4) is ***intended to cover private communications on public issues***." *Wilbanks,* 121 Cal.App.4th at 897 fn. 4 (emphasis added); *Ruiz v. Harbor View Cmty. Ass'n* (2005) 134 Cal.App.4th 1456, 1467 (same); *see also Briggs,* 19 Cal.4th at 1116 (public interest encompasses activity between private people). This interpretation is sound because "the Legislature is presumed to know about existing case law when it enacts or amends a statute." *In re W.B., Jr.* (2012) 55 Cal.4th 30, 57.

Thus, FilmOn's contention is wrong because "subdivision (e)(4) applies to private communications concerning issues of public interest." *Terry,* 131 Cal.App.4th at 1546; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1015; *Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736; *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, 525 fn. 4.

F. Section 425.16(e)(4) Does Not Contain A "Contribute To The Debate" Requirement

The Court of Appeal properly rejected FilmOn's reliance on *Wilbanks* for the proposition that a matter of widespread public interest (*i.e.*, the third *Rivero* category) must also "contribute to the debate" (sometimes referred to as the "*Wilbanks'* Rule"). *FilmOn.com,* 13 Cal.App.5th at 721-22. It held that the *Wilbanks* rule was unsound because it relied on cases that did not involve matters of widespread public interest and unnecessarily narrowed the definition of public interest. *Id.* (quoting *Cross,* 197 Cal.App.4th at 381 fn. 15).

FilmOn argues the Court of Appeal erred by casting doubt on the *Wilbanks'* Rule, claiming the *Wilbanks' Rule* was well-reasoned and that cases subsequent to *Cross* relied on this rule. *See* POB, p. 23. FilmOn is wrong.

1. The *Wilbanks'* Rule Is Not Supported By The Text Of Section 425.16

The requirement that a matter of widespread interest must also contribute to the debate is not found in the text of Section 425.16(e)(4). Rather, it defines protected speech as "any other 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." C.C.P. § 425.16(e)(4). As discussed in Section V.A., Section 425.16 must be construed broadly and strictly by its terms and that courts do not have power to rewrite the anti-SLAPP statute by including requirements that do not exist. As such, the text of the statute and the rules of statutory construction do not support the *Wilbanks'* Rule.[25]

2. The *Wilbanks'* Rule Relied On Inapposite Cases

The Court of Appeal correctly noted that "the *Wilbanks* court provided no analysis for [the Rule] 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

[25] FilmOn may argue that "contribute to the public debate" is embodied in Section 425.16(a)'s language that the statute is "to encourage continued ***participation*** in matters of public significance." (emphasis added). But FilmOn's interpretation would require rewriting the statute to say "continued ***public participation*** in matters of public significance." This interpretation is impermissible. *See* Section V.A. Additionally, this Court has already ruled that Section 425.16(a) does not impose additional requirements on a defendant. *See Navellier,* 29 Cal.4th at 94 (Section 425.16(a) does not impose a "valid exercise" requirement); *Equilon,* 29 Cal.4th at 59 (Section 425.16(a) does not impose an "intent to chill" requirement); *Cotati,* 29 Cal.4th at 75 (Section 425.16(a) does not impose a demonstrable "chilling effect" requirement); *Briggs,* 19 Cal.4th at 1118 (Section 425.16(a) does not impose a "public interest" requirement under Sections 425.16(e)(1-2)).

further restricted." *FilmOn.com,* 13 Cal.App.5th at 721 (internal quotes omitted) (quoting *Cross,* 197 Cal.App.4th at 381 fn. 15).

The Court of Appeal went on to explain why these cases did not involve matters of widespread public interest.

> 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. [Citation] 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 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 Ctr.,* 107 Cal.App.4th at 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.

FilmOn.com, 13 Cal.App.5th at 721 fn. 5 (emphasis in the original).

This reasoning is sound and FilmOn has made no effort to demonstrate otherwise.

3. Cases Citing The Wilbanks' Rule Are Inapposite

Aside from *Cross* and the present case, thirteen published California cases cited the *Wilbanks'* Rule. Nearly all are inapposite because they did not involve a matter of widespread public interest under Section 425.16(e)(4) (*i.e.,* the third-*Rivero* category and the only category which the *Wilbanks'* Rule applies). Rather, four involved public forums (*i.e.,* Section

425.16(e)(3)) – which, by definition, involve communications to the public,[26] two involved purely private disputes (*i.e.,* not matters of public interest),[27] two involved disputes with homeowner's associations and not matters of widespread public interest (*i.e.*, the *Du Charme* category),[28] two involved a public figure or a limited purpose public figure (*i.e.*, the first *Rivero* category)[29] and one found the act underlying the claim did not

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[26] *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1252-53 (social media sites); *Kronemyer v. IMDB* (2007) 150 Cal.App.4th 941, 949-50 (website); *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23 (website); *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246-47 (public streets and website). Additionally, two of these cases involved public or limited purpose public fibures (*i.e.* the first *Rivero* category) not matters of widespread public. *See Jackson,* 10 Cal.App.5th at 1254-55 (famous boxer and his ex-wife were public figures); *Gilbert,* 147 Cal.App.4th at 24-26 (well-known cosmetic surgeon was a limited purpose public figure).

[27] *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 82-85 (university researcher's accusations that another researcher used contaminated samples and plagiarized two academic papers was a private dispute and not a matter of widespread public interest); *Wilson v. Cable News Network, Inc.* (2016) 6 Cal.App.5th 822, 833-37, *review granted,* 389 P.3d 861 (behind the camera journalist was not a public figure or limited purpose public figure and CNN's "staffing decision" was not a matter of widespread public interest).

[28] *Ruiz,* 134 Cal.App.4th at 1466-70; *Colyear v. Rolling Hills Cmty. Ass'n of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-34.

[29] *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347 (maid of Marlon Brando who was a beneficiary under Brando's will was a limited purpose public figure because Brando was a public figure and the disposition of his assets were a matter of public interest); *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 677-78 ("[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.").

involve expressive activity.[30]

The remaining cases are *OASIS* and *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709 and *OASIS. Rivera* omitted any discussion on how monograph labels on prescription drugs contributed to the public debate and only stated that "[t]reatment for depression is a matter of public interest[.]" *Id.* at 716-17. *OASIS,* as discussed in Section V.B.4., the case was wrongly decided and should not be followed.[31]

For all these reasons, this Court should disapprove the *Wilbanks'* Rule.

G. <u>FilmOn Misinterprets And Misapplies The Public Interest Requirement</u>

1. <u>FilmOn Misinterprets The Public Interest Requirement</u>

FilmOn misleadingly argues that an "amorphous public interest" is insufficient to satisfy the public interest requirement. *See* POB, p. 29 (quoting *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280). The actual rule comes from *Weinberg* and concerns the "in connection" requirement of Section 425.16(e)(4). *See* Section, V.D. Citing *Weinberg,* the *Dyer* court augmented this rule by holding "[t]he fact a 'broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements."[32] *Dyer,* 147 Cal.App.4th at

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[30] *Anderson v. Geist* (2015) 236 Cal.App.4th 79, 87 ("[T]he execution of a warrant is not an exercise of rights by a peace officer; it is the performance of a mandatory duty, at the discretion of the court.").

[31] Specifically, the Court found that the "OASIS Organic seal" did not "contribute to a broader debate on the meaning of the term 'organic.'" *OASIS,* 183 Cal.App.4th at 1203-04.

[32] The *Dyer* version is suspect because its language is at odds with the plain language of Section 425.16(e)(4), which states that the conduct must be

1280.

Aside from *Weinberg* and the present case, there are thirteen published California decisions that cite the *Weinberg* version in full.[33] *Dyer*, and six cases that cite the *Dyer* version of the rule, applied it to determine whether there was a connection between the conduct or speech at issue and the asserted public interest.[34]

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made "in connection" with a matter of public interest. *Compare* C.C.P. § 425.16(e)(4) *with Dyer,* 147 Cal.App.4th at 1280.

[33] *Cross,* 197 Cal.App.4th at 374; *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 936; *Hailstone,* 169 Cal.App.4th at 736; *Terry,* 131 Cal.App.4th at 1547; *Colyear,* 9 Cal.App.5th at 131; *Greiner v. Taylor* (2015) 234 Cal.App.4th 471, 481; *Wilson,* 6 Cal.App.5th at 833; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 658; *Rivera,* 187 Cal.App.4th at 716; *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 972; *Rand Res., LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1092, *review granted,* 381 P.3d 229; *McGarry v. Univ. of San Diego* (2007) 143 Cal.App.4th 97, 110; *Baughn v. Dep't of Forestry and Fire Protection* (2016) 246 Cal.App.4th 328, 336.

[34] *Bikkina,* 241 Cal.App.4th at 84-85 ("Here, the specific nature of the speech was ***about*** falsified data and plagiarism in two scientific papers, not about global warming.") (emphasis added); *World Fin.,* 172 Cal.App.4th at 1570, 1572 ("defendants' communications were not ***'about'*** these broad topics [*i.e.*, "the pursuit of lawful employment … workforce mobility and free competition"]) (emphasis added); *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1216, 1229-30 (defendant's message "did not ***implicate*** a public issue" and was "devoid of any information ***about*** D.C.") (emphasis added); *Century 21 Chamberlain & Ass'n v. Haberman* (2009) 173 Cal.App.4th 1, 9 (defendant "has not shown the negligence claim 'either ***concerned*** a person or entity in the public eye, conduct that could directly affect a large number of people beyond the direct participants or a topic of widespread, public interest.'") (emphasis added); *Talega Maint. Corp. v. Standard Pac. Corp* (2014) 225 Cal.App.4th 722, 733-34 (defendants "statements" were "of interest to only a narrow sliver of society [and] not a public issue."); *Grewal v Jammu* (2011) 191 Cal.App.4th 977, 989 fn. 8 ("the statements were personal attacks on plaintiff, who was neither running in the election nor campaigning publicly in connection with it."); *Dyer,* 147 Cal.App.4th at

As such, FilmOn's interpretation of "public interest" lacks a "connection" with the actual requirements of the statute.

2. FilmOn Misapplies The Public Interest Requirement

FilmOn seeks to shift the focus of the public interest inquiry from the content of DoubleVerify's report to the report itself. *See* POB, pp. 28, 30. In essence, FilmOn argues that the public is not interested in DoubleVerify's reports and, therefore, they do not constitute protected activity. *See Id.* Again, FilmOn is wrong.

Section 425.16(e)(4) makes clear the focus of the public interest inquiry is whether the content of the speech concerns a matter of public interest, not whether the speech or conduct itself is a matter of public interest. As Section 425.16(e)(4) states: the "conduct in furtherance of the exercise of ... the constitutional right to free speech" must be made "***in connection with a public issue*** or an issue of public interest." C.C.P § 425.16(e)(4) (emphasis added).

FilmOn's interpretation would result in rewriting the statute to state "***conduct*** in furtherance of the exercise of ... the constitutional right to free speech ***that is of public interest*** and made in connection with a public issue or an issue of public interest." As explained in Section V.A., this Court cannot rewrite Section 425.16(e)(4) to contain additional requirements not articulated in that section.

FilmOn also misapplies the "public interest" and "arises from" requirements by arguing this lawsuit concerns a private dispute between FilmOn and DoubleVerify and that dispute is not a matter of public interest. POB, 28, 31. FilmOn misapplies the rule because its claims do not "arise

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1280 ("defendants are ***unable to draw any connection*** between [matters of public interest] and Dyer's defamation and false light claims.").

from" FilmOn's present legal dispute with DoubleVerify. Rather, FilmOn's claims arise from DoubleVerify's creation and dissemination of its reports. (1:AA:005-7; 1:AA:064-67; 1:AA:072). FilmOn's interpretation of Section 425.16's "public interest" requirement would add an additional requirement that the "dispute itself be a matter of public interest" – which does not appear in the statute. This additional requirement is impermissible and would result in interpreting Section 425.16 narrowly. *See* Section V.A.

H. <u>FilmOn Fails To Refute That DoubleVerify's Reports Qualify As Activity Falling Under Section 425.16(e)(4)</u>

The "Arises From" Requirement: The entire "basis" of FilmOn's trade libel and business tort claims is DoubleVerify creating and disseminating reports to its 1,200 clients that classify FilmOn's website as containing adult content and infringing copyrighted content. (1:AA:005-7; 1:AA:064-67; 1:AA:072).

The "In Furtherance" Requirement: DoubleVerify's reports satisfy this requirement because their creation and dissemination are acts constituting the exercise of DoubleVerify's right to free speech. The reports constitute the expression of DoubleVerify's analysis and the dissemination of those reports expresses that analysis to third parties.

The "Public Interest" Requirement: DoubleVerify's reports implicate the "public interest" requirement in three ways: (1) they concern the topics of widespread public interest and that affect a substantial number of people (*i.e.*, "adult content" and "copyright infringement"); (2) they concern an entity in the public eye (*i.e.*, FilmOn and its controversial founder Alki David); and (3) they qualify as "consumer information," which is judicially recognized as a matter of public interest.

<u>Adult Content And Copyright Infringement</u>: The Court of Appeal correctly affirmed the Trial Court's finding that DoubleVerify's reports

concerned matters of public interest.

> 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.

FilmOn, 13 Cal.App.5th at 719-20; Footnotes 5-6; (1:AA:005-7; 1:AA:064-67; 1:AA:071-73; 1:RA:0008-3:RA:0326; 6:RA:0519-534; 7:RA:536-734).

The Court of Appeal also held: "Matters receiving extensive media coverage through widely distributed news or entertainment outlets are, by definition, matters of which the public has an interest." *Id.* at 720 (citing *Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651 *disapproved on other grounds in Equilon,* 29 Cal.4th at 86 fn.5). Here, "the publications that reported specifically about FilmOn's legal entanglements [with copyright infringement] were readily recognizable press outlets such as *Fortune, Business Insider* and *Hollywood Reporter.*" *FilmOn,* 13 Cal.App.5th at 720; (1:RA:0008-95; 1:AA:071).

Also, FilmOn has been subject to numerous federal lawsuits regarding its copyright infringement, further evidencing FilmOn's involvement in copyright infringement is a matter of widespread public interest and affects a substantial number of people. *See* Footnotes 5-6; (1:AA:006; 1:AA:071; 2:RA:0096-3:RA:0326).

Additionally, the Court of Appeal stated: "[T]he public debate over legislation to curb children's exposure to adult and sexually explicit content demonstrates DoubleVerify's reports identifying such content on FilmOn's websites concerned an issue of public interest." *FilmOn,* 13 Cal.App.5th at 720; (6:RA:0519-534; 7:RA:536-734; 1:AA:073).

<u>*FilmOn Is An Entity In The Public Eye*</u>: FilmOn concedes that it and

its founder has been subject to media scrutiny. POB, p. 29. Furthermore, in its petition for review, FilmOn described itself as "a ***leading*** web-based entertainment provider[.]" Petition, p. 6 (emphasis added). Furthermore, the various press reports regarding FilmOn's legal entanglements also evidence it is an entity in the public eye, particularly with respect to copyright infringement. (1:RA:0008-95; 1:AA:071).

Consumer Information: It is well-settled: speech or conduct that provides "consumer information" is a matter of public interest.[35] Here, DoubleVerify's reports informed advertisers (*i.e.*, consumers or potential consumers of advertising space on FilmOn) that FilmOn's website contains adult content and copyright infringement. (1:AA:005-7; 1:AA:064-67; 1:AA:072). This information informed the advertisers' choices regarding whether to post advertisements on FilmOn's website. (1:AA:063-65).

The "In Connection" Requirement: Here, DoubleVerify's reports were directly related to the matters of public interest DoubleVerify asserted. The reports directly addressed FilmOn's websites containing infringing copyrighted content and adult content. (1:AA:005-7; 1:AA:064; 1:AA:067 1:AA:072). Additionally, those reports directly related to the reasons why FilmOn was an entity in the public eye (*i.e.*, as a leading web-based entertainment provider, it contained adult content and infringing

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[35] *See Wilbanks,* 121 Cal.App.4th at 898-90 (defendant's online postings that plaintiff was unscrupulous and under investigation was protected consumer information); *Chaker,* 209 Cal.App.4th at 1143-47 (postings on consumer website by mother of plaintiff's ex-girlfriend that attacked his character and business ethics were protected consumer information); *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 343-44 (article warning that doctor exaggerates his experience was protected consumer information); *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366 (online review criticizing dentist's services was protected consumer information); *cf. OASIS,* 183 Cal.App.4th 1210 and 1210 fn. 21 (certification was not consumer information because it was not third-party endorsement or critique).

copyrighted content). *Id.* Finally, DoubleVerify's reports directly concerned consumer information. The reports informed FilmOn's prospective and actual advertisers of FilmOn's association with copyright infringement and adult content so those advertisers could determine whether to advertise on FilmOn's websites. *Id.*; (1:AA:063-65).

Therefore, there is no doubt DoubleVerify satisfied its burden under the first prong of Section 425.16 by demonstrating FilmOn's claims arise from the creation and dissemination of DoubleVerify's reports and that those reports constitute acts in furtherance of DoubleVerify's right to free speech in connection with matters of public interest. As such, the Trial Court and Court of Appeal's decisions must be affirmed.

VI. CONCLUSION

DoubleVerify amasses billions of bits of data about companies and their websites and then distributes it to the public (who, like purchasers of a newspaper or ticket-holders to a movie, must pay for that information). In this case, it reported on matters of great interest to the public: that FilmOn appears to have stolen vast amounts of the content found on its website, and that FilmOn contained content not appropriate for children.

If FilmOn thought this quintessential fully-protected speech could somehow remotely be classified as commercial speech, it would have (and should have and ***had to)*** assert Section 425.17(c). It did not. FilmOn's assertion that this failure is now apparently of no concern because this Court should just simply incorporate Section 425.17(c) factors into the Section 425.16 is in blatant contravention to the text of, the cases regarding, and the legislative history of Sections 425.16 and 425.17(c). It is an assertion that should be categorically rejected.

For the reasons stated above, DoubleVerify respectfully requests this Court to affirm the Court of Appeal's decision.

Dated: March 22, 2018

FOX ROTHSCHILD LLP

By:

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ADDENDUM A

California LEGISLATIVE INFORMATION

CODE OF CIVIL PROCEDURE - CCP

PART 2. OF CIVIL ACTIONS [307 - 1062.20] *(Part 2 enacted 1872.)*

TITLE 6. OF THE PLEADINGS IN CIVIL ACTIONS [420 - 475] *(Title 6 enacted 1872.)*

CHAPTER 2. Pleadings Demanding Relief [425.10 - 429.30] *(Chapter 2 repealed and added by Stats. 1971, Ch. 244.)*

ARTICLE 1. General Provisions [425.10 - 425.55] *(Article 1 added by Stats. 1971, Ch. 244.)*

425.17. (a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

(Amended by Stats. 2011, Ch. 296, Sec. 36.5. (AB 1023) Effective January 1, 2012.)

ADDENDUM B

California LEGISLATIVE INFORMATION

CODE OF CIVIL PROCEDURE - CCP

PART 2. OF CIVIL ACTIONS [307 - 1062.20] *(Part 2 enacted 1872.)*

TITLE 6. OF THE PLEADINGS IN CIVIL ACTIONS [420 - 475] *(Title 6 enacted 1872.)*

CHAPTER 2. Pleadings Demanding Relief [425.10 - 429.30] *(Chapter 2 repealed and added by Stats. 1971, Ch. 244.)*

ARTICLE 1. General Provisions [425.10 - 425.55] *(Article 1 added by Stats. 1971, Ch. 244.)*

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

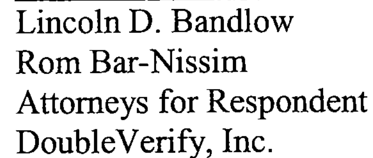
(Amended by Stats. 2014, Ch. 71, Sec. 17. (SB 1304) Effective January 1, 2015.)

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certified that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of DoubleVerify, Inc. is produced using 13-point Times New Roman type, including footnotes, and contains approximately 13,997 words, which is less than the total words permitted by the rules of the Court. Counsel relies on the word count to the computer program used to prepare this brief.

Dated: March 22, 2018

FOX ROTHSCHILD LLP

By: 

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10250 Constellation Blvd., Suite 900, Los Angeles, California 90067.

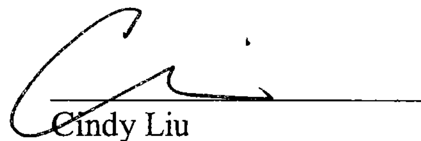
On March 22, 2018, I served the following document(s) described as **RESPONDENT'S ANSWERING BRIEF** on the interested parties in this action as follows:

Ryan G. Baker, Esq. Brian E. Klein, Esq. Scott M. Malzahn, Esq. BAKER MARQUART LLP 2029 Century Park East, Suite 1600 Los Angeles, CA 90067 Tel: 424-652-7800 Facsimile: 424-652-7850 E-Mail: rbaker@bakermarquart.com bklein@bakermarquart.com	Attorneys for Plaintiff and Petitioner, FILMON.COM, Inc.
Hon. Terry A. Green Los Angeles County Superior Court Stanley Mosk Courthouse Department 14 111 North Hill Street Los Angeles, CA 90012	Trial Judge (LASC 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	Appeal Case No.: B264074

[X] **BY OVERNIGHT MAIL (FEDEX):** I enclosed said document(s) in an envelope or package provided by FEDEX and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FEDEX or delivered such document(s) to a courier or driver authorized by FEDEX to receive documents.

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

Executed on March 22 ., 2018, at Los Angeles, California.



Cindy Liu