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IN THE
SUPREME COURT OF CALIFORNIA

FILMON.COM, INC.,
Petitioner,

v.

DOUBLEVERIFY, INC.,
Respondent.

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

REPLY BRIEF ON THE MERITS

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Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515
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INTRODUCTION

California enacted anti-SLAPP law to protect the "valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code Civ. Pro. § 425.16(a). Although anti-SLAPP law is construed broadly, its application has limits. This case presents conduct outside those limits. This Court should clarify that a commercial entity cannot distort the important protections of the anti-SLAPP statute to shield itself from liability for false and misleading statements made to a paying audience of one.

Defendant DoubleVerify, Inc.'s ("DoubleVerify's") false and misleading confidential reporting about websites operated by FilmOn.com, Inc. ("FilmOn") is not speech or petitioning activity protected by anti-SLAPP law. No matter how broadly the statute is construed, DoubleVerify's private, commercial speech was not an exercise of its constitutional right to petition; nor was DoubleVerify's activity connected

to "a public issue or an issue of public interest." Cal. Code Civ. Pro. § 425.16(e)(4). DoubleVerify's conduct does not fall within the statute's "catch-all" provision. *See Id.*

Particularly when applying the anti-SLAPP catch-all provision, the Legislature intended courts to follow fundamental constitutional principles in evaluating challenged conduct. The plain statutory text requires that a court examine both the content and *context* of the speech at issue to determine whether speech satisfies the "arises from," "in furtherance of," and "public interest" requirements. "In furtherance of" is superfluous if the catch-all provision is focused solely on the content of the speech, as DoubleVerify asserts.

Likewise, the overall structure and legislative history of Section 425.16 support FilmOn's interpretation. The anti-SLAPP statute protects the constitutional rights of freedom of petition and freedom of speech. Consistent with that purpose, the Legislature established a statutory framework that borrows from and reflects well-established constitutional principles. Clauses (1) – (2) of Section 425.16(e) protect all speech that takes place before or in connection with official governmental proceedings on a *per se* basis and clause (3) extends to any speech on a public issue so long as it takes place in a public forum. In contrast, the catch-all provision in clause (4) requires a court to analyze the particular content of the speech and the surrounding circumstances to render case-by-case determinations. Commercial speech occupies a less protected status under constitutional law and the anti-SLAPP statute.

DoubleVerify's heavy reliance on the commercial speech exemption under Section 425.17(c) is misplaced. Not only is that exemption not at issue here, the exemption does not change the statutory analysis under the catch-all provision. When the Legislature enacted Section 425.17(c), it exempted only a narrow subset of commercial speech and otherwise left

pre-existing law intact. Courts should consider the commercial nature of the speech at issue in determining whether such speech furthers constitutional rights in connection with an issue of public interest, even where that speech is not exempt under Section 425.17(c). *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.* (*"OASIS"*) (2010) 183 Cal. App. 4th 1186.

None of the relevant authority suggests ignorance of the factual context of challenged speech. Yet, like an ostrich with its head in the sand, DoubleVerify urges this Court to ignore countless undisputed facts, inducing the following: DoubleVerify is a commercial business; it sells IQR Reports to other businesses for commercial purpose; it tailors each IQR report to the individual needs of a particular customer; DoubleVerify's customers use the IQR Reports to formulate advertising strategies, whether those strategies promote Disneyland or pornography; DoubleVerify's customers are contractually required to keep these reports confidential; and DoubleVerify's reports do not contribute to any public discussion.

DoubleVerify's argument that its confidential IQR Reports are protected because they contain a couple of tags that label FilmOn as a copyright infringer and a purveyor of adult content and therefore relate in some general way to larger issues of interest to the public has been repeatedly rejected by courts. DoubleVerify does not disseminate its reports to the public; its reports do not arise out of any ongoing controversy or contribute to any public discussion.

If DoubleVerify's confidential IQR Reports are protected, it is difficult to imagine any commercial speech that would not also be protected. The insulation of purely commercial activities such as those of DoubleVerify is not the intention of the anti-SLAPP statute. This Court should protect the integrity of the anti-SLAPP statute and reverse the decision below.

ARGUMENT

A. FilmOn Applies Principles of Statutory Interpretation.

When interpreting statutes, "we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law[.]" (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 75.) In analyzing provisions in the anti-SLAPP statute, the legislative intent underlying section 425.16 must be " 'gleaned from the statute as a whole[.]' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal. 4th 53, 60 (quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118).) "[L]egislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App. 4th 1036, 1048.)

The text of the catch-all provision specifically refers to activity "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" (Code Civ. Proc. § 425.16(e)(4)), and the structure of the anti-SLAPP statute confirms that this Legislature intended the statute to reflect constitutional principles. It would violate settled principles of statutory interpretation to ignore this structure and the express reference to constitutional rights in the definition of protected activity in the catch-all provision.

1. The Plain Text Of The Catch-All Provision Requires Consideration Of The Commercial Nature Of Speech And Other Relevant Factual Circumstances.

DoubleVerify's claim that to consider the commercial or business nature of the speech at all is to impermissibly impose new requirements on the catch-all provision (ROB at 33-34) is meritless. Such considerations are not new burdens, but part and parcel of any analysis of whether the

speech in question "arises from," is "in furtherance of" rights to free speech and concerns a matter of public interest.

As DoubleVerify concedes, to fall within the protection of this provision, the defendant bears the burden of proving that the "plaintiff's claim (1) 'arises from'; (2) 'conduct in furtherance of the exercise of . . . the exercise of . . . the constitutional right of free speech'; (3) 'in connection with'; (4) 'a public issue or an issue of public interest.'" (ROB at 44 (quoting Code Civ. Proc. § 425.16(e)(4)).) Each of these requirements impose substantive limits on the catch-all provision and must be read as a whole. "We must give meaning to th[e] statutory [language], under settled principles of statutory construction." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118.)

While DoubleVerify claims that the catch-all provision focuses solely on the content of speech, it is not sufficient that a defendant demonstrate the content of the speech concerns a matter of public interest. The parties agree the "in furtherance of" requirement in the catch-all provision is an additional requirement above and beyond the public interest requirement, which requires that the conduct at issue "'help advance or facilitate the exercise of free speech rights.'" (ROB at 44 (quoting *Collier v. Harris* (2015) 240 Cal. App. 4th 41, 53).) Likewise, to satisfy the "arises from" requirement, this Court has held that the conduct underlying the plaintiff's cause of action (here, the publication of an IQR report on a confidential basis to a DoubleVerify customer) "must *itself* have been an act in furtherance of the right of petition or free speech[.]" (*City of Cotati,* 29 Cal. 4th at 78 (emphasis in original).) Even the public interest requirement must be considered within the overall context of the allegedly protected activity. (*See Nagel v. Twin Labs., Inc.* (2003) 109 Cal. App. 4th 39, 47 ("the language 'in connection with a public issue' modifies earlier language in the statute referring to the acts in furtherance of the

constitutional right of free speech. The phrase cannot be read in isolation").) Accordingly, the defendant must show a causal relationship between the particular conduct at issue and the exercise of free speech or petition rights.

Here, DoubleVerify does not dispute that its IQR Reports constitute commercial speech and it uses self-serving and largely tautological statements to claim that those reports satisfy the "in furtherance of", "arises from" and public interest requirements. (*See, e.g.,* ROB at 56 (asserting "DoubleVerify's reports satisfy the [public interest] requirement because their creation and dissemination are acts constituting the exercise of DoubleVerify's right to free speech.").) In fact, DoubleVerify's wholly confidential IQR Reports do not arise from or further any constitutional right of free speech in connection with a public issue. Its purpose is merely to generate business by providing a service on a confidential basis to assist companies with the placement of online advertisements. While there is nothing wrong with this business model, the catch-all provision is not so broad as to insulate DoubleVerify from liability when its activities clearly have no role in encouraging continued participation in matters of public significance.

FilmOn previously cited multiple well-reasoned cases in which appellate and trial courts have considered the identity of the speaker, audience and content of the speech in concluding that the speech at issue is not protected under Section 425.16. (*See* POB at 20-24.) DoubleVerify largely ignores these cases. Its only answer is that FilmOn's cases are "outdated" and "inapposite" because they were decided before the adoption of the commercial speech exemption in 2003. (ROB at 39.) Not so. All the cases cited by FilmOn remain good law. There is no authority for the proposition that these cases were superseded by the enactment of the

commercial speech exemption.[1] To the contrary, the Legislature clearly approved of and implicitly endorsed the logic of these decisions when it enacted the commercial speech exemption. In any event, FilmOn cited several cases post-dating the 2003 enactment of the commercial speech exemption, which explicitly discussed the commercial nature of the speech at issue when assessing whether that speech was in furtherance of a constitutional right. (*See OASIS,* 183 Cal. App. 4th 1186; *Rezec v. Sony Pictures Ent., Inc.* (2004) 116 Cal. App. 4th 135; *World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1573.)

2. The Catch-All Provision Requires Examination Of The Particular Speech At Issue On A Case-By-Case Basis In Light Of The Overall Context.

DoubleVerify's contention that the text of the catch-all provision is focused solely on the content (not the context) of speech is meritless. (ROB at 28.) If anything, the catch-all provision requires greater factual examination of the surrounding circumstances than a showing under the other categories of protected activity in subdivision (e).

Clauses (1) and (2) protect all statements "made before" or "in connection with" "a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]" (Code Civ. Proc. § 425.16(e)(1) & (2).) When "crafting" these clauses, the Legislature "equated a public issue with the authorized official proceeding to which it connects." (*Braun,* 52 Cal. App. 4th at 1047.) "[I]t is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." (*Id.*) In other words, the defendant does not have to make any additional

[1] FilmOn discusses the interaction between Sections 425.16 and 425.17 in detail below. (*See infra* at B(2).)

showing that the particular speech at issue was made in furtherance of the exercise of constitutional rights in connection with an issue of public interest. (*See also Briggs,* 19 Cal. 4th at 1122 ("In effectively deeming statements and writings made before or connected with issues being considered by any official proceeding to have public significance per se, the Legislature afforded trial courts a reasonable, bright-line test applicable to a large class of potential section 425.16 motions").)

In contrast, the catch-all provision does not protect any particular category of speech on a *per se* basis. Nor does it presume that speech that occurs in any particular place (such as in official government proceedings or a public forum) furthers the exercise of constitutional rights. Instead, the catch-all provision requires a court to analyze the factual circumstances surrounding the speech at issue on a case-by-case basis to determine whether the speech meets the "arises from," "in furtherance of" and "public interest" limitations. (*See Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal. App. 4th 515, 526 ("[a]lthough in most cases a competitor's statements regarding its competition would not fall within section 425.16, subdivision (e)(4), we decline to adopt a per se rule excluding all competitor's statements from anti-SLAPP protection. Instead, we must consider each case in light of its own unique facts.").)

3. The Structure Of Section 425.16 Mirrors Constitutional Principles, Which Should Guide This Court's Analysis.

DoubleVerify's contention that constitutional principles have no place in an analysis of the anti-SLAPP statute is meritless. The Legislature structured Section 425.16 to mirror constitutional principles and it placed great importance on the setting or context where the allegedly protected conduct occurred. While it is true that DoubleVerify does not need to prove that its IQR Reports are themselves constitutionally protected,

fundamental principles of constitutional law (including the context within which the speech at issue arose) should guide a court's decision-making under the catch-all provision.

The entire structure of the anti-SLAPP statute is designed to protect "the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. §§ 426.16(a), 426.16(b)(1).) The Legislature defined what acts are "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" in subdivision (e) of Section 425.16. The first two clauses in subdivision (e) protect favored categories of speech closely linked to civic participation in government, which lie at the core of free speech and petition rights. (*See Braun,* 52 Cal. App. 4th at 1047 (explaining that clauses (1) and (2) "safeguard free speech and petition conduct aimed at advancing self government").) Likewise, clause (3) protects speech that takes place in a public forum, which traditionally has been associated with heightened free speech protections. (*Prigmore v. City of Redding* (2012) 211 Cal. App. 4th 1322, 1335-38.) Indeed, under both federal and California law, courts frequently focus on "the 'place' of th[e] speech" or "the nature of the forum" in determining the appropriate level of protection for the speech at issue. (*Frisby v. Schutlz* (1998) 487 U.S. 474, 479-80; *see also Int'l Soc'y for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal. 4th 446, 454.)

Contrary to DoubleVerify's contention that only clauses (1) and (3) of Section 425.16(e) require consideration of the context that gave rise to the speech or other conduct at issue, the context is important under all four clauses. While clause (2) is not limited to statements "made before" official government proceedings, the statements at issue must still be made in connection with "a legislative, executive, or judicial proceeding, or any

other official proceeding authorized by law" to fall within clause (2). (Code Civ. Proc. § 425.16(e)(2).) Additionally, as DoubleVerify acknowledges (ROB at 28), clauses (1) and (3) both focus heavily on the setting or context of the speech. They protect any statements "made before" official government proceedings and statements "made in a place open to the public or a public forum in connection with an issue of public interest." (Code Civ. Proc. § 425.16(e)(1) & (3).) So long as the speech was made in a place open to the public or a public forum in connection with an issue of public interest, it is presumed that the speech is in furtherance of the exercise of constitutional rights. (*See id.*)

When the Legislature amended the anti-SLAPP statute in 1997, it structured clause (4) as a catch-all to extend the protections of the statute beyond those specific activities protected by the preceding clauses to "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." (Code Civ. Proc. § 425.16(e)(4).) The purpose of the catch-all provision is to ensure that other conduct worthy of protection would not be omitted simply because it did not take place in connection with an official proceeding or in a public forum. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997.)

While clause (4) is not limited to conduct that arises in any particular place or forum, it should be interpreted in a manner that is consistent with the preceding categories of protected activity. Where, as here, a statute lists a series of specific categories followed by a more general category, the general category is "restricted to those things that are similar to those which are enumerated specifically." (*Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 342 (internal citations omitted); *see also People v. Elsey* (2000) 81 Cal. App. 4th 948,

959 (ruling that "other building" in a statute "is a catch-all phrase that follows a list of specific items, which is meant not to describe a particular structure but to incorporate additional structures of the type previously listed, in accordance with the canon of statutory construction, ejusdem generis").) Indeed, the catch-all provision – by referring to "other conduct" – clearly refers back to clauses (1) through (3) as setting forth other examples of conduct that the Legislature has deemed to be "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16 (e)(4).)

Like clauses (1)-(3), the catch-all provision should be interpreted consistently with fundamental constitutional principles. Treating commercial speech with more scrutiny in the anti-SLAPP context is consistent with the purpose of the SLAPP statute, which is to keep large and powerful interests from silencing free speech through the threat of economic ruination by litigation. (*See Equilon Enterprises LLC,* 29 Cal. 4th at 68 n.5.) Commercial speech is entitled to less protection under the constitution (in part because speech with an economic motivation is far less likely to be stamped out by regulation or litigation), so the nature of the particular speech at issue necessarily weighs on whether such speech is truly in furtherance of constitutional rights. (*See Nagel,* 109 Cal. App. 4th at 47*; World Fin. Grp., Inc.*, 172 Cal. App. 4th at 1569.)

DoubleVerify's reliance on *City of Montebello v. Vasquez* (2016) 1 Cal. 5th 409 is misplaced. While that case held that courts "are not *required* to wrestle with difficult questions of constitutional law" in determining whether speech is protected the anti-SLAPP statute (*id.* at 422), it does prohibit this court from considering the commercial nature of speech under the catch-all provision. This Court reasoned that "the councilmembers' votes, as well as statements made in the course of their

deliberations at the city council meeting where the votes were taken, qualify as 'any written or oral statement or writing made before a legislative . . . proceeding'" under clause (1). (*Id.* (quoting Code Civ. Proc. § 425.16(e)(1)).) And, it found that "[a]nything they or City Administrator Torres said or wrote in negotiating the contract qualifies as 'any written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body'" under clause (2). (*Id.* (quoting Code Civ. Proc. § 425.16(e)(2)).) Because the legislature had statutorily defined the acts in clauses (1) and (2) as protected, there was no need for the defendant to prove that the acts at issue were themselves constitutionally protected. (*Id.* at 422 (explaining that the Legislature defined specific activities that qualify as an "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" in clauses (1) and (2)).)

Importantly, *City of Montebello* did not analyze the catch-all provision. Nor did it close its eyes to constitutional principles. Rather, it found the activity at issue furthered the exercise of constitutional rights, reasoning that "participation" in council member meetings is "constitutionally protected activity" and "legislators are given the widest latitude to express their views" under the First Amendment. (*Id.* at 423 (internal citations omitted).)

B. DoubleVerify's Heavy Reliance On The Commercial Speech Exemption Under Section 425.17(c) Is Misplaced.

DoubleVerify acknowledges that the analysis under the commercial speech exemption "is separate and distinct from the analysis to determine protected speech under Section 425.16." (ROB at 29.) Despite this admission, it repeatedly argues that FilmOn cannot satisfy its burden of proving that the commercial speech exemption applies and waived any argument under this exemption. (*Id.* at 22-23.) These arguments are red

herrings. This appeal involves the catch-all provision, not the commercial speech exemption.

Even if this Court considers the commercial speech exemption, the statutory text, legislative history, and case law do not support DoubleVerify's contention that this exemption precludes courts from considering whether other forms of commercial speech fall outside the catch-all provision.

1. The Commercial Speech Exemption Is Not At Issue In This Appeal.

This Court granted *certiorari* to consider whether "a court [should] take into consideration the commercial nature of [] speech" in determining whether that speech "furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of the catch-all provision in the anti-SLAPP statue[.]" (Petition for Review at 2.) As it must, DoubleVerify concedes that it bears the "burden of proof" under the first step of the anti-SLAPP analysis. (*See* ROB at 30 (stating "the defendant's burden of proof is to make 'a threshold showing that the challenged cause of action is one arising from protected activity'").) It is undisputed that DoubleVerify's IQR Reports are not protected under clauses (1) through (3) of Section 425.16(e). Thus, the sole question is whether those reports qualify for protection under the catch-all provision.[2]

While it is true that a plaintiff bears the burden of proving the applicability of the commercial speech exemption (ROB at 30-31), FilmOn

[2] DoubleVerify spills considerable ink to argue that FilmOn's case lacks merit. (ROB at 16-20.) In actuality, DoubleVerify's Reports made misleading and false representations regarding FilmOn's business and the content available on its websites. In any event, this Court did not grant *certiorari* on the second step of the anti-SLAPP analysis. Thus, there is no need for this to Court to "reach the anti-SLAPP statute's secondary question whether [FilmOn] 'established that there is a probability that [FilmOn] will prevail on the claim.'" (*City of Cotati,* 29 Cal. 4th at 81 (quoting Code Civ. Proc. § 425.16(b)(1)).)

does not and has never relied on the commercial speech exemption. Nor did this Court grant *certiorari* to examine whether the commercial speech exemption is applicable to this case. Thus, it is unnecessary to consider whether DoubleVerify's confidential IQR Reports fall within Section 425.17. This Court should reject DoubleVerify's attempts to shift the burden of proof to FilmOn.

2. Even If This Court Considers The Commercial Speech Exemption, It Does Not Support DoubleVerify's Interpretation Of The Catch-All Provision.

Far from undermining FilmOn's interpretation, Section 425.17(c) confirms that commercial speech occupies a less protected status under the anti-SLAPP statute than other forms of speech. It does not – as DoubleVerify suggests – render the well-established distinction between commercial and non-commercial speech immaterial for the purposes of the catch-all provision.

a. The Commercial Speech Exemption Only Addresses A Narrow Subset Of Commercial Speech And Does Not Alter The Analysis Under The Catch-All Provision.

DoubleVerify's argument that the legislature intended Section 425.17(c) to "exclusively define commercial speech for purposes of the anti-SLAPP statute" (ROB at 35) is not supported by the statutory text, legislative history or case law. The Legislature did not intend to change or otherwise alter anti-SLAPP analysis under Section 425.16 when it enacted Section 425.17(c), save for taking certain very narrow categories outside of the analysis altogether.

When the Legislature amended the anti-SLAPP statute in 2003 to add the exemptions set forth in Section 425.17, it did not make any changes to Section 426.16. It did not amend the catch-all provision to state that all commercial speech not exempted by Section 425.17(c) is protected activity.

If the Legislature had intended to do that, it could easily have done so. It did not. It is not the province of this Court to re-write the catch-all provision to protect all commercial speech that falls outside of Section 425.17(c). (*Equilon Enter., LLC,* 29 Cal. 4th at 66.)

The commercial speech exemption was drafted to exempt a narrow subset of commercial speech. Although the exemption has been described as applying to claims arising from "commercial speech" (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal. App. 4th 1043, 1047), that description is overbroad. In fact, the bill only "excludes *some* commercial speech from the anti-SLAPP motion" altogether. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.), as amended July 8, 2003, p. 3) (italics added); *see also id* as amended May 1, 2003, pp. 11-12 (noting the bill merely states that anti-SLAPP procedures "are not applicable to the specified type of commercial speech.").) To fall within the commercial speech exemption, a cause of action must satisfy several concrete and specific criteria:

> (1) the defendant must be "a person primarily engaged in the business of selling or leasing goods or services" (Code Civ. Proc. § 425.17(c));
> (2) the plaintiff's cause of action must "arise[ ] from a [ ] statement or conduct by" the defendant (*id.*);
> (3) the statement or conduct must be of a type qualifying the cause of action for exemption (*id.* § 425.17(c)(1)); and
> (4) the statement must be addressed to or intended to reach a qualifying audience, or be made in a qualifying setting (*id.* § 425.17(c)(2)).

Much like the bright-line test established by clauses (1) and (2) of Section 425.16(e) for speech made before or in connection with official governmental proceedings,[3] the commercial speech exemption creates a

[3] (*See Briggs,* 19 Cal. 4th at 1122 (explaining that clauses (1) and (2) create a "bright-line test" for determining what speech is protected).)

bright-line test that *exempts* an entire form of commercial speech without having to prove that the particular speech at issue furthers the exercise of constitutional rights in connection with a public issue. It thus creates an "efficient screening mechanism for disposing of SLAPP's quickly and at minimal expense to taxpayers and litigants." (*See City of Montebello,* 1 Cal. 5th at 422.)

FilmOn's interpretation of the catch-all provision does not render the commercial speech exemption mere surplusage. Whereas Section 425.17(c) exempts an entire form of commercial speech on a *per se* basis, the catch-all provision serves a different function. It requires a close examination of the factual circumstances surrounding the particular speech at issue to determine whether it merits protection. Thus, even if DoubleVerify's IQR Reports are not exempt under Section 425.17(c), they still need to be examined under the catch-all provision.

Indeed, the legislative history makes clear that the commercial speech exemption was not meant to affect pre-existing rights or law with respect to other forms of commercial speech that fall outside the scope of the exemption. In the legislative record, proponents of the bill wrote: "It is also important to keep in mind that this bill does not attach liability to any speech, nor does it override existing law, which may provide a defense against liability based on the nature of the speech." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended July 8, 2003, p. 3.) With respect to the commercial speech exemption, the bill only intended to "trim off a few bad branches" of the anti-SLAPP law by exempting a few very narrow categories from anti-SLAPP analysis altogether. (*Id.*, as amended May 1, 2003, pp. 7-8.) It otherwise left the pre-existing law intact, including the ability to claim that commercial speech is not protected under the catch-all provision when defending against an anti-SLAPP motion. (*See id.; Demetriades v. Yelp,*

Inc. (2014) 228 Cal. App. 4th 294, 309 (stating that the legislative history associated with Section 425.17 "indicates this legislation is aimed squarely at false advertising claims and is designed to permit them to proceed without having to undergo scrutiny under the anti-SLAPP statute").)

In short, Section 425.17(c) only exempts the most clear-cut cases of commercial speech from anti-SLAPP analysis altogether; other speech of a commercial or economic nature is not automatically protected from the anti-SLAPP statute altogether, but its commercial character is still a relevant consideration under the catch-all provision. (*See OASIS*, 183 Cal. App. 4th at 1186.)

b. *OASIS* Was Wisely Decided.

Unable to effectively distinguish *OASIS*, DoubleVerify argues that the *OASIS* decision is "flawed" and "must be disapproved." (ROB at 40-42.) In fact, the decision contains a sound and thoughtful discussion of both Section 425.16 and Section 425.17(c), as applied to commercial speech about a third party's products where that third party is not the speaker's competitor. *OASIS* is the best guide for this Court's analysis.

Though DoubleVerify criticizes *OASIS* on the ground it "made no effort to reconcile its analysis under Sections 425.16 and 425.17(c)" (*id.* at 41), the Court of Appeal correctly analyzed these provisions independently from each other according to the text, structure and legislative history of the anti-SLAPP statute. (*OASIS*, 183 Cal. App. 4th at 1199-1218.) Indeed, other courts have similarly analyzed Section 425.16 and 425.17(c) separately. (*See World Fin. Grp.*, 172 Cal. App. 4th at 1573 ("Because we conclude that the complaint does not arise from protected activity, we need not decide whether any of WFG's claims are exempt from the anti-SLAPP statute under subdivision (c) of section 425.17.")) It rejected an attempt to distinguish "*Nagel, Trimedica,* and *Scott* on the basis that they involved speech by a product manufacturer about its own product, and that it is not

such a manufacturer." (Oasis, 183 Cal. App. 4th at 1209.) It reasoned that "[t]he fact that the 'OASIS Organic' seal will be placed on some member products, rather than its own products, does not automatically, as OASIS asserts, transform its certification activities into a statement about the larger issue of `organic' health and beauty care products. The nature of the communication is not changed when a group of sellers joins in advertising their common product." (*Id.* at 1210 (internal quotations omitted).) After considering the commercial nature of the trade association's speech, it ruled that the placement of the trade association's seal on certain member products was not protected activity under the catch-all provision. (*See id.*)

Contrary to DoubleVerify's contention that *OASIS*'s interpretation of commercial speech is "more expansive than Kasky's definition" (ROB at 41), *Kasky* cited with approval U.S. Supreme Court precedent holding that a reference to a particular product or service is not necessarily essential to finding that speech is commercial in nature. (*Kasky v. Nike, Inc.* (2002) 27 Cal. 4th 939, 957 (quoting *Bolger v. Youngs Drug Prod. Corp.* (1983) 463 U.S. 60, 67 fn. 14) ("we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech").) Rather than adopt a single "all-purpose test," *Kasky* held 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." (Kasky, 27 Cal. 4th at 962.)

The Court of Appeal and DoubleVerify's attempts to distinguish *OASIS* are not persuasive. DoubleVerify does not publish its reports in a public forum and therefore cannot credibly claim to provide consumer protection information to the public. Under the rationale of the court in *OASIS*, DoubleVerify's confidential IQR Reports are not protected speech.

c. The Structure of The Commercial Speech Exemption Confirms The Importance Of The Distinction Between Commercial And Non-Commercial Speech Under The Anti-SLAPP Statute.

Far from undermining FilmOn's interpretation, Section 425.17(c) confirms that commercial speech occupies a less protected status under the anti-SLAPP statute than other forms of speech. It does not – as DoubleVerify suggests – render the well-established distinction between commercial and non-commercial speech immaterial for the purposes of the catch-all provision.

In enacting the commercial speech exemption, the Legislature followed constitutional law principles. The legislative history "indicates it was drafted to track constitutional principles governing regulation of commercial speech based upon guidelines discussed in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939. In doing so, it followed *Kasky's* guidelines on commercial speech, focusing on the speaker, the content of the message, and the intended audience." (*JAMS, Inc. v. Superior Court* (2016) 1 Cal. App. 5th 984, 994 (internal quotations omitted).) "[A]n analysis prepared for the Senate Committee on the Judiciary noted that Senate Bill 515 was 'consistent with the recommendation of the Senate Judiciary Committee analysis last year on [Senate Bill] 1651[,] which urged the sponsors to look at *the content and context* of the statement or conduct when crafting an exemption, rather than enacting a wholesale exclusion of a class of defendants[,] which had been proposed in [Senate Bill] 1651." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal. 4th 12, 29 (quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended May 1, 2003, p. 9 (italics added).)

d. *Simpson* Is Inapposite.

DoubleVerify's contention that FilmOn seeks to resurrect the rejected "delivery exemption" fundamentally misconstrues FilmOn's position and is meritless. FilmOn does not claim and has never claimed that all statements "made [by a business] in the course of delivering its services" (ROB at 31) fall outside the scope of the catch-all provision or are otherwise exempt from the anti-SLAPP statute. Rather, FilmOn merely claims that courts should consider the identity of the speaker, audience and content of the speech in determining whether speech is protected under the catch-all provision.

The decision in *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal. 4th 12 which did not involve the catch-all provision, is inapposite. In that case, this Court decided that an attorney's representations about an allegedly defective screw in an advertisement to recruit potential plaintiffs for a class action suit did not qualify as commercial speech within the meaning of Section 425.17(c). It reasoned that any implication in the advertisement that the screws were defective "is not about [the attorney's] or a competitor's "business operations, goods, or services[.]" (*Id.* at 30.) It is, rather, a statement 'about' [the plaintiff]—or, more precisely, [the plaintiff's] products.' It therefore falls squarely outside section 425.17(c)'s exemption for commercial speech." (*Id.* at 30, 32 (reasoning this exemption "applies only to a cause of action 'arising from' a statement (or conduct) that 'consists of representations of fact about that person's or a business competitor's business operations, goods, or services[.]'" (quoting Code Civ. Proc. § 425.17(c)(1)).) While *Simpson* held that that statements made while a good or service is being delivered must be about that person's or a competitor's goods or services to fall within the commercial speech exemption (*id.*), it did not consider or discuss how other forms of commercial speech may be treated under the catch-all provision.

Moreover, DoubleVerify grossly oversimplifies and misstates the factual record. FilmOn does not merely rely on the fact that DoubleVerify "delivered" its IQR Reports as part of its business (though that is one relevant consideration) to contend that those reports are unprotected, but also identifies multiple other facts relevant to whether those reports were made in furtherance of the exercise of constitutional rights on a matter of public interest as discussed below.

C. DoubleVerify Misconstrues Case Law Regarding Limited Circumstances Where Private Communications Are Protected.

Citing the Court of Appeal's decision, DoubleVerify asserts that the catch-all provision "'governs even private communications, so long as they concern a public issue.'" (ROB at 47 (citing *FilmOn.com v. DoubleVerify, Inc.* (2017) 13 Cal. App. 5th 707, 717).) FilmOn does not dispute that a private communication may be protected under the catch-all provision in appropriate circumstances, but that is not the case here.

DoubleVerify ignores many cases cited by FilmOn where courts have concluded that ordinary commercial speech about a company, product or service does not further the exercise of free speech or does not concern a matter of public interest. (*See* POB at 21-23.) Instead, DoubleVerify cites a series of distinguishable cases – none of which involve purely private communications sent by one business to another in the ordinary course. Notably, these cases also demonstrate that courts regularly examine the context of the speech under the catch-all provision.

In two cases, claims arose out of allegedly defamatory statements made in letters that were circulated among *multiple* people about ongoing disputes or controversies of interest to a limited but definable *portion* of the public. The courts required proof that the statements arose in the context of ongoing controversy, dispute or discussion consistent with the framework

set forth in *Du Charme v. Int'l Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal. App. 4th 107, 119.

For example, in *Hailstone v. Martinez* (2008) 169 Cal. App. 4th 728, 737, an existing board member and trustee was accused of misappropriating union funds. The Secretary-Treasurer of the local union sent a letter about the alleged misappropriation to the plaintiff, as well as multiple executives of the company, the union's executive board and the Department of Labor. (*Id.* at 733.) The court concluded the "alleged misappropriation of union funds was of interest, not only to the union officials to whom the allegedly defamatory statements were made, but also to a definable portion of the public, *i.e.*, the more than 10,000 members of Local 948." (*Id.* at 737-78.) It also found that "[t]he statements were made in connection with an ongoing controversy" over an investigation into "possibly illegal actions." (*Id.*) Accordingly, it ruled that the letters were protected under the catch-all provision. (*Id.*; *see also Ruiz v. Harbor View Cmty. Ass'n* (2005) 134 Cal. App. 4th 1456, 1468-69 (letters exchanged between a resident of a homeowner's association and the association's attorney "were written in the context of the disputes between [them], were part of the ongoing discussion over those disputes, and 'contributed to the public debate' on the issues presented by those disputes").)[4] These cases are inapposite.

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[4] DoubleVerify's other cases also are distinguishable. (*See Integrated Healthcare Holdings,* 140 Cal. App. 4th at 520–21, 523-24 (e-mail sent to "medical committee members and other individuals" expressing concern about the financial survival of four hospitals, which was sent after public hearings and multiple articles were published on the same subject, was a matter of "widespread public interest"); *Averill v. Superior Court* (1996) 42 Cal. App. 4th 1170, 1175 (statements made about the "placement of a shelter in petitioner's neighborhood" in a letter were protected where the petitioner had also petitioned the city council and had written to the local newspaper); *Vogel v. Felice* (2005) 127 Cal. App. 4th 1006, 1015 (statements at issue were published on public websites).)

DoubleVerify cannot show that its wholly confidential IQR Reports (which it sent only to its paying customers) arose in the context of an ongoing controversy, dispute or discussion that was of interest either of the public at large or any definable portion of the public. And, DoubleVerify's reports certainly did not contribute to a public debate.

Moreover, DoubleVerify does not seriously dispute that the commercial speech at issue is different from those cases cited by the Court of Appeal involving speech about registered sex offenders and child predators. (*See* POB at 31-33.) The facts of those cases show that while each communication might have nominally been private, the activity in question had a lot more in common with classic petitioning activity: concerned citizens organizing and warning against a threat of clear public interest to interested members of the community. (*See Cross v. Cooper* (2011) 197 Cal. App. 4th 357; *Terry v. Davis Community Church,* (2005) 131 Cal. App. 4th 1534; *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal. App. 4th 450.) There is absolutely no evidence that DoubleVerify's IQR Reports were similarly intended to protect children from pornography. In fact, DoubleVerify admits it provides services to companies absent any value judgment, which may include a company like Red Bull advertising on a site with "adult content." (ROB at 16, n. 2.) Concerned neighbors and parents speaking out to protect neighbors and children from predatory people in their community is a far cry from one business providing advertising information to another.

DoubleVerify attempts to resurrect its discredited canard[5] that it is analogous to the media or consumer protection organizations like Consumer Reports. (ROB at 12.) But this is not what DoubleVerify does.

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[5] In the Court of Appeal below, DoubleVerify explicitly stated that neither it nor the trial court relied on the argument that its reports provided consumer protection information. (ROB at 31.)

DoubleVerify does not publish information or reports of value to sections of the public that anyone with an Internet connection or newspaper or magazine subscription can access. Nor do DoubleVerify's reports inform the public. Instead, DoubleVerify, by its own admission, generates a narrowly targeted report, for a single client, designed to help that client exploit its target demographic through online advertising opportunities.[6]

D. DoubleVerify's IQR Reports Are Purely Private Communication That Do Not Contribute Or Otherwise Further Public Debate Or Discussion.

DoubleVerify argues this Court should disapprove *Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898, which held that "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner contribute to the public debate." *Wilbanks* is firmly rooted in the text of the catch-all provision and the stated purpose of the anti-SLAPP statute.

Contrary to DoubleVerify's contention, the *Wilbanks* rule is grounded in the text of the anti-SLAPP statute. The term "to contribute" is a synonym of "to further." (Oxford English Thesaurus 2018 accessed at https://en.oxforddictionaries.com/thesaurus/contribute.) When Section 425.16 was amended in 1997 to add the catch-all provision and a rule of

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[6] DoubleVerify does not publish its reports to the public, so this case is clearly distinguishable from instances where courts have protected consumer protection information posted on the Internet or reported in newspapers. (*See Wilbanks v. Wolk* (2004) 121 Cal. App. 4th 883, 898-90 (online postings warning public about an unscrupulous insurance broker); *Chaker v. Mateo* (2012) 209 Cal. App. 4th 1138, 1146 (website postings made in a "public forum" provided information intended to protect the public); *Carver v. Bonds* (2005) 135 Cal. App. 4th 328, 343-44 (article in newspaper warned readers about a particular doctor and provided information about how to pick a doctor); *Wong v. Tai Jing* (2010) 189 Cal. App. 4th 1354, 1367 (online Yelp review provided consumer protection information about a dentist and commented on a "controversy concerning the potential adverse health effects of exposure to mercury in amalgam").)

broad construction, the Legislature expressly directed that Section 425.16 "shall be construed broadly" as a means "[t]o this end", *i.e.*, "to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Code Civ. Proc. § 426.16(a).) Thus, as least under the catch-all provision, an activity must contribute to the public debate in some manner to further (*i.e.*, help advance or contribute to) the exercise of free speech and petition rights in connection with a public issue.

Additionally, the *Wilbanks* rule was based in part on *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal. App. 4th 913. DoubleVerify's contention that "FilmOn has made no effort to demonstrate" that the Court of Appeal's discussion of *Rivero* and its progeny is wrong. (ROB at 51.) FilmOn devoted four pages of its opening brief to a discussion of these cases, which hold that the public interest requirement is not satisfied by analogizing the particular speech at issue to an issue of greater import. (*See* POB at 23, 26-30; ROB at 46-47 n. 24 ("'there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient'") (citing *Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1132-33).)[7]

Additionally, DoubleVerify does not dispute that the mere fact a person is a public figure is not enough to transform the issue into one of public interest, unless the particular speech at issue is of public interest. (*See* POB at 30.) This is not a case where the statements at issue were made to the press about a particular case, as in *Annette F. v. Sharon S.*

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[7] DoubleVerify's attempt to distinguish several cases cited by *Wilbanks* on the ground that "[n]early all" of them did not involve a matter of widespread public interest (ROB at 51-53) is meritless. DoubleVerify's IQR Reports also do not concern a matter of widespread public interest.

(2004) 199 Cal. App. 4th 1146, 1162, or were made in connection with a governmental proceeding, as in *Church of Scientology v. Wollersheim* (1996) 42 Cal. App. 4th 628, 651. While a couple articles published about copyright lawsuits involving FilmOn may themselves be protected, DoubleVerify's IQR Reports did not comment on those lawsuits and did not contribute to any public discussion. As DoubleVerify admits, its service simply generates a spreadsheet after consultation with its client, with impression numbers and terms. (AA 65, 138, 141; RT 18:19-28; 20:19-28.) The IQR Reports do not contain any written commentary or analysis. (AA 65, 138, 141; RT 18:19-28; 20:19-28.)

E. DoubleVerify's Description Of Its Service Makes Clear It Can Only Qualify Under The Rejected Synecdoche Theory Of Public Interest.

DoubleVerify also claims that its reports concern issues of widespread public interest that affect a substantial number of people (copyright infringement and adult content)[8] that its statements must meet the public interest requirement. (ROB at 56.) In doing so, DoubleVerify is using the widely rejected "synecdoche" theory of public interest. (*See Commonwealth Energy Corp. v. Investor Data Exch., Inc.,* (2003) 110 Cal. App. 4th 26, 34.)

Even if one were to adopt DoubleVerify's unsupported contention that only the "content" of its IQR Reports matters (ROB at 55), DoubleVerify would still be wrong. As DoubleVerify concedes, when one looks to the specific nature of the speech, one must examine what it is about and not the broad topics that can be extracted from it. (ROB at 54, fn. 1.) Thus, public interest analysis requires an "examination of the

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[8] DoubleVerify claims copyright infringement was of specific interest (while admitting that adult content was only generally of interest). (ROB at 57.) However, DoubleVerify only mustered a single page from an obscure blog commenting on DoubleVerify's copyright rating of FilmOn. (AA 57.)

specific nature of the speech rather than the generalities that might be abstracted from it." (*See, e.g., Commonwealth Energy,* 110 Cal. App. at 34; *Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595, 601 (2003).)

DoubleVerify's interpretation would result in the exact thing that *Rivero* and its progeny warn against: speech becoming protected not because the public has any interest in the particular speech at issue, but merely because its IQR Reports (like virtually all speech) can be analogized in some general way to the public's general interest in copyright infringement and adult content online. (*See, e.g., Rivero*, 105 Cal. App. 4th at 925; *Consumer Justice Center*, 107 Cal. App. 4th at 600.)

DoubleVerify's reports are generated to an audience of one. The reports provide information a customer can use to place advertisements pursuant to an advertising strategy. No one outside of the customer in question cares about these reports, because by their nature they are only useful to and communicated to the individual customer. (AA 64-67; RT 26:21-27.) That customer in turn uses the reports for the mundane task of deciding on which websites to place pop up and banner ads. (*Id.*) DoubleVerify never demonstrated the public is fascinated by how companies decide which websites to place pop up ads on websites is an issue of public interest. Nor is how they do so an issue of public importance. Instead, DoubleVerify's reports speak only with a narrow commercial purpose, and can only be extrapolated to issues of greater public import. These are not issues of public concern.

CONCLUSION

The Court should reverse the decision below and find that DoubleVerify has not upheld its burden of proof under the first step of the anti-SLAPP analysis under Section 425.16(e)(4). It should further hold that courts should consider whether an allegedly protected activity is commercial in nature, the identity of the speaker, the identity of the audience or its intended purpose in determining whether that activity is protected by the catch-all provision.

DATED: April 27, 2018

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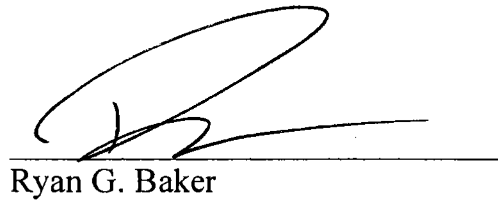
The text of this brief consists of 8,170 words (including footnotes), according to the word count generated by the Microsoft Word word-processing program used to prepare the brief.

Dated: April 27, 2018



Ryan G. Baker

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Lincoln D. Bandlow FOX ROTHSCHILD LLP 10250 Constellation Blvd., Suite 900 Los Angeles, CA 90067	Attorneys for Defendant and Respondent **DOUBLEVERIFY, INC.**
Hon. Terry A. Green, Judge Los Angeles County Superior Court Stanley Mosk Courthouse, Department 014 111 North Hill Street Los Angeles, CA 90012	Trial Judge (L.A.S.C. Case No. BC561987)
Clerk of the Court California Court of Appeal Second Appellate District, Div. 3 Ronald Reagan State Building 300 S. Spring Street, 2nd Floor Los Angeles, CA 90013	Case No. B264074

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