No. 22-35305

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KIM CARTER MARTINEZ,

Plaintiff-Appellee,

v.

ZOOMINFO TECHNOLOGIES INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Washington
District Judge Marsha J. Pechman, No. 3:21-cv-05725-MJP-BNW

OPENING BRIEF FOR DEFENDANT-APPELLANT ZOOMINFO TECHNOLOGIES INC.

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant ZoomInfo Technologies Inc. states under Federal Rule of Appellate Procedure 26.1 that it has no parent corporation and no publicly held corporation directly owns at least 10% of its stock. The Carlyle Group Inc., a publicly traded corporation, indirectly owns at least 10% of ZoomInfo's stock.

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REQUEST FOR ORAL ARGUMENT

Defendant-Appellant ZoomInfo Technologies Inc. respectfully requests oral argument.

INTRODUCTION

Every day, countless people search the Internet for contact and business-related information. This case concerns whether California's right-of-publicity law imposes liability on an online directory for answering such requests with accurate and responsive information, simply because the responses also accurately state that additional information is available through a free or paid subscription. California's law does not go that far. And the First Amendment would not permit it regardless.

ZoomInfo offers the public free access to business information—name, employer, job title, work address, news, etc.—for millions of professionals. If a person searches for a specific professional, ZoomInfo (if it has a match in its directory) will respond with a "preview profile" providing certain information about that professional (*e.g.*, name, employer, and job title). The preview will also advise that additional information (*e.g.*, work email address) is available through a trial or subscription to ZoomInfo's full directory. Like traditional white and yellow pages, ZoomInfo's directory presents "in convenient form" useful information for members of "a society in which each individual has but limited time and resources." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

There is no allegation that the information at issue here—routine *business* information—is false, sensitive, secret, or defamatory. Nor does the plaintiff here—a political and legislative director for a public-employee union—challenge the

inclusion or disclosure of her professional contact information in ZoomInfo's directory. She is adamant that her "lawsuit is *not* about the distribution of [her] information." ER-60 (emphasis added). That is unsurprising. Directories of business and professional listings are "entitled to the full protection of the First Amendment." *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 954 (9th Cir. 2012). Plaintiff concedes the preview profile is "accurat[e]." ER-157 (¶28). And she and her employer make the same information (and more) publicly available online.

Plaintiff instead objects that, in addition to confirming some of plaintiff's professional information when someone requests it, ZoomInfo *also* tells the requester that additional information exists in its directory. Plaintiff contends that responding to a request for information *and* informing the requester that more information is available for purchase violates her right of publicity. That theory strikes at core First Amendment rights. Plaintiff nowhere disputes that both the preview information ZoomInfo provides in response to information requests, and its publication and sale of additional information in its directory, are fully protected by the First Amendment. But plaintiff would deny ZoomInfo the right to *tell interested individuals*—those who request information about plaintiff and view her preview profile—*about* the information available in its directory. That is not the law. A right to publish and sell protected works, *but not tell anyone what's in them*, is no right at all. *See Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 638-39 (9th Cir. 1982).

No one here denies the importance of an individual's right of publicity. That right prevents businesses from unfairly exploiting an individual's personal brand to promote unrelated products or give customers a false impression of endorsement. An individual has the right to decide whether a business can sell athletic shoes branded with her name or put her face on billboards saying its cars are great. But that is not what ZoomInfo is doing. ZoomInfo simply states truthfully that its directory contains information about plaintiff—information plaintiff concedes ZoomInfo is free to disclose—and only in response to queries about plaintiff herself. No law can impose liability for that protected speech consistent with the First Amendment. And nothing in California's right-of-publicity law purports to do so.

California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, was designed to protect against claims like these. It "allow[s] early dismissal of meritless [F]irst [A]mendment cases aimed at chilling expression through costly, time-consuming litigation." *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016). The First Amendment does not allow plaintiff to foreclose a directory from providing truthful, factual business information in response to specific queries, or from telling interested persons about the information offered for sale in the directory. Her suit cannot proceed.

Plaintiff, moreover, lacks standing to sue. Under Article III of the U.S. Constitution, a plaintiff must have suffered a concrete, actual-or-imminent injury akin to those recognized at common law. But the injury plaintiff asserts—supposed

economic harm from ZoomInfo's telling interested users that it has accurate, publicly available professional contact information about her—is unlike any injury that has traditionally supported suit in American courts. Plaintiff's vague assertions of worry and discomfort are likewise insufficient to establish concrete injury. And any supposed injury is not actual or imminent regardless. The complaint does not allege that *anyone*—apart from plaintiff's own attorneys—ever viewed, or imminently will view, the speech to which she objects. This suit must be dismissed.

JURISDICTIONAL STATEMENT

The district court asserted subject-matter jurisdiction under 28 U.S.C. § 1332(d). ER-154-155 (¶20). As discussed below, pp. 21-38, *infra*, the district court lacked jurisdiction because plaintiff lacks Article III standing. On April 11, 2022, the district court denied ZoomInfo's motion to strike the complaint under California's anti-SLAPP law. ER-16-17. ZoomInfo filed a timely notice of appeal on April 14, 2022. ER-170-172; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine. *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1012-16 (9th Cir. 2013).

ISSUES PRESENTED

1. Whether plaintiff lacks Article III standing.

2. Whether the district court erred in denying ZoomInfo's motion to strike this suit under California's anti-SLAPP law, Cal. Civ. Proc. Code § 425.16, because

the action arises from ZoomInfo's protected expression and plaintiff has not shown a probability that she will prevail on the merits.

RELEVANT STATUTORY PROVISIONS

Relevant statutes appear in the Statutory Addendum to this brief.

STATEMENT OF THE CASE

I. BACKGROUND

A. ZoomInfo's Directory of Professional Contact Information

ZoomInfo provides an online searchable directory of professional contact information, akin to a modern and more useful version of the yellow pages. ER-4; ER-151-152, ER-154-155, ER-157 (¶¶7, 20, 28). The directory includes employer and employee names, job titles, workplace addresses, business phone numbers, business email addresses, employee organizational charts, news, and other information for a wide range of businesses, government employers, non-profits, unions, and other workplaces. ER-157-158 (¶¶28-29), ER-114-117. When an Internet user searches for information (such as by Googling someone's name), the results may provide information from ZoomInfo's directory for free and without a subscription. ER-157 (¶28). For access to additional information, users may sign up for a free trial or subscribe to a paid or free version of the directory. ER-160, ER-162 (¶¶34, 37).

B. Plaintiff Alleges That ZoomInfo Uses Publicly Available Information To Offer Full Directory Access to Users Seeking Her Professional Contact Information

Plaintiff Kim Carter Martinez is a Political and Legislative Director for the American Federation of State County and Municipal Employees ("AFSCME"), a public-employee labor union. ER-157 (¶28); ER-114-117; *see* ER-19 (taking judicial notice of ER-114-117). As a "labor union representing public sector employees," AFSCME "aims to promote social and economic justice" "[t]hrough advocacy and legislative action." ER-157 (¶28); *see* ER-115.[1] AFSCME has over 1.3 million members and $340 million in assets, and spent nearly $26 million on "Political Activities and Lobbying" in 2021.[2] AFSCME Council 57, the affiliate where plaintiff works, has over 26,500 members and $5.6 million in assets, and spent nearly $250,000 on "Political Activities and Lobbying" in fiscal year 2020.[3]

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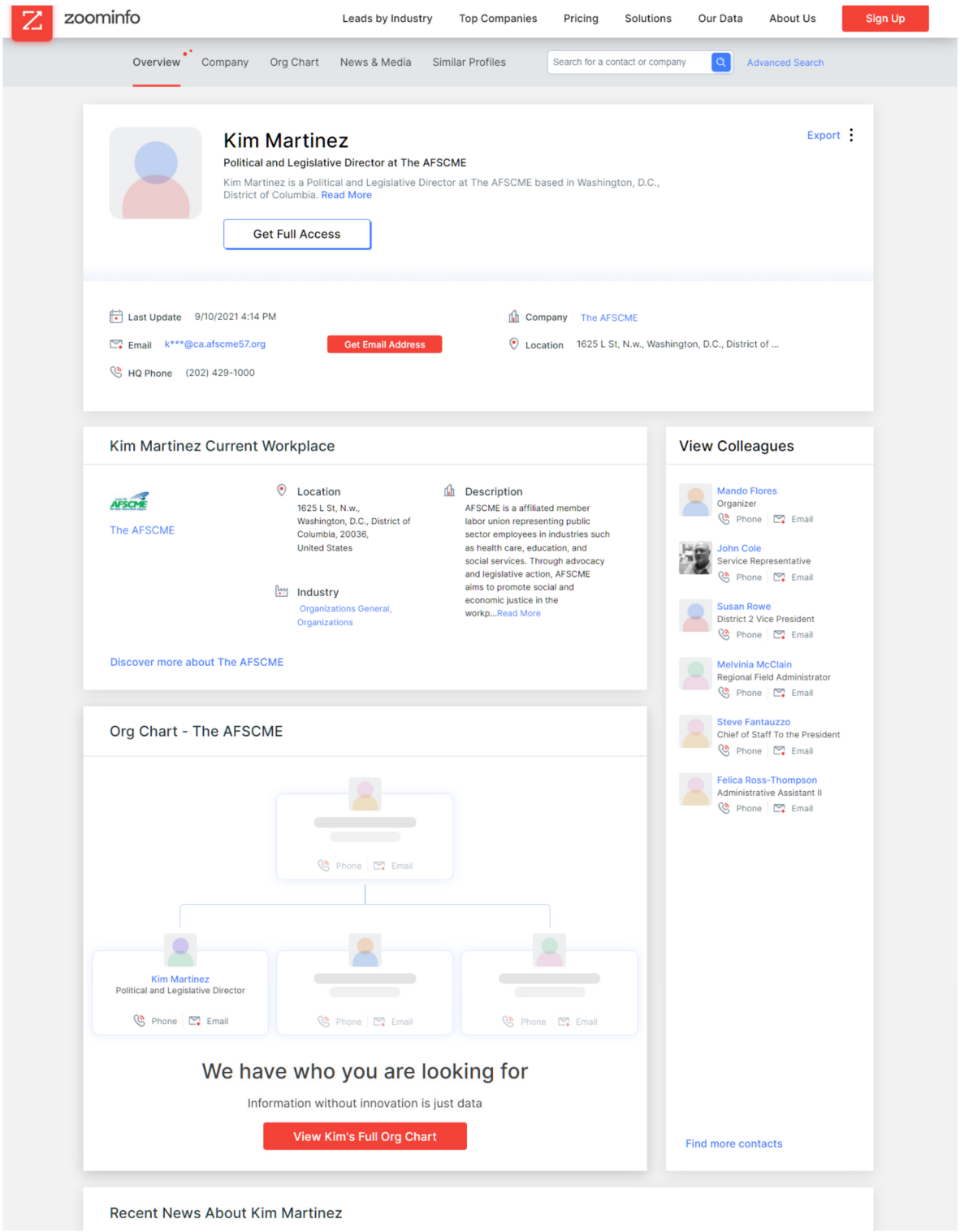
[1] Plaintiff stated in district court that she "has not made any allegations about her employment, job duties, or scope of her public involvement in the Complaint." ER-87. But the complaint includes a screenshot from her ZoomInfo preview profile and alleges that the profile "*accurately* identifies her name, phone number, workplace address, partially redacted email address, job title, partially redacted job description, a list of her workplace colleagues, and an organization chart of her workplace." ER-157 (¶28) (emphasis added). The district court also took judicial notice of plaintiff's full preview profile, ER-114-117, without objection from plaintiff, *see* ER-19.

[2] State Cty. & Mun. Emps. AFL-CIO, U.S. Dep't of Labor Form LM-2 (Mar. 29, 2022), https://olmsapps.dol.gov/query/orgReport.do?rptId=810738&rptForm=LM2Form.

[3] State Cty. & Mun. Emps. AFL-CIO, Council 57, U.S. Dep't of Labor Form LM-2 (Aug. 2, 2021), https://olmsapps.dol.gov/query/orgReport.do?rptId=773852&rptForm=LM2Form.

According to the complaint, Internet users looking for plaintiff's professional contact information can search for it in ZoomInfo's directory by either (1) using search terms like "kim carter martinez zoominfo" on a search engine like Google; or (2) entering her name in ZoomInfo's search bar. ER-157, ER-159, ER-160 (¶¶28, 30, 32, 34). ZoomInfo responds to a user's query with a preview profile, an excerpt of which is reproduced below: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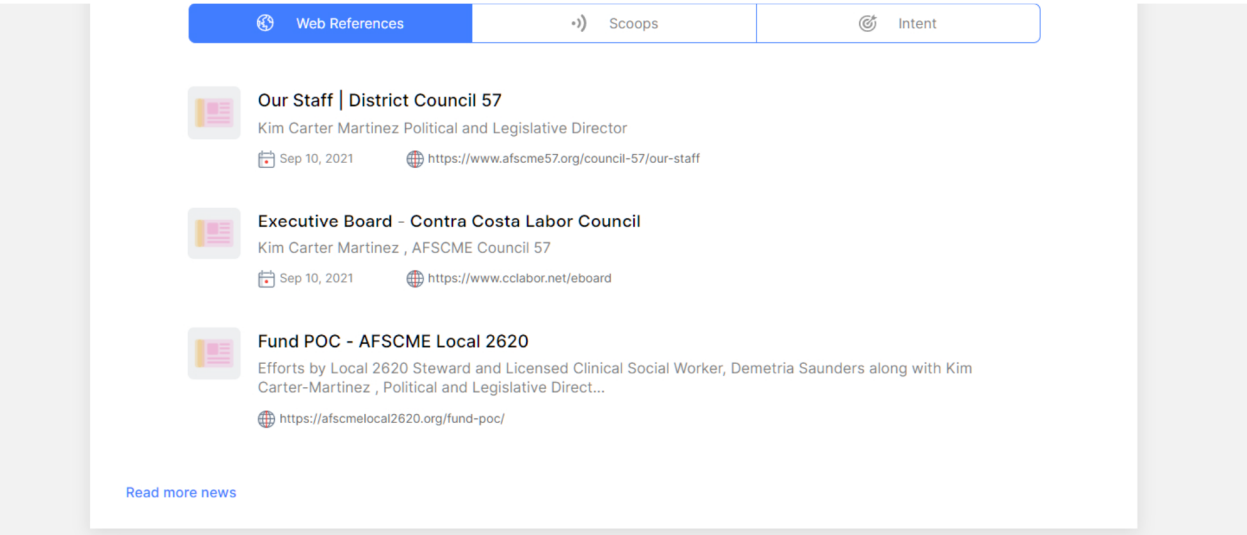

ER-115-116. As the image shows, the preview profile provides certain basic professional information in response to the search: plaintiff's name, job title, employer, a redacted version of her work email address, the phone number and address for AFSCME's headquarters, a high-level description of AFSCME's work, a partial organizational chart, and links to "Recent News" about plaintiff on other websites (including AFSCME's). No personal information appears in the preview profile, such as a home address, home phone number, or personal email address.

Plaintiff does not challenge the disclosure of her professional contact information in the preview profile. She maintains that this "lawsuit is not about the distribution of [her] information." ER-60. She concedes the information in her preview profile is "accurat[e]." ER-157 (¶28). She does not contend any of that information is sensitive, embarrassing, or not otherwise publicly available. Indeed, the information about plaintiff in her preview profile is publicly available on

plaintiff's own LinkedIn profile and AFSCME employee page. *See* ER-99-113; p. 32 & n.9, *infra*. The Department of Labor's website likewise discloses plaintiff's name, employer, and salary history, among other information.[4]

Plaintiff instead complains that, along with providing accurate information, ZoomInfo states that it can provide access to *additional* information. The complaint alleges that, once a user specifically searches for information about plaintiff and views her preview profile, the user may see an option to obtain "Full Access" to additional information, such as unredacted business email addresses. ER-151, ER-157 (¶¶5, 28; *see* ER-160 (¶34) (preview profile includes "'Free Trial' button"). Clicking those links (which plaintiff calls "advertisements," ER-154 (¶18)) offers the user "access to [plaintiff's] full profile," along with other profiles in ZoomInfo's directory, by either subscribing to ZoomInfo's free "'Community Edition'" or signing up for a free trial (which can be converted to a paid or free subscription). ER-160-162 (¶¶34-35, 37). The complaint does not allege that anyone other than plaintiff's attorneys has ever viewed (or imminently will view) her preview profile, or used the links on that profile to purchase a ZoomInfo subscription.

[4] *See* Off. Labor Mgmt. Stds., U.S. Dep't of Labor, Online Public Disclosure Room, https://olmsapps.dol.gov/olpdr/?_ga=2.90683673.2035658964.1658101139-1372066623.1658101139#Union%20Reports/Officer/Employee%20Search/ (search last name "Carter Martinez" and first name "Kim").

II. PROCEDURAL HISTORY

A. Plaintiff's Complaint

Plaintiff filed a putative class-action complaint against ZoomInfo in September 2021, seeking to represent a class of California residents whose names and information may appear in ZoomInfo preview profiles. ER-150-169. Plaintiff asserts claims for misappropriation of her name and likeness under California's right-of-publicity statute, Cal. Civ. Code § 3344, and California common law. ER-166-168 (¶¶ 54-64). Subject to exceptions, § 3344 prohibits knowing use of a person's "name . . . or likeness . . . on or in products, merchandise, or goods, or for purposes of advertising or selling" goods or services without consent. Cal. Civ. Code § 3344(a). As relevant here, the elements of the common-law tort are materially the same. ER-6-7; *see In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1273 n.4 (9th Cir. 2013). Both causes of action generally exempt from liability "the use of a person's name in connection with matters of public interest." *New Kids on the Block v. News America Publ'g, Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992); *see* Cal. Civ. Code § 3344(d).

The complaint does not allege that any of the information in plaintiff's preview profile is inaccurate, sensitive, or not otherwise publicly available. It does not challenge "the publication of ZoomInfo's directory" or the information in it. ER-73. Focusing solely on links in the preview profile that offer access to additional

information, the complaint asserts that ZoomInfo "misappropriated" plaintiff's name and persona by using them "in advertisements promoting website subscriptions." ER-153 (¶13), ER-157 (¶28).

The complaint asserts that ZoomInfo deprived plaintiff of her "economic interest" in her name and persona, which the complaint asserts "have commercial value." ER-154 (¶18); ER-152 (¶9). The complaint does not allege facts showing that her name and persona have preexisting commercial value; rather, it asserts that their "commercial value is demonstrated by" ZoomInfo's use of the information. ER-152 (¶9). The complaint also asserts that plaintiff suffered "mental injury" because she is allegedly "worried and uncertain about her ability to control how her name and persona is used." ER-163-164 (¶44). The complaint does not allege facts substantiating mental harm, such as a need for psychological treatment or physical manifestations of mental distress. Nor does the complaint deny that plaintiff has declined to "make use of [ZoomInfo's] opt-out procedure and have her information removed from ZoomInfo." ER-20-21; *see* ZoomInfo, *Remove Your ZoomInfo Professional Profile*, https://www.zoominfo.com/update/remove.

B. ZoomInfo's Motions To Dismiss and Strike

ZoomInfo moved to dismiss the complaint because plaintiff lacks Article III standing. ER-20-21. ZoomInfo explained that the complaint fails to plead facts

plausibly establishing any concrete economic or mental injury, and nowhere alleges that anyone ever viewed her preview profile or imminently will.

ZoomInfo also moved to strike plaintiff's suit under California's anti-SLAPP statute, Cal. Civ. Proc. Code §425.16. ER-5. The anti-SLAPP statute "'protect[s] citizens in the exercise of their First Amendment constitutional rights of free speech,'" *Roe v. Halbig*, 29 Cal. App. 5th 286, 301 (2018), by "'allow[ing] for early dismissal of meritless [F]irst [A]mendment cases aimed at chilling expression through costly, time-consuming litigation,'" *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1155 (9th Cir. 2021). Under the statute, a suit must be dismissed once the defendant "'make[s] a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's constitutional right to free speech'" in connection with an issue of public interest, unless the plaintiff carries a burden of "establish[ing] a reasonable probability that [she] will prevail on [her] claim." *Id.* at 1155; *see* Cal. Civ. Proc. Code §425.16(b)(1), (e).

The claims here target protected speech, ZoomInfo explained, because ZoomInfo's online directory—providing business contact information for millions of professionals—is useful, factual, of interest to the public, and protected under the First Amendment. ER-139-143. Directory previews are provided only to users who search for them, and only in response to those searches. The provided information is necessary for the directory to be comprehensive and responsive to inquiries.

Plaintiff's professional information is of particular interest to the public, ZoomInfo also observed, given her role as Political and Legislative Director for a public-sector union. ER-143-144.

ZoomInfo explained that plaintiff had not shown a probability of prevailing on her claims. ER-147. Those claims failed under both the First Amendment and California's public-interest exception to right-of-publicity claims. ER-13-14, ER-142-145; *see* Cal. Civ. Code § 3344(d). The public-interest exception "bars . . . [a] cause of action . . . based on publication of matters that are in the public interest or concern public affairs" and "'is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest.'" ER-139-140 (quoting *New Kids*, 971 F.2d at 310 n.10). Plaintiff did not explain how a directory of professional contact information could function, and provide publicly useful information, without using and responding to inquiries that use the listed individual's name. The statute, ZoomInfo explained, does not impose liability for truthful speech that accurately identifies some of the directory's information while offering access to additional information—and even if the statute purported to do so, it would unjustifiably burden protected speech in violation of the First Amendment.

C. The District Court's Decision

The district court denied ZoomInfo's motion to dismiss and anti-SLAPP motion, along with a request for judicial notice. ER-3-22.

1. As to Article III standing, the court held that plaintiff had adequately alleged a concrete economic injury based on the "commercial value of her persona." ER-9-12. The court acknowledged that plaintiff had not shown her persona had any preexisting commercial value. ER-9-12. But the court thought it permissible to assume her persona had commercial value based on ZoomInfo's use of her information in its directory. ER-10-11. The court also held that plaintiff had adequately alleged concrete mental injury by asserting that ZoomInfo's use of her name made her "'deeply uncomfortable,'" "'worried,'" and "'uncertain.'" ER-12.

ZoomInfo had urged that plaintiff failed to show actual or imminent injury, because there was no allegation anyone searched for and viewed her preview profile, or imminently would do so. ER-140. The court did not address that argument.

2. Turning to the anti-SLAPP motion, the court did not deny that ZoomInfo's provision of a comprehensive directory of professionals concerns matters of public interest. ER-14. Nor did it dispute that providing truthful information in response to search inquiries is ordinarily protected First Amendment conduct. But it declared ZoomInfo's preview profiles are "commercial in nature and not protected speech." ER-16. The court further stated there was "no evidence to suggest that

[plaintiff's] persona is a matter of public interest." ER-17; *see also* ER-13-14. The court did not explain why offering factual information about a public-employee union's Political and Legislative Director was not speech on a matter of public interest.

The court also opined that, even assuming the preview profile was "a matter of public interest," the anti-SLAPP motion must be denied because plaintiff had a reasonable probability of prevailing on the merits. ER-17. On the merits, however, the court upheld the complaint only because it found the statutory exception for "'publication of matters in the public interest'" did not apply. ER-13-14. The court did not attempt to reconcile those statements.

3. The district court took judicial notice of a complete copy of plaintiff's ZoomInfo preview profile. *See* ER-17-19; ER-114-117. But it denied ZoomInfo's request to take judicial notice of: (1) an AFSCME website identifying plaintiff and her job title, business address, email, and phone number, and (2) plaintiff's LinkedIn profile showing her name, position at AFSCME, and information about her employment history and education. ER-99-101, ER-102-113. ZoomInfo sought to introduce those webpages "only to show that the content of the ZoomInfo profile on which plaintiff bases her complaint is publicly and widely available." ER-24. Plaintiff "agree[d] that the existence of these publicly available websites is acceptable for the Court to judicially notice." ER-85. The court nonetheless refused to take

judicial notice or otherwise "acknowledg[e] the 'websites' existence in the public realm' without considering '[w]hether [their] content [wa]s true.'" ER-19.

SUMMARY OF ARGUMENT

I. This suit should be dismissed for lack of Article III standing because plaintiff fails to allege a concrete, actual or imminent injury. Plaintiff does not claim any injury from the inclusion of her professional contact information in ZoomInfo's directory, or from the disclosure of that information to users who search for and view her preview profile. She instead complains that, when responding to users who specifically request her information, ZoomInfo provides accurate professional contact information and advises that further information is available through a trial or subscription to ZoomInfo's directory. Plaintiff cannot explain how that benign exchange causes her concrete injury.

A. The district court held that plaintiff alleged a concrete economic injury, but the complaint alleges no *facts* plausibly supporting that claim. Instead, the district court assumed that ZoomInfo's mere use of plaintiff's name and persona supported an inference that they have commercial value. But the law is clear that mere use of a plaintiff's name or persona does not constitute cognizable injury. And the use alleged here—which is nothing like conventional advertising—does not plausibly suggest that plaintiff's name or persona has commercial value. Plaintiff's conclusory assertion that ZoomInfo profited from her persona is likewise

insufficient. That assertion does not establish that ZoomInfo *deprived* plaintiff of anything, as Article III requires. Regardless, plaintiff alleges no facts showing ZoomInfo profited from her persona—which would happen only if someone viewed her preview profile and purchased a $10,000 subscription as a result.

Plaintiff's purported mental injury likewise fails. Her assertions of "worry," "discomfort," and "uncertainty" lack the factual support Rule 8 requires. Nor are they analogous to mental injuries traditionally cognizable in American courts. If plaintiff's asserted mental harm sufficed, Article III's concreteness requirement would be a dead letter—plaintiffs could challenge bare procedural violations simply by alleging the violations made them uncomfortable. But Supreme Court precedent squarely holds that bare procedural violations are insufficient for Article III standing.

B. Plaintiff fails to allege any actual or imminent injury. The "advertising" that purportedly injures her would occur *only* if someone searched for her professional information on ZoomInfo and viewed her preview profile. But the complaint nowhere alleges that anyone but plaintiff's lawyers has done so, or imminently will.

II. This case should be dismissed under California's anti-SLAPP statute.

A. California's anti-SLAPP law permits a defendant to move to strike a suit that targets speech in connection with issues of public interest. As this Court has held, directories like ZoomInfo's are speech entitled to full First Amendment protection. ZoomInfo's speech is also in connection with issues of public interest.

ZoomInfo's directory contributes to public discourse by collecting publicly available business contact information and news articles to create profiles for millions of professionals. That resource facilitates public discussion about the professionals and organizations that shape commercial, social, and political issues.

B. The district court denied ZoomInfo's anti-SLAPP motion because it thought ZoomInfo's use of plaintiff's information was "commercial" and unprotected. But this Court has squarely held that a directory of business and professional listings is *not* commercial speech, even if it includes advertisements. Advertisements for protected speech are likewise protected. Nor does a financial or commercial *motive* render speech ineligible for anti-SLAPP protection. And while the district court purported to invoke factors courts have considered when deciding whether speech involves issues of public interest, it never described those factors—each of which actually favors ZoomInfo.

The district court erroneously divorced plaintiff's preview profile from ZoomInfo's broader directory. The directory contributes to the public interest by providing a *compendium* of useful information about a large number of professionals. It makes no sense to atomize that compendium into individual entries and ask whether each entry, viewed in isolation, sufficiently bears on public issues. That approach is particularly improper here, where plaintiff complains about links in the preview *informing users about the directory*. And even if one were to ignore the

directory, plaintiff's preview profile—which concerns her role as a public-employee union's Political and Legislative Director—involves matters of public interest.

C. Because this suit arises from speech on issues of public interest, plaintiff must show a probability of prevailing on the merits. She cannot. ZoomInfo's protected speech cannot result in liability for misappropriation under California law or the First Amendment. Both common-law and statutory right-of-publicity claims exempt from liability the use of a name or likeness for matters of public interest. ZoomInfo's speech clearly falls within that exemption. The First Amendment forbids liability in any event. And plaintiff cannot show injury sufficient to satisfy the injury element of a right-of-publicity claim.

ARGUMENT

This suit cannot be reconciled with the First Amendment protections to which ZoomInfo's directory of professional contact information is entitled. Plaintiff seeks to bar ZoomInfo from responding to specific queries for plaintiff's professional contact information by providing relevant information and advising the requester that *additional* information is available. That effort to chill the provision of protected information is exactly the kind of lawsuit California's anti-SLAPP statute is meant to foreclose.

Plaintiff also lacks standing to sue under Article III. She fails to allege facts showing that ZoomInfo, by telling requesters about the information in its directory,

causes her any concrete harm. And she alleges no facts showing that her asserted injury—which would arise only if someone searched for and viewed her information—has actually occurred or imminently will occur.

I. PLAINTIFF LACKS ARTICLE III STANDING

Article III standing is a "threshold jurisdictional" requirement that must be satisfied in every case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).[5] At a minimum, standing requires a plaintiff to show she suffered an "injury in fact" that is (1) "'concrete,'" not "'abstract,'" and (2) "'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339-40 (2016). Plaintiff has satisfied neither requirement here.

Plaintiff does *not* contend that she suffers a "concrete" injury from inclusion of her business contact information in ZoomInfo's directory or from disclosure of that information to users who search for and view her preview profile. Indeed, she insists her "lawsuit is not about the distribution of [her] . . . information." ER-60. That is unsurprising. Plaintiff's preview profile consists of ordinary professional contact information: her name, employer, job title, job description, a redacted version of her work email address, and the address and telephone number for her

[5] *See also Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (state-law claims cannot proceed in federal court without standing); *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1117 n.1 (9th Cir. 2017) (addressing standing *sua sponte* on appeal from denial of anti-SLAPP motion).

employer's headquarters. ER-157 (¶28); ER-114-117. Plaintiff does *not* allege that any of that information is secret, sensitive, or not otherwise publicly available. And she concedes the information in the preview profile is "accurat[e]." ER-157 (¶28). Plaintiff does not assert "reputational harms, disclosure of private information, and intrusion upon seclusion" that could support Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Instead, Plaintiff complains about *additional* information that is returned together with truthful professional information. She objects that, in responding to search inquiries, ZoomInfo provides the preview profile together with text stating that further information is available through a free trial or a free or paid subscription to ZoomInfo's directory. ER-157-158, ER-160-162 (¶¶28-29, 33-37). Plaintiff does not explain how *a statement that* information about her is available—delivered in response to specific requests—could harm her in any concrete way when the *availability and disclosure of the information* is concededly unobjectionable.

Plaintiff's effort to cast ZoomInfo's responses as "advertisements," ER-157 (¶28), is inaccurate—and it obscures the fundamental First Amendment values at stake and her corresponding lack of injury. If someone called directory assistance (*i.e.*, "411") to request a person's phone number, surely the operator could confirm that directory assistance has a phone number for that person *and* offer additional information (the person's address) or a service (connecting the call) for a fee. No

one would call that conversation—requesting information, providing information, and communicating that other information is available—an "advertisement." More to the point, no one would say it inflicts *concrete harm* on the person whose information directory assistance offers to provide. The result is no different here. Simply communicating that a person's information is available, when that information is lawfully available, does not cause that person concrete harm.

To be sure, a true right-of-publicity violation could cause concrete harm. If a business plastered a person's likeness on billboards giving the false impression that she endorsed its product, for example, that could unfairly leverage the value of her persona and potentially cause humiliation or other actionable distress. But nothing like that happened here. This case is about a hypothetical interaction in which a member of the public *runs a search* for information *about plaintiff* and ZoomInfo responds with truthful information while advising how to obtain more.

In finding concrete injury, the district court credited plaintiff's bare assertions that she suffered economic and mental injury. But the mere incantation of some "injury" does not satisfy Article III's standing requirement. A plaintiff must "plausibly and clearly allege a concrete injury" by pleading sufficient *facts* to substantiate such an injury. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020); *see Spokeo*, 578 U.S. at 338. The complaint here, however, rests on conclusory assertions and unsubstantiated assumptions.

Nor has plaintiff pleaded facts plausibly showing an injury that is "'actual or imminent,'" rather than "'conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339. The "advertisements" that supposedly cause her injury are displayed *only* when a user searches for and views her ZoomInfo preview profile. But the complaint alleges no facts showing that anyone (apart from plaintiff's attorneys) ever *actually* searched her name, much less viewed her profile. Nor does it allege anyone will *imminently* take the steps needed to view her profile. The harm she asserts is entirely hypothetical. For that reason, too, she lacks Article III standing.

Standard of Review. Standing is a question of law reviewed *de novo*. *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 705 (9th Cir. 2020).

A. Plaintiff Alleges No Concrete Injury

"Article III require[s] that the plaintiff's injury in fact be 'concrete'—that is, 'real, and not abstract.'" *TransUnion*, 141 S. Ct. at 2204. Central to that inquiry is "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* But simply *asserting* a traditionally cognizable harm (or a close analogue) is not enough. To survive a motion to dismiss, "the plaintiff must 'clearly . . . allege *facts*'" that plausibly establish the supposed injury. *Spokeo*, 578 U.S. at 338 (emphasis added); *see McGee*, 982 F.3d at 708-09; *Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, 560 (9th Cir. 2019). Although the district court found a

concrete injury on two theories—economic injury and mental injury, ER-7-13—plaintiff fails to plead sufficient facts to establish concrete injury under either.

1. *The Complaint Fails To Allege Concrete Economic Injury*

The district court's primary theory was that plaintiff suffered "concrete economic injury" from ZoomInfo's "use of her likeness." ER-9-12. Economic or monetary harm can, of course, constitute concrete injury. *TransUnion*, 141 S. Ct. at 2204. But a plaintiff cannot establish standing merely by reciting a "legal theory" of injury—she must plead sufficient *facts* to "plausibly alleg[e] that *she suffered* these injuries." *McGee*, 982 F.3d at 708-09 (emphasis added).

As the district court recognized, to establish a concrete economic injury, plaintiff would need to allege facts plausibly showing both "the commercial value of her persona" and that ZoomInfo's conduct "deprives her of its value." ER-10. The complaint does neither. It *asserts* that plaintiff's "nam[e], personal information, photographs, likenes[s], and person[a] have commercial value." ER-152 (¶9); *see* ER-154 (¶18) (asserting plaintiff has "an economic interest" in her name and information). But it does not plead *facts* supporting that conclusion. As the court recognized, the complaint does not allege any "readily identifiable preexisting value in [plaintiff's] persona." ER-7, ER-10. Nor does it allege facts showing any commercial value *now* (*e.g.*, as a result of ZoomInfo's alleged conduct), such as by identifying a market where plaintiff could make commercial use of her persona to

promote products or alleging that ZoomInfo somehow prevented her from pursuing such opportunities.

That is miles away from the sorts of factual allegations this Court has found sufficient. For example, the plaintiffs in *Davis v. Facebook, Inc.* established concrete economic harm from the sale of their personal browsing histories. 956 F.3d 589 (9th Cir. 2020). But they did not merely "allege that their browsing histories carry financial value." *Id.* at 600 (cited ER-8). They alleged *facts* making that conclusion plausible, pointing to "a study that values users' browsing histories at $52 per year, as well as research panels that pay participants for access to their browsing histories." *Id.* Similarly, the plaintiffs in *Fraley v. Facebook, Inc.* did not merely assert a "'general commercial value' in their personal endorsements," ER-8—they alleged "specific" facts showing that "friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers," 830 F. Supp. 2d 785, 799-800 (N.D. Cal. 2011) (Koh, J.). The complaint here is devoid of such facts.

The district court filled the gap with an assumption: It posited that, "'[i]f a defendant uses a plaintiff's name and/or likeness to advertise, then it can reasonably be inferred that the name and/or likeness has some economic value, even if small.'" ER-8 (quoting *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203-EMC, 2021 WL 5050079, at *14 (N.D. Cal. Nov. 1, 2021)). That assumption is unsustainable, both

legally and factually. At common law—which is relevant in assessing concrete injury, *see TransUnion*, 141 S. Ct. at 2204, 2209—the mere use of a plaintiff's name or likeness has *not* traditionally provided the basis for a lawsuit. *See Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 542 (1993) ("[E]very publication of someone's name or likeness does not give rise to an appropriation action."). Liability attaches only where there is use, appropriation, *and resulting injury*. *See Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). "Resulting injury is the *sine qua non* of a cause of action for misappropriation of name." *Slivinsky v. Watkins-Johnson Co.*, 221 Cal. App. 3d 799, 807 (1990). "Until the *value of the name* has in some way been appropriated, there is no tort." *Restatement (Second) of Torts* § 652C cmt. c (1977) (emphasis added).

The district court's assumption that a plaintiff's name has commercial value, simply because the defendant used her name, improperly collapses those distinct requirements. It is akin to assuming that a newspaper would not use a person's name in an article relevant to her profession unless her name itself had commercial value. It effectively allows plaintiffs to establish concrete injury under Article III merely by alleging a bare legal violation—a notion the Supreme Court has squarely and repeatedly rejected. *See TransUnion*, 141 S. Ct. at 2205; *Spokeo*, 578 U.S. at 341.

It might be that *some particular uses* of a person's name or likeness could support an inference of commercial value—*e.g.*, where a company features a plain-

tiff in an advertising campaign or implies the plaintiff endorsed its product. But ZoomInfo does not use plaintiff's name or likeness like that. It uses her name only to state, in response to specific inquiries, that information about her is available. Much like directory assistance, ZoomInfo will respond if someone makes an inquiry seeking information about a particular person, by providing that person's business contact information. And it will do likewise for *any* of the millions of profiles available in its directory. ER-157-162 (¶¶28-37); ER-164-165 (¶¶47, 49); *see* pp. 5-6, *supra*. Those facts do not plausibly establish that *any* person's name or persona—much less plaintiff's in particular—has commercial value.[6]

Plaintiff also has not plausibly alleged the other requirement to establish standing based on economic injury—that ZoomInfo's conduct "deprives her of [the] value" of her persona. ER-10. The district court thought it was enough that ZoomInfo allegedly "profit[ed] from [its] use of [plaintiff's] persona." ER-10. But

[6] Plaintiff's information at issue here, on its own, has no commercial value to ZoomInfo. That information could *not* be sold on its own, because it is publicly available elsewhere. *See* pp. 9-10, *supra*. And while ZoomInfo has observed that the information it collects is "'an integral part of [its] products and services,'" ER-9 (quoting ER-152 (¶9)), its directory contains information about "'125 million business professionals,'" ER-161 (¶35). The value of that information *in the aggregate* says nothing about whether *plaintiff's information in particular* has commercial value. In fact, anyone can freely opt out of ZoomInfo's database; plaintiff has simply chosen not to. *See* ER-20-21. This case is nothing like *Fraley*, where the plaintiffs invoked "explicit statements by Facebook's own CEO and COO that friend endorsements [incorporating users' 'likes'] are two to three times more valuable than generic advertisements." 830 F. Supp. 2d at 800.

"a plaintiff's claim of injury in fact cannot be based solely on a defendant's gain; it must be based on a plaintiff's loss." *Silha v. ACT, Inc.*, 807 F.3d 169, 174-75 (7th Cir. 2015).[7] Even if ZoomInfo realized a profit from any use of information about plaintiff (but see below), plaintiff has "not establish[ed] how this [alleged] profiteering deprived [her] of the economic value of [her] information." *Id.* at 175. She does not allege, for example, that her name and professional contact information are now less valuable as promotional tools or that she has lost promotional opportunities. And without showing that her information "carr[ies] financial value" for which she otherwise could obtain payment, she cannot be said to have "retain[ed] a stake in the profits." *Davis*, 956 F.3d at 600.

In any event, plaintiff does not "sufficiently allege" facts showing "that [ZoomInfo] profited from" her persona in any way. *Davis*, 956 F.3d at 600. The complaint does not allege anyone has actually viewed plaintiff's preview profile. *See* pp. 35-37, *infra*. Much less does it allege that someone viewed her profile *and then purchased a ZoomInfo subscription as a result*. That alone is fatal.

The complaint, moreover, alleges that the preview profile links to two *free* options for accessing additional information. ER-160, ER-161-163 (¶¶34, 36-38).

[7] *See also In re Google, Inc. Privacy Policy Litig.*, No. 12-cv-1382, 2013 WL 6248499, at *5 (N.D. Cal. Dec. 3, 2013) (to allege injury "a plaintiff must do more than point to the dollars in a defendant's pocket; he must sufficient[ly] allege that in the process he lost dollars of his own").

And it alleges that "convert[ing]" from either of those free options to a paid subscription costs "$10,000 per year or more." ER-160 (¶34). A paid subscription is well worth the price to those seeking full access to ZoomInfo's directory of 125+ million profiles and other services. *See* ER-161 (¶35). But it is not plausible that someone bought a $10,000 subscription *because they saw a link on plaintiff's preview profile*. Absent a credible connection between plaintiff's information and a customer's decision to subscribe, plaintiff cannot show that ZoomInfo profited at her expense. *Contrast Fraley*, 830 F. Supp. 2d at 800 (plaintiffs "identified a direct, linear relationship between the value of their endorsement . . . and the alleged commercial profit gained by Facebook").[8]

2. *The Complaint Fails To Allege Concrete Mental Injury*

Plaintiff's claim of "mental injury" is equally conclusory, merely asserting that ZoomInfo's conduct "disturbed her peace of mind" and made her "deeply uncomfortable," "worried," and "uncertain." ER-163-164 (¶44); *see* ER-15. The district court deemed that sufficient "to satisfy Rule 8." ER-13. But Rule 8 requires a plaintiff to support her standing with "factual content," not "bald allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009); *see Center for Biological Diversity*,

[8] Labeling the supposed injury an infringement of plaintiff's "intellectual property" interest in her name and persona, ER-163 (¶¶42-43), is "pointless." *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 824 (1979). Any "property" interest would reduce to whether "the name and likeness of the person involved [is endowed] with commercially exploitable opportunities," *id.*—which plaintiff has failed to establish.

946 F.3d at 560. The complaint does not offer *facts* substantiating mental harm, such as allegations that plaintiff required psychological treatment or suffered "physical manifestations" of mental distress. *Pennell v. Global Trust Mgmt., LLC*, 990 F.3d 1041, 1045 (7th Cir. 2021). Rule 8 demands more than "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678.

Plaintiff's allegations are also insufficient to satisfy Article III. "'[N]egative emotions'" like "'stress and confusion'" do not themselves establish concrete harm. *Ojogwu v. Rodenburg Law Firm*, 26 F.4th 457, 463 (8th Cir. 2022) (quoting *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 864 (6th Cir. 2020), and *Pennell*, 990 F.3d at 1045). "'The state of confusion is not itself an injury. Nor does stress by itself with no physical manifestations and no qualified medical diagnosis amount to a concrete harm.'" *Id.* Attaching different labels—like "anxiety," "distress," worry, or discomfort—does not change the outcome. *Garland v. Orlans, PC*, 999 F.3d 432, 440 (6th Cir. 2021).

When an alleged injury is intangible (like the mental injury asserted here), it is particularly important that the injury have "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion*, 141 S. Ct. at 2204. That ensures "federal courts exercise 'their proper function in a limited and separated government.'" *Id.* at 2203. Here, plaintiff cannot allege classic intangible injuries like "reputational harms, disclosure of private information,

and intrusion upon seclusion." *Id.* at 2204. The (utterly commonplace) professional contact information in the preview is concededly "accurat[e]" and not alleged to be sensitive or secret. ER-157 (¶28).

Indeed, plaintiff and her employer *themselves* publicly share the same information on the Internet. That fact is properly subject to judicial notice, as plaintiff conceded below. *See* ER-85; p. 16, *supra*. There is no plausible contrary argument.[9] And while plaintiff could costlessly remove her information from ZoomInfo's database, she has chosen not to. *See* ER-20-21; p. 12, *supra*.

Plaintiff points to common-law misappropriation, arguing that "mental injury" was traditionally recognized as grounds for suit. ER-69. By her own account, however, the relevant authority recognized only the mental harm that might result from "[k]nowledge of possible economic loss" or "harm to reputation." ER-69

[9] Plaintiff's publicly available LinkedIn profile and AFSCME employee webpage disclose the same kind of professional contact information as plaintiff's preview profile—indeed, they disclose even more. *See* ER-99-113. The district court's refusal to take judicial notice of that fact because it purportedly "exceed[ed] the permissible bounds under [Evidence] Rule 201," ER-17-19, was legal error and an abuse of discretion, *see United States v. Woods*, 335 F.3d 993, 1000-01 (9th Cir. 2003). Where, as here, a website's authenticity and accessibility are undisputed, Rule 201 allows judicial notice of the fact "'that [the] information [on the website] was publicly available.'" *United States ex rel. Hong v. Newport Sensors, Inc.*, 728 F. App'x 660, 661 (9th Cir. 2018); *see* ER-85 ("Plaintiff agrees that the existence of these publicly available websites is acceptable for the [c]ourt to judicially notice . . . ."). That is all ZoomInfo sought to show: that information on plaintiff's preview profile is publicly available elsewhere. *See* ER-19. ZoomInfo did not seek judicial notice of the information's truth, ER-24—because *the complaint itself* alleges that the information on plaintiff's preview profile is "accurat[e]," ER-157 (¶28).

(citing *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1006 n.12 (2008)). It cannot support a claim of concrete mental injury *independent* of economic or reputational harm.

Cognizable mental injury for common-law misappropriation, moreover, had to be severe: "in the nature of humiliation, embarrassment, and outrage." *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974); *see Fairfield v. Am. Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 86-87, 91 (1955) ("mental anguish"). The same is true of other common-law actions. Intentional infliction of emotional distress requires "extreme and outrageous conduct that exceed[s] the bounds of what is generally tolerated in a civilized society." *Braunling v. Countrywide Home Loans Inc.*, 220 F.3d 1154, 1158 (9th Cir. 2000). "[M]ere discomfort" does not "approach the level of extreme and outrageous conduct." *Id.* Negligent infliction of emotional distress similarly requires distress "'so severe that no reasonable person could be expected to endure it.'" *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1062 (9th Cir. 2003) (alteration omitted).

Plaintiff's assertions of worry and discomfort do not approach that mark. Although Article III "does not require an exact duplicate" of a traditionally recognized injury, the harm plaintiff asserts is not even a "close" analogue. *TransUnion*, 141 S. Ct. at 2204. A "bare allegation of anxiety is an intangible harm *without* 'a

close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit.'" *Garland*, 999 F.3d at 439 (quoting *Spokeo*, 578 U.S. at 341).

If plaintiff's assertions of mental harm sufficed, Article III's concreteness requirement would be a dead letter. The Supreme Court has made clear that a plaintiff cannot establish standing merely by alleging an injury "particularized" to him, such as an alleged violation of "'*his* statutory rights'" with respect to "'*his* . . . information.'" *Spokeo*, 578 U.S. at 339-40 (second emphasis added). The plaintiff must *also* show the alleged violation caused "'real,'" "concrete" harm. *Id.* at 340, 342. Legal violations that cause no harm—such as "dissemination of an incorrect zip code" in a credit report—thus cannot sustain standing. *Id.* at 342. Under the reasoning below, however, a plaintiff could circumvent that limitation simply by alleging that a violation made her "uncomfortable" and "worried." ER-163 (¶44); *see* ER-12. That would allow "virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any . . . law"—"flout[ing]" the constraints of Article III. *TransUnion*, 141 S. Ct. at 2206 & n.2.

3. *A Bare Statutory Violation Does Not Equal Concrete Injury*

The district court declined to address plaintiff's contention that "a bare procedural violation" of California's right-of-publicity statute "is sufficient to show a concrete injury." ER-13. The argument is squarely foreclosed by Supreme Court precedent holding that "'bare procedural violation[s], divorced from any concrete

harm,'" *do "not suffice* for Article III standing." *TransUnion*, 141 S. Ct. at 2213 (emphasis added). "[U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.* at 2205. Plaintiff thus must allege a concrete injury *beyond* a bare statutory violation. As discussed above, she has not.

B. Plaintiff Alleges No Actual or Imminent Injury

Plaintiff also fails the independent requirement that her alleged injury be "'actual or imminent.'" *Spokeo*, 578 U.S. at 339. Again, plaintiff does not contend she is injured by the mere inclusion of her professional contact information in ZoomInfo's directory or the existence of a preview profile. *See* ER-59; pp. 21-22, *supra*. She claims injury *only* from ZoomInfo's purported use of her name and persona "to advertise ZoomInfo subscriptions." ER-68; ER-150, ER-154, ER-163-164, ER-165, ER-166, ER-167-168 (¶¶2, 18, 43-44, 49, 56, 59, 63).

Consistent with the complaint, however, that supposed advertising would occur only in specific circumstances. A member of the public would have to search for plaintiff's professional contact information by entering her name in ZoomInfo's search bar or "kim carter martinez zoominfo" in a search engine. In response, ZoomInfo would offer—and the user would have to choose to view—a preview profile with some of plaintiff's professional contact information, alongside links

offering access to additional information through a trial or subscription. *See* ER-159-163 (¶¶30-38). The complaint does not allege that ever occurred. It alleges no facts showing that anyone (apart from plaintiff's attorneys) ever actually searched for plaintiff on ZoomInfo, much less viewed the preview profile links that plaintiff calls advertising. Absent actual use of her persona to advertise subscriptions, plaintiff cannot show that such use caused her an "actual" injury.[10]

Nor can plaintiff show "imminent" injury. A plaintiff cannot rest on "'[a]llegations of *possible* future injury'" or even an "'objectively reasonable likelihood'" of future injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013). The "'threatened injury must be *certainly impending* to constitute injury in fact.'" *Id.* at 409. The complaint pleads nothing showing that ZoomInfo will "imminently" or "certainly" use plaintiff's persona to "advertise" (even in the sense in which plaintiff uses that term). Again, any supposed "advertisements" would be available only to users who specifically "search for" plaintiff's information, and would be seen only by those who choose to view the ZoomInfo preview profile sent in response. ER-159 (¶31). The complaint does not allege that anyone will decide to take those steps,

[10] Insofar as plaintiff's attorneys—her agents—viewed the supposed advertisements, any injury is "self-inflicted" and cannot support standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013); *cf. Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780-81, 783 (9th Cir. 2018) (no actual injury based on "'unauthorized disclosures of information'" where defendant "disclose[d] [plaintiff's] information" only to plaintiff).

much less that such action is "certainly impending." A possibility that something *might* happen cannot support standing. That is especially true where, as here, that possibility "rest[s] on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414.

TransUnion is instructive. There, the plaintiffs complained that their credit reports mistakenly labeled them "'potential terrorist[s]'" but, for many of the plaintiffs, their credit reports had never been disclosed to third parties. 141 S. Ct. at 2209. The Supreme Court held that those plaintiffs lacked standing. The plaintiffs argued there was a "risk of dissemination to third parties" because "TransUnion could have divulged their misleading credit information to a third party at any moment." *Id.* at 2212. But the Court held that was "too speculative to support Article III standing" because "the plaintiffs did not demonstrate a sufficient likelihood that their individual credit information would be requested by third-party businesses and provided by TransUnion." *Id.*

Likewise here, plaintiff has not pleaded facts plausibly showing a sufficient likelihood that her professional contact information will be requested by third-party users and provided, along with supposed promotional materials, by ZoomInfo. It is *possible* that someone *might* search for and view her preview profile. But a mere possibility, or even an "'objectively reasonable likelihood,'" that someone would

search for her profile is insufficient—the threatened injury must be "'certainly impending.'" *Clapper*, 568 U.S. at 410. Plaintiff has not shown that.

Nor can plaintiff fill the gap by saying she is *presently* "worried and uncertain" about how her name and persona might be used *in the future*. ER-163-164 (¶44). That "is too speculative to qualify as an injury in fact because it is merely a fear of a future harm that is not 'certainly impending.'" *Garland*, 999 F.3d at 440.

II. THE COMPLAINT MUST BE DISMISSED UNDER CALIFORNIA'S ANTI-SLAPP STATUTE

To "'protect citizens in the exercise of their First Amendment constitutional rights of free speech,'" *Roe v. Halbig*, 29 Cal. App. 5th 286, 301 (2018), California's anti-SLAPP statute "'allow[s] for early dismissal of meritless [F]irst [A]mendment cases" that may have the effect of "chilling expression through costly, time-consuming litigation,'" *Herring Networks*, 8 F.4th at 1155. *See* Cal. Civ. Proc. Code §425.16. To achieve that goal, the statute is "construed broadly." §425.16(a). The statute applies whether or not a suit was "brought with the intention to chill the defendant's speech'" and whether or not "'any speech was actually chilled.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003).

The anti-SLAPP statute requires dismissal here. Plaintiff's suit targets speech—the provision of truthful information in response to a request—that the First Amendment fully protects. ZoomInfo provides a public directory of professional contact information. When a member of the public searches for information about

a professional in that directory, ZoomInfo returns useful information and advises how to obtain more. Like the white and yellow pages before them, ZoomInfo and other online directories contribute to everyday civic, social, and economic engagement by offering the public a convenient and comprehensive guide to the professionals who keep business, industry, and government running. "[T]he public is interested in and constitutionally entitled to know about things, people, and events that affect it." *Dora*, 15 Cal. App. 4th at 546.

Plaintiff's claims would make it nearly impossible to provide such resources. Her suit would impose monetary liability for providing truthful information in response to a search, because ZoomInfo *also* truthfully advises the viewer about the availability of access to the *rest* of ZoomInfo's directory. Plaintiff does not dispute that ZoomInfo has a First Amendment right to provide its directory, to respond to searches with relevant and truthful information, or to advise the public how to access the directory. But she would prohibit ZoomInfo from providing searchers with information about *what's in the directory* and offering access to it. That theory is irreconcilable with the First Amendment and California law alike. This suit does not seek to protect plaintiff's "right of publicity." It seeks to shut down the communication of *true, public information about a professional* and *speech about how to get that information*. That novel theory goes too far.

Standard of Review. This Court reviews *de novo* the denial of an anti-SLAPP motion, including "whether a plaintiff has met [her] burden 'to show a probability of success' on the merits." *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 951, 957 (9th Cir. 2013).

A. Plaintiff's Claims Arise from Protected Speech in Connection with Issues of Public Interest

Under California's anti-SLAPP law, a defendant may bring a "special motion to strike" a cause of action "arising from any act of [the defendant] in furtherance of the [defendant's] right of petition or free speech . . . in connection with a public issue." Cal. Civ. Proc. Code §425.16(b)(1). A claim that arises from protected speech must be dismissed unless "the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.* As explained in Sections II.A and II.B, the claims here unquestionably arise from ZoomInfo's protected speech in connection with issues of public interest. As explained in Section II.C, plaintiff has failed to show a probability of prevailing on those claims.

1. There can be no question this suit arises from acts "in furtherance of" ZoomInfo's "right of . . . free speech." Cal. Civ. Proc. Code §425.16(b)(1). Free speech broadly encompasses "any . . . writing made in a place open to the public or a public forum," as well as "any other conduct in furtherance of . . . the constitutional right of free speech." §425.16(e)(3), (4). Both categories apply here. Data sources and "Web sites accessible to the public," like ZoomInfo's directory and profiles, are

"'public forums' for purposes of the anti-SLAPP statute." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006). And providing the directory and information therein—including profiles—is unquestionably "conduct in furtherance" of ZoomInfo's free speech rights. Cal. Civ. Proc. Code §425.16(e)(4). "[D]irectories" providing "names, addresses, and phone numbers" for "businesses and professionals" are "entitled to the full protection of the First Amendment." *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 962 (9th Cir. 2012).

Those precedents make this an *a fortiori* case—and the contrary approach would have devastating First Amendment consequences. The complaint alleges that, when users ask for information by typing the name of a specific person into a search bar, ZoomInfo answers with relevant information and advises how to get more. That speech is clearly First Amendment-protected. *See Dex*, 696 F.3d at 962. The contrary view would shut down speech and the search for information. Individuals would be able to use a person's name to search for information. But no business would be able to respond using that person's name and telling the requester that it has information about that person available. It is impossible to offer business profile information without using the name of the person whose information is sought.

2. ZoomInfo's directory and profiles are also speech "in connection with a public issue" or "issue of public interest." Cal. Civ. Proc. Code §425.16(b)(1), (e)(4). That category is "construed broadly," §425.16(a), to encompass "*any issue*

in which the public is interested." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008); *see Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 n.3 (9th Cir. 2017). An "issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." *Nygard*, 159 Cal. App. 4th at 1042.

That capacious standard reflects the First Amendment principles the anti-SLAPP law protects. As the Supreme Court has explained, "matters of public interest" include any speech that "can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'" or that is "'a subject of general interest and of value and concern to the public.'" *Snyder v. Phelps*, 562 U.S. 443, 452-53 (2011). It does not matter if, in some eyes, particular speech's "contribution to public discourse may be negligible." *Id.* at 460. Speech concerns issues of public interest—and "'is entitled to special protection'"—so long as it "relates to broad issues of interest to society at large, rather than matters of 'purely private concern.'" *Id.* at 452, 454.

ZoomInfo's directory easily clears that bar. A digital descendant of traditional print directories, ZoomInfo's directory contributes to public discourse by collecting publicly available business contact information and news articles to create profiles for millions of professionals. Being able to search for, learn about, and find contact information for professionals at myriad businesses, government employers, unions,

and other workplaces is plainly an issue "in which the public takes an interest," *Nygard*, 159 Cal. App. 4th at 1042, and "'of value and concern to the public,'" *Snyder*, 562 U.S. at 452-53. Such a resource facilitates public knowledge and discussion about the professionals and organizations that touch virtually every corner of American public life, whether commercial, social, or political. "[T]he public is interested in and constitutionally entitled to know about things, people, and events that affect it." *Dora*, 15 Cal. App. 4th at 546.

It could hardly be otherwise. In "a society in which each individual has but limited time and resources," each of us necessarily looks to others "to bring to [us] in convenient form the facts" bearing on matters of public interest. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). To that end, some municipalities have *required* publication of directories with "business listings." *Dex*, 696 F.3d at 954. Technology has changed the means of obtaining such information, but not its importance. Where individuals once might have "turn[ed] to the phone book to find useful information" about businesses, professionals, and the goods and services they offer, people "now turn to the internet" and resources like ZoomInfo (or its competitors). *Dex*, 696 F.3d at 957. ZoomInfo's directory is, as a result, "'fairly considered as relating to any matter of political, social, or other concern to the community.'" *Snyder*, 562 U.S. at 452-53. It is not confined to "matters of 'purely private concern.'" *Id.* at 454.

Courts have readily concluded that similar directories and compilations qualify as speech on issues of public interest. In *Davis v. Avvo, Inc*., the court had "no difficulty" finding that "a website that provides profiles of many lawyers, doctors, and dentists" based on "information . . . gathered from publicly available material" was "'in connection with an issue of public concern'" because the website "provide[d] information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer." No. 11-CV-1571-RSM, 2012 WL 1067640, at *1, *3 (W.D. Wash. Mar. 28, 2012) (Washington anti-SLAPP law). In *Ellis v. Dun & Bradstreet*, the court held a website "in the business of compiling and distributing business information" protected under California's anti-SLAPP law. No. 18-CV-10077-MRW, 2019 WL 8017821, at *4 (C.D. Cal. Nov. 20, 2019). In *Vrdolyak v. Avvo, Inc.*, a "directory" of information about "professionals" "akin to the yellow pages" was declared "newsworthy information." 206 F. Supp. 3d 1384, 1388 (N.D. Ill. 2016) (Illinois law). Similar cases abound.[11] No less than those websites, ZoomInfo's directory of professional contact information and news contributes to ongoing public discussion on topics of widespread interest. It is protected under California's anti-SLAPP law.

[11] *See, e.g.*, *Exeltis USA Inc. v. First Databank, Inc*., No. 17-CV-04810-HSG, 2017 WL 6539909, at *11 (N.D. Cal. Dec. 21, 2017) (subscription database of information about pharmaceuticals); *Kronemyer v. Internet Movie Database Inc*., 150 Cal. App. 4th 941, 948 (2007) (movie credits database); *see also* pp. 52-59, *infra* (discussing public-interest exemption from liability).

B. The District Court's Contrary Rationales Are Unpersuasive

The district court did not deny that ZoomInfo's professional directory qualifies as speech in connection with issues of public interest. *See* ER-14 (recognizing "ZoomInfo may operate a database that might concern matters of general interest"). It nonetheless held the anti-SLAPP law did not apply because the "specific use of [plaintiff's] persona at issue in this case" was purportedly "commercial in nature and not protected speech." ER-14, ER-16. But even "'commercial speech' is entitled to the protection of the First Amendment." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). And the court erred regardless.

First, precedent forecloses treating the speech here as "commercial." Commercial speech is "'speech which does "*no more than* propose a commercial transaction."'" *Dex*, 696 F.3d at 957 (emphasis added). Applying that definition, this Court has held that a printed directory of business and professional listings is *not* commercial speech, even if it includes advertisements among its pages. *Id.* ZoomInfo's online directory of business and professional listings is no different. The directory and the profiles it provides cannot be dismissed as merely proposing a commercial transaction. Even a cursory review of the preview profile that would be returned in response to a search for plaintiff's name makes clear that the opposite is true. The profile provides accurate, factual information about plaintiff's position as Political and Legislative Director for AFSCME, contact information including

AFSCME's address and telephone number, and "Recent News About" plaintiff in her role at the union. ER-114-117; ER-157 (¶28).

While the preview *also* tells the viewer that one can access additional information through a trial or subscription (for free or a fee), that is not *all* it does. A user seeking to learn about the people responsible for AFSCME's political activities could identify plaintiff as one of those people and find relevant information and news just by viewing her preview profile, without signing up for anything. The preview cannot be said to "do no more than" propose a commercial transaction.[12]

Even the preview's offer of additional information cannot be dismissed as "commercial" "advertisement[s]." ER-4. The law is clear that "truthful advertisements" that "promote protected speech" are "noncommercial" speech and entitled to the same protection as the underlying expressive work. *Charles v. City of Los Angeles*, 697 F.3d 1146, 1155-56 (9th Cir. 2012); *see* pp. 54-59, *infra*. That makes sense: If an author has a First Amendment right to publish a book, she also has a right to advertise the availability of that book and its contents. So too for ZoomInfo. Because ZoomInfo's professional directory is First Amendment-protected speech—

[12] The complaint's assertion that "ZoomInfo's sole purpose in using [plaintiff's] name, personal information, and persona on its website is to solicit subscriptions to zoominfo.com," ER-163 (¶39), is not only a "bald allegatio[n]" entitled to no weight, *Iqbal*, 556 U.S. at 681; it is also belied by the preview profile incorporated into the complaint.

just like its print-era forebears—communications that promote that protected speech and advise of its contents are entitled to the same First Amendment protections.

Second, a financial or "commercial" *motive* does not render speech ineligible for anti-SLAPP protection. The district court opined that "ZoomInfo's use of the persona appears to be to generate revenue, rather than general public interest." ER-17. But the same could be said of countless works that undoubtedly qualify for anti-SLAPP protection. If "the prospect of some financial benefit from a publication" made the work ineligible for protection, that would strip protection from "virtually all books, magazines, newspapers, and news broadcasts." *Kronemyer*, 150 Cal. App. 4th at 949. That is not the law. Courts have found that the anti-SLAPP statute's protection extends to advertising. *See Cammarata v. Bright Imperial Ltd*., No. B218226, 2011 WL 227943, at *5 (Cal. App. Jan. 26, 2011), *as modified on denial of reh'g* (Feb. 24, 2011) (unpublished) (applying anti-SLAPP statute to adult video website advertising); pp. 54-59, *infra* (advertising for protected work receives same protection as underlying work).[13] The question is simply whether speech is "in con-

[13] *Cf. Dex*, 696 F.3d at 960 ("economic motive in itself is insufficient to characterize a publication as commercial"); *Carafano v. Metrosplash.com Inc*., 207 F. Supp. 2d 1055, 1074 (C.D. Cal. 2002) ("The fact that [an interactive internet service] makes a profit from selling memberships does not transform the speech at issue into commercial speech."), *aff'd on other grounds*, 339 F.3d 1119 (9th Cir. 2003); *Aldrin v. Topps Co.*, No. 10-CV-09939-DDP, 2011 WL 4500013, at *2 (C.D. Cal. Sept. 27, 2011) ("The mere fact that a product is sold for a profit does not render the product commercial speech" or exclude it from anti-SLAPP protection).

nection with . . . an issue of public interest," Cal. Civ. Proc. Code § 425.16(e)(3)—not whether the speaker acted *pro bono*.

Third, insofar as the district court claimed support from the non-exhaustive factors listed in *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *see* ER-17, it erred. The district court never described those factors. They do not ask whether speech is "commercial." They seek to "distinguis[h] a public interest from a private one" by asking whether speech involves "something of concern to a substantial number of people"; whether there is "some degree of closeness between the challenged statements and the asserted public interest"; and whether the speaker's conduct is a "mere effort to gather ammunition for another round of private controversy." *Piping Rock*, 946 F. Supp. 2d at 968. They also caution that "'public interest' does not equate with mere curiosity," and that "a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Id.*

ZoomInfo's directory and profiles fall decisively on the "public interest" side of each of those factors. A convenient source of professional contact information is of broad interest to a substantial number of people. *See* pp. 41-44, *supra*. The challenged speech directly concerns ZoomInfo's provision of that resource to the public. ZoomInfo is not gathering ammunition for some private controversy. Nor is it catering to "mere curiosity" or airing "otherwise private information." It pro-

vides basic information and news concerning people's *professional*, public-facing lives. That is not "private information"—indeed, such information is already publicly available elsewhere. *See* p. 32 & n.9, *supra*.

Fourth, the district court erred in divorcing "the specific use of [plaintiff's] persona at issue in this case"—her individual preview profile—from the directory in which it appears. ER-14. Like a traditional phone directory, ZoomInfo's directory contributes to public knowledge by providing a *compendium* of professional contact information. It makes no sense to assess the work's connection to the public interest by atomizing it into individual entries and then deciding whether each entry, viewed in isolation, would spark sufficient public interest. The work's connection to public issues comes, in no small part, from the *collection* of information itself. *See Cox*, 420 U.S. at 491.

A contrary rule would wreak havoc. No one would be able to provide a directory or compendium of professional information if, before conveying some of that information in response to a request, they had to stop, examine the information and the individual at issue, and make a judgment whether the information by itself has a sufficient connection to the public interest. Any supposed error for any individual request could result in lawsuits without the protection of the anti-SLAPP statute. The result would be precisely the chill on free-speech rights the anti-SLAPP law is meant to foreclose. The statute should not be read to impose that burden—

particularly given its mandate that its protections "shall be construed broadly" to secure First Amendment freedoms. Cal. Civ. Proc. Code § 425.16(a).

Here, moreover, plaintiff complains *not* merely about her individual preview profile, but about the existence of links in that profile *offering access to ZoomInfo's full directory*. *See* ER-151-152, ER-160-162 (¶¶4-8, 34-37). Whether her claims challenging those links "aris[e] from" speech "in connection with a public issue," Cal. Civ. Proc. Code § 425.16(b)(1), can be assessed only by considering the ZoomInfo directory that the links themselves identify. *Cf. Snyder*, 562 U.S. at 454 (finding speech "spoke to broader public issues" by considering its "overall thrust"). Because plaintiff seeks to shut down speech notifying the public of the ZoomInfo directory and its contents, any evaluation of the "public interest" must take into account the public's interest in knowing about such a directory.

Fifth, even if one were to look only at plaintiff's preview profile (and ignore the challenged reference to the full directory), it still qualifies as speech in connection with a public issue. The availability of information about professionals is of public interest. And *plaintiff's* preview profile is unquestionably on the public-interest side of any line. Plaintiff is a political director for a major public-employee union, AFSCME. The preview profile accurately informs users that she is "Political and Legislative Director at The AFSCME," and provides links to "Recent News About" plaintiff in that role, including from AFSCME itself. ER-157 (¶28); ER-

114-117; *see* pp. 6-9, *supra*. A union's political and legislative initiatives are plainly issues of public interest. The Supreme Court has held that the activities of public-employee unions—especially a "union's political and ideological projects"—are "matters of substantial public concern." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460-61, 2474-76 (2018). Congress has found the public interest in union activities so significant as to declare that union employees' names and salaries "shall be public information." 29 U.S.C. §435(a); *see* §431(b)(3); *see* pp. 6 & nn.2-3, 9-10 & n.4, *supra* (discussing AFSCME disclosures, including for plaintiff). Speech that identifies a union's Political and Legislative Director, provides relevant professional contact information, and links to news about her role plainly contributes to public discussion of those issues.

* * *

No matter how one slices it, ZoomInfo's speech has the requisite connection to an "issue of public interest." Cal. Civ. Proc. Code §425.16(e)(4). The *directory as a whole* provides a valuable means of finding contact information for the professionals who shape our Nation's economic, social, and political life and the issues that define it. Plaintiff's *individual preview profile* concerns a person involved in a particular issue of public interest. And the *links* on that preview profile—offering access to the full directory—tell people how to get information of public interest. Plaintiff's claims are accordingly subject to California's anti-SLAPP law.

C. Plaintiff Has Not Shown a Probability of Prevailing on the Merits

Once a defendant "'make[s] an initial *prima facie* showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of . . . free speech'"—as ZoomInfo does above—"'the burden shifts.'" *Vess*, 317 F.3d at 1110; *see* Cal. Civ. Proc. Code §425.16(b)(1). At that point, "'the plaintiff [must] demonstrate a probability of prevailing on the challenged claims.'" *Vess*, 317 F.3d at 1110. Where (as here) the claims are challenged on the pleadings, that question is "'treated in the same manner as a motion [to dismiss] under Rule 12(b)(6).'" *Herring*, 8 F.4th at 1156. A plaintiff cannot show a probability of success—and her suit must be dismissed—if she "'presents an insufficient legal basis for the claims.'" *Id.* at 1155. That is precisely the case here.

1. *ZoomInfo's First Amendment-Protected Speech Cannot Result in Liability for Misappropriation*

"Publication of matters in the public interest, which rests on the right of the public to know, and the freedom of the press to tell it, cannot ordinarily be actionable." *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 421 (1983). Both "common law" and "statutory" California right-of-publicity claims "specifically exemp[t] from liability the use of a name or likeness in connection with the reporting of a matter in the public interest." *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 793 (1995). Use of a plaintiff's name or likeness "'in connection with any news, *public affairs*, or sports broadcast or account'" is immune under

§3344(d). *New Kids on the Block v. News America Publ'g, Inc*., 971 F.2d 302, 309 (9th Cir. 1992) (quoting Cal. Civ. Code §3344(d)) (emphasis added). Similar immunity applies to common-law claims. *See Eastwood*, 149 Cal. App. 3d at 421.

That immunity is grounded in "the need to ensure that First Amendment-protected expression is not unduly chilled by the threat of tort actions that would otherwise prevent the truthful promotion of protected expressive works." *Charles*, 697 F.3d at 1154. The immunity also sweeps more broadly than the First Amendment itself. The exception "is designed to *avoid* First Amendment questions in the area of misappropriation by providing *extra breathing space* for the use of a person's name in connection with *matters of public interest*." *New Kids*, 971 F.2d at 310 n.10 (emphasis added).

For the reasons above, ZoomInfo's directory is entitled to full First Amendment protection and involves speech on issues of public interest. *See* pp. 40-44, *supra*. That both triggers anti-SLAPP protections *and* forecloses plaintiff's claims on the merits. Courts have "broadly interpreted the term 'public affairs'" to encompass "matters of public interest," including "'things that would not necessarily be considered news.'" *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 416 (2001). The exemption encompasses, for example, "making historical facts available to the public through . . . Web sites." *Id.* at 411. So long as "the purpose is 'informative or cultural' the use is immune." *New Kids on the Block v. News*

America Publ'g, Inc., 745 F. Supp. 1540, 1542, 1546 (C.D. Cal. 1990) (finding 900-number poll asking callers "to name the sexiest New Kid [on the Block]" immune because it "gather[ed] information for dissemination to the public"), *aff'd*, 971 F.2d 302; *see also Gangland Prods.*, 730 F.3d at 961. The speech challenged here is factually informative and concerns matters of public interest. *See* pp. 40-44, *supra*. Given that paper directories compiling information are First Amendment-protected, it is hard to see how ZoomInfo's online directory should be treated differently. *See Dex*, 696 F.3d at 962. Providing accurate information in response to requests, together with information about how users can get more, is unquestionably protected, and immune from liability for right-of-publicity claims, as well.

That plaintiff purports to challenge "advertisements" for ZoomInfo's directory does not change the result. Under both the First Amendment and § 3344(d), "protection from tort liability" extends "to advertisements for expressive works so as to prevent tort actions from choking the truthful promotion of protected speech." *Charles*, 697 F.3d at 1154 (citing *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 873 (1979) (Bird, C.J., concurring)). Absent that rule, publishing First Amendment-protected works would be protected, but authors would not be free to tell the public about how to get the works or advertise their content. That would render the protections meaningless. The right to speak must encompass the right to encourage others to read or listen. Courts thus routinely hold that California's right-

of-publicity law does not allow liability for truthful speech that uses a person's name or likeness to promote a protected work in which that person's name or likeness appears.[14] Liability is permissible only where the promotion contains some falsehood, such as a misrepresentation about the underlying work or false claim of endorsement,[15] or concerns an unrelated product.[16]

This Court's decision in *Cher v. Forum International, Ltd*., 692 F.2d 634 (9th Cir. 1982), is illustrative. There, the entertainer Cher had given an interview to a reporter on the understanding that it would run in *Us* magazine. When *Us* did not publish the interview, the reporter sold it to other magazines, *Star* and *Forum*. Cher did "not allege that the published text of the interview was false or defamatory," or

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[14] *See, e.g.*, *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982); *Montana*, 34 Cal. App. 4th at 797; *Guglielmi*, 25 Cal. 3d at 872 (Bird, C.J., concurring).

[15] *See, e.g.*, *Cher*, 692 F.2d at 639-40 (advertisement misrepresented underlying work); *Eastwood*, 149 Cal. App. 3d at 420 (advertisement and underlying work false); *Solano v. Playgirl, Inc.,* 292 F.3d 1078, 1080-81, 1089 (9th Cir. 2002) (promotion falsely implied endorsement and misrepresented underlying work).

[16] *See, e.g.*, *Abdul-Jabbar v. Gen. Motors Corp*., 85 F.3d 407, 416 (9th Cir. 1996) (basketball player's identity used to promote car); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir. 2001) (surfers' images used to sell clothing); *Newcombe v. Adolf Coors Co*., 157 F.3d 686, 693 (9th Cir. 1998) (baseball player's likeness used to sell beer); *Fraley*, 830 F. Supp. 2d at 804 (Facebook users' "likes" used to advertise third-party products); *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1099 (E.D. Cal. 2009) (pilot's name used to promote "unrelated wireless services"); *see generally Gionfriddo*, 94 Cal. App. 4th at 413-14 ("A review of the cases finding that commercial speech violates the right of publicity strongly suggests that advertisements are actionable when the plaintiff's identity is used, without consent, to promote an *unrelated* product . . . . A celebrity's likeness may be used, however, to advertise a *related* product.").

that "private facts were published without her consent." *Id.* at 637. Instead, she argued that the magazines had violated her right of publicity by using her name in "headlines, cover promotions and advertising in connection with the interview." *Id.* This Court rejected her claims insofar as the defendants had truthfully used her "name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication," including "subscription advertising." *Id.* at 639. Liability could be imposed, the Court held, only to the extent that the advertising contained an actionable falsehood, such as a false claim of endorsement or a misrepresentation of the underlying work (there, *Forum*'s false claim that "Cher 'tells *Forum*' things that she 'would never tell *Us*' "). *Id.*

Those principles foreclose plaintiff's claims here. Plaintiff does not challenge ZoomInfo's right to publish the underlying work here, its directory. Plaintiff likewise does not challenge ZoomInfo's right to include her professional contact information in the directory, or allege that the directory or her preview profile contains false information or discloses otherwise private facts. She complains only that ZoomInfo has supposedly used her name to "advertise" subscriptions to a directory in which she legitimately appears. *See* ER-61; ER-151 (¶6). But that supposed "advertising" responds to an inquiry seeking professional information about plaintiff by correctly stating that the directory contains more professional information about plaintiff. Just as the defendants in *Cher* were permitted to employ

Cher's name in advertising their protected publication of an interview with her, ZoomInfo may respond to inquiries about plaintiff by disclosing that its directory contains professional information about her. That is true even if the "advertising" invites potential customers to purchase a "subscription" that covers more than just information about the plaintiff. *Cher*, 692 F.2d at 639; ER-151-152 (¶¶6-7); *see Montana*, 34 Cal. App. 4th at 796 (no liability for posters that reproduced newspaper pages with plaintiff's likeness "'as an advertisement for the periodical itself'").

If anything, this is an easier case than *Cher*. ZoomInfo does not use plaintiff's name or persona in conventional advertising. It does not publicize her name to the world; put it on magazine covers, billboards, or mailings; or post it in well-trod locations. ZoomInfo simply informs users *who specifically search for plaintiff's professional information* that they can obtain additional information by subscribing to the directory (or signing up for a free trial). Even if that benign exchange could be considered "advertising," it cannot be said to appropriate plaintiff's identity. It just tells an interested person about the content of a First Amendment-protected compilation. Directory assistance does not appropriate a person's identity by confirming, in response to a caller's inquiry, that it has contact information for that person. *See* pp. 22-23, *supra*. The result is no different when functionally the same exchange—a request for information and a response—occurs through ZoomInfo's website.

To reach its contrary conclusion, the district court relied on inapposite authority. In declaring "the Section 3344(d) carveout" inapplicable, it invoked *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996). ER-14.[17] That case, however, involved an advertisement for an *unrelated product*: An automaker used a basketball player's achievements (as a three-time March Madness MVP) to promote its car (a three-time Consumer's Digest Best Buy). *Abdul-Jabbar*, 85 F.3d at 409. Here, by contrast, the supposed advertisements promote a protected work—ZoomInfo's directory—*that includes information about plaintiff*. Insofar as plaintiff's name is used, it is to identify "a *related* product" that concerns plaintiff herself. *Gionfriddo*, 94 Cal. App. 4th at 413-14 (distinguishing *Abdul-Jabbar* on that basis).

That is not a basis for liability. Even if "advertisements are actionable when the plaintiff's identity is used, without consent, to promote an *unrelated* product," use of a person's identity "to advertise a *related* product" is not actionable. *Gionfriddo*, 94 Cal. App. 4th at 413-14 (surveying cases); *see* p. 55, n.16, *supra*. As this Court has explained, neither the First Amendment nor California law permits liability for "advertising which is merely an adjunct of the protected publication and promotes only the protected publication." *Cher*, 692 F.2d at 639. That principle dooms plaintiff's claims. "Since the use of [plaintiff's] name and likeness in the

[17] The court also cited *Fraley*, 830 F. Supp. 2d at 805, which applied *Abdul-Jabbar*.

[directory] was not an actionable infringement of [her] right of publicity, the use of [her] identity in advertisements for the [directory] is similarly not actionable." *Guglielmi*, 25 Cal. 3d at 873 (Bird, C.J., concurring).[18]

A different conclusion "would be illogical." *Guglielmi*, 25 Cal. 3d at 873 (Bird, C.J., concurring). ZoomInfo would have the indisputable right to offer access to its directory—but it would be "effectively preclude[d from engaging in] advance discussion or promotion of [its] lawful enterprise" by telling potential customers *what's in the directory*. *Id.* Such a rule would raise "[s]erious First Amendment concerns," as creators of protected works "would be blocked from advertising their contents for fear of tort liability." *Charles*, 697 F.3d at 1154. That is not the law. The same protection that attaches to ZoomInfo's professional directory "extend[s]" to "advertisements for [that] expressive wor[k]" as well. *Id.*; *see Montana*, 34 Cal. App. 4th at 797. Even if the speech plaintiff challenges could be called "advertisements," her challenge fails.

2. *Plaintiff Has Not Shown Actionable Injury*

Plaintiff likewise is unlikely to prevail because she has not shown actionable injury. "Resulting injury is the *sine qua non* of a cause of action for misappropriation of name." *Slivinsky*, 221 Cal. App. 3d at 807. As discussed above, plaintiff has not

[18] "Chief Justice Bird's views in *Guglielmi* held the support of the majority of the [California Supreme C]ourt." *Gionfriddo*, 94 Cal. App. 4th at 411 n.8.

alleged injury sufficient for Article III standing. *See* pp. 21-38, *supra*. Even if she could clear the bare constitutional minimum, her asserted injuries would still be inadequate on the merits.

The complaint does not plead facts plausibly establishing that the supposed "advertisements"—links that would appear only if someone were to search for information on plaintiff and then view plaintiff's preview profile—were ever displayed to *anyone*. *See* pp. 35-37, *supra*. As a result, plaintiff cannot show "'use'" or "'appropriation'" of her name, let alone "'resulting injury.'" *Sarver*, 813 F.3d at 903. Even if someone did search plaintiff's name and was shown the preview profile together with links to additional resources, the complaint would not establish that any cognizable economic injury resulted. There are no facts plausibly showing that the value of plaintiff's name was exploited or diminished. While plaintiff asserts that ZoomInfo profited from the purported use, that cannot be true absent *some* allegation that her information was viewed *and* a sale ensued as a result. She pleads no facts plausibly supporting any such conclusion—or that she would be entitled to share in any profits regardless. *See* pp. 28-30, *supra*.

Plaintiff's asserted mental injury likewise does not constitute the "mental anguish," "humiliation, embarrassment, and outrage" required to sustain her claims on the merits (or under Article III). *Fairfield*, 138 Cal. App. 2d at 86-87, 91; *Mot-*

schenbacher, 498 F.2d at 824; *see* pp. 30-34, *supra*. For that reason, too, she cannot show a probability of prevailing on the merits.

CONCLUSION

The Court should reverse the denial of ZoomInfo's anti-SLAPP motion and remand with instructions to dismiss either for lack of jurisdiction or on the merits.

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Respectfully submitted,

s/ Shon Morgan

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Statutory Addendum

STATUTORY PROVISIONS

Cal. Civ. Proc. Code § 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 the plaintiff 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 that defendant's 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 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 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 Section 7923.115, 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 email 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.

Cal. Civ. Code §3344

(a) Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-35305

I am the attorney or self-represented party.

This brief contains 13,974 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that, on August 19, 2022, I caused the foregoing document to be filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

August 19, 2022

s/ Shon Morgan
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