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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HERRING NETWORKS, INC., a California corporation,

Plaintiff,

v.

AT&T, INC., a Delaware corporation; AT&T SERVICES, INC., a Delaware corporation; DIRECTV, LLC, a California limited liability company; and WILLIAM KENNARD, an individual,

Defendants.

CASE NO. 37-2022-00008623-CU-BC-CTL

REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT (CODE CIV. PROC., § 425.16) ON BEHALF OF AT&T INC. (SPECIALLY APPEARING), AT&T SERVICES, INC., AND WILLIAM KENNARD (SPECIALLY APPEARING)

ASSIGNED FOR ALL PURPOSES TO:
HON. JOHN S. MEYER
DEPARTMENT C-64

HEARING:
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INTRODUCTION

Herring's opposition cannot overcome the straightforward application of the anti-SLAPP statute set forth in Defendants' motion. Herring's claims arise from AT&T Inc., AT&T Services, Inc. (together "AT&T"), and William Kennard's protected speech activity, and Herring cannot show a probability of prevailing on the merits of those claims. The claims may be *pleaded* as breaches of an agreement, but the *conduct* that Herring alleges is Defendants' exercise of political speech and conduct, which is the heart of what the anti-SLAPP statute is designed to protect.

Herring's opposition brief nowhere cites or quotes the anti-SLAPP statute; fails to mention, much less engage with or distinguish, a single case cited by Defendants; includes a mere *two-page* "Argument" section that cites a grand total of four cases; and does not directly respond to Defendants' arguments regarding the allegations in Herring's Complaint. Herring's opposition distorts the relevant case law, presents new allegations that it says are not protected activity, and asserts (without argument) that the allegations of protected activity identified by Defendants are somehow "incidental" to Herring's claims. None of these arguments undermine the clear showing in Defendants' motion that Herring's claims arise from protected activity and thus satisfy prong one of the anti-SLAPP statute.

First, Herring's claims arise from protected activity.

- Herring's argument that the "principal thrust" of its claims is breach of contract and tortious conduct, and not protected activity, improperly focuses on the "label" of the claim, rather than the underlying conduct that forms the basis of the claim.
- Herring's reliance on new allegations in response to Defendants' anti-SLAPP motion violates the well-established principle that a plaintiff may not avoid an anti-SLAPP challenge by asserting new facts not pleaded in the complaint.
- Herring's contention that the anti-SLAPP statute covers only "public" communications, and so does not apply to the "private" communications it newly alleges in its Opposition, is wrong: the statue "governs even private communications, so long as they concern a public issue." (*Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456, 1467.)

Second, Herring cannot establish a probability of success on the merits.

- Herring cannot substantiate a breach of contract claim because AT&T Inc. was not a party to the Affiliation Agreement, and Herring fails to plead facts showing that Defendants breached any provision of the agreement. The related claim for breach of the implied covenant fails because Herring improperly bases this claim on the terms of a *separate* agreement.
- Herring's claim for intentional interference with prospective economic advantage fails because Herring did not (and cannot) establish a reasonable probability of future economic benefit.

- Herring's UCL claims fail for lack of a predicate violation, and because of Herring's undisputed failure to show that there are no adequate legal remedies available.

ARGUMENT

I. Defendants Satisfy Prong One of the Anti-SLAPP Analysis Because Herring's Claims Arise from Protected Activity.

Defendants' anti-SLAPP motion made a "threshold showing" that Herring's claims arise from protected activity—that is, activity in furtherance of Defendant's free speech rights (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 936; see Mot. 13-19)—and nothing in Herring's opposition undermines that showing.

Herring's claims for breach of contract (Counts 1 and 2) are based on AT&T's alleged statements to "Reuters, Bloomberg News, and other media outlets" (Compl. ¶ 101; Mot. 13-14), statements by CNN news anchors and commentators discussing the purported public harm caused by OAN (Compl. ¶¶ 74-77, 80-82, 106; Opp. 13), and statements by John Oliver on HBO about the dangers of OAN's conspiracy-laden reporting (Compl. ¶¶ 78-79, 82; Opp. 13). Herring does not deny that these statements were (i) made in a "public forum" (namely, in online and on-air news media (Mot. 14)) and (ii) made "in connection with an issue of public interest" (namely, the debate over whether AT&T's alleged relationship with OAN was contributing to the harm many groups believed OAN was inflicting on American democracy (Mot. 15-16; Compl. ¶¶ 50-61, 74-81)). These statements thus fall comfortably within the broad categories of speech protected under the anti-SLAPP law. (Code Civ. Proc., § 425.16(e)(3) [anti-SLAPP statute protects "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"].)

The same is true with respect to Herring's claims for breach of the implied covenant of good faith and fair dealing (Count 3), intentional interference with prospective economic advantage (Count 4), and violations of the UCL (Counts 5 and 6). These claims are based on allegations that AT&T and Kennard—in response to public criticism of AT&T's affiliation with OAN's "toxic" (Compl. ¶ 79), "far-right" conspiracy views (*id.* ¶¶ 50, 56)—engaged in speech and conduct inducing DIRECTV not to renew its agreement to carry OAN. All of this conduct is protected under the anti-SLAPP statute's catch-all provision, which applies to "conduct in furtherance of the exercise of the … constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16(e)(4).)

Herring responds to the foregoing with four main arguments, but each fails, as shown below.

A. Herring Cannot Hide Behind the Label of the Causes of Action It Pleaded.

Herring's primary argument on the first prong of the anti-SLAPP statute is that the "principal thrust" of Herring's claims is not protected speech activity, but rather Defendants' breaches of the Affiliation Agreement, and other "tortious conduct." (See Opp. 1, 13, 15.) But as Defendants explained in their motion (Mot. 12), the law is clear that the *cause of action* is not determinative under prong one; what matters is whether the *underlying conduct* being challenged is protected activity. Herring does not even dispute that the underlying conduct is protected; it argues only that because that conduct constitutes a breach of contract, Defendants cannot satisfy the first prong. Herring is wrong.

California courts assess the "principal thrust" of a cause of action by "disregard[ing] the labeling of the claim" and identifying the "injury-producing *conduct* that provides the *foundation* for the claim." (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50, italics added.) As the California Supreme Court recently reiterated, it is not the name of the claim that matters, but rather "what *actions* by the defendant … form the basis for liability." (*Bonni v. St. Joseph Health Sys.* (2021) 11 Cal.5th 995, 1009, italics added.) Courts examine the alleged *conduct* that underlies the claim, not the form of the cause of action.

For example, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90, the plaintiffs tried to defeat an anti-SLAPP challenge by arguing that the complaint was only "a garden variety breach of contract and fraud claim" not covered by the anti-SLAPP law. The California Supreme Court rejected the argument, holding that the specific *allegations* on which the claims were based were protected activity. The Court explained that merely characterizing a claim as a breach of contract claim did not address the relevant question—that is, whether "the defendant's *activity* that gives rise to his or her asserted liability" constitutes protected speech activity. (*Id.* at p. 92.) Under this approach, the Court said it was clear that defendant met its threshold burden of demonstrating that plaintiffs' "garden variety" breach of contract claim was based on speech activity protected by the anti-SLAPP statute. (*Id.* at pp. 89-90, 92.)

So too here. Defendants in their motion properly identified the underlying allegations that form the basis of Herring's claims (see Mot. 9-13, 17), and then analyzed in detail how those underlying acts "are protected under a statutorily defined category of protected activity" (*Bonni*, *supra*, 11 Cal.5th at p. 1009; Mot. 13-19).

Herring does not meaningfully respond. It focuses myopically on the "labeling of the claim" without ever analyzing the "injury-producing conduct that provides the foundation for the claim[s]." (*Collier*, *supra*, 240 Cal.App.4th at p. 50.) That is not the relevant inquiry, so Herring's misguided "principal thrust" arguments do not at all undermine Defendants' showing in their motion.

B. Herring Cannot Rely on New Allegations Not Pleaded in the Complaint.

Herring also seeks to expand its claims beyond what it alleged in its Complaint, and presents new allegations that it contends do not implicate the anti-SLAPP statute. (Opp. 1-2, 14.) Specifically, Herring now alleges that: (1) Kennard breached the Affiliation Agreement "in private emails with individual third parties" and "internal emails to key executives at AT&T" (*id.* at pp. 1-2, 6-7, 14); (2) AT&T breached the Affiliation Agreement by meeting with the NAACP and encouraging unnamed groups to raise their concerns about OAN with DIRECTV (*id.* at pp. 2, 8-9, 11); and (3) AT&T breached the Affiliation Agreement when its CEO emailed DIRECTV's CEO encouraging him to "indulge" the requests of "[s]everal special interest groups" to discuss OAN (*id.* at pp. 2, 11).

None of these allegations appear in the Complaint. Herring acknowledges in its concurrently filed opposition to AT&T's demurrer that these are *brand new allegations*. (Opp. to AT&T Demurrer 11 ["Herring can amend the Complaint to add additional instances of violations of the non-disparagement provision, which are set forth in Herring's pending Opposition to AT&T's Anti-SLAPP Motion."].)

But courts have held repeatedly that a plaintiff may not avoid operation of the anti-SLAPP statute by "broaden[ing]" its claims "to include [additional] allegations" in response to the motion. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 359; *Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 897 ["Courts have routinely concluded that plaintiffs may not be permitted to evade the intent of the anti-SLAPP statute by amendment once faced with an anti-SLAPP motion."]; cf. *Bel Air Internet*, *supra*, 20 Cal.App.5th at p. 944 [plaintiff may not "re-characterize [its] own allegations to avoid an anti-SLAPP challenge"].) In *Medical Marijuana*, the plaintiffs responded to an anti-SLAPP motion with an opposition that cited new allegations not mentioned in their complaint. (46 Cal.App.5th at pp. 881, 892.) The court rejected the maneuver, emphasizing "the issues to be determined in an anti-SLAPP motion are framed by the pleadings" and the court would not "redraft[]" the complaint "based on allegations of activities that plaintiffs simply have not identified." (*Id.* at p. 883, italics omitted.) This Court should reject

Herring's attempt to follow the same 'amendment by opposition' approach here. (*Ibid.*; see also *Hansen v. Cal. Dept. of Corr. & Rehab.* (2008) 171 Cal.App.4th 1537, 1547 ["A plaintiff cannot avoid a SLAPP motion by amending the complaint."].)

C. Herring's New Allegations Constitute Protected Activity Because They Concern Private Communications Concerning Public Issues.

Even if it were proper to consider the allegations Herring raises for the first time in its Opposition (it is not), Herring's rationale for why these new allegations are not protected activity is simply wrong.

Herring contends that its new allegations—as well as an earlier pleaded allegation that AT&T told Herring it would "take the lead" responding to public criticism—do not describe protected activity because they concern "private" speech and conduct, rather than the "public communications which implicate the anti-SLAPP statute." (Opp. 2-3, 14.) But the touchstone under the relevant provision of the anti-SLAPP law (Section 425.16(e)(4)) is not whether the communications at issue were made in private or public; rather, the question is whether the communications "concern[] issues of public interest." (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546; *Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456, 1467 ["Section 425.16 … governs even private communications, so long as they concern a public issue."].) Herring's new allegations easily satisfy that standard.

Kennard's "private emails with individual third parties" and "internal emails to key executives at AT&T" regarding OAN (Opp. 1-2); AT&T's "private meeting with the NAACP" (*id.* at p. 2); and the other private communications cited by Herring were *all* part of Defendants' participation in the public controversy surrounding AT&T's role in supporting OAN, and the implications of OAN's reporting for American democracy. For example, in the "private emails" cited by Herring, Kennard wrote to push back against criticism from a prominent political action group (The Lincoln Project) and government watchdog organization (Common Cause) regarding AT&T funding OAN's "radical right" views (PMK Ex. 10) and its "spread of harmful lies about the 2020 election" (PMK Ex. 8; see also PMK Ex. 4). These responses were part of the same public debate that emerged after the October 2021 Reuters story broke. In fact, Kennard used the *same talking points* in these "private" emails that AT&T used publicly in response to the Reuters article. (Compare Compl. ¶ 51, with PMK Ex. 8 and Ex. 10.) Similarly, AT&T's purportedly "private" meeting with the NAACP (which was announced publicly) focused on that group's charge that

AT&T's support for OAN was causing "irreparable damage to our democracy," and that AT&T should "drop OAN immediately." (Compl. ¶¶ 54, 58.) Put simply, these so-called private communications were inextricably linked to the "intense public debate and scrutiny" of OAN and AT&T's role in supporting that channel—clearly issues of widespread public interest. (Mot. 13; *id.* at pp. 15-16.)

Because these private and public statements were all made in connection with the *public controversy* surrounding OAN, they are protected speech activity under the anti-SLAPP statute. (See *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 151 [Section 425.16(e)(4) satisfied when a defendant—through "private speech or conduct"—"participated in, or furthered, the discourse that makes an issue one of public interest."]; *Ojjeh v. Brown* (2019) 43 Cal.App.5th 1027, 1044 [private activity protected under anti-SLAPP law when it "directly related to the asserted issue of public interest and [was] undertaken to contribute toward the public discourse on the matter"].) *Ruiz v. Harbor View Community Association* (2005) 134 Cal.App.4th 1456 is instructive. There, the court considered whether two "private letters"—which it said were "similar to private conversations"—concerned an issue of public interest such that they were protected under the anti-SLAPP statute. (*Id.* at p. 1467.) The court found that the letters were protected because they were "part of the ongoing discussion" over a public dispute about a community association's architectural guidelines, and "contributed to the public debate" on the issues presented by that dispute. (*Id.* at p. 1469.) So too here: the private communications alleged by Herring were all "part of the ongoing discussion" regarding AT&T's relationship with OAN and "contributed to the public debate" on that issue.

Herring relies on *California Bank Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, but that case is inapposite because the private speech there, unlike here, was not related to a broader issue of public interest. The plaintiffs in *California Bank* filed a lawsuit seeking satisfaction of certain medical liens, and defendant moved to strike the complaint on grounds that the complaint alleged acts under consideration by the California Medical Board. (*Id.* at pp. 1035-1036.) The court found plaintiffs' complaint did not involve protected activity, but rather a payment dispute "between private parties." (*Id.* at p. 1037.) There was no indication (nor argument by the defendant) in *California Bank* that the private payment dispute was linked to any broader public issue. Here, by contrast, AT&T and Kennard's private speech occurred in connection with a wide-ranging public debate, including national news coverage about the relationship between the parties, and significant public criticism of the parties themselves by prominent

advocacy organizations. *California Bank* is unhelpful to Herring's argument.[1]

Herring also asserts its new allegations of private communications show that the *other* allegations of arguably protected activity identified by Defendants "are only incidental to the[] contract-based claims and tortious conduct." (Opp. 3, 15.) This naked statement without any supporting authority is not properly raised, so the Court should reject it outright. (*People v. Bryant, Smith & Wheeler* (2014) 60 Cal.4th 335, 363 ["If a party's briefs do not provide legal argument and citation to authority on each point raised, the court may treat it as waived, and pass it without consideration."], cleaned up.) Herring is also clearly wrong. Allegations of protected activity are "incidental" to a plaintiff's claim only when they "merely provide context, without supporting a claim for recovery." (*Bel Air Internet*, *supra*, 20 Cal.App.5th at pp. 944-945.) That is not the case here, where the alleged protected activity forms the *basis* for Herring's claims, not mere "context." Indeed, Herring's Complaint makes that clear. (Compl. ¶¶ 50-52 [alleging that AT&T's public statements in response to Reuters article breached the Affiliation Agreement]; *id.* ¶¶ 65, 68-70 [alleging that Defendants' public statement in response to Bloomberg News article breached the Affiliation Agreement]; Opp. 13 [alleging that on-air statements by CNN news reporters and commentators breached the Affiliation Agreement].) Herring's claim that these foundational allegations are merely incidental should not be taken seriously.

Herring cites (at 15) *Martinez v. Metabolife International, Inc.* (2003) 113 Cal.App.4th 181, but that case is worlds away from this one. In *Martinez*, a product manufacturer moved to strike a consumer's claims for product liability and breach of warranty (among other claims), on grounds that the principal thrust of the claims was protected commercial speech. (*Id.* at pp. 184-185, 188.) The court rejected the argument, finding that the plaintiff's claims were based on allegations regarding the condition of the product and the conduct of the defendant in designing the product, not the commercial speech the defendant engaged in when marketing the product. As the court explained, the allegedly protected speech was only incidental to

[1] Moreover, *California Bank* did not even consider the question here, namely, under what circumstances the anti-SLAPP statute's catch-all provision (§ 425.16(e)(4)) applies to private communications. Instead, at issue in *California Bank* was whether the plaintiff's complaint was protected under a separate provision, § 425.16(e)(2), as a "statement or writing made in connection with an issue under consideration or review by a … judicial body, or any other official proceeding authorized by law." The court held that the plaintiff's complaint was not protected activity under § 425.16(e)(2) because it was based on a private payment dispute that was "never under consideration in any court or official proceedings until [plaintiff] filed the current action." (*California Bank*, *supra*, at p. 1037.) Section 425.16(e)(2) is not at issue here.

the claims asserted in the complaint because that speech was "largely unrelated to and entirely distinct from the wrongful, injury-causing conduct by [defendant] on which Plaintiffs' claims [were] premised." (*Id.* at p. 188.) Here, by contrast, AT&T and Kennard's protected speech activity *is* the "wrongful, injury-causing conduct" on which Herring's claims are based. *Martinez* is inapposite.

D. Herring's Claim That Defendants' Speech Was Unlawful Does Not Defeat Defendants' Showing That the Speech Was Protected Activity.

Finally, Herring suggests that AT&T's communication to Herring that AT&T would "take the lead" in responding to the public controversy surrounding OAN is not protected activity because the communication itself was an unlawful business practice. (Opp. 14 ["This private conversation, *which constitutes a fraudulent and unfair business practice*, does not trigger any protection for any defendant under the anti-SLAPP statute," italics added.].) The Court need not consider this argument because Herring did not develop it. (*Gerlach v. K. Hovnanian's Four Seasons at Beaumont, LLC* (2022) 82 Cal.App.5th 303, 311-312 [considering an argument forfeited when the plaintiffs made no attempt "to support the contention by discussing the application of relevant legal authority to the facts of this case"].) In any event, Herring comes nowhere close to showing that this speech was "illegal *as a matter of law*," which is the required standard "for a claim of illegality to defeat an anti-SLAPP motion at the first step." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424.) To satisfy this high bar, the defendant "must concede" his speech was illegal, "or the evidence [must] conclusively demonstrate it." (*Ibid.*) Neither circumstance applies here.

Herring's focus on the unlawfulness of the alleged private conversation "confuses the threshold question of whether the SLAPP statute applies with the question whether [Herring] has established a probability of success on the merits." (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305.) The California Supreme Court has made clear that "[t]he first step of the anti-SLAPP analysis is limited to whether a claim arises from protected activity." (*City of Montebello*, *supra*, 1 Cal.5th at p. 424.) Defendants have made that showing. (Mot. 13-19; see Section I, *supra*, at p. 6.) Herring's argument (Opp. 14) that AT&T's "take the lead" statement to Herring was unlawful "plac[es] the cart before the horse." (*DuPont Merck Pharm. Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566.)

II. Herring Fails to Establish a Probability of Prevailing on its Claims.

Given that all six of Herring's claims are based on protected speech activity, Herring has the burden

"to state and substantiate a legally sufficient claim." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 390.) This requires Herring "to prove with admissible evidence a probability that [it] will prevail on [each] claim." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 855.) For the reasons set forth in AT&T and Kennard's respective demurrers filed on April 11, 2022, and AT&T and Kennard's replies in support of their demurrers filed concurrently with this memorandum, which Defendants incorporate here by reference, Herring has not stated any legally sufficient claim. And it certainly has not *proven* a probability of prevailing. Defendants highlight below the key reasons why Herring's Opposition fails to show that Herring's claims have the requisite minimal merit.

Breach of Contract. As a threshold matter, the breach of contract claims (Counts 1 and 2) against Defendant AT&T Inc. must be dismissed because "[u]nder California law, only a signatory to a contract may be liable for any breach." (*Clemens v. Am. Warranty Corp.* (1987) 193 Cal.App.3d 444, 452.) Herring argues that Defendants' conduct is "interrelated" and that AT&T Inc. is a "related party" under the Affiliation Agreement, but it does *not* dispute that AT&T Inc. was not a party to the contract, which is the relevant question. (*Tri-Continent Int'l Corp. v. Paris Savings & Loan Ass'n* (1993) 12 Cal.App.4th 1354, 1359 [a plaintiff "cannot assert a claim for breach of contract against one who is not a party to the contract"].)

Herring also fails to "state and substantiate" a breach of either the confidentiality or non-disparagement provision (claims it asserts only against AT&T and DIRECTV (Compl. ¶¶ 101, 109)). The purported confidential information was either already public, or Herring fails to offer any non-conclusory allegations that AT&T disclosed any non-public information. (AT&T Demurrer 12.) As to the alleged breach of the non-disparagement provision, Herring ignores Defendants' argument that the provision cannot reasonably be interpreted to require AT&T to monitor the speech of CNN, HBO, and other affiliated news outlets when reporting on issues of public importance. (*Id.* at pp. 12-13.) Instead, Herring insists that the Court "cannot resolve this contract interpretation issue on a demurrer." (Opp. to AT&T Demurrer 11.) That is wrong (*Sprinkles v. Associated Indem. Corp.* (2010) 188 Cal.App.4th 69, 76), but also beside the point because Herring has not provided "competent admissible evidence" proving its facially unreasonable interpretation of the non-disparagement provision. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.)

Breach of the Implied Covenant. Herring concedes that its claim for breach of the Affiliation

Agreement's implied covenant of good faith and fair dealing (Count 3) is based on Herring not receiving the benefits of an entirely separate agreement. (Opp. to AT&T Demurrer 11 ["Defendants breached the implied covenant by depriving it of the benefits of the Advertising Agreement."].) This dooms the claim. The implied covenant only protects a "party's right to receive the *benefits of the agreement actually made*." (*Guz v. Bechtel Nat'l Inc.* (2000) 24 Cal.4th 317, 349.) That agreement—the Affiliation Agreement—does not mention the Advertising Agreement, does not refer to any "benefits" of the Advertising Agreement, and does not provide for an extension to be coterminous with the Advertising Agreement. Defendants could not have breached the covenant of good faith implied in the Affiliation Agreement by depriving it of benefits that never existed in that agreement. (AT&T Demurrer 14-15.)

Intentional Interference. Herring's claim for intentional interference with business expectancy (Count 4) similarly fails. Herring insists that this claim is legally sufficient because its Complaint alleges "fraud" in violation of common law and California's Civil Code. (Opp. to AT&T Demurrer 12-13.) But Herring's Complaint nowhere alleges "fraud" on the part of Defendants, and certainly not with the required degree of particularity such claims require. (*Philipson & Simon*, *supra*, 154 Cal.App.4th at p. 362 ["Fraud is required to be pleaded with specificity."].) Herring also fails to respond to Defendants' argument that this claim fails because Herring has not shown a reasonable probability of future economic benefit. (AT&T Demurrer 17.) Its argument on this point—that the Complaint supports a reasonable inference that Herring suffered economic harm due to Defendants' acts (Opp. to AT&T Demurrer 13)—does not establish (and certainly not with "competent admissible evidence") that it was reasonably probable DIRECTV would have renewed the Affiliation Agreement absent the alleged interference.

UCL Claims. Herring all but abandons its UCL claims (Counts 5 and 6). It argues that unpleaded "fraudulent conduct" satisfies the unlawfulness and unfair prongs of the UCL but ignores entirely the threshold argument that precludes its claims: the UCL's equitable remedies are available only where there are no adequate *legal* remedies available. (Mot. 23; AT&T Demurrer 17-18.) Herring pleads no facts, and offers no evidence, showing that is the case. (See Opp. to AT&T Demurrer 14.)

CONCLUSION

The Court should strike Herring's claims with prejudice and award attorneys' fees and costs to Defendants AT&T Inc., AT&T Services, and William Kennard. (Code Civ. Proc., § 425.16(c)(1).)

DATED: January 6, 2023

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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
01/09/2023 at 10:46:00 PM
Clerk of the Superior Court
By Elizabeth Reyes,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HERRING NETWORKS, INC., a California corporation,

Plaintiff,

v.

AT&T, INC., a Delaware corporation; AT&T SERVICES, INC., a Delaware corporation; DIRECTV, LLC, a California limited liability company; and WILLIAM KENNARD, an individual,

Defendants.

CASE NO. 37-2022-00008623-CU-BC-CTL

SPECIALLY APPEARING DEFENDANT AT&T INC.'S NOTICE OF MOTION AND MOTION TO SEAL

[Declarations of Natalie L. Hall and Ashley E. Johnson and [Proposed] Order filed concurrently herewith]

ASSIGNED FOR ALL PURPOSES TO:
HON. JOHN S. MEYER
DEPARTMENT C-64

HEARING:
Date: January 13, 2023
Time: 10:30 a.m.
Dept: C-64
Reservation ID: [reservation set by Court during January 5, 2023 hearing]

Action Filed: March 7, 2022

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 13, 2023 at 10:30 a.m., or as soon thereafter as the matter may be heard, in Department C-64 of the Hall of Justice Courthouse, San Diego Superior Court, located at 330 W. Broadway, San Diego, California 92101, Defendant AT&T Inc., by special appearance, will and hereby does move this Court for an order that seals certain portions of Plaintiff Herring Networks, Inc.'s Opposition to AT&T Inc., AT&T Services, Inc., and William Kennard's Special Motion to Strike (anti-SLAPP Motion), Opposition to AT&T Inc.'s Motion to Quash, Opposition to William Kennard's Motion to Quash, Opposition to DIRECTV, LLC's Special Motion to Strike (anti-SLAPP Motion), Exhibit A to the Supplemental Declaration of Charles Herring, and Exhibits C and D to the Declaration of Jeremy J.F. Gray submitted in support thereof.

The portions of these documents AT&T seeks to seal contain and reference information from documents that have been marked as Confidential and produced pursuant to the parties' protective order in this matter. AT&T Inc. has an overriding interest that outweighs the limited public interest in this material. If this information was disclosed to the public, Defendants AT&T Inc. and AT&T Services, Inc.'s economic interest would be harmed because competitors would be able to access this sensitive information and gain an unfair competitive advantage. Finally, the proposed sealing is narrowly tailored, and no less restrictive means exists to protect this confidential information.

This Motion to Seal is based upon the attached Memorandum of Points and Authorities, the Declarations of Natalie L. Hall and Ashley E. Johnson filed concurrently herewith, all records and papers on file as may be relevant, and such further oral and documentary evidence as may be presented at the hearing on this motion.

DATED: January 9, 2022

GIBSON, DUNN & CRUTCHER LLP

By: Ashley E. Johnson
Ashley E. Johnson

Attorney for Defendant AT&T INC. (By Special Appearance)

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In support of its Opposition to the AT&T Defendants and William Kennard's Special Motion to Strike (anti-SLAPP Motion), Opposition to AT&T Inc.'s Motion to Quash, and Opposition to William Kennard's Motion to Quash, Plaintiff Herring Networks, Inc. ("Plaintiff") lodged certain portions of its Oppositions and declarations in support of those Oppositions conditionally under seal. AT&T Inc. ("AT&T"), by special appearance, now moves for an order permanently sealing limited portions of that redacted material from those filings. AT&T has filed this motion in pursuant to Rules of Court 2.550 *et seq.* on the grounds that AT&T's confidentiality interests—and the parties' protective order—should prevail over the limited public interest that exists over this evidence, that a substantial probability exists that AT&T's interests will be prejudiced if the record is not sealed; and that the proposed redactions are narrowly tailored. Accordingly, AT&T respectfully requests that the Court order the redacted portions of these filings (collectively, the "Confidential Material") be permanently redacted and sealed. The Confidential Material reveals strategic discussions and other confidential business information and is not public in nature—information that is not appropriate to publicly disclose and, in fact, is protected under California law.

ARGUMENT

"[T]he right to inspect and copy judicial records is not absolute." (*Nixon v. Warner Comm.* (1978) 435 U.S. 589, 598.) California Rule of Court 2.550 authorizes a court to order that a record be filed under seal if it finds that the following conditions have been met: (1) there exists an overriding interest that overcomes the right of public access to the record which supports sealing the record; (2) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; and (3) the proposed sealing is narrowly tailored; and no less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, rule 2.550(d); see also *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1216–1218.) Each of these conditions is satisfied here.

A. AT&T Has An Overriding Interest That Overcomes The Right of Public Access To The Confidential Material

The protection of privacy and business confidentiality are "overriding interests" sufficient to warrant the sealing of records. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1222 fn. 46; see also Advisory

Comm. Cmt. to rule 2.550 ["Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute 'overriding interests.'"].) California trial courts routinely grant motions to seal documents containing private, sensitive, proprietary, or confidential business information, including agreements and communications. (See, e.g., *Comfort Systems USA Inc. v. Gallagher Bassett Services Inc.* (Cal. Super. Nov. 02, 2016) 2016 WL 10746675, at *1 [sealing agreements that "relate to confidential business matters"]; *SanDisk Corp. v. SK Hynix Inc.* (Cal. Super. June 26, 2015) 2015 WL 4878941, at *11 [sealing document revealing "contractual terms of a complex" business relationship]; *Hewlett-Packard Co. v. Oracle Corp.* (Cal. Super. May 20, 2016) 2016 WL 3035579, at *1–3 [sealing documents "due to the competitively sensitive nature of the information," including "confidential financial transactions" and "[u]ndisclosed pricing or financial incentives information"].)

Here, the Confidential Material contains sensitive, proprietary, and confidential business information that warrants the protection of sealing. Indeed, Plaintiff cites and summarizes the content of documents that AT&T has already moved to uphold the confidentiality of and seal from public record. (See Oct. 31, 2022 Motion to Uphold.) The specific reasons AT&T provided therein similarly apply to the documents referenced again in Herring's Filings—-these documents reflect (1) internal discussions and meetings that are routinely considered confidential business information, (2) confidential, internal materials distributed to the AT&T Board of Directors, including Board meeting notes and agendas, which are among the most commercially-sensitive documents AT&T possesses (3) discussions between any AT&T entity and AT&T Inc. Board members (including Mr. Kennard), and (4) Mr. Kennard's communications with third parties. (See Mot. to Uphold at pp. 7–12.) These documents were exhibits introduced at the PMK deposition of AT&T. Additionally, Plaintiff has cited confidential portions of the PMK deposition of AT&T, which also warrants protection because it similarly references confidential and internal communications and decision-making.

B. A Substantial Probability Exists That AT&T's Overriding Interest Will Be Prejudiced If The Records Are Not Sealed

The presumption against sealing "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

(*Press-Enterprise Co. v. Superior Court of Cal., Riverside County* (1984) 464 U.S. 501, 510.) Courts do (and should) "refuse[] to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing." (*Nixon v. Warner Commc'ns, Inc.* (1978) 435 U.S. 589, 598.)

Here, there is a substantial probability that AT&T Inc. and AT&T Services, Inc.'s overriding interests in preserving confidential business information will be prejudiced if the Confidential Material is not sealed because disclosure would likely harm their business interests. (Hall Decl. ¶ 5.) California courts have found that confidential business information, such as the content referenced in the Confidential Material, warrants protection from disclosure. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1222, fn. 46 [private and confidential business information is an overriding interest that overcomes the right to public access].) Public disclosure of the Confidential Material would harm the business interests of one or more AT&T entities, including by placing those entities at a competitive disadvantage. (See Hall Decl. ¶ 5.) For example, disclosure of the information would give valuable insight into AT&T's discussions and strategies that may influence potential third party entities' interactions with AT&T Services Inc. in the future. (Hall Decl. ¶ 6.) Accordingly, there is an overriding interest in favor of sealing the Confidential Material.

C. The Proposed Sealing is Narrowly Tailored, and No Less Restrictive Means Exist

AT&T's request is narrowly tailored to protect only the Confidential Material described herein. Redacted versions of the Filings obscuring only references to, discussions of, or quotes from documents that AT&T has designated as confidential are publicly on file. AT&T requests sealing of only certain of the redacted portions of Herring's filings referenced herein (i.e., redactions more limited than what even Plaintiff proposed), which reference confidential documents and discussions. The proposed sealing order is therefore narrowly tailored so as to maximize the public's access to court records without compromising AT&T's ability to maintain the confidentiality of this material. Indeed, throughout this matter the parties have engaged in multiple rounds of meet-and-confer correspondence related to the confidentiality of documents produced by AT&T, and as a result of these meet-and-confer efforts, AT&T agreed to de-designate a number of documents in an attempt to reach a resolution with Herring. AT&T's proposed redactions to Herring's filings reflect only the portions of documents that remain designated as confidential after these efforts. There are no less restrictive means available to AT&T Inc. to protect the overriding interests of AT&T entities in the confidentiality of its business information.

D. The Protective Order Encompasses The Information Sought to Be Sealed

Finally, it bears noting that the parties stipulated and this Court ordered that the above-referenced information should be treated as confidential under the terms of the stipulated Protective Order, which protects any confidential information so designated and exchanged in discovery, including the limited discovery currently allowed by the Court relating to personal jurisdiction issues. (See May 18, 2022 Stipulation and Protective Order ("Protective Order").) That order governs the documents and information at issue here. (See Protective Order, ¶ 1.c ["'Confidential' means any Documents, Testimony, or Information in the possession of a Designating Party that the Designating Party believes in good faith contains information involving trade secrets, or confidential business, financial or personal information, including but not limited to information protected by California's constitutional and common law right to privacy, subject to Rules 2.550, 2.551, 2.580, 2.585, 8.45, 8.46, and 8.47 of the California Rules of Court, or under other provisions of California law or other applicable law"].) Herring recognized this when it redacted the Confidential Material and lodged its Oppositions and supporting declarations conditionally under seal.

Moreover, AT&T proceeded with discovery in good faith reliance on the parties' agreement and this Court's order that this type of confidential, sensitive information would be protected from public view. The fact that AT&T has designated the Confidential Material as such pursuant to the Protective Order is "akin to" a "good cause showing," allowing the documents to "remain outside public purview." (*Overstock.com, Inc. v. Goldman Sachs Grp., Inc.* (2014) 231 Cal.App.4th 471, 484; see also *Phillips v. General Motors Corp.* (9th Cir. 2002) 307 F.3d 1206, 1213 ["When a court grants a protective order for information produced during discovery, it already has determined that 'good cause' exists to protect this information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality."].) The Court granted the parties a Protective Order in recognition of the confidential and highly sensitive business information that would be exchanged. Were this Court to now find a "presumed right of access" to this information "irrespective of whether it has been previously designated confidential pursuant to a protective order … [it] would invite myriad discovery skirmishes wherever a party is faced with producing material in discovery that it considers confidential." (*Mercury, supra,* 158 Cal.App.4th at p. 99.) As the court in *Mercury* explained:

> We are not unmindful of the ever-increasing costs of civil litigation and involvement of courts in the policing of all types of pretrial matters; we have no desire to add to those litigation costs and court burdens by creating unnecessary disincentives to the resolution of discovery controversies. (*See Fairmont Ins. Co v. Superior Court* (2000) 22 Cal.4th 245, 253-54 ["A central purpose of the Discovery Act was to keep the trial courts out of the business of refereeing day-to-day discovery by requiring parties to conduct discovery and resolve disputes with minimal judicial involvement."].)

(*Ibid.*) The concerns recognized in *Mercury* squarely support protecting the confidential, commercially-sensitive information contained in Herring's filings by sealing that material.

CONCLUSION

AT&T respectfully requests that the Court grant the present motion and order the Confidential Material be permanently sealed.

DATED: January 9, 2022

GIBSON, DUNN & CRUTCHER LLP

By: Ashley E. Johnson
Ashley E. Johnson

Attorney for Defendant AT&T INC. (By Special Appearance)

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ELECTRONICALLY FILED
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County of San Diego
01/09/2023 at 10:46:00 PM
Clerk of the Superior Court
By Elizabeth Reyes,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HERRING NETWORKS, INC., a California corporation,

Plaintiff,

v.

AT&T, INC., a Delaware corporation; AT&T SERVICES, INC., a Delaware corporation; DIRECTV, LLC, a California limited liability company; and WILLIAM KENNARD, an individual,

Defendants.

CASE NO. 37-2022-00008623-CU-BC-CTL

DECLARATION OF NATALIE L. HALL IN SUPPORT OF SPECIALLY APPEARING DEFENDANT AT&T INC.'S MOTION TO SEAL

[Notice of Motion and Motion to Seal, Declaration of Ashley E. Johnson, and [Proposed] Order filed concurrently herewith]

ASSIGNED FOR ALL PURPOSES TO:
HON. JOHN S. MEYER

HEARING:
Date: January 13, 2023
Time: 10:30 a.m.
Dept: C-64

Action Filed: March 7, 2022

I, Natalie L. Hall, state and declare as follows:

1. I am currently the Assistant Vice President – Senior Legal Counsel of Defendant AT&T Services, Inc. I have been employed by AT&T Services, Inc. since March of 2012. I have personal knowledge of the facts set forth below, and if called as a witness, could and would testify competently to those facts under oath. This declaration is submitted in support of Specially Appearing Defendant AT&T Inc.'s Notice of Motion and Motion to Seal.

2. AT&T Inc. ("AT&T") is a global telecommunications holding company with more than 500 subsidiaries that operates in an intensely competitive marketplace.[1]

3. In light of this fierce competition, and mindful of its commercial interests, AT&T has concerns that actual or potential competitors might use AT&T's or another AT&T entity's sensitive, confidential information to gain an unfair competitive advantage, or to cause them commercial harm. As such, AT&T maintains strict confidentiality in its business operations.

4. The portions of Plaintiff's filings that AT&T seeks to seal (the "Confidential Material") are private, internal documents and transcripts that contain information describing or implicating AT&T's and/or an AT&T entity's sensitive business processes, communications strategies, and internal analysis and deliberations.

5. Public access to this information risks competitive harm to AT&T because it would provide confidential insight into AT&T's and/or an AT&T entity's internal deliberations and decision making. This includes AT&T's and/or an AT&T entity's corporate communications, internal decision-making processes, public relations strategy, and analysis of its relationships with third parties.

6. If any of AT&T's or its subsidiaries' actual or potential competitors were able to review the confidential information contained in the Confidential Material, these competitors could be able to leverage this information to their advantage, and to AT&T's and/or an AT&T entity's detriment. For example, a competitor could gain insight into AT&T's or an AT&T entity's internal deliberations, and then either exploit perceived vulnerabilities or, conversely, try to imitate AT&T's or an AT&T entity's processes. Either result could harm AT&T's business interests. Similarly, non-competitor third parties could use the

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[1] As a holding company, AT&T conducts no business with the public. AT&T does not offer, sell, or provide goods or services to the public.

information to gain an unfair advantage in their current or future relationships with AT&T or an AT&T entity.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this Declaration is executed this 9th day of January, 2023 in Dallas, Texas.

Natalie Hall

NATALIE L. HALL

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Attorneys for Defendant AT&T Inc. (By Special Appearance)

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
01/12/2023 at 11:39:00 AM
Clerk of the Superior Court
By E- Filing,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

HERRING NETWORKS, INC., a California corporation,

Plaintiff,

v.

AT&T, INC., a Delaware corporation; AT&T SERVICES, INC., a Delaware corporation; DIRECTV, LLC, a California limited liability company; and WILLIAM KENNARD, an individual,

Defendants.

CASE NO. 37-2022-00008623-CU-BC-CTL

SPECIALLY APPEARING DEFENDANT AT&T INC.'S REPLY IN SUPPORT OF ITS MOTION TO SEAL

ASSIGNED FOR ALL PURPOSES TO:
HON. JOHN S. MEYER
DEPARTMENT C-64

HEARING:
Date: January 13, 2023
Time: 10:30 a.m.
Dept: C-64
Reservation ID: [reservation set by Court during January 5, 2023 hearing]

Action Filed: March 7, 2022

INTRODUCTION

Plaintiff Herring Networks, Inc. ("Herring") opposes AT&T's request to seal its confidential information despite the fact that Herring has access to every document at issue (it submitted them to this Court).[1] This is exactly what AT&T feared—and has previously articulated to this Court: Herring, a media company, seeks to make public highly-sensitive information for no apparent purpose other than opportunistic media stunts to harass AT&T and try to make this litigation as painful as possible in order to extract a meritless settlement. These tactics wouldn't be a first for Herring. Herring has previously gone on the airwaves of its One America News Network ("OAN") and asked viewers to "dig up dirt" on AT&T and its Chairman, William Kennard. OAN also broadcasted a picture of Mr. Kennard, along with a phone number and the statement, 'Contact AT&T Now!" In this context—a highly politicized environment where both its executives and unrelated third-parties could be subject to potential harassment—AT&T's concerns regarding the dissemination of its confidential materials is legitimate, and more than understandable.

Moreover and regardless, Herring is wrong on the law. Herring repeatedly concocts false standards AT&T must meet, including that it submit "a line-by-line analysis" (Opp. at p. 6) of the reasons for sealing for each of the hundreds of pages of documents that *Herring* chose to submit in support of its oppositions. But no such requirement exists. AT&T met the actual standard by submitting an uncontroverted declaration (Declaration of Natalie L. Hall) explaining in detail the confidential information in the documents Herring filed under seal and how AT&T's interests would be prejudiced if the material is not permanently sealed. And contrary to Herring's assertion, AT&T has narrowly tailored its sealing request through proposed redactions (see Declaration of Ashley Johnson) that comply with California Rules of Court, Rule 2.550 and 2.551. The Court should disregard Herring's improper tactics to expose AT&T's confidential information and grant AT&T's motion to seal.

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[1] AT&T requested sealing of only certain of the redacted portions of Herring's filings referenced herein, i.e., AT&T's proposed redactions are *more* limited than what Plaintiff proposed.

ARGUMENT

A. AT&T Sufficiently Asserts Its Interest Overcomes The Right of Public Access To The Confidential Material

AT&T has stated its overriding interest that overcomes the right of public access to the Confidential Material. (See Mot. at 3–4.) In support of its motion, AT&T submitted the Declaration of Natalie L. Hall, stating that the Confidential Material consists of "private, internal documents and transcripts that contain information describing or implicating AT&T's and/or an AT&T entity's sensitive business processes, communications strategies, and internal analysis and deliberations." California courts routinely grant requests to seal exactly this type of confidential material. (See, e.g., *Hewlett-Packard Co. v. Oracle Corp.* (Cal.Super. May 20, 2016) No. 2011-1-CV-203163, 2016 WL 3035579, at *2 ["confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace"]; *SanDisk Corp. v. SK Hynix Inc.* (Cal. Super. June 26, 2015) 2015 WL 4878941, at *11 [sealing document revealing "contractual terms of a complex" business relationship].) Herring does not dispute this evidence—it merely contends that AT&T "does not specify which information in the internal discussions, meetings and materials are confidential." (Opp. at p. 4.) This is flatly wrong. AT&T submitted "line-by-line" redactions to the Court of the briefings and exhibits at issue, which indicates the specific information AT&T contends is confidential and thus should be sealed. (See Johnson Decl., Exs. 1–7.) To the extent Herring argues AT&T must "specify" the information in further detail in the motion itself, that is illogical because if AT&T were to state the very information it seeks to seal in this publicly-filed, unredacted motion, that itself would be a disclosure of the confidential information and defeat the purpose of AT&T's sealing request.

Herring asserts that AT&T has not made a case for sealing because the Confidential Material does not fit under one of the categories stated in footnote 46 of *NBC Subsidiary*. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46.) But that footnote gave *examples* of "various other overriding interests" that "[c]ourts have acknowledged," including "protection of trade secrets" and preserving personal information. (*Ibid.*) Nowhere does *NBC Subsidiary*—or any other California state court case AT&T is aware of—hold that these are the *only* grounds for sealing material.

Finally, AT&T's interests also overcome the right to public access because Herring has already admitted that its purpose in seeking to publicize documents produced in this litigation is to advance its smear campaign against AT&T and Mr. Kennard. Indeed, in January of 2022, OAN host Dan Ball publicly urged viewers to "dig up dirt" on Mr. Kennard in response to DIRECTV's decision not to renew Herring's networks. (Justin Baragona, *OAN Host Begs Viewers to Dig Up 'Dirt' on AT&T Chair After DirecTV Drops Network*, THE DAILY BEAST (Jan. 18, 2022), https://www.thedailybeast.com/oan-host-dan-ball-begs-viewers-to-dig-up-dirt-on-atandt-chair-after-directv-drops-network.) This type of gamesmanship is expressly prohibited under the Civil Discovery Act. (Code Civ. Proc., § 2023.010(c) [misuses of the discovery process include "[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense"].) AT&T also has an interest in ensuring this case is not litigated in the court of public opinion. This Court should not allow Herring to abuse the discovery process for that purpose.

B. AT&T's Overriding Interest Will Be Prejudiced If The Records Are Not Sealed

The presumption against sealing "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Press-Enterprise Co. v. Superior Court of Cal., Riverside County* (1984) 464 U.S. 501, 510.) Courts do (and should) "refuse[] to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing." (*Nixon v. Warner Commc'ns, Inc.* (1978) 435 U.S. 589, 598.)

AT&T has submitted undisputed evidence that it has an overriding interest in preserving its confidential business information. Herring's barebones argument to the contrary attempts to impose an insurmountably high burden on AT&T to support its arguments with more "specific facts" regarding "the danger of any trade secrets or confidential financial information being revealed," but tellingly, Herring does not cite to any authority that supports this assertion. (Opp. at pp. 5–6.) As explained above, Herring misstates *NBC Subsidiary*, which only provided examples, not an exhaustive list, of bases justifying the sealing of documents. (*Ante* at p. 3.) The Hall Declaration states AT&T will suffer competitive harm if these documents are made public and exactly how it would suffer harm. The declaration explains the rationale behind AT&T's concerns—it operates in an "intensely competitive marketplace," and if any actual or potential competitors gained insight into the "corporate communications, internal decision-

making processes, public relations strategy, and analysis of its relationships with third parties" contained in the Confidential Materials, they could "leverage this information to their advantage, and to AT&T's and/or an AT&T entity's detriment" by "exploit[ing] perceived vulnerabilities" or "try[ing] to imitate AT&T's or an AT&T entity's processes." (Hall Decl., ¶¶ 2–6.) Herring does not dispute any of this or submit any contrary evidence. Its argument—which lacks both legal and evidentiary support—is irrelevant to the Court's analysis.

C. AT&T's Request is Narrowly Tailored

Herring contends that AT&T's motion should fail because it "did not provide a line-by-line analysis to justify the sealing of all of the Subject Material." (Opp. at p. 6.) Again, that is an extremely burdensome standard invented by Herring and wholly unsupported by the law, as evidenced by Herring's lack of authority for its bald assertion. And in fact, AT&T submitted "line-by-line" redactions to the Court of the briefings and exhibits at issue, requesting sealing of *only* the confidential material contained therein. (See Johnson Decl., Exs. 1–4.) Nothing further is needed to show the sealing is narrowly tailored.

Further, the public's interest is limited to materials "submitted as a basis for adjudication." (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.*(2014) 231 Cal.App.4th 471, 488.) "This does not mean the mere act of submitting discovery materials in support of or in opposition to a pretrial motion imbues the materials with constitutional import, triggering the sealed record rules." (*Id.* at p. 497.) As AT&T explained in its reply brief in support of its special motion to strike—and will further explain in its forthcoming reply in support of its motion to quash (if needed)—the evidence Herring submitted is largely irrelevant to the actual questions before the Court in those motions. (See, e.g., Reply in Support of Special Motion to Strike at pp. 9–10.) It is unsurprising that Herring attached documents with political undertones, given its transparent purpose to "dig up dirt" on AT&T and Mr. Kennard to try this case in the court of public opinion. For instance, Herring submits confidential testimony and documents relating to Mr. Kennard's role on the board of Dominion Voting Systems (*id.*, Exs. C, D) and includes an entire section on Dominion in the "Statement of Facts" in its opposition to AT&T, AT&T Services, Inc., and Mr. Kennard's special motion to strike. But Herring *never mentions Dominion in its argument opposing the motion* because Dominion is irrelevant to its legal arguments. (See generally Herring's Opp. to Motion to Strike.) Herring does the exact same thing with multiple other documents. As another example, Herring submits AT&T's internal

communications relating to outreach by special interest groups, and Herring includes an entire "fact" section on the NAACP, only to never mention it again in support of its legal argument. (*Ibid.*) And Herring submits AT&T's board minutes, among the most commercially sensitive documents AT&T possesses, and again fails to cite those minutes in support of its legal argument. (*Ibid.*) Herring has submitted these documents because topics like Dominion and the NAACP are hot button issues for Herring's viewers; it is clear that this is Herring's intended audience, not the Court. This Court should not allow Herring to circumvent the parties' Protective Order by attaching documents in "support" of its briefings, fail to use them as a basis for any legal arguments, and then request the Court unseal them, abusing the discovery process for improper purposes.

D. Herring's Argument Regarding The Parties' Protective Order Is Irrelevant

Finally, Herring argues that the parties' Protective Order is irrelevant because, under California Rules of Court, Rule 2.551(a), "[t]he Court must not permit a record to be filed under seal *based solely* on the agreement or stipulation of the parties" (emphasis added). This deliberately misconstrues AT&T's argument. AT&T's motion clearly states that the Court's granting of the Protective Order indicates the Court "already has determined that 'good cause' exists to protect the information from being disclosed to the public," which is *additional* support for sealing the materials that AT&T has in good faith designated confidential. (*Overstock.com, Inc. v. Goldman Sachs Grp., Inc.* (2014) 231 Cal.App.4th 471, 484, quoting *Phillips v. General Motors Corp.* (9th Cir. 2002) 307 F.3d 1206, 1213.) Contrary to Herring's argument (Opp. at p. 7), that the court's decision in *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, was in the context of discovery-related disputes does not mean these considerations are entirely irrelevant here. In compliance with California Rule of Court 2.551, AT&T has submitted specific argument and evidence in support of this sealing request, beyond the Protective Order. (See Mot.; Hall Decl.) Any sealing of materials would thus not be "based solely on the agreement or stipulation of the parties." (Opp at p. 6.)

Moreover, the *Mercury* court specifically addressed that the underlying concerns guiding its reasoning were the "serious risks of abuse, not only in terms of exorbitant costs associated with it, *but the exposure of private matters concerning both litigants and third parties.*" (*Mercury, supra*, 158 Cal.App.4th at p. 98, emphasis added.) This concern is front and center here, where AT&T must protect its interests against

Herring's attempts to publicize AT&T's Board minutes and internal communications in furtherance of its smear campaign against AT&T.

CONCLUSION

AT&T respectfully requests that the Court grant the present motion and order the Confidential Material be permanently sealed.

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