THE MAREK LAW FIRM, INC.
DAVID MAREK (CA Bar No. 290686)
David@marekfirm.com
AMI SANGHVI (CA Bar No. 331801)
ami@marekfirm.com
228 Hamilton Avenue
Palo Alto, CA 94301
(650) 460-7148

BERMAN NORTH LLP
Stacy Y. North (CA Bar No. 219034)
stacy@bermannorth.com
2001 Van Ness, Suite 300
San Francisco, CA 94109
(650) 843-1988

Attorneys for Plaintiff
MAURY BLACKMAN

SUPERIOR COURT OF STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
CIVIL UNLIMITED JURISDICTION

MAURY BLACKMAN, an individual,

Plaintiff,

v.

SUBSTACK, INC., a Delaware Corporation; AMAZON WEB SERVICES, INC., a Delaware corporation; JACK POULSON, an individual; TECH INQUIRY, INC., a Delaware corporation; DOES 1-25, inclusive,

Defendants.

Case No.: CGC-24-618681

PLAINTIFF'S OPPOSITION TO DEFENDANT AWS'S MOTION TO STRIKE UNDER THE ANTI-SLAPP STATUTE (CCP § 425.16)

REDACTED

Date: **February 4, 2025**
Time: **9:30 AM**
Dept.: **301**
Judge: **Hon. Joseph M. Quinn**

PUBLIC

REDACTS MATERIALS PURSUANT TO COURT'S JANUARY 7, 2025 ORDER

THE MAREK LAW FIRM, INC.
DAVID MAREK (CA Bar No. 290686)
David@marekfirm.com
AMI SANGHVI (CA Bar No. 331801)
ami@marekfirm.com
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Palo Alto, CA 94301
(650) 460-7148

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I. INTRODUCTION

Plaintiff commenced this action because Defendants continue to engage in illegal conduct. They are in receipt and possession of and continue to disseminate a sealed arrest report that did not result in a conviction. California criminal and civil laws and public policy safeguard the rights of individuals arrested without a conviction. These Defendants, however, refuse to comply with the law. The First Amendment does not protect them, and a motion under the anti-SLAPP statute is not appropriate in light of Defendants' illegal activities. Plaintiff incorporates by reference and joins in his concurrently filed oppositions to the Defendants' anti-SLAPP motions. For all the reasons stated in the memoranda, Plaintiff respectfully requests that the Court deny Defendant's motion.

II. STATEMENT OF FACTS

A. Defendants' Illegal Dissemination of a Sealed Report

This case arose from Defendants' ongoing dissemination of a document and information contained in it (the "Sealed Report") that was subject to an uncontested sealing order entered by San Francisco Superior Court Judge Carolyn Gold dated February 17, 2022. (Compl. ¶19; *see* Declaration of Plaintiff, dated January 14, 2025 ("Plaintiff Decl.") ¶16, Exh. A ("Sealing Order")) California law "deemed the arrest not to have occurred." *See* Sealing Order; Pen. Code § 851.91(e). In addition to the protections afforded by the Sealing Order, Pen. Code §§ 851.92(b)(5) and (c) prohibit and criminalize the unauthorized dissemination of such a Sealed Report. Pen. Code § 11143 and Labor Code § 432.7(g)(3) prohibit the receipt and possession of these documents and information. At no time has any person or entity challenged Judge Gold's Sealing Order. (Plaintiff Decl. ¶17)

B. Defendant's Arrest Was Never Newsworthy

Plaintiff was the CEO of Premise Data, a private company, in December 2021 when he had an encounter with the San Francisco Police Department at his residence. (*Id.* ¶¶4, 9) Although the matter was public, no media reported on these events. (*Id.* ¶¶18-20) After the charges were quickly dismissed, at which time Plaintiff was petitioning the Court under Cal. Pen. Code §851.91 to have the record sealed, no media reported on the events and no third parties challenged the Sealing Order. (*Id.*) Nineteen months later, in September 2023, Poulson publicly disseminated the Sealed Report, and at that time, no media reported on Poulson's blog posts. (*Id.* ¶20) In December 2023, Poulson reported

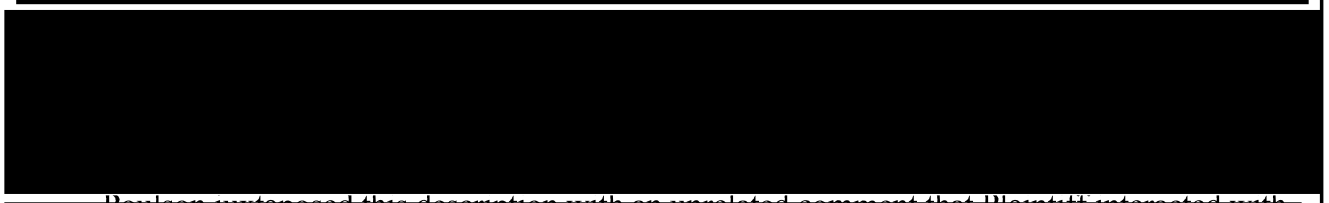
that the Premise Data Board demanded Plaintiff's termination in substantial part because of Plaintiff's '[redacted] and no media reported on the termination. (Declaration of Jack Poulson In Support of Special Motion to Strike dated December 6, 2024 ("Poulson Decl.") Exhs. D, H; Plaintiff Decl., ¶20) Between December 2021 and October 3, 2024 (when this Complaint was filed), no one other than Defendants publicly disseminated the Sealed Report or reported on it. (*Id.*)

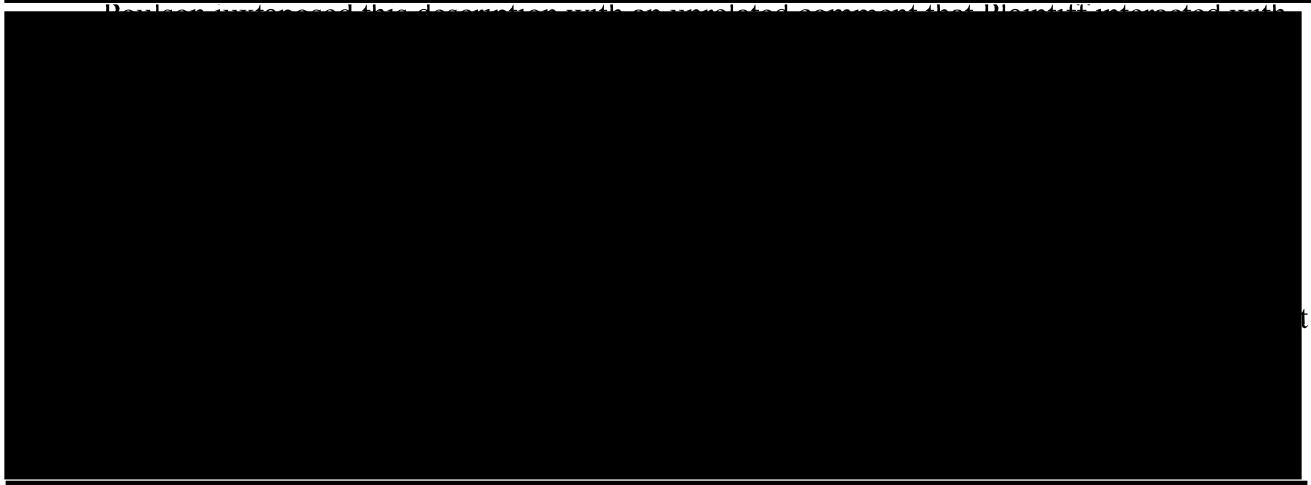
In addition, between 2019 and 2024, Premise Data was involved in a lawsuit against former employees in Santa Clara County (the "Santa Clara Litigation"). No one other than Poulson reported when this case was filed, during the litigation, or when it settled. (Plaintiff Decl. ¶35)

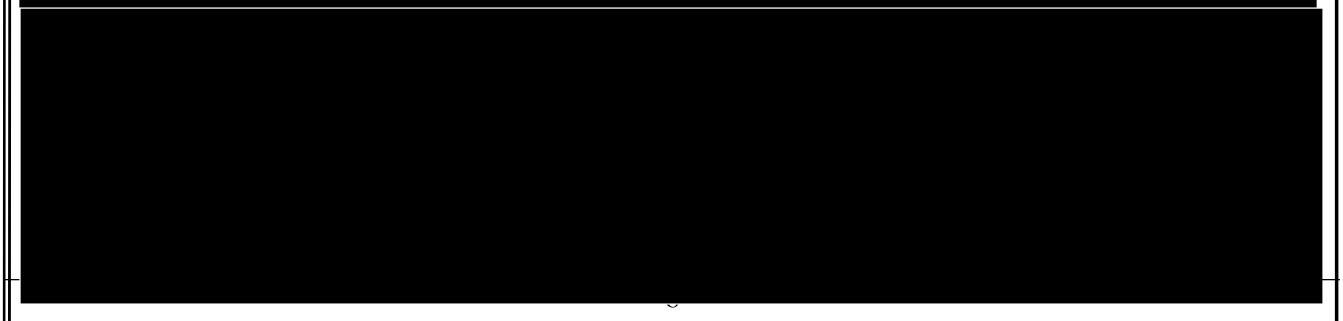
Not only was Plaintiff unknown but also Premise Data – and the use of technology surveillance by the U.S. Special Operations Forces – was not in the public interest. (Declaration of Cameron Scherer dated January 14, 2025 ("Scherer Decl.") ¶6; Plaintiff Decl. ¶4) Poulson admitted that "there appears to be little appetite in the U.S. media to interrogate the roles of Premise Data and Two Six Technologies in ongoing U.S. information operations." (Poulson Exh. A; Exh. I) According to Poulson, "[d]espite journalist Byron Tau using primary sources to expose the California-based gig-work information gathering company Premise Data in 2021 as a covert front for intelligence gathering for U.S. Special Operations Forces around the globe, the reporting never captured broad public attention." (Poulson Exh. I)

C. Poulson's Blog Posts Create False Implications Of Fact

[redacted]







[redacted]

D. Plaintiff's Efforts To Remove The Sealed Report; Plaintiff's Damages

Since Plaintiff learned Defendants were disseminating the Sealed Report, he and San Francisco City Attorney made repeated, unsuccessful requests to Defendants to remove the Sealed Report and related information. (*Id.*, ¶¶49-69) Defendants continue to disseminate the Sealed Report and information contained in it, long after Plaintiff's employment terminated. (*Id.*)

As a result of Defendants' ongoing dissemination of the Sealed Report and Poulson's blog posts, Plaintiff has suffered severe financial and non-financial injuries. (*Id.* ¶¶74-76)

III. ARGUMENT

A. The Anti-SLAPP Statute Does Not Apply[1]

1. Illegal Activities Fall Outside the Protection of Anti-SLAPP

Speech that is "illegal as a matter of law" is not constitutionally protected and falls outside the protection of the anti-SLAPP statue. *Flatley v. Mauro*, 39 Cal.4th 299, 320 (2006). Defendants' ongoing conduct from which the Complaint arises – including, receiving, possessing, and disseminating the Sealed Report and the information contained in it – is illegal because it violates California Penal Code §§ 851.91, 851.92, 11143, and 166. Specifically, Sections 851.92(b)(5) and (c) make it illegal for an unauthorized person to disseminate a sealed record or information related to it. Defendants do not dispute that they possessed, disseminated, and continue to disseminate the Sealed Report and the information contained in it. Section 11143 makes it a misdemeanor for any person "who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information". Defendants do not dispute that

[1] Code of Civ. Proc. §425.16(c) also mandates that a prevailing plaintiff on a SLAPP motion "shall" recover attorney's fees and costs upon the successful dismissal of Defendant's frivolous motion to strike the entire Complaint. Here, Defendants' decision to bring a SLAPP motion despite their blackletter violations of the law, renders the motion frivolous. *See Moore v. Shaw*, 116 Cal. App. 4th 182, 199 (2004), *as modified* (Mar. 26, 2004) (applying substantive standards of section 128.5 in awarding attorney fees to prevailing Plaintiff under the anti-SLAPP statute). If the Court denies the Motion, then Plaintiff will file a separate fee motion and memorandum of costs.

they were not authorized by law to receive the Sealed Report or the information contained in it. Section 166(a) makes it unlawful to disregard a court order. Defendants do not dispute that a valid Sealing Order existed prohibiting disclosure of the Sealed Report. Any argument by Defendants that these statutes are unconstitutional must be rejected for the reasons addressed herein.

2. The Anti-SLAPP Provisions Do Not Apply to the Challenged Speech.

Defendants bear the initial burden of demonstrating that the conduct alleged in the complaint arises from protected activity within the meaning of the broadly constructed statute that is nonetheless not intended to apply to purely private individuals. *Navellier v. Sletten*, 29 Cal.4th 82, 88 (2002); *see also Weinberg v. Feisel*, 110 Cal.App.4th 1122 (2003) (complaint relating to false allegations of criminal conduct against party who is not public figure nor has thrust himself into a public issue is a private matter not subject to anti-SLAPP statute). If Defendants fail to meet this burden, the motion must be denied. *Blackburn v. Brady*, 116 Cal.App.4th 670 (2004).

i. Poulson's Posts Are Not Protected by §425.16(e)(2).

Section 425.16(e)(2) "does not accord anti-SLAPP protection to suits arising from any act having any connection, however, remote, with an official proceeding." *Paul v. Friedman,* 95 Cal.App.4th 853, 866 (2002) (rejecting application of (e)(2) where statements simply mention or refer to official proceedings without connection with an issue under review in that proceeding.); *see also Maranatha Corr., LLC v. Dep't of Corr. & Rehab.,* 158 Cal.App.4th 1075, 1085 (2008) (finding matter under consideration if kept "before the mind" and given "attentive thought, reflection, meditation.") Thus, the statute contemplates an "ongoing—or, at the very least, immediately pending—official proceeding." *Rand Res., LLC v. City of Carson*, 6 Cal. 5th 610, 627 (2019) (collecting cases denying application of 425.16(e)(2) when no official proceeding was pending at the time of the speech); *see also Cole v. Patricia A. Meyer & Assoc.*, 206 Cal.App.4th 1095, 1120 (2012) (rejecting speech as protected when published after the issue was no longer under consideration by a judicial body). The court disposed of Plaintiff's matter 18 months earlier and thus, no expression – even if related to the arrest – could be "made in connection with an issue under consideration or review." *See Rand*, 6 Cal. 5th at 627. Tech Inquiry relies on inapposite cases where the investigation was ongoing or the matter was still under consideration. (AWS Motion, p. 14)

ii. Poulson's Posts Are Not Protected by §425.16(e)(3) or (4).

Section 425.16(e)(3) and (4) only protect speech that is an "issue of public interest".[2] Defendants must establish, first, that the speech at issue implicated an issue of public interest, and then, if it did, the existence of a "functional relationship … between the speech and the public conversation about some matter of public interest." *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133 (2019) (denying anti-SLAPP protection for speech that bore some relationship to issues of public interest was nonetheless private as between parties and "never entered the public sphere"). Here, the challenged speech is not an issue of public interest, and, even if it is, has no functional relationship with the public conversation on such issue.

"The most commonly articulated definitions of 'statements made in connection with a public issue' focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest." *Wilbanks v. Wolk*, 121 Cal.App.4th 883, 898 (2004) (internal citations omitted), *see also Weinberg*, 110 Cal.App.4th at 1131-32 ("a 'public controversy' does not equate with any controversy of interest to the public"), citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (holding that a divorce action between two well-known people may have piqued the public's interest but was not a public controversy); *Rand*, 6 Cal.5th at 616-9.

Using this analysis, Poulson's blog posts concerning and disseminating the Sealed Report and information contained in it – the challenged speech – do not concern an issue of public interest. Cases that have been found to address a person in the public eye refer to celebrities or nationally known figures or entities. *See Sipple v. Found. for Nat'l Progress,* 71 Cal.App.4th 226, 239 (1999)

[2] An "issue of public interest" as that phrase is used in § 425.16(e)(3) and (4) is not equivalent to a "matter of public significance" as that phrased in used in Supreme Court jurisprudence on the First Amendment. Speech "in connection with an issue of public interest" as used in § 425.16(e)(3) and (4) is broader than a "matter of public significance". *See* Section 425.16(e); *see also Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.App.4th 1106, 1117-1120 (1999) ("Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."). Thus, even if the Court found that Defendants' speech constituted "an issue of public interest," Defendants' speech still would not be a "matter of public significance" as that phrase used in *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

("nationally known figure"). Plaintiff is not in this category.[3] AWS used the phrase, *without any evidentiary support* and despite incorrectly arguing his public figure status is irrelevant, "high-powered tech CEO" to argue Plaintiff was in the public eye. (AWS Motion, p. 15) In fact, Plaintiff was an unknown CEO of an unknown private company. (Plaintiff Decl. ¶¶1-2; Scherer Decl. ¶6) No one reported on Plaintiff's public arrest for [redacted] or when Premise Data replaced Plaintiff as the CEO; or when Poulson repeatedly disseminated the Sealed Report; and no one reported on the Santa Clara litigation. (Plaintiff Decl. ¶¶18-20; 35)

Defendants do not argue that the challenged speech directly affected a large number of people.

Further, Poulson's speech does not concern a topic of widespread, public interest. *See World Fin. Grp., Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal.App.4th 1561, 1570 (2009), *as modified* (May 7, 2009) (requiring consideration of the specific nature of the speech and the context). Cases that fall into this category include *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623 (2001) (concerning media coverage that featured a coach, who pled guilty to child molestation, in a story "about adult coaches who molest youths playing team sports); *Carney v. Santa Cruz Women Against Rape*, 221 Cal.App.3d 1009, 1021 (1990) ("content, form and context" of the speech "portray a publication dedicated to addressing the general topic of sexual assault and harassment," including "a list of certain [counseling and defense] services provided by SCWAR"; or *Sipple,* 71 Cal.App.4th at 239 (article protected because it focused on domestic abuse by a nationally known person who was involved in the national debate on domestic violence) and involve plaintiffs that were directly connected to a discussion of topics of widespread public interest. *See e.g.*, *Dyer v. Childress*, 147 Cal.App.4th 1273, 1281 (2007). Here, the challenged speech concerns the dissemination of the Sealed Report and the information contained in it published nearly two years after the occurrence.

AWS argues that Poulson's blog posts concern an issue of public interest because they report on "the felony arrest of a high-powered tech CEO". (AWS Motion, p. 15) Defendants, however, offer

[3] Plaintiff is neither a public nor a limited purpose public figure. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351(1974); *see also Copp v. Paxton*, 45 Cal.App.4th 829, 845-46 (1996) (elements to characterize a limited purpose public figure are: a public controversy regarding an issue debated publicly with foreseeable and substantial ramifications for nonparticipants; plaintiff's voluntary act through which he sought to influence resolution of that public issue; and that statements are germane to the plaintiff's participation in the controversy.").

no evidence to counter that no media covered the arrest – when it was public and then when Poulson disseminated it publicly – or Plaintiff's termination. Indeed, the continued dissemination after Premise Data terminated Plaintiff's employment further undermines any argument that the speech concerned a topic of widespread interest because Plaintiff was a "high-powered tech CEO." *See Cole*, 206 Cal.App.4th at 1121 (speech about *defunct* company not an issue of widespread public interest).

AWS did not cite to a single case that supports its argument that speech concerning and disseminating a Sealed Report – concerning charges against an individual not in the public eye, dismissed more than 18 months prior – concern the public interest. *Leiberman v. KCOP Television, Inc.* 110 Cal.App.4th 156 (2003), which AWS cites, does not stand for this proposition. *Leiberman* involved challenged speech reporting on a doctor who was allegedly *presently* prescribing controlled substances without a legitimate medical purpose in a news report about doctors engaging in that specific conduct. Here, there was no suspected criminal activity at the time of the challenged speech. Moreover, in *Leiberman*, the court considered that the challenged speech was a news report about doctors engaging in this specific conduct. That is not the case here, where the challenged speech does not concern the issue of domestic violence. Further, the *Sipple* Court considered all of the following issues: that Sipple was in the public eye; that he was in the public eye partially because he "was able was able to capitalize on domestic violence issues to further his career"; and "[o]n different levels, the article addresses the issue of domestic violence." 71 Cal.App.4th at 238. Only after considering each of these issues did that Court determine the challenged speech concerned an issue of public interest; none of those factors exist in this case. *Gates v. Discovery Commc'ns, Inc.*, 34 Cal.4th 679 (2004) dealt with speech that was in the public record that concerned a convicted criminal. *Carney v. Santa Cruz Women Against Rape*, 221 Cal.App.3d 1009, 1021 (1990) considered that the "content, form and context" of the challenged speech "portray a publication dedicated to addressing the general topic of sexual assault and harassment," including "a list of certain [counseling and defense] services provided by SCWAR". *Seelig v. Infinity Broad. Corp.*, 97 Cal.App.4th 798, 807-8 (2002) determined the protected speech concerned an issue of public interest because the challenged speech concerned the discussion of plaintiff in "a television show of significant interest to the public and the media." If the standards are applied, the challenged speech here concerns a topic of widespread, public interest.

Indeed, even if the Court finds that the challenged speech concerned an issue of public interest, Defendants still cannot satisfy the second prong under *FilmOn*. Defendants would need to establish that Poulson's speech "participated in, or furthered, the discourse that makes an issue one of public interest." *FilmOn*, 7 Cal.5th at 151. Here, the challenged speech does not engage in a discussion or analysis of tech CEOs who are arrested. Nor did reporting a nearly two-year old arrest that did not lead to a conviction further discourse on the technology surveillance industry or Premise Data's role in that industry.

B. Plaintiff Can Demonstrate a Probability of Success On His Claims.

If Defendants demonstrate the challenged claims arise from protected activity (which is not the case here), the burden shifts to Plaintiff to show a probability he will prevail on the merits. *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 71 (2005), *as modified on denial of reh'g* (Feb. 28, 2005). Under an anti-SLAPP motion, a plaintiff is required to demonstrate only a minimal level of sufficiency and triability of the claim. *Lin v. City of Pleasanton*, 176 Cal.App.4th 408 (2009); *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal.App.4th 728 (2003) (complaint not stricken if supported by merely prima facie showing of facts).

1. The First Amendment Does Not Immunize Defendants.

AWS's argument is that its violations of the Penal Code, Labor Code, and Plaintiff's privacy are immunized by the First Amendment. (AWS Motion, p. 18), citing *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (when the press "*lawfully* obtains *truthful* information about a matter of *public significance* then state officials may not constitutionally punish publication of the information, *absent a need to further a state interest of the highest order*."); *Bartnicki*, 532 U.S. at 514. AWS's illegal conduct is not protected by the First Amendment because (i) Defendants continue, without obtaining an unsealing order, to disseminate the Sealed Report; (ii) Poulson's speech was not a "matter of public significance," (iii) Poulson's speech was not "truthful;" (iv) Poulson did not lawfully receive the Sealed Report; and (v) California has an interest of the highest order to safeguard sealed information concerning an arrest that did not lead to a conviction.

i. Defendants' Are Disseminating A Sealed Report.

The Sealing Order granted pursuant to Section 851.91 remains in effect, unchallenged. *See* Rules of Court, rules 2.550 and 2.551 (establishing a standard and procedure for courts to use when

request is made to seal a record, recognizing the First Amendment right of access to documents). Rule 2.551(h)(2) has a mechanism to challenge the Sealing Order, but Defendants never did so and count not meet that high burden. Accordingly, as this court has already recognized, the Sealed Report and the material contained in it cannot be public without first obtaining an unsealing order from Judge Gold. Order Granting Plaintiff's Motion to Seal, January 7, 2025.

ii. Defendants' Speech Is Not A Matter of Public Significance.

The Supreme Court recognized that the First Amendment provides greater protection to speech that is "newsworthy" and "a matter of public significance." *See Bartnicki*, 532 U.S. 514 at 528, citing to *New York Times Co. v. United States*, 403 U.S. 713 (1971) (upholding the right of the press to publish "information of great public concern" like the Pentagon Papers); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (noting less rigorous First Amendment protections for matters of purely private significance which do not implicate the same constitutional concerns as matters of public concern) *citing Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-759 (1985) (recognizing not all speech is of equal First Amendment importance and "speech on public issues occupies the highest rung of the hierarchy of First Amendment values").

Bartnicki plainly dealt with "newsworthy" matters. *Bartnicki*, 532 U.S. at 518 (involving publication of illegally recorded conversation where union President made threatening comments to School Board President during a highly publicized public union negotiation). The *Bartnicki* Court refused to determine broadly that truthful publication may never be punished, but it held that, after weighing the First Amendment interests against the competing interests in that matter, the interests served by the law at issue did not justify restricting a journalist's "truthful" speech on a "matter of public significance." *Id*. The speech in *Bartnicki*, unlike Defendants' dissemination of the Sealed Report, was an unsealed, newsworthy matter of public significance that concerned public issues; use of public funds; and ongoing threats of violence against members of the public School Board. That Court concluded that had the statements been made in a public arena they would have been "newsworthy," whereas here the arrest was initially public and then illegally made public again by Poulson's September 2023 post but was not newsworthy. Far from being a public entity, Poulson

admits that the public had no interest in Premise Data. And there was no suggestion of ongoing threats to members of a public board.

iii. Defendants' Speech Was Not Truthful.

In determining truthfulness, the "pertinent question" is whether a "reasonable fact finder" could conclude that the statements "as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory fact that tended to injure" plaintiff's reputation. *James v. San Jose Mercury News, Inc.*, 17 Cal.App.4th 1, 13 (1993)f; *see also Wilbanks*, 121 Cal.App.4th at 902 (speech is not truthful if "a reasonable trier of fact could conclude that the published statements imply a provably false factual assertion.") Where a speaker states "incomplete" facts, the statements may imply a false assertion of fact. *Id.* at 903. Further, where the speaker "implies a knowledge of facts which may lead to a defamatory conclusion," the implied facts may constitute defamation. *Eisenberg v. Alameda Newspaper, Inc.*, 74 Cal.App.4th 1359 (1999). Here, Poulson's statements falsely imply that Plaintiff was [redacted] and state falsely that the arrest was deemed to have occurred. (Scherer Decl. ¶¶10-13; Plaintiff Decl. ¶¶30-31)

iv. Defendants Did Not Legally Receive the Sealed Report.

Defendants did not – and could not – lawfully receive the Sealed Report, when doing so was unlawful under Penal Code § 11143 and Labor Code § 432.7(g)(3). *See Loder v. Municipal Court*, 17 Cal.3d 859, 868 (1976) (comparing the sealed report to "contraband"). *See also Bartnicki*, 532 U.S. at 548 (dissent) (Scalia, A. dissenting) (recognizing that, even without an express prohibition on receipt, "knowingly receiving and disclosing" the protected speech is "hardly … law-abiding"). Further, the First Amendment does not protect illegal conduct in connection with newsgathering, and the press is not "immune from liability for crimes and torts committed in news gathering activities." *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 513 (1986).

v. The Ability to Seal an Arrest Record And Give Deference to Court Orders Serves a Compelling Interest.

Even if Defendants obtained truthful information lawfully, imposing liability for the dissemination of a Sealed Report serves the need to further state interest of highest order – i.e., giving meaning to the Legislature's decision to enact laws that allow for individuals who have suffered arrest without conviction to seal their records and giving meaning to an order by a court of competent

jurisdiction. *See* Section 851.91 and 851.92. The restriction of disseminating sealed information is not a content-based restriction because the restriction is not based on the topic discussed or the idea or message expressed. *See Loder*, 17 Cal.3d at 868. Moreover, the Supreme Court has recognized explicitly "California could decide not to give out arrestee information at all without violating the First Amendment." *See Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999). *See* 2017 California Senate Bill No. 393, California 2017-2018 Regular Session.

2. 47 U.S.C. §230 Does Not Immunize AWS.

While courts have held that 47 U.S.C. § 230(c)(1) ("Section 230") provides broad immunity in certain circumstances, "this immunity is not limitless." *Calise v. Meta Platforms, Inc.*,103 F.4th 732, 739 (9th Cir. 2024), *citing Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (Section 230(c)(1) does not "declare[] a general immunity from liability deriving from third-party content" and reversing District Court's finding of immunity under Section 230 because all of the plaintiffs' claims are premised on Meta's publication of a third-party advertisement).

Section 230 only applies to claims that "seek to treat [defendants] as a publisher or speaker." *Calise*, 103 F.4th at 739, citing *Barnes*, 570 F.3d at 1100 (immunity to an interactive computer service provider against claims that "seek to treat [the provider] as a publisher or speaker."); *see also In re Facebook Simulated Casino-Style Games Litig.*, No. 22-16888, 2024 WL 2287200, at *2 (9th Cir. May 21, 2024) ("To determine whether a particular claim should be dismissed under Section 230, a court must identify "the underlying legal duty" and determine whether "it seek[s] to hold the defendant liable as a 'publisher or speaker' of third-party content.") citing *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676, 682 (9th Cir. 2019). Here, California law prohibits any unauthorized person – such as Defendant – from being in possession of the Sealed Report. *See* Labor Code § 432.7(g)(3); Penal Code § 11143.

This illegal conduct forms the basis of Defendants' liability to Plaintiff because the source of their duty to Plaintiff arises from the statutes they violated. *See In re Apple Inc. App Store Simulated Casino-Style Games Litig.*, 625 F.Supp. 3d 971, 994 (N.D. Cal. 2022) (permitting one theory of liability to proceed where Plaintiffs did not attempt to treat the Platforms as "the publisher or speaker" of third-party content, but rather sought to hold the Platforms responsible for their own

illegal conduct), *appeal dismissed and remanded sub nom. In re Facebook*, 2024 WL 2287200. Thus, these statutes do not seek to hold Defendants liable as a "publisher or speaker" of third-party content. Rather, they are liable for being knowingly in possession of contraband.

Defendants are not immune because they "materially contribute" to the illegality in question – namely the possession and dissemination of the Sealed Report. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008) (denying Section 230 immunity website required users to disclose protected characteristics to tailor results that steered users according to discriminatory preferences which limited access to housing in violation of housing antidiscrimination laws)

C. Plaintiff's Claims Should Not Be Rejected For Other Reasons

1. Emotional Distress and Interference Claims

Plaintiff plainly pled fact sufficient to state a claim against AWS for both interference and emotional distress: Defendants – including AWS, who hosted Poulson's Substack blog posts – violated multiple sections of the Penal Code and Labor Code, all of which interfered with Plaintiff's employment with Premise Data and other economic relationships. (Compl. ¶¶ 69, 82, 91) Contrary to AWS's claim, Plaintiff pled that Defendants, including AWS, knew of the contract between Plaintiff and his employer. (*Id.*, ¶ 90) AWS's fact-based argument – that "AWS was [not] aware of Plaintiff, let alone his relationship with his employer, before the alleged breach or disruption" (AWS Motion, p. 21) – is not appropriate at this stage. AWS also claims falsely that Plaintiff did not allege "independently wrongful conduct." (*Id.*) In paragraph 69 (and elsewhere), Plaintiff alleged that Defendants, including AWS, violated various sections of the Penal Code and Labor Code. Finally, Plaintiff plainly pled that Defendants' conduct was "outrageous and so extreme as to exceed all bounds of that usually tolerated in a civilized community" – including noncompliance with laws even when requested to do so by Plaintiff and the San Francisco City Attorney. (Compl., ¶130)

2. Defamation and False Light

Plaintiff pled that Defendants' defamation arises principally from two false statements: (i) Defendants stated that the arrest was deemed to have occurred, when, as an unequivocal matter of law, it was deemed not to have occurred; and (ii) Poulson's blog posts falsely imply that Plaintiff was

[redacted]

d[redacted]. (Compl. ¶¶ 140; 144) As discussed herein, a series of truthful facts that imply a defamatory connection between them can create a defamatory implication. *See Weller v. Am. Broad. Companies Inc.*, 232 Cal.App.3d 991, 1003-1004 (1991); *Wilbanks*, 121 Cal.App.4th at 902. Here, Poulson's blog posts – by their context, tone, omissions, and juxtapositions – are both actually false and create the false implication that Plaintiff was or might be [redacted] (Scherer Decl. ¶¶10-13; Plaintiff Decl. ¶¶30-31)

Poulson's Motion itself highlights this point in his argument to this Court that Plaintiff's guilt should be assumed based on the Sealed Report. Although Plaintiff was not charged with [redacted] Poulson (who does not have access to the court record), in writing about the Sealed Report to this Court, suggested that Plaintiff was actually guilty by offering, for no legal reason, that although charges against Plaintiff were dismissed and Judge Gold entered the Sealing Order "70 percent of domestic violence cases [are dismissed], due to the difficulty of prosecuting even meritorious cases." (Poulson Motion, p. 7) The obvious implication of this statement is that the claims at issue were meritorious notwithstanding the record. All the Defendants seemingly adopt this position by virtue of the arguments that Plaintiff's arrest itself concerned the public interest given the presumed effect it might have on his role as CEO.

Plaintiff has also pled a false light claim. (Compl., ¶¶ 108-118) *See Price v. Operating Eng'rs Local Union No. 3*, 195 Cal.App.4th 962, 970 (2011). Here, Plaintiff pled that Defendants knew or acted with reckless disregard for the truth that the challenged speech would create a false impression by implying that Plaintiff was or might be guilty of having engaged in [redacted]

3. Privacy Claims

AWS's argument that "the facts disclosed were no longer private when the Articles were published" is nonsensical. (AWS Motion, p. 23) To the contrary, prior to Poulson's dissemination of the Sealed Report and the information contained in it, the fact of the incident and the information described in the Sealed Report were private and sealed by a court order pursuant to Penal Code § 851.91. Thus, AWS's argument must be rejected.

AWS also argues, without any legal support, that Plaintiff's privacy claims fail because the invasion was "justified by a competing interest." (AWS Motion, p. 23) AWS cite to *Int'l Fed'n of*

Prof'l & Technical Eng'rs, Local 21 v. Super. Ct., 42 Cal.4th 319, 346 (2007) is off point. There is no comparison these facts and that city employees' privacy right to their public salaries.

4. Negligence and Unfair Business Practices

Plaintiff's negligence claims arise from Defendants' ongoing violations of the law and, for Substack and AWS, their own policies. (Compl., ¶¶ 51, 53, 58, 59) Violation of the law raises a presumption that the violator was negligent. *See Jacobs Farm/Del Cabo, Inc. v. W. Farm Serv., Inc.*, 190 Cal. App.4th 1502, 1526 (2010) (recognizing negligence per se and noting presumption of negligence arises if: (1) defendant violated statute; (2) violation proximately caused plaintiff's injury; (3) injury resulted from kind of occurrence statute was designed to prevent; and (4) plaintiff was one of the class of persons the statute was intended to protect).

Plaintiff's pleading also establishes a probability of success on the claim for violation of Section 17200 of the Business and Professions Code. (Compl., ¶¶150-156) Section 17200 "borrows" violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. An "unlawful" business practice or act within the scope of the UCL is "an act or practice, committed pursuant to business activity, that is at the same time forbidden by law." *Bernardo v. Planned Parenthood Fed'n. of Am.*, 115 Cal.App.4th 322, 352 (2004), quoting *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999) (noting materials on the website were educational and scientific rather than representations to an intended commercial audience). In *Bernardo*, Planned Parenthood's anti-SLAPP motion was independently granted on the ground that Bernardo failed to identify any statute, regulation or law she contended Planned Parenthood had violated. *Id.* Here, Plaintiff has identified multiple sections of the Penal Code and Labor Code that Defendants violated. Moreover, Defendants have a commercial interest in generating interest or achieving "clicks" making it commercial speech.

IV. CONCLUSION

For the reasons stated herein and in conjunction with arguments set forth in Plaintiff's Opposition to Defendants Tech Inquiry, Substack, and Poulson's Motions to Strike, Defendant AWS's Motion to Strike Plaintiff's entire Complaint must be denied.

Dated: January 14, 2025

Respectfully submitted,

THE MAREK LAW FIRM, INC.

By: David Marek
David Marek
Attorney for Plaintiff