Derek C. Flint, Bar No. 034392
Ian R. Joyce, Bar No. 035806
SNELL & WILMER LLP
One East Washington Street
Suite 2700
Phoenix, Arizona 85004-2556
Telephone: 602.382.6000
Facsimile: 602.382.6070
Email: dflint@swlaw.com
ijoyce@swlaw.com

Attorneys for Curtis Gervais

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PATH NETWORK, INC., a Delaware corporation; and TEMPEST HOSTING LLC, an Arizona limited liability company,

Plaintiffs,

v.

RENE ROOSEN and JANE DOE ROOSEN, husband and wife; COSMIC GLOBAL, INC., a Delaware corporation; HOSTINGKING INC., a Delaware corporation; JOHN AND JANE DOES, I-X; ABC CORPORATIONS, I-X; RED AND BLACK LIMITED LIABILITY COMPANIES, I-X; and XYZ PARTNERSHIPS,

Defendants.

No. CV2025-066422

REPLY IN SUPPORT OF MOTION TO VACATE FEBURARY 20, 2026 ORDER ALLOWING PLAINTIFFS TO FILE FIRST AMENDED COMPLAINT AS LODGED

and

MOTION TO SEAL EXHIBITS A AND B OF PLAINTIFFS' FIRST AMENDED COMPLAINT AND EXHIBITS 1, 2, 5, AND 6 OF THIS MOTION

Assigned to: Hon. Michael Gordon

In his Motion to Vacate and Seal (the "Motion"), Gervais explained that at least *three* court orders require Exhibits A and B to the First Amended Complaint ("FAC") to be filed under seal.[1] Gervais also explained that these Exhibits were acquired through a Canadian *Anton Piller* order—a type of order that Canadian

[1] Plaintiffs do not dispute that Exhibits 1, 2, 5, and 6 of the Motion should be filed under seal. Thus, this Reply will only focus on Exhibits A and B of the FAC.

courts themselves view as "draconian" and "massive intrusion[s]" into a person's private life. *Celanese Can. Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, paras. 1, 30 (Can.). These two facts, standing alone, warrant granting the Motion in its entirety because: (1) Rule 5.4(c)(2) provides that a court should seal documents if doing so is authorized by a "prior court order," and (2) the manner in which Exhibits A and B were acquired, by itself, satisfied all four factors for sealing those documents under Rule 5.4(c)(2)(A)–(D). Yet, despite the primacy of these two issues in the Motion, *Plaintiffs do not address them at all in their Response*. Having failed to do so, Plaintiffs all but concede that the Motion should be granted. Indeed, their newfound opposition to sealing Exhibits A and B is at odds with the Notice of Lodging ("Notice") they filed previously—in which they took "no position" on whether the Exhibits should be filed under seal. By taking "no position" in the Notice, Plaintiffs waived their ability to contest the sealing of Exhibits A and B now.

Plaintiffs' position that they somehow complied with the requirement in Rule 5.4(g) to "serve" the Notice fares no better. Importantly, Plaintiffs do *not* dispute that they failed to serve Gervais with the Notice, as required by Rule 5.4(g)(3). And their view that some lower "notice" standard should apply lacks any basis in the text of the Arizona Rules of Civil Procedure.

Accordingly, Gervais respectfully requests that the Court vacate the February 20, 2026 Filing Order and grant the Motion requiring Exhibits A and B to be filed under seal.

I. Plaintiffs' Response Fails to Contest Dispositive Arguments in the Motion and Is Inconsistent with Their Prior Litigation Position.

In their Response, Plaintiffs fail to address several dispositive arguments raised in the Motion explaining why Exhibits A and B of the FAC should be sealed. To the extent that Plaintiffs do oppose the Motion, their newfound opposition to sealing the Exhibits is inconsistent with their prior position in the Notice, where they

took "no position" as to whether the Exhibits should be filed under seal. Not. Lodg. at 2–3. The Court should grant the Motion for these reasons alone.

A. <u>Multiple Court Orders Require Exhibits A and B to Be Filed Under Seal</u>.

Rule 5.4(c)(2) states that "*unless* a statute, rule, or *prior court order* authorizes a document to be filed under seal, a court may order that a document may be filed under seal only if it finds in a written order" that the documents should be confidential under the Rule 5.4(c)(2)(A)–(D) factors. (emphasis added). The word "unless" recognizes that the existence of a "prior court order" is a *separate, independent*, ground for sealing a document. Here, the Motion explained that there are at least *three* "prior court orders" requiring Exhibits A and B to be filed under seal: (1) the Preliminary and Permanent Injunctions in the Canadian Matter; (2) the *Anton Piller* Order ("APO") under which Exhibits A and B were acquired; and (3) the Canadian Court's September 15, 2025, order incorporating Sections 14 and 15 of the Minutes of Settlement. Motion at 11–12. Plaintiffs are incorrect (at 6) that these court orders relate only to "the manner in which the documents were obtained, not on their confidential, or trade-secret status." These orders, in fact, require the entire court file to remain under seal. *See* Mot. at 5–7

Remarkably, Plaintiffs all but ignore this issue in their Response: they do *not* contest that these court orders require Exhibits A and B to be filed under seal, and they do *not* argue that these court orders are somehow inapplicable. They do state (at 6), without further analysis, that it is "immaterial that another court may have ordered the documents to be treated confidentially"—but they cite no authority for the proposition that this Court should simply disregard the PI and Permanent Injunctions, APO, and September 15, 2025 court order. To the contrary, American courts generally enforce orders from foreign jurisdictions. *E.g.*, Restatement (Second) of Conflict of Laws § 98 ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so

far as the immediate parties and the underlying cause of action are concerned");[2] *see also id.* § 92 cmt. a. ("As used in the Restatement of this Subject, 'judgment' is a general term which includes not only judgments at law but also the orders, injunctions or decrees" of other courts); *Remington Rand Corp.-Delaware v. Bus. Sys. Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987) ("Under the principle of international comity, a domestic court normally will give effect" to non-final judicial actions from foreign courts).

By failing to address this issue, Plaintiffs have conceded that there are on-point, binding, court orders requiring Exhibits A and B to be filed under seal. The Court should grant the Motion for this reason, alone.

B. <u>Plaintiffs' Newfound Opposition Is Inconsistent with the Settlement Agreement and Notice of Lodging.</u>

Plaintiffs' opposition to the Motion fails for a second threshold reason: in the Notice, they waived any objections to Gervais' request to seal.

Waiver is the "intentional relinquishment of a known right or of conduct that would warrant such an inference." *Minjares v. State*, 223 Ariz. 54, 58 ¶ 17 (App. 2009); *see also Adams v. Bear*, 87 Ariz. 288, 294 (1960) ("It is a fundamental rule of law that parties are bound by their pleadings and evidence may not be introduced to contradict or disprove what has been admitted or asserted as a fact in their pleadings."). A "claim of waiver based on conduct . . . must include evidence of acts inconsistent with the intent to assert a right." *Minjares*, 223 Ariz. at 58 ¶ 17.

When Plaintiffs filed the Notice, they took "*no position* as to whether the documents, or the contents therein" should actually be filed under seal. Not. Lodg. at 2–3 (emphasis added). Plaintiffs further acknowledged that the Minutes of Settlement "*requires* Plaintiffs to *request* the documents be filed under seal in any

[2] Absent controlling Arizona law to the contrary, Arizona courts generally follow the Restatement. *E.g.*, *In re Krohn*, 203 Ariz. 205, 210 ¶ 18 (2022) ("[W]here not bound by our previous decisions or by legislative enactment, we would follow the Restatement of Law." (citation modified)).

court proceeding." *Id.* at 2 (emphasis added). Having taken these positions, Plaintiffs waived the right to now affirmatively *oppose* Gervais' Motion.

C. Plaintiffs Ignore the *Anton Piller* Process.

Even if the Court finds it necessary to consider the factors in Rule 5.4(c)—which it need not do because Exhibits A and B must be sealed pursuant to "prior court order[s]"—those factors support Gervais' position. Plaintiffs' Response ignores the most compelling reason why the Court should seal Exhibits A and B: those documents were acquired by Plaintiffs through a highly invasive *Anton Piller* process. As discussed in the Motion, APOs "authorize the massive intrusion, without advance notice, of a privately orchestrated search on the privacy of a business competitor or other target party." *Celanese Can. Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, para. 30. That is precisely what happened here: Plaintiffs acquired the documents in Exhibits A and B through an *Anton Piller* search of Gervais' home and personal devices.

Rather than addressing this fundamental issue directly, Plaintiffs instead focus (at 7) on the "documents themselves."[3] But the sealing factors in Rule 5.4(c)(2) aren't limited to the literal text of the "documents themselves." Rather, the factors consider whether there is an "overriding *interest* exists that supports filing the document under seal," whether the person seeking seal would be "prejudiced if it is not filed under seal," and that the proposed sealing procedure is reasonable and no less restrictive sealing process exists. Ariz. R. Civ. P. 5.4(c)(2)(A)–(D). As explained in the Motion, the manner in which the documents to be filed under seal were collected implicates all four of these factors.

First, as the Canadian court that issued the APO recognized, there is an overriding public interest in ensuring that documents acquired through the invasive

[3] As discussed below, *infra* Part III, Plaintiffs claim that the "documents themselves" do not contain confidential information is puzzling in light of their view that Exhibits A and B somehow show that the Defendants disclosed Plaintiffs' own "trade secrets."

Anton Piller process remain under seal. Mot. at 12–13. Plaintiffs do not address this point and therefore concede it.

There is also evidence that Plaintiffs acquired Exhibits A and B through improper means. *See* Mot. at 13; *Aviva USA Corp. v. Vazirani*, 902 F. Supp. 2d 1246, 1273 (D. Ariz. 2012) ("Compelling reasons to seal a judicial record typically will exist when such court files might become a vehicle for improper purposes . . . .") (quotation omitted)); *Ctr. for Auto Safety v. Goodyear Tire & Rubber Co.*, 247 Ariz. 567, 572 ¶ 22 (App. 2019) (reasoning "the 'compelling reasons' standard set out in federal case law" and Rule 5.4 "are substantially the same").[4] Curiously, Plaintiffs do not dispute that they acquired the documents through improper means; rather, they contend (at 6) that there is no evidence that Plaintiffs are "planning to use them for some improper purposes." But Plaintiffs' attempt to make Exhibits A and B public in this matter is such an "improper purpose"—as it directly goes against the Canadian court orders and the Minutes of Settlement.

Beyond this, Plaintiffs' continued opposition to the Motion is perplexing in light of the FAC's allegation that Exhibits A and B contain Plaintiffs' trade secrets, as well as Plaintiffs' "confidential and sensitive information relating to infrastructure, contracts, resources, client list, and out-of-band information." *See* FAC at ¶¶ 111–12, 151–53, 196–209. If it is true that Exhibits A and B contain Plaintiffs' own trade-secret information, their attempt to publicly disclose that information undermines the merits of their own claims. *See, e.g.*, *Calisi v. Unified Fin. Servs. Inc.*, 232 Ariz. 103, 106 ¶ 14 (App. 2013) (to establish that information is a "trade secret" a plaintiff must show that it took reasonable efforts to "maintain [the information's] secrecy.").

[4] Plaintiffs are correct (at 6) that the Motion cited to page 1109 in *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir. 2016) without including a parenthetical indicating that page appeared in a dissent. Counsel apologizes for the Bluebook error. But the legal proposition—that courts should seal documents being used for improper purposes—is well established elsewhere, including in *Aviva*.

Second, given the circumstances undern which Exhibits A and B were acquired and the content of those Exhibits themselves, substantial prejudice would also result if the Exhibits remain public. *See* Mot. at 13. The only argument that Plaintiffs make in response to this point (at 7) is that the "nature" of the documents is not "highly sensitive." But again, this ignores the highly invasive *Anton Piller* process and is inconsistent with Plaintiffs own representations that the documents contain sensitive business information.

Third and fourth, because the entirety of Exhibits A and B must be kept under seal by court order, there is no "less restrictive means" to preserve the confidentiality of those documents, and Gervais' sealing request is reasonable. Mot. at 13–14. Contrary to Plaintiffs' position (at 7), Gervais' statement that Plaintiffs could have worked with him to come to a reasonable solution prior to the filing of the Notice is not some sort of "admission" that he would have been agreeable to partial redactions. To be clear, Gervais' position is—and always has been—that the documents must not be part of the public court file. That position is based on the Canadian court orders that bind both Plaintiffs and Gervais.

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Simply put, allowing Exhibits A and B to remain public is contrary to several court orders and is highly prejudicial to Gervais. In contrast, Plaintiffs have not shown any compelling reason to keep these documents public. And because Plaintiffs' Response does not address several dispositive issues and is inconsistent with the position they took in the Notice, the Court should grant the Motion and seal Exhibits A and B.

II. Plaintiffs Concede That Gervais Was Not Served with the Notice of Lodging.

In addition to the foregoing threshold issues with Plaintiffs' Response, the Court should also vacate its order making Exhibits A and B public because Plaintiffs never served the Notice on Gervais. Mot. at 9–11. Plaintiffs do not (and cannot)

argue that they actually served Gervais.[5] Rather, they argue (at 4) that "[w]here a rule requires service or notice but is silent as to the manner in which it must be accomplished—particularly as to nonparties—courts assess sufficiency under due process principles." But Plaintiffs do not cite *any* case or rule of procedure holding that where a Rule requires a party to be "served," the due process standard applies rather than the typically service procedures. Plaintiffs cite (at 4) *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Matter of Rights to Use of Gila River*, 171 Ariz. 230 (1992).[6] But both of those cases evaluated whether statutes allowing interested non-parties to be notified of administrative proceedings by publication complied with due process. *Mullane*, 339 U.S. at 309–10, 317–20; *Matter of Rts. to Use of Gila River*, 171 Ariz. at 236–37. Neither case addressed a statute or rule—like Rule 5.4(g)—that requires actual "service."

To be sure, there is no basis to ignore the word "serve" in Rule 5.4(g)(3), as Plaintiffs ask the Court to do. If a rule's "text is clear and unambiguous, it controls unless it results in an absurdity or a constitutional violation." *State v. Serrato*, 568 P.3d 756, 759 (Ariz. 2025). The word "serve" is clear and unambiguous here. And Plaintiffs are incorrect (at 4) that the Rules are "silent as to the manner in which [service] must be accomplished." Rules 4.1, 4.2, and 5 provide detailed service instructions; Plaintiffs provide no explanation as to why these service requirements would not apply to the word "serve" in Rule 5.4. *See Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017) (when interpreting "a specific provision" courts consider other provisions "that are *in pari materia*—of the same subject or general purpose").

Even if some sort of "notice" requirement applied, rather than service requirements, Plaintiffs' position would still fail. As part of the Motion, Gervais signed a declaration, under penalty of perjury, stating that he "never received the Notice of Lodging." Mot. Ex. 3 ("Gervais Decl.") at ¶ 19. Plaintiffs call this

[5] Plaintiffs still have not served Gervais with the Notice.
[6] The page of *Gila River* that Plaintiffs cite, page 253, does not exist.

statement "implausible," but they do not provide any opposing affidavit that would undercut Gervais' testimony.

It is also irrelevant (contrary to Plaintiffs' position at 5), that Plaintiffs emailed a copy of the Notice to Gervais' former Canadian counsel, Andrew Francis. Mr. Francis submitted an affidavit stating that "made clear to Path's counsel during our phone call on January 23 that I would not be representing Mr. Gervais in the Arizona Matter." Mot. Ex. 7 ("Francis Decl.") at ¶ 8. This is supported by Gervais' declaration that Mr. Francis "was retained solely for the purposes of the Ontario Matter and *had no authority to act on my behalf* in any proceedings in the United States." Gervais Decl. at ¶ 17 (emphasis added). Even if Mr. Francis had been Gervais' counsel in this case (which would not have been possible because he is not licensed in Arizona), email is not an effective means of service under Rules 4.1 and 4.2 absent a prior agreement between the parties. Ariz. R. Civ. P. 4.1(d)

Despite the clear service requirement in Rule 5.4(g), Plaintiffs attempt to rely (at 5) on *In re Focus Media Inc.*, 387 F.3d 1077 (9th Cir. 2004), for the proposition that "service on a represented person's counsel is effective when made." But *Focus Media* held only that implied authority to accept service under Federal Rule of Bankruptcy Procedure 7004(b)(8) may be found only when two conditions are met: "(1) the agent is the attorney representing the party *in the related bankruptcy proceeding*, and (2) the totality of the surrounding circumstances demonstrates the intent of the client to convey such authority." 387 F.3d at 1083 (emphasis added). This interpretation of a federal bankruptcy rule has no applicability here. And it certainly does not relieve Plaintiffs of their obligation to do what Rule 5.4(g) requires: "serve" the Notice on Gervais.

Because Plaintiffs never served the Notice, Gervais is not asking for a "do-over," as Plaintiffs contend (at 1). Had Gervais been served, he would have had the right to file a motion to seal Exhibits A and B under Rule 5.4(g)(4)(B); because he was not served and did not receive the Notice within the 14-day time frame to file

such a motion, he was deprived of this right at the outset. And at any rate, Plaintiffs do not explain why the fact that Exhibits A and B were erroneously made public is an act which cannot be "undo[ne]"—Rule 5.4(c)(1) expressly contemplates that a party might file a motion to seal a document that was previously publicly available.

Plaintiffs' failure to serve the Notice plainly justifies vacating the Filing Order.

III. Conclusion.

Plaintiffs have failed to rebut, or even respond to, many of the dispositive reasons why Exhibits A and B should be filed under seal—including that "prior court order[s]" require it. They concede that they did not properly serve the Notice on Gervais. And they do not compellingly argue that the Rule 5.4(c) factors are not met in this case. Accordingly, Gervais respectfully requests that the Court: (1) vacate the Filing Order and (2) enter an order sealing Exhibits A and B of the First Amended Complaint and Exhibits 1, 2, 4, 5, and 6 of Gervais' Motion.

DATED this 14th day of April, 2026.

SNELL & WILMER L.L.P.

By: */s/Derek Flint*

Derek C. Flint, Bar No. 034392
Ian R. Joyce, Bar No. 035806
One East Washington Street
Suite 2700
Phoenix, Arizona 85004-2556
Telephone: 602.382.6000
Facsimile: 602.382.6070

Attorneys for Curtis Gervais

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This 14th day of April, 2026 to:

Thomas A. Gilson
Ryan T. Bradway
Rose Law Group, PC
7144 E. Stetson Drive, Suite 300
Scottsdale, Arizona 85251
TGilson@roselawgroup.com
RBradway@roselawgroup.com
docket@roselawgroup.com

Attorneys for Plaintiffs

SNELL & WILMER