SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AT&T SERVICES, INC., Plaintiff, -against- BROADCOM INC., as successor in interest to VMware, INC. and VMWARE, Inc., Defendants.	Index No.: 654490/2024 Hon. Jennifer G. Schecter, J.S.C. **Motion Seq. No. 001**

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In its Order to Show Cause for Preliminary Injunction (the "Motion"), Plaintiff AT&T Services, Inc. ("AT&T")—a highly sophisticated multibillion-dollar company—seeks to rewind the clock and force Defendants VMware, Inc. ("VMware") and Broadcom Inc. ("Broadcom") (together, "Defendants") to sell support services for perpetual software licenses ("Support Services") that VMware has discontinued from its product line and to which AT&T has no contractual right to purchase.

To simplify its portfolio, speed innovation, and better serve customers, VMware has been transitioning from a perpetual to a subscription licensing model over the past several years. This transition has been well known in the industry and to AT&T. On December 11, 2023, following Broadcom's acquisition of VMware, VMware publicly announced it was finally completing the transition of all VMware solutions to subscription licenses, with the "End of Availability" of perpetual licenses and Support Services renewals for perpetual offerings.

In its Verified Complaint, filed eight months after the public announcement, AT&T resorts to sensationalism by accusing Broadcom of using "bullying tactics" and "price gouging." Such attacks are intended to generate press and distract the Court from a much simpler story. For years, AT&T enjoyed heavily discounted pricing from VMware and derived enormous value from the parties' agreement. But the agreement contains an unambiguous "End of Availability" provision, which gives VMware the right to retire products and services at any time upon notice. What's more, a year ago, AT&T opted *not* to purchase the very Support Services it now asks the Court to force VMware to provide. AT&T did so despite knowing Defendants were implementing a long-planned and well-known business model transition and would soon no longer be selling the Support Services in question. Although AT&T apparently regrets its decision to not renew Support Services [redacted] Defendants are not responsible for AT&T's choices.

Defendants have nonetheless negotiated in good faith with AT&T for months to enter into a new agreement that will fully address AT&T's needs. AT&T has rejected every proposal despite favorable pricing it has been offered and the situation it has created (and which it can still avoid). AT&T also could have spent the last several months or even years "migrating away" from VMware software, which it has admitted it intends to do. But AT&T chooses instead to wait until a week before its Support Services were set to expire to file its Motion.

To be entitled to a preliminary injunction, a party must demonstrate: (1) a likelihood of success on the merits; (2) danger of irreparable injury absent a preliminary injunction; and (3) a balancing of the equities in its favor. AT&T fails to satisfy each element.

First, AT&T is unlikely to succeed on the merits. AT&T cannot establish a breach of contract where VMware complied with the terms of its agreement. The parties' agreement expressly states that VMware has the right to retire its software and support services from time to time (the "EOA Provision"). Last year, despite knowing that VMware was transitioning from a perpetual to a subscription licensing model, AT&T [redacted] Although AT&T now would like to [redacted] of the Support Services, Defendants no longer sell the Support Services as they have reached their End of Availability ("EOA") per VMware's industry-standard lifecycle policies.

Second, AT&T cannot satisfy its showing of irreparable harm. Though AT&T spends most of its Motion illustrating the parade of horribles that will allegedly ensue if the retired Support Services are not reinstated, this presumes AT&T has no other options. AT&T does have other options and, therefore, the most it can obtain is monetary damages. The fact that AT&T has been given more than eight-months' notice and has in the meantime failed to take any measures to prevent its purported harm (*e.g.*, buy a subscription for the new offerings or move to another solution) is telling and precludes any finding of irreparable harm. Even if AT&T thinks it deserves

better pricing, it could have avoided its purported irreparable harm by entering in a subscription-based deal and suing for monetary damages instead of injunctive relief.

Third, the balance of equities tips in Defendants' favor. AT&T seeks a mandatory injunction, which courts in New York do not grant except in rare circumstances. Such circumstances are not presented in cases like this one, where AT&T had plenty of time to make alternative arrangements. Moreover, it would be inequitable to alter Defendants' current business offerings and force Defendants to sell a product that has been discontinued.

Lastly, courts do not grant preliminary injunctive relief when doing so would essentially provide the final relief that a party seeks. Here, granting AT&T's request would do exactly that, particularly as AT&T's desired renewed license would expire on September 8, 2025. If this action proceeds for longer than a year (which is likely), AT&T will obtain what it ultimately seeks. No extraordinary circumstances are presented here to merit such a result.

For these reasons, Defendants respectfully request that the Court deny the Motion.

BACKGROUND

While AT&T attacks Broadcom for its "bullying tactics," it conveniently omits important context regarding the parties' historical contractual relationship, efforts made by Defendants to reach a mutually agreeable solution, and the part AT&T played in creating this situation for itself.[1] In its Motion, AT&T asks this Court to force VMware to sell discontinued Support Services to AT&T even though: (i) VMware no longer sells Support Services for the perpetual licenses at issue; (ii) AT&T chose not to purchase additional Support Services last year when it was required to do so, (iii) AT&T has had notice of VMware's decision to retire the relevant Support Services since at least December 2023 and, therefore, has had several months to avoid the self-created harm

[1] Defendants also anticipate they will be asserting counterclaims against AT&T, including for [redacted]

it now claims; (iv) AT&T has admitted in writing to VMware that it can "migrate away" from VMware software and doing so will have "a very quick payback and strong IRR [internal rate of return]"; (v) AT&T could have completely avoided the "irreparable harm" it now claims it will suffer by accepting favorable proposals made by VMware; and (vi) any harm to AT&T can be compensated through money damages. Any harm claimed by AT&T is of its own making and Defendants should not be forced to sell or provide discontinued Support Services to AT&T.

A. THE PARTIES' AGREEMENTS ALL INCORPORATE AN END OF AVAILAIBLITY PROVISION

On September 27, 2007, AT&T and VMware entered into a Master End User License Agreement, which sets forth terms and conditions for AT&T's purchase of Software and Support Services from VMware (as amended, the "EULA"). Pressment Supplemental Affirmation filed Sept. 3, 2024 (hereinafter, "Pressment Supp. Aff."), Ex. E (2007 EULA), Dkt No. 46; *id*., Ex. F (EULA Amendment 4), Dkt. No. 47; *id*., Ex. G (EULA Amendment 10), Dkt. No. 48; Compl. ¶ 48. Critically, the EULA contains an EOA provision, which states: "**VMware may, at its discretion, decide to retire Software and/or Services at any time ("End of Availability") upon notice.**" Pressment Supp. Aff. Ex. F (EULA Amendment 4), Appendix A § 1.2 (the "EOA Provision") (emphasis added).

The parties also entered into an Enterprise License Agreements on September 27, 2013 and October 29, 2021, which permitted AT&T to purchase additional software from VMware. *See* Pressment., Ex. C. Dkt. 44 (2013 ELA), Attachment 1; Ex. B Dkt. 43 (2021 ELA). Both were amended several times. Amendment No. 1 to the 2021 ELA, dated August 3, 2022, is the subject of this dispute. *See* Pressment Supp. Aff., Ex. A., Dkt. 42 (hereinafter, the "Amendment"). The Amendment incorporates the EULA and online support terms, which both contain the EOA Provision. *See id*. § 11.1 (Governing terms: "Software listed on Amendment 1 ELA Schedule is subject to the terms and conditions of the [EULA]"); *id*. § 11.4 (Support Services are subject to

the support services terms posted [on VMware's website] . . . In the event of a conflict, the terms of the EULA shall control."); Affirmation of Gressett in Support of Defendants' Opposition to Plaintiff's Motion (hereinafter, "Gressett") (filed concurrently herewith) ¶ 39, Ex. 11 (applicable Support Services Policies on VMware Website), § 2.2. (EOA Provision).

The EOA Provision and related discontinuation provisions are important components of VMware's contracts. Indeed, during negotiations over a "Potential Discontinuation of Perpetual Licenses" section in the Amendment, VMware explicitly told AT&T that it "cannot contractually agree to sell discontinued products" and rejected proposed language that would weaken VMware's right to discontinue products. Gressett ¶¶ 41–44, Ex. 12.

B. VMWARE'S LONG PLANNED AND WELL-KNOWN TRANSITION FROM A PERPETUAL TO A SUBSCRIPTION MODEL

Since 2018, VMware had initiated strategic plans to transition its licensing model and product portfolio to a subscription model, which was becoming the industry trend. Gressett ¶¶ 6–12, 22. Indeed, VMware faced competitive pressures from public cloud competitors to shift towards a subscription model and away from perpetual licensing. Gressett ¶¶ 11–14.

By 2022, it was well known in the industry that VMware would be transitioning to a subscription model. Gressett ¶¶ 31–36. On May 26, 2022, Broadcom announced during its Q2 2022 Earnings Call its intention to shift from perpetual licenses to a subscription model upon completion of its acquisition of VMware. Gressett ¶ 31, Ex. 8. News articles in early 2022 also announced that VMware was planning to convert all product lines to subscription or SaaS. *See id*. 31, Ex. 9. On February 7, 2023, VMware published a blog post explicitly stating "I won't recommend the perpetual option just because it doesn't future-proof our customers against any 'End of Availability' announcements that we are expecting around perpetual." *See* Affirmation of Stepanie Colorado (filed concurrently herewith), ¶ 4, Ex. 2.

As AT&T admits, it knew long before December 11, 2023 that VMware was transitioning

from a perpetual licensing model to a subscription licensing model. Mot. at 7 (Broadcom's announcement about acquiring VMware "raised concerns with VMware's customers because Broadcom typically emphasized more costly subscription-based licensing rather than perpetual licenses") (cleaned). In fact, AT&T was fully aware of the EOA risks when it negotiated the Amendment in July and August 2022. Gressett ¶¶ 37–45.

A year later, fully aware of the EOA risks, AT&T opted to renew the Support Services for its perpetual licenses for [redacted] *Id.* ¶ 46.

C. VMWARE GAVE PUBLIC NOTICE THAT IT WOULD DISCONTINUE PERPETUAL SUPPORT SERVICES LICENSES

On December 11, 2023, VMware issued a public announcement describing changes to its policies and offerings following the Broadcom acquisition. *See* Gressett ¶ 10, 32, Ex. 1. The December 11 announcement stated VMware was planning to "[c]omplete the transition of all VMware by Broadcom solutions to subscription licenses, with the end of sale of perpetual licenses, Support and Subscription (SnS) renewals for perpetual offerings . . . beginning today." *Id.* ¶ 33. The Q&A section states "customers cannot renew their SnS contracts for perpetual licensed products after today." *Id.* ¶ 34. VMware subsequently published a blog post on its website on January 15, 2024 (further revised on January 22, 2024) explaining that vSphere products and solutions would not be available for purchase as standalone products and would instead be offered as part of a new consolidated subscription. *See* Gressett ¶¶ 35–36, Ex. 10.

After VMware's December 11, 2023 public announcement, VMware discussed its EOA decision with AT&T several times, starting from December 13. Gressett ¶ 47; *id.*, Ex. 13 (email to AT&T forwarding announcement and asking for meeting to discuss implications). Since January 2024, AT&T has endeavored in good faith to negotiate a new VMWare Cloud Foundation ("VCF") subscription agreement. Gressett ¶¶ 47–50, 57. But before this lawsuit, AT&T was half-

hearted—as recently as August 19, 2024, Susan Johnson of AT&T sent Broadcom's CEO, Hock Tan, an email explaining that AT&T would not be entering into a new subscription deal with VMware because it could just "migrate away." Gressett ¶ 56.

Notably, the most recent subscription proposal provided by VMware to AT&T offered well-below market pricing and included service offerings that would allow AT&T to avoid any of the purported "irreparable harm" it claims it will suffer in its Motion. *Id*. ¶ 59.

ARGUMENT

"[P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant." *Saran v. Chelsea GCA Realty Partnership, L.P.*, 148 A.D.3d 1197, 1199 (2d Dep't 2017) (cleaned). "To establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities favors the movant's position." *19 Patchen, LLC v. Rodriguez*, 153 A.D. 3d 1382 (2d Dep't 2017).); *see* CPLR 6301. "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" *Boening v. Nassau County Dept. of Assessment*, 200 A.D.3d 973, 974 (2d Dep't 2021) ((cleaned).

For the reasons discussed below, AT&T is not entitled to the drastic remedy it seeks in its Motion.

A. AT&T IS UNLIKELY TO SUCCEED ON THE MERITS

AT&T cannot establish a likelihood of success on its claims. *See New York City Mun. Lab. Comm. v. City of New York*, 156 N.Y.S.3d 681, 687 (N.Y. Sup. Ct. Sept. 29, 2021) (finding that "Petitioners will be unable to establish a likelihood of ultimate success on the merits."). For the

following reasons, its claims are likely to fail.[2]

1. Breach of Contract

To support its flawed contractual interpretation, AT&T inserts words into the parties' agreements that do not exist and entirely ignores others that do. A plain reading of the contracts makes it clear that AT&T's breach of contract claim cannot prevail.[3]

a. Defendants' Clear Right to Retire Support Services

Defendants have an express contractual right to retire Support Services. Section 11.4 of the Amendment provides that AT&T's "use of the Support Services is subject to the support services terms posted at http://www.vmware.com/support/policies, providing such terms are mutually agreeable and do not conflict with the EULA. In the event of a conflict, the terms of the EULA shall control." *See* Amendment § 11.4. Like the EULA, the referenced online support terms include an "End of Availability" provision stating, "VMware may, at its discretion, decide to retire any Software and/or Services offering from time to time ('End of Availability')." Gressett, Ex. 11; *compare* EULA, Amendment 4 ("VMware may, at its discretion, decide to retire Software and/or Services at any time ('End of Availability') upon notice…."). The online support terms further provide, "VMware has no obligation to provide Services for any Software after the End of Availability date published in the life cycle policy for that Software." Gressett, Ex. 11. The online support terms directly link VMware's Lifecycle support policies, which, again, discusses EOA and

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[2] AT&T incorrectly argues it need only show a "reasonable probability of success." Mot. at 13. The case it cites shows that is the standard when maintaining the status quo. *Bass v. WV Pres. Partners, LLC*, 209 A.D.3d 480, 481 (1st Dep't 2022) ("reasonable probability is sufficient . . . to warrant maintenance of the status quo."). AT&T is not seeking to keep the status quo, but is instead seeking to force Defendants to offer Support Services that have been discontinued. *See* Gressett ¶¶ 63–65.

[3] To show a breach of contract, AT&T must satisfy four elements: "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Lapa v. JP Morgan Chase Bank, N.A.*, 2023 WL 4706827, at *3 (S.D.N.Y. July 22, 2023); *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

describes it as a lifecycle phase. *See* Colorado, Ex. 1.

In addition to these EOA provisions, Section 18 of the Amendment, entitled "Potential Discontinuation of Perpetual Licenses," shows that AT&T was fully aware that licensed products and services could be discontinued at any time and, further, that AT&T had access to VMware's lifecycle policies explaining the same. *See* Amendment § 18. Indeed, when the parties were negotiating Section 18, VMware explicitly told AT&T in writing that it "cannot contractually agree to sell discontinued products" and removed language added by AT&T that sought to force VMware to continue making available discontinued perpetual license products while the parties negotiated a new subscription-based agreement. Gressett, ¶¶ 41–42; Ex. 12, § 9.

Tellingly, AT&T barely addresses the EOA Provision in its Motion. AT&T only contends, without evidentiary support, that the EOA provision "does not govern over the Amendment, nor does it permit Defendants to unilaterally cease offering services it is required to provide under the Amendment's Option." Mot. at 14–15. This argument contradicts the contracts' plain language.

In support of its baseless argument, AT&T cites *Advent Software, Inc. v. SEI Glob. Servs., Inc.*, 195 A.D. 3d 498, 499 (1st Dep't 2021), but that case is inapplicable. In *Advent Software, Inc.*, the court granted plaintiff's preliminary injunction motion because it found that (1) the defendant terminated the agreement without giving plaintiff the opportunity to cure, as required before termination; and (2) defendant had no contractual right to refuse renewal. *Id.* at 499. Here, the terms are crystal clear that Defendants have the right to refuse renewal. And besides giving notice (which Defendants provided), there is no condition precedent that Defendants must satisfy before refusing to renew due to EOA.

AT&T's additional arguments in its Complaint also fail. AT&T avers that its renewal rights under Section II.B.2 of the Amendment (hereinafter, "Section II.B.2") take precedence over the EOA Provision [redacted]

[redacted] Compl. ¶¶ 139–140. Nothing in the Amendment [redacted] which is also incorporated into the Amendment. AT&T is highly sophisticated and could have negotiated making the EOA provision inapplicable to the renewal of Support Services under the Amendment. Moreover, Section 18 of the Amendment demonstrates that AT&T knew EOA was a risk, and knew that VMware would reject attempts to curtail its right to discontinue perpetual license products. Gressett ¶ 41–42, Ex. 12. Accordingly, AT&T must now live with the negotiated terms. *See* *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 38 N.Y.3d 169, 177–78 (2022) ("courts generally may not relieve [sophisticated parties] of the consequences of their bargain") (cleaned).

AT&T also argues that the EOA Provision's language conflicts with the 2013 ELA, "which expressly governs AT&T's purchase of the Software and Support Services from VMware and controls in the event of a conflict with the EULA." Compl. ¶¶ 141–42. AT&T is wrong again. The Amendment is governed by the 2021 ELA and the EULA, not the 2013 ELA. *See* Amendment § 11.1. AT&T argues that Section 22.2 of the Amendment states that the 2013 ELA governs the 55,600 licenses of "Converted Perpetually Licensed Software" comprising the overwhelming majority of the Software. Compl. ¶ 142. AT&T's reliance on Section 22.2 of the Amendment is unavailing. Section 22.2 states only that the 2013 ELA governs the "Converted Perpetually Licensed Software and the reporting." Amendment § 22.2. But Section 22.2 does not reference Support Services or terms applicable to them at all, and Section 11.4 of the Amendment expressly states AT&T's "use of the Support Services is subject to" the online support terms and/or the EULA (both of which contain the EOA provision). *See* Amendment § 11.4.

Further, even if the 2013 ELA did govern the Support Services for the Converted Perpetually Licensed Software, the result is the same. *See* Amendment 22.2 ("Converted Perpetually Licensed Software and the reporting is governed by [2013 ELA], *as amended*")

(emphasis added); Pressment Supp. Aff., Ex. D., Dkt. 45 (ELA Amendment 6) § 2 (Converted Perpetually Licensed Software is subject to the terms of the EULA, as amended); *see also id.* § 4 (AT&T's use of Support Services is subject to support services terms at http://www.vmware.com/support/policies).

AT&T also relies on ELA Amendment 6 to say it obtained rights to renew Support Services for the Software at its "sole discretion." Compl. ¶ 143 (citing ELA Amendment 6 § 2). AT&T ignores that the renewal rights set forth in ELA Amendment 6 were superseded by the renewal rights set forth in the Amendment. *See* Amendment, Section II.B.2. Regardless, under both the Amendment and ELA Amendment 6, AT&T's use of the Support Services are subject to the online support terms and/or the EULA, which contain the EOA Provision. Amendment § 11.4; ELA Amendment 6 §§ 2, 4.

Finally, AT&T baselessly argues that the EOA Provision "does not permit Defendants to unilaterally revoke their obligation to provide AT&T with the Yearly Option under the Amendment". Compl. ¶ 145. Pointing to Section 1.1 of the EULA and how "Support Services Period" is defined therein, AT&T argues that the only limitation on Defendants' obligation to provide Support Services purchased during the current renewal period is AT&T's payment of Service Fees. Compl. ¶¶ 146–48. AT&T fails to mention that the very next provision (Section 1.2) is the EOA Provision. Pressment Supp. Aff. Ex. F (EULA Amendment 4), Appendix A § 1.2; *see also* Colorado, Ex. 1 §§ 2.1, 2.2. The EOA is obviously intended to apply during a Support Services Period. There would be no need for such a provision or notice under the provision outside of a Support Services Period.

b. AT&T Opted to [redacted]

AT&T makes numerous baseless arguments regarding its renewal rights under Section II.B.2 of the Amendment. As an initial matter, the Amendment's renewal provision is irrelevant

because the Support Services have reached EOA and are no longer available, through renewal or otherwise. *See supra*. AT&T acknowledges it was fully aware of the EOA risk [redacted] Compl. ¶¶ 73–83 (recounting articles in the press that put AT&T on notice). Moreover, as discussed above, when the Amendment was being negotiated, VMware explicitly told AT&T that it "cannot contractually agree to sell discontinued products" and removed language added by AT&T that sought to curtail VMware's right to discontinue perpetual license products. Gressett ¶¶ 41-42, Ex. 12 § 9. VMware also rejected other language proposed by AT&T during Amendment negotiations that would have given AT&T the right to annually renew at its sole discretion "the Pre-ELA Installed Software and the Converted Perpetually Licensed Software Production Legel Support Service," *id.* § 12, and added language that is substantially similar to today's Section II.B.2. *See id.* at Ex. A, § 2.B.

Despite the plain contractual language and pre-contractual discussions, AT&T mistakenly argues that because it exercised its first renewal term in September 2023, it automatically "secured" an irrefutable right to renew Support Services [redacted] Compl. ¶¶ 133, 135. But AT&T is reading language nonexistent language. Contrary to AT&T's contention, nowhere does the Amendment state that it "[redacted] (Compl. ¶ 135), simply by renewing for one 1-year renewal term before the deadline. AT&T is a sophisticated party and must live with the agreed-to terms. *See* *U.S. Bank Nat'l Ass'n*, 38 N.Y.3d at 177–78 (sophisticated parties will be held to the consequences of their bargain; *Lam Pearl St. Hotel, LLC v. Golden Pearl Constr. LLC*, 200 A.D.3d 521, 522 (1st Dep't 2021) (same).

AT&T's other arguments rights similarly fail. Section II.B.2 states in relevant part that AT&T could renew:

> "[redacted] If Customer renews the Covered Offerings [redacted]

> [redacted] Customer must purchase Production Level Support Services prior to the expiration of support [redacted] During the renewal period, [redacted] If Customer does not renew the Covered Offerings prior to the expiration of Product Support Level Service period, Customer may purchase such offerings thereafter at the fees set forth on VMware's then-current price list."

Section II.B.2 (emphasis added). AT&T had the option to renew f[redacted] meaning prior to September 9, 2023, [redacted] Here, AT&T elected to [redacted]

AT&T points to the third sentence in Section II.B.2 to argue that it would "make no sense" to provide AT&T the ability to reduce the level of Support Services required annually, if AT&T did not also have the corresponding ability to renew annually. Mot. at 11. AT&T omits the portion of the sentence stating, [redacted] Section II.B.2. This sentence simply recognizes that [redacted] This does not mean AT&T was entitled to [redacted] particularly when the Support Services in question had been discontinued during the first term.

Nor does AT&T's reading of the fourth sentence in Section II.B.2 overcome the fact that it opted to only renew for one year prior to the September 9, 2023 deadline. *See* Mot. at 11–12. This sentence simply contemplates that if AT&T had opted to renew for more than one 1-year term, but then failed to timely pay before the end of each elected renewal term, it could purchase the offerings at the then-current price list. But, again, this does not change the fact that AT&T [redacted] *See* Gressett ¶ 46.

Finally, AT&T argues that Defendant's reading that it needed [redacted]

[redacted] Mot. at 14. But Defendant's reading does not render the "[redacted] meaningless, because AT&T [redacted]

2. Breach of the Implied Covenant

Second, AT&T's claim for breach of the implied covenant of good faith and fair dealing fails on its face. There can be no breach of the implied covenant where, as here, Defendants were fully within their rights to retire Support Services. *Uber Techs., Inc. v. Am. Arb. Ass'n, Inc.*, 204 A.D.3d 506, 509 (1st Dep't 2022) ("Uber has not shown a likelihood of success on the merits of its breach of implied covenant claim, as AAA was fully within its express rights under the CA Rules to charge the fees set forth in the fee schedule."); *see also See Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 304 (1983) ("No obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship."). Nor could AT&T argue that Defendants breached the implied covenant when it agreed to extend the Support Services in good faith until October 21, 2024, giving AT&T enough time to seek alternate arrangements or enter into a new deal with Defendants.

B. AT&T WILL NOT SUFFER IRREPARABLE HARM AND MONETARY DAMANGES ARE SUFFICIENT

1. Monetary Damages Suffice

No irreparable harm can be found where monetary damages are sufficient. *See Uber Techs., Inc.*, 204 A.D.3d at 510; *SportsChannel Am. Assocs. v. Nat'l Hockey League*, 186 A.D.2d 417, 418 (1st Dep't 1992) ("Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable"). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" *EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dep't 2007).

Here, any harm AT&T purportedly has or may experience is compensable via monetary damages. While AT&T raises the specter of reputational harm and harm to customers, AT&T hides the fact that it has a viable alternative—AT&T was offered a below-market price deal on a VCF subscription that would allow AT&T to avoid its purported harm (including any alleged harm to customers). Gressett ¶ 59. The fact that an alternative deal is available, regardless of whether or not it is economically advantageous for AT&T (it is), precludes a finding of irreparable harm. *See Sterling Fifth Assocs. v. Carpentille Corp. Inc.*, 5 A.D.3d 328, 329 (1st Dep't 2004) (even "accepting [plaintiff's] allegations of self-dealing by [defendant] in forcing a sale of the building at a loss," the plaintiff's harm would be "compensable with money damages" and so did not constitute irreparable harm.).

In other words, AT&T's "irreparable harm" is self-created. *See Darwish Auto Grp., LLC v. TD Bank. N.A.*, 197 N.Y.S.3d 926 (N.Y. Sup. Ct. Nov. 2, 2023) (denying preliminary injunction where "irreparable harm that Darwish seeks to avoid largely is self-created"); *Curtis 1000, Inc. v. Youngblade*, 878 F.Supp. 1224 (N.D. Iowa 1995) ("Irreparable harm will not be found where alternatives already available to the plaintiff make an injunction unnecessary."). AT&T can mitigate its harm and still seek monetary damages against Defendants if it chooses.[4] *See Lanvin Inc. v. Colonia, Inc.*, 739 F. Supp. 182, 192–93 (S.D.N.Y. 1990) ("A movant for extraordinary relief cannot mask an ongoing failure on its part to mitigate its damages as an ongoing instance of irreparable harm.").

Notably, AT&T failed to provide any evidence[5] demonstrating why Defendants' alternative deal is not feasible, and it simply states it does not "want or need" different services

[4] To be clear, Broadcom does not agree that AT&T is entitled to any such monetary damages.

[5] Allegations of hardship are not evidence. *See Lewis v. Johnston*, 2010 WL 1268024, at *2 (N.D.N.Y. Apr. 1, 2010) ("Plaintiff's allegations, standing alone, are not sufficient to entitle him to preliminary injunctive relief.").

that come with the deal. Mot. at 5. AT&T's Motion merely demonstrates frustration on its part for failing to achieve the deal that it wants. But that is no reason to grant a preliminary injunction.

2. AT&T's Behavior and Statements Undercut Irreparable Harm Claim

In addition, AT&T's prior statements and actions belie its irreparable harm claim.

First, AT&T delayed in seeking injunctive relief. *Casita, L.P. v. MapleWood Equity Partners (Offshore) Ltd.*, 43 A.D.3d 260, 260 (1st Dep't 2007) (no irreparable harm where Plaintiff "offered no justification for delaying its request for an injunction for seven months after having been informed of the conditions."). AT&T knew Defendants would not renew the Support Services no later than December 11, 2023, and foresaw the transition to a subscription-based model since well before August 2022. Compl. ¶¶ 83–87; Pressment Supp. Aff. Ex. A (Amendment). AT&T was also repeatedly told by Defendants' representatives that Support Services would not be renewed months before this lawsuit. Gressett ¶¶ 47-50, 57; Ex. 13 (December 13, 2023 email to AT&T sharing the December 11 announcement) & Ex. 14 (January 17, 2024 email to AT&T executives expressing urgency and requesting meeting with senior leadership to discuss EOA). Nonetheless, AT&T moved slowly. It waited to file this lawsuit on August 29, 2024, barely a week before its Support Services were set to expire.

Second, AT&T's Executive VP, Susan Johnson, admitted in writing that AT&T intended to "migrate away" from VMware software and that doing so will have "a very quick payback and strong IRR [internal rate of return]." Gressett ¶ 56. Yet, AT&T waited until now to start "migrating way," despite perceived risks of EOA and Broadcom's purported "price gouging" going back at least as far back as August 2022. Nor did AT&T include more ironclad provisions in the Amendment to work around the EOA Provision.

Third, despite numerous communications between the parties since the December 11, 2023 public announcement, AT&T only mentioned its purported "irreparable harm" in passing. Gressett

¶¶ 55–56 ([AT&T] did not mention any "irreparable harm" in her email to [Broadcom"). The Complaint was the first time Defendants learned any details regarding how its software was being used. Gressett ¶ 55 ("VMware did not even know the details of how AT&T was using its software until AT&T filed its Complaint.").[6]

Fourth, despite the purported mission critical nature of VMware's software to AT&T's business, it is running very old software versions, some of which was already running unsupported due to AT&T's failure to upgrade. Gressett ¶¶ 51, 53, 69. VMware has tried to encourage AT&T to upgrade, to no avail. *Id*. ¶¶ 50–51.

3. AT&T Has Not Met Its Evidentiary Burden

AT&T spends ink focusing on harm to customers to obfuscate the fact that its own harm is compensable via monetary damages (and that it could avoid harm to customers). Harm to customers is relevant to the balance of equities element, but AT&T's burden is to show irreparable harm to itself. *See Kahn Prop. Owner, LLC v. Fruchthandler*, 202 N.Y.S.3d 896, 907 (N.Y. Sup. Ct. 2023) ("The nuanced difference between irreparable harm and balancing of the equities is that the former focuses on an individual litigant"). AT&T holds many VMware licenses not governed by the Support Services renewal fee (some of which already reached End of Support or will soon reach End of Support, independent of the EOA issue). Gressett ¶¶ 51–53, 60–61. AT&T does not specify (1) where relevant Amendment and non-Amendment licenses are located; (2) which customers they specifically serve; and (3) which licenses will lead to irreparable harm if unsupported (and which are already running unsupported or will soon go unsupported separate and apart for the EOA Provision). *Id*. ¶¶ 53–54. Nor could it. When pressed for details, AT&T has

[6] The Complaint also raises serious concerns regarding whether its vast deployment of VMware software breaches the parties' agreements and infringes on VMware's copyrights. Defendants expect this to be a focus of discovery. *See* Gressett ¶ 53 (AT&T states it has 75,000 Virtual Machines running across approximately 8,600 AT&T servers).

been unable to articulate where or how VMware's software was being used and its core counts were always uncertain or dubious. *Id.* ¶ 54. At most, AT&T can only raise conclusory statements about harm, which is insufficient. *See* *Sutton, DeLeeuw, Clark & Darcy v. Beck*, 155 A.D.2d 962, 963 (4th Dep't 1989); *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011) ("Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction.").

Moreover, Defendants are providing to all patches for Critical Severity Security Alerts for supported versions of VMware vSphere, which should address some of the "critical security patches" AT&T speculates it may need. AT&T fails to explain why this policy is inapplicable to the software it is using. Gressett ¶ 68, Ex. 15.

C. THE BALANCE OF EQUITIES FAVORS DEFENDANTS

"Injunctive relief may only be awarded if the movant makes a clear showing . . . that the balancing of the equities weighs in its favor." *Goldstone v. Gracie Terrace Apartment Corp.*, 110 A.D.3d 101, 104–05 (1st Dep't 2013). The balance of equities strongly favors denying the Motion.

First, the balance of equities counsels against forcing Defendants to provide discontinued Support Services. *See* Gressett ¶ 63 (an injunction would cause defendants to "halt its business model transformation and lose revenue from subscription-based new deals"); *Deutsche Lufthansa AG v. The Boeing Co.*, 2006 WL 3155273, at *5 (S.D.N.Y. Oct. 30, 2006) (denying injunction seeking to "maintain in operation a service which [aerospace company] has chosen to shut down completely"); *see also* *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057, 1059 (4th Dep't 2020) (defendant will suffer harm if forced to keep store open against their will")). Granting AT&T's request for this mandatory injunction would do just that. *See* *Matos v. City of New York*, 21 A.D.3d 936, 937 (2d Dep't 2005) (mandatory inunction is drastic and rarely granted). The injunction will also harm Defendants competitive standing. *See* Gressett ¶ 66 (similar customers

may "insist that VMware cannot discontinue its products and services").

Second, as the intellectual property holders, the balance of equities tip in Defendants' favors. *See, e.g.*, *Synopsys, Inc. v. AzurEngine Techs., Inc.*, 401 F. Supp. 3d 1068, 1074 (S.D. Cal. 2019) (The balance of the equities also tips in [software producer's] favor" even if other party "has been using the [] software as a necessary and critical tool in a major circuit design project that is currently underway."); *see also id.* ("That [software user] may prefer to continue using the software doesn't mean it is entitled as a matter of law to do so.").

Third, the public interest "does not favor forcing parties to a[n] agreement to conduct themselves in a manner directly contrary to the express terms of the agreement." *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir. 1992). Nothing in the agreement bars Defendants from revamping its policies and products in favor of innovation, including by discontinuing Support Services for retired product lines. *See* Gressett ¶¶ 63, 66. The fact that AT&T seeks to impose a non-existent contractual obligation upon Defendants does not tip equities in its favor. *See CC Fin. LLC v. Wireless Props., LLC*, 2012 WL 4862337, at *9 (Del. Ch. Oct. 1, 2012) (finding "equity respects the freedom to contract and teaches that parties should receive the benefit of their bargain"); *Suttongate Holdings Limited v. Laconm Management N.V.*, 159 A.D.3d 514, 515 (1st Dep't 2018) (same).

Fourth, AT&T cannot escape the fact that its harm is self-imposed. AT&T admits it had notice since at least mid-December 2023 that Support Services would not be renewed, and it was aware of EOA risk years earlier, including when it negotiated the Amendment. Compl. ¶¶ 77; 136. Blame, therefore, should not be shifted onto Defendants because of AT&T's failure to timely seek alternatives (including buying the offered subscription and alternate products) or migrating away earlier from VMware's software. *See Sync Realty Grp., Inc. v. Rotterdam Ventures, Inc.*, 63 A.D.3d 1429, 1431 (3d Dep't 2009) ("Considering that plaintiff's alleged harm appears to be in

part self-created, it cannot be said that the balance of equities tilts in plaintiff's favor.").

D. NO EXTRAORDINARY CIRCUMSTANCES ARE PRESENTED

Courts do not grant provisional injunctive relief where—as here—doing so "would grant the movant the ultimate relief to which he or she would be entitled in a final judgment." *Zoller v. HSBC Mortg. Corpl, (USA)*, 135 A.D.3d at 933, 934 (2nd Dep't 2016); *SHS Baisley v. Res Land*, 18 A.D.3d 727, 728 (2d Dep't 2005). Movant's burden is particularly heavy in those cases where granting preliminary injunction will give that party substantially the relief it would obtain after full trial on the merits. *Zoller*, 135 A.D.3d at 934 (requiring "extraordinary circumstances" to grant preliminary injunction where doing so would grant the movant the ultimate relief he seeks); *Bd. of Managers of Wharfside Condo. v. Nehrich*, 73 A.D.3d 822, 824 (2d Dep't 2010) (no extraordinary circumstances). AT&T points to no "extraordinary circumstances," nor could it. It can avoid harm by entering into a new subscription-based deal and suing for monetary damages if it thinks it paid too much.

AT&T's motion must also be denied because, notwithstanding AT&T's mischaracterization, imposing a preliminary injunction would *not* maintain the status quo. Instead, an injunction would alter Defendants' current and long-announced offerings and cause Defendants irreparable harm. Gressett ¶¶ 63–64; *id*. ¶ 65 (granting the Motion will "effectively [halt] VMware's multi-year business model transformation efforts and forcing VMware to sell a perpetual support SKU that was discontinued"); *see Times Square Stores Corp. v. Bernice Realty Co.*, 107 A.D.2d 677, 682 (2d Dep't 1985) (for preliminary injunctions pendente lite, "such extraordinary action is justified only where the situation is unusual and where the granting of the relief is essential to maintain the status quo") (internal quotations and citations omitted).

E. THE COURT SHOULD REQUIRE AN UNDERTAKING

Under CPLR 6312(b), "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court …." The undertaking should be "rationally related to [a defendant's] potential damages should the preliminary injunction later prove to have been unwarranted." *Peyton v. PWV Acquisition LLC*, 101 A.D.3d 446, 447 (1st Dep't 2012). If the Court grants AT&T's Motion, AT&T should be required to post an undertaking at least equal to the first annual payment for the five-year VCF subscription most recently offered to AT&T, [redacted]. This amount would be "pennies for a multibillion-dollar company like AT&T." Gressett ¶ 61. This amount reflects the minimum damage Defendants will suffer in one year if it is forced to provide Support Services without a VCF subscription agreement in place (an agreement required of all other similarly situated customers for the same software and services).

CONCLUSION

For the reasons discussed, the Court must deny AT&T's Motion.

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Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Stephanie Colorado, an attorney admitted to practice before the Courts of the State of New York, hereby certify that this memorandum complies with the word count limits contained in Rule 17 of Section 202.70 (Rules of the Commercial Division of the Supreme Court) because it contains 6,945 words, excluding parts of the memorandum excluded by Rule 17. In making this certification, I have relied upon the word count of the word-processing system used to prepare this memorandum.

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