

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

<p>AT&amp;T SERVICES, INC.,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>BROADCOM INC., as successor in interest to VMWARE, INC. and VMWARE, Inc.,</p> <p style="text-align: right;">Defendants.</p>
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Index No.: 654490/2024

Hon. Jennifer G. Schecter

**Motion Seq. No. 001**

**AFFIRMATION OF RANDALL  
GRESSETT IN SUPPORT OF  
DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S ORDER TO SHOW CAUSE  
FOR PRELIMINARY INJUNCTION**

I, Randall Gressett, affirm under penalty of perjury under the laws of New York as follows:

1. I am over 18 years of age, of sound mind and otherwise competent to make this Affirmation. The evidence set out in the foregoing Affirmation is based upon my personal knowledge unless expressly stated otherwise.

2. I submit this Affirmation in support of Defendants VMware and Broadcom Inc.'s Opposition to AT&T Services, Inc.'s ("AT&T") Order to Show Cause for Preliminary Injunction.

3. I serve as Vice President of Americas Strategic Sales of VMware by Broadcom, where I manage the EAST Area, including the Eastern Continental United States, Canada and our TELCO vertical markets. I was employed by EMC Corporation in 2004 when it acquired VMware, Inc. and my knowledge regarding VMware's business extends back to that time.

4. In November 2023, VMware, Inc. was acquired by Broadcom (hereinafter, the "Acquisition"). VMware, Inc. is a data center and cloud computing infrastructure software company. Broadcom is a global infrastructure technology company focused on semiconductor

and infrastructure software solutions. As part of the acquisition, VMware, Inc. was rebranded as VMware by Broadcom (hereinafter, “VMware”). In addition, to my knowledge and belief, Broadcom acquired all of VMware’s intellectual property and contracts as part of the acquisition.

**I. VMWARE’S TRANSITION TO SUBSCRIPTION-BASED MODEL BEGAN YEARS AGO AND WAS WELL KNOWN IN THE INDUSTRY.**

5. Long before the acquisition by Broadcom, it was well known in the industry that VMware would be transitioning from a perpetual to a subscription-based model.

6. To respond to customer feedback and the wider industry trend of a move to subscription, VMware initiated early on (at least in 2018) strategic changes to its licensing model and product portfolio. This included VMware’s preparations to move its customers from a perpetual to subscription-based licensing model. Significant progress was made in the years that followed, and upon Broadcom’s acquisition of VMware, Broadcom picked up where VMware left off. Broadcom also modified and improved those plans to better address the challenges VMware’s customers face today.

7. These changes have been introduced with a view to facilitating the deployment of VMware software and enabling VMware’s customers to more effectively compete, but also as well to preserve VMware’s ability to innovate. These changes will benefit end customers of VMware’s products, including by enhancing competition among cloud services providers, distributors, and resellers of VMware’s software as well as the quality of VMware products and services. In particular, the changes made to VMware’s portfolio:

- are fully in line with industry licensing standards;
- are driven by the competitive offerings and pressure from the public cloud, the need to continue to innovate, and deliver product innovation and updates more frequently to customers;

- aim to facilitate the deployment of VMware virtualization software across traditional datacenter and cloud environments by enhancing, among other aspects, license portability; and
- are needed to continue to invest in VMware's offering and partnership programs for the benefit of consumers.

8. Since the acquisition closed, Broadcom has focused on creating a single, unified infrastructure software product able to compete more vigorously with the public cloud offerings and to preserve its ability to invest and innovate in this highly competitive market.

9. Given the large number of on-premises and off-premises virtualization solutions available, including the public cloud, customers have many alternatives to choose from. Before the Broadcom acquisition, VMware had understood this market reality and was already working on addressing the pitfalls of its licensing and software suite program. As early as 2018, VMware had started to discourage the use of perpetual licenses and to roll out subscription offerings to match the cloud providers' subscription and consumption-based models.

10. After the acquisition, Broadcom has continued to implement VMware's plan to move to the industry standard subscription model. Separately, Broadcom has also moved to adapt its offerings to better compete with, in particular, VMware's public cloud competitors. On December 11, 2023, VMware announced changes to its portfolio to advance these goals and create a true private cloud offering that is as simple and easy to use for customers as the public cloud is today. A true and correct copy of the December 11, 2023 public announcement is attached hereto as **Exhibit 1**, and is available at <https://news.vmware.com/company/vmware-by-broadcom-business-transformation> (last visited Sept. 19, 2024).

11. In this context, VMware, pre- and post-acquisition, has implemented strategies to:

(1) respond to the competitive offerings and pressure from the public cloud; (2) integrate VMware's core offerings and simultaneously invest one billion dollars to create a more seamless customer experience, (3) continue VMware's migration from perpetual licensing to a subscription/Software as a Service ("SaaS") model in line with industry trends to provide a more predictable and sustainable economic model to support expenditure management and investment, (4) increase license portability for end customers by standardizing VMware software used by hosting providers, and (5) make the hosting service provider program consistent and more efficient.

12. The simplification and rationalization of VMware's portfolio and the shift to subscription are a culmination of VMware's multi-year business transformation efforts, most of which began long before the Broadcom acquisition.

**II. THE COMPETITIVE OFFERING AND PRESSURE FROM, IN PARTICULAR, THE PUBLIC CLOUD FORCED A REPOSITION OF VMWARE'S COMMERCIAL OFFERING AND GO-TO-MARKET APPROACH.**

13. VMware has been facing ever-increasing competition from, in particular, the public cloud, eroding its position in on-premises deployments.

14. The direct competitive constraint from the public cloud caused VMware—long before the Broadcom acquisition—to create a full-stack VMware Cloud Foundation product ("VCF") and promote its adoption and deployment across its customer base. Configured correctly, the VCF solution integrates functionality that previously required custom configuration of a number of disparate VMware solutions to create a truly cloud-like service and

management experience in the customer's own private data center.<sup>1</sup>

**III. VMWARE'S MORE INTEGRATED AND HIGHLY DISCOUNTED PRODUCT PORTFOLIO RESPONDS TO CUSTOMER DEMAND FOR MORE INTEGRATED AND SEAMLESS SOLUTIONS.**

15. Going forward, VMware will rely on its direct sales force to serve the largest customers on VMWare Cloud Foundation ("VCF"). Broadcom is already investing heavily in integrating within VCF a suite of formerly disparate products to function more seamlessly with one another and requiring less configuration by customers. VMware decreased from 168 to 2 principal offers, the number of offers with integrated releases promoting less issues with upgrades and less downtime (stack upgrade vs. upgrade of multiple disparate products at different times, with different processes and user interfaces). Broadcom is making a significant R&D investment to update this functionality. Broadcom is also investing heavily in professional services to assist customers with deployment. Broadcom expects that moving VCF customers to an integrated solution on a single configuration will significantly reduce the cost of supporting them and also lower customers' total costs of ownership. Importantly, Broadcom expects this integrated VCF solution will help VMware better compete with cloud and other competing solutions.

16. Additionally, Broadcom has significantly improved the benefits of license portability for VCF customers. Before the acquisition, like most companies in the software industry, VMware only permitted purchasers of VCF to use that license in their own data center. The new SKU offering allows customers to use their VCF license on-premises and then take their subscription, without any additional payment and without incurring switching costs, at any

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<sup>1</sup> VCF is VMware's new solution for customers looking to capture the full stack infrastructure value associated with a platform that offers vSphere, vSAN, and NSX with the full Aria management and orchestration suite with new services included.

time to a supported hyperscaler or cloud service provider (“CSP”) that is part of the Broadcom Advantage Partner Program as desired. The customer will thus retain its license subscription (and investment) as they move their workloads. Google Cloud will be the first to support VCF license portability. Other hyperscalers and cloud partners are expected to follow.<sup>2</sup> More than seventy CSPs have already signed on to the new VCSP program as Pinnacle partners, which shows their commitment to support such license portability over time.

17. Of course, to take full advantage of these developments, customers will also need to make some changes within their IT operations groups. The process of educating customers about the benefits of doing so are fully supported by Broadcom’s sales force.<sup>3</sup> For that reason, Broadcom has included customer activation and upgrade support in the VCF offering, at no extra cost. Additional professional services and dedicated support resources are also available.

18. As to pricing, the total subscription list price for the underlying disparate products with a similar combination of functionality that is now available in VCF was reduced by 50% post-acquisition, allowing customers to move to a more integrated solution at an attractive price point.

19. For customers with smaller deployments that may not be looking for a private-cloud experience, Broadcom is offering VMware vSphere Foundation (“VVF”) through its

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<sup>2</sup> See **Exhibit 2**, containing a true and correct copy of the following article: Broadcom and Google Cloud Announce License Portability Support for VMware Cloud Foundation on Google Cloud VMware Engine (Feb. 14, 2024), available at <https://news.vmware.com/releases/broadcom-google-vcf-license-portability> (last visited Sept. 18, 2024).

<sup>3</sup> See **Exhibit 3**, containing a true and correct copy of the following article: VMware by Broadcom: the first 100 days (March 14, 2024), available at <https://www.broadcom.com/blog/vmware-by-broadcom-the-first-100-days> (last visited Sept. 18, 2024), and **Exhibit 4**, containing a true and correct copy of the following article: VMware: Business Simplification, Portfolio Innovation and Ecosystem Standardization (Feb. 14, 2024), available at <https://news.vmware.com/company/vmware-by-broadcom-business-simplification> (last visited Sept. 18, 2024).

channel partners.<sup>4</sup> VVF includes the same functionality as one of the most common customer configurations before the acquisition—server virtualization as well as an automation layer to help customers more efficiently manage their virtualization deployments.

20. Again, by moving customers to a better-integrated configuration of functionality, Broadcom expects it will significantly reduce the cost of supporting those customers and also lower customers' total costs of ownership. Additionally, VVF is priced at a 50% discount compared to the subscription list price for the previous combination of VMware products needed to achieve the same functionality. With this significant discount, VVF is essentially priced at the same level as that of VMware's most common standalone server virtualization license offered pre-acquisition, vSphere ENT+, but with much more functionality.

21. Customers with lighter requirements such as basic hardware consolidation or virtualization on small numbers of servers, can still purchase subscriptions to vSphere standard through Broadcom's channel partners.

22. Previously, end customers spent large amounts upfront for a perpetual license to use VMware's software and paid separately for maintenance and support. Consistent with the overall industry trend, if not the standard, VMware has been moving to a subscription model where the client pays both for the use of the software as well as for maintenance, support and upgrades on yearly basis for a fixed term. The industry transition from perpetual to subscription licensing changes the payment terms as customers no longer pay up front for a license over a given amortization period in combination with fixed-term maintenance and support contracts, but instead pay for the license and associated service and maintenance on an annual basis for the

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<sup>4</sup> See **Exhibit 5**, containing a true and correct copy of the following article: Embracing Change with VMware vSphere Foundation (Jan. 17, 2024), available at <https://blogs.vmware.com/vsphere/2024/01/embracing-change-with-vmware-vsphere-foundation.html> (last visited Sept. 19, 2024).

subscription term.

23. As explained above, VMware's transition to a subscription-based SaaS model began long before the Broadcom acquisition and has been ongoing since at least 2018.<sup>5</sup> In line with VMware's pre-acquisition plans, the VMware vSphere family of offerings will solely be available as subscriptions or as term licenses,<sup>6</sup> and perpetual licenses are no longer available (although customers can continue to use their existing perpetual licenses). This switch away from a perpetual-based model and towards a subscription-based model was undertaken by VMware and would have been fully implemented in the absence of the acquisition.<sup>7</sup> In fact, the acquisition delayed its full implementation.

24. The subscription model is the model used by all major enterprise software providers today. Subscriptions provide a more stable and predictable cost management and revenue stream for software vendors like Broadcom (including VMware) to support their R&D and innovation efforts. In addition, the subscription model helps deliver what customers want: continuous innovation, faster time to value, seamless maintenance and upgrades, and predictable

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<sup>5</sup> See **Exhibit 6**, containing a true and correct copy of the following article: (The Motley Fool, VMware (VMW) Q1 2019 Earnings Conference Call Transcript (June 4, 2018), available at <https://www.fool.com/earnings/call-transcripts/2018/06/03/vmware-vmw-q1-2019-earnings-conference-call-transc.aspx>).

<sup>6</sup> Subscription has both a "term" or "duration" that is flexible (shorter/longer duration), expanded (more units) and contracted (fewer units) at renewal time. With a subscription, the licensee does not own a perpetual license to the software but instead gains the right to use the software or service as long as the subscription is active. The main difference between term and subscription licenses is that term doesn't have overages. Term licenses are not tied to the cloud for license metering or billing. These licenses come with a key, which looks/acts/feels like perpetual, with the exception of an expiry on the License key, unlike perpetual licenses. In addition, the license is valid only for the agreed-upon term, and at the end of the term, the licensee may need to renew the license or purchase a new one to continue using the software. See Exhibit 2 to the Affirmation of Stephanie Colorado, containing a true and correct copy of the Page Vault capture of the following article: Poonam Singh, Perpetual, Term, or SaaS?, Office of the CTO Blog, VMWare (Feb 7, 2023), available at <http://web.archive.org/web/20230316100341/https://octo.vmware.com/perpetual-term-or-saas/>.

<sup>7</sup> See **Exhibit 7**, containing a true and correct copy of VMware CEO Raghu Raghuram on Q4 2022 Results – Earnings Call Transcript (Feb. 24, 2022), available at: <https://seekingalpha.com/article/4490272-vmware-inc-vmw-ceo-raghu-raghuram-on-q4-2022-resultsearnings-call-transcript> (last visited Sept. 19, 2024).



investments. But these benefits are only realized when all customers are on the subscription model, with the harmonized versions and recurring, rather than sporadic, payment terms that come along with it.

25. The expansion of VMware's sales channels also resulted in different pricing metrics formulas for end customers and each partner type (distributors/resellers, cloud hosting customers, etc.). VMware had developed plans to transition to a per-core pricing long before the acquisition and consistent with these plans, VMware has now transitioned from these disparate pricing models to a single pricing metric – pricing per core. Pricing per core is the most appropriate proxy for compute capacity and has been the enterprise software industry standard for many years. Indeed, companies such as Microsoft, Oracle, and Red Hat apply per-core pricing – since as early as 2012 (for Microsoft, for example).

26. Among other benefits, the unified pricing metric across all VMware end customers and partners eliminates unequal treatment among customer or partner groups. It also has the fundamental advantage of facilitating license portability across deployment environments as customers do not need to buy another license if they move their workloads. For example, in the past a customer would have required a new license if it transitioned from self-hosting virtualization software in its own datacenter (where the VMware license would have been priced by server) to using virtualization software on a public cloud where the relevant cloud services provider would be using VMware software priced on the basis of memory usage.

27. Moreover, to facilitate the transition to subscription, Broadcom has provided additional discounts to customers with existing perpetual licenses. For example, Broadcom has offered pricing that provides additional discounts to customers for the initial years of their subscription in recognition of their initial investments in their perpetual licenses, which allows

customers to adjust gradually to the new model. This further eases the transition to the new licensing model.

28. The end result of the transition will be highly pro-competitive. It will reduce VMware's support costs, allowing it to focus its R&D investments and innovation efforts in the single product rather than investing in fixes and updates for various, previous versions. In addition, VMware's ability to compete more effectively with public cloud providers with its new offerings and the license portability features of VCF will also benefit customers who consume cloud services by making it easier for those customers to switch back and forth among private, hybrid and public cloud environments. As such, this gives customers greater choice and flexibility to run and manage their applications across all deployment environments.

29. In summary, the changes introduced by VMware to its VCF offering to create a consistent deployment experience across private cloud, hybrid cloud and public cloud environments for customers and switch from a perpetual to subscription-based model:

- are driven by direct competitive constraints and offerings from the public cloud;
- respond to customer demand to facilitate the deployment of VMware virtualization software across traditional datacenter and cloud environments, including on any public cloud. This provides customers with greater choice and flexibility to run and manage their application;
- are a continuation of, and consistent with, VMware's pre-acquisition plans to shift from a perpetual to a subscription-based licensing model priced per-core;

- are complemented with investments in VMware's offering and partnership programs for the benefit of consumers;

30. As such, these changes are fully in line with industry standards, execute decisions previously adopted by VMware to support their R&D efforts, will benefit end customers of VMware's products, and will enhance competition among cloud service providers, distributors and resellers of VMware's software.

#### **IV. PUBLIC ANNOUNCEMENTS REGARDING NEW PORTFOLIO OFFERINGS AND END OF AVAILABILITY OF SUPPORT SERVICES FOR PERPETUAL LICENSES**

31. As discussed above, long before the Broadcom acquisition, it was well known in the industry that VMware would be transitioning from a perpetual model to a subscription model. For example, in addition to VMware's own public announcements as far back as 2018, on May 26, 2022, Broadcom announced during its Q2 2022 Earnings Call its intention to complete the transition from perpetual licenses to a subscription model upon completion of its acquisition of VMware. A true and correct copy of the May 26, 2022 Broadcom Q2 2022 Earnings Call transcript is attached as **Exhibit 8** hereto, and is available at <https://www.fool.com/earnings/call-transcripts/2022/06/02/broadcom-ltd-avgo-q2-2022-earnings-call-transcript> (last visited Sept. 19, 2024). Other articles in early 2022 also foretold that VMware was planning to convert its product lines to subscription or SaaS.<sup>8</sup>

32. As discussed above, on December 11, 2023, VMware issued a public announcement on its website describing changes to its policies and offerings following the

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<sup>8</sup> See **Exhibit 9**, containing a true and correct copy of the following article: Sue Marek, VMware will convert all product lines to subscription or SaaS, SILVERLININGS (Feb. 25, 2022), available at <https://www.silverliningsinfo.com/cloud/vmware-will-convert-all-product-lines-subscription-or-saas>. The article was last visited on September 19, 2024.

Acquisition. *See Exhibit 1.*

33. The announcement described that 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, and hybrid purchase program/subscription purchase program (HPP/SPP) credits beginning today (effective dates will vary).” *Id.* The announcement also stated that, as part of its transition to a subscription model, “Offerings will solely be available as subscriptions or as term licenses following the end of sale of perpetual licenses and Support and Subscription (SnS) renewals beginning today.” *Id.*

34. In that same article, VMware reiterated that “we are ending the sale of Support and Subscription (SnS) renewals for perpetual offerings beginning today.” *Id.* The Q&A states that “customers cannot renew their SnS contracts for perpetual licensed products after today. Broadcom will work with customers to help them ‘trade in’ their perpetual products in exchange for the new subscription products, with upgrade pricing incentives. Customers can contact their VMware account or partner representative to learn more.” *Id.* The Q&A states the vSphere products were impacted by the new policy. *Id.*

35. VMware also published a blog post on its website on January 15, 2024, which was revised on January 22, 2024, explaining that VMware was discontinuing standalone products (including vSphere products) in light of its full transition to a subscription model, and that VMware software solutions would only be offered as part of VMware Cloud Foundation (VCF) or VMware vSphere Foundation (VVF) subscriptions.

36. **Exhibit 10** is a true and correct copy of the January 22 blog post. The article is available at <https://blogs.vmware.com/cloud-foundation/2024/01/22/vmware-end-of-availability->

[of-perpetual-licensing-and-saas-services/#:~:text=As%20announced%%20on%20December%2011,licensing%20to%20a%20subscription%20model](#) and was last visited on September 18, 2024.

**V. AT&T KNEW THE END OF AVAILABILITY RISKS AND FAILED TO PROTECT ITSELF**

37. On September 27, 2007, AT&T and VMware entered into a Master End User License Agreement, which set forth terms and conditions for AT&T's purchase of Software and Support Services from VMware (as amended, the "EULA"). See 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. The EULA contains an End of Availability provision, which states: "**VMware may, at its discretion, decide to retire Software and/or Services at any time ("End of Availability") upon notice.**" See Pressment Supp. Aff. Ex. F (EULA Amendment 4), Appendix A § 1.2 (the "EOA Provision").

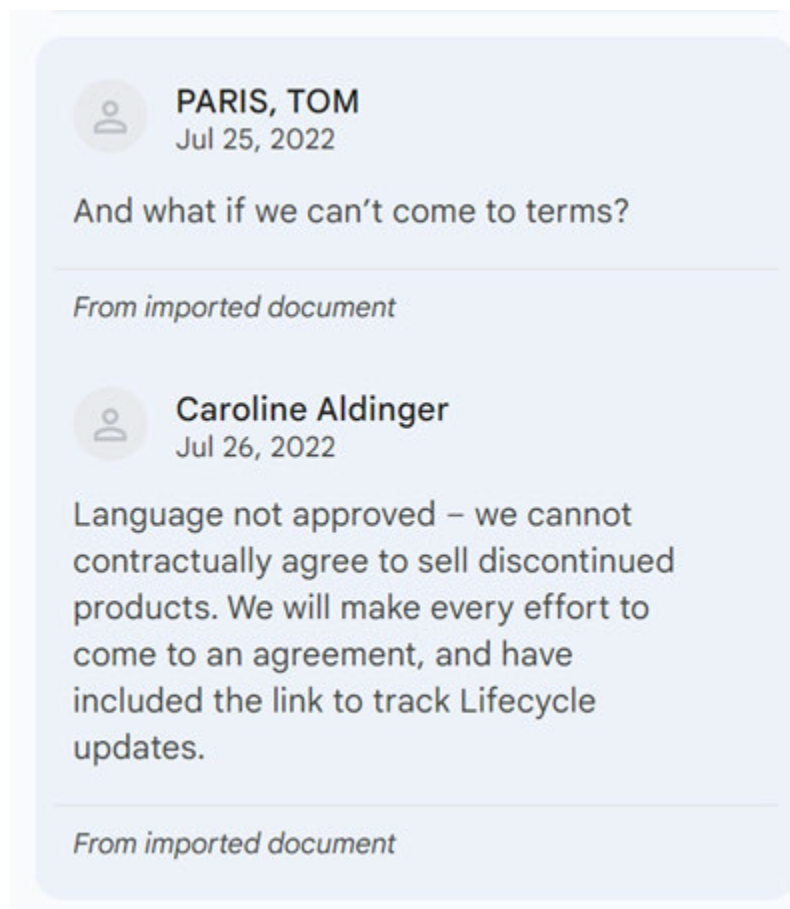
38. On August 3, 2022, the parties entered into Amendment No. 1 to the 2021 Enterprise License Agreement with VMware, dated August 3, 2022 (the "Amendment"), which contains the renewal terms that are the subject of this dispute. Pressment Supp. Aff., Ex. A. The Amendment is subject to the terms and conditions of the EULA. *Id.* §§ 11.1, 11.4. In particular, with respect to Support Services, Section 11.4 of the Amendment states, "Customer'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 no conflict with the EULA. In the event of a conflict, the terms of the EULA shall control."

39. A true and correct copy of the support services terms found at <http://www.vmware.com/support/policies> at the time the Amendment was executed is attached hereto as **Exhibit 11**. They also contain an "End of Availability" provision, which is consistent

with the EOA provision in the EULA. Specifically, Section 2.2 of the online support services terms provides, “**VMware may, at its discretion, decide to retire any Software and/or Services offering from time to time (“End of Availability”)**. VMware will notify affected customers, and will post information regarding End of Availability and the timeline for discontinuing the affected Services at <https://www.vmware.com/support/policies/lifecycle.html>. **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.**” Exhibit 11 at p. 2 (emphasis added). A true and correct copy of VMware’s Lifecycle Policies, which was available at <https://www.vmware.com/support/policies/lifecycle.html> at the time the Amendment was executed, is attached as Exhibit 1 to the Affirmation of Stephanie Colorado.

40. AT&T was fully aware VMware was transitioning to a subscription-based model when it entered into the Amendment.

41. Indeed, Section 18 of the Amendment, entitled “Potential Discontinuation of Perpetual Licenses,” expressly acknowledges the possibility that VMware may discontinue its Perpetual Licenses and includes a link to VMware’s Lifecycle Policies. During negotiations, AT&T sought to add the following language to the provision (formerly Section 9): “While both parties negotiate [the purchase of alternative subscription software], VMware will continue to make available to Customer any discontinued Perpetual License products at the rates documented in this Amendment.” VMware rejected this proposed language, explaining that we “cannot contractually agree to sell discontinued products.” A true and correct copy of a redlined draft of the Amendment showing the negotiation of the relevant terms is attached hereto as **Exhibit 12.**



42. Section 18 of the Amendment and the parties' related negotiations show that AT&T understood VMware had the right to discontinue products from time to time pursuant to its Lifecycle Policy, even when the parties' agreement otherwise would allow a party to purchase those same products at fixed prices in the future. As the End of Availability provisions in the EULA and online support terms make clear, the purchase of VMware products is subject to their general availability and VMware is entitled to discontinue its products and services at any time upon notice.

43. Moreover, although AT&T alleges in its Complaint that it entered into the Amendment to "ensure that Broadcom's acquisition of VMware would not change the terms on which AT&T had done business for years" and to "cement the commercial terms of its relationship with VMware for the foreseeable future," this is contradicted by the Amendment

itself and the parties' negotiations. If AT&T anticipated the End of Availability risk when it entered into the Amendment as it claims it did, and entered into the Amendment to avoid that risk, you would expect to see express language making clear that AT&T's renewal rights trumped VMware's rights to discontinue products and services pursuant to the End of Availability provision (which was incorporated into the Amendment). It doesn't exist. Instead, the Amendment expressly acknowledges VMware's right to discontinue perpetual licenses in Section 18, and I understand VMware rejected language proposed by AT&T during negotiations that would weaken that right. *See Exhibit 12* (proposed and rejected language to draft Section 9 (page 11 of document), which ultimately became Section 18 in the Amendment).

44. The redline of the draft Amendment, attached as **Exhibit 12**, also shows that VMware rejected other proposed renewal rights language from AT&T. AT&T's proposed renewal language stated that "AT&T may renew on an annual basis" for "4 consecutive one year periods[.]" VMware rejected that language. *See Exhibit 12* at pp. 11-12 (rejecting proposed renewal language to draft section 12.2). **Instead, the parties agreed that AT&T could renew "up to" three additional one-year renewal terms, so long as it did so prior to September 9, 2023.** *See Exhibit 12* at p. 18, Exhibit A, Section 2.B.

45. The true reason the parties entered into the Amendment is because AT&T induced VMware into agreeing to extend the 2021 ELA term and provide heavily discounted pricing in exchange for AT&T's purchase of the initial VCF software and Services for its Data Center Consolidation ("DCC") program. Months after the Amendment was executed, however, AT&T reneged on the DCC program, never deployed the initial VCF software, and never accepted VMware's Services. VMware was eventually forced to debook \$16 million in Services. AT&T also never followed through on the additional VCF software purchases they promised to make.



Simply put, AT&T bait and switched VMware on the Amendment, getting VMware to accept a minimal initial software purchase in exchange for an ELA extension, with assurances from AT&T's senior leadership that the full program would execute over two to three years.

46. Furthermore, AT&T goes to great lengths in its Complaint to paint VMware as a bully from which AT&T—a multibillion-dollar highly sophisticated company—needed to protect itself when it entered into the Amendment. But if AT&T truly felt the Support Services were essential to avoid irreparable harm to its customers, it would have exercised and purchased the “Three Year Renewal” option in the Amendment or at least elected to renew for more than one year. It did not. Thus, AT&T's Support Services for the Pre-ELA Installed Licenses were set to expire on September 9, 2024, under the plain terms of the Amendment.

47. After VMware's December 11, 2023 public announcement, VMware discussed its End of Availability decision with AT&T several times. On December 13, 2023, a VMware Account Director who reports to me sent the public announcements to several executives at AT&T and asked to schedule a meeting to discuss the implications for AT&T. A true and correct copy of the email correspondence is attached as **Exhibit 13**.

48. VMware and AT&T representatives subsequently met and communicated about VMware's End of Availability notification on several occasions. VMware was very clear that no extensions for Support Services would be granted to AT&T and that the parties would need to enter into a new commercial agreement before the Support Services expired on September 9, 2024.

49. VMware also provided AT&T key updates on VMware's product offerings, including: (i) the dramatic simplification of VMware's product portfolio, which included two primary offerings going forward: VCF and VMware vSphere Foundation; (ii) the end of sale of

perpetual licenses and Support and Subscription (SnS) renewals for perpetual offerings; and (iii) attractive pricing and trade-in for perpetual products in exchange for the new subscriptions products, with upgrade pricing incentives.

50. On January 17, 2024, VMware sent an email to AT&T executives expressing urgency and asking for a meeting with AT&T senior leadership. Among other things, VMware noted that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A true and correct copy of the email correspondence is attached as **Exhibit 14**.

51. VMware understood that AT&T had a disorganized at-risk portfolio with old versions of VMware software that it had licensed under different types of agreements (transactional vs ELA), some of which was already running unsupported due to AT&T's failure to upgrade. On information and belief, approximately 30% of AT&T's VMware environment is past End of Support or will go past End of Support next month, separate and apart from the End of Availability issue, because AT&T has neglected to update the outdated versions of software it is running.

52. Thus, **even if AT&T had been able to renew Support Services for the Pre-2022 ELA Installed Software under the Amendment this year and next,** a significant portion of its VMware environment would still be unsupported. AT&T fails to identify which of the "8,600 AT&T servers" have VMware software covered by the Amendment, a separate transactional license agreement, or both. A not insignificant subset of AT&T's VMware environment are

outside the scope of the Renewal Fees from the Amendment, and additionally remain unresolved. On information and belief, only about 30% of VMware's retiring annual software-related revenue from AT&T is from the Renewal Fees from the Amendment.

53. Likewise, AT&T claims its “more than 75,000 virtual machines operating with the Software—and the millions of AT&T customers worldwide those machines support—are living on borrowed time.” AT&T does not explain, however, which of those 75,000 virtual machines are on “borrowed time” because AT&T failed to exercise the “Three-Year Option” under the Amendment or because the virtual machines are relying on outdated, unsupported software versions purchased under separate agreements.

54. When pressed for details regarding its installed base, despite having reporting obligations under the ELA, AT&T could never articulate where or how VMware’s software was being used and its core counts were always uncertain or dubious. Thus, VMware believed (and continues to believe) a single VCF solution that would consolidate and update AT&T’s licenses and bring them under one roof would be essential for AT&T moving forward. Even so, AT&T dragged its feet, repeatedly threatened that it was going to move off VMware software entirely, refused to engage in good faith negotiations, and failed to consider reasonable alternative proposals.

55. Moreover, although the Complaint describes the irreparable harm that its customers will purportedly suffer if VMware does not provide discontinued Support Services to AT&T for another two years, this was not AT&T’s focus during negotiations. VMware did not even know the details of how AT&T was using its software until AT&T filed its Complaint. Indeed, the Complaint raises many questions regarding whether AT&T’s use of VMware’s software complied with its “internal use” and other obligations under the parties’ agreements,

and VMware expects that will be a topic of investigation in this matter.

56. Likewise, although AT&T now claims to be completely dependent on VMware software and describes it as critical to its operations, AT&T frequently informed VMware during the course of negotiations that it was planning to move off VMware software. For example, as recently as August 19, 2024, Susan Johnson, AT&T's Executive Vice President and General Manager – Wireline Transformation and Global Supply Chain, sent Broadcom's CEO, Hock Tan, an email explaining that AT&T would not be entering into a new subscription deal with VMware because the cost to “migrate away from VMware (projected at \$40-\$50M) has a very quick payback and strong IRR [internal rate of return][.]” If AT&T knew that it was not interested in moving to a subscription-based model and desired to migrate off VMware software, it could have prioritized that investment years ago when it first learned of VMware's business transition. Notably, Ms. Johnson did not mention any “irreparable harm” in her email to Mr. Tan.

57. For the last several months, Broadcom and VMware have been negotiating with AT&T on a VCF deal, which would include service offerings that support AT&T's virtualized environment.

58. AT&T alleges without support that Defendants are trying “extort hundreds of million in subscription fees while, at the same time, selectively permitting other customers to renew support services despite claiming they are no longer available.”

59. This is untrue. We recently gave AT&T an offer to purchase a five-year VCF subscription at a price that is well-below market, and that is as favorable if not even more favorable than offers made to similarly situated customers. AT&T indicated, however, that it would rather file a lawsuit and “migrate away” from VMware's software if Broadcom does not allow it to renew the discontinued Support Services **for another two years under the Amendment.**

60. AT&T's comparison of the annual price of support services under the Amendment and the price of the proposed VCF agreement is highly misleading. The reality is that AT&T has enjoyed heavily discounted pricing for years due to its lack of transparency and misleading representations regarding its deployment intentions. It is also running outdated, unsupported software and has deployed VMware software under different agreements. Any new VCF deal, no matter how reasonable or beneficial or valuable to AT&T, will be more expensive than its old one because it is up-to-date and much more comprehensive. The five-year VCF subscription proposal offers significant value and new technology, while also cleaning up AT&T's messy at-risk environment, bringing everything under one umbrella.

61. In any event, even if AT&T does not ultimately want the deal or wants to pay less, it could avoid any alleged "irreparable harm" by agreeing to the new subscription deal, paying the first annual fee (which would be pennies for a multibillion-dollar company like AT&T and significantly less than "migrating away" from VMware). Indeed, if AT&T's claims of irreparable harm are true, it *must* enter into a new agreement with VMware to avoid harm because a significant percentage of its software is already unsupported or will soon go unsupported regardless of whether it renews Support Services under the Amendment. In other words, the irreparable harm AT&T claims will not be avoided by the injunctive relief sought in its Motion through no fault of VMware.

62. The VCF and other pricing offered to AT&T and other customers is highly proprietary and public disclosure would cause VMware and Broadcom competitive harm. Additional information can be provided under seal or *in camera*, however, at the Court's request.

63. Conversely, if the Court forces VMware to provide discontinued Support Services for the next one or two years while this lawsuit is pending, AT&T will have secured exactly the ultimate relief it seeks. It will likely use the time during the lawsuit to migrate away from VMware software (apparently spending \$40-50 million doing so), and it will be impossible to determine what damages VMware suffered from having to halt its business model transformation and lose revenue from subscription-based new deals.

64. AT&T claims in its Complaint that “Defendants would suffer no harm if they were enjoined from shutting off the Support Services.” According to AT&T, “Defendants will get just what they bargained for under the Amendment. At this moment, Defendants are providing the Support Services they contracted to provide to AT&T and AT&T will continue to pay precisely the same fees for those Support Services as required under the Amendment.”

65. This is not true. If this Court enjoins Defendants from discontinuing Support Services for retired perpetual licenses, it effectively will be halting VMware’s multi-year business model transformation efforts and forcing VMware to sell a perpetual support SKU that was discontinued. Forcing a business to sell a product that has been discontinued for many important reasons is not merely maintaining the “status quo.”

66. As explained above, this transformation is critical to VMware’s business and will preserve its ability to invest and innovate in a highly competitive market. VMware has been notifying customers about the transition since 2018. AT&T has known about it for years. The subscription licensing model Defendants seek to implement is fully in line with industry standards, not “a farce” as AT&T claims. If the Court forces VMware to provide retired Support Services to AT&T notwithstanding the End of Availability provision incorporated repeatedly into the parties’ agreements, every other customer subject to the same support terms and

conditions likewise will insist that VMware cannot discontinue its products and services. This forced servitude and interference with Defendants' most important business decisions would have disastrous consequences not only for Defendants, but for any company that needs or wants to change its product lineup from time to time to stay competitive and drive innovation.

67. Although AT&T vaguely complains that other VMware customers have been provided extensions of their support services, they do not specify who, for how long, or under what circumstances. [REDACTED]

[REDACTED]

[REDACTED] In any event, VMware did agree to extend AT&T's Support Services through October 21, 2024, and Broadcom and VMware remain willing to negotiate a VCF subscription agreement in good faith in the meantime.

68. Moreover, AT&T fails to mention in its Motion or Verified Complaint that on April 15, 2024 (and updated April 18, 2024), Broadcom announced via blog post that all customers, including those with expired support contracts, will have access to all patches for Critical Severity Security Alerts for supported versions of VMware vSphere. A true and correct copy of this policy is attached as **Exhibit 15**, and available at <https://knowledge.broadcom.com/external/article?articleNumber=314603> (last visited September 19, 2024). To the extent AT&T is not running outdated, unsupported versions of VMware vSphere software, this policy should address at least some of the "critical security patches" AT&T speculates it may need. AT&T does not explain in its Motion why this policy is inapplicable to the software it is using.

I affirm this 20th day of September, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true to the best of my knowledge, information, and belief, and I understand that this document may be filed in an action or proceeding in a court of law.



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Randall Gressett



**CERTIFICATION OF WORD COUNT**

I hereby certify that the word count of this Affirmation complies with the word limits of Commercial Division Rule 17 (22 New York Codes, Rules and Regulations § 202.70(g)). According to the word-processing system used to prepare this affirmation, the total word count for all printed text exclusive of the material omitted under Commercial Division Rule 17 is 6,482 words.

Dated: September 20, 2024

Respectfully submitted,

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