No. 23-55375

In the United States Court of Appeals for the Ninth Circuit

MICHAEL TERPIN

Plaintiff-Appellant,

v.

AT&T MOBILITY LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Hon. Otis D. Wright | Case No. 2:18-cv-06975-ODW-KS

**BRIEF OF THE DEFENDANT-APPELLEE,
AT&T MOBILITY LLC**

Marcellus A. McRae
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Allyson N. Ho
Ashley E. Johnson
Michael A. Zarian
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2949

Counsel for Defendant-Appellee AT&T Mobility LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, AT&T Mobility LLC is a direct or indirect wholly owned subsidiary of AT&T Inc., a publicly traded company. No publicly held corporation owns 10 percent or more of AT&T Inc.'s stock.

Dated: September 25, 2023

Respectfully submitted,

/s/ Allyson N. Ho
Allyson N. Ho

Counsel for Defendant-Appellee AT&T Mobility LLC

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

AT&T takes the security of its customers' information very seriously. But it isn't an insurer against criminal acts with a highly attenuated connection (at best) to telecommunications service. Michael Terpin has secured nearly $100 million in civil judgments against the alleged perpetrators of an elaborate heist to steal $24 million of Terpin's cryptocurrency. He now seeks to recover $240 million more in damages from AT&T under a wide array of legal theories.

The district court correctly rejected Terpin's scattershot claims against AT&T as legally barred and unsupported by the record. Neither federal telecommunications law nor state common law allows liability to be imposed on AT&T under the circumstances here. Any other result would work a vast, unwarranted expansion of liability that would ultimately redound to the detriment of all AT&T's customers. The judgment in AT&T's favor should be affirmed in all respects.

STATEMENT OF THE ISSUES

1. Did the district court correctly grant summary judgment on:

   - Terpin's Federal Communications Act claim, because the undisputed facts establish that no information protected by the Act was disclosed;
   - His negligence-based claims, because the economic loss rule bars the claimed losses;
   - His contract claim, because the parties' contract limits liability for consequential losses;
   - All of these claims, in the alternative, because proximate cause is lacking; and
   - The declaratory-judgment claim, because it's mooted by the failure of the underlying substantive claims?

2. Did the district court correctly dismiss for failure to state a claim:

   - Terpin's fraud-based claims, because he failed to plead sufficient facts establishing a plausible claim for relief and, in the alternative, because those claims are barred by the economic loss rule and fail for lack of proximate cause; and
   - His punitive-damages request, because he failed to plausibly plead that AT&T acted with the required mental state?

STATEMENT REGARDING THE ADDENDUM TO THE BRIEF

All applicable statutes and regulations are contained in Terpin's addendum filed on July 26, 2023.

STATEMENT OF THE CASE

I. AT&T continually strives to improve its security measures against constantly evolving threats.

The technology at the core of this case involves what's known as a "SIM"—a subscriber identity module. Basically, a SIM is a chip inside a device, like a mobile phone, that enables the device to connect to a wireless network. A SIM also links a phone number with a specific customer account.

In a "SIM swap," an existing phone number becomes associated with a different SIM—enabling whatever phone contains the new SIM to send and receive communications using that phone number going forward. 9-ER-1600–01. Information contained on the previous SIM isn't transferred to the new SIM. 9-ER-1600–01. All that changes is which SIM (and accompanying phone) is able to use the phone number.

Like all wireless providers, AT&T and its authorized retailers or other contractors routinely perform SIM swaps at customers' requests for entirely legitimate reasons (*e.g.*, the customer buys a new phone or loses her phone and wants to keep using her same phone number on a new phone). In a recent filing with the Federal Communications Commission (FCC), AT&T advised that over 99 percent of the millions of SIM swaps

it performs each year are authorized. Comments of AT&T, *In re Protecting Consumers from Sim Swap and Port-Out Fraud*, WC Docket No. 21-341 at 2 (Nov. 15, 2021) ("Letter to FCC").[1]

In 2015, AT&T began to encounter *unauthorized* SIM swaps, where fraudsters would impersonate customers or otherwise trick AT&T personnel into performing a SIM swap to transfer control of an unaware customer's mobile phone number. 10-ER-1838, 1846. At the time, these unauthorized SIM swaps were generally used to make expensive international calls on the unaware customer's account, the cost of which AT&T would assume. 10-ER-1838.

To help ensure that only customers and authorized users can request SIM swaps (and make other account changes), AT&T has put in place security protocols for the personnel who perform the swaps. 10-ER-1845. These protocols balance two important goals: minimizing even further the relatively small number of unauthorized SIM swaps, while reducing barriers to the millions of legitimate SIM swaps requested by actual customers each year. 10-ER-1845; Letter to FCC 7–8.

[1] https://www.fcc.gov/ecfs/document/11151760309724/1.

AT&T continually reassesses and improves its security measures—even as fraudsters continually try to circumvent those measures. In addition to educating customers and fine-tuning its authentication procedures, AT&T has developed a cutting-edge, machine-learning system that identifies high-risk scenarios that require greater scrutiny, even if the authentication requirements have been met. 10-ER-1869, 1872.

AT&T has expended substantial financial resources, assembled an elite cadre of security experts, and developed sophisticated systems to defend against the virtually endless threats to the security of AT&T, its systems, and its customers around the world. 10-ER-1838, 1859–61, 1869–70, 1965. Unauthorized SIM swaps are one of those many threats. 10-ER-1981.

II. Terpin contracts with AT&T for wireless service.

In 2011, Michael Terpin entered into a contract with AT&T for mobile phone services, including making calls, sending texts and emails, and using the internet. 9-ER-1608–10. The mobile phone number he used with AT&T was the same phone number he'd been using for the previous fifteen years. 9-ER-1606–08. That phone number was publicly

available, as press releases on the internet had identified it as Terpin's. 9-ER-1609–10.

Terpin's receipt of mobile services with AT&T was governed, in part, by the AT&T Wireless Customer Agreement. 6-ER-1038–39 (SAC ¶ 104); 9-ER-1611–15. The Wireless Customer Agreement incorporates AT&T's Privacy Policy for wireless services. 6-ER-1110; 9-ER-1611–12. The Privacy Policy expressly informs users that—notwithstanding AT&T's efforts to safeguard customer information—there remains a risk that third parties may impermissibly gain access to that information:

> [N]o security measures are perfect, and [AT&T] cannot guarantee that your Personal Information will never be disclosed in a manner inconsistent with this Policy (for example, as the result of unauthorized acts by third parties that violate the law or this Policy).

6-ER-1097; *see also* 6-ER-1127.

The Wireless Customer Agreement also limits AT&T's liability for certain classes of damages, including "indirect special, punitive, incidental or ***consequential*** losses or damages." 6-ER-1125–26 (emphasis added); 9-ER-1613–14.

III. Terpin becomes a prominent cryptocurrency investor and attracts the attention of thieves.

About two years after entering the Wireless Customer Agreement with AT&T, Terpin began investing in cryptocurrency—then in its infancy. 9-ER-1604. Over the next several years, Terpin invested millions in cryptocurrency, becoming a "prominent member" of the "cryptocurrency community." 6-ER-1006–07, 1021–22 (SAC ¶¶ 18–19, 59).

Cryptocurrency (or "crypto" for short) is digital or virtual currency that's traded on digital exchanges. 6-ER-1006–07 (SAC ¶ 18). Crypto is accessed from digital "wallets" that can be "opened" only by using the owner's access credentials—*e.g.*, username and login. 9-ER-1601–04. And it's impossible to steal crypto using remote electronic means unless the access credentials are stored online. 9-ER-1604–06. Access credentials are never stored on a SIM and never transferred in a SIM swap. 9-ER-1601–06.

Terpin alleges that in June 2017, after taking control of his AT&T and T-Mobile accounts, thieves gained access to his Skype account, impersonated him, and convinced a client to send crypto to an account under the thieves' control. 6-ER-1032 (SAC ¶¶ 86–87). According to

Terpin, two days later he met with AT&T representatives in Puerto Rico (where he lives) to discuss the incident. 6-ER-1032–33 (SAC ¶ 88). Terpin claims that unnamed representatives promised him a "higher level of security" to protect his account, including requiring anyone attempting to change his phone number to recite a six-digit code. 6-ER-1033 (SAC ¶ 89).

IV. Thieves steal Terpin's crypto.

In January 2018, Terpin's crypto was stolen in the incident at the heart of this case. 6-ER-1035–41 (SAC ¶¶ 94–110). The perpetrators were led by Ellis Pinsky, who testified that given all the various contingencies involved in the elaborate heist, he pegged his likelihood of success at "less than 5 percent." 9-ER-1641–42; 5-ER-952:10–17.

Pinsky and his accomplices already had Terpin's mobile phone number (which had appeared on the internet in press releases) and the last four digits of his social security number. 9-ER-1610–11; 10-ER-1896–97. Pinsky allegedly bribed Jahmil Smith—who worked at Spring Communications, an AT&T authorized retailer—to use this information to perform a SIM swap on Terpin's account. 9-ER-1685–87, 1720–21, 1724. Terpin alleges that Smith used the social security number to

bypass security measures in AT&T's system and performed the swap. 9-ER-1724.

Once Pinsky had access to Terpin's mobile phone number, he testified that his team used it to log into Terpin's Gmail (email) account using the "forgot password" function. 9-ER-1748. According to Pinsky, he already knew that Terpin didn't secure his Gmail accounts with two-factor authentication (which would have required Pinsky to access an application installed on a physical device and enter a password to access the Gmail account). 9-ER-1642–43. Terpin admitted that he didn't secure certain corporate Gmail accounts with two-factor authentication because "it became cumbersome." 9-ER-1644–45.

Pinsky says that he sifted through Terpin's email messages in his Gmail account and eventually found an email address associated with Terpin's Microsoft account. 9-ER-1646–48. Pinsky then located and logged onto that account. 5-ER-944:1–14; 9-ER-1646–48. Terpin claims that he'd installed Microsoft Authenticator—which requires a second form of authentication other than a phone number before allowing anyone to log into a Microsoft account—but it malfunctioned. 9-ER-

1632–35. Terpin admitted that he knew his Microsoft Authenticator regularly malfunctioned. 9-ER-1633–35.

Pinsky testified that he found the access credentials to Terpin's crypto wallets saved in the trash folder of Terpin's Microsoft OneDrive, and then used them to access the wallets and steal $24 million in crypto. 9-ER-1646–48, 1749–50.

According to Terpin, his access credentials had somehow been auto-saved to his Microsoft account without his knowledge as part of his idiosyncratic login method. 9-ER-1615–16. Terpin testified that every time he accessed his crypto wallets, he:

- Plugged a flash drive into his computer;
- Accessed a password-protected file in the flash drive containing his crypto wallet credentials;
- Copied and pasted those credentials into a separate document on his computer; and
- Copied and pasted the credentials again from the separate document into the login screen for his crypto wallet.

9-ER-1616–17.

Terpin claims that Microsoft saved his access credentials to the OneDrive trash while they were in the separate document on his computer. 9-ER-1621–24. He admits that copying and pasting the access

credentials into a separate document was unnecessary (and not a best practice). 9-ER-1617–21. And he admits that if he hadn't done so, he wouldn't have suffered any crypto loss. 9-ER-1638–39.

V. Terpin sues Pinsky, his accomplices, and AT&T.

In the aftermath of the theft, Terpin brought civil suits against the perpetrators—including Pinsky and an accomplice, Nicholas Truglia—and AT&T. In April 2019, a California court awarded Terpin more than $75 million against Truglia in a default judgment. 5-ER-911–12. Truglia was also prosecuted criminally for his role in the theft. 11-ER-2165. A court entered judgment in Terpin's civil suit against Pinsky for $22 million. 5-ER-915–20.

Terpin's lawsuit against AT&T seeks $240 million more in damages. 8-ER-1418–1596. His initial complaint asserted claims for negligence, breach of contract, fraud, and various statutory causes of action. 8-ER-1484.

AT&T moved to dismiss Terpin's complaint in its entirety. Dkt. 14. The district court granted the motion in part—dismissing 14 of the 16 causes of action. 7-ER-1398–1416. Terpin filed an amended complaint,

and AT&T moved to dismiss again. 7-ER-1209–1397; Dkt. 33. Once more, the district court granted the motion in part. 6-ER-1192–1207.

Terpin then filed a second amended complaint—the operative one for purposes of this appeal—which included claims for:

- A declaration that AT&T's Wireless Customer Agreement is unconscionable (Claim 1);
- Unauthorized disclosure of customer information under the Federal Communications Act, *see* 47 U.S.C. §§ 206, 222 (Claim 2);
- Fraud—including deceit by concealment under Cal. Civ. Code §§ 1709, 1710 and common-law misrepresentation (Claims 3–4);
- Negligence—including negligent supervision, training, and hiring (Claims 5–7); and
- Breach of contract (Claim 8).

6-ER-999–1191.

AT&T moved to dismiss once more, this time only as to Terpin's fraud-based claims (Claims 3–4) and his request for punitive damages. Dkt. 43. The district court granted the motion in full. 1-ER-26–39. The court concluded that Terpin didn't adequately plead:

- That AT&T was required to disclose to Terpin that the six-digit code could be overridden by employees;

- That AT&T represented that its heightened security protocols were fool-proof (it had actually informed Terpin that they were *not*); and
- That AT&T never intended to provide increased security when it set up the six-digit code.

1-ER-30–34. The court dismissed Terpin's punitive-damages request for failure to allege that an officer or managing agent acted with oppression, fraud, or malice. 1-ER-34–38.

The district court provided Terpin an opportunity to "move to add a request for punitive damages . . . no later than twenty-one (21) days after the discovery cutoff deadline." 1-ER-38. Terpin never sought to reinstate his punitive-damages request.

After discovery ended, AT&T moved for summary judgment on Terpin's remaining claims. Dkt. 160-1. With his opposition, Terpin filed a statement listing 172 additional "facts"—including various legal conclusions and purported facts regarding extraneous issues. 9-ER-1598–1775.

The district court granted AT&T's motion. 1-ER-6–7. The court began by addressing Terpin's statement of additional "facts," concluding that it "flagrant[ly] disregard[ed]" the court's orders by citing dozens of facts "without any reasonable basis for believing that the additional facts

will materially affect the outcome of the motion." 1-ER-13. The court limited its consideration to the 24 additional facts Terpin cited in the argument section of his brief. 1-ER-13.

On the merits of Terpin's claims, the court held that:

- The Federal Communications Act claim failed as a matter of law because "[t]he undisputed facts establish that the SIM swap did not disclose any information that is protected" by the Act, 1-ER-20;
- The negligence-based claims were barred as a matter of law by the economic loss doctrine, because those claims aren't independent of the parties' contractual relationship, 1-ER-14–18; and
- The contract claim failed as a matter of law because AT&T didn't voluntarily assume—and indeed its Wireless Customer Agreement disclaimed—liability flowing from special or consequential damages like Terpin's crypto losses. 1-ER-20–23.

Because the court dismissed all of Terpin's substantive claims, it also dismissed as moot Terpin's declaratory-relief claim as to AT&T's Wireless Customer Agreement. 1-ER-24.

SUMMARY OF THE ARGUMENT

I. The district court properly granted summary judgment on Terpin's Federal Communications Act claim, because there's no evidence that any information protected by the Act was disclosed. Summary

judgment was also warranted on Terpin's state-law negligence claims, which are barred by the economic loss rule because (a) it's undisputed that the relationship between Terpin and AT&T is contractual, and (b) his tort claims aren't independent of that contract under California law.

Terpin's contract claims can't survive summary judgment either because his claimed damages are expressly barred by his agreement with AT&T. Given that all of these claims fail as a matter of law, the district court correctly dismissed Terpin's tag-along declaratory-relief claim too. And summary judgment can also be affirmed for the independent, alternative reason that what Terpin concedes is a "convoluted" causal chain is far too attenuated as a matter of law to create a triable issue on proximate cause.

II. The district court correctly dismissed Terpin's fraud-based claims and punitive-damages request for failure to state a claim. Terpin alleges he was defrauded because he was supposedly promised extra security and wasn't told that criminals could circumvent that extra security—but he failed to allege that AT&T had exclusive knowledge of, actively attempted to hide, or made partial representations with respect

to the fact that its security protocols aren't fool-proof. To the contrary, as Terpin's own complaint acknowledges, AT&T warned Terpin of this fact repeatedly. Nor has Terpin pleaded with particularity any facts to support his allegation that AT&T never intended to provide him extra security in the first place. And this Court can affirm the dismissal of both Terpin's fraud-based claims for the alternative, additional reason that proximate cause is lacking for these claims, too.

Finally, the Court should affirm dismissal of Terpin's request for punitive damages because he doesn't allege anything tying officials at AT&T to the type of willful, deliberate wrongdoing that's required to sustain such a request.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo, *Herrera v. L.A. Unified Sch. Dist.*, 18 F.4th 1156, 1158 (9th Cir. 2021), and it may affirm "on any ground supported by the record, regardless of whether the district court relied upon, rejected, or even considered that

ground." *Am. Fed. of Musicians of U.S. & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 981 (9th Cir. 2018).

This Court similarly reviews de novo a dismissal for failure to state a claim under Rule 12(b)(6). *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982 (9th Cir. 2017). Dismissal is proper where a complaint doesn't "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mere "labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal quotation marks omitted). And where, as here, "averments of fraud are made, the circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2002) (internal quotation marks omitted).

ARGUMENT

I. The district court properly granted summary judgment.

The district court was correct to grant summary judgment on Terpin's (1) Federal Communications Act claim, (2) negligence-based claims, and (3) contract claim (including his tag-along declaratory-relief

claim). Alternatively, the district court's judgment on all of these claims can be affirmed on the alternative ground that proximate cause is lacking.

A. No genuine issue of material fact exists as to Terpin's Federal Communications Act claim.

Congress significantly amended the Federal Communications Act in the Telecommunications Act of 1996, which sought to "foster increased competition in the telecommunications industry" by deregulating telecommunications and interconnecting the networks of incumbent service providers and new entrants to the market. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1236 (10th Cir. 1999). To "prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition," Congress included a privacy section now codified at 47 U.S.C. § 222. *ICG Commc'ns, Inc. v. Allegiance Telecom*, 211 F.R.D. 610, 612 (N.D. Cal. 2002) (quoting *In re Implementation of the Telecommunications Act of 1996*, 13 FCC Rcd. 8061 ¶ 1 (1998)).

Section 222 prohibits telecommunications providers like AT&T from disclosing without permission any "individually identifiable customer proprietary network information"—or CPNI—that a provider has "receive[d] or obtain[ed] . . . by virtue of its provision of a

telecommunications service." 47 U.S.C. § 222(c)(1). CPNI is defined in the statute as (1) information relating to services a customer receives, such as "the quantity, technical configuration, type, destination, location and amount of use of a telecommunications service"; and (2) information contained in a customer's bills. *Id.* § 222(h)(1). As the district court correctly held, there's no evidence that AT&T ever disclosed any § 222-protected information. *See* 1-ER-15.

1. There's no evidence that any § 222-protected information was disclosed.

The undisputed facts establish that Pinsky didn't get *any* of Terpin's information as a result of the SIM swap—all he got was control over Terpin's mobile phone number. 9-ER-1637–38. And because Pinsky gained access to that phone number only on a "going-forward" basis, he didn't "receive any information about Terpin's calling—[such as] who he was calling in the past or where he was calling from" because of the SIM swap. 9-ER-1637–38. These undisputed facts definitively foreclose Terpin's Federal Communications Act claim as a matter of law.

Trying to get around this problem, Terpin argues (at 39–44) that the SIM swap disclosed § 222-protected information because, according to Terpin, the swap provided Pinsky and his crew with access to "the

content of communications sent to or from [his] number." Terpin doesn't argue that these communications are themselves CPNI, but instead that they're protected by a general duty to "protect the confidentiality of proprietary information of" customers set out in § 222(a). But there's no evidence of any such "proprietary information" being communicated to Pinsky—the only communications Terpin identifies are messages *Pinsky* requested and received in the course of resetting various online passwords. Opening Br. 40, 44, 47–48; *see also Amici's* Br. 20, 24.[2] Pinsky's receipt of messages he caused to be generated bears no resemblance to the disclosure of a customer's information by the customer's carrier that § 222 addresses.

2. Terpin's attempts to overcome the lack of evidence all fail.

This Court doesn't need to engage on Terpin's statutory-construction argument given the absence of any evidence here of communications for § 222 to protect. But even if there were such

[2] *Amici* argue at length that AT&T violated § 201(b) of the Federal Communications Act—a claim Terpin never pleaded or argued (either here or below). *See Amici*'s Br. 15, 19–24. This Court shouldn't devote any more attention to this argument than Terpin did. *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998) ("We do not review issues raised only by an amicus curiae.").

evidence, Terpin's argument is deeply flawed because, as a matter of law, section 222(a) doesn't prohibit disclosure of information *other* than CPNI.

Statutes must be construed to "fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The parts of § 222's statutory structure work together in straightforward fashion: subsection (a)—entitled "In general"—sets forth a general obligation "to protect the confidentiality of proprietary information," and the remaining subsections—including subsection (c), entitled "Confidentiality of customer proprietary network information" (CPNI)—flesh out the precise contours of that obligation. Section 222 goes to great lengths to (1) specify the types of customer information it covers (including a lengthy definition of CPNI), (2) describe which actions are prohibited with respect to that information ("us[ing], disclos[ing], and permit[ting] access to" the information in certain circumstances), and (3) enumerate exceptions. 47 U.S.C. § 222(c)–(h).

If, as Terpin would have it, § 222(a) imposes a sweeping obligation to "protect" "all types of information that should not be exposed widely to the public," Opening Br. 42, then the vast bulk of § 222—which sets the

metes and bounds of CPNI protection—would be "swallowed by the general" duty and rendered mere "superfluity." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). But this Court has "long followed the principle that statutes should not be construed to make surplusage of any provision." *United States v. Mohrbacher*, 182 F.3d 1041, 1050 (9th Cir. 1999).

If accepted, Terpin's construction of § 222 would be anything but "harmonious." *Brown & Williamson Tobacco*, 529 U.S. at 133. Most problematic of all, it would leave the scope of § 222(a)'s obligation on telecommunications providers entirely unclear—casting doubt on what non-CPNI "proprietary information" would fall within the statute, and whether the obligation to protect that information permits exceptions, such as disclosure required by law or to emergency medical service providers. *See* 47 U.S.C. § 222(c), (d)(4) (setting forth requirements and exceptions for disclosure of CPNI). Terpin makes no effort to grapple with the uncertainty—and the serious practical consequences that would flow from it—that his interpretation would engender. *See Azar v. Allina*

Health Servs., 139 S. Ct. 1804, 1812 (2019) (rejecting interpretation that "would introduce [] incoherence into the [] statute").[3]

But again, the Court doesn't have to wade into the statutory-construction argument raised by Terpin, because even under his sweeping view of the statute, affirmance still would be required. It's undisputed that Pinsky didn't obtain access to any of Terpin's *pre*-swap communications, 9-ER-1637–38, and the only *post*-swap communications he contends Pinsky received while in control of his mobile phone number are password-reset messages sent to Pinsky in response to Pinsky's requests. Opening Br. 40, 44. Terpin didn't generate or request any of those messages, so there's no customer information for § 222 to protect. *See* 2-ER-179–82 (emails from Microsoft and Dropbox).[4]

---

[3] Because § 222 isn't ambiguous after "exhaust[ing] all the traditional tools of construction" (and Terpin doesn't argue that it is), there's no need to "wave the ambiguity flag" and defer to the FCC's interpretation of the statute. *Medina Tovar v. Zuchowski*, 982 F.3d 631, 634 (9th Cir. 2020) (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)).

[4] Terpin makes much of the fact that the FCC has adopted a similarly broad view of § 222(a). But even the FCC limits the statute's scope to "sensitive customer information to which a telecommunications carrier ***has access***." *In re Protecting Consumers from Sim Swap and Port-Out Fraud*, 36 FCC Rcd. 14120, 14121 ¶ 3 (2021) (emphasis added). The FCC has limited the scope of the broadband internet access rule Terpin discusses (at 43) partly for this very reason. *In re Restoring Internet*

Terpin pivots back to arguing (at 44–48) that the SIM swap exposed his CPNI to unauthorized parties, but he never identifies any information that qualifies as CPNI—because the record discloses none. Instead, he argues that AT&T disclosed CPNI because Pinsky received "the ability to receive and make calls to a phone with Terpin's number." Opening Br. 47. But this isn't information *at all*, much less CPNI.

"[A] statute should be enforced according to its terms, in light of its context." *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1186 (9th Cir. 2019). Section 222(h)—in a section entirely about the "[p]rivacy of customer *information*"—defines CPNI strictly as "*information*" relating to customer services or billing. (Emphasis added). As the district court rightly concluded, the SIM swap "did not reveal the details of Terpin's phone bill, user agreement, technical service specifications, call history, data usage, or any other confidential, proprietary information." 1-ER-20; 47 U.S.C. § 222(h).

Freedom, 33 FCC Rcd. 311, 320–21 ¶¶ 26, 42 (2018) (distinguishing between "information services" and "telecommunication services"). So even on the FCC's view, section 222(a) wouldn't reach the password-reset messages that AT&T takes no affirmative steps to disclose.

Terpin also contends (at 48) that Smith unlawfully "accessed" his CPNI in violation of § 222(c) because he must have "see[n] or input" Terpin's SIM number or his phone's IMEI number—essentially the serial number of a wireless device—in executing the SIM swap. *See also Amici's* Br. 21 (making same argument without support). The district court correctly rejected this "half-hearted[]" argument because Terpin "offer[ed] no evidence" of what "Smith did, or did not, see during the transaction," even though Terpin has the burden on summary judgment "to produce evidence of a triable issue." 1-ER-20 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).[5]

In any event, SIM and IMEI numbers aren't CPNI protected by § 222. They're essentially serial numbers that identify the customer's own hardware (*i.e.*, a phone and a SIM)—*not* "information about a telephone customer's use of the telephone network" that is "generated by" AT&T in its "provision of basic telecommunications services," such as "the number of lines ordered, service location, type and class of services

[5] The deposition testimony that Terpin now cites on appeal (at 48) doesn't help him—it discusses only whether the *new* phone's IMEI (that is, the one belonging to Pinsky) must be input in a SIM swap. 10-ER-1794–95, 1896.

purchased, usage levels, and calling patterns." *California v. FCC*, 39 F.3d 919, 930 (9th Cir. 1994); 47 U.S.C. § 222(h). Neither SIM nor IMEI numbers are CPNI, and Terpin offers no authority to the contrary.

* * *

It's undisputed that Smith's purported role in Pinsky's elaborate plot to steal Terpin's crypto was limited to providing access to Terpin's mobile phone number. That's not CPNI—it's not "information" at all—so § 222 is inapplicable. Summary judgment should be affirmed on Terpin's Federal Communications Act claim.

B. The economic loss rule bars Terpin's negligence claims as a matter of law.

The district court correctly applied California's economic loss rule to grant summary judgment on Terpin's state-law negligence-based claims. *See Rattagan v. Uber Techs., Inc.*, 19 F.4th 1188, 1191 (9th Cir. 2021) ("Application of the economic loss rule is substantive and thus governed by California law."). That rule bars "recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." *Moore v. Centrelake Med. Grp., Inc.*, 83 Cal. App. 5th 515, 534–35 (2022). Terpin's negligence claims fall squarely within the rule's scope.

1. Terpin's negligence claims aren't independent of the contract between him and AT&T.

Generally, the economic loss rule "functions to bar claims in negligence for pure economic losses in deference to a contract between litigating parties." *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 922 (2022). Declining to create tort duties that stem from contractual duties "protect[s] the integrity of the contractual process" by "let[ting] parties and their lawyers know where they stand and what they can expect to follow legally from the words they have written." *Id.* at 923 (quoting Ward Farnsworth, *The Economic Loss Rule*, 50 Val. U. L. Rev. 545, 553–54 (2016)).

In *Sheen*, the California Supreme Court recently clarified how the economic loss rule applies. The rule bars negligence claims if (1) the "litigants are in contractual privity," and (2) the claims "arise from—or are not independent of—the parties' underlying contracts." *Sheen*, 12 Cal. 5th at 942 (emphasis added). The *Sheen* court held that the plaintiff's negligence claim wasn't "independent of" the underlying contract because it was "based on an asserted duty that [was] contrary to the rights and obligations clearly expressed in the [] contract." *Id.* at 925.

The economic loss rule bars Terpin's negligence claims here, too. There's no dispute Terpin and AT&T are in privity, and that their contractual relationship involves the "provision of mobile telephone services." 6-ER-1038–39 (SAC ¶ 104); 9-ER-1608, 1612–13. As a result, Terpin can't recover in tort unless his negligence claims are "independent of the contract." *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999). But they aren't—as the district court correctly recognized, Terpin's claims assert that AT&T's alleged negligence (including in hiring, training, and supervising Smith) caused the disclosure of information that AT&T was "in possession of . . . only as a result of its contractual relationship with Terpin." 1-ER-18; *see* 6-ER-1057–65 (SAC ¶¶ 166–204); *Moore*, 83 Cal. App. 5th at 535–36 (negligence claim for failure to safeguard information barred by economic loss rule because of contractual privity between parties).

As in *Sheen*, imposing a duty of care here to safeguard Terpin's information from third-party hackers would be flatly inconsistent with the parties' contractual relationship. *See* 1-ER-15–17. The Wireless Customer Agreement between AT&T and Terpin expressly limits AT&T's liability for consequential losses or damages suffered by the use of

covered devices and services. 6-ER-1125–27. And the Privacy Policy unambiguously warns that "no security measures are perfect, and [AT&T] cannot guarantee that your Personal Information will never be disclosed in a manner inconsistent with this Policy (for example, as a result of unauthorized acts by third parties that violate the law or this Policy)." 6-ER-1097. Terpin's argument that AT&T's negligence caused information to be disclosed as the result of unauthorized third-party acts directly contradicts these provisions, so his claims aren't independent from the parties' contractual relationship. *Sheen*, 12 Cal. 5th at 925.

2. Terpin can't evade the economic loss rule by trying to turn an alleged violation of a federal statute into a violation of a state-law duty of care.

Terpin contends (at 53–55) that his negligence claims are independent from the underlying contracts because they're based on a statutory duty of care under the Federal Communications Act. But Terpin cites no authority allowing a party to circumvent the economic loss rule by asserting a statutory duty rather than a common-law one. That's not surprising because the relevant question is simply whether

the asserted duty is "independent of" the underlying contract—the *source* of that duty is beside the point. *See Sheen*, 12 Cal. 5th at 925.

In any event, the Federal Communications Act doesn't create a statutory duty of care. The mere fact that a statute imposes obligations doesn't create a "legal duty to use due care" for negligence. *Ladd v. County of San Mateo*, 12 Cal. 4th 913, 917 (1996); *Issakhani v. Shadow Glen Homeowners Ass'n*, 63 Cal. App. 5th 917, 930 (2021) ("Not all legislative enactments . . . are capable of forming the basis for a duty of care giving rise to a negligence claim."). Rather, for a legislative act to create a duty of care, there must be some "legislative intent to create a duty of care" enforceable through negligence. *Tucker v. CBS Radio Stations, Inc.*, 194 Cal. App. 4th 1246, 1255 (2011); *Sierra-Bay Fed. Land Bank Ass'n v. Super. Ct.*, 227 Cal. App. 3d 318, 333 (1991) ("it is the tort of negligence, and not the violation of the statute itself, that entitles a plaintiff to recover civil damages").

Beyond conclusorily asserting that the Federal Communications Act's statutory obligations are "duties," Terpin makes no effort to explain why the Act creates a duty of care enforceable through state negligence law. Tellingly, he cites *no* California case basing a negligence duty of

care on any federal statute. To the contrary, one California court has called "dubious" the "theory that the violation of a federal statute or regulation can be employed . . . not simply to define the standard of care but to impose a duty that would not otherwise exist under state law." *Asplund v. Selected Invs. in Fin. Equities, Inc.*, 86 Cal. App. 4th 26, 45 (2000). Other California courts have rejected attempts like Terpin's to establish a duty of care through federal law. *Tucker*, 194 Cal. App. 4th at 1255; *Moore*, 83 Cal. App. 5th at 535.[6]

There's good reason no California court has ever agreed with Terpin's theory—it would make *every* violation of federal law actionable under negligence, creating "a potentially enormous expansion of tort law" with "no apparent endpoint." *Sheen*, 12 Cal. 5th at 936 (rejecting similar

[6] Federal cases have largely held likewise. *See*, *e.g.*, *Strojnik v. Bakersfield Convention Hotel I, LLC*, 436 F. Supp. 3d 1332, 1344 (E.D. Cal. 2020) ("Plaintiff provides no authority, nor is the Court aware of any, to show that Congress enacted the ADA as a separate duty of care to give rise to an independent negligence claim under state laws."); *Mazed v. JP Morgan Chase Bank, N.A.*, 2013 WL 12131725, at *7 (C.D. Cal. May 6, 2013) ("Plaintiff cannot convert an alleged violation of a federal statute (the FDCPA) into a common-law negligence claim."); *Mosafer Inc. v. Broidy*, 2022 WL 793029, at *8 (C.D. Cal. Feb. 4, 2022); *but see Warren v. PNC Bank Nat'l Ass'n*, — F. Supp. 3d —, 2023 WL 3182952 (N.D. Cal. Apr. 30, 2023) (conflating the existence of statutory obligations with the creation of a legal duty of care).

argument to bypass the economic loss rule). There's no reason to think Congress intended to create a negligence duty when it created a federal cause of action in the same act, much less that California intends its common-law tort of negligence to expand with every new federal statute. *See Sheen*, 12 Cal. 5th at 943 (rejecting imposition of a duty because "there are causes of action *other* than general negligence . . . that may offer recourse").[7]

Grasping at straws, Terpin asserts (at 54) that an independent duty of care can be found in a consent decree and FCC rules that have nothing to do with SIM swaps. But under California law, "[t]he creation of a negligence duty of care involves fundamental policy decisions that cannot be delegated to any administrative body." *Calif. Serv. Station & Auto. Repair Ass'n v. Am. Home Assur. Co.*, 62 Cal. App. 4th 1166, 1176 (1998) (internal citation omitted). So the administrative actions Terpin invokes can't establish a duty of care on their own. *Id.* at 1175 ("an

[7] To that point, Terpin makes no attempt to align the conduct prohibited by the Federal Communications Act with his theories of negligence. So even if the Act imposed some duty of care, Terpin doesn't explain how to construe the scope of that duty or why the Act reaches his very different claims of negligence in hiring, supervision, and training.

administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature").

Even if the Act did create a statutory duty of care—and even if that duty could be imported into Terpin's negligence claims—Terpin's claims would still fail for the same reasons his § 222 claim does. *See* Part I; *Asplund*, 86 Cal. App. 4th at 40–41 (dismissing negligence claim premised on statutory violations where statutory claims failed anyway); *Marcus v. Nationstar Mortg., LLC*, 2022 WL 1486831, at *1 (9th Cir. 2022) (same).

3. Even if not forfeited, Terpin's argument that contracts of adhesion are categorically exempt from the economic loss rule is meritless.

Terpin briefly advances the novel argument (at 55–56) that the economic loss rule shouldn't apply if the underlying contract is one of adhesion. The district court didn't consider this argument because it was underdeveloped, 1-ER-18 n.5, and Terpin doesn't challenge the district court's ruling on that score. Nor does Terpin explain why this Court should depart from its usual practice of not considering issues for the first time on appeal. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018).

Even if this argument were properly before the Court (and even assuming the relevant agreements are contracts of adhesion), the California Supreme Court has squarely *rejected* the argument that a party's lack of "bargaining power" should justify an exception from the economic loss rule, reasoning that the contract "presumably outlined each party's risks, benefits, and obligation to their mutual satisfaction at the time the contract was made." *Sheen*, 12 Cal. 5th at 935, 938 (observing that California has "never" imposed "a tort duty on a contracting party to avoid negligently causing monetary harm to another party to that contract"). And the California Supreme Court has made clear in any event that "the Legislature is better situated than [courts] to tackle the '[s]ignificant policy judgment affecting social policies and commercial relationships.'" *Id.* at 948.

* * *

Terpin's negligence-based claims are wholly dependent on his underlying contracts with AT&T, so they're barred by the economic loss rule as a matter of law whether they're based on a statutory duty, a common-law duty, or an administratively imposed duty. This Court should decline to consider (or should otherwise reject) Terpin's novel

argument that contracts of adhesion should be exempt from the ordinary rule. The California Supreme Court has rejected that argument, and explained that legislatures—not courts—should make policy-laden decisions like that one. The district court's grant of summary judgment on Terpin's negligence-based claims should be affirmed.

C. Terpin can't recover contract damages under California law.

The district court also properly granted summary judgment on Terpin's contract claim. As the court explained, the parties agreed to release AT&T from liability for consequential damages, and Terpin's contract claim doesn't satisfy the requirements for seeking consequential damages anyway. 1-ER-20–23. This Court can affirm on either ground. The district court also rightly rejected Terpin's attempt to escape the contract by baselessly and belatedly claiming that it was modified after it was formed.

1. The Wireless Customer Agreement expressly bars Terpin's contract claim.

Under California law, "[a]n element of a breach of contract cause of action is damages proximately caused by the defendant's breach." *Copenbarger v. Morris Cerullo World Evangelism, Inc.*, 29 Cal. App. 5th

1, 9 (2018). There are two types of contract damages: "general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968 (2004). There's no dispute that Terpin seeks special, consequential damages—his crypto losses undisputedly didn't "flow directly and necessarily from a breach of contract." *Id.*

The plain language of the Wireless Customer Agreement disclaims any liability to AT&T from consequential damages by specifically excluding recovery of:

> any indirect, special, punitive, incidental or ***consequential*** losses or damages you or any third party may suffer by use of, or inability to use, Services, Software, or Devices provided by or through AT&T, including loss of business or goodwill, revenue or profits, or claims of personal injuries.

6-ER-1125–26 (emphasis added); 9-ER-1613–14.

Even though the district court expressly held that this clause defeats Terpin's contract claim by precluding his claim for damages, 1-ER-23, Terpin doesn't challenge this aspect of the court's breach-of-contract holding. The closest he comes is one sentence in a footnote (at 60 n.8) claiming that the provision "violates public policy." But "a

perfunctory request, buried amongst the footnotes, does not preserve an argument on appeal." *United States v. Ngumezi*, 980 F.3d 1285, 1287 (9th Cir. 2020). The Court could affirm on this ground alone.

In any event, the district court's holding is unassailable. Limitation-of-liability clauses "have long been recognized as valid in California." *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126 (2012) (enforcing clause precluding liability for "indirect, special, incidental or consequential damages") (capitalization altered). Below, Terpin argued that AT&T couldn't contractually limit its liability for "gross negligence or statutory violations," but as the district court explained, that rule doesn't apply to breach of contract claims. 1-ER-23; *Lewis v. YouTube, LLC*, 244 Cal. App. 4th 118, 124–26 (2015) (enforcing limited liability clause to bar contract claim); *Chou v. Charles Schwab & Co.*, 2023 WL 2674367, at *1 (9th Cir. Mar. 29, 2023) (same); *see also Darnaa, LLC v. Google, Inc.*, 236 F. Supp. 3d 1116, 1125 (N.D. Cal. 2017) ("no district court has precluded application of a limitation-of-liability to a general contract claim based on [Civil Code] Section 1668").

Terpin makes one other passing reference (at 60 n.8) to the Wireless Customer Agreement being a contract of adhesion that is unconscionable as against public policy, but as this Court has recognized, there is no "rule that an adhesion contract is per se unconscionable." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261–62 (9th Cir. 2017); *see Bass v. Facebook, Inc.*, 394 F. Supp. 3d 1024, 1037–38 (N.D. Cal. 2019) ("No one is forced to enroll in Facebook's social media service."). And Terpin offers no explanation why this particular contract is unconscionable.

2. The parties didn't contemplate consequential damages for crypto theft in 2011 theft when they entered the Wireless Customer Agreement.

Even without the contractual limit on liability, Terpin still can't pursue consequential damages as a matter of law. Consequential damages generally aren't recoverable "unless the circumstances were known or should have been known to the breaching party at the time he entered the contract." *Brandon & Tibbs v. George Kevorkian Acct. Corp.*, 226 Cal. App. 3d 442, 456 (1990). While parties can voluntarily assume the risk for such damages, "to do so they must be told, ***at the time the contract is made***, of any special harm likely to result from a breach." *Lewis Jorge Constr. Mgmt.*, 34 Cal. 4th at 970 (emphasis added).

Alternatively, such damages may be allowed if "the circumstances in which [the contract] is made . . . ***compel the inference*** that the defendant should have contemplated the fact that such a loss would be 'the probable result' of the defendant's breach." *Id.* (emphasis added).

Here, there's no dispute that Terpin entered into a contract with AT&T by 2011 at the latest. 9-ER-1608. He didn't begin investing in crypto, however, until 2013. 9-ER-1604. And even viewing the facts most favorably for Terpin, AT&T wasn't aware of his involvement in crypto until June 2017 at the earliest. 9-ER-1608–09, 1660. That means Terpin's crypto losses are "[n]ot recoverable" because they were "beyond the expectations of the parties"—both AT&T's subjective expectations and any person's reasonable expectations—when Terpin and AT&T entered the wireless contract in 2011. *Lewis Jorge Constr. Mgmt.*, 34 Cal. 4th at 970.

Terpin now argues—for the first time on appeal—that the expectations of the parties should be judged as of 2017 because the Privacy Policy and the Wireless Customer Agreement were modified that year. Opening Br. 58. Even if not forfeited, *see Orr*, 884 F.3d at 932, that argument is meritless and unsupported by the record. A modification

changes only "those portions of the written contract directly affected" and leaves the rest of the contract "intact." *Davies Mach. Co. v. Pine Mountain Club, Inc.*, 39 Cal. App. 3d 18, 25 (1974). Terpin doesn't identify anything that changed in the relevant provision foreclosing consequential damages.

Moreover, the new dates do nothing to change the key analysis of AT&T's expectations. Both were still before Terpin alleges AT&T learned in June 2017 about his crypto investments. *Compare* 9-ER-1608–09, 1660, *with* 5-ER-733, 849 (Wireless Customer Agreement, March 22, 2017), *and* 3-ER-316 (Privacy Policy, March 2, 2017).[8]

3. Terpin never alleged the existence—much less the breach—of an oral contract.

Terpin attempts (at 60) to bypass the limitation-of-liability provision by claiming that AT&T breached a separate June 2017

[8] Nor do the handful of articles and bulletins Terpin cites—some post-dating when he says the contracts were modified—"compel" a reasonable factfinder to infer that AT&T "should have contemplated" that crypto (or any) theft would be "the probable result" of an unauthorized SIM swap. *Lewis Jorge Constr. Mgmt.*, 34 Cal. 4th at 970. As explained, the major threat posed by unauthorized SIM swaps in 2017 was scammers making excessive international phone calls, which would result in loss to *AT&T*. 10-ER-1838.

agreement to provide heightened security to his account. But this wasn't the basis of the contract claim Terpin pleaded. The allegations of his "Breach of Contract – Privacy Policy" claim make no reference to an oral contract or any other alleged agreements in June 2017. 6-ER-1065–67 (SAC ¶¶ 205–11) ("AT&T breached the contract with respect to at least the following provisions of the Privacy Policy . . . ."). The district court declined to consider this argument—raised for the first time in opposition to summary judgment—and this Court should do the same. *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006).

Apparently recognizing this problem, Terpin directs the Court to an allegation cross-referencing all of the previous allegations in the operative complaint, including various alleged "promises for 'extra security.'" Opening Br. 57 (citing SAC ¶¶ 88–90, 94, 98–99). No allegation references an oral contract or oral modification to the Wireless Customer Agreement, let alone a breach of it. 6-ER-1032–33, 1035, 1037–38 (SAC ¶¶ 87–89, 94, 98–101). Even if there were an oral modification, it wouldn't permit Terpin to evade the limitation-of-liability provision, which would remain intact and applicable. *See Davies Mach.*, 39 Cal. App. 3d at 24–25 ("the effect [of a modification] is to alter only

those portions of the written contract directly affected by the oral agreement leaving the remaining portions intact").

Finally, Terpin argues (at 60) that the June 2017 oral agreement was a completely ***separate*** oral contract. That's not what he argued below, where he asserted that "AT&T's obligations under the [Wireless Customer Agreement] are ongoing and evolve as facts and circumstances change"—and the evolution included alleged promises regarding "extra security." SER-22. His belated new theory is both forfeited and meritless. *Orr*, 884 F.3d at 932.

To the extent the alleged agreement to continue providing the *same* services on essentially the *same* terms is enforceable at all, it would be only as a modification. *Han v. Mobil Oil Corp.*, 73 F.3d 872, 876–77 (9th Cir. 1995) (change that leaves "the purpose and effect of the original contract . . . undisturbed" is a "modification"); *Snowcreek IV Owners' Ass'n v. AmeriGas Propane, LP*, 2021 WL 2349698, at *6 (Cal. Ct. App. June 9, 2021) (party "cannot sidestep a [] requirement in a contract by simply deeming a modification a separate bilateral contact—particularly where the purported separate bilateral contract governs the same subject matter as the original contract").

* * *

The agreement between AT&T and Terpin expressly limits liability for the consequential damages Terpin seeks. Even if it didn't, consequential damages still wouldn't be available because AT&T couldn't possibly have predicted, when the contract was formed in 2011, that thieves would steal crypto from Terpin two years before he even began investing in crypto. Terpin can't avoid that result by belatedly claiming there was a "separate contract" when what he actually alleges is at best a modification that doesn't change the legal analysis at all.

D. Terpin can't establish proximate cause.

Alternatively, summary judgment should be affirmed because Terpin can't establish that AT&T's conduct proximately caused his claimed harm. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (common-law causation principles apply to federal statutory claims); *Copenbarger*, 29 Cal. App. 5th at 9 (proximate cause is an element of a contract claim under California law); *Steinle v. United States*, 17 F.4th 819, 822 (9th Cir. 2021) (same for negligence claim). Although the district court had no need to reach the issue, the

lack of proximate cause is yet another reason summary judgment was properly granted. *See Am. Fed. of Musicians*, 903 F.3d at 981.

1. Terpin's asserted injury is far too remote from AT&T's alleged actions and dependent on too many contingencies.

For present purposes, state and federal law apply the same basic principles of proximate causation—and these longstanding principles foreclose proximate cause in this case as a matter of law. *See Lutz v. United States*, 685 F.2d 1178, 1185 (9th Cir. 1982) (under federal law, causation becomes a "question[] of law" on summary judgment "where the facts are undisputed and only one conclusion may reasonably be drawn from them"); *Shih v. Starbucks Corp.*, 53 Cal. App. 5th 1063, 1071 (2020) (same under California law).

The proximate cause requirement isn't satisfied where the harm incurred is "too remote from [a] defendant's unlawful conduct." *Lexmark*, 572 U.S. at 133; *Novak v. Cont'l Tire N. Am.*, 22 Cal. App. 5th 189, 197–98 (2018) (no proximate cause where liability is premised on "an unlikely series of events"); *Wawanesa Mut. Ins. Co. v. Matlock*, 60 Cal. App. 4th 583, 588 (1997) (rejecting proximate cause based on a "Rube Goldbergesque system of fortuitous linkages"). Proximate cause is

absent where the connection between the action and the harm is "purely contingent" or "indirect." *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 10 (2010).

Indeed, the "general tendency" of proximate cause is not to extend liability "beyond the first step" in the chain of causation. *Holmes v. Sec. Inv. Prot. Co.*, 503 U.S. 258, 271–72 (1992); *Wawanesa Mut. Ins.*, 60 Cal. App. 4th at 588–89 (no proximate cause where chain of causation involved "no fewer than three 'but-fors'"). Multiple independent, intervening steps in the causal chain will preclude liability. *Hemi Grp.*, 559 U.S. at 15 (no proximate cause where "theory of liability rests on the independent actions of third and even fourth parties").

Here, the causation chain is undisputed. All parties agree that the SIM swap itself did *not* enable the perpetrators to immediately access Terpin's crypto wallets. 9-ER-1638–41. To the contrary, the perpetrators had to take numerous additional steps to obtain the access credentials to Terpin's crypto wallets. And multiple circumstances out of AT&T's knowledge or control had to exist for the theft to be possible—Terpin's email and Microsoft accounts had to be improperly secured, his Microsoft Authenticator had to be malfunctioning (and Terpin had to have ignored

that malfunctioning), and Terpin's credentials had to have been saved online. 9-ER-1604–06, 1624–36, 1646–47. The damages here are at least *seven steps* (all undisputed) into the chain of causation, which includes:

(1) a criminal conspiracy involving a "gang" of individuals that knew Terpin's publicly available mobile phone number and the last four digits of his social security number, 6-ER-1002 (SAC ¶ 8); 9-ER-1609–10; 10-ER-1896–97;

(2) the alleged bribe of an employee of an AT&T authorized retailer, 6-ER-1002 (SAC ¶ 8); 9-ER-1745–46, 1759–61;

(3) Terpin's failure to secure certain Gmail accounts with two-factor authentication because "it became cumbersome," 9-ER-1644–46—information Pinsky was aware of before the SIM swap, 9-ER-1642–43;

(4) Terpin's failure to secure his Microsoft account with a functional Microsoft Authenticator or other non-SMS two-factor authentication, which enabled the perpetrators to access Terpin's Microsoft account using information obtained from one of Terpin's Gmail accounts, 9-ER-1632–35, 1646–48;

(5) two separate Microsoft products malfunctioning (Authenticator and OneDrive), 9-ER-1623–24, 1633–35;

(6) Terpin's failure to respond to prior instances when his allegedly malfunctioning OneDrive inadvertently saved items before the January 7, 2018 thefts, 9-ER-1626–28; and

(7) Terpin's concededly unnecessary practice of copying and pasting access credentials from secured locations to separate documents, 9-ER-1617–21.

The claim of proximate cause here is about as plausible as the claim that giving a mouse a cookie proximately causes him to draw a picture. *See* Laura Joffe Numeroff & Felicia Bond, *If You Give A Mouse A Cookie* (1985).

The sheer volume of separate, intervening events (all undisputed for summary-judgment purposes) between the SIM swap and Pinsky stealing Terpin's crypto defeats proximate cause as a matter of law. After all, proximate cause generally doesn't look "beyond the first step," and here there are at least seven steps involving third parties and Terpin himself. *Holmes*, 503 U.S. at 271–72. Terpin's injury was wholly contingent on each of those seven steps—without any one of them, his crypto couldn't have been stolen. *E.g.*, 9-ER-1638–39 (Terpin admitting he would have suffered no loss without unnecessary copying/pasting habit); *Wawanesa Mut. Ins.*, 60 Cal. App. 4th at 588–89 ("three 'but-fors'" too many for proximate cause); *Shih*, 53 Cal. App. 5th at 1069 ("that's a lot of 'would not haves'").[9] That's precisely why Pinsky himself pegged

[9] For this reason, the claim by Terpin's *amici* (at 9–14) that SIM swaps are "largely unavoidable" by consumers misses the point. While neither telecommunications carriers nor customers—nor anyone else—can ever fully eliminate the risk that their systems or accounts will be attacked by

his likelihood of getting his hands on Terpin's crypto access credentials at "less than 5 percent." 9-ER-1641–42; 5-ER-952:10–17.

2. Terpin's focus on foreseeability is misplaced.

Terpin contends (at 61–65) that AT&T could have foreseen that a financial injury could result from a SIM swap. But his argument suffers from several fatal shortcomings.

First, foreseeability "alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202 (2017); *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 398 (1992) (courts decline to allow recovery "[e]ven when foreseeability [i]s present"). As this Court has explained, requiring more than foreseeability is particularly important in claims like this one involving "[c]ommunications services" that "are highly interconnected with modern economic and social life." *Fields v. Twitter, Inc.*, 881 F.3d 739, 749 (9th Cir. 2018) (addressing Anti-Terrorism Act). If a communication statute's bounds were extended "as far as foreseeability may reach," "ripples of

---

criminals, customers ***can*** protect themselves from theft by ensuring that they properly secure high-risk assets like crypto.

harm [could] flow far beyond the defendant's misconduct," giving rise to "boundless litigation risks." *Id.*

To the extent proximate cause does account for foreseeability, it doesn't do so at the high level of generality Terpin's argument requires. The question isn't whether the *type* of harm (*e.g.*, "financial losses") was foreseeable, Opening Br. 63, but whether the "course of events" leading to the harm was "a foreseeable result" of the conduct. *Shih*, 53 Cal. App. 5th at 1070. In *Shih*, for example, the court affirmed summary judgment for lack of proximate cause because—although Starbucks could foresee a burn risk from selling "boiling hot" beverages without a cup sleeve—it couldn't have foreseen that the plaintiff would spill the drink through an "unorthodox drinking maneuver." *Id.* at 1065. The events leading to the spill were "too remote from the alleged defects in the cup" to establish proximate cause. *Id.* at 1070–71; *see also Modisette v. Apple, Inc.*, 30 Cal. App. 5th 136, 154 (2018) (cell phone's failure to prevent driver from video-calling while driving wasn't proximate cause of crash).

So too here. The unfortunate series of events that culminated in the theft of Terpin's crypto was particularly attenuated—including independent criminal acts, security lapses, software malfunctions, and

Terpin's own concededly "unnecessary" copying and pasting his credentials that allowed them to be saved online. 9-ER-1616–21, 1623–24, 1632–34, 1638–39. This "unlikely series of events" was truly a "Rube Goldbergesque system of fortuitous linkages" that defeats proximate cause as a matter of law. *Novak*, 22 Cal. App. 5th at 197–98; *Wawanesa Mut. Ins.*, 60 Cal. App. 4th at 588 (giving cigarette to a friend wasn't proximate cause of fire caused when the friend dropped the cigarette); *Steinle*, 17 F.4th at 822 (negligent storage of pistol that was recovered and fired didn't proximately cause death from firing).

Finally, Terpin unconvincingly attempts to draw parallels to other decisions. He cites *Fraser v. Mint Mobile, LLC*, a decision on a *motion to dismiss* involving a SIM swap that—unlike the SIM swap here, 9-ER-1640–41—"provided criminals with all the information and access they needed to hack his accounts and steal his assets." 2022 WL 1240864, at *3 (N.D. Cal. Apr. 27, 2022) (limiting its decision to "this posture"). Terpin also cites an FCC decision, but unsurprisingly that administrative order didn't address the scope of proximate cause. *In re AT&T Inc.*, 35 FCC Rcd. 1743 (2020) (addressing use of geolocation information).

* * *

Even assuming Terpin's crypto loss was foreseeable, the causal chain had far too many links and depended on far too many contingencies and intervening actions to establish proximate cause. *Wawanesa Mut. Ins.*, 60 Cal. App. 4th at 588–89. Summary judgment on all claims can be affirmed on that alternative, independent basis.[10]

E. Terpin's declaratory-relief claim is moot.

The district court's summary-judgment order correctly dismissed Terpin's declaratory-relief claim as moot. 1-ER-24. That claim seeks a declaration that AT&T's Wireless Customer Agreement is unenforceable—a point that matters only insofar as Terpin has live claims against AT&T. Because those claims were properly dismissed, there is no "substantial controversy" between Terpin and AT&T regarding the Wireless Customer Agreement, and no "occasion for meaningful relief" from the declaratory judgment. *S. Cal. Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028, 1035

[10] In fact, judgment on *all* of Terpin's statutory and common-law claims—including the two fraud-based claims the district court correctly rejected at the motion-to-dismiss stage for other reasons—can be affirmed for lack of proximate cause. *See* Part II.C.

(9th Cir. 2009). The district court's grant of summary judgment on this claim should be affirmed.

II. The district court properly dismissed Terpin's fraud-based claims and request for punitive damages.

The district court correctly granted AT&T's motion to dismiss Terpin's second amended complaint as to his (1) deceit-by-concealment claim, (2) fraudulent misrepresentation claim, and (3) request for punitive damages. Even taking all of Terpin's well-pleaded factual allegations as true, Terpin has not stated (and cannot state) a claim.

A. Terpin's deceit-by-concealment claim was properly dismissed.

The district court correctly ruled that Terpin's deceit-by-concealment claim failed because the complaint failed to plead the required element of a duty to disclose. *Tenet Healthsystem Desert, Inc. v. Blue Cross of Cal.*, 245 Cal. App. 4th 821, 844 (2016); Cal. Civ. Code § 1710(3). Moreover, while the district court didn't have to reach the issue, Terpin also failed to adequately allege that he was "unaware of the [allegedly concealed] fact and would not have acted as he did if he had known of" it. *Tenet Healthsystem Desert*, 245 Cal. App. 4th at 844. Because Terpin failed to adequately allege at least two elements of his

claim—and didn't cure this defect when given the opportunity to replead—dismissal with prejudice was appropriate.

1. Terpin failed to plead a duty to disclose.

It's black-letter law (and common sense) that someone who isn't "bound to disclose" something can't be held liable in tort for not disclosing it. Cal. Civ. Code § 1710(3). As a result, Terpin had to plead with particularity that AT&T had a "legal duty" to disclose a "material fact." *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1186 (2014); *Vess*, 317 F.3d at 1106. Terpin hasn't carried his pleading burden.

As this Court has explained, under California law a legal duty to disclose for purposes of common-law fraud can arise in "only four circumstances," when the defendant:

(1) Is in a fiduciary relationship with the plaintiff;

(2) Had exclusive knowledge of material facts not known to the plaintiff;

(3) Actively conceals a material fact from the plaintiff; or

(4) Makes partial representations but also suppresses some material facts.

Deteresa v. Am. Broad. Cos., 121 F.3d 460, 467 (9th Cir. 1997). Terpin doesn't sufficiently allege any of these four circumstances.

First, he doesn't even try to allege a fiduciary relationship.

Second, he hasn't pleaded with sufficient particularity that AT&T had "exclusive knowledge" of any material fact. Below, Terpin argued that AT&T had exclusive knowledge of the "fact" that its security measures were "not adequate." SER-39–40. Now, Terpin asserts at an even higher level of generality that AT&T had "exclusive knowledge of its security practices." Opening Br. 66. Either way, it's not enough.

As to Terpin's theory below, it's beyond dispute that AT&T twice warned him (once in all caps) in the Wireless Customer Agreement and Privacy Policy that:

> (1) ***[N]o security measures are perfect*** and [AT&T] ***cannot guarantee*** that your Personal Information will never be disclosed in a manner inconsistent with this Policy (for example, as the result of unauthorized acts by third parties that violate the law or this Policy), 6-ER-1097 (emphasis added); and that
>
> (2) AT&T DOES NOT GUARANTEE SECURITY, 6-ER-1127.

These "actual[] disclosure[s]" preclude Terpin's claim of exclusive knowledge. *Clayton v. Landsing Pac. Fund, Inc.*, 2002 WL 1058247, at *6 (N.D. Cal. May 9, 2002), *aff'd*, 56 F. App'x 379 (9th Cir. 2003).[11]

As to Terpin's theory on appeal, a company's superior knowledge of its own products and services alone can't possibly give rise to liability for fraud—after all, *every* company has such knowledge. *See Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 (N.D. Cal. 2008); *Sosenko v. LG Elecs.*, 2019 WL 6118355, at *4 (C.D. Cal. Aug. 29, 2019). If anything, public disclosure of AT&T's security practices (including to thieves and fraudsters) would *increase* customers' risk, not protect them.

Third, Terpin hasn't alleged "affirmative acts" by AT&T to "hid[e], conceal[], or cover[] up" its purportedly imperfect security. *Lingsch v. Savage*, 213 Cal. App. 2d 729, 734 (1963). Terpin's theory is that he was allegedly told that adding a six-digit code to his account would protect him from an account breach, and that this was an "affirmative promise."

[11] Beyond these disclosures, Terpin was undoubtedly aware of the risk of SIM swaps before the January 2018 incident based on his own previous SIM swap incident. *See Shum v. Intel Corp.*, 633 F.3d 1067, 1079 (Fed. Cir. 2010) (rejecting claim to exclusive knowledge where plaintiff had access to information through his own advisors).

Opening Br. 68. But that isn't an allegation of an "affirmative act" to "hide" a fact. "Active concealment occurs when a defendant *prevents* the discovery of material facts." *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 878 (2017) (emphasis added). If it were permissible to "infer affirmative acts from mere knowledge and inaction, then active concealment would be reduced to a weakened form of exclusive knowledge." *Czuchaj v. Conair Corp.*, 2014 WL 1664235, at *6 (S.D. Cal. Apr. 18, 2014).

Fourth, Terpin didn't adequately allege that AT&T "ma[de] representations but d[id] not disclose facts which materially qualify the facts disclosed, . . . render[ing] its disclosure likely to mislead." *Morgan v. Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294 (1970). Terpin points (at 69–70) to allegedly incomplete representations about requiring appropriate authentication, but ignores that AT&T's disclosures in the Wireless Customer Agreement and Privacy Policy *did* qualify those representations by advising customers that it couldn't guarantee their information wouldn't be disclosed. 6-ER-1097, 1127; *see Clayton*, 2002 WL 1058247, at *6.

Terpin's conclusory assertion that these disclosures aren't sufficient is unsupported either by well-pleaded facts or law that could explain why not. Without any basis to impose on AT&T a duty to disclose, Terpin's concealment claim fails as a matter of law and was properly dismissed.

2. Terpin failed to plead lack of knowledge.

A claim for deceit also requires a plaintiff to plausibly plead with specificity that he wasn't aware of a concealed material fact and would have acted differently had he known about it. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1011–12 (9th Cir. 2011); *Vess*, 317 F.3d at 1104. Although the district court didn't need to reach this element of Terpin's claim given its holding that he hadn't adequately pled a duty to disclose, the Court can affirm on this ground, too, because Terpin doesn't (and can't) adequately allege that he was unaware of any concealed material fact that would have caused him to act any differently had he known about it.

Terpin himself alleges that AT&T publicly disclosed the risk of SIM swaps and resulting theft; articles in the press described that risk; and he had already experienced an unauthorized SIM swap. *See* Opening Br.

26–27. So Terpin would have *already been aware* of the material fact he alleges AT&T should have disclosed—that its security procedures could be circumvented. That he chose to remain with AT&T anyway indicates he would *not* have changed course had he been informed of this information again.

B. The district court properly dismissed Terpin's fraudulent misrepresentation claim.

The district court likewise properly dismissed Terpin's fraudulent misrepresentation claim—which Terpin only cursorily challenges on appeal. That claim requires a plaintiff to plead (and ultimately prove) "something more than nonperformance." *Magpali v. Farmers Grp., Inc.*, 48 Cal. App. 4th 471, 481 (1996). Instead, it requires a plaintiff to "plead facts explaining why the statement was false when it was made," such as "inconsistent contemporaneous statements or information which was made by or available to the defendant." *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152–53 (S.D. Cal. 2001).

The district court properly held that "Terpin fails to allege AT&T never intended to adhere to its heightened security protocols" when it allegedly stated that a six-digit code would avoid a future SIM swap. 1-ER-33. As the district court concluded, "[e]ven if AT&T knew that the

six-digit code could not prevent every potential security breach, the Court cannot infer from Mr. Terpin's allegations that AT&T intended for the code to provide no increase to security when it promised additional protection." 1-ER-33. Terpin's assertion (at 71) that AT&T knew that its security measures weren't 100 percent effective can't possibly support an inference that AT&T never intended to provide any additional protection. *See Magpali*, 48 Cal. App. 4th at 481 (even an "overly optimistic" promise can't support an intent to *break* that promise).

In addition, as an independent basis for affirmance, Terpin was required to (but did not) adequately "identify the . . . employees" who made the alleged false representations, including their names and "authority to speak." *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001); *Tarmann v. State Farm Mut. Auto Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991); *see* 6-ER-1032–33, 1051 (SAC ¶¶ 88, 144). The bottom line is that despite multiple opportunities, Terpin failed to properly allege any deliberate misrepresentations about future conduct. So dismissal was proper.

C. The dismissal of both of Terpin's fraud-based claims can be affirmed for additional, independent reasons.

Because Terpin's fraud-based claims arise out of the same facts as his negligence claims, they fall within the economic loss rule for the same reasons—namely, they aren't independent of the contract between the parties. *See* Part I.B. Terpin contends that his fraud-based claims fall within an exception to the economic loss rule because he was "fraudulently induced to enter a contract." Opening Br. 49 (quoting *Erlich*, 21 Cal. 4th at 551–52). But this isn't a fraudulent inducement case—Terpin entered his contract with AT&T in 2011, long before he invested in crypto and long before any of the alleged fraudulent statements or any allegations about a problem with SIM swaps leading to crypto theft. 9-ER-1608–10. This Court can affirm for this reason, too.[12]

[12] This Court has certified a question to the California Supreme Court asking whether fraudulent-concealment claims are exempt from the economic loss rule. *See Rattagan*, 19 F.4th at 1191–93. The majority of federal district courts to have considered the issue have held that California law recognizes no such exemption. *In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Litig.*, 483 F. Supp. 3d 838, 848–49 & n.5 (C.D. Cal. 2020) (collecting cases); *see also UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*, 117 F. Supp. 3d 1092, 1105 (C.D. Cal. 2015) ("Virtually any time a contract has been breached, the party bringing suit can allege that the breaching party never intended to meet its

Terpin's fraud-based claims also fail as a matter of law for lack of proximate cause, just like his other claims do. *See Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 869 (2008) (deceit by concealment requires proximate cause); *All. Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1246–47 (1995) (same for misrepresentation); *see also* Part I.D.[13]

D. The district court correctly dismissed Terpin's request for punitive damages, which was unsupported by allegations of malice.

Terpin's primary objection to the district court's rejection of his request for punitive damages—that the court supposedly applied "an incorrectly heightened pleading standard"—is unfounded. Opening Br. 72. Terpin speculates that the district court followed "California's heightened pleading standard," *id.*, but it did nothing of the sort. While it looked to California law for the substantive law—as Terpin concedes is appropriate, *id.*—the court explicitly relied on Federal Rule 8(a)(2) as the

---

obligations," and allowing that claim to proceed "would collapse the carefully-guarded distinction between contract and tort law").

[13] AT&T expressly preserved this argument below. SER-90 ("AT&T also argued [in its motion to dismiss] that the independent criminal acts of the hackers prevented a finding of proximate causation . . . AT&T preserves [this] argument[] raised in its prior briefing here").

applicable pleading standard. *See* 1-ER-29. Terpin's problem isn't that the district court failed to *apply* the proper Rule 8 standard, but that Terpin failed to *meet* that standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–63 (2007) (construing Rule 8); *Grimberg v. United Airlines, Inc.*, 2023 WL 2628708, at *3 (C.D. Cal. Jan. 10, 2023) (applying *Twombly* to punitive-damages request).

Specifically, Terpin didn't plead any facts plausibly suggesting that AT&T itself had acted with the requisite "oppression, malice, or fraud." Cal. Civ. Code § 3294(b). This standard can be satisfied only by someone sufficiently high-ranking that his or her conduct may be treated as the entity's "*own* wrongful conduct." *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1154 (1998). Terpin must plead—and ultimately prove—that an "officer, director or managing agent" of AT&T "authorized or ratified the wrongful conduct for which the [punitive] damages are awarded or was personally guilty of oppression, malice, or fraud." Cal. Civ. Code § 3294(b).

Terpin didn't (and can't) adequately plead this essential requirement. Terpin asserts (at 72–73) that Bill O'Hern, AT&T's Chief Security Officer, and David Huntley, AT&T's Executive Vice President

and Chief Compliance Officer, "did not require" AT&T to install a particular security measure Terpin believes could have been effective, and "knew of the structural flaws" that may have permitted the SIM swap to occur. But malice requires at least a "conscious disregard of the rights or safety of others"—meaning the defendant was "aware of the probable dangerous consequences of its conduct" but "willfully and deliberately failed to avoid those consequences." *Perez v. Auto Tech. Co.*, 2014 WL 12588644, at *4 (C.D. Cal. July 14, 2014) (internal citation omitted). Terpin's conclusory statements come nowhere near alleging "specific facts" establishing that this standard has been met here.[14]

Notably, while Terpin asserts (at 73) that his allegations were sufficient when made "given that discovery had yet to commence," he doesn't argue that, with the benefit of discovery, he has any basis even now to actually assert that O'Hern or Huntley possessed the required

[14] Terpin is wrong to suggest (at 74) that merely including the "names and titles" of AT&T officials in his complaint is sufficient to survive a motion to dismiss. The case he cites included much more specific allegations than just names and titles. *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1148 (N.D. Cal. 2018) (allegations based on internal documents from a company official, statements in public filings, and knowledge of specific security incidents).

mental state. Tellingly, even though the district court expressly permitted Terpin to seek leave to plead punitive damages at the conclusion of discovery if he developed a record to do so, Terpin never sought such leave. 1-ER-38. At bottom, Terpin "invites the court to read . . . an evil motive" into "facts that describe nothing more than the basic elements" of his claim. *See Kelley v. Corr. Corp. of Am.*, 750 F. Supp. 2d 1132, 1148 (E.D. Cal. 2010). This Court should decline the invitation.

CONCLUSION

For the foregoing reasons, this Court should affirm the appealed orders.

Dated: September 25, 2023

Respectfully submitted,

/s/ Allyson N. Ho

Marcellus A. McRae
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
mmcrae@gibsondunn.com

Allyson N. Ho
Ashley E. Johnson
Michael A. Zarian
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue
Dallas, Texas 75201
Telephone: (214) 698-3100
Facsimile: (214) 571-2949
aho@gibsondunn.com
ajohnson@gibsondunn.com
mzarian@gibsondunn.com

Counsel for Defendant-Appellee AT&T Mobility LLC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-55375

I am the attorney or self-represented party.

This brief contains 12,425 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Allyson Ho **Date** September 25, 2023
*(use "*s/[typed name]*" to sign electronically-filed documents)*