

Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 5/10/2019 1:10 PM
Reviewed By: R. Walker
Case #16CV291137
Envelope: 2869769

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

AGILENT TECHNOLOGIES, INC.,

Plaintiff,

vs.

TWIST BIOSCIENCE CORP., ET AL.,

Defendants.

Case No.: 16-CV-291137

**ORDER AFTER HEARING ON
MAY 3, 2019**

- (1) Motion by Plaintiff Agilent Technologies, Inc. to Strike Defendants Twist Bioscience and Emily Leproust’s Cross-Complaint Pursuant to the California Anti-SLAPP Statute;
- (2) Demurrer by Plaintiff Agilent Technologies, Inc. to Defendants Twist Bioscience and Emily Leproust’s Cross-Complaint;
- (3) Defendants Twist Bioscience Corp., Emily Leproust, and Siyuan Chen’s Demurrer and Motion to Strike Plaintiff’s Second Amended Complaint;
- (4) Demurrer by Defendant Solange Glaize to Plaintiff’s Second Amended Complaint; and
- (5) Related Motions to Seal

AND RELATED CROSS-ACTION.

This Order was issued conditionally under seal to the parties and lodged on May 10, 2019 by the Court. Pursuant to California Rules of Court, Rule 2.551(b)(3)(B), the

Clerk will remove the Order from its sealed envelope and place it in the public file unless a motion or application to seal the record is filed within 10 days from the date the record was lodged under seal.

The above-entitled matter came on for hearing on Friday, May 3, 2019 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued prior to the hearing. The appearances are as stated in the record. Having reviewed and considered the written submissions and oral argument of all parties and being fully advised, the Court orders as follows:

This is an action for trade secret misappropriation and related claims. Plaintiff Agilent Technologies, Inc. alleges that its former employee, defendant Emily Leproust, stole its industry-leading genomics technologies to start her own competitive company, defendant Twist Bioscience Corporation.

Currently at issue are Agilent's (1) special motion to strike Twist and Leproust's Cross-Complaint pursuant to the California "anti-SLAPP" statute and (2) demurrer to the Cross-Complaint. Also before the Court are (3) a demurrer to and motion to strike portions of Agilent's Second Amended Complaint ("SAC") by Twist, Leproust, and defendant Siyuan Chen and (4) a demurrer to the SAC by defendant Solange Glaize. All four motions are opposed.

Also before the Court are three motions to seal materials filed in connection with Agilent's special motion to strike, which are unopposed.

I. Agilent's Motions

Agilent moves to strike Twist and Leproust's entire Cross-Complaint under the anti-SLAPP statute and, alternatively, demurs to each cause of action in the Cross-Complaint for failure to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

1 A. Allegations of the Cross-Complaint

2 In their Cross-Complaint, Twist and Leproust allege that Agilent's SAC is without
3 merit. (Cross-Complaint, ¶¶ 1-37.) They further allege that Agilent filed this lawsuit for
4 improper purposes as part of a larger scheme "to broadcast to the marketplace inflammatory
5 and damaging allegations which it knows to be false about Twist and certain of its top
6 executives and scientists, who are former Agilent employees." (*Id.* at ¶¶ 38-39.) The Cross-
7 Complaint's allegations on the second point are summarized in more detail below.

8 1. *Agilent's Interference with Twist's IPO Through Statements to the SEC and the*
9 *Public*

10 One part of Agilent's alleged scheme involved its efforts to derail Twist's initial public
11 offering ("IPO"). (Cross-Complaint, ¶ 40.) The Registration Statement associated with the
12 IPO became public on October 2, 2018, with the IPO set for October 31. (*Id.* at ¶ 41.) On
13 October 29, Agilent approached Axios, a widely read news website, and leaked the story that it
14 was going to send a letter to the Securities and Exchange Commission ("SEC") that same day
15 "accusing Twist of making several false and misleading statements in its IPO filing
16 documents." (*Id.* at ¶ 42.) Axios published its story that morning with the title "Twist
17 Bioscience IPO faces challenge from Agilent." (*Ibid.*)

18 Agilent proceeded to send a letter to the Director of the Division of Corporate Finance
19 at the SEC, accusing Twist of making "false and/or misleading statements" in its IPO filing.
20 (Cross-Complaint, ¶ 43.) However, it was Agilent's letter that falsely stated that "Leproust
21 admitted under oath that she accepted the position as CEO of Twist in November 2011 while
22 she was still employed at Agilent" and that "Twist employees have admitted to taking and
23 retaining hundreds of confidential Agilent documents for years while developing the Twist
24 technology," including documents that reflect "Agilent trade secrets." (*Id.* at ¶ 44.) Agilent
25 publicized its SEC letter through a press release issued the same day. (*Ibid.*)

26 Agilent knew the first statement was false because Twist was not incorporated until
27 February 2013 and Leproust did not assume the position of CEO until April 2013, after she left
28 Agilent. (Cross-Complaint, ¶ 45.) Agilent knowingly and misleadingly pulled the November
2011 date from a confidential, non-public interrogatory response Twist provided during

1 litigation indicating that this was the earliest that Leproust discussed with Twist's co-founders
2 the *possibility* of forming a company and that Leproust could be a good candidate for CEO *in*
3 *the future*. (*Ibid.*)

4 Agilent knew the second statement was false because discovery has revealed no
5 evidence of "midnight downloads" or other *en masse* document heist, as its statement about
6 "taking" hundreds of documents was meant to convey. (Cross-Complaint, ¶ 46.) The evidence
7 shows that Agilent-related documents were inadvertently and passively retained by former
8 Agilent employees after they downloaded or emailed the documents to continue working for
9 Agilent at home on nights and weekends. (*Ibid.*) Though it was careful not to do so in its SEC
10 letter, Agilent makes repeated allegations of "theft" and "stealing" in its SAC, which it linked
11 to in its press release and referred to in its SEC letter. (*Ibid.*)

12 The SEC opted not to take action against Twist and permitted the IPO to proceed
13 without any changes to Twist's Registration Statement. (Cross-Complaint, ¶ 49.) However,
14 Agilent intentionally sent the letter just two days before the IPO to ensure there was no way for
15 Twist to respond prior to pricing. (*Id.* at ¶ 48.) Agilent's scheme was effective, stunting
16 momentum Twist had been gaining through its roadshow and resulting in a hit rate that was
17 considerably lower than expected. (*Id.* at ¶ 50.) Twist's stock priced at \$14, the lowest end of
18 the target range of \$14-\$16 for the IPO and opened for trading nearly two dollars lower. (*Ibid.*)
19 Each dollar decrease in pricing led to \$5 million less in funds raised for Twist, less
20 underwriting discounts and commissions. (*Id.* at ¶ 51.)

21 *2. Agilent's Attempt to Enforce Contract Provisions That Violate California Law and* 22 *Public Policy Through This Lawsuit and Prior Threats*

23 Twist and Leproust also allege that Agilent has used this lawsuit to enforce overbroad
24 confidentiality and non-solicitation provisions in its employment contracts. (Cross-Complaint,
25 ¶¶ 53-59.) Moreover, as early as February 19, 2014, Agilent began sending threatening letters
26 to Leproust, warning her not to use any of her "know-how" while working for Twist and not to
27 solicit any Agilent employees, lest she risk violating her employment contract. (*Id.* at ¶ 60.)
28 Agilent's lawyers also threatened Twist regarding "the product lines that [they] underst[oo]d
Twist intends to or is in the process of developing," without giving any indication of what

1 product lines they meant. (*Ibid.*) These actions amount to intimidation and bullying intended
2 to restrain Leproust and other Twist employees from practicing their chosen professions. (*Id.*
3 at ¶ 61.)

4 3. *Claims Asserted in the Cross-Complaint*

5 Based on these allegations, Twist and Leproust assert claims for (1) declaratory relief
6 (seeking a declaration of no trade secret misappropriation); (2) declaratory relief (seeking a
7 declaration of no breach of contract); (3) declaratory relief (seeking a declaration of no breach
8 of the duty of loyalty); (4) defamation, defamation per se, libel, libel per se, slander, and
9 slander per se (based on the statements preceding the IPO); (5) intentional interference with
10 prospective economic advantage (based on the statements preceding the IPO); and (6) unlawful
11 and unfair competition under Business & Professions Code section 17200 et seq. (based on the
12 statements preceding the IPO and Agilent's attempts to enforce invalid employment contract
13 provisions). They seek declaratory relief, injunctive relief, and damages.

14 B. Special Motion to Strike

15 Agilent moves to strike the entire Cross-Complaint as a SLAPP, urging that its claims
16 arise from protected activity and Twist and Leproust cannot establish a probability of success
17 on the merits. Twist and Leproust oppose the motion on both points, and urge that the conduct
18 giving rise to their Cross-Complaint falls within the commercial speech exemption to the anti-
19 SLAPP statute.

20 Defendants' request for judicial notice of materials from the SEC's web site regarding
21 the submission of complaints to the SEC; submitted in support of their opposition, is
22 GRANTED. (Evid. Code, § 452, subd. (h).)

23 1. *Legal Standard Governing Anti-SLAPP Motions*

24 Code of Civil Procedure section 425.16 provides in part, "A cause of action against a
25 person arising from any act of that person in furtherance of the person's right of petition or free
26 speech under the United States Constitution or the California Constitution in connection with a
27 public issue shall be subject to a special motion to strike, unless the court determines that the
28

1 plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”
2 (Code Civ. Proc., § 425.16, subd. (b)(1).)

3 “ ‘The purpose of the anti-SLAPP statute is to encourage participation in matters of
4 public significance and prevent meritless litigation designed to chill the exercise of First
5 Amendment rights. [Citation.] The Legislature has declared that the statute must be “construed
6 broadly” to that end.’ ” (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268; Code Civ. Proc.,
7 § 425.16, subd. (a).) “The point of the anti-SLAPP statute is that you have a right *not* to be
8 dragged through the courts because you exercised your constitutional rights.” (*People ex rel.*
9 *Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317.)

10 *a. Exempt and Protected Activity*

11 A threshold consideration in evaluating an anti-SLAPP motion is whether the plaintiff’s
12 lawsuit is exempt from the anti-SLAPP statute. (*People ex rel. Strathmann v. Acacia Research*
13 *Corp.* (2012) 210 Cal.App.4th 487, 498; *San Diegans for Open Government v. San Diego State*
14 *University Research Foundation* (2017) 13 Cal.App.5th 76, 93; *Takhar v. People ex rel.*
15 *Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 24.) The burden is on
16 the plaintiff to show that an exemption applies. (*Simpson Strong-Tie Company, Inc. v. Gore*
17 (2010) 49 Cal.4th 12, 25.)

18 If the court determines the action is not exempt from the anti-SLAPP statute, it must
19 then address whether the complaint should be stricken under section 425.16. (*San Diegans,*
20 *supra*, 13 Cal.App.5th at p. 93; *Takhar, supra*, 27 Cal.App.5th at p. 27.) “Resolving that issue
21 involves two steps. ‘First, the defendant must establish that the challenged claim arises from
22 activity protected by section 425.16.’ [Citation.] The defendant meets this burden by showing
23 the act underlying the plaintiff’s cause of action fits one of the categories of protected speech
24 enumerated in section 425.16, subdivision (e).” (*San Diegans, supra*, 13 Cal.App.5th at p. 93;
25 *Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51.)

26 “The ‘principal thrust or gravamen’ of [a plaintiff’s] claim determines whether section
27 425.16 applies. [Citations.] The “ ‘meaning of ‘gravamen’ is clear; ‘gravamen’ means the
28 ‘material part of a grievance, charge, etc.’ [Citation.]” [Citation.] [¶] In the context of the anti-

1 SLAPP statute, the “gravamen is defined by the *acts on which liability is based*” [Citation.]
2 The “focus is on the principal thrust or gravamen of the causes of action, i.e., the *allegedly*
3 *wrongful and injury-producing conduct* that provides the foundation for the claims.
4 [Citations.]” [Citation.]’ [Citation.]” (*Olive Properties v. Coolwaters Enterprises, Inc.* (2015)
5 241 Cal.App.4th 1169, 1175.) Thus, a defendant need only make a prima facie showing that
6 complaint and the claims asserted therein “arise[] from” its exercise of free speech or petition
7 rights as defined in Code of Civil Procedure section 425.16, subdivision (e). (*Governor Gray*
8 *Davis Committee v. American Taxpayer Alliance* (2002) 102 Cal.App.4th 449, 458-59.)

9 In making its determination, the court “shall consider the pleadings, and supporting and
10 opposing affidavits stating the facts upon which the liability ... is based.” (Code Civ. Proc.,
11 § 425.16, subd. (b)(2).) “Courts must be careful to distinguish allegations of conduct on which
12 liability is based from allegations of motives for such conduct. The court reviews the parties’
13 pleadings, declarations, and other supporting documents to determine what conduct is actually
14 being challenged, not to determine whether the conduct is actionable. [Citation.]” (*San*
15 *Diegans, supra*, 13 Cal.App.5th at p. 94.)

16 *b. Prima Facie Case Established by Admissible Evidence*

17 “ ‘If the defendant makes the required showing, the burden shifts to the plaintiff to
18 demonstrate the merit of the claim by establishing a probability of success.’ [Citation.]” (*San*
19 *Diegans, supra*, 13 Cal.App.5th at p. 94.) “ ‘To satisfy this prong, ... ‘the plaintiff “must
20 demonstrate that the complaint is both legally sufficient and supported by a sufficient prima
21 facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff
22 is credited.” ’ ’ ’ [Citation.]” (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 726–27; *Bel Air*
23 *Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.) “The second prong ... is
24 considered under a standard similar to that employed in determining nonsuit, directed verdict
25 or summary judgment motions. ... The plaintiff may not rely solely on its complaint, even if
26 verified; instead, its proof must be made upon competent admissible evidence. [Citation.] In
27 reviewing the plaintiff’s evidence, the court does not weigh it; rather, it simply determines
28 whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at

1 trial. [Citation.]” (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017 (*Paiva*); *San Diegans,*
2 *supra*, 13 Cal.App.5th at pp. 94-95.)

3 It is important to note the anti-SLAPP statute does not immunize or insulate a
4 defendant from any liability for claims arising from protected activity; rather, it “provides a
5 procedure for weeding out, at an early stage, such claims that are meritless. [Citations.]” (*San*
6 *Diegans, supra*, 13 Cal.App.5th at p. 95.)

7 2. Commercial Speech Exemption

8 Code of Civil Procedure section 425.17, subdivision (c) provides:

9 Section 425.16 does not apply to any cause of action brought against a person
10 primarily engaged in the business of selling or leasing goods or services,
11 including, but not limited to, insurance, securities, or financial instruments,
12 arising from any statement or conduct by that person if both of the following
13 conditions exist:

13 (1) The statement or conduct consists of representations of fact about that
14 person’s or a business competitor’s business operations, goods, or services, that is
15 made for the purpose of obtaining approval for, promoting, or securing sales or
16 leases of, or commercial transactions in, the person’s goods or services, or the
17 statement or conduct was made in the course of delivering the person’s goods or
18 services.

17 (2) The intended audience is an actual or potential buyer or customer, or a person
18 likely to repeat the statement to, or otherwise influence, an actual or potential
19 buyer or customer, or the statement or conduct arose out of or within the context
20 of a regulatory approval process, proceeding, or investigation....

20 A party must satisfy both prongs of this exemption to qualify for it. (*Hawran v. Hixson*
21 (2012) 209 Cal.App.4th 256, 273, 147 Cal.Rptr.3d 88.) As a statutory exception to section
22 425.16, the commercial speech exemption should be narrowly construed. (*Simpson Strong-Tie*
23 *Co., Inc. v. Gore, supra*, 49 Cal.4th at p. 22.) “The legislative history indicates this legislation
24 is aimed squarely at false advertising claims and is designed to permit them to proceed without
25 having to undergo scrutiny under the anti-SLAPP statute.” (*Demetriades v. Yelp, Inc.* (2014)
26 228 Cal.App.4th 294, 308–10; see *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 960–961; see also
27 *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 676.)
28

1 Here, while the conduct raised by the Cross-Complaint arguably involved
2 representations of fact about an Agilent competitor's business operations, goods, or services,
3 no representations are alleged to have been made "for the purpose of obtaining approval for,
4 promoting, or securing sales ..." of Agilent's own goods or services or while delivering its
5 goods or services. (See *Sunset Millennium Associates, LLC v. LHO Grafton Hotel, L.P.* (2006)
6 146 Cal.App.4th 300, 313 [hotel's opposition to its competitor's request for environmental
7 approval of its project did not qualify for commercial speech exemption because it failed to
8 meet these alternative requirements: "The statements made during the administrative and
9 litigation process were in an effort to forestall environmental approval of plaintiff's 2004
10 project; not for the purpose of promoting defendant's hotel "goods and services" as the phrase
11 is used in section 425.17, subdivision (c)(1)."]; *Contemporary Services Corp. v. Staff Pro Inc.*
12 (2007) 152 Cal.App.4th 1043, 1054 [litigation update that was directed at customers did not
13 qualify for commercial speech exemption because it "was sent in order to 'set the record
14 straight' with regard to plaintiffs' allegations against defendants and not to obtain approval for,
15 promote, or secure business for defendants' event staffing services"].) The commercial speech
16 exemption accordingly does not apply.

17 3. Protected Activity

18 Code of Civil Procedure section 425.16, subdivision (e) provides that an "act in
19 furtherance of a person's right of petition or free speech under the United States or California
20 Constitution in connection with a public issue' includes: (1) any written or oral statement or
21 writing made before a legislative, executive, or judicial proceeding, or any other official
22 proceeding authorized by law, (2) any written or oral statement made in connection with an
23 issue under consideration or review by a legislative, executive, or judicial body, or any other
24 official proceeding authorized by law, (3) any written or oral statement or writing made in a
25 place open to the public or a public forum in connection with an issue of public interest, or
26 (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the
27 constitutional right of free speech in connection with a public issue or an issue of public
28 interest."

1 Agilent contends that each of the Cross-Claims arises from protected activities:

2 (1) Agilent's lawsuit and pre-litigation letters, (2) its letter to the SEC, and (3) its press release.

3 It urges that the lawsuit and letter to the SEC are statements or writings before an official
4 proceeding, the pre-litigation letters are communications preparatory to or in anticipation of
5 bringing an action, and the press release and SEC letter are public statements in connection
6 with an issue of public interest. (Code Civ. Proc, § 425.16, subd. (e)(1) and (3).)

7 *a. The First Through Third Causes of Action for Declaratory Relief*

8 In their first three causes of action for declaratory relief, Twist and Leproust seek
9 declarations by the Court that they have not committed the underlying violations alleged by
10 Agilent in this action. The gravamen of these claims are the events giving rise to the
11 underlying disputes between the parties—generally, Leproust's actions in leaving her
12 employment with Agilent to work with Twist, and Leproust's and Twist's pursuit of their
13 business in either developing their own technology or misappropriating Twist's. Tellingly, the
14 argument and evidence submitted by the parties with regard to the merits of these claims goes
15 to the merits of this action as a whole.

16 While a cross-complaint is subject to an anti-SLAPP motion, it often properly "arises
17 out of the same transaction, occurrence, or series of transactions or occurrences as the cause of
18 action which the plaintiff alleges." (Code Civ. Proc., § 426.10, subd. (c).) "[T]o suggest that
19 all cross-actions arise from the causes of action in response to which they are pled would
20 contravene the statutory scheme governing cross-complaints." (*City of Cotati v. Cashman*
21 (2002) 29 Cal.4th 69, 77.) Moreover, "a claim filed in response to, or in retaliation for,
22 threatened or actual litigation is not subject to the anti-SLAPP statute simply because it may be
23 viewed as an oppressive litigation tactic." (*Id.* at p. 78.) Here, a dispute exists between the
24 parties over the legality of defendants' actions. It is this underlying dispute, rather than
25 Agilent's lawsuit or pre-litigation conduct, that gives rise to defendants' claims for declaratory

1 relief. (See *id.* at p. 80 [dispute over constitutionality of City Ordinance, rather than litigation
2 arising out of that dispute, was the basis for requests for declaratory relief].)¹

3 The first three causes of action consequently do not arise from protected activity.

4 *b. The Fourth and Fifth Causes of Action for Defamation and Intentional Interference*
5 *with Prospective Economic Advantage*

6 The fourth and fifth causes of action arise from Agilent's statements preceding Twist's
7 IPO, including its letter to the SEC and press release.

8 Agilent contends that the letter to the SEC is protected as both a "statement or writing
9 before [an] official proceeding" and a statement "made in a place open to the public or a
10 public forum in connection with an issue of public interest" (Code Civ. Proc., § 425.16,
11 subd. (e)(1) and (3).) It cites *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993,
12 where it was held that a "letter of complaint"² to the SEC qualified as a statement before an
13 official proceeding:

14 We have little difficulty concluding that the filing of the complaint qualified at
15 least as a statement before an official proceeding. ComputerXpress contends
16 defendants failed to show the subject of their complaint was ever " 'under
17 consideration or review by' " the SEC. However, the purpose of the complaint
18 was to *solicit* an SEC investigation. In the analogous context of the privilege
19 under Civil Code section 47 for a statement in an official proceeding, the
20 California Supreme Court has observed that the term "official proceeding" "has
21 been interpreted broadly to protect communications to or from *governmental*
22 *officials which may precede the initiation of formal proceedings.*" Thus, "
23 'communication to an official administrative agency ... designed to prompt action
24 by that agency' " is " 'as much a part of the "official proceeding" as a
25 communication made after the proceedings had commenced.' "

22 (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009, citations omitted.)

23 Defendants urge that Agilent failed to comply with certain SEC procedures in
24 submitting its complaint, such as providing individual contact information and keeping the
25 complaint confidential. As an initial matter, the SEC materials submitted by defendants

26 ¹ *Navellier v. Sletten* (2002) 29 Cal.4th 82, cited by Agilent, is not to the contrary. In that case, the plaintiff's claim
27 arose from its theory that the defendant's filing of counterclaims challenging the validity of a release was *itself* a
28 breach of contract.

² It is not clear from the opinion what specific process was employed by the defendants in *ComputerXpress* in
"filing" their "letter of complaint."

1 establish no such requirements. Furthermore, even if the letter to the SEC did not initiate a
2 formal proceeding, *ComputerXpress*, analogizing to cases construing the litigation privilege,
3 held that communications to governmental officials designed to prompt action by that agency,
4 even those that precede the initiation of formal proceedings, fall within this prong of the anti-
5 SLAPP statute as a prelitigation communication. (*ComputerXpress, Inc. v. Jackson, supra*, 93
6 Cal.App.4th at p. 1009, citing *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15,
7 30 [in the prelitigation context, “courts have applied the judicial privilege to certain discrete
8 categories of communications made in advance of actual litigation,” including
9 “communications or complaints by citizens to public officials or authorities charged with
10 investigating, prosecuting or remedying alleged wrongdoing”].)

11 However, defendants raise a related point regarding Agilent’s intent in complaining to
12 the SEC. Again through the general adoption of concepts governing the litigation privilege, in
13 the anti-SLAPP context, “[i]t is well settled that a party seeking to invoke the protections of
14 section 425.16 for prelitigation statements must demonstrate that the statements relate to
15 litigation that is contemplated in good faith and under serious consideration.” (*Bailey v.*
16 *Brewer* (2011) 197 Cal.App.4th 781, 792, internal citation and quotations omitted; see also
17 *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1269 [anti-SLAPP statute applied where
18 “[t]he only reasonable inference from the evidence ... is that Maxsecurity and Chudacoff were
19 contemplating litigation against Neville seriously and in good faith when the Letter was
20 written.”].) Here, the timing and content of Agilent’s letter to the SEC, and its subsequent
21 publication of the letter, suggest that Agilent was not motivated by a good faith and serious
22 belief that Twist’s securities filings were deficient. Agilent does not address this issue in its
23 moving papers and thus fails to meet its burden to show that the letter to the SEC qualifies as a
24 prelitigation statement under the anti-SLAPP statute. (See *Welker v. Law Office of Horwitz*
25 (S.D. Cal. 2009) 626 F.Supp.2d 1068, 1073 [“Defendant relies on the bald assertion it sent the
26 letter ‘in the course of litigation,’ but fails to submit evidence litigation was under serious
27 consideration.”].)

1 At the hearing on this matter, counsel for Agilent acknowledged the requirement that a
2 prelitigation communication relate to litigation contemplated in good faith to fall within the
3 anti-SLAPP statute. He urged, however, that Agilent's letter to the SEC was a "statement or
4 writing before [an] official proceeding," not a prelitigation communication. This argument
5 ignores the fact that, here, there was no official proceeding before the SEC. While cases
6 including *ComputerXpress* have extended the official proceeding prong of the anti-SLAPP
7 statute to cover pre-proceeding communications designed to prompt agency action, they have
8 done so by analogy to the litigation privilege and its protection of prelitigation
9 communications. (See *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1009,
10 citing *Edwards v. Centex Real Estate Corp., supra*, 53 Cal.App.4th at p. 30; *Dove Audio, Inc.*
11 *v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 ["Just as communications
12 preparatory to or in anticipation of the bringing of an action or other official proceeding are
13 within the protection of the litigation privilege of Civil Code section 47, subdivision (b), we
14 hold that such statements are equally entitled to the benefits of section 425.16."], internal
15 citation omitted.) Agilent does not explain why the requirement that a prelitigation
16 communication relate to litigation contemplated in good faith should not also be applied in this
17 context.

18 In any event, the principal thrust of defendants' fourth and fifth causes of action is that
19 Agilent's *publication* of its letter to the SEC caused them harm. In this regard, Agilent urges
20 that its letter to the SEC and press release were statements "made in a place open to the public
21 or a public forum in connection with an issue of public interest" (Code Civ. Proc., § 425.16,
22 subd. (e)(3)), again citing *ComputerXpress*. On this point, *ComputerXpress* cited the plaintiff's
23 status as a publicly traded company and allegation that it lost \$10 million in investments due to
24 the defendants' conduct as factors supporting a finding that statements published online,
25 including "that ComputerXpress's products were inferior, the company was a stock scam and
26 would be out of business within 30 days, the officers and directors were illegally conspiring to
27 manipulate the value of its stock, and one of the officers or directors had filed bankruptcy,"
28 pertained to a matter of public interest. (*Id.* at p. 1005.) Similar circumstances are present

1 here, as the conduct at issue surrounded Twist's IPO and Twist also alleges it lost around \$10
2 million in investments. (See Cross-Complaint, ¶ 50.)

3 However, critical to the Court's analysis here, *ComputerXpress* addressed the plaintiff's
4 argument (also advanced by Twist and Leproust) that statements by a company against its
5 competitor are not subject to the anti-SLAPP statute as speech connected to an issue of public
6 interest. Rather than rejecting that principle, the court concluded that the defendants were not
7 acting as competitors in the case before it:

8 Although defendants at one time contemplated a merger with ComputerXpress,
9 the record does not indicate that the defendants who published the Web site
10 messages were in competition with ComputerXpress when they made the
11 postings. Further, the tenor of the messages indicates defendants were speaking
12 "as investors" rather than competitors, as the comments in the messages appear to
have been directed at existing or potential shareholders rather than potential
customers.

13 (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1008, citing *Global Telemedia*
14 *Intern., Inc. v. Doe I* (C.D. Cal. 2001) 132 F.Supp.2d 1261, 1266 ["Reader and King are small
15 individual investors who are not in the communications business, or in any business that could
16 be said to be competing with Plaintiffs. They were speaking not as competitors, but simply as
17 investors."].) Here, it is apparent that Agilent was acting as a competitor rather than as an
18 investor in publicizing its letter to the SEC, so *ComputerXpress* is distinguishable in this
19 respect.

20 A subsequent California opinion, *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*
21 (2006) 140 Cal.App.4th 515 (which is not addressed by the parties), discussed the competitor
22 issue in greater nuance, although it also ultimately held that the defendant was not a competitor
23 of the plaintiff. Noting that federal courts have "formulated a rule that statements by a
24 commercial competitor about the competition are not matters of public interest," the opinion
25 correctly pointed out that the federal cases ultimately "rel[y] on the *lack* of any California case
26 law addressing the issue as support for" their position. (*Id.* at p. 525, discussing *MCSi, Inc. v.*
27 *Woods* (N.D. Cal. 2003) 290 F.Supp.2d 1030 and *Globetrotter Software, Inc. v. Elan Computer*
28 *Group, Inc.* (N.D. Cal. 1999) 63 F.Supp.2d 1127.) The court concluded that "[a]lthough in
most cases a competitor's statements regarding its competition would not" qualify as speech

1 regarding an issue of public interest, “we decline to adopt a per se rule excluding all
2 competitor’s statements from anti-SLAPP protection. Instead, we must consider each case in
3 light of its own unique facts.” (*Id.* at pp. 525-526.)

4 Considering the facts in this case, the Court concludes that the public interest prong of
5 the anti-SLAPP statute does not apply. Acknowledging that Twist had disclosed its litigation
6 with Agilent in its SEC filings, Agilent complained to the SEC that Twist did not characterize
7 specific disputed facts in the litigation in the manner most favorable to Agilent. Agilent
8 provides no evidence that it was “speaking as an investor” to other investors rather than as
9 Twist’s competitor. The Court does not conclude that this is the unique case where such
10 competitive battling qualifies as speech regarding an issue of public interest.³

11 Agilent accordingly fails to show that the anti-SLAPP statute applies to the fourth and
12 fifth causes of action.

13 *c. The Sixth Cause of Action for Unfair Competition*

14 A major portion of the sixth cause of action arises from the same conduct underlying
15 the fourth and fifth causes of action. The anti-SLAPP statute does not apply to this conduct for
16 the reasons already discussed. To the extent that the remaining portion of the sixth cause of
17 action may arise from protected activity, Agilent does not move to strike a portion of this
18 claim, or even the entirety of the sixth cause of action, but the entire Cross-Complaint. Under
19 the circumstances, the gravamen of the Cross-Complaint does not arise from protected activity.
20 (See *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 590 [“where the
21 plaintiffs have not specifically asked for relief as to some specified unprotected conduct that is
22 a subpart of a cause of action,” the gravamen analysis “remains a viable tool by which to assess
23 whether a plaintiff’s claim arises out of protected activity”]; *Optional Capital, Inc. v. Akin*
24 *Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111, fn. 5 [noting that a special
25

26
27 ³ Just after this matter was submitted, the Supreme Court of California issued its opinion in *FilmOn.com Inc. v.*
28 *DoubleVerify Inc.* (Cal., May 6, 2019, No. S244157) 2019 WL 1984290. Consistent with *Integrated Healthcare*, it
held that, although commercial speech is not categorically excluded from anti-SLAPP protection, the commercial
nature of a defendant’s speech is relevant in determining whether that speech merits protection under subdivision
(e)(4) of the anti-SLAPP statute, which, like subdivision (e)(3), addresses protected conduct “in connection with a
public issue or an issue of public interest.”

1 motion to strike may, but need not always, be directed to allegations within a pleaded count; “a
2 special motion to strike, like a conventional motion to strike may be used to attack an entire
3 pleading, such as a complaint, and various subparts of a pleading, such as a cause of action or
4 pleaded count, as well as component paragraphs, words or phrases”].)

5 *4. Conclusion and Order*

6 Agilent’s anti-SLAPP motion is DENIED.

7 C. Demurrer to the Cross-Complaint

8 Agilent demurs to each cause of action in the cross-complaint for failure to state a
9 claim, incorporating the merits arguments presented in support of its anti-SLAPP motion.
10 (Code Civ. Proc., § 430.10, subd. (e).)

11 *1. Legal Standard*

12 The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of*
13 *Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617,
14 621.) Consequently, “[a] demurrer reaches only to the contents of the pleading and such
15 matters as may be considered under the doctrine of judicial notice.” (*South Shore Land Co. v.*
16 *Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also
17 Code Civ. Proc., § 430.30, subd. (a).) “It is not the ordinary function of a demurrer to test the
18 truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s
19 conduct. ... Thus, ... the facts alleged in the pleading are deemed to be true, however
20 improbable they may be.” (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958,
21 internal citations and quotations omitted.)

22 In ruling on a demurrer, the allegations of the complaint must be liberally construed,
23 with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247
24 Cal.App.4th 1, 6.) Nevertheless, while “[a] demurrer admits all facts properly pleaded, [it
25 does] not [admit] contentions, deductions or conclusions of law or fact.” (*George v.*
26 *Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

27 ///

28 ///

1 2. *The First Three Causes of Action for Declaratory Relief*

2 Agilent contends that these claims should be dismissed because they are barred by the
3 litigation privilege and the *Noerr-Pennington* doctrine. However, as already discussed, these
4 claims arise from the underlying disputes between the parties and not from Agilent's filing of
5 this action.

6 Agilent further contends that the claims for declaratory relief simply seek denials of
7 liability for Agilent's existing causes of action against defendants and consequently should not
8 be entertained. "The court may refuse" to entertain a claim for declaratory relief "in any case
9 where its declaration or determination is not necessary or proper at the time under all the
10 circumstances." (Code Civ. Proc., § 1061.) However, the "general rule" is that "in an action
11 for declaratory relief the complaint is sufficient if it sets forth facts showing the existence of an
12 actual controversy relating to the legal rights and duties of the respective parties ... and
13 requests that the rights and duties be adjudged." (*Tiburon v. Northwestern Pac. R. Co.* (1970)
14 4 Cal.App.3d 160, 170.) Those circumstances are present here and the Court declines to
15 dismiss defendant's declaratory relief claims on this ground.

16 The demurrer to the first three causes of action will accordingly be overruled.

17 3. *The Fourth and Fifth Causes of Action for Defamation and Intentional Interference*
18 *with Prospective Economic Advantage*

19 As discussed above, the fourth and fifth causes of action arise from Agilent's
20 statements preceding Twist's IPO, including its letter to the SEC and press release. Agilent
21 contends these claims are barred by the litigation privilege, *Noerr-Pennington* doctrine, and
22 fair reporting privilege. It further urges that the statements at issue are true and thus cannot
23 give rise to a claim for defamation or a derivative claim for intentional interference with
24 prospective economic advantage.

25 As already discussed, while the SEC letter might qualify as a "prelitigation
26 communication" before an official proceeding, the litigation privilege does not apply to such a
27 communication unless it furthers the goals of litigation and "relates to litigation that is
28 contemplated in good faith and under serious consideration." (*Action Apartment Assn., Inc. v.*
City of Santa Monica (2007) 41 Cal.4th 1232, 1251.) Here, Twist and Leproust plausibly

1 allege that Agilent submitted the SEC letter, not with a good faith intention to prompt action by
2 the SEC, but in order to interfere with its competitor's IPO.

3 Similarly, "[t]he *Noerr-Pennington* doctrine provides that there is no antitrust liability
4 under the Sherman Act for efforts to influence government which are protected by the First
5 Amendment right to petition for redress of grievances, even if the motive behind the efforts is
6 anticompetitive." (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 574.) "An
7 exception to the doctrine arises when efforts to influence government are merely a sham; such
8 efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust
9 liability." (*Id.* at p. 575.) While the doctrine was formulated in the context of antitrust cases, it
10 has been applied in cases involving other types of civil liability, "including liability for
11 interference with contractual relations or prospective economic advantage or unfair
12 competition." (*Id.* at pp. 577-578, citations omitted.) The sham exception to the *Noerr-*
13 *Pennington* doctrine applies where facts are alleged to show that "defendants complained to the
14 SEC, not out of any desire to protect their investments or to instigate official action, but solely
15 out of a desire to block the public offering." (*Id.* at p. 581, quoting *Havoco of America, Ltd. v.*
16 *Hollobow* (7th Cir. 1983) 702 F.2d 643, 650.) This is exactly the theory that Twist and
17 Leproust allege here.

18 Agilent also contends that the statements in its letter to the SEC are substantially true.
19 Truth is an absolute defense to any defamation action. (*Campanelli v. Regents of University of*
20 *California* (1996) 44 Cal.App.4th 572, 581-582.) "In order to establish the defense, the
21 defendant need not prove the literal truth of the allegedly libelous accusation, so long as the
22 imputation is substantially true so as to justify the 'gist or sting' of the remark." (*Ibid.*)
23 "[S]light inaccuracy[ies] in the details" are overlooked, and "the statement is not considered
24 false unless it would have a different effect on the mind of the reader from that which the
25 pleaded truth would have produced." (*Hughes v. Hughes* (2004) 122 Cal.App.4th 931, 936,
26 internal citation and quotations omitted.) "[T]he issue of whether a statement is true or
27 substantially true is normally considered to be a factual one." (*Id.* at p. 937.)
28

1 Here, with regard to the first statement in the SEC letter, Agilent bases its defense on
2 defendants' discovery admissions that Leproust "accept[ed] [an] offer" to launch Twist "as a
3 co-founder" in 2011, at which time it was suggested that Leproust should be CEO. The Court
4 is inclined to agree with Agilent that this admission renders its statement that Leproust
5 accepted the CEO position in 2011 substantially true. As to the second statement in the SEC
6 letter, Agilent points to defendants' identification of 1,142 documents in Twist's possession
7 and 1,308 documents in Leproust's possession that "contain or reflect any Agilent confidential
8 information." However, defendants contend that these documents were passively retained by
9 former Agilent employees after the employees downloaded or emailed documents during their
10 tenure at Agilent to perform work for Agilent at home on nights and weekends, and were not
11 misused to develop Twist technology. (Cross-Complaint, ¶¶ 46-47.) Defendants' allegations
12 raise an issue of fact regarding whether Agilent's statement that "Twist employees have
13 admitted to taking and retaining hundreds of confidential Agilent documents for years while
14 developing the Twist technology" is substantially true. For one thing, Agilent cites no
15 admission by defendants that they took documents "while developing the Twist technology."
16 Further, Twist and Leproust persuasively argue that the "gist or sting" of this statement is that
17 defendants admitted to actively or knowingly taking documents while developing the Twist
18 technology, which is a material mischaracterization of their position. The truth of this
19 statement is an issue of fact not properly resolved on demurrer.

20 Finally, Agilent argues that to the extent defendants' claims arise from its report of
21 allegations in its SAC, they are barred by the fair report privilege. Given that this argument is
22 addressed to only a portion of the fourth and fifth causes of action, the Court need not rule on it
23 now. (See *PH II, Inc. v. Superior Court (Ibershof)* (1995) 33 Cal.App.4th 1680, 1682-1684 [a
24 demurrer does not lie to a portion of a cause of action].)

25 The demurrer to the fourth and fifth causes of action will accordingly be overruled.

26 4. *The Sixth Cause of Action for Unfair Competition*

27 Finally, a major portion of the sixth cause of action arises from the same conduct
28 underlying the fourth and fifth causes of action. The demurrer to that claims will be overruled

1 for the reasons already discussed. (See *PH II, Inc. v. Superior Court*, *supra*, 33 Cal.App.4th at
2 pp. 1682-1684.)

3 *5. Conclusion and Order*

4 Agilent's demurrer is OVERRULED in its entirety.
5

6 II. Defendants' Motions

7 Twist, Leproust, and defendant Siyuan Chen demur to and move to strike portions of
8 Agilent's Second Amended Complaint ("SAC"). Separately, defendant Solange Glaize demurs
9 to the SAC.

10 A. Allegations of the SAC

11 Agilent, headquartered in Santa Clara, is an industry leader in DNA and RNA synthesis
12 and measurement. (SAC, ¶¶ 17, 26.) It has become the leader in producing high-accuracy,
13 long oligonucleotides ("oligos"): DNA or RNA molecules that have a wide range of
14 applications in genetic testing, research, and forensics. (*Id.* at ¶ 38.) Before Twist, Agilent
15 was the only commercial entity capable of using inkjet printheads to synthesize long (greater
16 than 200 nucleotides) oligos at an extremely high density (approximately 36 microns apart) and
17 at an industry-leading error rate of 1 in 500 base pairs. (*Id.* at ¶ 3.) Agilent's oligo "library"
18 synthesis technology is the result of more than twenty years of interdisciplinary research,
19 development, and trial and error, marrying Agilent trade secrets in mechanics, chemistry,
20 biology, and other disciplines. (*Id.* at ¶ 39.) These trade secrets include those related to the
21 oligo writers; the composition of the "ink" used in syntheses; and the knowledge of the
22 environment, parameters, and specifications that work best and most efficiently to accurately
23 produce high-quality oligos. (*Ibid.*)

24 Leproust is a former Agilent scientist who founded a competitive company, Twist.
25 (SAC, ¶ 1.) Plaintiff alleges that she and other former Agilent employees, including Twist's
26 Senior Director of Chemistry and Molecular Biology Siyuan Chen and its former Chief
27 Financial Officer Solange Glaize, stole and retained Agilent's most sensitive documents
28 including experimental designs, data analyses, troubleshooting secrets, method refining, plans

1 for technological next steps, internal invention disclosures, validation reports, and proprietary
2 market analyses. (*Ibid.*)

3 *1. Leproust's Tenure at Agilent and Formation of Twist*

4 Agilent hired Leproust in 2000 to work on developing the chemical aspects of the inkjet
5 writer used for its high-density oligo synthesis, and she remained intimately involved in the
6 development and commercialization of Agilent's inkjet writer technology throughout her 13-
7 year career there. (SAC, ¶ 40.) By the end of her tenure at Agilent, she directed the research
8 and development of Applications and Chemistry in Genomics, supervising a team of scientists
9 and engineers responsible for the development and implementation of oligo synthesis and oligo
10 library synthesis technology. (*Ibid.*)

11 In late 2011, Agilent investigated expanding the applications for its oligo libraries to
12 meet a burgeoning market in synthetic biology. (SAC, ¶ 41.) Entering this market required
13 building on Agilent's technologies by developing technology that could quickly, cheaply, and
14 accurately assemble oligos into genes on-demand. (*Ibid.*) Around September 2011, Leproust
15 initiated a project to research and develop gene-assembly technologies through her Genomics
16 group at Agilent. (*Ibid.*) Around the same time—November 2011—she met with Twist's co-
17 founders and accepted their offer to join Twist as co-founder and CEO. (*Ibid.*) From this point
18 until she resigned from Agilent on April 12, 2013, Leproust developed her strategic plan for
19 Twist, a company now directly competing with Agilent and its partners in the oligo library
20 synthesis, derivative oligo products, and gene assembly markets for several hundreds of
21 millions of dollars in market share. (*Ibid.*) On February 4, 2013, while still employed by
22 Agilent, Leproust filed articles of incorporation for Twist. (*Id.* at ¶ 42.) Throughout her last
23 year of employment at Agilent, Leproust delivered proposals for a gene assembly system and
24 business to several venture capital investors. (*Id.* at ¶ 44.)

25 On April 12, 2013, Leproust abruptly left Agilent without notice, after several
26 days of skipping meetings and calling in sick, falsely stating she was leaving to work for a
27 "sequencing company." (SAC, ¶ 46.) She refused to sign Agilent's "Functional Exit Interview
28 Memo," which reminds departing employees of their obligations not to use or disclose

1 Agilent's confidential and proprietary information and to return its confidential documents.
2 (*Ibid.*) She also refused to take with her the Confidentiality and Assignment Agreement she
3 had signed in September of 2000, and wiped the contents of her Agilent-issued smartphone
4 before returning it. (*Ibid.*) Within three months, Twist reported that it had obtained \$4.7
5 million in Series A funding from fourteen investors and within five months, Twist had filed
6 provisional patent applications regarding its use of an oligo writer to synthesize oligos using
7 inkjet technology. (*Id.* at ¶ 47.) Twist could not have independently developed the technology
8 disclosed by these applications during its short time in existence. (*Id.* at ¶ 57.) Twist
9 continued to rapidly raise funds and secured \$50 million in its latest venture round financing in
10 April 2018, bringing its total financing to \$258.2 million. (*Id.* at ¶ 47.)

11 Twist markets itself as possessing a new platform for gene assembly to meet the
12 demand for fast and affordable access to large quantities of custom-made genes. (SAC, ¶ 49.)
13 The linchpins of this platform are (1) the use of silicon plates (rather than glass) to address
14 temperature-control and static issues that arise during gene assembly and (2) the use of
15 "capping" or double-coupling steps during the synthesis of longer oligos to reduce errors in
16 gene assembly. (*Ibid.*) These improvements were the subject of Leproust's experiments at
17 Agilent, some of which were conducted during her final seventeen-plus months of
18 employment, after she became the CEO of Twist. (*Ibid.*) Twist also markets and sells high-
19 quality oligo libraries for a broad range of applications and competes directly with Agilent in
20 the oligo library and derivative oligo products markets. (*Ibid.*)

21 2. *Leproust's Solicitation of Other Agilent Employees*

22 Under her Confidentiality and Assignment Agreement with Agilent, Leproust was
23 obligated not to solicit or recruit Agilent employees for two years following her resignation,
24 until April 12, 2015. (SAC, ¶ 51.) Yet she recruited and hired defendant Siyuan Chen away
25 from Agilent in November 2013. (*Ibid.*) Chen had worked for Agilent in Genomics Research
26 and Development as a nucleic acid chemist and had intimate knowledge of its oligo library
27 synthesis technology, the most advanced developments of which he had helped create, as well
28 as the gene assembly work Leproust was leading. (*Ibid.*) Chen had also agreed to the

1 Confidentiality and Assignment Agreement as a condition of his employment with Agilent.

2 (*Ibid.*)

3 Twist and Leproust hired several other Agilent employees, with at least two additional
4 hires taking place before the expiration of Leproust's obligation not to solicit Agilent
5 employees. (SAC, ¶¶ 53-54.) Among these several hires was defendant Solange Glaize,
6 Agilent's Corporate Controller and Chief Accounting Officer, as well as the Chief Financial
7 Officer for its Life Sciences Group. (*Id.* at ¶ 54.)

8 *3. Claims Alleged in the SAC*

9 Based on these allegations, Agilent asserts claims for (1) breach of contract against
10 Leproust, Chen, and Glaize; (2) breach of the duty of loyalty against Leproust; and (3) trade
11 secret misappropriation against all four defendants.

12 B. Demurrer and Motion to Strike by Twist, Leproust, and Chen

13 Twist, Leproust, and Chen demur to each cause of action in the SAC for failure to state
14 a claim. (Code Civ. Proc., § 430.10, subd. (e).) They also move to strike certain allegations
15 related to non-solicitation and non-compete provisions that they contend are void and
16 unenforceable as a matter of law.

17 *1. Demurrer to and Motion to Strike Allegations Associated with the First Cause of*
18 *Action for Breach of Contract*

19 In its first cause of action, Agilent alleges that Leproust, Chen, and Glaize violated
20 provisions of their employment contract addressing (1) the use and retention of Agilent's
21 Confidential Information (as to all defendants) (SAC, ¶¶ 61-64); (2) the disclosure and
22 assignment of Proprietary Developments and prohibitions on outside work that could lead to
23 divided loyalties (as to Leproust) (SAC, ¶¶ 65-66, 68-69); (3) a prohibition on soliciting or
24 recruiting Agilent's employees both during employment with Agilent and for a period of two
25 years following termination of employment (as to Leproust) (SAC, ¶¶ 67-69). Defendants urge
26 that the first and third theories seek to enforce provisions that are void as a matter of law. They
27 demur to the first cause of action insofar as it arises from these provisions and, alternatively,
28 move to strike allegations related to violations of these provisions.

1 a. *Provision Regarding Confidential Information*

2 Agilent alleges that, pursuant to paragraph 2 of its “Agreement Regarding Confidential
3 Information and Proprietary Developments” (the “Confidentiality and Assignment
4 Agreement”), defendants agreed “(a) to use [confidential] information only in the performance
5 of Agilent duties; (b) to hold such information in confidence and trust; and (c) to use all
6 reasonable precautions to assure that such information is not disclosed to unauthorized persons
7 or used in an unauthorized manner, both during and after [their] employment with Agilent.”
8 (SAC, ¶ 30.) The agreement broadly defines “Confidential Information” as “trade secrets,
9 confidential business and technical information, and know-how not generally known to the
10 public ... which is acquired or produced by me in connection with my employment by
11 Agilent.” (*Id.* at ¶ 31.) The agreement specifies that “Confidential Information” includes
12 “information on Agilent organizations, staffing, finance, information of employee
13 performance, compensation of others, research and development, manufacturing and marketing
14” (*Ibid.*) Agilent alleges that Leproust, Chen, and Glaize violated this provision because
15 they “improperly downloaded, stole, and retained Agilent confidential information.” (*Id.* at
16 ¶ 63.)

17 In an order dated January 23, 2017, the Court previously denied Twist and Leproust’s
18 motion to strike allegations related to this provision, finding no authority to support
19 defendants’ argument that a confidentiality provision should be construed as a restraint on an
20 employee’s ability to practice his or her profession that violates Business & Professions Code
21 section 16600. The order noted that “[c]onsistent with Agilent’s position, several California
22 and federal cases have drawn a distinction between nondisclosure (and related nonsolicitation)
23 provisions and noncompete provisions when applying section 16600,” and found no support
24 for the proposition that the provision’s asserted overbreadth would render it facially invalid
25 under section 16600, “where there is no direct restriction on Leproust’s ability to work for
26 Agilent’s competitors.”

27 In support of their present motion, defendants cite new authority published after the
28 Court issued its prior order, *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28

1 Cal.App.5th 923. There, the court held that a nonsolicitation provision was invalid under
2 section 16600. In that context, it stated that section 16600 “precludes an employer from
3 restraining an employee from engaging in his or her ‘profession, trade, or business,’ even if
4 such an employee uses information that is confidential but not a trade secret.” (At p. 940.)
5 Citing *The Retirement Group v. Galante* (2009) 176 Cal.App.4th 1226 (another nonsolicitation
6 case), the court held that section 16600 barred the enforcement of

7 a *contractual* clause purporting to ban a former employee from soliciting former
8 customers to transfer their business away from the former employer to the
9 employee’s new business, but a court may enjoin *tortious* conduct (as violative of
10 either the [UTSA], Civ. Code, § 3426 et seq.) and/or the unfair competition law)
11 by banning the former employee from using trade secret information to identify
12 existing customers, to facilitate the solicitation of such customers, or to otherwise
13 unfairly compete with the former employer.” (*Galante*, at p. 1238, 98 Cal.Rptr.3d
14 585.) This court in *Galante* thus concluded that when “[v]iewed in this light,”
“conduct is enjoined *not* because it falls within a judicially created ‘exception’
to section 16600’s ban on contractual nonsolicitation clauses, but is instead
enjoined because it is wrongful independent of any contractual undertaking.”
(*Id.* at pp. 1233, 1238, 98 Cal.Rptr.3d 585.)

15 (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*, *supra*, 28 Cal.App.5th at p. 940.)

16 As evidenced by this discussion, *AMN* addressed the use of confidential information in
17 the context of solicitation by former employees. (See *AMN Healthcare, Inc. v. Aya Healthcare*
18 *Services, Inc.*, *supra*, 28 Cal.App.5th at p. 939 [“the court properly granted summary judgment
19 on AMN’s first cause of action for breach of contract against individual defendants, which
20 alleged that such defendants ‘breached and, if not stopped, will continue to breach[,] the
21 [CNDA] by soliciting and inducing Traveler employees of [AMN] to become employees of
22 Aya.’ ”].) Although the trial court apparently rejected a breach of contract claim based on the
23 taking and retention of two simple documents (see *id.* at p. 931), the Court of Appeal did not
24 address this aspect of the plaintiff’s breach of contract claim (see *id.* at p. 939). Notably, it
25 pointed out that the confidentiality agreement at issue in that case defined confidential
26 information as synonymous with trade secrets, and went on to find that the two documents at
27 issue did not reflect trade secrets. (See *id.* at p. 940, fn. 7 [“We note that, although AMN
28 claims defendants wrongfully used AMN’s ‘confidential information’ as defined in section 1.2

1 of the CNDA ‘other than trade secrets’ in connection with each of these causes of action, by
2 *definition* the term ‘confidential information’ was synonymous with the term ‘confidential
3 trade secrets,’ as set forth in the CNDA.”.)

4 Consistent with these circumstances, as discussed below, subsequent federal court
5 opinions have read *AMN* to broadly invalidate employee nonsolicitation provisions, as applied
6 to former employees, under California law; however, they have not extended its holding to
7 confidentiality provisions more generally. (See *Barker v. Insight Global, LLC* (N.D. Cal., Jan.
8 11, 2019, No. 16-CV-07186-BLF) 2019 WL 176260, at *3 [“Having considered the *AMN*
9 decision and reviewed *Loral* and *Edwards*, the Court is convinced by the reasoning in *AMN*
10 that California law is properly interpreted post-*Edwards* to invalidate employee nonsolicitation
11 provisions.”]; *Weride Corp. v. Kun Huang* (N.D. Cal., Apr. 1, 2019, No. 5:18-CV-07233-EJD)
12 2019 WL 1439394, at *10 [finding likelihood of success on the merits as to breach of contract
13 claim based on misappropriation and use of confidential information, but following *Barker* and
14 *AMN* to hold nonsolicitation provision was invalid under section 16600].) This Court declines
15 to do so for the reasons discussed above and in its prior order. Here, Agilent does not allege
16 that defendants misused its confidential information to recruit employees after their tenure at
17 Agilent, but rather that they “stole Agilent’s most sensitive documents” while still working for
18 Agilent. (SAC, ¶ 1.) Specifically, Agilent alleges that

19 [u]sing thumb drives, cloud accounts, and personal emails, Leproust, Chen,
20 Glaize and other former Agilent employees stole hundreds of Agilent documents
21 clearly marked “Confidential.” These documents chart Agilent’s oligonucleotide
22 (“oligo”) synthesis technology processes from experiment to implementation.
23 Defendants stole and retained, for the past several years, experimental designs,
24 data analyses, troubleshooting secrets, method refining, and plans for
25 technological next steps. The documents also include highly confidential internal
26 invention disclosures and validation reports. But that’s not all. *On the very next*
27 *day after speaking to Leproust about coming to Twist*, Glaize accessed, stole,
28 retained and used key Agilent strategy documents marked “Confidential” that
contained Agilent’s proprietary analyses of the market opportunities in the
synthetic biology and gene synthesis markets—the markets around which
Leproust pitched her business to investors to raise over a quarter billion dollars.
Finally, document metadata show that current Twist employees, including the
named defendants, engaged in extensive downloading of documents from Agilent
computers to external, portable storage drives and devices in their final days at
Agilent. Those thumb drives are now missing.

1
2 (SAC, ¶ 1.) Such wholesale theft of confidential documents in violation of a confidentiality
3 provision was not at issue in *AMN*.

4 Finally, whether or not defendants' demurrer is appropriately construed as an improper
5 motion for reconsideration on this point, the Court will not award sanctions on that ground.
6 The broad language of *AMN* arguably bears on the Court's analysis of the confidentiality
7 provision at issue, and federal courts have recognized *AMN* as a material change in the law
8 regarding section 16600. There is no indication that the demurrer is frivolous, was brought for
9 an improper purpose, or otherwise warrants sanctions under Code of Civil Procedure section
10 128.7—and Agilent has not properly noticed a motion for such sanctions.

11 *b. Nonsolicitation Provision*

12 The Court has not previously addressed the sufficiency of Agilent's allegations
13 regarding the nonsolicitation provision (although as Agilent notes, these allegations were
14 included in its First Amended Complaint). As to this provision, the SAC alleges that Leproust
15 agreed "not to disrupt, damage or interfere with the operation or business of Agilent by
16 soliciting or recruiting its employees for myself or others, both during employment at Agilent
17 and for a period of two years following termination of employment with Agilent." (SAC,
18 ¶ 67.) Notwithstanding her agreement to these terms, Leproust "recruited and solicited one or
19 more Agilent employees to terminate their employment with Agilent within two years of
20 Leproust's resignation" (*Ibid.*) Based on these allegations, Agilent seeks injunctive relief
21 "restraining Leproust from soliciting and/or inducing Agilent's employees to terminate their
22 employment with Agilent for a further period of two years." (*Id.* at ¶ 72.)

23 The Court agrees with defendants and with the federal opinions that have considered
24 the issue that *AMN*, read in connection with *Edwards v. Arthur Andersen LLP* (2008) 44
25 Cal.4th 937, stands for the proposition that employee nonsolicitation provisions are generally
26 no longer valid under California law, at least insofar as they would prohibit former employees
27 from solicitation after their employment has terminated. While *AMN* is factually
28 distinguishable from this case in that recruiting was itself the profession at issue there, it
expressly called into doubt the older case of *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268,

1 upon which Agilent relies. Noting that “*Moyes* was decided several years before *Edwards*,”
2 *AMN* reasoned that

3 *Edwards* rejected the employer’s argument that the Legislature meant the word “
4 ‘restrain’ ” in section 16600 to mean “ ‘prohibit,’ ” such that a “mere limitation on
5 an employee’s ability to practice his or her vocation would be permissible under
6 section 16600, as long as it was *reasonably* based.” (*Edwards, supra*, 44 Cal.4th
7 at p. 947, 81 Cal.Rptr.3d 282, 189 P.3d 285, italics added.) *Moyes* use of a
8 reasonableness standard in analyzing the nonsolicitation clause there at issue thus
9 appears to conflict with *Edwards*’s interpretation of section 16600, which, under
the plain language of the statute, prevents a former employer from restraining a
former employee from engaging in his or her “ ‘lawful profession, trade, or
business of any kind,’ ” absent statutory exceptions not applicable here. (*Edwards*,
at p. 945, 81 Cal.Rptr.3d 282, 189 P.3d 285, italics added.)

10 (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc., supra*, 28 Cal.App.5th at p. 938.) As
11 noted by the federal courts that have subsequently considered the issue, the *AMN* court cited
12 factual differences with the circumstances in *Loral* as a secondary basis for its holding based
13 on this reasoning. (See *Weride Corp. v. Kun Huang, supra*, 2019 WL 1439394, at *11; see
14 also *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635,
15 646, fn. 7 [“when a decision is based on two separate grounds, neither is dictum”].)

16 The Court accordingly follows *AMN* and finds that the nonsolicitation provision at
17 issue here is invalid as applied to Leproust’s post-resignation recruitment. To the extent that a
18 more fact-specific analysis of the circumstances at issue is called for, the Court notes Agilent’s
19 allegations that before Twist, Agilent was the only commercial entity capable of using inkjet
20 printheads to synthesize long oligos at an extremely high density. (SAC, ¶ 3.) Thus, Agilent’s
21 employees were presumably among the only individuals with direct experience in the filed in
22 which Twist sought to compete. Barring Leproust from recruiting such individuals after her
23 resignation from Agilent would violate California public policy.

24 *c. Conclusion*

25 Given that the first cause of action survives as to both Leproust and Chen based on the
26 confidentiality provision, defendants’ demurrer to the first cause of action and their motion to
27 strike allegations related to that provision must fail. On the other hand, defendants’ motion to
28 strike allegations regarding the nonsolicitation provision will be granted.

1 2. *Demurrer to the Second Cause of Action for Breach of the Duty of Loyalty*

2 Again citing *AMN*, defendants contend that Agilent’s claim for breach of the duty of
3 loyalty is wholly derivative of its claim for breach of contract and consequently cannot support
4 a claim for tort liability. In *AMN*, however, the theory supporting the duty of loyalty claim was
5 the defendant’s alleged disclosure of two confidential documents to her new employer in
6 violation of her employment contract. (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.*,
7 *supra*, 28 Cal.App.5th at p. 941.) The court cited *Applied Equipment Corp. v. Litton Saudi*
8 *Arabia Ltd.* (1994) 7 Cal.4th 503 for the proposition that “[c]onduct amounting to a breach of
9 contract becomes tortious only when it also violates an independent duty arising from
10 principles of tort law,” circumstances which did not exist in *AMN*.

11 Here, Agilent alleges that Leproust founded and worked to benefit a competing
12 company for over a year while still employed by Agilent, through a range of actions beyond
13 the disclosure of a few confidential documents. These allegations support a claim for breach of
14 the duty of loyalty. (See *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 414 [“While
15 California law does permit an employee to seek other employment and even to make some
16 ‘preparations to compete’ before resigning, California law does not authorize an employee to
17 transfer his loyalty to a competitor. The duty of loyalty is breached, and the breach may give
18 rise to a cause of action in the employer, when the employee takes action which is inimical to
19 the best interests of the employer.”], internal citations and quotations omitted.)

20 The demurrer to the second cause of action will accordingly be overruled.

21 3. *Demurrer to the Third Cause of Action for Trade Secret Misappropriation*

22 Finally, defendants contend that Agilent’s allegations of damages arising from
23 defendants’ alleged trade secret misappropriation are not specific enough, especially
24 considering the late stage of discovery in this action. In support of this argument, they cite the
25 general principle that “[a]llegations must be factual and specific, not vague or conclusionary.”
26 (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 44.) However,
27 Agilent adequately alleges that defendants are competing with it and taking sales from it, and
28 furthermore that defendants were unjustly enriched by their misappropriation, an independent

1 theory of damages in a trade secret action. (See *Ajaxo Inc. v. E*Trade Financial Corp.* (2010)
2 187 Cal.App.4th 1295, 1301-1302 [evidence of unjust enrichment sufficient to prove damages
3 in action for trade secret misappropriation].) No heightened pleading standard applies to this
4 claim based on the stage of the litigation.

5 The demurrer to the third cause of action will accordingly be overruled.

6 *4. Conclusion and Order*

7 Defendants' demurrer to first, second, and third causes of action in the SAC is
8 **OVERRULED**. Defendants' motion to strike is **GRANTED IN PART** as to allegations
9 regarding the nonsolicitation provision, and is otherwise **DENIED**.

10 The following portions of the complaint are hereby struck without leave to amend:

11 -Paragraphs 35, 52, 53, and 67 in their entireties;

12 -"Under the Confidentiality and Assignment Agreement, Leproust was obligated not to
13 solicit or recruit Agilent employees for a period of two years—until April 12, 2015.
14 Yet, Leproust recruited and hired Siyuan Chen away from Agilent in November 2013."
(SAC, p. 17, ll. 6-8.); and

15 -"recruited and solicited one or more Agilent employees to terminate their employment
16 with Agilent within two years of Leproust's resignation, and" (SAC, p. 20, ll. 25-26.)

17 C. Demurrer by Glaize

18 Defendant Solange Glaize demurs to the first and third causes of action in the SAC on
19 the grounds that they fail to state a claim against her and are uncertain. (Code Civ. Proc.,
20 § 430.10, subs. (e) and (f).) She contends that any claim against her for trade secret
21 misappropriation is time-barred and Agilent fails to allege she possess any trade secrets or that
22 it was harmed by her alleged misappropriation. She further argues that the confidentiality
23 provision in Agilent's contract is unenforceable, and Agilent does not allege it was harmed by
24 her alleged breach of that provision.

25 *1. Allegations as to Glaize*

26 In collective terms, Agilent alleges that Glaize and other former Agilent employees
27 stole Agilent's most sensitive documents. Using thumb drives, cloud accounts,
28 and personal emails, Leproust, Chen, Glaize and other former Agilent employees
stole hundreds of Agilent documents clearly marked "Confidential." These

1 documents chart Agilent's oligonucleotide ("oligo") synthesis technology
2 processes from experiment to implementation. Defendants stole and retained, for
3 the past several years, experimental designs, data analyses, troubleshooting
4 secrets, method refining, and plans for technological next steps. The documents
also include highly confidential internal invention disclosures and validation
reports.

5 (SAC, ¶ 1.) More specifically, they allege Glaize "[o]n the very next day after
6 speaking to Leproust about coming to Twist, ... accessed, stole, retained and used key Agilent
7 strategy documents marked 'Confidential' that contained Agilent's proprietary analyses of the
8 market opportunities in the synthetic biology and gene synthesis markets—the markets around
9 which Leproust pitched her business to investors to raise over a quarter billion dollars." (*Ibid.*)
10 Based on these and other more general allegations, Agilent asserts claims against Glaize for
11 breach of the confidentiality provision in its employment contract and trade secret
12 misappropriation.

13 2. *Uncertainty*

14 As an initial matter, Glaize's demurrer based on uncertainty will be overruled.
15 Uncertainty is a disfavored ground for demurrer, and a demurrer on this ground is typically
16 sustained only where the pleading is so unintelligible that the defendant cannot reasonably
17 respond. (See *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616 ["A
18 demurrer for uncertainty is strictly construed, even where a complaint is in some respects
19 uncertain, because ambiguities can be clarified under modern discovery procedures."].) Here,
20 the claims against Glaize alleged clearly enough to enable a response.

21 3. *The Third Cause of Action for Trade Secret Misappropriation*

22 Glaize contends that the three-year statute of limitations bars Agilent's claim against
23 her for trade secret misappropriation. She urges that she was named as a defendant to this
24 action for the first time when the SAC was filed on December 10, 2018, while she left Agilent
25 for Twist more than three years earlier, on May 23, 2015.

26 "A demurrer based on a statute of limitations will not lie where the action may be, but
27 is not necessarily, barred." (*Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242
28 Cal.App.4th 651, 658, internal citations and quotations omitted.) The defect must clearly and

1 affirmatively appear on the face of the complaint and matters subject to judicial notice; “it is
2 not enough that the complaint shows that the action may be barred.” (*Ibid.*)

3 Here, the SAC does not allege when Glaize left her employment at Twist, nor does
4 Glaize cite any judicially noticeable material establishing this date. While she notes that
5 Agilent’s original complaint, filed on February 3, 2016, mentions her departure, the original
6 complaint also does not provide the date of her departure, and it was filed within three years of
7 December 2018. Glaize’s demurrer based on the statute of limitations fails on this ground
8 alone. Further, Agilent alleges that it did not have reason to discover *any* misappropriation by
9 its former employees until learning details about Twist’s technology in “the latter half of
10 2015.” (SAC, ¶ 12, fn. 2.) This suffices at the pleading stage to show that the delayed
11 discovery rule applies. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th
12 1308, 1319-1320 [“A plaintiff whose complaint shows on its face that his claim would be
13 barred without the benefit of the discovery rule must specifically plead facts to show (1) the
14 time and manner of discovery *and* (2) the inability to have made earlier discovery despite
15 reasonable diligence.”; once properly pleaded, belated discovery is normally a question of
16 fact], internal citation and quotations omitted.) As urged by Agilent, the mere fact that it knew
17 former employees had left to found Twist is insufficient to trigger inquiry knowledge. (See
18 *Intermedics, Inc. v. Ventritex, Inc.* (N.D. Cal. 1991) 775 F.Supp. 1258, 1266 [“In the
19 ferociously competitive and self-consciously secretive world in which these parties operate, we
20 see no reason to assume that plaintiff in fact had access to significant information about
21 defendants’ product before defendants made that information public At least in the
22 commercial setting at issue here, suspicion and fear are not sufficient predicates for launching a
23 lawsuit”].) Moreover, Glaize’s own argument that she is an unlikely misappropriator
24 because she works in finance rather than as a scientist undercuts the notion that Agilent should
25 have immediately suspected her of misappropriation upon her departure.

26 Glaize further contends that the SAC fails to “plausibly” allege that she possessed any
27 technical trade secrets, since her responsibilities were in accounting and finance. However, as
28 already described, the SAC specifically alleges that Glaize took “key Agilent strategy

1 documents marked 'Confidential' that contained Agilent's proprietary analyses of the market
2 opportunities in the synthetic biology and gene synthesis markets," and it alleges that such
3 documents are trade secrets. (SAC, ¶ 82 [identifying "analyses of the competitive landscape of
4 the target enrichment and oligo library markets" as among the trade secrets that were
5 misappropriated].)

6 Finally, Glaize contends that Agilent does not allege it was harmed by her
7 misappropriation. However, Agilent specifically alleges that by using its trade secrets and
8 confidential information, "Twist is in the process of bringing products to market more quickly
9 and more cheaply than could otherwise have been possible, thereby gaining an unfair
10 competitive advantage." (SAC, ¶ 59.) As already discussed, this is sufficient; unjust
11 enrichment supports a claim for trade secret misappropriation, and no heightened pleading
12 requirement applies with regard to damages in this context.

13 4. *The First Cause of Action for Breach of Contract*

14 Like the other defendants, Glaize argues that the confidentiality provision in Agilent's
15 employment contract is unenforceable. For the reasons already discussed, the Court disagrees.

16 Finally, Glaize contends that Agilent fails to allege damages in connection with its
17 breach of contract claim, urging that her mere retention of confidential documents could not
18 have caused Agilent any harm. However, the SAC alleges that Glaize "used" Agilent's
19 confidential strategy documents to help Twist. (SAC, ¶ 1.) As urged by Agilent, the same
20 theories of damages that apply to its claim for trade secret misappropriation, such as
21 disgorgement of unjust enrichment, may generally be employed to support this type of claim
22 for breach of a nondisclosure agreement. (See *Ajaxo Inc. v. E*Trade Grp., Inc.*, 135
23 Cal.App.4th 21 [disgorgement]; see also *Hernandez v. Lopez* (2009) 180 Cal.App.4th 932,
24 938-939 [unjust enrichment may be awarded on a claim for breach of contract in appropriate
25 circumstances].) In addition, Glaize does not show that an award of nominal damages on this
26 claim would be unsupported if these measures prove inappropriate. (See *Tribeca Companies,*
27 *LLC v. First American Title Insurance Company* (2015) 239 Cal.App.4th 1088, 1103, fn. 12
28

1 [plaintiff who proves breach of contract but fails to show damages may nevertheless recover
2 nominal damages and, when appropriate, costs of suit], citing Civ. Code, § 3360.)

3 *5. Conclusion and Order*

4 Glaize’s demurrer is OVERRULED in its entirety.
5

6 III. Motions to Seal

7 In two separate motions, Agilent moves to file under seal (1) the Declaration of Dr.
8 Kevin Luebke submitted in support of its special motion to strike and (2) the unredacted reply
9 declaration of Dr. Luebke submitted in support of that motion.

10 Defendants move to file under seal the unredacted versions of their opposition to
11 Agilent’s special motion to strike and of Exhibits 2, 8, 10, 11, and 26 to the Declaration of
12 Andrew J. Bramhall filed in support of defendants’ opposition to the special motion to strike.

13 A. Legal Standard

14 Generally, “[t]he court may order that a record be filed under seal only if it expressly
15 finds facts that establish: (1) There exists an overriding interest that overcomes the right of
16 public access to the record; (2) The overriding interest supports sealing the record; (3) A
17 substantial probability exists that the overriding interest will be prejudiced if the record is not
18 sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to
19 achieve the overriding interest.” (Cal. Rules of Court, rule 2.550(d).)

20 However, in actions for trade secret misappropriation, the court “shall preserve the
21 secrecy of an alleged trade secret by reasonable means, which may include ... sealing the
22 records of the action” (Civ. Code, § 3426.5.) The usual sealing rules do not apply to
23 records such as these, which “are required to be kept confidential by law.” (Cal. Rules of
24 Court, rule 2.550(a)(2); see *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292,
25 298-299 [“a mandatory confidentiality requirement ... is imposed ... in actions initiated
26 pursuant to the Uniform Trade Secrets Act for misappropriation of trade secrets”].) While the
27 Court retains the authority to unseal claimed secrets that are not even arguably secret, it must
28 generally preserve the confidentiality of claimed secrets until such time as that information is

1 finally adjudged not to be a trade secret. (See *Cypress Semiconductor Corporation v. Maxim*
2 *Integrated Products, Inc.* (2015) 236 Cal.App.4th 243, 255.)

3 Where rule 2.550 applies, “[c]ourts have found that, under appropriate circumstances,
4 various statutory privileges, trade secrets, and privacy interests, when properly asserted and not
5 waived, may constitute overriding interests.” (*In re Providian Credit Card Cases* (2002) 96
6 Cal.App.4th 292, 298, fn. 3.) In addition, confidential matters relating to the business
7 operations of a party may be sealed where public revelation of the information would interfere
8 with the party’s ability to effectively compete in the marketplace. (See *Universal City Studios,*
9 *Inc. v. Superior Court (Unity Pictures Corp.)* (2003) 110 Cal.App.4th 1273, 1285-1286.)

10 Where some material within a document warrants sealing, but other material does not,
11 the document should be edited or redacted if possible, to accommodate both the moving party’s
12 overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court,
13 rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to
14 the information in the document, rather than framing the issue to the court on an all-or-nothing
15 basis. (*In re Providian, supra*, 96 Cal.App.4th at p. 309.)

16 B. Agilent’s Motions to Seal

17 Agilent moves to seal declarations by Dr. Luebke that discuss its trade secrets. The
18 Court finds that sealing these materials is a “reasonable means” of preserving the secrecy of
19 Agilent’s alleged secrets. (Civ. Code, § 3426.5.)

20 Agilent’s motion to seal is therefore GRANTED.

21 C. Defendants’ Motion to Seal

22 The materials at issue in defendants’ motion reflect personal information of Leproust
23 and confidential business and personal information of non-parties. The proposed redactions
24 are narrowly tailored to this information. This information is appropriately filed under seal and
25 the factors set forth in rule 2.550(d) are satisfied.

26 ///

27 ///

28 ///

1 Defendants' motion to seal is accordingly GRANTED.

2 IT IS SO ORDERED.

3
4 Dated: _____

May 10, 2019



Honorable Brian C. Walsh
Judge of the Superior Court