SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Thank you.

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DATE: OCTOBER 11, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV362163	Edgar v. Aegion Corporation, et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	17CV319705	Group One Construction, Inc. v. La Encina Development, L.L.C., et al.	See Line 2 for tentative ruling.
LINE 3	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 3 for tentative ruling.
LINE 4			
LINE 5			
LINE 6			
LINE 7			
LINE 8			
LINE 9			

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LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Edgar v. Aegion Corporation, et al. (Class Action)
Case No.: 20CV362163

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 11, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a class action arising out of alleged violations of the Fair Credit Reporting Act (FCRA). The Class Action Complaint, filed by plaintiff Javonti Edgar (Plaintiff) against defendants Aegion Corporation, Schultz Industrial Services, Inc., and Schultz Mechanical Contractors, Inc. (collectively, Defendants) on January 21 2020, sets forth a single cause of action for Violation of 15 U.S.C. §§1681b(b)(2)(A) (FCRA).

On May 3, 2023, the court granted preliminary approval of the settlement, subject to approval of the modified class notice.

Plaintiff now moves for final approval of the settlement, attorney's fees, costs and expenses, and enhancement payment (Motion).

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion. [Citation.]" (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and citing *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. [Citation.]" (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. [Citations.]" (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba, supra,* 91 Cal.App.4th at p. 245, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll persons who were the subject of a background report (including a consumer report and investigative consumer report) obtained by Defendants [] from and including January 21, 2015 through the date of preliminary approval[.]

According to the terms of settlement, Defendants will pay a gross, non-reversionary settlement amount of $541,190. The total settlement amount includes attorney's fees not to exceed $180,396.66 (1/3 of the gross settlement fund), litigation expenses not to exceed $15,000, a service award in the amount of $10,000 for the class representative, and settlement administration costs not to exceed $25,000 (estimated at preliminary approval to be $21,184). The net settlement amount will be distributed to class members on a pro rata basis.

The settlement agreement provides that checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be sent to the Controller of the State of California pursuant to the Unclaimed Property Law. The court indicated at preliminary approval that the parties' proposal to send funds from uncashed checks to the Controller of the State of California did not comply with Code of Civil Procedure section 384 and directed the parties to provide a new *cy pres* prior to the final fairness hearing. The Motion

indicates that "[a]ny amounts remaining uncashed from Participating Settlement Class Members for 180 days will be paid to Alliance for Children's Rights, a 501(c)(3) non-profit" and refers to "Joint Stipulation Designating *Cy Pres*." (Motion at p. 11.) The court is unable to locate this "Joint Stipulation Designating *Cy Pres*" and the parties are directed to file a copy of the referenced document.

On June 16, 2023, the settlement administrator mailed notice packets to 3,820[1] Class Members. (Clark Decl., ¶ 9.) Ultimately, 23 notice packets were undeliverable. (*Id*.) As of August 30, 2023, there were no requests for exclusions or objections. (*Id*., ¶ 10.)

Assuming the court awards the requested $10,000 enhancement payment to the named plaintiff, each Class Member will receive approximately $82.38. (Motion at p. 23.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Named plaintiff requests an enhancement award in the amount of $10,000 but the court is unable to locate a declaration in support of this request. The court is not able to meaningfully evaluate the request absent a supporting declaration and will continue this matter to give named plaintiff an opportunity to file a one. The court notes that given the average estimated recovery of $82.38 per class member, it is not inclined to grant a $10,000 enhancement award. (See *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 789-790, 805-806 (*Clark*) [In a $2 million settlement, trial court's approval of an enhancement award of $25,000 each to the two named plaintiffs—44 times the average payout of $561.44 to each class member—was an abuse of discretion on the record in that case].)[2]

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[1] The class list provided by Defendants contained 3,829 individuals but nine were removed as duplicate records. (Declaration of Jada Clark of Simpluris, Inc. in Support of Final Approval of Settlement (Clark Decl.), ¶ 4.)

[2] A $10,000 enhancement award would amount to more than 121 times the estimated average payout of $82.38 to each class member. (See *Clark*, *supra*, 175 Cal.App.4th at p. 806 ["[T]here is no 'presumption of fairness' as to the amount of an enhancement" and "the trial court abused its discretion not merely because of the enormous disparity in recovery, but because, as we have explained, the evidence in the record is entirely insufficient to support an enhancement of the magnitude awarded."].)

The court also has an independent right and responsibility to review the requested attorney's fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel requests attorney's fees in the amount of $180,396.66 (1/3 of the gross settlement amount). Plaintiff's counsel provides evidence demonstrating a total lodestar of $121,442.50. (Declaration of Shaun Setareh in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement (Setareh Decl.), ¶ 30.) By the court's calculation, this results in a reasonable multiplier of 1.49. The attorney's fees requested are reasonable and are approved.

Plaintiff's counsel requests and provides evidence of costs in the amount of $11,680.52. (Setareh Decl., ¶ 25 & Exh. A.) The costs are approved. Settlement administration costs of $24,348.00 are also approved.[3] (Clark Decl., ¶ 11.)

As stated above, the court is unable to evaluate named plaintiff's request for an enhancement payment absent a declaration to support the request. The parties are also directed to file a copy of the "Joint Stipulation Designating *Cy Pres*" for the court's review. Accordingly, this matter is continued to November 15, 2023, at 1:30 p.m. in Department 19. The "Joint Stipulation Designating *Cy Pres*" and a supplemental declaration to support the requested enhancement payment shall be filed no later than November 1, 2023. The supplemental declaration must provide specific details about named plaintiff's participation in the action, including but not limited to risks incurred, notoriety and personal difficulties encountered, amount of time and effort spent, and personal benefit or lack thereof enjoyed by named plaintiff as a result of this litigation.

[3] Administration costs at preliminary approval were estimated at $21,184.00. The Clark Declaration indicates that "costs increased due to the addition of the Case website and the total of 18 months of maintenance for the website." (Clark Decl., ¶ 11.)

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Calendar Line 2

Case Name: Group One Construction, Inc. v. La Encina Development, L.L.C., et al.
Case No.: 17CV319705

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 11, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This case arises from a construction contract dispute between Plaintiff Group One Construction, Inc. ("Group One"), a California general building contractor, and Defendant La Encina Development LLC ("La Encina"), a California development company. La Encina hired Group One to construct five homes in San Jose but the contract was terminated prior to the completion of the project. Group One initiated this action filing a complaint for breach of contract and to foreclose a mechanics lien in the amount of approximately $985,000. Thereafter, La Encina filed a cross-complaint raising claims for (1) breach of contract, (2) declaratory relief, and (3) constructive trust against Group One and (4) a claim for piercing the corporate veil asserted against Group One's alleged owner or agent Richard Lee Foust ("Foust").

La Encina's current operative cross-complaint, the Third Amended Cross-Complaint ("3AXC") alleges claims for (1) declaratory relief, (2) breach of contract, (3) constructive trust, (4) fraud, and (5) violation of Penal Code section 496. The first three causes of action were asserted against Foust, Elizabeth Simic, another alleged owner or agent of Group One, and Cal Pacific, Foust's new construction company and alleged successor of Group One. The latter two causes of action were asserted against Faust and Simic only.

On September 13, 2021, Foust filed his Second Amended Cross-Complaint against La Encina and its alleged owners and lenders Jen Hau Richard Chen, Sheena Chang, Chung Yeh, Chien Huanchu, Yehs II Family Limited Partnership, Chinche Huang, and Chuan LLC (collectively, "Cross-Claimants"), asserting causes of action for (1) Intentional misrepresentation (against all Cross-Claimants); (2) Negligent misrepresentation (against all Cross-Claimants); (3) Slander per se (against Chen); and, (4) Concealment (against all Cross-Claimants).

Currently before the Court is (1) Foust's, Simic's, and Cal Pacific's ("Cross-Defendants") demurrer to La Encina's third amended cross-complaint, (2) Foust's motion for leave to file a third amended cross-complaint, and (3) Foust's motion to compel further responses to his special interrogatories, set one, and requests for production of documents, set one.

II. CROSS-DEFENDANTS' DEMURRER

Cross-Defendants have filed a demurrer challenging the fifth cause of action in La Encina's third amended cross complaint ("3AXC"), a claim for violation of Penal Code section 496. La Encina has opposed the demurrer and Cross-Defendants have filed a reply.[4]

A. Cross-Defendants' Request for Judicial Notice

Cross-Defendants request judicial notice of (A) La Encina's initial complaint filed February 5, 2018, (B) the settlement agreement in Group One's bankruptcy case in United States Bankruptcy Court, Northern District Case No. 17-52301, (C) La Encina's request for dismissal of the initial complaint as to Group One filed May 7, 2019, (D) Foust's notice of motion and motion for summary judgment filed November 13, 2020, (E) La Encina's motion for leave to file its first amended complaint, (F) La Encina's first amended cross complaint filed July 23, 2021, (G) the court order re Cross-Defendants' demurrer to La Encina's first amended cross complaint filed February 25, 2022, (H) the order authorizing employment of an accountant in Group One's bankruptcy case, (I) the trustee's final accounting in Group One's bankruptcy case, (J) the final decree in Group One's bankruptcy case, (K) La Encina's second amended cross-complaint filed in this case on March 11, 2022. He seeks judicial notice of all items as court documents under Evidence Code section 452, subdivision (d) and as facts not reasonably subject to dispute under Evidence Code section 452, subdivisions (g) and (h).

La Encina objects within the body of its opposition to the Court taking judicial notice of Exhibits B, C, D, E, G, H, I, and J to Cross-Defendants' request for judicial notice on relevance grounds and because the Court cannot take judicial notice of the facts contained in the documents.

The Court finds that the bankruptcy court documents are not relevant to the outcome of the demurrer. " 'There is … a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue.' [Citations.]" (*Silverado Modjeska Recreation & Park Dist. v. County of*

[4] Simic has filed a joinder to Foust's reply.

Orange (2011) 197 Cal.App.4th 282, 307, fn. 18.) Cross-Defendants ask the Court to take judicial notice of these items to make a fact based argument regarding the significance of the accounting that was Group One's bankruptcy case. The Court finds that the bankruptcy court documents cannot establish the fact that Group One members did not commit any wrongdoing. (See *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 456, fn. 9 ["In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]"].) The request for judicial notice is denied as to items B, H, I, and J.

With respect to the remaining requests for judicial notice, they are granted under Evidence Code section 452, subdivision (d) with the caveat that the court will not consider the hearsay statements contained therein for their truth. (See *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882; *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.)

Cross-Defedants' request for judicial notice is GRANTED as to items A, C, D, E, F, G, and K, and DENIED as to items B, H, I, and J.

B. Legal Standard

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10, subd. (e).)[5] A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (§§ 430.10, 430.50, subd. (a).)

The Court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods*

[5] All further undesignated statutory references are to the Code of Civil Procedure.

Corp. (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

C. Discussion

Simic and Foust demur to the fifth cause of action in La Encina's 3XAC. The 3XAC alleges that Simic and Foust obtained funds from Group One, which were meant to be used to pay subcontractors, sub-subcontractors, suppliers, and laborers for their work on the project. But, Simic and Foust did not pay those subcontractors, suppliers, and laborers, allegedly in violation of Penal Code section 484b. (3XAC, ¶ 13(b).) Simic and Foust repeatedly represented to La Encina that they were requesting funds to pay the subcontractors, sub-subcontractors, suppliers, and laborers but, instead, they stole the money, allegedly in violation of Penal Code section 496. (*Ibid*.) The fifth cause of action alleges that Article 9.6.2 of the General Conditions in the February 9, 2016 contract between La Encina and Group One required Group One to pay subcontractors, sub-subcontractors, suppliers, and laborers and Business and Professions Code section 7108.5 requires general contractors to pay those same groups within 10 days of receipt of payment from the owner, in this case, La Encina. (3XAC, ¶¶ 52, 53.) La Encina paid every amount requested by Group One until termination of the contract but Group One did not pay all amounts owing to subcontractors, sub-subcontractors, suppliers, and laborers. (3XAC, ¶ 59.)

Simic and Foust contend that the fifth cause of action in La Encina's 3XAC is barred by the statute of limitations and that the claim does not relate back to the filing of the initial complaint. They assert that the three-year statute of limitations under Civil Code section 338 applies and that La Encina should have been aware of the claim by August 15, 2017, the date the contract with GroupOne was terminated. La Encina does not argue that a different statute of limitations applies.

La Encina disputes that the statute of limitations began to run on August 15, 2017 and asserts that when it discovered or should have discovered the theft is a question of fact that cannot be determined on a demurrer. It also contends that Foust fraudulently concealed the basis for the claim, thereby tolling the statute of limitations. Specifically, La Encina argues that Foust turned over the project records to the bankruptcy trustee when GroupOne declared bankruptcy and did not keep a copy, forcing La Encina to obtain the records from the trustee. La Encina maintains that it did not receive the project records until late 2020 and that it did not

receive necessary banking records until January 2021, which is when it discovered the basis for the claim.

A statute of limitations defense may be raised by demurrer [citation].” (*Doyle v. Fenster* (1996) 47 Cal.App.4th 1701, 1707.) The statute of limitations may be asserted on demurrer, when the grounds for the defense are disclosed on the face of the complaint or from matters judicially noticed. (See *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 746; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.)

“ ‘A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.’ [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. [Citation.]” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort*, *supra*, 91 Cal.App.4th at p. 881.)

“A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear ‘clearly and affirmatively’ from the dates alleged. It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy ‘is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment . . . .’ [Citation.]” (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.)

The limitations period in Civil Code section 338 begins to run on discovery of the violation. (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 258.) “Discovery occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing the injury (here, ‘wrong’ is not used in a technical sense, but in a lay one). [Citations.]” (*Ibid*.) “ ‘A plaintiff has reason to suspect when he has notice or information of circumstances to put a reasonable person on inquiry.’ [Citations.]” (*Ibid*.)

The Court finds that the statute of limitations has run and that this fact appears on the face of the 3AXC and items subject to judicial notice. La Encina was aware of the factual basis for the claim asserted in the fifth cause of action at the time of the filing of La Encina’s initial complaint. The initial complaint, of which the Court has taken judicial notice, states

"GROUP ONE failed to make payments to subcontractors, sub-subcontractors, suppliers and laborers as required by the Contract Documents and Business & Professions Code § 7108.5. GROUP ONE repeatedly disregarded applicable laws regarding the payment to subcontractors, sub-subcontractors, suppliers and laborers."[6] (Initial Complaint, ¶ 13(i).) At that time, La Encina apparently knew that it had paid Group One amounts it believed Group One would pay to the subcontractors, sub-subcontractors, suppliers and laborers and it knew that Group One did not pay those groups.

La Encina argues that its awareness of the breach of contract claim it initially asserted on these same facts is not the same as awareness of the Penal Code section 496 violation. However, the only remaining fact of which La Encina would not have been aware is the fact that that Group One appears to have used the money in question for its own purposes, which can be inferred by the fact that the money was not paid to the subcontractors, sub-subcontractors, suppliers and laborers. If Group One received the money and did not pay the subcontractors, sub-subcontractors, suppliers and laborers, this is enough to alert La Encina to the likely possibility that Group One had kept the money. Thus, the Court finds that La Encina had inquiry notice of the factual basis for the fifth cause of action.

Cross-Defendants contend that the Penal Code section 496 claim does not relate back to the filing of the initial complaint because it does not involve the same injury and instrumentality as the claims raised in the initial complaint and because the initial complaint did not give Cross-Defendants adequate notice of the new claim. They assert that all claims from the initial complaint were dismissed other than the alter ego claim against Foust.

> An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not 'relate back' to an earlier timely filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality.

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[6] The Court has taken judicial notice of La Encina's initial complaint and, although it may not consider the truth of the matters asserted in the complaint, it may consider the fact that La Encina filed a complaint containing this statement. (See *Al Holding Co. v. O'Brien & Hicks* (1999) 75 Cal.App.4th 1310, 1313-1314 [court may take judicial notice of existence of document to establish complaint is time barred].)

> [Citations.] An amended complaint relates back to an earlier complaint if it is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. [Citations.] However, the doctrine will not apply if the 'the plaintiff seeks by amendment to recover upon a set of facts entirely unrelated to those pleaded in the original complaint.' [Citation.]

(*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 276-277.) "In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading."

(*Id.* at p. 277.)

A cause of action cannot relate back to the filing of a prior complaint where the entirety of the prior complaint was voluntarily dismissed without prejudice. (*Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 433.) But, La Encina cites to no authority indicating that a complaint cannot relate back to a prior complaint where some, but not all, of the causes of action had been dismissed involuntarily. Further, does it cite any authority indicating that the new complaint must relate back to the facts alleged in the remaining cause(s) of action where, as here, the initial complaint alleges the necessary facts to show the cause of action relates back outside of any dismissed cause of action. The Court finds that the fifth cause of action relates back to the filing of the initial complaint. In paragraph 12, which is part of the general factual allegations, the initial complaint alleged that Group One failed to pay the same subcontractors, sub-subcontractors, and suppliers the 3AXC alleges were not paid and that Group One requested payment on behalf of these groups with no intention of paying them. Although couched in breach of contract language, this is the exact factual basis of the fifth cause of action in the 3AXC.

Cross-Defendants argue that the 3AXC does not allege the same injury, accident, or instrumentality because the initial complaint alleged breach of contract whereas the 3AXC alleges that Cross-Defendants fraudulently induced La Encina to pay them money earmarked for same subcontractors, sub-subcontractors, and suppliers. But, relation back is not thwarted when the plaintiff alleges a new legal theory or different cause of action and the initial complaint alleged that Group One requested payment from La Encina on behalf of those groups when it had no intention of actually paying those groups as required. The Court finds that the Penal Code section 496 claim relates back to the initial complaint.

Cross-Defendants also assert that the fifth cause of action is not adequately pled because it does not allege that she and Foust acted with the requisite criminal intent.

Penal Code section 496, subdivision (a) provides

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.[7]

Penal Code section 496, subdivision (c) provides, "Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees."

Citing *Siry Investment, L.P. v. Farkhondehpour* (2022) 13 Cal.5th 333, 361-362 (*Siry*), Cross-Defendants argue that

> [N]ot all commercial or consumer disputes alleging that a defendant obtained money or property through fraud, misrepresentation, or breach of a contractual promise will amount to a theft. To prove theft, a plaintiff must establish criminal intent on the part of the defendant beyond 'mere proof of nonperformance or actual falsity.' [Citation.] This requirement prevents ' "[o]rdinary commercial defaults" ' from being transformed into a theft. [Citation.] If misrepresentations or unfulfilled promises 'are made innocently or inadvertently, they can no more

[7] La Encina alleges that the predicate violation for the Penal Code section 496 claim is a violation of Penal Code section 484b, which provides

> Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials or equipment provided incident to such construction, and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense[.]

> form the basis for a prosecution for obtaining property by false pretenses than can an innocent breach of contract.' [Citation.] In this case, the record appears consistent with a conclusion that defendants acted not innocently or inadvertently, but with careful planning and deliberation reflecting the requisite criminal intent.

They assert that the 3AXC does not allege facts showing that they engaged in "careful planning and deliberation[.]" (*Siry*, *supra*, 13 Cal.5th at p. 362.)

La Encina contends that the requirement to plead criminal intent is met by paragraph 42 of the 3AXC,[8] which states

> Repeatedly over the course of the Project and until LA ENCINA terminated the contract with GROUP ONE, Cross-defendants explicitly and implicitly represented that the funds they were requesting from LA ENCINA for work done on the Project would be used to pay the invoices submitted by subcontractors, sub-subcontractors, suppliers and laborers who worked on or supplied materials for the project and that if LA ENCINA did not pay the payment applications for base contract work and requests for change orders, then the subcontractors would walk off the job. Further, over the course of the project, Cross-defendants repeatedly represented to LA ENCINA that GROUP ONE and its subcontractors had sustained and were sustaining delay damages that were increasing the costs of completing the scope of work. Cross-defendants presented numerous change order requests seeking these delay damages.

The 3AXC alleges Cross-Defendants then knowingly misrepresented that they would pay the subcontractors and then failed to do so. (3AXC, ¶ 43.)

The 3AXC goes on to state

> [A]s of the date of this Cross-complaint, Cross-defendants have not used a substantial portion of the money received from LA ENCINA for the payment of

[8] Paragraph 42 is contained in the fourth cause of action but it is incorporated by reference into the fifth cause of action. (3AXC, ¶ 51.)

> subcontractors, sub-subcontractors, suppliers or laborers, but instead FOUST and SIMIC willfully and intentionally took money paid by LA ENCINA for exclusive use on the LA ENCINA project and for the benefit of subcontractors and suppliers who worked on or supplied products and equipment on the LA ENCINA project and spent it elsewhere so as to leave multiple subcontractors, sub-tier contractors and suppliers unpaid for services rendered and supplies used for or delivered to the project.

(3XAC, ¶ 56.)

Taken together, these allegations indicate that Cross-Defendants requested funds from La Encina misrepresenting that the funds would be forwarded to the subcontractors, sub-subcontractors, suppliers or laborers without ever intending to provide the funds to those groups and that this occurred over a significant period of time. The Court finds that these claims are sufficient to allege that Cross-Defendants' actions were not entered into "innocently or inadvertently" but rather with criminal intent. The demurrer is OVERRULED.

In its opposition to the demurrer, La Encina objects to Cross-Defendants' argument and evidence regarding the implications of Group One's bankruptcy accounting. (Opposition, p. 1, ln. 24-p. 2, ln. 6.) La Encina requests that the Court strike that portion of the demurrer. The Court declines to strike the offending portion of the demurrer in the absence of any citation to authority. However, the Court notes that it has not relied on this argument or the evidence in support to reach conclusions above.

D. Conclusion

The demurrer is OVERRULED.

III. MOTION FOR LEAVE TO FILE THIRD AMENDED CROSS-COMPLAINT

Foust moves for leave to file a third amended cross-complaint ("3ACC"). Cross-Complainants oppose the motion and Foust has filed a reply.

A. Requests for Judicial Notice and Evidentiary Objections

a. Foust's Requests for Judicial Notice

Foust requests judicial notice of (A) his notice of motion and motion for leave to amend 3ACC filed February 22, 2022, (B) the declaration of Foust's counsel in support of same, (C) Foust's declaration in support of his opposition to the motion to expunge lis pendens filed

March 16, 2018, (D) the order re La Encina's and Richard Chen's demurrer and motion to strike challenging Foust's first amended cross-complaint filed August 11, 2020, (E) the order re La Encina's and Richard Chen's demurrer to Faust's second amended cross-complaint filed February 25, 2022, (F) Foust's amended cross-complaint filed February 20, 2020, (G) Foust's amendment to the cross-complaint filed February 24, 2020, (H) Foust's second amended cross-complaint filed January 25, 2021, (I) Foust's notice of motion and motion for summary judgment filed November 13, 2020, (J) La Encina's amendment to cross-complaint substituting Roes filed March 15, 2021, (K) La Encina's ex parte application, filed March 15, 2021, to continue hearing on Foust's motion for summary judgment, (L) La Encina's notice of motion for leave to file amended cross-complaint filed April 27, 2021, (M) La Encina's amended cross-complaint, (N) La Encina's second amended cross-complaint, (O) Foust's declaration in support of motion for summary judgment filed December 21, 2021.

Cross-Complainants object to the Court taking judicial notice of exhibits B, C, D, E, G, H, I, and J because they are not relevant to the matters raised in the instant motion to amend. The Court agrees. The Court DENIES the request for judicial notice of exhibits B, C, D, E, G, H, I, and J.

With respect to the remaining items, these documents are subject to judicial notice under Evidence Code section 452, subdivision (d). Accordingly, the Court GRANTS judicial notice of items A, F, K, L, M, N, and O with the caveat that the court will not consider the hearsay statements contained therein for their truth.

The Court DENIES Foust's requests for judicial notice in support of his reply. (See *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Ca1.App.4th 308, 314-316 [trial court erred in considering the evidence submitted with reply brief]; see also *Nazir v. United Airlines,* Inc. (2009) 178 Ca1.App.4th 243, 252 [stating that evidence submitted for the first time in reply is not generally allowed]; see also *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537 [stating that "new evidence is not permitted with reply papers"].)

b. Cross-Complainants' Request for Judicial Notice

Cross-Complainants request judicial notice of (1) the fact that Group One filed this lawsuit on November 28, 2017, (2) La Encina filed its cross-complaint on February 5, 2018, (3) Foust filed his cross-complaint against La Encina and Chen on August 15, 2019, (4) Foust filed an amended cross-complaint on February 20, 2020 and the amended cross-complaint made no reference to a 2015 contract as a basis for recovery, (5) Foust filed a second amended

cross-complaint on September 13, 2021 and it made no reference to a 2015 contract as a basis for recovery, (6) La Encina filed a motion for summary judgment on September 9, 2022 and the hearing was scheduled for January 26, 2023, (7) on February 3, 2023, Judge Rosen issued her interim order tentatively granting the motion for summary judgment but allowing Foust to file a motion to amend, (8) on March 23, 2023, Judge Rosen issued her final order granting the motion for summary judgment and denying the motion to amend, (9) notice of Judge Rosen' order was filed and served on March 23, 2023, (10) the members and managers of La Encina filed a motion for summary judgment on March 23, 2023, and (11) on September 18, 2023, Foust filed the instant motion.

Foust did not oppose these requests for judicial notice. The requests for judicial notice are proper as these are matters that may be gleaned from court documents that are subject to judicial notice under Evidence Code section 452, subdivision (d). Accordingly, Cross-Complainants' request for judicial notice is granted.

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c. Cross-Complainants' Objections to the Declaration of Douglas Dal Cielo in Support of Motion for Leave to File 3ACC

La Encina objects to portions the declaration of Foust's counsel Douglas Dal Cielo in support of the motion for leave to file 3ACC. The Court declines to rule on the objections because it has decided the outcome of the motion without reference to the portions of the declaration La Encina objects to.

B. Legal Standard

Sections 473, subdivision (a), and 576 provide that the court "may, in the furtherance of justice," allow a party to amend any pleading. "It is well established that 'California courts have "a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the

substantial rights of others." [Citation.] Indeed, "it is a rare case in which 'a court will be justified in refusing a party leave to amend his [or her] pleading so that he [or she] may properly present his [or her] case.' "[Citation.]' [Citation.] Thus, absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. [Citation.]" (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.)

" 'Leave to amend a complaint is thus entrusted to the sound discretion of the trial court. . . .' [Citations.]" (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) "[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment. [Citation.]" (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) The court does not abuse its discretion by denying leave to amend where the facts stated do not constitute a cause of action. (See *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 654.)

C. Merits

Foust seeks leave to file a 3ACC and asserts that the proposed 3ACC will not add new causes of action or parties but simply expand on the factual allegations already alleged. La Encina asserts, inter alia, that the instant motion is an improper request for reconsideration of Judge Rosen's order granting La Encina's motion for summary judgment and denying Foust's requests for leave to amend.

On March 23, 2023, Judge Rosen issued her order granting La Encina's motion for summary judgment and denying Foust's requests for leave to amend. With respect to Foust's motion for leave to file a 3ACC filed February 22, 2023, Judge Rosen found that it would be futile to allow Foust to amend to add allegations relating to a June 2015 contract because the allegations would be time barred and because Foust must have known that the alleged misrepresentation made by La Encina's agents were untrue at the time Group One entered into the 2016 contract with La Encina. (Cross-Complainants' Request for Judicial Notice, Ex. 2, p. 22-26.) In short, Judge Rosen refused to allow amendment to add allegations regarding the 2015 contract.

The Court finds that the instant motion for leave to file a 3ACC is an improper request for reconsideration of Judge Rosen's order granting La Encina's motion for summary judgment and denying Foust's related motion for leave to amend. "[O]ne trial judge may not reconsider or overrule a ruling of another judge." (*Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876.) Further, the Court rejects the argument that Judge Rosen refused to allow the amendment because Foust sought to add a cause of action alleging a violation of Penal Code section 496 and that Foust is not attempting to add new claims in the instant motion to amend. A close reading of Judge Rosen's order shows that she clearly based her ruling on the fact that Foust was attempting to add allegations related to the 2015 contract. Further, although no new causes of action labeled as such are added, the proposed 3AXC, attached to the declaration of Foust's counsel in support of the motion, shows that the 2015 contract is incorporated into the causes of action other than the third cause of action for slander per se alleged against Chen only. Thus, Foust is not seeking to merely add additional background allegations to clarify the reasons why it entered into the 2016 contract; it is attempting to use the 2015 contract as an additional basis for Cross-Complainants' liability when the 2015 contract was not mentioned before in any of the prior versions of Foust's cross-complaint.

Accordingly, Foust's motion for leave to file a 3ACC is DENIED.

D. Conclusion

Foust's motion for leave to file a 3ACC is DENIED.

IV. MOTION TO COMPEL FURTHER RESPONSES

On October 11, 2022, Foust filed a motion to compel further responses to the special interrogatories, set one, and requests for production of documents, set one. The motion initially requested further responses to special interrogatories ("SROGs") 2 through 18 as propounded to Chuan LLC and Yehs II Limited Partnership; SROGs 6 through 11 and 16 through 22 as propounded to Jen Hao Richard Chen, Chung Yeh, and Sheena Chang; SROGs 2 through 11 and 16 though 22 as propounded to Chinche Huang and Chien Huanchu. It sought further responses to requests for production of documents ("RPDs") 1, 20 through 23, 25 through 27, 30, 33, and 34 to Chuan, LLC and Yehs II Limited Partnership; RPDs 1, 19, 33, and 34 to Jen Hao Richard Chen, Chung Yeh, and Sheena Chang; RPDs 1, 19 through 23, 25

through 27, 30, 33, and 34 to Chinche Huang and Chien Huanchu. Cross-Complainants opposed the motion and Foust filed a reply. After three rounds of informal discovery conferences, Foust narrowed the categories of items requested to: (1) written proof of citizenship for the La Encina members; (2) proof of all financial transactions between the La Encina members and La Encina in the form of redacted bank records; and (3) any and all schedules filed with the La Encina members tax returns related to the La Encina property only. (Joint Discovery Statement filed June 6, 2023 ("Joint Discovery Statement"), p. 2, lns. 4-8.) The parties could not reach a resolution as to Foust's entitlement to these items or as to the effect of the grant of La Encina's motion for summary judgment on item 2. (*Id.*, p. 6, lns. 14-20.)

According to the Joint Discovery Statement, Foust contends that these categories of discovery are relevant to La Encina's alter ego claim against Foust because it will demonstrate that La Encina engaged in the same conduct it accuses him of. (Joint Discovery Statement, pp. 2, lns. 27-28; 3, lns. 1-6.) Foust also asserted that the discovery is relevant to his fraud in the inducement defense because it relates to the misrepresentations that were allegedly made to induce Group One to enter into the contract with La Encina. (*Id.* at p. 3, lns. 7-12.) Foust maintained that the requested discovery goes to the issue of La Encina's damages. (*Id.* at p. 3, lns. 13-17.)

Cross-Complainants asserted that sworn responses had already been given regarding La Encina's members' and managers' citizenship but Foust insisted on written proof. (Joint Discovery Statement, p. 3, ln. 28 – p. 4, ln. 6.) Cross-Complainants also argued that Foust already had every item it needed to determine the project's finances but Foust countered that certain transactions did not "line up." (*Id.* at p. 4, lns. 7-15.) Finally, Cross-Complainants contended that their tax documents are privileged. (*Id.* at p. 4, lns. 20-22.)

Foust alleged that Cross-Complainants and La Encina engaged in a scheme to secure funds from China without reporting these investments or income from these investments to the United States government. He asserted that the money from China was improperly funneled into La Encina, which he contends is relevant to his unclean hands defense.

A. Proof of Citizenship

Foust argues that Cross-Complainants' citizenship status is relevant to whether they unlawfully funneled money from China. He contends that Labor Code section 1171.5, subdivision (a) provides that for "purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws" but there is no similar provision with respect to civil cases. Thus, he argues there is no categorical bar to production of citizenship records. The Court finds that Foust has not shown that the citizenship of La Encina members or managers is relevant. At most, Foust contends that their citizenship status is relevant to whether they funneled money in the La Encina from China, which he alleges is related to his unclean hands defense to La Encina's alter ego claim and Foust's alter ego claim.

> The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. Courts have expressed this relationship requirement in various ways. The misconduct must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants. [T]here must be a direct relationship between the misconduct and the claimed injuries . . . so that it would be inequitable to grant [the requested] relief. The issue is not that the plaintiff's hands are dirty, but rather that the manner of dirtying renders inequitable the assertion of such rights against the defendant. The misconduct must prejudicially affect . . . the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief.

(*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 979, internal citations and quotation marks omitted.) Here, Foust does not explain how the fact that money from China may have been funneled into La Encina and that investment and investment income may not have been reported to the federal government may prejudicially affects Foust's rights.

Even if Foust's unclean hands defense is viable to the extent it relies on the failure to report money funneled into La Encina from China, he does not explain how the citizenship of the individual members or investors in La Encina, as opposed to the actual source of the funds, is relevant. Foust does not, for example, assert that a person without Chinese citizenship

would not be able to move funds from China to the United States and, even if that were the case, an individual may have family members or friends who are Chinese nationals who might assist them in transferring funds into the United States.

Discovery is allowed for any matters that are not privileged and relevant to the subject matter, and a matter is relevant if it appears reasonably calculated to lead to the discovery of admissible evidence. (§ 2017.010.) For discovery purposes, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Super. Ct.* (1995) 33 Cal.App.4th 1539, 1546.)

Further, after the informal discovery conferences, Foust has made clear that he is seeking documentary proof of citizenship and a motion to compel further responses to RPDs requires a showing of good cause. In general, a motion for an order compelling further responses to the request for production of documents "shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand." (§ 2031.310, subd. (b)(1).) In order to establish good cause, the burden is on the moving party to show relevance to the subject matter and specific facts justifying the discovery. (See *Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.) Here, Foust has not met this burden. Accordingly, the motion to compel is denied to the extent it requests proof of Cross-Complainants' citizenship.

B. Financial Transactions

Where the right to privacy is asserted in the discovery context, the items sought must be "directly relevant" and "essential to the fair resolution" of the lawsuit. (*Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1425.) To establish direct relevance, "[i]t is not enough that the information might lead to relevant evidence," which could be sufficient to establish general relevance for discovery purposes absent a privacy objection. (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 901.) "Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issue does not suffice." (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1017.)

The right to privacy under the California Constitution protects an individual's "reasonable expectation of privacy against a serious invasion." (*Pioneer Electronics, Inc. v.*

Sup. Ct. (2007) 40 Cal.4th 360, 370.) The law is well established that the right to privacy extends to a person's financial affairs. (*Moskowitz v. Superior Court* (1982) 137 Cal.App.3d 313, 315 ["Personal financial information comes within the zone of privacy protected by article I, section 1 of the California Constitution."]; *Fortunato v. Superior Court* (2003) 114 Cal.App.4th 475, 481 [stating, "there is a right to privacy in confidential customer information whatever form it takes, whether that form be tax returns, checks, statements, or other account information"]; see also *Valley Bank of Nevada v. Sup. Ct.* (1975) 15 Cal.3d 652, 658.)

In *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, the California Supreme Court announced a test for evaluating privacy concerns. "The party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. [Citation.] The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations. [Citation.]" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 552.)

Although La Encina's motion for summary judgment has greatly narrowed the issues raised by Foust, the Court finds that these financial transactions remain relevant to Foust's alter ego claim and unclean hands defense particularly because Foust is seeking solely those financial records involving the La Encina project. Cross-Complainants contend that they have produced the complete finances for the La Encina projects but Foust contends that some of the transactions do not "line up." During the informal discovery process, it was suggested that Foust should identify the specific transactions at issue and then request further responses to those transactions only. In light of the legitimate privacy concerns of the individual Cross-Complainants, the Court finds that this approach is appropriate. Foust is ordered to identify the transactions that remain unexplained and to meet and confer with Cross-Complainants to obtain further responses to the SROGs and RPDs embracing those transactions.

C. Schedules Filed with Tax Returns

State and federal tax returns are privileged. (*Fortunato v. Superior Court*, *supra*, 114 Cal.App.4th at p. 479.) The purpose of the tax return privilege "is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes." (*Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513.) The privilege extends to information submitted on a tax return and documents, such as W-2 forms, that are required to be attached to a taxpayer's state and federal income tax returns and constitute an integral part of the return. (*Brown v. Superior Court* (1977) 71 Cal.App.3d 141, 143, citing *Sav-On Drugs, Inc. v. Superior Court of Los Angeles County* (1975) 15 Cal.3d 1.)

The privilege does not apply when (1) a taxpayer intentionally waives the privilege; (2) the gravamen of the lawsuit is inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of tax returns is involved. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 721.) The privilege may also yield where a party, in bad faith, conceals their financial information. (*Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 276.) Relevance alone will not render a privilege inapplicable. (*Fortunato v. Superior Court*, *supra*, 114 Cal.App.4th at p. 482.)

Here, Foust is seeking the schedules filed with the La Encina members' tax returns, which are privileged under the tax return privilege. (See *Brown v. Superior Court*, *supra*, 71 Cal.App.3d at p. 143 [privilege extends to documents submitted with tax returns that are an integral part of the return].) Foust contends that the requests are narrowly tailored to documents related to the La Encina project and that they are relevant to his claim for fraud in the inducement, his alter ego claim, the defense of unclean hands, including whether money was improperly funneled into La Encina, and to the issue of La Encina's damages. He states that the requests are targeted toward discovering the source of the funds invested into La Encina. He asserts that any privacy concerns can be addressed with a protective order.

The Court finds that the tax return schedules are not relevant to this case. In his reply separate statement, Foust argues that the schedules are relevant because, due to La Encina's structure, its profits and losses are passed on to its members and reported on the members' tax returns and the proper reporting of related income is relevant to his unclean hands defense.

But, the Court has already determined that Foust has failed to adequately explain how the failure to report funds to the government can support an unclean hands defense in this case. Accordingly, the motion to compel is denied to the extent it seeks tax return schedules.

D. Sanctions

Foust initially requested sanctions in the amount of $3,190 but in his reply, he requested $4,224.50 against Cross-Complainants and their counsel, William Gutierrez, jointly and severally. Cross-Complainants also request sanctions against Foust and his counsel in the amount of $4,905.

With respect to the SROGs, section 2030.300, subdivision (d), which provides, "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." With respect to the RPDs, section 2031.310, subdivision (h) provides for issuance of monetary sanctions when a party unsuccessfully makes or opposes motion to compel further responses to RPDs "unless [the court] finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

The Court declines to award sanctions to either party due to the fact that neither party has fully prevailed on the motion. Although Cross-Complainants have substantially prevailed, the Court finds that Foust acted with substantial justification in seeking the discovery items at issue.

E. Conclusion

The motion to compel further responses is DENIED as to the citizenship records and tax return schedules. With respect to the financial transactions, Foust is ordered to identify the transactions that do not "line up" and the parties are ordered to meet and confer with regard to whether Cross-Complainants will agree to provide further responses to the SROGs and RPDs as related to those transactions.

V. CONCLUSION

Cross-Defendants' demurrer to La Encina's 3AXC is OVERRULED.

Foust's motion for leave to file a 3ACC is DENIED.

The motion to compel further responses is DENIED as to the citizenship records and tax return schedules. With respect to the financial transactions, Foust is ordered to identify the transactions that do not "line up" and the parties are ordered to meet and confer with regard to whether Cross-Complainants will agree to provide further responses to the SROGs and RPDs as related to those transactions.

Cross-Complainants, as the substantially prevailing parties, shall prepare the order, in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 3

Case Name: Alorica Inc. v. Fortinet, Inc.
Case No.: 19CV344971

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 11, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

According to the allegations of the operative Second Amended Complaint ("SAC"), following extensive negotiations and discussions, plaintiff Alorica Inc. ("Plaintiff") purchased thousands of products from defendant Fortinet, Inc. ("Defendant") in an amount exceeding $10,000,000 between September 2017 and September 2018. (Second Amended Complaint ("SAC"), ¶¶ 4-15.) The products included the Fortinet FortiGate models FG-201E, FG-500E, FG-600D, FG-l500D, FG-3200D, and FG-3960E; Fortinet FortiSwitch models FSW-248D, FSW-248D-FPOE, FSW-248E-FPOE, FSW-448D, FSW-448D-FPOE, and FSW-1024D; and network management software including FortiManager, FortiAnalyzer, and FortiAuthenticator. (SAC, ¶ 15.) Plaintiff also purchased enhanced support and extended services from Defendant to ensure that any problems that arose would be promptly resolved. (*Id.* at ¶ 16.) Plaintiff alleges that Defendant made numerous misrepresentations regarding the capabilities, functionality, and point of development of its software and hardware, which induced Plaintiff to purchase Defendant's products and services. (*Id.* at ¶¶ 18, 33, 36-38, 54, 56, 60, & 62.)

Shortly after Plaintiff and Defendant began deploying and implementing the products in Plaintiff's facilities in January 2018, Plaintiff encountered problems with Defendant's software and hardware that Defendant failed to fix. (SAC, ¶¶ 17-34 & 39.) Plaintiff alleges that Defendant breached warranties in the Fortinet End User License Agreement by failing to provide hardware free from material defects in workmanship and failing to provide software that substantially conformed to Defendant's functional specifications. (*Id.* at ¶¶ 45-49.) Plaintiff also alleges that Defendant made various misrepresentations that induced it to continue to deploy Defendant's products and services. (*Id.* at ¶¶ 54, 56, 60, & 62.) Plaintiff further alleges that when Defendant was able to develop a fix for a problem, it promised to

include the fixes in FortiOS v. 6.0, the next version of the FortiOS software to be released. (*Id.* at ¶¶ 34, 54, & 60.) However, when Defendant released FortiOS v. 6.0 in March 2018, it did not include many of the fixes thereby stranding Plaintiff on its own heavily patched, customized version of FortiOS v. 5.6. (*Id.* at ¶ 35.) As a result of Defendant's conduct, Plaintiff allegedly sustained damages, such as the costs of and lost revenue from many network outages caused by Defendant's defective equipment and financial penalties incurred because Plaintiff is subject to service level commitments that require its agents to handle and resolve calls within a certain period of time. (*Id.* at ¶¶ 43, 52, 58, & 64.)

Based on the foregoing allegations, the SAC, filed on November 8, 2021, sets forth causes of action for: (1) Breach of Warranty; (2) Negligent Misrepresentation; and (3) Intentional Misrepresentation.

On June 25, 2019, Defendant filed a First Amended Cross-Complaint ("FACC") in which it alleges Plaintiff misrepresented its network resources/requirements and capabilities to Defendant. (FACC, ¶¶ 18 & 33.) Defendant alleges Plaintiff failed to properly deploy its products in Plaintiff's network. (*Id*. at ¶ 28.) For example, Plaintiff's employees asked questions to Defendant that could have been answered by the product documentation Defendant provided, and incorrectly used Defendant's products in ways that could have been avoided if Plaintiff properly trained its employees. (*Ibid*.) As a result of Plaintiff's inability to deploy its own network, Defendant eventually took over roughly 80 percent of the deployment activities, including designing Plaintiff's network on the fly. (*Id*. at ¶ 29.) Defendant was not contractually obligated to perform this work, but did so in a good faith effort to help its customer. (*Ibid*.)

In the end, Defendant's efforts could not overcome the problems Plaintiff had created. (FACC, ¶ 31.) Defendant dedicated thousands of hours and incurred millions of dollars in damages and costs because of Plaintiff. (*Id*. at ¶ 32.)

Based on the foregoing allegations, the FACC sets forth the following causes of action: (1) Breach of Contract—Fortinet Service Terms & Conditions; (2) Breach of Contract—End User License Agreement; (3) Fraud/Intentional Misrepresentation; (4) Negligent Misrepresentation; (5) Defamation; (6) Intentional Interference With Prospective Economic

Relations; (7) Negligent Interference with Prospective Economic Relations; (8) Unfair Competition; (9) Declaratory Judgment of No Breach of Contract; (10) Declaratory Judgment of No Negligent Misrepresentation; and (11) Declaratory Judgment of Limitation on Damages.

Subsequently, Plaintiff demurred to the FACC. On October 11, 2019, the court sustained the demurrer to the first and second causes of action with leave to amend and overruled the demurrer to the third through eleventh causes of action.

On April 29, 2021, the clerk entered Defendant's Request for Dismissal of the fifth through seventh causes of action of the FACC with prejudice.

Most recently, on August 17, 2023, the clerk entered Defendant's Request for Dismissal of the eighth cause of action of the FACC with prejudice.

Now before the court are the following matters: (1) Defendant's motion for summary judgment of the SAC and/or summary adjudication of each and every cause of action alleged in the SAC, Plaintiff's request for exemplary damages, and the eleventh cause of action of the FACC; (2) Plaintiff's motion for summary adjudication of the third, fourth, and eighth causes of action of the FACC[9]; (3) Plaintiff's motion to strike the declarations of David Edmonds ("Edmonds"), David Monery ("Monery"), Jessica Shannon ("Shannon"), Jonathan Torian ("Torian"), and Joseph Mihelich ("Mihelich") submitted in support of Defendant's motion for summary judgment and/or adjudication; (4) Plaintiff's motion to strike the Appendix of Evidence in Support of Defendant's Reply submitted in support of Defendant's motion for summary judgment and/or adjudication; (5) Plaintiff's motion to seal portions of Plaintiff's motion for summary adjudication; (6) Defendant's motion to seal portions of Defendant's opposition to Plaintiff's motion for summary adjudication; (7) Plaintiff's motion to seal portions of Defendant's opposition to Plaintiff's motion for summary adjudication; (8) Plaintiff's motion to seal portions of Plaintiff's reply submitted in support of its motion for summary adjudication; (9) Defendant's motion to seal portions of Defendant's motion for summary judgment and/or adjudication; (10) Plaintiff's motion to seal portions of Defendant's motion for summary judgment and/or adjudication; (11) Plaintiff's motion to seal portions of

[9] The court construes Plaintiff's motion as one for summary adjudication because it is only directed at the third, fourth, and eighth causes of action of the FACC, not at the FACC as a whole (i.e., the motion does not attack the ninth through eleventh causes of action of the FACC).

its opposition to Defendant's motion for summary judgment and/or adjudication; (12) Defendant's motion to seal portions of its reply submitted in support of its motion for summary judgment and/or adjudication; and (13) Plaintiff's motion to seal portions of Defendant's reply submitted in support of Defendant's motion for summary judgment and/or adjudication.

II. DEFENDANT'S MOTION FOR SUMMAR JUDGMENT AND/OR ADJUDICATION AND OTHER RELATED MOTIONS

Defendant has filed a motion for summary judgment of the SAC and/or summary adjudication of each and every cause of action alleged in the SAC, Plaintiff's request for exemplary damages, and the eleventh cause of action of the FACC. In support of its motion, Defendant filed a public version of its Appendix of Evidence in Support of Fortinet's Reply in Support of its Motion for Summary Judgment or, in the Alternative, for Adjudication ("Reply Appendix"), which redacts a substantial amount of material that was filed conditionally under seal pursuant to California Rules of Court, rule 2.551.

However, upon review of the record, it appears that Defendant did not file an unredacted version of its Reply Appendix. Consequently, the court cannot evaluate and rule on Defendant's motion for summary judgment and/or adjudication at this time. Furthermore, the Reply Appendix is also the subject of one of Plaintiff's motions to strike as well as multiple motions to seal. In the interests of judicial efficiency, the court has determined that all of the motions pertaining to Defendant's motion for summary judgment and/or adjudication should be heard at the same time given the interrelated nature of the matters.

Accordingly, the following motions are CONTINUED to December 6, 2023, at 1:30 p.m. in Department 19: (1) Defendant's motion for summary judgment of the SAC and/or summary adjudication of each and every cause of action alleged in the SAC, Plaintiff's request for exemplary damages, and the eleventh cause of action of the FACC; (2) Plaintiff's motion to strike the declarations of Edmonds, Monery, Shannon, Torian, and Mihelich submitted in support of Defendant's motion for summary judgment and/or adjudication; (3) Plaintiff's motion to strike the Reply Appendix submitted in support of Defendant's motion for summary judgment and/or adjudication; (4) Defendant's motion to seal portions of Defendant's motion

for summary judgment and/or adjudication; (5) Plaintiff's motion to seal portions of Defendant's motion for summary judgment and/or adjudication; (6) Plaintiff's motion to seal portions of its opposition to Defendant's motion for summary judgment and/or adjudication; (7) Defendant's motion to seal portions of its reply submitted in support of its motion for summary judgment and/or adjudication; and (8) Plaintiff's motion to seal portions of Defendant's reply submitted in support of Defendant's motion for summary judgment and/or adjudication.

III. REMAINING MOTIONS TO SEAL

A. LEGAL STANDARD

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285–1286 (*Universal*).)

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

B. PLAINTIFF'S MOTION TO SEAL PORTIONS OF ITS MOTION FOR SUMMARY ADJUDICATION

Plaintiff seeks to seal portions of its motion for summary adjudication. Specifically, Plaintiff asks the court to seal portions of its memorandum of points and authorities, separate statement of undisputed material facts, and Exhibits 2 and 3 to its Appendix of Evidence. The materials at issue quote from or discuss portions of a deposition transcript and interrogatory responses that have been designated as "Confidential" by Defendant under the parties' protective order. Plaintiff states that the materials arguably contain confidential business information, but it takes no position on whether the particular documents in question are actually confidential in nature. Plaintiff further states that to the extent Defendant so contends, then it may file further evidence and briefing in support of that position.

As an initial matter, the parties' agreement to seal a document, as set forth in the stipulated protective order, is clearly not enough in and of itself to warrant a sealing order. (See *Universal*, *supra*, 110 Cal.App.4th at pp. 1283-1284.) As explained in *McNair v. National Collegiate Athletic Assn.* (2015) 234 Cal.App.4th 25 (*McNair*):

> *Universal* concluded, however, that "more than a mere agreement of the parties to seal documents filed in a public courtroom" is needed. (*Universal, supra*, 110 Cal.App.4th at p. 1281.) There must be "a specific showing of serious injury. [Citations.]" (*Id*. at p. 1282.) "'[S]pecificity is essential. [Citation.] Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.' [Citation.] We have been unable to find any appellate court decision which construes *Publicker* to permit sealing of court documents merely upon the agreement of the parties without a specific showing of serious injury." (*Ibid*.; accord, *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 106 [4 Cal. Rptr. 3d 823].) Rules of Court, rule 8.46(d)(1) expressly states that a record "must not be filed under seal solely by stipulation or agreement of the parties." Thus, the mere agreement of the parties alone is insufficient to constitute an overriding interest to justify sealing the documents.

(*McNair, supra,* 234 Cal.App.4th at pp. 35-36; Cal. Rules of Court, rule 2.551(a) ["[t]he court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties"].)

Here, no party has made a specific showing that any party would suffer serious injury if the deposition transcript and discovery responses were not filed under seal. Plaintiff's motion to seal does not demonstrate any potential injury from the disclosure of the materials. Furthermore, Defendant has not moved to seal the subject materials or presented any evidence warranting sealing.

Accordingly, the motion to seal is DENIED.

C. DEFENDANT'S MOTION TO SEAL PORTIONS OF ITS OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

Defendant seeks to seal portions of its opposition to Plaintiff's motion for summary adjudication. Specifically, Defendant asks the court to seal portions of its opposition, response to Plaintiff's separate statement of undisputed material facts, and Exhibits 6, 8, 17, 18, 20, 21, 23, 26, 29, 32, and 34-36 to its Appendix of Evidence. Defendant asserts that the materials contain its confidential commercial business information, confidential business information of third parties, and confidential employee information. (Declaration of Will Cooper in Support of Fortinet's Motion to Seal Exhibits and Certain Portions of Fortinet's Opposition to Alorica's Motion for Summary Judgment or, in the Alternative, Summary Adjudication, ¶¶ 3-5.) Defendant urges that public disclosure of the materials would inflict significant and irreparable competitive and financial harm to Defendant. (*Ibid.*) The proposed sealing appears to be narrowly tailored to the confidential information.

The court therefore finds that Defendant has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at p. 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal is GRANTED.

D. PLAINTIFF'S MOTION TO SEAL PORTIONS OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

Plaintiff seeks to seal portions of Defendant's opposition to Plaintiff's motion for summary adjudication. Specifically, Plaintiff asks the court to seal Exhibits 1-5, 9-16, 22, 24, 25, 28, 31, 33, 37 to Defendant's Appendix of Evidence. Plaintiff asserts that the subject exhibits consist of emails, documents, discovery responses, and deposition testimony revealing confidential commercial information about Plaintiff's network and business operations. (Declaration of Arjun Sivakumar, ¶ 4.) Plaintiff states that the sensitive commercial, financial, and business information was marked "Highly Confidential – Attorneys' Eyes Only" pursuant to the parties protective order. (*Ibid.*) Plaintiff contends that it would be prejudiced if the confidential information was publicly disclosed as it would be available to Plaintiff's competitors. (*Ibid.*) The proposed sealing appears to be narrowly tailored to the confidential information.

The court therefore finds that Plaintiff has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at p. 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal is GRANTED.

E. PLAINTIFF'S MOTION TO SEAL PORTIONS OF ITS REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY ADJUDICATION

Plaintiff seeks to seal portions of its reply submitted in support of its motion for summary adjudication. Specifically, Plaintiff asks the court to seal portions of its reply brief, Exhibits 5-8, 10, 11 and 13 to its Appendix of Exhibits, its Appendix of Exhibits, portions of its reply to Defendant's separate statement of additional material facts, and portions of the

Declaration of Leo J. Presiado in Support of Reply Brief. Plaintiff asserts that the subject exhibits, and the portions of the reply papers discussing those exhibits, contain confidential commercial information about Plaintiff's network and business operations. (Declaration of Arjun Sivakumar, ¶ 4.) Plaintiff states that the sensitive commercial, financial, and business information was marked "Highly Confidential – Attorneys' Eyes Only" pursuant to the parties protective order. (*Ibid.*) Plaintiff contends that it would be prejudiced if the confidential information was publicly disclosed as it would be available to Plaintiff's competitors. (*Ibid.*) The proposed sealing appears to be narrowly tailored to the confidential information.

The court therefore finds that Plaintiff has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at p. 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal is GRANTED.

IV. PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

A. EVIDENTIARY OBJECTIONS

1. Defendant's Objections

In connection with its opposition, Defendant submits objections to portions of Exhibits 1 and 3 to Plaintiff's Appendix of Evidence and any references to those exhibits in Plaintiff's separate statement of undisputed material facts.

As an initial matter, the objections are improper to the extent they are directed to some of the undisputed material facts ("UMF") asserted by Plaintiff in its separate statement (as opposed to the evidence proffered in support of the UMF). (See Cal. Rules of Ct., rule 3.1354(b) [mandating that all written objections *to evidence* in opposition to a motion for summary judgment quote or set forth the objectionable statement or material].)

Moreover, Defendant's objections do not comply with California Rules of Court, rule 3.1354. Rather than submit two separate documents as required by the rule—one setting forth

the objections and another setting forth a proposed order—Defendant submitted a single packet of objections, signed by counsel, with blanks for the court to indicate its rulings and lines for the court to sign on. (See Cal. Rules of Ct., rule 3.1354(b) [a party must provide written objections that comply with one of the formats described in the rule] (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) This hybrid document does not comply with California Rule of Court, rule 3.1354.

Because Defendant's evidentiary objections do not comply with the California Rules of Court, the court is not required to rule on the objections. (See *Vineyard Spring Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) [trial courts only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat v. State Farm Mut. Auto. Ins. Co.* (2012) 211 Cal.App.4th 1, 8-9 (*Hodjat*) [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers]; *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118 (*Schmidt*) [the trial court acted within its discretion when it overruled evidentiary objections for failing to meet the requirements of the California Rules of Court for the format of evidentiary objections].)

Accordingly, the court declines to rule on Defendant's evidentiary objections.

2. Plaintiff's Objections

In connection with its reply, Plaintiff submits objections to portions of the Declaration of Lindsay Cooper offered in support of Defendant's opposition.

Plaintiff's objections do not comply with California Rules of Court, rule 3.1354. Rather than submit two separate documents as required by the rule—one setting forth the objections and another setting forth a proposed order—Plaintiff submitted a single packet of objections, signed by counsel, with blanks for the court to indicate its rulings and a line for the court to sign on. (See Cal. Rules of Ct., rule 3.1354(b) [a party must provide written objections that comply with one of the formats described in the rule] (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) This hybrid document does not comply with California Rule of Court, rule 3.1354.

Because Plaintiff's evidentiary objections do not comply with the California Rules of Court, the court is not required to rule on the objections. (See *Vineyard, supra,* 120 Cal.App.4th at p. 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat, supra,* 211 Cal.App.4th at pp. 8-9 [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers]; *Schmidt, supra*, 28 Cal.App.5th at p. 1118 [the trial court acted within its discretion when it overruled evidentiary objections for failing to meet the requirements of the California Rules of Court for the format of evidentiary objections].)

Accordingly, the court declines to rule on Plaintiff's evidentiary objections.

B. LEGAL STANDARD

"A motion for summary adjudication … shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).) The pleadings limit the issues presented for summary adjudication and such a motion cannot be granted or denied on issues not raised by the pleadings. (*Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663-1664.) "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., § 437c, subd. (f)(1).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

A defendant seeking summary adjudication "must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material

fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co*. (2002) 98 Cal.App.4th 66, 72; see Code Civ. Proc., § 437c, subd. (p)(2).)

"A triable issue of material fact exists ' 'if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.] Thus, a party 'cannot avoid summary [adjudication] by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]' " (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 631.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary adjudication must present admissible evidence. (See *Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) The motion may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences which raise a triable issue of fact. (*Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718 (*Hepp*).) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny summary adjudication on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary adjudication "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing summary adjudication and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389; see also *Hepp, supra*, 86 Cal.App.3d at p. 717.)

C. EIGHTH CAUSE OF ACTION

Plaintiff moves for summary adjudication of the eighth cause of action for unfair competition, arguing that Defendant lacks standing, Defendant has not suffered any compensable harm, the alleged misrepresentations pose no likelihood of misleading the public, and Plaintiff's alleged conduct is not tortious and falls outside the UCL.

However, Defendant dismissed the eighth cause of action with prejudice on August 17, 2023. Consequently, the motion for summary adjudication of the eighth cause of action is now moot.

Accordingly, the motion for summary adjudication of the eighth cause of action of the FACC is deemed MOOT.

D. THIRD AND FOURTH CAUSES OF ACTION

Plaintiff moves for summary adjudication of the third cause of action for fraud/intentional misrepresentation and the fourth cause of action for negligent misrepresentation, arguing that Defendant cannot establish the element of causation. Plaintiff asserts that the third and fourth causes of action are predicated on the allegation that Defendant was damaged when it voluntarily chose to provide additional customer support services to Plaintiff at no charge, after products that Plaintiff purchased from Defendant did not work as expected. Plaintiff summarizes Defendant's allegations as follows: "[Defendant] alleges that when [Plaintiff] began discussing a potential purchase of [Defendant] products to upgrade its network, [Plaintiff] provided incomplete or incorrect information about its needs, requiring [Defendant] to make 'educated assumptions.' When problems subsequently arose with respect to the functionality of [Defendant's] products, [Defendant] then provided customer support services to [Plaintiff] at no charge, which it asserts constitute 'damages' from [Plaintiff's] 'misrepresentations.' " Plaintiff contends that Defendant cannot establish any causal nexus between the alleged misrepresentations and its alleged damages because the FACC and Defendant's discovery responses reveal that Defendant chose to incur the alleged damages for the sake of maintaining its business relationship with Plaintiff. Plaintiff further argues that even if Defendant could establish all of the elements of its claims, there are complete defenses to the causes of action including waiver, consent, and failure to mitigate damages.

In opposition, Defendant asserts that because Plaintiff misrepresented its needs, Defendant contracted to provide a lower, cheaper level of service that Plaintiff demanded. Defendant contends that its decision to later provide additional services at no cost was not voluntary because Plaintiff threatened it and demanded additional services. Defendant maintains that it provided the support Plaintiff demanded under extreme pressure—Plaintiff's CEO purportedly bombarded Defendant with urgent demands for additional service and Plaintiff cut the timeline for deployment. Defendant states that its provision of additional

services Plaintiff was demanding after misleading it into contracting for a lower service level was a foreseeable result of Plaintiff's alleged misrepresentations and subsequent demands.

The elements of a claim for intentional misrepresentation are: (1) a misrepresentation; (2) knowledge of its falsity; (3) the defendant's intent to induce the plaintiff's reliance on the misrepresentation; (4) the plaintiff's actual and justifiable reliance; and (5) resulting damage. (*Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 230-231; *Philipson & Simon v. Gulsvig* (2007) 154 Cal App 4th 347, 363.) Similarly, the elements of a claim for negligent misrepresentation are: (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196; *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

"To recover damages for fraud, a plaintiff must have sustained damages proximately caused by the misrepresentation. A damage award for fraud will be reversed where the injury is not related to the misrepresentation." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1252.) "[N]o liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained." (*Orcilla v. Big Sur, Inc*. (2016) 244 Cal.App.4th 982, 1008; punctuation and citations omitted.)

The issue of causation may be decided as a question of law only if, under undisputed facts, there is no room for a reasonable difference of opinion." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864; see also *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354 ["the issue of proximate cause ordinarily presents a question of fact. However, it becomes a question of law when the facts of the case permit only one reasonable conclusion."].)

Here, Plaintiff presents UMF supporting its characterization of Defendant's allegations. (UMF Nos. 1-10.) Namely, that Plaintiff was seeking to upgrade its computer network and entered into discussions with Defendant regarding a possible purchase of Defendant's equipment in 2017; during an initial design meeting, Plaintiff's representatives identified

certain network requirements and requests for custom features but did not submit a formal request for a proposal or provide adequate network diagrams that Defendant could use to accurately assess Plaintiffs full needs; Defendant was, therefore, required to make educated assumptions about Plaintiff's network topography in order to prepare a proposal; Plaintiff representatives also overstated Plaintiff's internal resources and competency for deploying and maintaining the new network; Defendant proposed a set of products, support, and services for Plaintiff to purchase based on the limited information provided; Plaintiff rejected the recommendation on the support and services resources, which included 24 hours per day, 7 days per week support, and instead chose to purchase a cheaper support package that provided support 8 hours per day, 5 days per week; when the deployment of products failed to go smoothly, Defendant dedicated thousands of man-hours and incurred millions of dollars in damages and costs by providing "24x7" support and taking over roughly 80 percent of deployment activities which work was undertaken by Defendant free of charge; according to Defendant, but for Plaintiff's misrepresentations, Defendant would have proposed a bill of material to Plaintiff that more accurately reflected the resources Defendant would be required to expend on the project, instead of being forced to provide those resources free of charge (as Defendant later did). (UMF Nos. 1-11.) Additionally, Plaintiff highlights Defendant's allegation that Defendant was not contractually obligated to provide the additional services, but performed that work in a good faith effort to help its customer. (UMF No. 13.) Plaintiff also submits deposition testimony from Timothy Cooksey ("Cooksey"), who worked on Plaintiff's project as Defendant's Program Manager for Americas Professional Services. Cooksey testified that, in his opinion, Defendant provided technical and professional services to Plaintiff voluntarily and was not deceived into doing that by Plaintiff in any way. (UMF No. 14.)

This evidence is sufficient to meet Plaintiff's initial burden to show that there is no causal link between the alleged misrepresentations and the claimed damages. As Plaintiff persuasively argues, there is no causal connection between any action taken by Defendant in reliance on the alleged misrepresentations and its claimed damages. Rather, the alleged damages are the result of Defendant's decision to provides services above and beyond what Plaintiff contracted for at no additional charge. The lack of compensation for the significant

time and resources Defendant spent attempting to assist Plaintiff with deploying Defendant's equipment has nothing to do with the alleged misrepresentations regarding Plaintiff's network topography, internal resources, and competency. Plaintiff points out that Defendant offered, but Plaintiff declined to purchase a more expensive and complete support services package. At any time, Defendant could have negotiated compensation for any additional services it provided beyond what was contractually required or declined to provide additional services without payment. The fact that Defendant instead chose to provides services above and beyond what Plaintiff contracted for at no additional charge is not the result of any alleged misrepresentation made by Plaintiff.

In opposition, Defendant fails to raise a triable issue of material fact with respect to the element of causation. Even assuming for the sake of argument that Defendant provided extracontractual services due to pressure or threats from Plaintiff, such allegations do not establish the elements of the third and fourth cause of actions which set forth claims for intentional and negligent misrepresentation. To prove fraud, Defendant must plead and prove that it has taken some action in reliance on a misrepresentation and its reliance on the misrepresentation was the cause of its damages. That Defendant may have been pressured to provide services above and beyond what Plaintiff contracted for at no additional charge does not show that Defendant was misled into doing so.

For these reasons, Plaintiff has shown that the element of causation cannot be established and it is entitled to summary adjudication of these claims.[10]

Accordingly, the motion for summary adjudication of the third and fourth causes of action is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

[10] Because Plaintiff's arguments regarding the element of causation are dispositive, the court need not reach Plaintiff's arguments that it also has complete defenses to the third and fourth causes of action.

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