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.

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

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DATE: DECEMBER 6, 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	22CV396584	Recology Wage and Hour Cases (JCCP 5251)	Continued per Stipulation and Order to February 7, 2024.
LINE 2	22CV394218	Espinoza v. Fish Market Restaurants, Inc.	See Line 2 for tentative ruling.
LINE 3	20CV364033	Yanez v. Gardner Family Health Network, Inc. (Class Action)	See Line 3 for tentative ruling.
LINE 4	17CV319705	Group One Construction, Inc. v. La Encina Development, L.L.C., et al.	See Line 4 for tentative ruling.
LINE 5	17CV319705	Group One Construction, Inc. v. La Encina Development, L.L.C., et al.	See Line 4 for tentative ruling.
LINE 6	17CV319705	Group One Construction, Inc. v. La Encina Development, L.L.C., et al.	See Line 4 for tentative ruling.

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LINE 7	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Recology Wage and Hour Cases (JCCP 5251)
Case No.: 22CV396584

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Calendar Line 2

Case Name: Espinoza v. Fish Market Restaurants, Inc.
Case No.: 22CV394218

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on December 6, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

Plaintiff Jorge Espinoza ("Plaintiff") filed a Complaint on February 9, 2022, which set forth causes of action for: (1) Failure to Pay Minimum Wage; (2) Failure to Pay Overtime Compensation; (3) Failure to Provide Meal Period Compensation; (4) Failure to Provide Rest Period Compensation; (5) Failure to Indemnify Necessary Business Expenditures; (6) Wage Statement Violations; (7) Waiting Time Penalties; (8) Private Attorney General Act (Labor Code §§ 2699, et seq.) (9) Declaratory Relief; and (10) Unfair Competition in Violation of Cal. Business and Professions Code §§ 17200, et seq.

On April 13, 2022, the court entered an order dismissing Plaintiff's first through seventh, ninth, and tenth causes of action without prejudice. Consequently, only the PAGA claim (i.e., the eighth cause of action) remains.

The parties reached a settlement of the remaining PAGA claim. Plaintiff now moves for approval of the PAGA settlement. The motion is unopposed.

II. LEGAL STANDARD

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements.
> …
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc.*, *supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. DISCUSSION

The proposed settlement has been made with regard to the following aggrieved employees: "former and current employees of Defendant [Fish Market Restaurants, Inc. ('Defendant')] from February 9, 2021, through December 31, 2022, without executed arbitration agreements with PAGA waivers." (Declaration of Justin Lo in Support of Motion for an Order Approving Settlement of Claims Brought Pursuant to the Private Attorneys General Act of 2004 […] ("Lo Dec."), Ex. D ("Settlement Agreement"), ¶¶ I.2, I.16.)

Pursuant to the terms of the settlement, Defendant will pay a non-reversionary, maximum settlement amount of $245,000. (Settlement Agreement, ¶¶ I.9, III.2.) This amount includes attorney fees in the amount of $81,666.66 (1/3 of the gross settlement amount), litigation costs up to $15,000, and settlement administration costs (estimated to be $15,000). (Settlement Agreement, ¶¶ I.9, I.10, III.4, III.6.) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the PAGA Period. (Amended Settlement Agreement, ¶¶ I.10, III.5.) Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the California Department of Industrial Relations – Unclaimed Wage Fund in the names of the aggrieved employees to whom the checks were issued. (Settlement Agreement, ¶ IV.4.)

In exchange for the settlement, the aggrieved employees agree to release Defendant, and related persons and entities, from any and all claims under PAGA that are pled in the Complaint, or which could have been pled in the Complaint, based on the factual allegations in the Complaint and the LWDA Letter that arose during the PAGA Period. (Settlement Agreement, ¶¶ I.13, III.6, III.7.)

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. Plaintiff indicates that the settlement resolves PAGA claims on behalf of approximately 556 aggrieved employees who collectively worked 8,713 pay periods during the PAGA Period. Plaintiff conducted informal and formal discovery, and received and reviewed policy documents relating to aggrieved employees' employment and a 1/3 sampling of time and wage records of all aggrieved employees within the PAGA Period. (Lo Dec., ¶¶ 12-13.) Plaintiff determined

that Defendant's maximum potential exposure for the PAGA claim is $871,300. (*Id.* at ¶ 19.) The parties participated in mediation with Todd Smith, Esq. and reached a settlement agreement after several months of negotiations. (*Id.* at ¶¶ 12, 15.) The settlement represents approximately 28 percent of the maximum potential value of Plaintiff's PAGA claim.

Consequently, the court finds that the settlement is fair. It provides for a significant recovery and eliminates the risk and expense of continued litigation.

Plaintiff's counsel seeks attorney fees of $81,666.66 (1/3 of the maximum settlement amount). Plaintiff's counsel provides evidence demonstrating a lodestar of $41,275. (Lo Dec., ¶ 29 & Ex. G.) This results in a multiplier of 1.98. The court finds that the fees requested are reasonable as a percentage of the total recovery. The fees are therefore approved.

Plaintiff's counsel requests litigation costs in the total amount of $11,195.44 and provides evidence of incurred costs in that amount. (Lo Dec., ¶ 27 & Ex. E.) Consequently, the court finds costs in the amount of $11,195.44 to be reasonable and approves that amount.

Lastly, Plaintiff's counsel requests up to $15,000 for the claims administration fee. However, the estimate provided by the settlement administrator provides for a flat fee total of $7,576.77. (Lo Dec., Ex. F.) Thus, the settlement administration costs are approved in the lesser amount of $7,576.77.

Accordingly, the motion to approve PAGA settlement is GRANTED.

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

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Calendar Line 3

Case Name: Yanez v. Gardner Family Health Network, Inc. (Class Action)
Case No.: 20CV364033

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on December 6, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This is a putative class and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative First Amended Class Action Complaint, filed on April 3, 2020, sets forth the following causes of action: (1) Failure to Pay All Wages; (2) Rest Period Violations; (3) Meal Period Violations; (4) Wage Statement Violations; (5) Waiting Time Penalties; (6) Unfair Business Practices; (7) PAGA Penalties for Failure to Pay All Wages; (8) PAGA Penalties for Rest Period Violations; (9) PAGA Penalties for Meal Period Violations; (10) PAGA Penalties for Wage Statement Violations; and (11) PAGA Penalties for Waiting Time Penalties.

The parties have reached a settlement. On May 3, 2023, the court granted preliminary approval of the settlement subject to approval of the amended class notice.

Plaintiff submitted an amended class notice on May 10, 2023. On May 16, 2023, the court entered a formal order granting preliminary approval and approving the amended class notice.

On September 21, 2023, the court entered a Joint Stipulation and Order Continuing the Hearing on Plaintiff's Motion for Final Approval ("Stipulation"). The Stipulation states that the settlement administrator mailed notice packets to 738 class members on July 3, 2023, and subsequently defendant Gardner Family Health Network, Inc. ("Defendant") discovered there were 59 class members who were inadvertently omitted from the class list. The Stipulation indicated that the parties intended to serve notice on the additional 59 members. The court continued the final fairness hearing to December 6, 2023, to allow the additional 59 class members adequate time to respond to the class notice.

Plaintiff Eva Yanez ("Plaintiff") now moves for final approval of the settlement. The motion is unopposed.

V. 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." (*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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *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." (*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." (*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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

VI. DISCUSSION

The action has been settled on behalf of the following class:

> All non-exempt employees of Defendant [Gardner Family Health Network, Inc. ("Defendant")] who worked at any time from February 24, 2016, to March 18, 2022, in the State of California.

The class includes a subset of PAGA Aggrieved Employees, who are defined as "Class Members who worked anytime from January 24, 2019 to March 18, 2022 ('PAGA Period')."

As discussed in connection with preliminary approval, Defendant will pay a gross, non-reversionary amount of $1,125,000. The gross settlement amount includes attorney fees not to exceed $375,000 (1/3 of the gross settlement amount), litigation costs up to $21,500, a service award not to exceed $5,000, settlement administration costs (estimated to be no more than $10,000), and a PAGA Payment of $30,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be distributed to PAGA Aggrieved Employees).

The net settlement amount will be distributed to class members pro rata based on the number of workweeks worked during the class period. Funds from checks that remained uncashed 180 days after issuance will be sent to Legal Aid at Work as a *cy pres* recipient in accordance with Code of Civil Procedure section 384.

In exchange for the settlement, class members who do not opt out will release Defendant, and related persons and entities, from all causes of action and theories that were alleged in the in this action or reasonably could have been alleged based on the facts alleged in the pleadings.

On July 3, 2023, the settlement administrator mailed notice packets to 738 class members. (Declaration of Chantal Soto-Najera on Behalf of CPT Group, Inc. Regarding Settlement Administration ("Soto-Najera Dec."), ¶ 6.) After the initial mailing, Defendant discovered that 59 class members were inadvertently omitted from the class list. (*Id.* at ¶ 7.) On September 15, 2023, the settlement administrator mailed notice packets to the additional 59 class members. (*Ibid.*) Ultimately, nine notice packets were deemed undeliverable. (*Id.* at ¶ 9.) As of October 6, 2023, there were no objections and four requests for exclusion.[1] (*Id.* at ¶¶ 10-12.)

[1] The four individuals who requested exclusion are: Amishi Khandelwal; Chitra Malani; Willie David Menchaca; and Jennifer Del La Cruz Vargas.

The estimated average payment is $858.29 and the estimated highest payment is $2,262.60. (Soto-Najera Dec., ¶ 15.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests a service award in the amount of $5,000. Plaintiff submitted a declaration in support of her request, detailing her participation in the action. Plaintiff declares that she spent over 50 hours in connection with the litigation, including discussing the case with class counsel, being available during mediation, and reviewing the settlement agreement. (Declaration of Eva Yanez in Support of Motion for an Order Granting Final Approval of Class Action Settlement, ¶¶ 6-12.)

Moreover, Plaintiff undertook risk by putting her name on the case because it might impact her future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].) Accordingly, the court finds the incentive award is warranted and it is approved.

The court also has an independent right and responsibility to review the requested attorney 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 seeks attorney fees in the amount of $375,000 (1/3 of the gross settlement amount). Plaintiff's counsel provides evidence demonstrating a lodestar of $198,765. (Declaration of Jeff Geraci in Support of Motion for an Order Granting Final Approval of Class Action Settlement ("Geraci Dec."), ¶ 35 & Ex. 1.) This results in a multiplier of 1.9. The attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel also requests $20,303 in litigation costs and provide evidence of costs incurred in that amount. (Geraci Dec., Ex. 2.) The costs appear to be reasonable and are approved. The administrative costs in the amount of $10,639.26 are also approved. (Soto-Najera Dec., ¶ 18.)

Accordingly, the motion for final approval of the class and representative action settlement is GRANTED.

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

The court will set a compliance hearing for August 7, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Lines 4 - 6

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 December 6, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. 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. On November 28, 2017, Group One filed a complaint for breach of contract and to foreclose a mechanics lien in the amount of approximately $985,000.

On February 5, 2018, La Encina filed a Cross-Complaint, which alleged claims for: (1) Breach of Contract; (2) Declaratory Relief; (3) Constructive Trust; and (4) Piercing the Corporate Veil. The first through third causes of action were alleged against Group One. The fourth cause of action was asserted against cross-defendant Richard Lee Foust ("Foust").

On May 7, 2019, La Encina dismissed its Cross-Complaint with prejudice as to Group One.

On August 15, 2019, Foust filed a Cross-Complaint against Jen Hao Richard Chen ("Chen"), which set forth causes of action for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Slander Per Se; and (4) Alter Ego.

On February 20, 2020, Foust filed a First Amended Cross-Complaint ("FACC") against La Encina and Chen, alleging claims for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; and (3) Slander Per Se.

Foust substituted Sheena Chang ("Chang") as ROE 1 and Chung Yeh ("Yeh") as ROE 2 on April 24, 2020.

Foust substituted Chien Huanchu ("Huanchu") as ROE 3, Yehs II Family Limited Partnership as ROE 4, Chinche Huang ("Huang") as ROE 5, and Chuan, LLC ("Chuan") as ROE 6 on January 25, 2021.

La Encina substituted Cal Pacific Enterprises, Inc. ("Cal Pacific") as ROE 1 and Elizabeth Simic ("Simic") on March 15, 2021.

On July 23, 2021, La Encina filed a First Amended Cross-Complaint, which set forth causes of action for: (1) Breach of Contract; (2) Declaratory Relief; (3) Constructive Trust; and (4) Fraud. The first through third causes of action were alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group One's successor. The fourth cause of action was alleged against Foust and Simic individually.

On September 13, 2021, Foust filed his operative Second Amended Cross-Complaint ("SACC") against La Encina, Chen, Chang, Yeh, Huanchu, Yehs II Family Limited Partnership, Huang, and Chuan, alleging claims for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Slander Per Se; and (4) Concealment. The first, second, and fourth causes of action are alleged against all of the cross-defendants. The third cause of action is alleged only against Chen.

On March 11, 2022, La Encina filed a Second Amended Cross-Complaint, which set forth causes of action for: (1) Declaratory Relief; (2) Breach of Contract; (3) Constructive Trust; (4) Fraud. The first and second causes of action were alleged against Foust and Simic as alter egos of Group One, and against Cal Pacific as Group One's successor. The third cause of action was alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group One's successor. The fourth cause of action was alleged against Foust and Simic individually.

On February 23, 2023, La Encina filed its operative Third Amended Cross-Complaint ("TACC"), which 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 and second causes of action are alleged against Foust and Simic as alter egos of Group One, and against Cal Pacific as Group One's successor. The third cause of action is alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group

One's successor. The fourth cause of action is alleged against Foust and Simic individually. The fifth cause of action is alleged against Foust and Simic individually and as alter egos of Group One.

On March 23, 2023, the court (Hon. Amber Rosen) entered an order granting La Encina's motion for summary judgment of the first, second, and fourth causes of action of the SACC. The court opined that paragraph 26 of the SACC "demonstrates that Foust and Group One did not reasonably rely on misrepresentations that La Encina had sufficient capital to cover the construction costs and that it could pay Group One's monthly invoices." The court also determined that "Foust's supplemental declaration in support of his opposition to the motion to expunge lis pendens and mechanic's lien, and Chen's declaration also demonstrate that Foust and Group One did not reasonably rely on misrepresentations that it would not leverage or borrow against the land owned free and clear."

On November 30, 2023, the court entered an Order Re: Motion for Judgment on the Pleadings and Motions for Summary Judgment and/or Summary Adjudication. In its order, the court: (1) granted the nonstatutory motion for judgment on the pleadings of Foust's SACC by Chen, Chang, Yeh, Huanchu, Yehs II Family Limited Partnership, Huang, and Chuan (collectively, "La Encina's Managers and Members"), without leave to amend; (2) granted the motion for summary adjudication of the third cause of action of Foust's SACC by La Encina's Managers and Members and deemed the remainder of the motion moot; (3) granted the motion for summary judgment or, alternatively, summary adjudication of La Encina's TACC by Cal Pacific; and (4) denied the motion for summary judgment or, alternatively, summary adjudication of La Encina's TACC by Foust.

Also on November 30, 2023, La Encina filed a Notice of La Encina Development, LLC's Acceptance of Offer of Elizabeth Simic to Compromise (Civ. Proc. Code § 998), advising the court that La Encina had accepted Simic's offer to compromise.

Trial in this action is currently set for February 20, 2024.

Now before the court are the following motions: (1) the motion by Simic to continue the trial; (2) the motion by Foust to bifurcate the trial; (3) Simic's joinder to Foust's motion to bifurcate the trial; and (4) the motion La Encina and Chen to compel Cal Pacific to provide

further responses to document requests ("DR") made by La Encina in a deposition notice and to compel Foust to provide further responses to special interrogatories ("SI") propounded by Chen. All of the motions are opposed.

II. MOTION TO CONTINUE TRIAL

Simic moves to continue the trial from February 20, 2024 to April 1, 2024.

As La Encina has accepted Simic's offer to compromise, a controversy no longer exists with respect to Simic.

Accordingly, Simic's motion to continue the trial is deemed MOOT.

III. MOTION TO BIFURCATE TRIAL

Foust moves to bifurcate the trial into two phases, with phase one addressing the issue of whether Foust is the alter ego of Group One and phase two addressing all other issues.

A. SIMIC'S JOINDER

Simic filed a joinder to Foust's motion to bifurcate the trial.

As La Encina has accepted Simic's offer to compromise, a controversy no longer exists with respect to Simic.

Accordingly, Simic's joinder is deemed MOOT.

B. REQUESTS FOR JUDICIAL NOTICE

In connection with his moving papers, Foust asks the court to take judicial notice of documents filed in this case and documents filed in Group One's bankruptcy case. La Encina objects to the request to the extent Foust seeks to have the court judicially notice the truth of the contents of the documents.

The subject documents are generally proper subjects of judicial notice as they are court records relevant to the pending motion; however, the court can only take judicial notice of the existence of the documents as well as the truth of the results reached in any court order. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and

judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Foust's request for judicial notice is GRANTED.

C. LEGAL STANDARD

Code of Civil Procedure section 1048, subdivision (b) states:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.

"[T]he decision to bifurcate is discretionary with the trial court." (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 833; see *Huff v. Securitas Security Services USA, Inc*. (2018) 23 Cal.App.5th 745, 762.)

D. DISCUSSION

Foust argues the court should bifurcate the trial into two phases and try the issue of whether Foust is the alter ego of Group One first. Foust asserts that the alter ego allegations are driving the litigation. He notes that the first cause of action for Declaratory Relief and the second cause of action for Breach of Contract are alleged against him as an alter ego of Group One, the third cause of action for Constructive Trust is alleged against him individually and as an alter ego of Group One, the fourth cause of action for Fraud is alleged against him individually, and the fifth cause of action for Violation of Penal Code section 496 is alleged against him individually and as an alter ego of Group One. Foust asserts that the alter ego phase would be a court trial and would not require substantial evidence in the form of witness testimony as La Encina appears to be focusing its alter ego claim on the formation of Group One in 2021. Foust contends that if La Encina is unsuccessful in proving its alter ego allegations, the remainder of the case will be streamlined. Foust further contends that if La Encina is successful on its alter ego theory, the evidence presented during the initial phase of trial will not be duplicated.

In opposition, La Encina argues that bifurcation of trial would not expedite trial or further judicial economy. La Encina asserts that contrary to Foust's assertion otherwise its alter ego theory is not limited to issues surrounding Group One's formation. La Encina states that its grounds for pursuing alter ego liability include that Group One was never properly formed, was inadequately capitalized at its inception and when it entered into the contract with La Encina, failed to adhere to corporate formalities, was gutted of its assets by Foust, and was generally insolvent. La Encina also highlights that to pierce the corporate veil it must show that failure to disregard the corporate entity and hold Foust liable would sanction a fraud or promote injustice. La Encina states that the facts and evidence that will justify a finding of alter ego are the same facts and evidence that are integral to its causes of action for Breach of Contract, Fraud, and Violation of Penal Code section 496. La Encina concludes that bifurcating the trial will only result in a significant duplication of effort.

> Whether a party is liable under an alter ego theory is normally a question of fact. [Citations.] "The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court." [Citation.] Nevertheless, it is generally stated that in order to prevail on an alter ego theory, the plaintiff must show that "(1) there is such a unity of interest that the separate personalities of the corporations no longer exist; and (2) inequitable results will follow if the corporate separateness is respected." [Citation.]
>
> "The alter ego test encompasses a host of factors: '[1] [c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses … ; [2] the treatment by an individual of the assets of the corporation as his own … ; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same … ; [4] the holding out by an individual that he is personally liable for the debts of the corporation …; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities … ; [5] the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family … ; [6] the use of the same office or business location; the employment of the same employees and/or attorney … ; [7] the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization … ; [8] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation … ; [9] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities … ; [10] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities … ; [11] the use of the corporate entity to procure labor, services or merchandise for another person or entity … ; [12] the

> diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another … ; [13] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions … ; [14] and the formation and use of a corporation to transfer to it the existing liability of another person or entity.' … [¶] This long list of factors is not exhaustive. The enumerated factors may be considered '[a]mong' others 'under the particular circumstances of each case.' " [Citations.] "No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. [Citation.]" [Citation.]

(*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812, citations omitted.)

Here, the court is not persuaded that bifurcation of the trial in the manner proposed by Foust will promote judicial economy, preserve party resources, or curb any unnecessary litigation. The third through fifth causes of action are alleged against Foust as an individual. Even if Foust prevailed in the proposed phase one of the trial, the third through fifth causes of action against him would remain. Thus, any determination that Foust is not the alter ego of Group One will not effectively end or shortcut the need for further trial. Furthermore, as La Encina persuasively argues, the alter ego analysis involves a multitude of factors and, therefore, it is likely many of the facts and evidence relevant to the alter ego issue will also need to be presented to establish the elements of La Encina's causes of action for Breach of Contract, Fraud, and Violation of Penal Code section 496. Consequently, the proposed bifurcation would result in a significant duplication of effort.

Accordingly, Foust's motion to bifurcate trial is DENIED.

IV. MOTION TO COMPEL FURTHER RESPONSES TO DR AND SI

La Encina and Chen move to compel Cal Pacific to provide further responses to DR Nos. 2-18, 25, 28, 29, 32-39, and 41-45, and to compel Foust to provide further responses to SI Nos. 26-32.[2]

A. EFFECT OF NOVEMBER 30, 2023 COURT ORDER

La Encina and Chen argue the court should compel Cal Pacific to provide further responses to DR Nos. 2-18, 25, 28, 29, 32-39, and 41-45 because the sought-after documents

[2] On December 1, 2023, La Encina and Chen filed a notice stating that they partially withdraw their motion to compel to the extent it seeks to compel Foust to provide further responses to SI Nos. 10-15 and 34. Consequently, the court does not address the motion with respect to those discovery requests.

are relevant to the issue of whether Cal Pacific is a successor or a mere continuation of Group One.

As explained above, the court granted Cal Pacific's motion for summary judgment of La Encina's TACC on November 30, 2023, opining that La Encina failed to raise a triable issue of material fact as to whether Cal Pacific was a successor or mere continuation of Group One. Because a controversy no longer exists with respect to Cal Pacific, there is no longer good cause for the discovery sought by DR Nos. 2-18, 25, 28, 29, 32-39, and 41-45.

Accordingly, the motion to compel Cal Pacific to provide further responses to DR Nos. 2-18, 25, 28, 29, 32-39, and 41-45 is denied as MOOT. The only discovery requests that remain at issue are SI Nos. 26-32.

B. LEGAL STANDARD

If a party demanding a response to an interrogatory deems that an objection to an interrogatory is without merit or too general, that party may move for an order compelling a further response. (Code Civ. Proc., § 2030.300, subd. (a)(1)–(3).) If a timely motion to compel a further response to an interrogatory has been filed, the burden is on the responding party to justify any objection to the discovery request. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255 (*Fairmont*); *Coy v. Superior Court (Wolcher)* (1962) 58 Cal.2d 210, 220-221 (*Coy*).)

C. DISCUSSION

In SI Nos. 26-32, Chen asks Foust to identify documents that reflect his assets, documents that reflect the value of his assets, documents that reflect his liabilities, the custodian of records reflecting his assets, the custodian of records reflecting his liabilities, each loan application he made in the past two years, and the custodian of any loan application made by him in the past two years. Chen states that the discovery sought by these SI is relevant because La Encina seeks exemplary damages against Foust. Chen acknowledges that he simply served discovery requests seeking information regarding Foust's financial condition and he did not bring a motion for order permitting such discovery pursuant to Civil Code section 3295, subdivision (c).

Foust objected to the SI on numerous grounds, including that the requests sought premature discovery of his financial condition.

Punitive damages may be awarded in an action for breach of an obligation not arising from contract if the plaintiff establishes by clear and convincing evidence that the defendant was guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a).) Pretrial discovery of a defendant's financial condition in connection with a claim for punitive damages is prohibited absent a court order permitting such discovery. Civil Code section 3295, subdivision (c) states:

> No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. … Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294.

That proscription is intended to curb financial discovery "unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded." (*Rawnsley v. Superior Court* (1986) 183 Cal.App.3d 86, 91.) The purpose of this requirement is to protect defendants' financial privacy and prevent defendants from being pressured into settling nonmeritorious cases in order to avoid disclosure of their financial information. (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 119-120.)

Here, the parties agree that the SI seek to obtain discovery of Foust's financial condition to the extent it is relevant to La Encina's claim for exemplary damages. However, Chen failed to obtain an order permitting such discovery in accordance with Civil Code section 3295, subdivision (c). Furthermore, Chen himself does not seek exemplary damages against Foust. Consequently, it does not appear to the court that there is any reason why Chen would need or be entitled to discover information regarding Foust's financial condition. For these reasons, the court sustains Foust's objections to the requests as seeking premature discovery of his financial condition.

Accordingly, the motion to compel Foust to provide further responses to SI Nos. 26-32 is DENIED.

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

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Calendar Line 5

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

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Calendar Line 6

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

- oo0oo -

Calendar Line 7

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 December 6, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VIII. 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.

On October 17, 2023, the court entered an Order addressing Plaintiff's motion for summary adjudication of the third, fourth, and eighth causes of action of the FACC, and several related motions to seal. Additionally, because Defendant failed to file an unredacted version of its Reply Appendix, the Order continued the following matters to December 6, 2023: (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 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; (3) 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; (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.

Subsequently, the parties filed the following additional matters, which are also set for hearing on December 6, 2023: (1) Defendant's motion to seal portions of Plaintiff's opposition to Defendant's motion for summary judgment and/or adjudication; (2) Defendant's motion to seal portions of its amended evidentiary objections and the proposed order on its amended evidentiary objections; (3) Plaintiff's motion to seal Defendant's amended evidentiary objections, the proposed order on Defendant's amended evidentiary objections, and Defendant's notice of errata; (4) Plaintiff's motion to strike Defendant's Notice of Errata; (5) Plaintiff's motion to strike Defendant's amended evidentiary objections; and (6) Plaintiff's motion to seal Defendant's opposition to Plaintiff's motion to strike Defendant's amended evidentiary objections.

II. MOTIONS TO STRIKE

Plaintiff moves to strike: (1) the declarations of Edmonds, Monery, Shannon, Torian, and Mihelich filed on July 3, 2023; (2) the 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 was filed as a redacted document on September 5, 2023 and as an unredacted document on October 11, 2023; (3) Defendant's Notice of Errata filed on November 15, 2023; and (4) Defendant's amended evidentiary objections filed on November 15, 2023. Plaintiff argues the court should strike the foregoing documents because they were filed and served late. Plaintiff argues it has been prejudiced by the late filings because Defendant has been given the unfair advantage of extra time to prepare the subject documents (extra time not afforded to Plaintiff).

Defendant opposes the motions to strike, arguing that Plaintiff has not been prejudiced by any delay.

"A trial court has broad discretion under rule 3.1300(d) of the California Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Bozzi v. Nordstrom, Inc*. (2010) 186 Cal.App.4th 755, 765-766 [affirming the trial court's refusal to consider briefing and evidence filed after the

applicable deadline for papers opposition to a motion for summary judgment]; see *Mackey v. Trustees of California State University* (2019) 31 Cal.App.5th 640, 657 [affirming the trial court's refusal to consider briefing and evidence filed after the applicable deadline for papers opposition to a motion for summary judgment]; see also *G. E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co.* (1992) 11 Cal.App.4th 318, 325, fn. 4 [same].)

Here, the Eleventh Amended Scheduling Order entered on June 13, 2023, states that opening briefs on dispositive motions are due on June 30, 2023, and reply briefs on dispositive motions are due on September 1, 2023. Consequently, the declarations of Edmonds, Monery, Shannon, Torian, and Mihelich were filed three days late; the Notice of Errata was filed almost five months late; the redacted Reply Appendix was filed four days late and the unredacted Reply Appendix was filed over one month late; and the amended evidentiary objections were filed over two months late. Defendant has not demonstrated good cause for the late submissions. In addition, the court notes that the Notice of Errata makes changes to Defendant's separate statement of undisputed material facts attempts to introduce new evidence (i.e., Exhibit 135) that was not included in Defendant's moving papers. Similarly, the amended evidentiary objections do not merely correct formatting issues, but contain significant material changes to Defendant's evidentiary objections. The court finds that Plaintiff has been prejudiced by Defendant's repeated late filings and, consequently, the court declines to consider the subject documents.

Accordingly, Plaintiff's motions to strike are GRANTED.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Defendant moves 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.

A. EVIDENTIARY OBJECTIONS

1. Plaintiff's Objections

In connection with its opposition, Plaintiff submits objections to the declarations of Lindsay Cooper, Charles B. Stevens, Edmonds, Monery, Shannon, Torian, and Mihelich,

which were filed in conjunction with Defendant's moving papers. Plaintiff also submits objections to the declaration of Lindsay Cooper, which was filed in connection with Defendant's reply.

Plaintiff's objections do not comply with California Rules of Court, rule 3.1354. Rather than timely 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 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 (*Hodja*t) [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 Plaintiff's evidentiary objections.

2. Defendant's Objections

In connection with its reply, Defendant filed objections to portions of the declarations of Robert Dees, Edward J. Naughton, Leo Presiado, and Ivan Zatkovich, and Exhibits 1-4, 20, 31-37, 39, 40, 50, 58, 65, 67, 68 to Plaintiff's Appendix of Exhibits.

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, 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 Defendant's evidentiary objections.

B. LEGAL STANDARD

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73.)

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Oran*ge (2013) 220 Cal.App.4th 946, 954 (*All Towing*) ["Summary judgment is proper only if it disposes of the entire lawsuit."].) "Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff

'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact 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.]" (*Madden v. Summit View, In*c. (2008) 165 Cal.App.4th 1267, 1272 (*Madde*n).)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment or adjudication must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny the motion 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 judgment or adjudication "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing the motion 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 v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

C. DISCUSSION

1. Breach of Warranty Cause of Action

Defendant argues it is entitled to summary adjudication of the first cause of action of the SAC for Breach of Warranty because Plaintiff does not possess, and cannot reasonably obtain, evidence that Defendant's hardware and software breached the Limited Warranty set forth in the parties' End User License Agreement ("EULA"). Defendant asserts that Plaintiff does not possess, and cannot reasonably obtain, the requisite evidence because Plaintiff cannot identify how Defendant's products failed to comply with the Limited Warranty (i.e., how Defendant's products failed to comply with the specifications set forth in Defendant's data

sheets). In support of its argument, Defendant cites to its undisputed material fact ("UMF") Nos. 50-51. UMF No. 50 states that the SAC is silent on how Defendant's hardware or software products failed to comply with the Limited Warranty. UMF No. 51 states that Plaintiff failed to identify any instances during discovery of Defendant's hardware or software products not complying with the Limited Warranty. The evidence cited in support of these UMF is the SAC, the EULA, and page 44, lines 7-15 of Volume 2 of the deposition of Robert Dees ("Dees"). As is relevant here, Defendant asserts that Dees testified at deposition that he, himself, did not analyze whether Defendant breached the Limited Warranty.

Here, Defendant does not meet its initial burden to show that Plaintiff does not possess, and cannot reasonably obtain, evidence that Defendant's hardware and software breached the Limited Warranty set forth in the EULA. Defendant did not submit the portion of Dees' testimony that it relies upon. Specifically, In connection with its moving papers, Defendant did not submit any excerpt from Volume 2 of Dees' deposition.[3] Therefore, there is no admissible evidence supporting UMF No. 51.

Even if Defendant had submitted evidence showing that Dees testified at deposition that he, himself, did not analyze whether Defendant breached the Limited Warranty, this evidence would not be sufficient to meet Defendant's initial burden. The mere fact that Dees did not personally analyze whether Defendant's conduct ever breached the Limited Warranty does not meant that Plaintiff does not possess, and cannot reasonably obtain, evidence that Defendant's conduct breached the Limited Warranty. (See e.g., *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439 ["the cases do not establish that a defendant shifts the burden of production to the plaintiff by showing that a plaintiff witness has no personal recall of the defendants' product. Under the standard enunciated in Aguilar [citation], the defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any means."].) The burden does not shift where Defendant has not submitted factually devoid discovery responses and the deposition testimony cited does not contain questions aimed at whether Plaintiff had any evidence showing that Defendant breached the Limited Warranty.

[3] Defendant submitted excerpts from Volume 2 of Dees' deposition in connection with its Notice of Errata, which the court has declined to consider. But in any event, the excerpts attached to the Notice Errata do not contain the portion of Dees' deposition testimony cited in support of UMF No 51.

Accordingly, Defendants motion for summary adjudication of the first cause of action of the SAC for Breach of Warranty and summary judgment of the SAC is DENIED.

2. Negligent and Intentional Misrepresentation Causes of Action

Defendant argues it is entitled to summary adjudication of the second and third causes of action of the SAC for Negligent and Intentional Misrepresentation because Plaintiff ratified the EULA after it discovered the alleged misrepresentations, Plaintiff not possess, and cannot reasonably obtain, the evidence showing that the Defendant made any of the alleged misrepresentations, Plaintiff cannot establish knowledge of falsity, and Plaintiff did not justifiable rely on the alleged misrepresentations. Defendant further argues that the economic loss rule bars the claim for negligent misrepresentation.

Defendant's arguments are not well-taken. First, the court has already addressed and disposed of Defendant's argument regarding the economic loss rule. As explained in prior court orders, the economic loss rule provides that "where a purchaser's expectations in a sale are frustrated because the product he brought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988 (*Robinson*).) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless the purchaser can demonstrate harm above and beyond a broken contractual promise. (*Ibi*d.)

In *Robinson*, the California Supreme Court carved out an exception to this rule, holding that it does not bar claims for fraud and intentional misrepresentation which are independent of the contract alleged to have been breached. (*Robinson, supra,* 34 Cal.4th at p. 991.) The court reasoned that a breach of contract remedy assumes that the parties to a contract can negotiate the risk occasioned by a breach; given this negotiation, it is "appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive … ." (*Ibid*., citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 517.) However, because a party to a contract could not "rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract," the court explained that public policy demanded that the party who is deceived be permitted to recover damages not limited to the contract. (*Ibid*.) Thus, where one party

commits fraud during the contract formation or performance, the injured party may recover in contract and tort. (*Ibid*.; see *Harris v. Atlantic Richfield Co*. (1993) 14 Cal.App.4th 79, 78; see also *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 645 (*Lazar*) ["[F]raudulent inducement of contract—as the very phrase suggests—is not a context where the 'traditional separation of tort and contract law' [citation] obtains. To the contrary, this area of the law traditionally has involved both contract and tort principles and procedures."]; *Erlich v. Menezes* (1999) 21 Cal. 4th 543, 551-552 ["Tort damages have been permitted in contract cases ... where the contract was fraudulently induced."]; *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp*. (C.D. Cal. 2009) 660 F.Supp.2d 1163, 1188 ["The economic loss rule poses no barrier to a properly pled fraudulent inducement claim[.]"].)

Here, the second cause of action is predicated on conduct beyond the alleged contractual promises. Specifically, 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. As Plaintiff alleges that Defendant made false representations which induced Plaintiff to enter into the subject agreement to purchase Defendant's products in the first instance, Plaintiff's negligent and intentional misrepresentation claims are independent of the contract that is alleged to have been breached. Furthermore, Defendant's alleged misrepresentation regarding the inclusion of fixes in FortiOS v. 6.0 is conceptually distinct from Defendant's alleged obligation to provide hardware and software in conformance with the alleged warranties. For these reasons, the economic loss rule does not bar the second cause of action.

Second, Defendant has not shown that Plaintiff's purported ratification of the EULA constitutes waiver of its claims for negligent and intentional misrepresentation. Defendant's evidence regarding Plaintiff's purported ratification of the EULA merely shows that Plaintiff retained the benefits of its contract with Defendant. (See *Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1220 [a victim of fraud has the right to retain the benefits of the contract].) Plaintiff's purported ratification of the EULA does not constitute a new, substitute agreement or an extracontractual benefit, which would result in waiver. (See *id.* at fn. 4 [distinguishing cases where the victim forfeits a fraud claim by entering into a new, substitute agreement with,

or accepting extracontractual benefits from, the defrauding party, with knowledge of the fraud].)

Third, Defendant does not meet its initial burden to show that Plaintiff does not possess, and cannot reasonably obtain, evidence that Defendant made any of the alleged misrepresentations. In support of its argument, Defendant cites to its UMF No. 69, which states that Plaintiff was unable to identify any alleged misrepresentations. The evidence cited in support of this UMF is page 96, line 21 through page 97, line 23 of Volume 2 of Dees' deposition. Defendant did not properly submit the portion of Dees' testimony that it relies upon. Specifically, in connection with its moving papers, Defendant did not submit any excerpt from Volume 2 of Dees' deposition.[4] Therefore, there is no admissible evidence supporting UMF No. 69.

Fourth, Defendant has not submitted any admissible evidence demonstrating that Plaintiff cannot establish knowledge of falsity. In support of its argument, Defendant relies solely on the late-filed declarations of Shannon and Torian, which the court has declined to consider.

Fifth, Defendant does not meet its initial burden to show that Plaintiff did not justifiable rely on the alleged misrepresentations. Defendant asserts that Plaintiff cannot have relied on the alleged misrepresentations the EULA contained various disclaimers. However, it is well established that such disclaimers do not operate to insulate defrauding parties from liability or preclude a plaintiff from demonstrating justifiable reliance on misrepresentations. (See *Orozco v. WPV San Jose, LLC* (2019) 36 Cal.App.5th 375, 393 ["Finally, it is well established that the kind of disclaimers and exculpatory documents—such as the 'estoppel' attached to the lease and signed by Orozco that disavowed any representations made by landlord or its agents to him—do not operate to insulate defrauding parties from liability or preclude Orozco from demonstrating justifiable reliance on misrepresentations."].)

Accordingly, Defendant's motion for summary adjudication of the second and third causes of action of the SAC for Negligent and Intentional Misrepresentation is DENIED.

3. Plaintiff's Request for Exemplary Damages

[4] Defendant submitted excerpts from Volume 3 of Dees' deposition in connection with its Notice of Errata, which the court has declined to consider.

Defendant argues it is entitled to summary adjudication of Plaintiff's request for exemplary damages because Plaintiff cannot introduce any evidence that an officer, director, or managing agent of Defendant acted with oppression, fraud, or malice. In support of its argument, Defendant cites to UMF Nos. 67-75. However, those UMF simply provide that Plaintiff's misrepresentation claims are predicated on statements allegedly made by Shannon and Torian, and purport to show that the statements made by Shannon and Torian were not false. The UMF do not address whether Shannon or Torian are an officer, director, or managing agent of Defendant. Furthermore, UMF Nos. 67-75 are not supported by any admissible evidence because the court has declined to consider the declarations of Shannon and Torian.

Accordingly, Defendant's motion for summary adjudication of Plaintiff's request for exemplary damages is DENIED.

4. Declaratory Judgment of Limitation on Damages Cause of Action

Defendant argues it is entitled to summary adjudication of its eleventh cause of action of the FACC for Declaratory Judgment of Limitation on Damages and the court should declare, as a matter of law, that Section 9 of the EULA caps any recovery for breach of the Limited Warranty at the amount of a refund of any defective or nonconforming product. Defendant contends that Section 9 of the EULA limits any damages for breach of the Limited Warranted to repair, replacement, or refund of the allegedly defective product. Defendant then concludes that the most Plaintiff can recover for breach of warranty is a refund, i.e., the total purchase price of the products at issue.

Here, as Plaintiff persuasively argues, the eleventh cause of action of the FACC is not a proper subject of summary adjudication. As currently alleged, the eleventh cause of action seeks a declaration that "[Plaintiff's] right to any damages from [Defendant] are barred and/or limited by the EULA" (FACC, ¶¶ 116-122 & Relief, ¶ 4), and Defendant specifically seeks a declaration that Plaintiff is, at most, entitled to a refund. Consequently, Defendant seeks summary adjudication of a portion of Plaintiff's claim for compensatory damages. However, "Code of Civil Procedure section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire

cause of action." (*Decastro W. Chodorow & Burns v. Superior Court* (1996) 47 Cal.App.4th 410, 422.) Defendant cannot evade this rule by arguing that it is seeking adjudication of its claim for declaratory relief because the claim is effectively an affirmative defense to an allegation of past wrongdoing. (See *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403]"[D]eclaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them."]; see also 5 Witkin, California Procedure (4th ed. 1997) Pleading, § 823, p. 279 [where there is an accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied]; Code Civ. Proc., § 1061 ["The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."].)

Accordingly, Defendant's motion for summary adjudication of the eleventh cause of action of the FACC for Declaratory Judgment of Limitation on Damages is DENIED.

IV. 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. DEFENDANT'S MOTION TO SEAL PORTIONS OF ITS MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Defendant seeks to seal portions of its motion for summary judgment and/or adjudication. Specifically, Defendant asks the court to seal portions of Exhibits 9, 11, 13, 14, 41, 49-53, 60, 66, 67, 75, and 79 to the Declaration of Lindsay Cooper. 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 File Certain Exhibits to Lindsay Cooper's Declaration Under Seal, ¶¶ 2-5.) 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 City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1286 (*Universal*) [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.

C. PLAINTIFF'S MOTION TO SEAL PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Plaintiff seeks to seal portions of Defendant's motion for summary judgment and/or adjudication. Specifically, Plaintiff asks the court to seal Exhibits 1, 5-8, 15, 16, 18-40, 42-48, 54-59, 61-65, and 80-82 to the Declaration of Lindsay Cooper, portions of Defendant's memorandum of points and authorities, and portions of Defendant's separate statement of undisputed material facts. Plaintiff asserts that the subject materials 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.

D. PLAINTIFF'S MOTION TO SEAL PORTIONS OF ITS OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Plaintiff seeks to seal portions of its opposition to Defendant's motion for summary judgment and/or adjudication. Specifically, Plaintiff asks the court to seal Exhibits 1, 3, 7, 9, 16, 21, 24, 42, 44, 45, 47, 49, 51, 52, 67-70 to its Appendix of Evidence, portions of the Declaration of Leo J. Presiado, its response to Defendant's separate statement of undisputed material facts, and portions of its opposition. Plaintiff asserts that the subject materials consist of emails, documents, and deposition testimony revealing confidential commercial information about Plaintiff's network and business operations. (Declaration of Leo J. Presiado, ¶ 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. DEFENDANT'S MOTION TO SEAL PORTIONS OF ITS REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Defendant seeks to seal portions of its reply in support of its motion for summary judgment and/or adjudication. Specifically, Defendant asks the court to seal portions of its reply, portions of its response to Plaintiff's separate statement of additional material facts, portions of its evidentiary objections, Exhibits 90-96, 100, 104, 125, 127, 132, and 134 to its Reply Appendix. Defendant asserts that the materials contain its confidential commercial business information and confidential business information of third parties. (Declaration of

Jordan E. Alexander in Support of Fortinet's Motion to Seal Exhibits and Certain Portions of Fortinet's Reply in Support of Fortinet's Motion for Summary Judgment or, in the alternative, Summary Adjudication, ¶¶ 3-6; Declaration of Scott Atkinson in Support of Fortinet's Motion to Seal Exhibits and Certain Portions of Fortinet's Reply in Support of Fortinet's Motion for Summary Judgment or, in the alternative, Summary Adjudication, ¶¶ 2-5.) 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.

F. PLAINTIFF'S MOTION TO SEAL PORTIONS OF DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Plaintiff seeks to seal portions of Defendant's reply in support of its motion for summary judgment and/or adjudication. Specifically, Plaintiff asks the court to seal portions of Defendant's response to Plaintiff's separate statement of additional material facts and Exhibits 85-89, 97-99, 101-103, 105-121, 124 126, 128-131, and 133 to Defendant's Reply Appendix. Plaintiff asserts that the subject materials 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.

G. DEFENDANT'S MOTION TO SEAL PORTIONS OF PLAINTIFF'S OPPOSITION TO ITS MOTION FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

Defendant seeks to seal portions of Plaintiff's opposition to its motion for summary judgment and/or adjudication. Specifically, Defendant asks the court to seal Exhibits 4-6, 10, 12, 15, 17-20, 22, 26, 31-40, 46, 48, 50, 56, 59-62, 65, and 66 to Plaintiff's Appendix of Evidence, Plaintiff's response to Defendant's separate statement of undisputed material facts, portions of the Declaration of Leo J. Presiado, and portions of Plaintiff's opposition. Defendant asserts that the materials contain its confidential commercial business information and confidential business information of third parties. (Declaration of Jordan E. Alexander in Support of Fortinet's Motion to Seal, ¶¶ 3-6.) 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.

H. DEFENDANT'S MOTION TO SEAL PORTIONS OF ITS AMENDED EVIDENTIARY OBJECTIONS AND THE PROPOSED ORDER

Defendant seeks to seal portions of its amended evidentiary objections and portions of the proposed order on its amended evidentiary objections. Defendant asserts that the materials contain its confidential commercial business information and confidential business information of third parties. (Declaration of Jordan E. Alexander in Support of Fortinet's Motion to Seal, ¶¶ 3-6.) 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.

I. PLAINTIFF'S MOTION TO SEAL DEFENDANT'S AMENDED EVIDENTIARY OBJECTIONS, THE PROPOSED ORDER, AND NOTICE OF ERRATA

Plaintiff seeks to seal portions of Defendant's amended evidentiary objections, portions of the proposed order on Defendant's amended evidentiary objections, and Exhibit 135 to Defendant's Notice of Errata. Plaintiff asserts that the subject materials consist of emails, documents, 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

"Confidential" 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.

J. PLAINTIFF'S MOTION TO SEAL DEFENDANT'S OPPOSITION TO ITS MOTION TO STRIKE DEFENDANT'S AMENDED EVIDENTIARY OBJECTIONS

Plaintiff seeks to seal portions of Defendant's opposition to Plaintiff's motion to strike Defendant's amended evidentiary objections and portions of Defendant's opposition to Plaintiff's motion to strike Defendant's Notice of Errata. Plaintiff asserts that the subject materials consist of emails, documents, 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 "Confidential" 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.

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

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