SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

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

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DATE: SEPTEMBER 20, 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	21CV381890	Dominguez, et al. v. All-Pro Bail Bonds, Inc., et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	19CV348674	In Re Cloudera, Inc. Securities Litigation (formerly Lazard v. Cloudera, Inc., et al.) Lead Case/Consolidated Action	Rescheduled to October 11, 2023 at 1:30pm
LINE 3	19CV348674	In Re Cloudera, Inc. Securities Litigation (formerly Lazard v. Cloudera, Inc., et al.) Lead Case/Consolidated Action	Rescheduled to October 11, 2023 at 1:30pm
LINE 4	22CV407799	Reedy, et al. v. Southwest Airlines Co. (Class Action)	See Line 4 for tentative ruling.
LINE 5	20CV365252	Flores v. ACCO Engineered Systems, Inc. (Included in Acco Wage and Hour Cases, JCCP5172, Santa Clara)	Continued per S&O to November 15 at 1:30 p.m.

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LINE 6	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 6 for tentative ruling.
LINE 7	19CV355879	Guzik Technical Enterprises v. Keysight Technologies, Inc.	Continued by Court to October 4, 2023 at 1:30 p.m.
LINE 8	23CV415981	Kobayashi v. Dfinity USA Research LLC, et al.	See Line 8 for tentative ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Dominguez, et al. v. All-Pro Bail Bonds, Inc., et al. (Class Action)
Case No.: 21CV381890

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 20, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a class action arising out of credit bail agreements that allegedly violate Civil Code sections 1799.91, 1799.92, 1799.93, and 1799.95 because they do not provide cosigner with the required notice. The Class Action Complaint ("Complaint"), filed on May 14, 2021, sets forth the following causes of action: (1) Violation of California Unfair Competition Law, Cal. Business & Professions Code §§ 17200-17210; and (2) Declaratory Judgment. Plaintiffs Rakly Dominguez and Grace Dominguez (collectively, "Plaintiffs") have reached a settlement with defendants All-Pro Bail Bonds, Inc. ("All-Pro"), Bankers Insurance Company, and Bankers Surety Services, Inc. (collectively, "Defendants"). Plaintiffs moved for preliminary approval of the settlement.

On February 1, 2023, the court continued the motion for preliminary approval of the settlement to March 29, 2023. In the minute order dated February 1, 2023, the court requested Plaintiffs file a supplemental declaration explaining why Philadelphia Reinsurance Company, and its related persons and entities, were in included in the release. The court also asked Plaintiffs to clarify the amount of attorney fees being sought. On March 13, 2023, Plaintiffs' counsel filed a supplemental declaration. The declaration explained that the bail bond agreements issued by All-Pro during the class period included those issued by All-Pro on behalf of the other defendants and Philadelphia Reinsurance Company and clarified the amount of attorney fees sought. The Court granted the motion for preliminary approval.

Currently before the Court are (1) Plaintiffs' motion for final approval of class action settlement and (2) Plaintiffs' motion for attorneys' fees and costs, administration costs, and service awards for class representatives. The motions are unopposed. As discussed below, the Court is inclined to grant final approval and approves Plaintiffs' attorney fees, costs,

administration costs, and service awards. However, as explained below, the Court requests that Plaintiffs' counsel provide, prior to the hearing on this matter if possible, a supplemental declaration explaining the basis for the $100,000 in administration costs.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*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.)

III. DISCUSSION

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

> [A]ll non-spouse co-signers who signed an All Pro Surety Bail Bond Indemnity Agreement and an All Pro Promissory Note for Surety Bail Cond at any time prior
> to May 1, 2021 (collectively, the "All-Pro Agreements(s)"), and for which a payment was sought from, owed, or made to All Pro (or any third party collection
> agency collecting payments on behalf of All Pro) pursuant to the All-Pro Agreements at any time between May 25, 2017, and the date of Preliminary Approval of this Class Settlement Agreement.

The non-reversionary gross settlement amount is $2,300,000. Plaintiffs are seeking attorney fees in the amount of $766,590, representing 33.33% of the gross settlement amount. Plaintiffs are also seeking costs in the amount of $12,375.56, less than the $20,000 requested at preliminary approval. Plaintiffs are also seeking $100,000 in costs for administering notice to the class.

The $1,413,534.44 class portion of the settlement will be allocated to the settlement class members pro rata based on the total number of payments made to All-Pro on the specific event (i.e., series of transactions resulting in the posting by All-Pro of criminal bail bond(s) by which a criminal defendant is released from custody) for which the Class Member executed an All-Pro Agreement. The average payment to class members will be $41.82 and the highest payment is $943.66. Class members will not be required to submit a claim to receive their payments. Funds associated with checks uncashed after 180 days will be tendered to the Children's Advocacy Institute.

In addition to the monetary settlement, All-Pro agrees that it will be subject to a stipulated permanent injunction enjoining it, and persons or entities acting in concert with it, from the Effective Date onwards, from collecting from all non-spouse co-signers any outstanding installment premium payments remaining due and owing on All-Pro Agreements executed prior to May 1, 2021. Plaintiffs estimate that the value of the injunction to the class members during the class period is $21.5 million.

In exchange for the settlement, class members who do not opt out will release

> [A]ny and all of the Released Parties of and from any and all claims, causes of action, demands, or legal theories of relief alleged or otherwise raised or that could have been raised based on or related to the factual allegations pleaded in Plaintiffs' Class Action Complaint ("Complaint"), including without limitation all of the following: Violation of Civil Code 1799.91: Violation of Civil Code 1799.95; Violation of Business and Professions Code § 17200, et seq. (Unfair competition Law or UCL) based on or related to the alleged Violation of Civil Code 1799.90, et seq.; Declaratory Relief based on or related to the alleged Civil Code § 1799.90, et seq; violations, claims for injunctions, and all claims for damages, penalties, interest, fees and costs, restitution, equitable relief, and other amounts or types of relief recoverable under said claims, causes of action, "demands or legal theories of relief. The period of this release shall extend to the limits of the Settlement Class Period. The release shall exclude the release of any claims not permitted to be released by law.

The "Settlement Class Period" means the period from April 30, 2017 to the date when the final approval order becomes final.

The "Released Parties" are defined as

> Defendants, Philadelphia Reinsurance Company, and each of their past, present, and future parents, subsidiaries, affiliates, predecessors, successors, assigns, joint
> venturers, and joint employers, and each of their past, present, and future owners, officers, directors, principals, heirs, members, managers, employees, consultants, partners, affiliates, subsidiaries, parents, investors, shareholders, attorneys, accountants, auditors, consultants, insurers, reinsurers, joint venturers, agents, representatives, predecessors, successors, assigns, or legal representatives and any individual or entity who or which could be jointly liable with Defendants or
> Philadelphia Reinsurance Company, or all persons or entities acting by, through under or in concert with any of them.
>
> In addition, Plaintiffs agree to a comprehensive general release.

At preliminary approval, the Court found that the settlement was a fair a reasonable compromise of the class claims. It finds no reason to deviate from this finding now, especially considering that there are no objections. The Court thus finds that the settlement is fair and reasonable for purposes of final approval.

The notice process has now been completed. There were no objections to the settlement and only six individuals requested exclusion from the class. (Declaration of Bryn Bridley re: Notice and Settlement Administration (Bridley Decl.), ¶ 9.) Of the 33,798 notices mailed by the administrator, 7,307 were returned to Atticus Administration, LLC ("Atticus"), the settlement administrator. (*Id.*, ¶ 7.) Two hundred fifty-nine notices were returned with forwarding addresses and were remailed to those addresses; six of there were ultimately

undeliverable. (*Ibid*.) Of the remaining 7,048 returned notices, 6,735 were sent to a professional service for address tracing and 313 were not sent for tracing because they were received after the exclusion and objection deadline. After tracing, new addresses were received for 4,027 records and were not received for 2,708 records. (*Ibid*.) Notices were remailed to the 4,027 new addresses and 591 of those were returned as undeliverable. (*Ibid*.) The total number of notices deemed undeliverable was 3,612. (*Ibid*.) Thus, the administrator was ultimately able to provide notice to approximately 89.31 percent of the class. (*Id.*, ¶ 8.)

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.) The benefits achieved by the settlement justify an award of attorney fees to class counsel. Plaintiffs seek a fee award of $766,590, amounting to one third of the gross settlement amount. Plaintiffs also request costs in the amount of $12,375.56, less than the $20,000 requested at preliminary approval. Plaintiffs' litigation costs are approved in the amount of $12,375.56.

With respect to the fees, the lodestar method is a recognized method for calculating attorney fees in civil class actions, and is appropriately employed in this case. (See *Wershba*, *supra,* 91 Cal.App.4th at p. 254 ["Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method."]; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556-557 [trial court properly awarded attorney fees in consumer class action based on lodestar method where there was no "common fund" justifying a percentage recovery].)

> The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.

(*Consumer Privacy Cases*, *supra,* 175 Cal.App.4th at p. 556, internal citation and quotations omitted.)

"There is 'no mathematical rule requiring proportionality between compensatory damages and attorney's fees awards, [citation], and courts have awarded attorney's fees where plaintiffs recovered only nominal or minimal damages.' " (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 421.)

Plaintiff's counsel submits that their total fees incurred in this action so far, as of August 25, 2023, are $326,517 based on 427.20 hours spent on the case by counsel with billing rates of $650 to 925 per hour. (Declaration of Julian Hammond in Support of Motion for Final Approval of Class Action Settlement, and Motion for Attorneys' Fees and Costs, and Class Representative Service Awards (Hammond Decl.), ¶ 13.) Counsel indicates that comparing the requested fees result in a multiplier of 2.35 to their current lodestar. (Id., ¶ 49.) The 2.35 multiplier is somewhat high but not outside the realm of reasonable multipliers. (See *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66 ["2.5 multiplier that class counsel are to receive is [not] so out of line with prevailing case law as to constitute an abuse of discretion."]; *Wershba, supra,* 91 Cal.App.4th at p. 255 ["Multipliers can range from 2 to 4 or even higher."].) Additionally, the fees requested are reasonable as a percentage of the common fund and a large portion of the value achieved by Plaintiffs' counsel is the injunction, which counsel estimates is worth approximately $21.5 million. The fees are, therefore, approved.

Plaintiffs also request administration costs in the amount of $100,000. In support of this request, Plaintiffs have provided the declaration of Bryn Bridley, Director of Project Management at Atticus. Attached to the declaration is an invoice consisting of one line item and indicating that administration totaled $100,000. Neither the declaration nor the invoice provide any breakdown of the expenses incurred or expected or services performed or expected to be performed. The declaration simply states that "This amount includes preparing the Class List, printing, and mailing the Class Notice, Class Member communications, project management, establishing a qualified settlement fund entity, obtaining a federal tax identification number, opening a bank account, calculation of the Class Member Payment, and sending payments to the Settlement Class." (Bridley Decl., ¶ 12.) The Court requests that Plaintiffs' counsel provide, prior to the hearing on this matter if possible, a supplemental declaration breaking down how the administration costs were incurred by category.

At preliminary approval, the Court reduced Plaintiffs' requested service awards to $5,000 for Rakly Dominguez and $2,500 for Grace Dominguez.[1] The Court approves these amounts.

IV. CONCLUSION

The Court is inclined to grant final approval. However, the Court requests that Plaintiffs' counsel provide, prior to the hearing on this matter if possible, a supplemental declaration explaining the basis for the $100,000 in administration costs and providing a breakdown of the costs by category.

Assuming that final approval is granted, the prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

Assuming that final approval is granted, the Court will set a compliance hearing for **May 22, 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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[1] Plaintiffs initially requested $10,000 for Rakly Dominguez and $5,000 for Grace Dominguez.

Calendar Line 2

Case Name:
Case No.:

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Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: Reedy, et al. v. Southwest Airlines Co. (Class Action)
Case No.: 22CV407799

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 20, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

This is a putative class action arising out of the practice of Defendant Southwest Airline Co. ("Defendant") of issuing travel credits that expire after one year to passengers who change or cancel their flights. Plaintiffs Claire Reedy, Victoria Rosales, and Roman Chepulskyy (collectively, "Plaintiffs") contend that Defendant advertises that it does not charge "change fees" or "cancel fees" for its plane tickets. They assert that they each purchased plane tickets from Defendant but they later had to cancel or reschedule their flights. They were issued travel credits which displayed expiration dates. Because customers may not be able to use their travel credits before the stated expiration dates, Plaintiffs maintain that this practice of issuing travel credits that expire results in profits to Defendant and constitutes de facto charging of change or cancel fees.

The First Amended Class Action Complaint ("FAC"), filed on May 19, 2023, sets forth the following causes of action: (1) intentional misrepresentation; (2) violation of California Unfair Competition Law (Cal. Business & Professions Code §§ 17200-17210) ("UCL"); (3) violation of California Consumers Legal Remedies Act (Cal. Civ. Code § 1750, et seq.) ("CLRA"); (4) unjust enrichment, and (5) breach of contract.

Currently before the Court is (1) Defendant's demurrer to Plaintiffs' FAC. Plaintiffs have opposed the demurrer and Defendant has filed a reply.

VI. DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

Defendant requests judicial notice of three versions of its contract of carriage ("CoC"), which it contends were in placed at the time each Plaintiff purchased tickets from Defendant. It asserts that these CoCs are subject to judicial notice as facts not reasonably subject to dispute under Evidence Code section 452, subdivision (h). Plaintiffs oppose the request arguing that

they dispute that they agreed to be bound by the CoCs and that the determination of the existence and proper interpretation of an agreement is a question of fact not suitable for resolution on a demurrer. The FAC does not mention the CoCs and Plaintiffs are disputing whether the CoCs apply in the instant case. Under the circumstances, the Court finds that the CoCs are not subject to judicial notice as facts not reasonably subject to dispute. (See *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 456, fn. 9 ["In ruling on a demurrer, a court may consider facts of which it has taken judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]"].) The request for judicial notice is DENIED.

VII. LEGAL STANDARD

As relevant to the instant case, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10, subd. (e).)[2] A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (§§ 430.10, 430.50, subd. (a).)

The Court in ruling on a demurrer treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

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

VIII. DISCUSSION

Defendant demurs to the entire FAC on the ground that the claims are preempted under the Airline Deregulation Act ("the Act"). It also demurs to each cause of action on the ground of failure to state a claim.

A. Plaintiffs' Claims Other than the Breach of Contract Claim are Preempted

The Act's preemption provision states, "Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart [49 USCS §§ 41101 et seq.]." (49 U.S.C. § 41713, subd. (b)(1).) "[F]or a claim to be preempted by the ADA, ' "two things must be true[:] (1) the claim must derive from the enactment or enforcement of state law, and (2) the claim must relate to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them." ' [Citation.]" (*Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1166-1167.)

Plaintiffs do not dispute that the claims relate to airline rates, routes, or services. Instead, they oppose the demurrer asserting that the Act does not preempt state law claims arising out of an airline's "own, self-imposed undertakings." (*Am. Airlines v. Wolens* (1995) 513 U.S. 219, 228 (*Wolens*).) They make no specific argument with respect to the claims other than the breach of contract claim; they merely indicate that those claims are not preempted for the same reasons that the breach of contract claim is not prempted.

With respect to the breach of contract claim, Defendant maintains that the CoCs, which it contends Plaintiffs rely on, contain the entirety of the parties' agreement. This argument must be rejected. Plaintiffs assert that the claims are based, not on the CoCs but on Defendants' promises not to charge change and cancellation fees made in a series of advertisements. In fact, the FAC makes no mention of the CoCs whatsoever. Further, if Plaintiffs' claim were based on the CoCs, the claim would not be preempted but would be based on Defendant's self-imposed undertaking, the assertions it made in the CoCs. (See *Bugarin v. All Nippon Airways Co., Ltd.* (N.D.Cal. 2021) 513 F. Supp. 3d 1172, 1190.)

Defendant also argues that Plaintiffs are attempting to use state law to read into the CoCs obligations that do not exist. But, as mentioned above, Plaintiffs contend that Defendant made promises via advertising that it charged no change or cancellation fees and that it is these promises that were breached allegedly resulting in Defendant's liability for Plaintiffs' breach of contract claim. Thus, the breach of contract claim is based on Defendant's alleged representations, which Plaintiffs contend constituted an offer and Plaintiffs' (and the putative class members') acceptance of that offer by purchasing plane tickets. The Court finds that the breach of contract claim is not preempted by the Act.

With respect to the intentional misrepresentation, UCL, CLRA, and unjust enrichment claims, Plaintiffs' argument that they are based on Defendant's "self-imposed undertakings" is unpersuasive. *Wolens* itself held that the use of Illinois consumer law to challenge an airline's devaluation of frequent flyer earned miles was preempted by the Act, but the Act did not preempt the breach of contract claims because "terms and conditions airlines offer and passengers accept are privately ordered obligations" not " 'a State's "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law[.]" (*Wolens, supra*, 513 U.S. at pp. 228-229.)

Here, the UCL and CLRA claims are necessarily premised on violations of state statutory law, namely Business and Professions Code section 17200, et seq. and Civil Code section 1750. Although the laws on which Plaintiffs' claims are based do not explicitly purport to regulate airline rates, routes, or services, Plaintiffs do not contend that their non-contract claims do not relate to these areas. Additionally, the Act's "preemption provision applies not 'only to legislation enacted by a state legislature and regulations issued by a state administrative agency,' but also to 'state common-law rules.' [Citation.]" (*SwiftAir, LLC v. Southwest Airlines Co.* (2022) 77 Cal.App.5th 46, 54 (*SwiftAir*), quoting *Northwest, Inc. v. Ginsberg* (2014) 572 U.S. 273, 281.) Further, courts have held that similar claims are preempted by the Act. (See *People ex rel. Harris v. Delta Air Lines, Inc.* (2016) 247 Cal.App.4th 884, 888 [UCL claim brought by State preempted by the Act]; *Shrem v. Southwest Airlines Co.* (N.D.Cal. Aug. 8, 2016, No. 15-cv-04567-HSG) 2016 U.S.Dist.LEXIS 104297, at *11 [unjust enrichment claim preempted]; *SwiftAir, supra*, 77 Cal.App.5th at p. 50 [fraud

claims preempted]; *Brownstein v. Am. Airlines* (N.D.Cal. Nov. 7, 2005, No. C-05-3435 JCS) 2005 U.S.Dist.LEXIS 30295, at *14 [CLRA and UCL claims preempted].)

The Court finds that the non-contract claims are preempted by the Act. The demurrer is SUSTAINED as to first through fourth causes of action on the ground that they are preempted by the Act.

B. Remaining Contentions Regarding the Breach of Contract Cause of Action

Defendant also contends that the advertisements Plaintiffs allege form the basis of the contract between themselves and Defendant do not constitute a contract as a matter of law. In general, "advertisements are not typically treated as offers, but merely as invitations to bargain. [Citations.]) There is, however, a fundamental exception to this rule: an advertisement can constitute an offer, and form the basis of a unilateral contract, if it calls for performance of a specific act without further communication and leaves nothing for further negotiation. [Citation.]" (*Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, 455; *Donovan v. Rrl Corp.* (2001) 26 Cal.4th 261, 272 ["certain advertisements have been held to constitute offers where they invite the performance of a specific act without further communication and leave nothing for negotiation."].)

Defendant relies primarily on *Konik v. Time Warner Cable* (C.D.Cal. Dec. 2, 2009, No. CV 07-763 SVW (RZx)) 2009 U.S.Dist.LEXIS 138618, in which the plaintiff asserted that a specific written contract did not govern his relationship with the defendant; rather the defendant made various promises via television advertisements, mailings, and internet postings, which the plaintiff contended constituted an offer. (*Id.*, *10-11.) The plaintiff alleged that he accepted the officer by paying for cable television service. (*Id.*, *11.) The Court held that the language of the statements at issue would not be reasonably understood by consumers to be an offer because they did not contain clear and specific terms and they did not request any response from the customer. (*Id.*, *15-16.)

Here, the FAC provides,

> When Plaintiffs and the Class Members bought airline tickets from Defendant Southwest, they entered into contracts with Defendant Southwest to be provided with certain services including flights on certain terms. Based on Defendant

> Southwest's advertising scheme, as detailed herein, including advertising of the Product as "travel funds" and the advertising of the tickets as imposing "no change fees" and "no cancel fees," material terms of these contracts included that in exchange for monetary payment, Plaintiffs and the Class Members would receive airline tickets that could be changed or cancelled without incurring any fees (and therefore that could be changed or cancelled without having any expiration dates imposed on any "travel funds").

(FAC, ¶ 92.)

The exact terms of the alleged contracts have not been pled in the FAC. Plaintiffs assert that "[i]n an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199.) However, they have not sufficiently pled the material terms of the alleged contracts. The FAC does plead sufficient facts to show a definite offer from Defendant nor what specific act Plaintiffs must complete to accept the offer. Accordingly, the demurrer is SUSTAINED as to the fifth cause of action on the ground of failure to state a claim.

C. Leave to Amend

" 'Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. [Citation.] . . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "Plaintiffs have the burden to show how they could further amend their pleadings to cure the defects. [Citation.]" (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 411.) Here, Plaintiffs do not explain how they could amend the FAC to cure the defect discussed above.

With respect to the first through fourth causes of action, the Court does not see how the FAC could be amended to cure the preemption issue. Accordingly, leave to amend is denied as to those causes of action. (See *People ex rel. Harris v. Delta Air Lines, Inc.*, *supra*, 247 Cal.App.4th at pp. 907-908.) With respect to the fifth cause of action (breach of contract), the Court has found that the claim has not been preempted but that Plaintiffs have failed to sufficiently allege the material terms of the contracts they allegedly entered into with

Defendant. The Court finds that leave to amend would not be futile. Accordingly, leave to amend is granted with respect to the fifth cause of action.

IX. CONCLUSION

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the first through fourth causes of action. The demurrer is SUSTAINED WITH 10 DAYS' LEAVE TO AMEND as to the fifth cause of action.

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: Flores v. ACCO Engineered Systems, Inc. (Included in Acco Wage and Hour Cases, JCCP5172, Santa Clara)
Case No.: 20CV365252

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Calendar Line 6

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 September 20, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

Plaintiff Alorica Inc. ("Plaintiff") brings this action for breach of contract and fraud against defendant Fortinet, Inc. ("Defendant"). The background of these proceedings is summarized in the court's *Order Re: Motions to Seal; Discovery Motions* filed on August 14, 2023 (Hon. Zayner) and is not repeated here. Court records show a trial conference scheduled for October 11, 2023, and a jury trial scheduled to begin October 16, 2023. Before the court is Defendant's motion for (1) an order compelling Plaintiff to withdraw its request to claw back three documents, ALORICA-01860037, ALORICA-01902906, ALORICA-01866965 (the "Clawed Back Documents"); (2) a finding that Plaintiff has waived its right to claw back testimony on the Clawed Back Documents; and (3) any further relief deemed appropriate by the court. Also before the court are Plaintiff's two motions to seal filed with respect to Defendant's pleadings for the instant motion.

At the outset of discovery in this matter, the parties reached a stipulation regarding the production of electronically stored information ("ESI"), agreeing that "the production of privileged or otherwise protected ESI in this action is not a waiver of such privilege or protection," and further that "the procedure for returning or destroying any such privileged or otherwise protected ESI shall be the same as provided for under Code of Civil Procedure Section 2031.285." (Declaration of Arjun Sivakumar filed on September 7, 2023, ¶ 4, Ex. 1, p. 4:16-20 ["Sivakumar Decl."].) "In one of its ESI productions, Alorica inadvertently produced the three documents which are at issue in this Motion, which are spreadsheets containing a line item from Alorica's legal department that contains a prediction of the amount of a potential settlement of this action that was generated at some point in 2019." (*Id.*, ¶ 5.) "Alorica clawed back the documents as privileged and re-served them with that line-item redacted." (*Ibid.*)

On May 23-24, 2023, Defendant took the deposition of Plaintiff's Chief Financial Officer, Max Schwendner. (Declaration of Lindsay Cooper filed on August 23, 2023, ¶ 2 ("Cooper Decl.").) Defendant questioned Mr. Schwendner extensively about the three Clawed Back Documents during the deposition. (*Id.*, ¶ 5.) Almost a month after Mr. Schwender's deposition, Plaintiff asserted its claim regarding the Clawed Back Documents, and produced redacted versions where the discussion of "Fortinet Settlement of Lawsuit" is redacted. (*Ibid.*) The parties met and conferred on the issue of the claw back claim both before and after the informal discovery conference ("IDC") that took place on August 18, 2023, but they were unable to reach an agreement to resolve the issue. (*Id.*, ¶¶ 8-11.)

II. 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.)

Where some material within a document warrants sealing, but other material does not, the document should be edited and 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 of the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

B. Plaintiff's Motion to Seal Portions of Defendant's Motion to Compel

Plaintiff seeks to seal Exhibits 1 and 2 to the Declaration of Lindsay Cooper in Support of Fortinet, Inc.'s Motion to Compel, filed on August 23, 2023. These documents consist of deposition testimony relating to Plaintiff's confidential company information. (Declaration of Arjun Sivakumar, ¶ 4.) This information is not publicly available, and its disclosure could harm Plaintiff. (*Ibid.*) Additionally, the materials have been designated as "confidential" or "highly confidential" under parties' protective order. (*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 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 Reply

Plaintiff seeks to seal Fortinet's Reply in Support of its Motion to Compel, filed on September 13, 2023, at page and line numbers 1:4; 1:12; 1:15-17; 1:22; 1:25; 3:11-25; 4:13; 4:15; 4:18-20; 5:8-9; 7 (fn. 7). Plaintiff also seeks to seal Exhibits 1-6 to the Declaration of

Lindsay Cooper in Support of Fortinet, Inc.'s Reply, filed on September 13, 2023. These documents contain deposition excerpts and spreadsheets relating to Plaintiff's confidential company information. (Declaration of Arjun Sivakumar, ¶ 4.) This information is not publicly available, and its disclosure could harm Plaintiff. (*Ibid.*) Additionally, the materials have been designated as "confidential" or "highly confidential" under parties' protective order. (*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 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.

III. MOTION TO COMPEL

A. Legal Standard

Defendant moves the court pursuant to section 2031.285 of the Code of Civil Procedure[3], which provides in relevant part as follows: "(a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim. … [¶] … (d) (1) If the receiving party contests the legitimacy of the claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal." (Code Civ. Proc., § 2031.285, subds. (a), (d)(1).) Thus, section 2031.285 allows a party to make a so-called "claw back" claim and gives the court authority to determine the legitimacy of such a claim. By enacting the statute,

[3] Further unspecified statutory references are to the Code of Civil Procedure.

the Legislature codified the rule, "that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." (*Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 900.)

"In the attorney-client context, a confidential communication is 'information between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.' (Evid. Code, § 952)" (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 222 [internal footnote omitted] (*Roush*).) "Such confidential communications are privileged unless the client discloses a significant part of the communication or consents to its disclosure by someone else." (*Ibid.*, citing Evid. Code, § 912, subd. (a).)[4]

"Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege—by failing to assert the protection, by tendering certain issues, and by conduct

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[4] Evidence Code section 912 reads in pertinent part: "(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) … is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

"(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), … a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. …

"(c) A disclosure that is itself privileged is not a waiver of any privilege.

"(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), … when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer … was consulted, is not a waiver of the privilege."

inconsistent with claiming the protection." (*Roush, supra*, 150 Cal.App.4th at p. 222 [quoting and citing *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239].)

B. Plaintiff's Clawback Claim

1. *Procedural Issues*

As a preliminary matter, Plaintiff contends Defendant's motion is procedurally defective because Defendant did not initially submit the Clawed Back Documents themselves to the court and the deadline to do so has passed. (Opp., pp. 4.) Section 2031.285, subdivision (d)(1) provides: "If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal."

Here, the court finds no merit to the argument that Defendant's motion fails to comply with procedural requirements of the statute. Plaintiff does not set forth facts establishing that the motion is impermissibly tardy. The issue of the Clawed Back Documents was brought to the court's attention at least by the IDC on August 18, 2023. Plaintiff cites to no authority indicating that the court may not hear a motion to compel under Code of Civil Procedure section 2031.285 that is filed outside of the statutory deadline. Further, while Plaintiff asserts that Defendant is required to submit the documents in question to the court, the language of the statute requires it to present the "information" to the court. (Code Civ. Proc., § 2031.285, subd. (d)(1).) The information in question is not reasonably disputed and is readily ascertainable by the Defendant's initial moving papers in support of this motion. Moreover, even if strict compliance with the statute requires submission of the actual documents in question to the court (which the court is not convinced it does), Defendant has so complied through its reply declaration lodging the spreadsheets in question confidentially with court. (See Declaration of Lindsay Cooper in support of Fortinet's reply in support of its motion to compel, filed on September 13, 2023.)

Therefore, the court finds Plaintiff's contention of procedural defects to be without merit.

2. *Privilege or Protection*

Defendant contends Plaintiff should withdraw its claw back claim because the spreadsheets in question are not privileged. (Mot., pp. 3-4.) In opposition, Plaintiff argues the documents are protected by the attorney-client privilege and work product doctrine. (Opp., pp. 4-5.)

"Under the Evidence Code, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer. Confidential communication' is defined as including a legal opinion formed and the advice given by the lawyer in the course of that [attorney-client] relationship." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371 (*Roberts*) [internal quotation marks and citations omitted].) "[T]he privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. [Citations.]" (*Ibid.*) "The attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 734.) The privilege "does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice. [Citations.] For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Id.*, p. 735.)

"The attorney work product doctrine is codified in section 2018.010 et seq. of the Code of Civil Procedure." [5] (*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033 (*City of Petaluma*).) "The work product rule in California creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal

[5] Section 2018.030 provides: (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

theories." (*Ibid.*) "The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation." (*Laguna Beach County Water Dist. v. Superior Court* (2004) 124 Cal.App.4th 1453, 1459 [internal quotation marks and citations omitted].)

Here, the portions of the Clawed Back Documents that reflect an estimated settlement value in relation to this action appear to reflect confidential attorney-client communications and information protected by the work product doctrine. The values of the spreadsheet cells in question should be considered privileged because they are very likely the result of "legal opinion formed and advice given" in the course of the attorney-client relationship and in "anticipation of litigation." (*Roberts, supra*, 5 Cal.4th at p. 371.) The work product doctrine similarly applies because the portions of the writings in question reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." (Code Civ. Proc., § 2018.030, subd. (a).)

Defendant relies upon *In re Perkins' Estate* (1925) 195 Cal. 699, 710, for the proposition that the communications were not privileged because they were "in the nature of business rather than legal advice." (Mot., p. 4:4-5.) However, the authority cited is distinguishable because, in that case, there was "no testimony that [the attorney] was retained" in his legal capacity at any time by the party claiming the attorney-client privilege. (*In re Perkins' Estate, supra*, 195 Cal. at p. 710.) In this case, by contrast, Plaintiff establishes an attorney-client relationship with its declaration stating the Clawed Back Documents contain "a line item from Alorica's legal department that contains a prediction of the amount of a potential settlement of this action...." (Sivakumar Decl., ¶ 5.) Thus, the court finds that Plaintiff has made a colorable claim that the Clawed Back Documents contain information that is protected by the attorney-client privilege or work product doctrine.

3. *Waiver*

Defendant argues that even if some information contained in the Clawed Back Documents is subject to a valid claim of privilege or protection, Plaintiff nevertheless waived any such claim by sending at least one of the documents to a non-lawyer third party and by failing to raise any objection during Mr. Schwendner's deposition. (Mot., p. 4-5.) In

opposition, Plaintiff contends that sending the information to consultant does operate as a waiver and that it is not seeking to claw back the deposition testimony. (Opp., pp. 6-7.)

As discussed above, confidential communications are privileged "unless the client discloses a significant part of the communication or consents to its disclosure by someone else." (*Roush*, *supra*, 150 Cal.App.4th at p. 222, citing Evid. Code, § 912, subd. (a) [see Order, fn. 2].)

Waiver of the attorney-client privilege and the work product doctrine is found by "conduct inconsistent with claiming the protection" such as by "failing to assert the protection." (*Id.*, [quoting and citing *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239].) Specifically in the context of oral depositions, section 2025.460, subdivision (a) provides: "The protection of information from discovery on the ground that it is privileged or that it is protected work product under Chapter 4 (commencing with Section 2018.010) is waived unless a specific objection to its disclosure it timely made during the deposition."

Here, in support of its position that Plaintiff waived the privilege or protection, Defendant presents excerpts of the transcript of the deposition of Mr. Schwendner. (Cooper Decl., filed August 23, 2023, Exs. 1-2.) The court has carefully reviewed these transcript excerpts wherein Mr. Schwendner is questioned about the Clawed Back Documents and specifically about the estimated settlement values that Plaintiff claims is protected from discovery. Throughout the questioning relating to the Clawed Back Documents, Plaintiff's counsel interposes numerous objections asserting several different grounds, such as "vague and ambiguous," "lacks foundation," "calls for speculation," and "the document speaks for itself." (*Ibid.*) However, at no point does Plaintiff's counsel raise a specific objection to the disclosure of the estimated settlement information on the ground that it is privileged or that it is protected work product. Such a failure is clearly "conduct inconsistent" with claiming the privilege and protection. (*Roush*, *supra*, 150 Cal.App.4th at p. 222). Further, by the plain language of section 2025.460, subdivision (a), Plaintiff has waived the attorney-client privilege and word product protection as to that information by failing to specifically object "during the deposition."

Plaintiff does not dispute these points in opposition, and its focus on disclosures other than during the deposition does nothing to refute that a waiver occurred during the deposition. Similarly, while Plaintiff attempts to draw a distinction between the Clawed Back Documents and the deposition testimony about those documents, for purposes of this motion, the import of the deposition testimony discussed above is not whether such testimony is itself admissible, but rather whether it operates as a waiver of the protections claimed by Plaintiff. The court finds that it does.

Thus, the court finds Plaintiff's claw back claim as to ALORICA-01860037, ALORICA-01902906, ALORICA-01866965 to be without merit, and Defendant need not return the documents in question to Plaintiff. To the extent this constitutes the relief sought by Defendant's motion, the motion is GRANTED.

The admissibility of the subject documents and/or any testimony about them is not before the court at this time and are issues better suited to motions in limine. Accordingly, the balance of Defendant's motion is DENIED.

The prevailing party shall prepare the order per California Rules of Court, rule 3.1312.

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Calendar Line 7

Case Name: Guzik Technical Enterprises v. Keysight Technologies, Inc.
Case No.: 19CV355879

Continued by Court to October 4, 2023 at 1:30 p.m.

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Calendar Line 8

Case Name: Kobayashi v. Dfinity USA Research LLC, et al.
Case No.: 23CV415981

Unopposed motions for admission *pro hac vice* are GRANTED. Court will sign proposed orders. No appearance necessary.

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Calendar Line 9

Case Name:
Case No.:

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Calendar Line 10

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Calendar Line 11

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