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

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LAW AND MOTION TENTATIVE RULINGS
[DATE: NOVEMBER 13, 2024 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	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 2	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 3	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 4	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 5	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 6	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 7	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
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LAW AND MOTION TENTATIVE RULINGS

LINE 9	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 1 for tentative ruling.
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Lines 1 – 9

Case Name: Sagemcom Broadband SAS v. DivX, LLC, et al.
Case No.: 23CV424785

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 13, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Background

This case arises from disputes regarding an intellectual property license agreement.

A. Plaintiff Sagemcom's Allegations

On August 30, 2024, Plaintiff Sagemcom Broadband SAS ("Sagemcom") filed its operative First Amended Complaint ("FAC") against Defendants DivX, LLC and KPMG LLP.

According to the FAC's allegations, Sagemcom entered a contractual relationship in 2007 with DivX. Inc., which later became DivX, LLP (collectively, "Old DivX"), relating to Old DivX's video software. (FAC, ¶ 1.) Old DivX allegedly amended the license agreement (the "Agreement") to allow Plaintiff to purchase a perpetual license on Old DivX's software. (*Id.* at ¶ 2.)

Old DivX eventually sold its assets to Defendant DivX, LLC (also referred to herein as "New DivX"). (*Id.* at ¶ 4.) On June 30, 2022, New DivX sent Sagemcom a letter asserting that it was a party to the license agreement and demanding an audit of Sagemcom's records based on a provision in the agreement. (*Id.* at ¶ 5.) New DivX engaged Defendant KPMG LLP ("KPMG") to conduct the audit. (*Id.* at 6.)

Both New DivX and KPMG represented that KPMG would be performing an audit of Sagemcom. (FAC, ¶¶ 5-6.) KPMG later revealed that New DivX engaged KPMG as an advisor, not an independent auditor, to conduct a contract compliance review of Sagemcom on behalf of New DivX. (*Id.* at ¶ 6.) Sagemcom alleges that New DivX and KPMG's false representations about the nature of KPMG's activity induced Sagemcom to participate and share confidential information about its business and its products – information that Sagemcom had no obligation to share and would not have otherwise agreed to provide. (*Id.* at ¶¶ 6-7.)

KPMG prepared and sent Sagemcom its "preliminary findings." (FAC, ¶ 8.) Sagemcom alleges that there was no basis for these findings and that the findings were inconsistent with

the terms of the expired agreement. (*Ibid.*) KPMG denied any obligation to review, understand, or state what interpretation of the license agreement it applied or what information it relied upon. (*Id.* at ¶¶ 8-9.) Over Sagemcom's repeated objections, KPMG sent its "preliminary findings" to New DivX, sharing Sagemcom's confidential information with New DivX in the process. (*Id.* at ¶ 10.) KPMG also prepared a second set of "preliminary findings" based on erroneous conclusions regarding the expired license agreement, Sagemcom's quarterly reports, and Sagemcom's product components and functionality. (*Id.* at ¶ 12.)

Sagemcom seeks an order declaring that its agreement with DivX expired on June 30, 2014, except for a perpetual license provision and that Sagemcom does not owe any unpaid royalties to New DivX. (FAC, ¶ 18.) Sagemcom also seeks damages for the following: New DivX's and KPMG's alleged misrepresentations regarding the nature of KPMG's involvement; KPMG's alleged breach of its nondisclosure agreement with Sagemcom; New DivX's alleged breach of the covenant of good faith and fair dealing; and KPMG's alleged breach of the covenant of good faith and fair dealing. (*Ibid.*)

Effective December 6, 2007, Sagemcom and DivX entered into a Consumer Electronics License Agreement for Branded Devices (the "Original Agreement"). (FAC, ¶ 31 and Ex. C.[1]) Sagemcom agreed to pay royalties on its cable and satellite set-top boxes that used DivX software. (*Id.* at ¶ 32.) Section 5.7 of the Original Agreement, titled "Audit," allowed DivX to audit Sagemcom's records relating to the Original Agreement upon "reasonable notice and at [a] reasonable time." (*Id.* at ¶ 33.)

Effective January 1, 2011, Sagemcom and DivX entered into a Restated Consumer Electronics License Agreement for Branded Devices (the "Restated Agreement"). (FAC, ¶ 35 and Ex. D.) Among other things, the Restated Agreement created separate royalty rates for two different sets of DivX software: (1) the previously licensed "DivX Home Theater Profile" and (2) a new "DivX Plus HD Profile." (*Ibid.*) The Restated Agreement set forth certification requirements, including detailed protocols for a product to be confirmed as "DivX Certified." (*Ibid.*) As before, the Restated Agreement included an audit provision in Section 5.7 allowing

[1] The Exhibits referenced in Sagemcom's FAC, filed August 30, 2024, are attached to Sagemcom's original Complaint, filed under seal on October 16, 2023.

DivX to audit Sagemcom's records relating to the agreement upon "reasonable notice and [a] reasonable time." (*Id.* at ¶ 36.)

On July 1, 2012, Sagemcom and DivX executed an amendment to the Restated Agreement (the "2012 Amendment"). (FAC, ¶ 38 and Ex. E.) The 2012 Amendment extended the renewal term and provided that the Restated Agreement applied to the "DivX Home Theater Profile," the "DivX Plus HD Profile," and the "DivX Plus Streaming Profile." (*Ibid.*)

On September 30, 2013, Sagemcom and DivX agreed to amend the Restated Agreement further to allow Sagemcom to purchase a perpetual license to the "DivX Home Theater Profile" software (the "2013 Amendment"). (FAC, ¶ 41 and Ex. F.) Sagemcom paid a flat fee to continue using the "DivX Home Theater Profile" in perpetuity. (*Ibid.*) The 2013 Amended also included a license to "DivX Plus HD Profile" and the "DivX Plus Streaming Profile" on a per-unit royalty basis for a one-year term. (*Ibid.*) The parties agreed that the 2013 Amended would expire on June 30, 2014, except as to the perpetual license for the "DivX Home Theater Profile" and related surviving terms. (*Id.* at ¶ 42.) After the agreement expired, Sagemcom continued to comply with the perpetual license. (*Id.* ¶¶ 49-52.)

On December 18, 2017, "Old DivX's" parent corporation (NeuLion, Inc.) agreed to sell certain assets to an affiliate of Fortress Investment Group called "DivX CF Holdings LLC," which was later renamed as "DivX, LLC" (i.e., "New DivX"). (FAC, ¶ 53.)

On June 30, 2022, Defendant "New DivX" (hereinafter, "DivX") set Sagemcom a letter requesting an audit of Sagemcom's records. (FAC, ¶ 55 and Ex. G.) DivX represented that "[t]he purpose of the audit is to confirm that [Sagemcom] is in compliance with the terms and conditions of the Agreement. The audit is part of DivX's regular, ongoing practice of confirming shipment reports it receives from its licensees." (*Id.* at ¶ 56.) DivX represented that the audit would be "performed by an independent Certified Public Accounting firm." (*Id.* at ¶ 57.)

On July 11, 2022, a Director of KPMG contacted Sagemcom by email, referring to DivX's June 30, 2022, letter. (FAC, ¶ 58.) KMPG was aware of DivX's representation that the audit would be performed by an independent Certified Public Accounting ("CPA") firm. (*Id.* at ¶ 59.) Relying on the representations from DivX and KPMG, Sagemcom agreed to participate

in DivX's requested audit under Section 5.7 of the Agreement. (FAC, ¶ 61.) On October 27, 2022, KPMG executed a Contract Compliance Services Mutual Non-Disclosure Agreement (the "NDA"). (*Id*. at ¶ 63 and Ex. I.) The NDA stated that it is "solely for the purpose of confirming certain undertaking provided in the Audit section of the License Agreements …; it does not modify the terms of the License Agreements in any way." (*Id.* at ¶ 64.)

On May 15, 2023, KPMG issued it "preliminary findings," which purported to conclude that Sagemcom had underreported royalty bearing products and owed DivX a sum substantially larger that what Sagemcom paid for its perpetual license. (FAC, ¶ 73.) On July 7, 2023, after repeated letters and calls from Sagemcom, KPMG admitted that Sagemcom had provided information that may alter KPMG's "preliminary findings." (*Id.* at ¶ 82.) KPMG conducted an on-site inspection at Sagemcom from July 24 to July 28, 2023. (*Id.* at ¶¶ 84-96.)

On September 22, 2023, KPMG sent a new set of "preliminary findings" to Sagemcom. (FAC, ¶ 101.) Sagemcom expressed objections to the new findings. (*Id.* at ¶ 103.) On September 27, 2023, KPMG revealed for the first time that it was not in fact performing an "audit" and that Sagemcom was operating under "a misconception" that KMPG was performing an "audit" when it was in fact performing "a contract compliance review of Sagemcom on behalf of DivX." (*Id.* at ¶ 104 and Ex. S.) KPMG also stated that it was not required to be "independent" because, under the AICPA [American Institute of Certified Public Accountants] Consulting Standards, it only had a duty of care towards its client, "New" DivX. (*Id.* at ¶ 105.) After further correspondence, KPMG sent the new "preliminary findings" to DivX on or after September 29, 2023. (*Id.* at ¶ 110.)

KMPG was required to comply with, and failed to comply with, the AICPA Code of Professional Conduct, the AICPA Statement on Standards for Forensic Service, the AICPA Statement on Standards for Consulting Services, the AICPA Statements on Auditing Standards, and the AICPA Statement on Standards for Attestation Engagements, including by failing to maintain integrity and objectivity, failing to exercise due professional care, and failing to serve as an independent auditor. (FAC, ¶¶ 112-125.)

Based on the preceding allegations, plaintiff Sagemcom's FAC sets forth the following causes of action: (1) request for declaratory judgment (DivX); (2) fraud (against DivX and

KPMG); (3) breach of contract (against KPMG); (4) breach of implied covenant of good faith and fair dealing (against New DivX); and (5) breach of implied covenant of good faith and fair dealing (against KPMG).

B. Cross-Complainant DivX's Allegations

On July 26, 2024, defendant and cross-complainant DivX, LLC filed its operative First Amended Cross-Complaint ("FACC") against plaintiff and cross-defendant Sagemcom.

The court observes that the FACC refers to two different entities as "DivX." The FACC begins as follows: "Cross-Complainant DivX, LLC ('DivX' or 'Cross-Complainant') brings the first amended cross-complaint … against [Sagemcom]… ." (FACC, p. 2:1-3.) The FACC later states: "DivX is the successor-in-interest to DivX, LLC, …. Herein, the term 'DivX' also refers to DivX, LLC, DivX's predecessor-in-interest, with respect to facts and events occurring prior to the formation of DivX." (FACC, ¶ 8.)

According to the allegations of the FACC, DivX was founded in 2000 and developed digital video playback technology. (FACC, ¶ 1.) DivX licensed its technology widely, including to Sagemcom, a cable set top box manufacturer. (*Id.* at ¶ 4.) DivX and Sagemcom memorialized their agreement in a Restated Consumer License Agreement for Branded Devices, dated January 1, 2011, and amended on July 1, 2012, and July 1, 2013 (collectively, the "Agreement"). (*Ibid.*) [*1030 motion states original agreement is dated 11/6/07]

Under the Agreement, Sagemcom obtained the right to sell products using certain DivX profiles as long as Sagemcom fulfilled certain obligations. (FACC, ¶ 5.) DivX performed all of its obligations under the Agreement. (*Id.* at ¶ 6.) Sagemcom secretly and repeatedly breached the Agreement by shipping products with DivX capabilities but without paying for the products to be DivX certified, as required by the Agreement. (*Ibid*.) In order to hide its actions and avoid paying royalties, Sagemcom incorrectly certified its products, sent false royalty reports to DivX, and actively blocked a 2022-23 audit conducted by KPMG. (*Ibid.*) Sagemcom engaged in a calculated deception by selling products incorporating DivX functionality without paying for them. (*Ibid.*)

Based on the forgoing allegations, cross-complainant DivX's FACC sets forth the following causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) quantum meruit.

C. Procedural History

On October 16, 2023, Plaintiff Sagemcom initiated this matter by filing a Complaint against Defendants DivX and KPMG, setting forth causes of action for: (1) declaratory judgment (against DivX); (2) fraud (against DivX and KPMG); (3) unfair competition (against DivX and KPMG); (4) breach of contract (against DivX); (5) breach of contract (against KPMG); (6) breach of implied covenant of good faith and fair dealing (against DivX); (7) breach of implied covenant of good faith and fair dealing (against KPMG).

On May 31, 2024, DivX filed a Cross-Complaint against Sagemcom, setting forth a sole cause of action for breach of contract. The same day, DivX and KMPG both filed demurrers to Sagemcom's Complaint. Also on May 31, 2024, DivX filed a motion for order requiring Sagemcom to file an undertaking pursuant to Code of Civil Procedure section 1030 (the "Section 1030 Motion").

On July 1, 2024, Sagemcom filed a demurrer to DivX's Cross-Complaint. On July 26, 2024, DivX its operative FACC against Sagemcom, setting forth causes of action for: (1) breach of contract; (2) breach of the implied covenant of good faith fair dealing; and (3) quantum meruit. On August 27, 2024, Sagemcom filed a demurrer to DivX's FACC.

On August 30, 2024, Sagemcom filed its operative FAC, setting forth the following causes of action: (1) request for declaratory judgment (against New DivX); (2) fraud (against New DivX and KPMG); (3) breach of contract (against KPMG); (4) breach of implied covenant of good faith and fair dealing (against New DivX); and (5) breach of implied covenant of good faith and fair dealing (against KPMG). On October 1, 2024, DivX and KPMG filed demurrers to Sagemcom's FAC.

Now before the court are the following: (1) DivX's demurrer to Sagemcom's FAC; (2) KPMG's demurrer to Sagemcom's FAC; (3) Sagemcom's demurrer to DivX's FACC; (4) DivX's Section 1030 Motion; and (5) various related motions to seal. The demurrers and the Section 1030 Motion are opposed. The motions to seal are unopposed.

II. Legal Standard on Demurrer

A demurrer may be utilized by the 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. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) As relevant here, "[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 more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading. … (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

The court treats a demurrer as "admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccini*), 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 possibility 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, internal quotations and citations omitted.) 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.)

III. DivX's Demurrer to Sagemcom's FAC

DivX demurs to Sagemcom's FAC on the ground that the FAC fails to sufficient facts to state the second and fourth causes of action. (DivX's Notice of Demurrer and Demurrer, p. i:8-10; Code Civ. Proc., § 430.10, subd. (e).)

A. Second Cause of Action

The FAC's second cause of action is for fraud. "The elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 (*Engalla*), punctuation and citations omitted.) "All of

these elements must be present if actionable fraud is to be found; one element absent is fatal to recovery." (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828.)

"Fraud actions … are subject to strict requirements of particularity in pleading. … Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*) ["In California, fraud must plead specifically; general and conclusory allegations do not suffice. [Citations.]"]; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

"The pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518.) In *Lazar*, the California Supreme Court stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Lazar, supra*, 12 Cal.4th 631, 645.)

DivX contends that the FAC's second cause of action is subject to demurrer because it fails to plead: misrepresentation, inducement, justifiable reliance, and harm. (DivX's Memorandum of Points and Authorities ("DivX's MPA"), pp. 6:2-11:2.)

1. *Misrepresentation*

DivX initially argues that the FAC fails to identify any misrepresentation. (DivX's MPA, pp. 6:8-8:27.) DivX contends that the FAC's allegations of misrepresentation are not actionable because they are inconsistent with documents incorporated into the FAC. (*Id.* at p. 6:13-15.) For example, DivX points to the FAC's allegation that "New DivX's intentional misrepresentations to Sagemcom began with its June 30, 2022 'Notice of Audit Pursuant to Agreement.'" (*Id.* at pp. 6:25-7:1; FAC, ¶ 134 and Ex. G, at 107.) According to DivX, the audit notice itself "plainly contradicts Sagemcom's allegation" because it explains that the purpose of the audit, pursuant to Section 5.7 of the Agreement, is to confirm that Sagemcom is in compliance with the terms of the Agreement." (DivX's MPA, p. 7:2-5.) DivX's asserts that the terms of the NDA between Sagemcom and KPMG provide further evidence that Sagemcom

knew DivX appointed KPMG to provide contract compliance services by reviewing Sagemcom's book and records as provided in the license agreements. (*Id.* at p. 7:7-12.)

DivX contends that the FAC's allegations that DivX hid its intent regarding the audit should be disregarded "because the documentary evidence reflects that such intent was explicitly stated to Sagemcom from the start, including in an agreement Sagemcom signed." (DivX's MPA, p. 7:12-19.) DivX directs the court to authority in support of its position that the contents an incorporated document takes precedence over any inconsistent or contrary allegations in a pleading, including *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 290; *Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1409; and *Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607 (*Westamerica*). (DivX's MPA, pp. 5:19-25, 7:12-19.)

In opposition, Sagemcom argues that the FAC sufficiently alleges ongoing misrepresentation by DivX that lasted for over a year and remained uncorrected until after KPMG completed its audit. (Sagemcom's Opposition, pp. 7:18-8:4.) Sagemcom further contends that DivX's demurrer raises no issue regarding the particularity of the allegations of misrepresentation, and instead uses hindsight reasoning in arguing that Sagemcom should have known all along that DivX's representations regarding the audit were false. (*Id.* at p. 8:4-9:7.) Sagemcom persuasively argues that DivX's various characterizations of KPMG's activity as an "audit" supports the FAC's allegation that DivX misrepresented the nature of KPMG's involvement. (*Id.* at p. 8:12-15, fn. 5.)

Sagemcom further contends that DivX's arguments are focused upon factual disputes going to the truth of FAC's misrepresentation allegations, rather than upon the sufficiency of the allegations for purposes of the court's determination on demurrer. (Sagemcom's Opposition, p. 9: 8-16; *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879 (*Ramsden*) ["On demurrer the allegations of the complaint are assumed to be true. A demurrer is simply not the appropriate procedure for determining the truth of disputed facts."])

Here, the court is not persuaded that the FAC's allegations of misrepresentation by DivX concerning KPMG's audit activities are so inconsistent with its supporting documents that the fraud claim fails as matter of law. The FAC alleges that DivX initially characterized

KPMG activity as an independent audit, giving the impression of objectivity to gain Sagemcom's cooperation. (FAC, ¶¶ 134-136.) This allegation is supported by the content of DivX's June 30, 2022 letter, stating:

> The purpose of the audit is to confirm that Licensee is in compliance with the terms and conditions of the Agreement. This audit is part of DivX's regular, ongoing practice of confirming shipment reports it receives from its licensees. [¶] This audit will be conducted at your facilities during regular business and will be performed an independent Certified Public Accountant.

(FAC, Ex. G at p. 107.)

Resolution of the Parties' respective interpretations of the language in the documents incorporated into the FAC requires a factual inquiry beyond the scope of demurrer. The *Westamerica* decision relied upon by DivX is distinguishable because, there, the plaintiff's allegation that it faced conflicting escrow instructions was contradicted by the clear statutory terms of one document (the escrow agreement itself), in which the appellate court found "no lack of clarity." (*Ramsden, supra,* 201 Cal.App.4th at p. 608-609.) In this case, the FAC incorporates 24 documents in support of its allegations, and the Parties dispute the meaning of the Section 5.7 audit provision as well as whether KMPG's involvement went beyond the scope of that provision and the representations regarding the same.

Furthermore, while DivX correctly asserts that a heightened pleading standard applies to allegations of fraud, it makes no substantive argument that it is unable to determine the nature of the misrepresentation allegations against it. Therefore, the court finds that the FAC sufficiently alleges the misrepresentation element.

2. *Inducement*

DivX contends that Sagemcom makes no plausible allegation that DivX intended or had any reason to fraudulently induce Sagemcom to cooperating with KPMG as DivX's appointed auditor. (DivX's MPA, p. 9:1-7.) DivX further argues that it could not have induced Sagemcom's cooperation when Sagemcom was already required to cooperate under the Agreement. (*Ibid.*)

In opposition, Sagemcom argues that the FAC sufficiently alleges that DivX intended to induce Sagemcom's reliance upon its misrepresentations in order to gain access to Sagemcom's confidential business information to support an allegedly baseless royalty

demand. (Sagemcom's Opposition, pp. 9:18-10:4; FAC, ¶¶ 144-152.) Sagemcom further argues that if it had known that it was not an audit, it would have had no obligation to and would have participated in KMPG's "contract compliance review." (*Id.* at p. 10:4-17.)

Here, the court finds that the FAC sufficiently alleges DivX's intent to defraud and induce reliance upon DivX's alleged misrepresentations. Admitting the truth of the pleaded facts for purposes of demurrer, the court finds that the FAC sufficiently pleads facts supporting this element.

3. *Justifiable Reliance*

DivX next argues that Sagemcom provides no plausible claim for justifiable reliance. (DivX's MPA, pp. 9:8-10:20.) DivX contends that the word "audit" is a well-known term, and that neither DivX nor KMPG ever represented that the audit would be conducted under particular AICPA standards. (*Id.* at p. 9:11-19.) Although DivX admits that KPMG did mention the AICPA in reference to DivX's engagement of KPMG, this letter occurred "after-the-fact" and was not reference to the relationship between DivX and Sagemcom under the Agreement. (*Id.* at p. 9:19-25.) DivX emphasizes that the Agreement itself does not mention that the audit would be subject to AICPA standards and gives DivX the sole right to appoint auditors. (*Id.* at pp. 9:25-10:4.)

DivX argues that Sagemcom is "unable to demonstrate justifiable reliance as a matter of law" because Section 5.7 of the Agreement permits DivX alone to choose the auditors, with no requirement of neutrality, and because Sagemcom (in a May 31, 2023, letter to KPMG) repeatedly asserted that KPMG had a lack of independence but continued to provide KPMG with information and access. (DivX's MPA, p. 10:5-20.)

According to Sagemcom, the FAC alleges that Sagemcom justifiably relied upon on many representations by DivX, including that KMPG was "independent," that KPMG was a CPA, and that KPMG was conducting an "audit" limited to "records relating to the Agreement." (Sagemcom's Opposition, p. 10:19-23; FAC, ¶¶ 55-57, 112-125.) Sagemcom argues it alleged that DivX is bound to KPMG's misrepresentations under a conspiracy theory. (*Id.* at p. 10:23-24; FAC, ¶ 121.) Sagemcom again contends that DivX is inappropriately arguing the facts rather than the sufficiency of the allegations. (*Id.* at ¶ 10:24-26.)

Here, the courts finds that the FAC adequately alleges justifiable reliance. DivX offers no authority in support of its position that the existence of the Section 5.7 audit provision giving DivX the right conduct an audit necessarily precludes the possibility that DivX could make misrepresentations regarding the purported audit or that Sagemcom could justifiably rely upon such misrepresentations. The FAC sufficiently alleges this element for purposes of demurrer.

4. *Harm*

Lastly, DivX contends that the FAC's second cause of action fails because it does not plausibly allege any resulting damage to its interests. (DivX's MPA, pp. 10:21-11:2.) In opposition, Sagemcom points to the FAC's allegations that, as proximate result of DivX's and KPMG misrepresentations, "Sagemcom has suffered reputational harm, substantial business disruption, incurred substantial use of employee time and company resources and attorneys' fees and costs, as well as additional damages in the amount to be determined." (Sagemcom's Opposition, p. 12:24-27; FAC, ¶ 152.) In addition, the FAC sufficienlty ties the alleged harm to the allegations of DivX's misrepresentations. (FAC, ¶¶ 149-152; *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1064 [a fraud plaintiff must allege that damages were caused by the actions taken in reliance on the defendant's misrepresentations].)

Accordingly, the court finds that the FAC sufficiently alleges the harm element.

In conclusion with respect to the second cause of action, the court finds that the FAC sufficiently pleads facts supporting the elements of the fraud claim against DivX, and further, that any disputes regarding the truth or interpretation of the facts alleged are not suitable for resolution at the demurrer stage on this cause of action.

Accordingly, DivX's Demurrer to the FAC's second cause of action is OVERRULED.

B. Fourth Cause of Action

The FAC's fourth cause of action is for breach of the implied covenant good faith and fair dealing. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*).) "The covenant thus cannot 'be endowed with the existence

independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.)

A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 528 (*Howard*); see also *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54.) To recover in tort for breach of the implied covenant, the defendant must "have acted unreasonably or without proper cause." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (*Careau*).)

DivX contends its exercise of its contractual rights under the Agreement does not amount to a breach of the implied covenant. (DivX's MPA, p. 11:15-21.) DivX relies upon *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 (*Wolf*) for the proposition that the implied covenant of good faith and fair dealing "will not be read into a contract to prohibit a party from doing that which is expressly permitted in the agreement itself." (*Ibid.*) DivX argues that because it was expressly given the right to have an audit conducted by its appointed auditors, exercising that right cannot be a breach of the implied covenant. (*Ibid.*)

DivX again argues that the FAC's allegations regarding false representations can be disregarded because they conflict with documents incorporated into the FAC. (DivX's MPA, pp. 11:22-12:5.) DivX further argues that Sagemcom cannot fabricate wronging by DivX based on AICPA industry standards that are not mentioned in the Agreement. (*Id.* at p. 12:6-15.) DivX maintains that it has prevented Sagemcom from receiving the benefits of the perpetual license of the Home Theater profile, and that DivX only seeks compensation for Sagemcom's use of the DivX Plus HD profile. (*Id.* at p. 12:16-20.) DivX contends that the Agreement contains none of the restrictions in the scope of the audit that Sagemcom seeks to impose. (*Id.* at pp. 12:21-13:3.)

In opposition, Sagemcom asserts that the FAC alleges a breach of the implied covenant of good faith and fair dealing by misrepresentations that it was engaging in an "independent" audit, instructing KPMG to collect confidential information and conduct tests beyond the scope of the audit, and falsely claiming unpaid royalties. (Sagemcom's Opposition, p. 13:10-15; FAC, ¶¶ 168-172.) Sagemcom argues that an implied covenant claim is appropriate in this case because the audit provision does not specify what it means to conduct an audit in good faith, and that the manner in which DivX exercise its rights under the Agreement were not in good faith. (*Id.* at p. 13:14-26.)

Sagemcom observes that the implied covenant "is read into contracts and functions as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (which not technically transgressing the express covenants) frustrates the other party's right to the benefits of the contract." (*Thrifty Payless, Inc. v. The Americana at Brand LLC* (2013) 218 Cal.App.4th 1230, 1244 (*Thrifty*), emphasis original, internal punctuation and citations omitted.) Sagemcom argues the *Wolf* decision relied upon by DivX is distinguishable because Section 5.7 of the Agreement does not expressly give DivX unfettered discretion regarding the exercise of its right to audit. (Sagemcom's Opposition, pp. 13:27-14:5, fn. 10.)

In *Wolf*, the agreement in question gave defendant Disney "the unlimited discretion to grant (or not grant) to third parties licenses to exploit the Roger Rabbit characters." (*Wolf, supra,* 162 Cal.App.4th at p. 1122.)

> [A]lthough is has been said the implied covenant finds particular application in situations where on party is invested with a discretionary power affecting the rights of another, if the express purpose of the contract is to grant unfettered discretion, and the contract is otherwise supported by adequate consideration, then the conduct is, by definition, within the reasonable expectation of parties can never violate an implied covenant of good faith and fair dealing.

(*Id.* at p. 1120-1121, internal punctuation and citations omitted.) The appellate court in *Wolf* concluded that the trial court did not err by directing a verdict in Disney's favor on the implied covenant claim, stating that "recognizing an implied term that would limit the unfettered discretion given to Disney to license the characters as it saw fit would be at odds with the express terms of the agreement." (*Id.* at p. 1123.)

Here, Section 5.7 of the Agreement provides in pertinent part as follows: "Upon reasonable notice and at reasonable time, [DivX] shall have the right to audit [Sagemcom's] records relating to this Agreement. Licensee shall cooperate fully with [DivX's] appointed auditors." (FAC, Ex. D. at p. 79.) In the court's view, this language does not bestow unfettered discretion upon DivX regarding an audit, but rather states that the timing and notice of the audit must be "reasonable" and that scope of the audit is limited to records relevant to the Agreement. While there is no mention of any AICPA standards, nor any express definition regarding the meaning of "audit" as used in Section 5.7, it is nevertheless reasonable for Sagemcom to argue that the contracting parties intended the audit process to be fair and neutral and that the parties would act in good faith regarding its completion. As such, the FAC's allegations that DivX acted in bad faith and for an improper purpose are sufficient to state a claim for violation of the implied covenant. (See FAC, ¶¶ 168-172; see also *Careau*, *supra*, 222 Cal.App.3d at p. 1395 [to recover for breach of the implied covenant, the defendant must "have acted unreasonably or without proper cause."

Accordingly, DivX's demurrer to the FAC's fourth cause of action is OVERRULED.

IV. KPMG's Demurrer to Sagemcom's FAC

KPMG demurs to Sagemcom's FAC on the ground that the FAC fails to sufficient facts to state the second, third and fifth causes of action. (KPMG's Notice of Demurrer and Demurrer, p. 2:2-9; Code Civ. Proc., § 430.10, subd. (e).)

A. Request for Judicial Notice

In support of its demurrer, KPMG asks the court to take judicial notice of the following ("RJNs"): (1) the contents of Sagemcom's CSR [Corporate Social Responsibility] Report posted on Sagemcom's website; (2) excerpted portions the AICPA's Statements on Auditing Standards; (3) excerpted portions of the AICPA's Standards on Attestation Engagements; (4) excerpted portions of the AICPA's Statement on Standards for Forensic Services.

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code, § 450.) A precondition to judicial notice in either its permissive or mandatory forms is that the mater to be noticed be relevant to the matter at issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th

282, 307.) A court need not take judicial notice of a matter unless it is "necessary, helpful, or relevant." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6.) Evidence Code section 453, subdivision (b), requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter."

The requests for judicial notice are DENIED. The first request concerns a report unrelated to the demurrer and therefore is not necessary, helpful, or relevant. The second, third, and fourth requests consist of selected excerpts of AICPA statements and standards referenced in the FAC. KPMG has not provided the full AICPA materials in question, and even if it had, the court does not consider these materials necessary, helpful, or relevant with respect to the sufficiency of the FAC's allegations against KPMG.

B. Second Cause of Action

The FAC's second cause of action is for fraud. As explained previously, "[t]he elements of fraud that will give rise to a tort action for deceit are: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (*Engalla, supra,* 15 Cal.4th at p. 974, punctuation and citations omitted.)

"In California, fraud must plead specifically; general and conclusory allegations do not suffice. [Citations.]" *Lazar, supra,* 12 Cal.4th at p. 645.) In *Lazar,* the California Supreme Court stated that "this particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Lazar, supra,* 12 Cal.4th 631, 645.)

KPMG initially contends that the FAC does not allege a knowing misrepresentation or non-disclosure by KPMG with fraudulent intent. (KPMG's Memorandum of Points and Authorities ("KMPG's MPA"), pp. 10:7-13:23.) KPMG further contends that the FAC fails to sufficiently allege justifiable reliance. (KPMG's MPA, pp. 13:24-14:23.) Sagemcom argues that the FAC contains detailed allegations of misrepresentation. (Sagemcom's Opposition, pp. 7:16-8:19.)

Here, much as Sagemcom argued in support of its demurrer to the same pleading, KPMG contends that the FAC's allegations of fraud are refuted by the exhibits to the FAC. (*Id.* at pp. 4:11-12, 10:10-11:24.) For the same or similar reasons as discussed above, the court remains unpersuaded the FAC's allegations of misrepresentation by KPMG relating to its audit activities are so inconsistent with its supporting documents there can be no misrepresentation as a matter of law. The FAC alleges that DivX initially characterized KPMG activity as an independent audit, giving the impression of objectivity to gain Sagemcom's cooperation. (FAC, ¶¶ 134-136.) This allegation is supported by the content of DivX's June 30, 2022 letter, stating:

> The purpose of the audit is to confirm that Licensee is in compliance with the terms and conditions of the Agreement. This audit is part of DivX's regular, ongoing practice of confirming shipment reports it receives from its licensees. [¶] This audit will be conducted at your facilities during regular business and will be performed an independent Certified Public Accountant.

(FAC, Ex. G at p. 107.) The FAC further alleges that KPMG was aware of and adopted DivX's representations that KPMG was conducting an audit. (FAC, ¶¶57-59.)

KPMG argues that Sagemcom's "quibbling" with the meaning of the term "audit" is a baseless attempt to avoid the statements in KPMG's communications and the NDA. (KPMG's MPA, p. 11:6-18.) KPMG acknowledges that the term "audit" can have very different meanings but asserts that DivX's and KPMG's use of the word could only have one meaning as a matter of law, based on the exhibits incorporated into the complaint. (*Ibid.*) As stated previously, resolution of the Parties' respective interpretations of the language in the documents incorporated into the FAC requires a factual inquiry beyond the scope of demurrer.

Sustaining the demurrer based on DivX's or KPMG's preferred definitions of words would run counter to the rule of liberal construction in pleading. "Code of Civil Procedure section 452 provides in full: 'In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.' This rule of liberal construction means that the reviewing court draws inferences favorable to the plaintiff, not the defendant. [Citations.]" In light of this rule, and for the reasons discussed above, the court finds that the FAC sufficiently alleges the fraud claim against KPMG.

Accordingly, KPMG's demurrer to the FAC's second cause of action is OVERRULED.

C. Third Cause of Action

The FAC's third cause of action is for breach of contract. "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 (*Richman*); see also CACI, No. 303.)

KPMG initially contends that the FAC fails to state a claim for breach of contract because Sagemcom's disagreements with KPMG's preliminary findings do not amount to breach of the NDA. (KPMG's MPA, pp. 15:1-27.) KPMG further alleges that it was under no obligation to return Sagemcom's information if doing do was required to comply with applicable professional standards and regulations. (*Id.* at p. 16:1-21.) Sagemcom also argues that the FAC does sufficiently allege that KPMG improperly disclosed customer information. (*Id.* at pp. 3:22-17:7.) Finally, KPMG contends that Sagemcom has not alleged any damages. (*Id.* at p. 4:8-16.)

Here, Sagemcom persuasively argues that it has pled the sufficiently pled the elements of the breach of contract claim. (Sagemcom's Opposition, pp. 12:12-14:7.) The FAC alleges that KPMG impermissibly shared with DivX confidential product and shipment information that it could not have reasonably believed was relevant to the perpetual license. (FAC, ¶ 78.) It alleges that KMPG breached the NDA by disclosed proprietary and confidential information to DivX. (*Id.* at ¶¶ 157-158.) The FAC alleges that the NDA required KMPG to return or confidential information upon request and that KPMG failed to do so. (*Id.* at ¶¶ 159, 161.) Finally, the FAC alleges damages, including reputational harm, business disruption and potential liabilities resulting from KPMG's breach. (*Id.* at ¶ 162.) Accepting these allegations as true for purposes of demurrer, the court finds that the FAC sufficiently alleges the elements of the breach of contract claim.

Accordingly, KPMG's demurrer to the FAC's third cause of action is OVERRULED.

D. Fifth Cause of Action

The FAC's fifth cause of action is for breach of the implied covenant of good faith and fair dealing. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz, supra,* 24 Cal.4th at p. 349.) "The covenant thus cannot 'be endowed with the existence independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.) A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard, supra,* 187 Cal.App.4th 498, 528 (*Howard*).) To recover in tort for breach of the implied covenant, the defendant must "have acted unreasonably or without proper cause." (*Careau, supra,* 222 Cal.App.3d at p. 1395.)

KMPG contends that the fifth cause of action fails because its allegations are refuted by exhibits attached to the FAC, and that actions taken prior to the execution of the contract cannot form the basis for a breach of the implied covenant. (KMPG's MPA, p. 17:19-27.) KMPG further argues that the claim is legally deficient because it cannot be based upon conduct expressly permitted by the underlying contract. (*Id.* at p. 18:2-12.)

KPMG's arguments here mirror those in its demurrer to the second cause of action and those made by DivX's in its demurrer to the implied covenant claim against DivX. These arguments depend upon KMPG's contention that the FAC's allegations are refuted by its exhibits, as a matter of law. For the reasons discussed above, the court has rejected this reasoning as applied to the allegations of the FAC.

Accordingly, for the same reasons discussed previously, KMPG's demurrer the FAC's fifth cause of action is OVERRULED.

V. Sagemcom's Demurrer to DivX's FACC

Sagemcom demurs to the FACC's first, second, and third causes of action on the grounds that the court has no jurisdiction of the subject alleged and that the pleading does not

state sufficient facts. (Sagemcom's Notice of Demurrer and Demurrer, p. 1:12-13; Code Civ. Proc., § 430.10, subds. (a) and (e).)

A. First Cause of Action

The FACC's first cause of action is for breach of contract. "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff. (*Richman, supra,* 224 Cal.App.4th at p. 1186; see also CACI, No. 303.)

Sagemcom initially contends that the Amended Agreement is expired and the four-year statute of limitations for breach of contract claims bars any such claims that accrued prior to October 16, 2019. (Sagemcom MPA, pp. 5:20-6:12.) According to Sagemcom, the termination of the Amended Agreement caused it to cease binding the parties and it could not be extended or modified thereafter. (*Ibid.,* citing *Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1189.) Sagemcom argues that the FACC's claims regarding the DivX Plus HD profile are entirely barred because they expired in 2014. (*Ibid.*) Sagemcom argues that the statute of limitations bars many of DivX's breach allegations. (*Id.* at p. 8:8-9:26.) Sagemcom further contends that the FACC fails to plead fact necessary to allege breach of section 3.7, 4.2, 5.6, or 5.7 of the Amended Agreement. (*Id.* at pp. 9:27-14:11.)

In opposition, DivX argues that the FACC states a claim for breach that survived the expiration of the Agreement as a whole. (DivX's Opposition, pp. 2:20-3:11.) DivX points to the "survival" clause of the Agreement at section 11.5, providing that certain sections of the Agreement survive. (*Ibid.*) DivX further argues that it sufficiently alleges breaches of the Agreement, specifically with respect to sections 3.7, 5.6, 5.7, and 4.2. (*Id.* at pp. 3:12-8:19.) DivX further contends that its claims are not barred by the statute of limitations because it sufficiently alleges delayed discovery. (*Id.* at pp. 8:20-11:9.)

"A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint *might* be barred.

(*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; '*conclusory allegations will not withstand demurrer*.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808, internal citations omitted, emphasis added; see also *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 1324-1325 [To be entitled to the benefit of the delayed discovery rule a plaintiff must specifically plead the time and manner of discovery and show the following: 1) the plaintiff had an excuse for late discovery; 2) the plaintiff was not at fault in discovering facts late; 3) the plaintiff did not have actual or presumptive knowledge to be put on inquiry; 4) the plaintiff was unable to make earlier discovery despite reasonable diligence.].)

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. The limitations period begins once the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Mills v. Forestex Co*. (2003) 108 Cal.App.4th 625, 642-643 [internal citations omitted].)

Here, the FACC alleges facts in support of DivX's delayed discovery argument, including the following: Sagemcom incorrectly certified its products and sent false royalty reports; Sagemcom had reason to believe that DivX remained ignorant as to the nature and scope of Sagemcom's misreporting; it was unreasonably difficult for DivX to obtain and test Sagemcom's products; there was no indication in the parties' longstanding relationship that

raised suspicions that an audit was necessary; Sagemcom was in a superior position to know whether its products supported the DivX Plus HD profile; and Sagemcom actively obstructed DivX's attempts to Sagemcom. (FACC, ¶¶ 6, 23-34; DivX's Opposition, pp. 8:20-9:23.) These allegations are sufficiently specific and plausible to withstand demurrer.

Sagemcom contends that the discovery rule generally does not apply to contract actions where the claims do not involve a fiduciary relationship, fraud, or unusual situations. (Sagemcom's MPA, p. 8:20-25, citing *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 830-832 (*April*).) But, as DivX persuasively argues in opposition, the discovery rule can apply in contract cases where the act causing the injury is difficult to detect, where the perpetrator was in a far superior position to comprehend the act and injury, and where the perpetrator had reason to believe that the injured party remained ignorant that he or she had been wronged. (DivX's Opposition, pp. 9:24-10:19, citing *April*, *supra*, 147 Cal.App.3d at p. 831 and *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5.) As discussed above, the FACC alleges that these factors exist here, and the court treats these allegations as true for purposes of demurrer.

In sum, the court finds that the FACC sufficiently alleges breach of contract claims that are not time-barred due the survival clause in the Agreement and due to the reasonably specific allegations supporting application of the delayed discovery rule.

Accordingly, the demurrer to FACC's first cause of action is OVERRULED.

B. Second Cause of Action

The FACC's second cause of action is for breach of the covenant of good faith and fair dealing. "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz*, *supra*, 24 Cal.4th at p. 349.) "The covenant thus cannot 'be endowed with the existence independent of its contract underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of the agreement. (*Id.* at p. 350.) Where a breach of an actual term is alleged, a separate implied covenant claim, based on the same breach is superfluous. (*Id.* at p. 327.)

A breach of implied covenant of good faith and fair dealing involves something beyond the breach of the contractual duty itself. (*Howard, supra*, 187 Cal.App.4th 498, 528 (*Howard*).) To recover in tort for breach of the implied covenant, the defendant must "have acted unreasonably or without proper cause." (*Careau, supra*, 222 Cal.App.3d at p. 1395.)

Sagemcom contends that the FACC's second cause of action fails because it is entirely duplicative of its breach of contract claim. (Sagemcom's MPA, p. 14:12-15:10.) Sagemcom argues that the claim must fail because it does not allege anything that goes beyond a mere contractual breach, relies on the same facts as the contract cause of action, and seeks the same relief as the contract claim. (*Id.* at p. 15:6-10, quoting *Careau, supra*, 222 Cal.App.3d at p. 1371.)

In opposition, DivX argues that its implied covenant claim is distinct because it based upon allegations that Sagemcom intentionally prevented DivX from reaping benefits under the Agreement, regardless of whether Sagemcom did so in violation of specific contractual obligations. (DivX's Opposition, p. 11:10-23.) DivX further contends that Sagemcom's position that the contract claim fails supports DivX's position that the implied covenant claim is not duplicative. (*Id.* at p. 11:24.) Finally, DivX contends that California law permits parties to plead in the alternative even claims are inconsistent. (*Id.* at p. 12:2-8.)

Here, there is merit to DivX's argument that may plead in the alternative. (See *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 ["When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows a party to plead in the alternative and make inconsistent allegations."]; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890 [redundancy is not ground for demurrer and is "the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment"].)

Accordingly, the demurrer to second cause of action is OVERRULED.

C. Third Cause of Action

The FACC's third cause of action is for quantum meruit. The requisite elements for a quantum meruit claim are: "1) the plaintiff acted pursuant to an explicit or implicit request for

the services by the defendant, and 2) the services conferred a benefit on the defendant." (*Port Medical Wellness, Inc. v. Connecticut General Life Ins. Co.* (2018) 24 Cal.App.5th 153, 180.)

As relevant here, the FACC alleges the following: by executing the Agreement on January 1, 2011, Sagemcom requested that DivX provide it with valuable technical information regarding its DivX Plus HD profile; Sagemcom realized the benefits of DivX's Plus HD profile; the royalties payment provision of the Agreement regarding the DivX Plus HD profile expired on June 30, 2014; Sagemcom continued to realize the benefits of DivX Plus HD profiled after expiration of the royalties payments provisions; Sagemcom should compensate DivX for the reasonable value of the benefits Sagemcom realized by its continued used of the DivX's Plus HD profiled. (FACC, ¶¶ 68-74.)

Sagemcom contends the quantum meruit claim fails because the parties had an actual agreement and because the two-year statute of limitations for quantum meruit claim limits DivX's recovery under the theory to the reasonable value of any benefits realized after October 16, 2021, and Sagemcom contends there was none. (Sagemcom's MPA, p. 15:11-24.) In opposition, DivX argues that a quantum meruit claim may proceed where the parties dispute whether the contract provides a remedy or where a quantum meruit award does not conflict with an underlying contract. (DivX's Opposition, p. 12:10-25.[2]) DivX further argues that even if the claim conflicted with the Agreement, it is allowed to plead in the alternative at this stage. (*Id.* at p. 13:3-10.)

For the same reasons discussed above, the third cause of action withstands demurrer because the FACC sufficiently alleges delayed discovery and because DivX may plead in the alternative.

Accordingly, the demurrer to the FACC's third cause of action is OVERRULED.

VI. DivX's Section 1030 Motion

DivX moves for an order requiting Sagemcom to file an undertaking in the amount of $4.9 million to secure an award of costs and fees pursuant to Code of Civil Procedure section 1030 ("Section 1030"). (Notice of Motion and Motion, p. ii:2-6.) The stated grounds for the

[2] The court observes that DivX improperly relies upon unpublished decisions in support of this point. The parties are reminded to refrain from cited unpublished decisions.

motion are that: (1) Sagemcom is a foreign corporation; (2) DivX would be entitled to recover reasonable attorney's fees and costs should it prevail in the action; and (3) a reasonable possibility exists that DivX will prevail in the action. (*Ibid.*) Sagemcom opposes the motion. Sagemcom opposes the motion, arguing that DivX cannot demonstrate that Section 1030 should apply here, and that the amount requested is outsized and unsubstantiated. (Sagemcom's Opposition to DivX's Section 1030 Motion ("Sagemcom's 1030 Opposition"), pp. 1:14-15, 2:5-7.)

A. Legal Standard

"Plaintiffs who reside outside of California may be required to post an undertaking to ensure payment of costs to a prevailing defendant." (*Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 428 (*Alshafie*).) "Code of Civil Procedure section 1030 provides that upon a defendant's motion, the trial court is required to order an out-of-state plaintiff to file an undertaking to secure recoverable costs and attorney's fees if the defendant shows a reasonable possibility that it will obtain a judgment in the action." (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1430 (*Baltayan*).) Section 1030, subdivisions (a)-(c), provides as follows:

> **(a)** When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding. For the purposes of this section, "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract.
>
> **(b)** The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.
>
> **(c)** If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

"The statute requiring a nonresident plaintiff to file a cost bond is intended to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not

within the court's jurisdiction." (*Shannon v. Sims Serv. Ctr.* (1985) 164 Cal.App.3d 907, 913, internal citation omitted.) "The statute therefore acts to prevent out-of-state residents from filing frivolous lawsuits against California residents." (*Yao v. Superior Court* (2002) 104 Cal.App.4th 327, 331; see also *Gonzales v. Fox* (1977) 68 Cal.App.3d Supp 16, 18; see also *Alshafie, supra*, 171 Cal.App.421 at p. 428.)

B. Discussion

DivX argues that the court should grant the motion for undertaking in the amount of $4.9 million because: Sagemcom is an out-of-state plaintiff; DivX has a right to recover it fees and costs if it prevails in this case; there is a reasonable possibility that DivX will prevail; and the required undertaking should not be less than $4.9 million. (DivX's Memorandum of Points and Authorities in support of its Section 1030 Motion ("1030 MPA"), pp. 3:22, 4:4, 4:15, 14:19.)

Sagemcom does not dispute that it is an out-of-state plaintiff and admits in its operative complaint that it is a French corporation. (FAC, ¶ 19 ["Sagemcom is a company organized and existing under the laws of France with its principal place of business at 250 route de l'Empereur 92500 Rueil-Malmaison, France."].) Sagemcom argues in opposition that the statute is not intended to protect out-of-state defendants, that DivX has not demonstrated a reasonable possibility that it will prevail, and that DivX has not provided reasonable basis for the requested amount of $4.9 million. (Sagemcom's Opposition to DivX's Section 1030 Motion ("Sagemcom's 1030 Opposition"), pp. 6:21-22, 8:7-8, 14:14-15.)

1. *Right to Recover Fees and Costs*

For purposes of Section 1030, "attorney's fees" means "reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract." (Section 1030, subd. (a).) As DivX points out in its motion, Section 13.2 of the Agreement states: "In the event of any litigation or other proceeding concerning or relating to this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party its legal fees and costs, including without limitation attorney, expert witness and court fees and costs." (Complaint, Ex. D., §13.2 at p. 84.) Sagemcom does not dispute that Section 13.2 of the Agreement applies to the attorney fees and costs incurred in this litigation.

Sagemcom contends that Section 1030 was not intended to apply to DivX because DivX is not a California resident. (Sagemcom's 1030 Opposition, pp. 6:21-7:12.) Sagemcom contends that DivX is an entity organized under Delaware law with a principal place of business in New York. (*Id.* at p. 7:7-12.) In reply, DivX contends that it is a California resident because it has a principal place of business in San Diego and presents supporting evidence. (DivX's Reply, pp. 2:27-3:6.) DivX asserts that the exhibit in Sagemcom's opposition brief contains a clerical error listing DivX's principal place of business in New York. (*Id.* at p. 3:7-12.) Sagemcom then filed a Surreply, insisting that DivX's claim of California residency is "tenuous and unproven," in part because DivX represented to Washington state authorities that its principal place of business is in New York. (Surreply, p. 2:11-3:3.)

Sagemcom also relies upon two federal decisions in support of the proposition that a defendant bringing a Section 1030 motion must establish that there is a risk of being unable to recover attorney fees and costs. (Sagemcom's 1030 Opposition, pp. 6:8-10, 7:15-19, citing *Donshen Textile (Holdings) Ltd. v. Rabinowitz*, No. 13-cv-09030, 2014 U.S. LEXIS 198260, 2014 WL 12638884 (C.D. Cal. May 5, 2014); *Wilson & Haubert, PLLC v. Yahoo! Inc.*, No. C-13-5879 EMC, 2014 U.S. Dist. LEXIS 471157, 2014 WL 1351210 (N.D. Cal. Apr. 4, 2014).)

The court is not persuaded by Sagemcom's arguments that Section 1030 does not apply to DivX because it is arguably not a California resident and because DivX has not established a risk regarding the recovery of fees and costs from Sagemcom. While Sagemcom points to language concerning the legislative intent of Section 1030 in reference to California residents, the statute itself contains no express limitation that the moving defendant must be a California resident. (See Section 1030, subd. (a).) Similarly, the statute also lacks any express requirement that the moving defendant establish a risk of being unable to recover attorney's fees to which they may be entitled. (See Section 1030, subd. (b).) The court declines to follow the federal district court decisions relied upon by Sagemcom, who fails to provide any binding California on these points. Thus, Sagemcom fails to support its arguments that Section 1030 does not apply here. (See *Quantum Cooking Concepts, Inc. v. Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [the trial court is not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"].)

Accordingly, the court finds that DivX has established a right to recover fees and costs under the Agreement and under Section 1030, if it can establish a reasonable possibility of prevailing.

2. *Reasonable Possibility of Prevailing*

Courts have interpreted the "reasonable possibility" requirement of Section 1030 to be a relatively low standard for the defendant to meet. (See *Baltayan, supra*, 90 Cal.App.4th at p. 1432 ["Respondent were not required to show that there was no possibility that appellant could win at trial, but only it was *reasonably possibly* that respondents would win."].) DivX contends it can meet this standard with respect to the claims against it. (1030 MPA, p. 4:19-20.)

In opposition, Sagemcom contends that DivX cannot demonstrate that it is entitled to judgment on any of Sagemcom's claims against it. (1030 Opposition, p. 8:7-12.) As DivX explains in its Reply, some of Sagemcom's arguments in opposition regarding DivX's demurrer to the Complaint are now moot because Sagemcom has since filed its FAC. (1030 Reply, p. 4:8-16.) In its opposition and again it its Surreply, Sagemcom acknowledges facts relating to its obligations under the Agreement that could reasonably be interpreted to support DivX's pursuit of audit. (See 1030 Opposition, pp. 4, fn. 2, and 12, fn. 13; Surreply, pp. 5:13-6:17.)

While the court's analysis above regarding DivX's demurrer to Sagemcom's FAC ultimately concludes by overruling the demurrer as to both the second and fourth causes of action, this does not necessarily mean that DivX has no reasonable possibility of prevailing on the claims against it. As Sagemcom repeatedly argues in opposition to DivX's demurrer, DivX's arguments demonstrate many factual disputes with respect to the FAC's allegations. DivX's sets forth a plausible argument that KMPG's activity in this matter was within the scope of the Agreement's audit provision.

Accordingly, given the detailed facts and plausible theories offered by DivX in support of its motion, as well as the low bar for the "reasonable possibility" requirement under Section 1030, the court finds that DivX has sufficiently shown that there is a reasonable possibility that it will obtain judgment in the action. (See *Baltayan, supra,* 90 Cal.App.4th at p. 1432

["Respondent were not required to show that there was no possibility that appellant could win at trial, but only it was *reasonably possibly* that respondents would win."].)

3. *Amount of Undertaking*

Section 1030, subdivision (b), provides that "[t]he motion shall be accompanied by an affidavit in support of the ground for motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding." DivX contends that it has complied with this requirement with the Declaration of Michael Song, dated May 31, 2024 (the "5/31/2024 Song Dec."). (1030 Reply, p. 10:8-12.)

Mr. Song states that, as of May 31, 2024, DivX had incurred over $370,000 in fees and costs of $13,000. (5/31/2024 Song Dec., ¶ 6.) He further states: "Based on a careful assessment of the likely course of the litigation and the work that will need to be done, I estimate that the additional fees and costs that will be incurred in the further defense of this through trial will likely exceed $4.53 million." (*Id.* at ¶ 7.) Mr. Song concludes his declaration with his estimate that DivX will incur fees and costs through trial in an amount exceeding $4.9 million. (*Id.* at ¶ 8.) DivX requests this amount in its motion, offering no calculation or authority in support for its request. (1030 MPA, p. 14:19-26.)

In opposition, Sagemcom persuasively argues that DivX has not provided reasonable evidence or explanation to substantiate the requested undertaking amount of $4.9 million. (1030 Opposition, pp. 14:14-15:15.) Sagemcom contends that Mr. Song's purported careful assessment alone is not enough, observing that Section 1030, subdivision (a), defines "attorney's fees" to mean "reasonable attorney's fees [.]" (*Id.* at p. 15:7-9, fn. 17.)

In its Reply, DivX suggests that the onus should be on Sagemcom to provide an explanation for what bond it believes is appropriate for it to post. (1030 Reply, p. 10:13-14.) Nevertheless, under the statute, it is the moving defendant's burden to provide an affidavit in support of the motion. (Section 1030, subd. (b).) In response to Sagemcom's arguments, DivX has made no suggestion of a lower amount nor any attempt to clarify how it arrived at the amount requested, such as by providing the numbers of hours billed and the attorneys' hourly rates. While DivX contends that Sagemcom makes no argument that there is an error in DivX's

calculations, it would be more accurate to state that DivX has provided no calculations at all. In sum, DivX's affidavit in support of the requested undertaking is too conclusory to support the substantial amount requested.

Accordingly, the Section 1030 Motion is DENIED.

VII. Motions to Seal

There are several motions to seal now before the court, and in the interest of clarity, the court addresses them below in the order that they were filed.

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.)

A. Sagemcom's June 10, 2024, Motion to Seal

On June 10, 2024, Sagemcom filed a motion to seal the redacted portions documents filed by DivX, as follows: (1) DivX's Cross-Complaint, pp. 3:11, 9:13; (2) DivX's Section 1030 Motion, pp. 2:28, 6:18, 7:3-10, 7:17, 7:23, 7:26-27, 8:1-3, 8:28; and (3) Declaration of Brian Satterley in Support of DivX's Section 1030 Motion ("Satterley Dec."), p. 3:11 and Ex. 1.

Sagemcom explains that each of the above proposed redactions contain Sagemcom's sensitive and confidential information which would harm Sagemcom if disclosed. (Declaration of Thibault Decoudun, filed July 3, 2024, ¶ 3.) The redactions in question relate to Sagemcom's confidential business information that it does not publish, and Sagemcom has a strong interest in maintaining the confidentiality of this information because its disclosure could affect future negotiations and give competitor's an unfair advantage. (*Id.* at ¶ 4.) Exhibit 1 to Satterley Declaration is a copy of KPMG's purported preliminary findings, and the information contained therein is highly sensitive and confidential, would harm Sagemcom if disclosed. (*Id.* at ¶ 5.)

The proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that Sagemcom has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, Sagemcom's June 10, 2024, motion to seal is GRANTED.

B. Sagemcom's September 3, 2024, Motion to Seal

On September 3, 2024, Sagemcom filed a motion to seal the redacted portions of its FAC filed on August 30, 2024, and Exhibits C, D, E, F, J, K, L, M, O, S, T, and X thereto. In support of the motion, Sagemcom submits the following declarations, all filed or refiled on August 30, 2024: (1) Declaration of Kourtney Mueller Merrill ("8/30/2024 Merrill Dec.");

(2) June 10, 2024 Declaration of Thibault Decoudun; and (3) April 10, 2024 Amended Declaration of TJ Fox.

Sagemcom explains that the proposed redactions contain Sagemcom's commercially sensitive and non-public information. (8/30/2024 Merrill Dec., ¶ 2.) The proposed redactions include the specific amount paid for the perpetual license, information that is confidential and harm Sagemcom if made public, including by weakening bargaining position in future negotiations or giving competitors a strategic advantage. (*Id.* at ¶ 3.) The proposed redaction of supplier component information is necessary to prevent disclosure of Sagemcom's non-public and commercially sensitive technical product information. (*Id.* at ¶ 4.) Sagemcom provided this information only pursuant to a non-disclosure agreement, and its disclosure could undermine Sagemcom's position amongst its competitors. (*Ibid.*)

The proposed redactions of references to non-public business negotiations in exhibits to the FAC will prevent disclosure of this information to competitors. (8/30/2024 Merrill Dec., ¶ 5.) The proposed redactions of references to volumes of shipped products and itemized and bottom-line royalty assessments are directed to non-public and commercial sensitive business information and supported by Sagemcom's strong interest maintaining the confidentiality of this information as it related to suppliers, customers, and competitors. (*Id.* at ¶ 6.)

The proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that Sagemcom has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal*, *supra*, 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, Sagemcom's September 3, 2024 motion to seal portions of its FAC is GRANTED.

C. Sagemcom's September 25, 2024, Motion to Seal

On September 25, 2024, Sagemcom filed a motion to seal portions of its opposition to DivX's Section 1030 Motion and portions of the September 25, 2024 Declaration of Thibault Decoudun ("9/25/2024 Motion to Seal"). Sagemcom asserts that the information sought to be sealed was previously sealed by the court in its April 25, 2024 minute order. In support of the

motion, Sagemcom submits the June 10, 2024 Declaration of Thibault Decoudun ("6/10/2024 Decoudun Dec.") and the April 10, 2024 Declaration of Kourtney Mueller Merrill ("4/10/2024 Merrill Dec.").

Sagemcom explains that the proposed redactions relate to: (1) KPMG royalty assessments that can be used to derive confidential volumes of Sagemcom's products; (2) the unpaid royalties that Sagemcom purportedly owes to DivX; and (3) non-public information regarding the functionality of particular components in the disputed products. (9/25/2024 Motion to Seal, pp. 2:25-3:6.) Disclosure of KPMG's purported assessments would cause Sagemcom serious competitive and strategic harm. (6/10/2024 Decoudun Dec., ¶¶ 4-5; 4/10/2024 Merrill Dec., ¶ 6.) The amount Sagemcom paid for the perpetual license is non-public and commercially sensitive. (4/10/2024 Merrill Dec., ¶ 3.) Disclosure of information regarding the identity and functionality of particular components in disputed product could reveal Sagemcom's non-public technical product information. (6/10/2024 Decoudun Dec., ¶ 5; 4/10/2024 Merrill Dec., ¶ 6.)

In addition, on November 6, 2024, DivX filed a notice of joinder to request the sealing of Exhibits 1-3 of the September 25, 2024 Declaration of Thibault Decoudun. (Notice of Joinder, pp. 1:8-28.) DivX further requests that Exhibits 1 and 2 be stricken from the records. In support of the request, DivX provides declarations from TJ Fox ("Fox Dec.") and S. Michael Song ("Song Dec."), attached to its notice of joinder.

DivX explains that Exhibits 1-3 of the September 25, 2024 Declaration of Thibault Decoudun contain confidential information related to DivX's Certified Test Kits ("CTKs"). The CTKs are non-public and commercially sensitive documents, and their use relates to DivX's confidential business practices and dealings with licenses. (Fox Dec., ¶ 3.) If these documents were made public, DivX's competitors are likely to use the information to gain a competitive advantage over DivX. (*Id.* at ¶ 4.) Sagemcom has confirmed that it does not cite Exhibits 1 and 2 and does not oppose removing Exhibits 1 and 2 from the records. (Song Dec., ¶¶ 2-3.)

Sagemcom's and DivX's proposed sealings appear to be narrowly tailored to confidential information. Therefore, the court finds that the parties have established overriding

interests that justify sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, Sagemcom's September 25, 2024, motion to seal is GRANTED, and DivX's request to seal Exhibits 1-3 of the September 25, 2024 Declaration of Thibault Decoudun is GRANTED.[3]

D. DivX's October 23, 2024, Motion to Seal

On October 23, 2024, DivX filed a motion to seal portions of its Reply Memorandum in support of its Section 1030 Motion (the "1030 Reply Brief"). (10/23/2024 Motion to Seal, p. 1.) The portions of the 1030 Reply Brief in question relate to a September 16, 2024 letter from Thibault Decoudun (the "Decoudun Letter"), designated by Sagemcom as confidential. (*Id.* at p. 2:2-25.) In support of its motion to seal, DivX provides the Declaration of Michael Song ("Song Dec.").

DivX explains that Exhibit 3 to its 1030 Reply Brief is a true and correct copy of the Decoudun Letter. (Song Dec., ¶ 2.) The Decoudun Letter contains sensitive and confidential business information relating to the license agreement between DivX and Sagemcom, and specifically, a dollar amount from which the royalty rate between the parties may be determined. (*Id.* at ¶ 3.) The court granted DivX's motion to seal this information in its April 25, 2024 order. (*Ibid.*) The Decoudun letter is not available to the public and has been maintained as a confidential file within DivX. (*Ibid.*) If this information were made public, it would disclose sensitive and confidential business information, potentially harming the interest of both parties. (*Ibid.*; 10/24/2024 Motion to Seal, p. 3:14-27; Amended Declaration of TJ Fox, filed on April 11, 2024.)

The proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that DivX has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal*,

[3] DivX does not offer any authority or identify a specific procedure in support of its request to strike Exhibits 1 and 2 of the September 25, 2024 Declaration of Thibault Decoudun from the record. Accordingly, the request to seal Exhibits 1-3 is GRANTED, and the request to strike Exhibits 1 and 2 is DENIED without prejudice.

supra, 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, DivX's October 23, 2024, motion to seal is GRANTED.

E. Sagemcom's November 4, 2024, Motion to Seal

On November 4, 2024, Sagemcom filed a motion to seal portions of DivX's 1030 Reply Brief. In support of its motion, Sagemcom submits the Declaration of Kourtney Mueller Merrill, dated November 1, 2024 (the "11/1/2024 Merrill Dec").

Sagemcom explains that each proposed redaction contains Sagemcom's sensitive and confidential information, and disclosure of this information would harm Sagemcom. (11/1/2024 Merrill Dec., ¶ 2.) Sagemcom treat information about is shipped products confidential and has a strong interest maintain its confidentiality because its disclosure could give competitors an unfair advantage. (*Id.* at ¶ 3.) Exhibit 3 to DivX's 1030 Reply Brief is a copy of the September 16, 2024 letter that Thibault Decoudun sent to TJ Fox, counsel for DivX. (*Id.* at ¶ 4.)

The court observes that the all of the requested redactions are included among those requested sealed by DivX in its October 23, 2024 motion to seal regarding its 1030 Reply Brief. The court again finds that the proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that Sagemcom has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, Sagemcom's November 4, 2024, motion to seal is GRANTED.

VIII. Conclusion

DivX's demurrer to the FAC's second and fourth causes of action is OVERRULED.

KPMG's demurrer to the FAC's second, third, and fifth causes of action is OVERRULED.

Sagemcom's demurrer to the FACC's first, second, and third causes of action is OVERRULED.

DivX's Section 1030 Motion is DENIED.

The motions to seal are GRANTED.

The Court will prepare the Order.

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