

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**Circuit Court Case No. 20-17009**

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**JOHN PARZIALE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED  
PLAINTIFF-APPELLANT,  
V.  
HP, INC.,  
DEFENDANT-APPELLEE.**

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**REPLY BRIEF FOR PLAINTIFF-APPELLANT JOHN PARZIALE**

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**APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
DISTRICT COURT CASE NO.: 19-CV-05363-EJD  
(Honorable Edward J. Davila)**

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## INTRODUCTION

Appellant John Parziale (“Parziale” or “Appellant”)’s Opening Brief centered this appeal on two issues: whether the District Court improperly took judicial notice of a website Appellant did not plead to have ever visited in ruling on Defendant/Appellee HP, INC.’s (“HP” or “Appellee”) Motion to Dismiss; and whether, regardless of if the store page is or is not considered, HP put consumers on adequate notice for them to have a reasonable expectation that HP would engage in the conduct it engaged in. If the District Court should not have considered the unvisited website, its entire opinion which relies on Parziale having reviewed information on that website necessarily fails. If consumers did not have a reasonable expectation that HP would engage in the conduct it engaged in, then HP did not obtain consumers authorization to invade their printers and consumers could not reasonably have avoided the harm, thus violating the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030 *et. seq.*, the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), F.S.A. § 501.201 *et. seq.*, and committing trespass to chattels.

In HP’s Answering Brief, HP invites this Court to continue the legal and factual mistake of reading allegations regarding the HP Store Webpage into Appellant’s complaint where none exist and introduces both new evidence and a two new legal arguments for the first time on appeal—neither of which is

appropriate. Parziale explicitly pled that he purchased the printer from Amazon.com and reviewed the store page in deciding to purchase the printer. 2ER152-153, 155 at ¶¶ 24, 27, 38. There is no mention of store.hp.com anywhere in the Second Amended Complaint. To permit Appellee to read in language that does not exist into the Second Amended Complaint to then introduce an irrelevant exhibit and have the Court rule based off that exhibit is an abuse of process. Such error is obviously not harmless as it conjures facts out of thin air in making a ruling.

Recognizing this issue, Appellee now requests judicial notice of this other Amazon.com webpage, but the Ninth Circuit does not consider evidence introduced for the first time on appeal.<sup>1</sup> *See Acedo v. Abalos*, 692 F. App'x 891 (9th Cir. 2017) (citing *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988)) (“to the extent Acedo requests judicial notice of documents that were not filed in the district court, we do not consider evidence introduced for

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<sup>1</sup> HP’s “statement of facts” exclusively refers to information contained within the HP Support page and the printer box which the District Court declined to take judicial notice of. *See, e.g.*, 2ER137 (Exhibit B to the Declaration of Ilissa Samplin); 2ER142 (Exhibit C to the Declaration of Ilissa Samplin); 1ER8 (“the Court no longer finds that the support page is relevant to its analysis and declines to take judicial notice of Exhibit C to the Samplin Declaration); 1ER7 (“The Court, therefore, declines to consider Exhibit B to the Samplin Declaration.”). Accordingly, HP’s entire statement of facts must be disregarded as unsupported by any factual record on appeal.

the first time on appeal”). Additionally, Appellee raises for the first time two novel arguments that Appellant had not adequately pled the CFAA requirement of \$5,000 in alleged damages and it had consent as an affirmative defense to trespass, but, similarly, this Court will not consider arguments that are raised for the first time on appeal. *See James v. Soc. Servs. Agency of Butte Cty.*, 310 F. App'x 162 (9th Cir. 2009) (citing *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999)).

With those arguments disposed of, Appellee’s brief centers on the same fundamental question that Appellant’s does: whether HP adequately disclosed to consumers using the language as pled enough information to permit them to understand the actions HP intended to take and thus make an informed decision about whether they wanted to do business with HP. HP argues that a consumer purchasing a box in store or a printer from Amazon.com should be held to be aware of any piece of information available publicly anywhere in making its decision—and Parziale disagrees as such rule flies in the face of the clear and conspicuous disclosure requirements. But more fundamentally, because the District Court’s Order was entirely based off the store.hp.com webpage that Parziale never visited, it must be overturned and remanded for further consideration. Parziale respectfully requests this Court reverse the District Court in full.

## ARGUMENT

### **A. Parziale Challenged The Judicial Notice On The Motion To Dismiss**

HP first argues that Parziale did not take issue with the request for judicial notice on the Motion to Dismiss and thus waives the argument, but also cites exactly where Parziale took such issue. Parziale objected to HP's use of the printer box and webpage in its Motion because the Second Amended Complaint did not refer extensively to the document. 2ER42 at fn. 4. Parziale additionally objected because he had no basis from which to determine whether they were true and accurate. *Id.* It is also worth noting that HP did not actually request or move for judicial notice of the exhibits but instead argued they were incorporated by reference. 2ER104, 109, 112. HP noted for the first time in its reply that "the Court may independently take judicial notice of the store page," which deprived Parziale of the ability to respond to that argument more specifically. 2ER24 at fn. 1. This is exactly what the Court did in *sua sponte* "tak[ing] judicial notice on its own." 1ER7-10. Accordingly, Parziale may adequately take issue with the District Court's decision on appeal.

### **B. Parziale's Second Amended Complaint Does Not Mention Store.HP.Com**

HP makes a strained argument that it was appropriate for the District Court to make multiple steps of "inference" to determine that "store page" meant

store.hp.com, but such argument is flawed for multiple reasons. First, HP is effectively arguing that the term “store page” is ambiguous. Parziale explicitly pled that he purchased the printer from Amazon.com and reviewed the store page in deciding to purchase the printer. 2ER152-153, 155 at ¶¶ 24, 27, 38. The reasonable inference is that “store page” is referring to the store page on Amazon.com, the place from which Parziale purchased one of his printers.

To the extent the term “store page” is ambiguous and could be interpreted to mean store.hp.com (an address that is never mentioned in the Second Amended Complaint), such ambiguity weighs in favor of excluding the document, not including it. A court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Aledlah v. S-L Distribution Co., LLC*, No. 20-CV-00234-JSC, 2020 WL 2927980, at \*3 (N.D. Cal. June 3, 2020) (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). Here, the Complaint does not clearly refer to the document and HP requires this Court draw multiple inferences to conclude that it does, such that prong (1) is not met. Because any alleged reference is so vague, the webpage clearly cannot be central to Parziale’s claim, and thus prong (2) is not met. Prong 3 is met, but this is akin to HP attaching a copy of the great American novel “Of Mice and Men.” While it certainly is an authentic copy of such

document, that does not render the document as having any meaning to the relevant inquiry. Accordingly, the District Court abused its discretion when it *sua sponte* issued judicial notice of store.hp.com and thereafter issued its order based on the position that Parziale reviewed such webpage.

**C. HP's Belated Request For Judicial Notice Of The Amazon.com Store Page Is Irrelevant**

HP's last argument on this issue is that any error by the District Court in considering a webpage Parziale never visited is that the error was harmless because the existence of the store.hp.com page in the public domain means that consumers should be presumed to have reviewed it and the Amazon.com store page contained similar language, based on a Motion for Judicial Notice filed for the first time in this Court. With respect to the first issue, this goes to the heart of the issue as discussed in Parziale's opening brief and below—whether a consumer should be deemed to have knowledge of any piece of public information anywhere instead of just the clear and conspicuous disclosures made on the face of the products sold. If the Court did not find that Parziale had viewed store.hp.com, the basis for its entire opinion that Parziale relied on the information on the store page disappears. *See, e.g.*, 1ER11 (“the warning on the store page is sufficient”); 1ER13 (“the warning on the store page put Plaintiff on notice”). Accordingly, the Court's error in taking

the request for judicial notice as to the store page and ruling that Parziale had viewed it is in the entire source of harm in this appeal.

With regards to HP's reference to the amazon.com store page and novel arguments thereon, such arguments are inappropriate. Such evidence was not introduced at the District Court level and the Ninth Circuit does not consider evidence introduced for the first time on appeal. *See Acedo, supra* 692 F. App'x 891 (citing *Kirshner, supra* 842 F.2d at 1077) ("to the extent Acedo requests judicial notice of documents that were not filed in the district court, we do not consider evidence introduced for the first time on appeal"). Accordingly, HP cannot show that the error by the District Court, which ruled exclusively based on information it took judicial notice of, was harmless.

**D. Parziale Has Adequately Pled That The HP Failed To Put Consumers**

**On Notice So As To State A Claim Under FDUTPA**

HP only argues as the third prong of the FTC unfairness test, which is incorporated into FDUTPA, and thus concedes that the consumer injury pled was substantial and the injury was not outweighed by any countervailing benefits to consumers or competition. *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1096 (Fla. Dist. Ct. App. 2014). As to the issue of whether the harm was reasonably avoidable, HP's response to Parziale's Opening Brief is that the store.hp.com page, box, and HP support page adequately put consumers on notice

regarding HP’s intentions to unilaterally destroy their compatibility with third party ink cartridges, but as noted in the introduction, the District Court explicitly refused to take judicial notice of either the box or the HP Support page and, as discussed above, erred in taking notice of the store page which was irrelevant.<sup>2</sup> HP similarly argues about references made in Parziale’s prior complaint, in particular the First Amended Complaint, but such argument is pointless because after Parziale filed the Second Amended Complaint, the First Amended Complaint lost all legal effect and the allegations considered are those in the operative pleading. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012) (en banc) (“[A]n amended complaint supercedes the original complaint and renders it without legal effect . . .”). Further, and in particular, Parziale clarified in the Third Amended Complaint that he had not relied upon the support page. 2ER155 at ¶ 37 & fn. 2. To the extent all these unincorporated documents are excluded, HP’s arguments necessarily fail.

While Parziale will stand on his arguments set forth in his opening brief about the disclosures that were made (and in the alternative if all the documents are considered) and how they failed to provide conspicuous disclosure so as to permit

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<sup>2</sup> 1ER8 (“the Court no longer finds that the support page is relevant to its analysis and declines to take judicial notice of Exhibit C to the Samplin Declaration); 1ER7 (“The Court, therefore, declines to consider Exhibit B to the Samplin Declaration.”).

a consumer to make an informed choice, Parziale does want to briefly address the *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152 (9th Cir. 2012) case that HP relies heavily on in its brief. *Davis* concerned a consumer who obtained a Best Buy credit card that did not state on the advertisement that an annual fee applied, but who in the course of actually applying for and receiving the card was presented with the terms and conditions of the card which included the annual fee, and was required to click a box confirming he had reviewed the terms and conditions. *Id.* at 1158. Thus, even if the initial advertisement had failed to include sufficient information, the consumer was required to assent to having read the terms and conditions that corrected the omission via a clickwrap. *See Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (“[A] party may be bound by a ‘clickwrap’ agreement if the terms are clear and acceptance is unambiguous, regardless of whether he actually reads them.”). Accordingly, in that context, a consumer could have reasonably avoided the harm if he had read the terms and conditions presented and that he acknowledged reading.

*Davis* is inapposite with what occurred here as the only relevant disclosure here, at best, is that the printer comes enabled with “dynamic security.” There are no terms of use or additional conditions that are either presented or need to be agreed to about what dynamic security means at the time of purchase. Instead, it more closely resembles a nebulous and undefined term of art like “Gigabit-class

LTE” and “LTE advanced” as used in *Anderson v. Apple Inc.*, No. 3:20-CV-02328-WHO, 2020 WL 6710101 (N.D. Cal. Nov. 16, 2020). The fundamental question is whether a reasonable consumer would read the disclosure that the printer is “dynamic security enabled” and understand that to mean HP will force firmware updates onto the printers to render them incompatible with third-party cartridges. The test of whether the injury is reasonably avoidable is if the disclosures made permit a consumer “to anticipate the impending harm and the means to avoid it.” *Orkin Exterm. Co., Inc. v. FTC*, 849 F.2d 1354, 1365–66 (11th Cir.1988). Such disclosure does not lead to such understanding in a reasonable consumer and thus there was no way a consumer could make an informed decision and reasonably avoid the harm suffered by HP’s actions.

**E. The CFAA Covers Access Which Exceeds Authorization And The Alteration Of Information**

HP cites to *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (“*Nosal I*”) for the position that the CFAA claim for “exceeds authorization” does not apply to access such at this, but this misrepresents the effect of *Nosal I*, particularly in light of the jurisprudence created later in the same case, *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016) (“*Nosal II*”).<sup>3</sup>

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<sup>3</sup> HP additionally argues about whether it exceeded authorization because of its disclosures, but such argument regarding disclosure has been made *ad nauseum*

In *Nosal II*, the Court provided background on the current state of the CFAA, noting that in *Nosal I* it held that ‘[w]ithout authorization’ would apply to *outside* hackers (individuals who have no authorized access to the computer at all) and ‘exceeds authorization access’ would apply to *inside* hackers (individuals whose initial access to a computer is authorized but who access unauthorized information or files).” 844 F.3d at 1034 (citing 676 F.3d at 858). *Nosal I* narrowly tailored its conclusion to the facts contained within it, namely concerning whether a disgruntled employee could download client lists for its own purpose even if such download exceeded the use policies of its employers which prevented the sharing of such information. 676 F.3d at 857. As summed up, “the plain language of the CFAA “target[s] the unauthorized procurement or alteration of information, not its misuse or misappropriation.” *Id.* at 863 (citing numerous Courts in agreement with this proposition). By adopting the narrower construction, *Nosal I* effectively noted that the CFAA concerned impermissible modifications and hacking, both from within and without.

As discussed in the opening brief, HP’s conduct in this case does effectively constitute the hacking that still fell within *Nosal I*. HP exceeded its authorization by accessing files and altering them without the permission of consumers in order

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above and in Parziale’s opening brief such that it will not be further addressed here.

to implement its destructive firmware updates—it did not engage in a misuse or misappropriation of data. Numerous published decisions in the Northern District of California have found that the exact conduct at issue complained of here—using firmware updates to reduce the functionality of devices—have been held to be violations of the CFAA. This makes sense because even though the focus is on impermissible modifications or hacking. Further, the Court in *Nosal II* found that HP’s argument that the CFAA should be limited to hacking events “where the party circumvents a technological access barrier,” concluding instead that “such a requirement [is] missing from the statutory language” and “would make little sense . . . .” *Id.* at 1038-39. Accordingly, the conduct complained of here adequately states a claim under the CFAA.

**F. HP Cannot Raise The CFAA’s \$5,000 Loss Threshold For The First Time On Appeal**

For the first time on appeal, HP raises a new argument that Parziale fails to state a claim under the CFAA because he fails to plead damages aggregating to at least \$5,000 in value. But, again, HP is bringing up this legal issue for the first time on appeal and never argued such issue below. HP does not even address the fact that it did not bring up this argument in its Motion to Dismiss and the District Court thus obviously did not consider it. It similarly fails to provide any argument as to why the Ninth Circuit should now hear this issue for the first time on appeal.

The “general rule is that [the Ninth Circuit] will not consider issues raised for the first time on appeal.” *Midway Fin. Corp. v. Walters*, 980 F.2d 737 (9th Cir. 1992) (citing *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir.1990)). However, “an issue [may be] raised for the first time on appeal if (1) there are ‘exceptional circumstances’ why the issue was not raised in the trial court, (2) the new issue arises while the appeal is pending because of a change in the law, or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.” *Id.* HP does not argue that any such basis for considering its new argument exists because there are no exceptional circumstances for why HP failed to raise the issue previously, there has been no change in the law that causes the issue to arise, and the issue is a factual issue with respect to whether Parziale adequately pled facts to support such claim. Because HP failed to bring up this argument with the District Court, it has waived such argument at this time and thus its argument on the topic must summarily be ignored.

**G. Consent Is An Affirmative Defense To Trespass And Not Ripe For A Motion To Dismiss**

HP argues that, similar to its arguments regarding the CFAA, it did not act without authorization in reducing the functionality of consumers and that Parziale consented to such actions through “silence and inaction.” HP’s first argument

regarding disclosure and authorization has been adequately addressed above and in the opening brief such that Parziale will briefly turn to the “silent consent” argument. As an initial matter, as with its argument regarding the \$5,000 limit on CFAA, HP did not raise the affirmative defense of consent at the District Court level such that argument is inappropriate for consideration at this time.

Additionally, “consent to entry is an affirmative defense to trespass.” *Fla. Publ'g Co. v. Fletcher*, 340 So.2d 914 (Fla.1976). *See also Morkowitz v. Texaco Inc.*, 842 F. Supp. 1232, 1242 (N.D. Cal. 1994) (“consent is a defense to claims of trespass and nuisance.”) (citing *Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125 (Ct. App. 1991)). “Ordinarily, affirmative defenses ... may not be raised on a motion to dismiss except when the defense raises no disputed issues of fact.” *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 n.6 (9th Cir. 2018). The exception is where there is no dispute of facts. As set forth numerous in the briefing, the Parties clearly heavily dispute whether HP had consent to engage in the destructive conduct it engaged in against Parziale’s printer. Parziale even specifically pled that HP did not have consent twice in his Second Amended Complaint at ¶¶ 11 & 139. 2ER150 (“Plaintiff . . . did not consent to HP unilaterally pushing such modifications . . . .”) (“Plaintiff and Class Members did not consent to HP’s invasive firmware update.”). Accordingly, given the standard present on a Motion to Dismiss as presented before this Court, the Court should

find that Parziale has stated a claim for trespass to chattels and reverse the District Court.

### **CONCLUSION**

For the foregoing reasons, the District Court erred in granting HP's Motion to Dismiss. Therefore, Parziale respectfully requests that this Court reverse the District Court ruling and order the District Court to reinstate Parziale's Class Action against HP.

Dated: May 5, 2021

Respectfully Submitted,

BY: /s/ Todd M. Friedman  
TODD M. FRIEDMAN

ATTORNEYS FOR  
APPELLANT

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. 32(a)(7)(c) AND CIRCUIT RULE 32-1**

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached Opening Brief for the Appellant John Parziale complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and (6) as it is proportionately spaced, has a typeface of 14 points, and contains 3,544 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 5, 2021

Respectfully Submitted,

BY: /s/ Todd M. Friedman  
TODD M. FRIEDMAN

ATTORNEYS FOR  
APPELLANT

## CERTIFICATE OF SERVICE

I, Todd M. Friedman, certify that on May 5th, 2021, the Appellant's Reply Brief was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed document was sent, via the EMC/ECF system:

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