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HP INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOBILE EMERGENCY HOUSING CORP., and TRACK RAT ENTERPRISES, INC. d/b/a PERFORMANCE AUTOMOTIVE & TIRE CENTER, and DAVID JUSTIN LYNCH, individually, and on behalf of all others similarly situated,,

Plaintiffs,

v.

HP INC. d/b/a/ HP COMPUTING AND PRINTING INC., a Delaware Corporation,,

Defendant.

CASE NO. 5:20-cv-09157-SVK

DEFENDANT HP INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT

[Declaration of Joseph R. Rose in Support of Defendant HP Inc.'s Opposition to Plaintiffs' Motion for Leave to File Fourth Amended Complaint filed concurrently herewith]

Judge: Susan van Keulen

Trial Date: None
Date Action Filed: December 17, 2020

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTS AND PROCEDURAL BACKGROUND 2

A. Plaintiffs' First Four Complaints 2

B. HP's Motion To Dismiss, The Court's Order, And HP's Answer To The TAC 4

C. Discovery Conducted To Date 4

D. So v. HP, Inc. And This Court's Denial Of Mr. So's Motion To Relate 5

E. Plaintiffs' Proposed Fourth Amended Complaint 6

III. LEGAL STANDARD 7

IV. ARGUMENT 7

A. Plaintiffs' Proposed Amendment Would Inject A Distinct Inkjet Lawsuit Into This LaserJet Case, Vastly Broaden The Scope Of Discovery, And Unduly Prejudice HP 9

B. Plaintiffs Unduly Delayed In Seeking To Add Allegations Relating To Inkjet Printers 12

C. Plaintiffs' Proposed Amendments Are Futile As To Their Consumer Deception Claims 14

V. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Abelyan v. Onewest Bank,
2011 WL 13189883 (C.D. Cal. Mar. 21, 2011) 10

Acri v. Int'l Ass'n of Machinists & Aerospace Workers,
781 F.2d 1393 (9th Cir. 1986) 9

AmerisourceBergen Corp. v. Dialysist W., Inc.,
465 F.3d 946 (9th Cir. 2006) 12

Carolina Cas. Ins. Co. v. Lanahan & Reilley, LLP,
2011 WL 3741004 (N.D. Cal. Aug. 25, 2011) 13

Cervantes v. Countrywide Home Loans, Inc.,
656 F.3d 1034 (9th Cir. 2011) 14

Eminence Cap., LLC v. Aspeon, Inc.,
316 F.3d 1048 (9th Cir. 2003) 9

Foman v. Davis,
371 U.S. 178 (1962) 7

Harris v. Vector Mktg. Corp.,
2010 WL 11484806 (N.D. Cal. Apr. 5, 2010) 12

Irise v. Axure Software Sols., Inc.,
2009 WL 3615973 (C.D. Cal. July 30, 2009) 7

IXYS Corp. v. Adv. Power Tech., Inc.,
2004 WL 135861 (N.D. Cal. Jan. 22, 2004) 7, 11

Jackson v. Bank of Hawaii,
902 F.2d 1385 (9th Cir. 1990) 7, 9

Lockheed Martin Corp. v. Network Sols., Inc.,
194 F.3d 980 (9th Cir. 1999) 13

Lockman Found. v. Evangelical All. Mission,
930 F.2d 764 (9th Cir. 1991) 7

Miller v. Yokohama Tire Corp.,
358 F.3d 616 (9th Cir. 2004) 12

Mulato v. Wells Fargo Bank, N.A.,
76 F. Supp. 3d 929 (N.D. Cal. 2014) 7

Parziale v. HP, Inc.,
2020 WL 5798274 (N.D. Cal. Sept. 29, 2020) 8

Parziale v. HP, Inc.,
445 F. Supp. 3d 435 (N.D. Cal. 2020) 8

Peterson v. California,
2011 WL 3875622 (E.D. Cal. Sept. 1, 2011) 11

S.F. Herring Ass'n v. Dep't of the Interior,
946 F.3d 564 (9th Cir. 2019) 12

Salmon Trollers Mktg. Ass'n v. Gutierrez,
2007 WL 9810965 (N.D. Cal. Nov. 29, 2007) 13

Sanderling Mgmt. Ltd. v. Snap Inc.,
2021 WL 3160867 (C.D. Cal. July 9, 2021) 14

Soil Retention Prod., Inc. v. Brentwood Indus., Inc.,
521 F. Supp. 3d 929 (S.D. Cal. 2021) 14

United States v. Webb,
655 F.2d 977 (9th Cir. 1981) 7

Zikovic v. S. Cal. Edison Co.,
302 F.3d 1080 (9th Cir. 2002) 11

STATUTES

Cal. Civ. Code 1770(a)(15) 7

RULES

Fed. R. Civ. P. 15(a) 9

Fed. R. Civ. P. 15(d) 13

I. INTRODUCTION

Plaintiffs filed this lawsuit on December 17, 2020, alleging (incorrectly) that HP failed to disclose that firmware updates issued to Plaintiffs' LaserJet printers could render some third-party toner cartridges incompatible. Since then, Plaintiffs have filed three amended complaints adding new Plaintiffs and claims—all based on allegations related to LaserJet printers and a specific firmware update allegedly sent to those printers in late 2020. HP has spent the past 21 months engaged in factual investigation, discovery, and motion practice focused on LaserJet printers and firmware updates alleged in the four complaints filed to date. Now, nearly two years into the case, Plaintiffs seek to derail that process by filing a *fourth* amended complaint to add what amounts to a second, new, and distinct lawsuit about *inkjet* printers and a completely different firmware update allegedly sent to those printers in 2022. The new case Plaintiffs seek to "amend" into this lawsuit would dramatically expand the scope of this litigation: it involves different technology, firmware, firmware updates, firmware teams, devices, business units and, necessarily, different discovery than the currently pleaded case. And the new inkjet claims Plaintiffs seek to add are already pending in this district before a different judge in *Henry So v. HP, Inc.*, No. 22-cv-02327-BLF, which this Court declined to relate to this case. ECF No. 64. In fact, the new Plaintiff proposed to be added here, Paige Vollmer, is already a member of the putative class in the *So* case, and inkjet printers have been the subject of multiple, separate class action lawsuits in this district, including *Parziale v. HP Inc.*, No. 5:19-cv-05363-EJD, and *In re Printer Firmware Update Litig.*, No. 5:16-cv-05820-EJD-SVK. Allowing Plaintiffs to amend this nearly two-year-old case to file a duplicative claim adds nothing but inefficiency and undue burden.

Plaintiffs say their delay should be excused because Ms. Vollmer's inkjet printer "recently lost functionality with third party ink cartridges after a firmware update." Mot. at 1. But these inkjet-related allegations are not recent developments. Plaintiffs have been aware of them since the start of this case. Indeed, Plaintiffs tried unsuccessfully, three months ago, to expand discovery in this case to include inkjet printers. ECF No. 67 at 2; *see also* ECF No. 1 ¶ 56 (original 2020 complaint reciting alleged customer complaints about ink cartridges). Yet over the past 21 months of this case, Plaintiffs never sought to assert any inkjet claims. As the Court noted in denying Plaintiffs' discovery motion, Plaintiffs' class allegations have been "narrowly drawn" to include only LaserJet models. ECF No. 69

at 2. That they found a proposed plaintiff who claims she had a recent issue with a firmware update does not make Plaintiffs' inkjet allegations "recent," much less an appropriate subject for amendment.

This case is also not in its "early stage" as Plaintiffs claim. Mot. at 1. HP has already completed significant discovery and factual investigation focused exclusively on LaserJet printers and toner cartridges. This includes HP's initial disclosures, which identified witnesses with LaserJet and toner responsibility; HP's interrogatory responses, which have been the subject of significant meet and confer and amendment; and HP's document collections and productions, which have been underway since November 2021. If the Court grants Plaintiffs leave to expand this case now, the parties will have to renegotiate, and HP will have to redo, all of this discovery because Ms. Vollmer's proposed claims arise from entirely different facts than Plaintiffs' LaserJet claims. For instance, Ms. Vollmer's inkjet printer runs on a completely different technology than Plaintiffs' LaserJet printers and was developed and marketed by different groups within HP. Ms. Vollmer also raises distinct allegations about the harm that allegedly befell her: She alleges she was affected by a different firmware update than the one that allegedly impacted Plaintiffs' printers, and that her printer displayed an error message after the update was installed that is entirely different from the one alleged in Plaintiffs' complaints. These important distinctions mean that, with few exceptions, none of the written discovery responses HP has served to date, none of the custodians HP has identified to date, and none of the documents HP has collected to date, apply to Ms. Vollmer's proposed claims. Moreover, the error message Ms. Vollmer alleges she received explicitly disclosed the information Plaintiffs claim was missing from the error message displayed by their LaserJet printers. For this reason, Plaintiffs' proposed amendment also would be futile as to the consumer deception claims Ms. Vollmer belatedly seeks to join.

To permit Plaintiffs a do-over at this point in the case would unduly prejudice HP, require the parties to start from square one on discovery, and duplicate claims already pending in the *So* case, fundamentally defeating judicial efficiency and economy. The Court should deny Plaintiffs' Motion.

II. FACTS AND PROCEDURAL BACKGROUND

A. Plaintiffs' First Four Complaints

Plaintiffs filed this action on December 17, 2020, asserting seven causes of action under California's consumer protection statutes, the Computer Fraud and Abuse Act, and the California

Comprehensive Computer Data Access and Fraud Act, and for trespass to chattels. ECF No. 1. Plaintiffs' chief complaint is that, in November 2020, HP released a firmware update that caused Plaintiffs' LaserJet printers to reject their preferred third-party toner cartridges, and then allegedly misrepresented the cause of the issue by displaying a "supply problem" error message on Plaintiffs' LaserJet printers. Plaintiffs alleged that the "supply problem" message failed to "attribute the problem to a firmware update." *Id.* ¶ 27. While Plaintiffs' complaint recited a series of comments on "message boards and Internet forums" related to inkjet printers, *id.* ¶ 56, none of the named Plaintiffs alleged claims related to inkjet printers, and Plaintiffs' class definition covered only LaserJet models, *id.* ¶ 57; *see also* ECF No. 69 at 2 (discovery order finding that Plaintiffs' class definition did not include inkjet models). On February 10, 2021, HP moved to dismiss the initial complaint. ECF No. 24.

Approximately one month later, while HP's first motion to dismiss was pending, Plaintiffs amended their complaint as a matter of right, adding a new Plaintiff and an additional claim under the CLRA. ECF No. 30. Like the other Plaintiffs, this new Plaintiff, David Lynch, alleged that the same firmware update at issue in the initial complaint rendered his LaserJet printer inoperable with his preferred third-party toner cartridges, and that he was misled by the "supply problem" error message. *Id.* ¶¶ 57, 61. Plaintiffs did not add any allegations regarding inkjet models.

On March 19, 2021, the parties stipulated to the filing of a Second Amended Complaint ("SAC"), which was filed that day. ECF Nos. 37, 39. In their SAC, Plaintiffs added a request for damages under the CLRA. ECF No. 39 ¶ 161. Again, Plaintiffs added nothing about inkjet printers.

The parties subsequently stipulated to the filing of the Third Amended Complaint, which was filed on April 8, 2021, and is the operative complaint. ECF Nos. 40, 42. The TAC added claims under the anti-hacking statutes. *See, e.g.*, TAC ¶¶ 88, 90, 107. Plaintiffs continued to allege that HP's firmware update disabled their LaserJet printers from using certain third-party toner cartridges of their choosing, and then displayed the same, allegedly misleading "supply problem" error message. *Id.* ¶¶ 5, 29, 65, 71, 74, 107, 117, 122, 123, 131, 140, 141, 165. Plaintiffs' TAC continued to recite alleged complaints by customers about inkjet printers, *id.* ¶ 71, and included general references to issues related to "ink and toner supply cartridges." *E.g.*, *id.* ¶¶ 1, 2, 4, 5, 9, 20, 23, 24. But Plaintiffs' specific allegations and class definition continued to address only LaserJet models. *See* ECF No. 69 at 2.

B. HP's Motion To Dismiss, The Court's Order, And HP's Answer To The TAC

HP moved to dismiss the TAC. ECF No. 44 ("Motion to Dismiss"). Among other things, HP pointed out that it had disclosed on various pages of its website that the printers Plaintiffs purchased were "[d]ynamic security enabled printer[s]," which were "[o]nly intended to be used with cartridges using an HP original chip." *Id.* at 4; *see also* ECF Nos. 45-3, 45-4, 45-5. These pages also disclosed that "[c]artridges using a non-HP chip may not work, and those that work today may not work in the future." Motion to Dismiss at 4; *see also* ECF Nos. 45-3, 45-4, 45-5. (While HP also included these disclosures on the printer boxes, Declaration of Joseph R. Rose ("Rose Decl.") ¶ 2, Plaintiffs omitted that fact from their TAC and HP consequently did not rely on the printer box disclosures in moving to dismiss.)

On October 15, 2021, the Court granted in part and denied in part HP's Motion to Dismiss. ECF No. 52. The Court declined to dismiss Plaintiffs' various omissions-based consumer deception claims because Plaintiffs alleged that the "supply problem" error "suggest[ed] that the third-party supply cartridges were broken when, instead, the [firmware] transmission simply disabled the supply cartridges." *Id.* at 19. The Court dismissed Plaintiffs' trespass to chattels claim, their claim under section 1030(a)(2)(C) of the Computer Fraud and Abuse Act, and their claim under subsection (c)(7) of the California Comprehensive Computer Data Access and Fraud Act. *Id.* at 23. Shortly thereafter, Plaintiffs represented that they would not be filing an amended complaint "at this time." ECF No. 53. Accordingly, on December 3, 2021, HP filed its Answer. ECF No. 55.

C. Discovery Conducted To Date

The parties served initial disclosures on March 26, 2021. Rose Decl. ¶ 3. HP's initial disclosures focused on identifying witnesses with responsibilities for LaserJet printers and toner cartridges. *Id.* Plaintiffs served 39 requests for production, requests for admission, and interrogatories on November 16, 2021. *Id.* ¶ 4. HP issued written responses to all three sets of requests on January 12, 2022. *Id.* ¶ 5. HP made its first document production on June 30, 2022, and its second production on September 16, 2022. *Id.* ¶ 8. On September 16, 2022, HP served amended interrogatory responses following a series of meet and confer discussions with Plaintiffs. *Id.*

The parties' negotiations over Plaintiffs' requests for production and interrogatories have been extensive, and have included motion practice. The parties met and conferred via telephone regarding those requests on February 11, May 19, July 13, and August 30, 2022, and have exchanged numerous substantive emails and letters. *Id.* ¶ 6. On June 7, 2022, after several attempts to resolve key disputes failed, the parties submitted a joint discovery letter asking the Court to decide, among other things, a dispute over whether Plaintiffs could seek discovery from HP regarding inkjet printers. ECF No. 64. HP maintained that Plaintiffs were not entitled to such discovery because their allegations were specific to LaserJet printers. *See id.* The Court agreed, finding that the definition of "Class Printers" in Plaintiffs' TAC "only identifie[d] LaserJet printers." ECF No. 69 at 2. The Court limited discovery to LaserJet printers that were the "object of [HP's] alleged unlawful conduct" (i.e., that received firmware updates that impacted the printer's dynamic security functionality). *Id.*

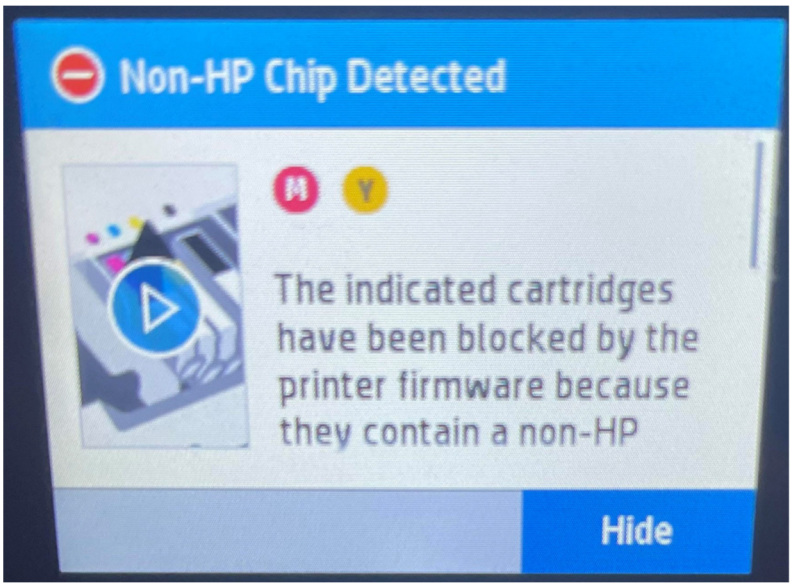
To respond to Plaintiffs' 39 requests for production, HP has conducted significant internal investigation, including collecting documents and data, identifying document custodians, and developing search terms. Rose Decl. ¶ 7. In reliance on Plaintiffs' LaserJet-focused allegations and the Court's discovery order, HP's diligence in this regard has focused exclusively on LaserJet models. *Id.* All but one of the custodians HP has identified to date have responsibilities that relate exclusively to LaserJet models; that is, only one of HP's proposed custodians has responsibilities that relate to both LaserJet and inkjet models. *Id.* And the search terms HP has been using for document collection and review relate exclusively to LaserJet models. *Id.* If the case is expanded to include inkjet printers and cartridges, most if not all of this work would have to be redone—21 months into the case. *Id.* ¶ 9.

D. *So v. HP, Inc.* And This Court's Denial Of Mr. So's Motion To Relate

On April 14, 2022, an alleged inkjet printer customer named Henry So filed a separate class action lawsuit against HP alleging that the third-party ink cartridges in his inkjet printer ceased functioning as a result of certain firmware updates HP released in 2020. *See So v. HP, Inc.*, 5:22-cv-02327-BLF (N.D. Cal.), ECF No. 1. On April 29, 2022, Mr. So filed an administrative motion asking this Court to relate his case to Plaintiffs' case. ECF No. 62. HP opposed the motion, pointing out the differences between Mr. So's inkjet claims and the LaserJet claims at issue in this case. *See* ECF No. 63. On May 6, 2022, the Court denied Mr. So's motion to relate. ECF No. 64.

E. Plaintiffs' Proposed Fourth Amended Complaint

Now, more than two months later and nearly nine months after HP answered the operative TAC, Plaintiffs seek leave to amend their complaint to add Ms. Vollmer as a new Plaintiff. Ms. Vollmer alleges that her inkjet printer ceased functioning with her preferred third-party ink cartridges as a result of a firmware update HP allegedly released in June 2022. ECF No. 72-3 ("Proposed 4AC") ¶¶ 70, 74. She alleges that after the firmware update was transmitted, her inkjet printer displayed an error message spelling out *precisely* the information Plaintiffs have so far alleged was omitted from the error messages they received—*i.e.*, that cartridges were "blocked by the printer firmware because they contain a non-HP chip":



Id. ¶¶ 75, 77. Plaintiffs also for the first time seek to amend their class definition to include inkjet printers.

The claims Plaintiffs seek to add through their proposed amendment are wholly encompassed by the claims in Mr. So's lawsuit. Both Ms. Vollmer and Mr. So allege that HP's firmware updates to inkjet printers violate the Computer Fraud and Abuse Act, the California Comprehensive Computer Data Access and Fraud Act, the FAL, and the UCL. *Compare* Proposed 4AC, *with So*, ECF No. 1. The putative classes are also the same. Mr. So alleges a "Device Owner Class" composed of "[a]ll persons and entities in the United States who own a Class Printer or a similar HP inkjet Printer"; a "Damages Subclass" composed of "[a]ll persons and entities in the United States who own a Class Printer that displayed a diagnostic error . . . as a result of HP's transmission of a firmware update and

other conduct described in this Complaint"; and a "State Consumer Subclass" composed of members of the "Damages Subclass" who "resid[e] in California and States with a similar consumer protection statute to Cal. Civ. Code 1770(a)(15)." *So*, ECF No. 1 ¶ 106. The classes Plaintiffs seek to certify in their proposed amended pleading are substantially the same (except that they also include LaserJet models). *See* Proposed 4AC ¶ 84. There is no claim Ms. Vollmer seeks to assert here that is not already asserted on her behalf in the *So* lawsuit.

III. LEGAL STANDARD

"[L]eave to amend is not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). Courts "may decline to grant leave where there is 'any apparent or declared reason' for doing so." *IXYS Corp. v. Adv. Power Tech., Inc.*, 2004 WL 135861, at *2 (N.D. Cal. Jan. 22, 2004) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 772 (9th Cir. 1991).

In the Ninth Circuit, "four factors [are] relevant to whether a motion for leave to amend pleadings should be denied: (1) undue delay, (2) bad faith or dilatory motive, (3) futility of amendment, and (4) prejudice to the opposing party." *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981). "Prejudice to the opposing party is the most important factor." *Jackson*, 902 F.2d at 1387 (citations omitted). Not all factors need to be present for a court to deny a motion for leave to amend. *See, e.g.*, *Mulato v. Wells Fargo Bank, N.A.*, 76 F. Supp. 3d 929, 942–43 (N.D. Cal. 2014) (denying motion for leave where only undue delay and prejudice factors were satisfied); *Irise v. Axure Software Sols., Inc.*, 2009 WL 3615973, at *6 (C.D. Cal. July 30, 2009) (same).

IV. ARGUMENT

In an effort to sweep together all HP printer products and firmware updates, Plaintiffs characterize this narrow LaserJet case as a broad attack on HP's supposed ongoing "unlawful practices." Mot. at 1–3. It is not. Plaintiffs have never articulated any legal basis for a claim that HP is obligated to ensure its printers work with any and all third-party cartridges, including those with cloned or counterfeit security chips. Nor could they. The law does not require HP to make its printers compatible with all third-party cartridges, and nothing prohibits HP from taking steps to ensure only high-quality toner cartridges with genuine HP security chips are used with HP printers. Recognizing

as much, Plaintiffs premised their actual claims in this case on an incorrect theory that HP failed to adequately *disclose* its cartridge authentication practices to consumers. That issue—whether HP adequately disclosed its cartridge authentication practices—must be decided based on the specific printer model, the specific disclosures on the box for that printer model, the specific disclosures publicly available on HP's website, the specific disclosures and notifications presented by the individual printer, and with regard to the specific firmware updates for the particular printer model. It is not a one-size-fits-all analysis that can be applied across all HP printer models at all times.

Of course, HP *did* disclose its practices to consumers, clearly and conspicuously. The following notice was printed on the outside of the box for each of Plaintiffs' LaserJet printers:

> Dynamic security enabled printer. Only intended to be used with cartridges using an HP original chip. Cartridges using a non-HP chip may not work, and those that work today may not work in the future. More at: … www.hp.com/go/learnaboutsupplies.

Rose Decl. ¶ 2. And the online store pages for the LaserJet models Plaintiffs purchased contained the following disclosure:

Dynamic security	Dynamic security enabled printer. Only intended to be used with cartridges using an HP original chip. Cartridges using a non-HP chip may not work, and those that work today may not work in the future. http://www.hp.com/go/learnaboutsupplies

ECF Nos. 45-4 at 6, 45-5 at 6. HP's website also provided a separate page dedicated to informing consumers that, as a result of firmware updates, "cartridges using a non-HP chip or modified or non-HP circuitry may function for a period of time, but then cease to function." ECF No. 45-3 at 1. While the Court permitted Plaintiffs' claims to survive dismissal because Plaintiffs asserted that they did not view HP's disclosures (or simply omitted them from their complaint), *see* ECF No. 52, discovery will confirm these disclosures were more than reasonably available to consumers, which is all the law requires.[1]

[1] Thus, in *Parziale*, the court dismissed all claims related to HP's dynamic security measures where the plaintiffs' allegations revealed that HP had adequately disclosed its practices. *See Parziale v. HP, Inc.*, 445 F. Supp. 3d 435, 441, 452 (N.D. Cal. 2020) (dismissing omissions claims brought under Florida's analogues to the UCL and FAL in light of HP's website disclosures); *Parziale v. HP, Inc.*,

In any event, Plaintiffs cannot recast their existing claims to downplay the practical impact of their request to amend, for a fourth time, 21 months into the case. Plaintiffs' proposed amendments would not only duplicate the already-pending and unrelated *So* case, but also would significantly broaden the scope of this case, the proposed class, and the required discovery to include new technologies, firmware, firmware updates, and business units when discovery is already well underway and the case is nearly two years old. And Plaintiffs have no justification for waiting until August 2022 to propose claims about inkjet printers. Indeed, Plaintiffs claimed awareness of alleged issues with inkjet printers as early as December 2020, when they filed their initial complaint, yet repeatedly framed their class allegations narrowly across three amended pleadings to include only LaserJet printers. Plaintiffs should not be rewarded—and HP should not be prejudiced—by Plaintiffs' undue delay.

A. Plaintiffs' Proposed Amendment Would Inject A Distinct Inkjet Lawsuit Into This LaserJet Case, Vastly Broaden The Scope Of Discovery, And Unduly Prejudice HP

"Prejudice is the touchstone of the inquiry under Rule 15(a)," and "carries the greatest weight." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citation omitted). Courts deny leave to amend where "allowing amendment would prejudice [the other party] because of the necessity for further discovery," especially "when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action. *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986). Accordingly, undue prejudice may be found if the proposed "additional claims advance different legal theories and require proof of different facts." *Jackson*, 902 F.2d at 1387.

This factor weighs strongly in favor of denying Plaintiffs' Motion. In reliance on the theories actually pleaded in the TAC, as confirmed by the Court's discovery order, ECF No. 69 at 2, the parties have been engaged for many months in extensive discovery that does not include inkjet printers, ink cartridges, or firmware updates for inkjet printers. Plaintiffs knew of the alleged claims related to inkjet printers since at least the inception of this case, yet waited until a *fifth* pleading to propose bringing them into this case. Plaintiffs' new, late-breaking proposed inkjet allegations are so distinct from the LaserJet claims at issue here that they are already the subject of a separate lawsuit pending in this

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2020 WL 5798274, at *1 (N.D. Cal. Sept. 29, 2020) (dismissing claim under the "unfair" prong of Florida's analogue to the UCL in light of the same website disclosures).

district, *see So*, ECF No. 1, which this Court found to be unrelated to this case. *See* ECF No. 64. Plaintiffs' proposal to duplicate them here would require new discovery and undo the progress HP has made in this case to date. *Cf. Abelyan v. Onewest Bank*, 2011 WL 13189883, at *2 (C.D. Cal. Mar. 21, 2011) (denying leave to amend "[e]ven though discovery ha[d] not yet commenced" because plaintiffs' proposed amendments would "expand the scope of the case and require [D]efendants to undertake a new course of defense"). There is no basis to permit Plaintiffs to so significantly upend this case now, expanding discovery at substantial cost and burden to HP.

Contrary to Plaintiffs' characterization of this case as in its "early stage," Mot. at 6, discovery is well under way. The parties served responses and objections to requests for admission, interrogatories, and requests for production more than nine months ago, in January 2022. Rose Decl. ¶ 5. HP worked diligently in the ensuing months to resolve disputes over certain of HP's responses and objections to Plaintiffs' interrogatories and requests for production, and litigated Plaintiffs' motion to compel after several attempts to resolve the parties' disagreements failed. *Id.* ¶¶ 6–7. With assistance from the Court, the parties have largely resolved those disputes. And to date, HP has made two separate document productions (the first on June 30, 2022, and the second on September 16, 2022), and served amended interrogatory responses to address Plaintiffs' comments during meet and confers. *Id.* ¶ 8. HP has spent months identifying and collecting from document custodians and negotiating search terms with Plaintiffs' counsel. Only one of HP's current document custodians has relevant experience in inkjet printers, and the search terms HP has been using for document collection and review relate exclusively to LaserJet models. *Id.* ¶ 7. If the case is expanded to include inkjet printers and ink cartridges, HP will have to redo most if not all of its work to date in conducting internal investigations, collecting and reviewing documents and data, identifying document custodians, and developing search terms. *Id.* ¶ 9.

Ms. Vollmer's proposed inkjet claims arise from entirely different facts than the LaserJet issues currently in the case. All three existing Plaintiffs purchased LaserJet models that were allegedly affected by the same alleged November 2020 firmware updates, while Ms. Vollmer alleges she was injured by a firmware update released just a few months ago, in June 2022, to completely different categories of printers. *Compare* TAC ¶¶ 40, 52, *with* Proposed 4AC ¶¶ 70, 74. Ms. Vollmer's inkjet

printer uses a completely different technology than the LaserJet models alleged in the TAC and was developed and marketed by different groups within HP as compared to those that worked on LaserJet models and toner cartridges. Rose Decl. ¶ 9. The printers were also marketed and sold at different times: the LaserJet models alleged in the TAC were allegedly purchased in 2018, 2019, and 2020, TAC ¶¶ 35,46, 58, and are no longer sold by HP while Ms. Vollmer's inkjet model remains in widespread production today. Rose Decl. ¶ 9. Accordingly, little if any of the discovery conducted regarding LaserJet models will apply to Plaintiffs' proposed inkjet claims, undoing much of the progress made to date and imposing significant additional burdens on HP.

Moreover, the new inkjet allegations in Plaintiffs' proposed amendment involve new and different theories regarding the printer error messages. Plaintiffs' current theory is they were misled by the "supply problem" error message that appeared on their LaserJet printers after the update at issue was released, which Plaintiffs say failed to disclose that the issue was the result of a firmware update. TAC ¶¶ 41, 53, 65. Ms. Vollmer, by contrast, alleges her inkjet printer displayed an error message that *correctly* represented the source of the problem. Proposed 4AC ¶ 77 ("The error message said: 'The indicated cartridges have been blocked by the printer firmware because they contain a non-HP chip.'"). Plaintiffs do not—and cannot—explain how the message Ms. Vollmer received was misleading. Thus, while Plaintiffs' new theory of liability is unclear, there can be no question that it is *different* and will inevitably raise new and distinct issues in discovery, further undoing the progress made to date and prejudicing HP. *See IXYS Corp. v. Advanced Power Tech., Inc.*, 2004 WL 135861, at *3 (N.D. Cal. Jan. 22, 2004) ("[T]he need for a party to conduct supplemental discovery or to consider a new line of legal argument are classic sources of prejudice that have regularly proven sufficient to defeat a motion for leave to amend.") (citing *Zikovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002)).

Further underscoring the prejudicial effect of Plaintiffs' proposed amendment is the fact that Plaintiffs could have asserted allegations regarding inkjet printers in their initial complaint filed 21 months ago, but did not. *See Peterson v. California*, 2011 WL 3875622, at *4 (E.D. Cal. Sept. 1, 2011) (observing that "[d]iscovery or other litigation costs" are prejudicial "when the additional costs could easily have been avoided had the proposed amendments been included within the original pleading") (citation omitted). The Ninth Circuit has held that leave to amend was properly denied with eight

months left of discovery where the proposed amendment would cause the "parties to scramble" in response to the plaintiff's additional claims and would have "unfairly imposed potentially high, additional litigation costs on [the defendant] that could have easily been avoided had [plaintiff] pursued its 'tainted product' theory in its original complaint or reply." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006). The same is true here, as HP will need to re-do much—if not all—of the discovery and factual investigation it has completed to date, at a substantial cost that could have been avoided had Plaintiffs included allegations regarding inkjet printers and ink cartridges in their initial complaint. This prejudice to HP is reason alone to deny Plaintiffs' Motion. *See Harris v. Vector Mktg. Corp.*, 2010 WL 11484806, at *4 (N.D. Cal. Apr. 5, 2010) (finding undue prejudice and denying motion to amend because Plaintiff had "vastly underestimated the likely scope of discovery" and failed to consider the "work that Defendant must undertake in defense and rebuttal of Plaintiff's contentions").

B. Plaintiffs Unduly Delayed In Seeking To Add Allegations Relating To Inkjet Printers

Courts have "particularly broad" discretion to deny leave to amend where the plaintiff "previously filed an amended complaint." *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004). And "[l]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 582 (9th Cir. 2019). Both factors weigh in favor of denying leave to amend here.

Plaintiffs already amended their complaint three times. Yet in each new version of their complaint, Plaintiffs did not raise a single claim about inkjet printers. This fact alone favors denying Plaintiffs' Motion. *See Harris*, 2010 WL 11484806, at *1 (finding undue delay and denying leave to amend because the plaintiff had knowledge of the proposed amendments "from the outset of the case," yet failed to add the relevant claims despite having "asked for and/or [taking] numerous opportunities to amend her complaint").[2] Moreover, Plaintiffs have known about alleged issues with inkjet printers

[2] Plaintiffs argue the previous amended complaints were by stipulation, Mot. at 5–6, which is beside the point. Plaintiffs were aware of inkjet-related claims since the start of the case and could have sought to add them in their four prior complaints, yet failed to do so. These facts weigh against granting leave to amend.

from the outset of this case. Indeed, they argued in the parties' joint discovery letter that their claims have always encompassed inkjet. *See* ECF No. 67 at 1–2 (asserting that "Plaintiffs' allegations amply support discovery into inkjet printers that were impacted in the same way as Plaintiffs' LaserJet printers"). Yet as the Court recognized in rejecting Plaintiffs' argument, Plaintiffs' complaints did not put HP on notice of inkjet claims or allege a putative class that encompassed purchasers of inkjet printers. *See* ECF No. 69 at 2. And it does not matter whether Plaintiffs intended to include claims about inkjet printers from the start (and merely failed to articulate them); inartful pleading is no excuse. *See Salmon Trollers Mktg. Ass'n v. Gutierrez*, 2007 WL 9810965, at *5 (N.D. Cal. Nov. 29, 2007) ("While the complaint may have been a product of inartful pleading (or imprudent dismissing), this is not excusable given that it is plaintiff's fourth complaint on file in this action.").

Plaintiffs also fail to provide any explanation for their delay, which further weighs against granting leave to amend. *See Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (noting that this factor is "especially" relevant to the amendment analysis when "no reason is given for the delay" and "[n]othing in the proposed amended complaint relied on facts that were unavailable" previously). Plaintiffs summarily assert that there has been no delay, which is plainly inaccurate and insufficient. *See* Mot. at 6. In fact, it is contradicted by the fact that Plaintiffs have been aware of alleged issues with inkjet printers from the outset of this case. And while Plaintiffs elsewhere in their Motion say they have received "additional reports . . . impacting inkjet printers" since filing their case in December 2020, Mot. at 4, they do not—and cannot—establish that inkjet-related claims were previously unavailable to them. Again, Plaintiffs have known of such allegations from the outset of this case, and expressly argued that their previous complaints encompassed inkjet printers. *See* ECF No. 67 at 2. Because Plaintiffs fail even to explain, much less excuse, their delay, their Motion should be denied.[3]

[3] Plaintiffs' Motion does not seek leave to file a "supplemental" pleading under Rule 15(d), which permits a party to add events "that happened after the date of the pleading to be supplemented." *Carolina Cas. Ins. Co. v. Lanahan & Reilley, LLP*, 2011 WL 3741004, at *6 (N.D. Cal. Aug. 25, 2011). However, if the Court were to construe Plaintiffs' Motion as a request under Rule 15(d), it should still be denied, since the proposed amendments "constitute new claims that should be brought in a separate action" (and, in fact, have already been brought in the *So* lawsuit). *Id.*

C. Plaintiffs' Proposed Amendments Are Futile As To Their Consumer Deception Claims

Finally, the Court may deny leave to amend if the proposed amendment "would be futile." *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011); *see Soil Retention Prod., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929, 967 (S.D. Cal. 2021) (denying leave to amend because "Plaintiffs' legal theories fail as a matter of law" and, as a result, "[f]urther amendment would simply be a futile exercise") (citation omitted). All of Plaintiffs' inkjet-related claims are covered by the *So* lawsuit, making their addition here pointless and inefficient. But more than that, when it comes to Plaintiffs' omissions-based consumer deception claims under the FAL and UCL, Plaintiffs' amended claims will not even survive Rule 12(b)(6) dismissal, rendering them futile from the start.

The Court previously allowed Plaintiffs' claims under the FAL and the fraudulent prong of the UCL to proceed because Plaintiffs alleged the "supply problem" error message displayed on HP's LaserJet printers—the only alleged "misrepresentation" identified in the TAC—failed to state that a firmware update was the reason Plaintiffs' preferred third-party cartridge stopped working. ECF No. 52 at 19.[4] But in Plaintiffs' proposed fourth amended complaint, Ms. Vollmer alleges that she received an error message that precisely identified the cause of the printer issue: "The indicated cartridges have been blocked *by the printer firmware* because they contain a non-HP chip." Proposed 4AC ¶ 77 (emphasis added). That error message disclosed the very information Plaintiffs alleged was missing in the LaserJet printers' error message. *See* ECF No. 52 at 19. Accordingly, Ms. Vollmer's claims under the FAL and the fraudulent prong of the UCL are foreclosed by the Court's previous order. Thus, they are not only *duplicative* of the *So* lawsuit; they are, as alleged in this case, *futile*. Plaintiffs' attempt to introduce them—and force the parties to engage in unnecessary motion practice to dispose of them—should be denied. *See Soil Retention*, 521 F. Supp. 3d at 967; *Sanderling Mgmt. Ltd. v. Snap Inc.*, 2021 WL 3160867, at *6 (C.D. Cal. July 9, 2021).

[4] The Court also permitted Plaintiffs' CLRA claim to proceed in light of their allegations regarding the "supply problem" message, ECF No. 52 at 19, but Ms. Vollmer does not propose to assert a CLRA claim.

V. CONCLUSION

For the reasons stated above, HP respectfully requests that the Court deny Plaintiffs' Motion for Leave to File a Fourth Amended Complaint.

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Respectfully submitted,

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