UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN CEPELAK, et al.,

Plaintiffs,

v.

HP INC.,

Defendant.

Case No. 20-cv-02450-VC

ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS SECOND AMENDED COMPLAINT

Re: Dkt. No. 70

The plaintiffs bring this putative class action based on HP's failure to disclose its practice of "underprinting." According to the plaintiffs, HP printers use color ink when printing in black and white. And once the color ink runs out, HP printers refuse to print—even in black and white. The plaintiffs say they never would have purchased these printers if they had known about this practice.

HP's motion to dismiss the plaintiffs' second amended complaint is denied in part and granted in part. The motion to dismiss the fraud-by-omission claims is denied because the product defect that the plaintiffs allege is "central to the product's function." The motion to dismiss the claim under Arkansas law is denied because the Arkansas plaintiff has alleged an actual injury. Finally, the motion to dismiss the plaintiffs' claims for equitable relief is denied with respect to the plaintiffs' claims for injunctive relief, but granted with respect to the plaintiffs' claims for monetary equitable relief.

Fraud-by-Omission Claims: HP's challenge to the plaintiffs' fraud-by-omission claims is improperly raised: HP failed to raise this argument in its initial motion to dismiss, though it could have. It therefore may not raise it now. *See* Fed. R. Civ. P. 12(g)(2). But the argument

would fail even if it were not forfeited. To state a fraud-by-omission claim under California law, the plaintiffs must allege a product defect that is "central to the product's function." *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 (9th Cir. 2018). HP argues that a defect is only central to the product's function if it "renders the product incapable of use by any consumer," pointing to the Ninth Circuit's language in *Hodsdon*. 891 F.3d at 864. But, considered in context, this language does not establish a condition that must be met to state a fraud-by-omission claim. Rather, the Ninth Circuit was shedding light on the types of defects that are central to a product's function by laying out a spectrum of alleged defects. On one end of the spectrum are cases that easily state a claim: defects that "render[] the product incapable of use by any consumer." *Id.* On the other end—cases that do not state a fraud-by-omission claim—are those defects that are merely "based on subjective preferences." *Id.*

The plaintiff's claim in *Hodsdon*—that the defendant had a duty to disclose that its goods may have been produced using child or slave labor—failed because it was closer to the latter pole than the former. Here, the plaintiffs' allegations are much closer to the other pole as the defect that the plaintiffs allege goes to the core functionality of a printer: its ability to print. Once the color ink has run out, the plaintiffs' printers will not print. And the plaintiffs allege that the color ink will always run out, even if a printer has only been used to print in black and white. Wanting a printer to print when it still has ink is not a mere "subjective preference." Therefore, the plaintiffs have adequately alleged a product defect under California law.

Arkansas Deceptive Trade Practices Act Claim: HP next challenges the plaintiffs' claim under the Arkansas Deceptive Trade Practices Act (ADTPA). To state a claim under ADTPA, a plaintiff must allege "actual financial loss." Ark. Code Ann. § 4-88-113(f). Allegations of a mere diminution in value do not meet this requirement. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 328 (2005). For example, a design defect that reduces the resale value of a car is insufficient to state a claim under ADTPA, unless the car "has actually malfunctioned or the defect has manifested itself." *Id.* But here, the plaintiffs have alleged actual financial loss: due to HP's alleged deceptive practices, the plaintiffs have had to purchase more ink than they otherwise would have.

Therefore, HP's motion to dismiss this count is denied.

Claims for Equitable Relief: Finally, HP argues that the plaintiffs' claims for equitable relief should be dismissed because the plaintiffs have not alleged that they lack an adequate remedy at law. "It is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law." *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996) (ellipsis in original) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)). In *Sonner v. Premier Nutrition Corp.*, the Ninth Circuit recognized that this principle applies where "a party requests [equitable relief] under the UCL and CLRA in a diversity action," whatever remedies may be available in state court. 971 F.3d 834, 844 (9th Cir. 2020). Therefore, to state a claim for equitable relief, the plaintiffs must allege that they lack an adequate legal remedy.

Some courts have suggested that *Sonner* prevents parties from pleading claims for legal and equitable relief in the alternative. *See, e.g.*, *Anderson v. Apple Inc.*, 500 F. Supp. 3d 993, 1009 (N.D. Cal. 2020). This may be a plausible reading of *Sonner*, but it is not the best reading. *Sonner* primarily speaks to the ability of a federal court to *award* equitable relief at the end of the case. The ultimate holding of *Sonner* is that a plaintiff "must *establish* that she lacks an adequate remedy at law before *securing*" equitable relief under the UCL and CLRA. 971 F.3d at 844 (emphasis added). While *Sonner* recognized that a complaint seeking equitable relief must "plead 'the basic requisites of the issuance of equitable relief' including 'the inadequacy of remedies at law,'" nothing in *Sonner* precludes plaintiffs from doing so in the alternative to remedies at law. *Id.* at 844 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Indeed, the Federal Rules of Civil Procedure permit demands for relief in the alternative. Fed. R. Civ. P. 8(a)(3).

Sonner, therefore, should not be understood as a categorical bar to pleading claims for equitable relief under the UCL and damages under the CLRA in a single complaint, as plaintiffs can bring claims in the alternative under different legal theories. For example, a plaintiff may be able to state a claim for equitable relief under the unfair prong of the UCL alongside a claim for

damages based on a theory of fraud under the CLRA. *See Elgindy v. AGA Service Company*, 2021 WL 1176535, at *15 (N.D. Cal. Mar. 29, 2021) (declining to dismiss the plaintiffs' claims under the unlawful and unfair prongs of the UCL because only equitable relief was available under this legal theory, despite the availability of a legal remedy for the plaintiffs' claims on a fraud-based theory). The relevant inquiry is not what other claims the plaintiffs have raised, but whether they have plausibly alleged the inadequacy of legal remedies for each claim for equitable relief that they seek.

Here, the plaintiffs have plausibly alleged the inadequacy of remedies at law with respect to their claims for injunctive relief. If the plaintiffs were seeking injunctive relief because they planned to buy HP printers in the future, this would be a close question—such harm may be able to be wholly cured by future damages actions, making injunctive relief inappropriate. *See Clark v. American Honda Motor Co.*, 528 F. Supp. 3d 1108, 1121 (C.D. Cal. Mar. 25, 2021). But that is not the harm that the plaintiffs have articulated. The plaintiffs state that, absent an injunction, they "will abstain from purchasing [HP printers] even though they would like to do so in the future" because they will not be able to rely on HP's representations (or lack thereof) concerning the alleged defect. This harm cannot be remedied by a future damages action because the plaintiffs cannot bring a lawsuit based on their decision *not* to purchase a printer. *Cf. Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 972 (9th Cir. 2018) (holding that a plaintiff asserting this type of harm may have standing to seek an injunction against false advertising or labeling); *see also Zeiger v. WellPet LLC*, 526 F. Supp. 3d 652, 687 (N.D. Cal. 2021) ("California's consumer protection laws permit courts to issue injunctions that serve different purposes and remedy different harms than retrospective monetary damages.").

In contrast to their claim for injunctive relief, the plaintiffs have not alleged the inadequacy of a remedy at law with respect to their claims for equitable monetary relief. All of the plaintiffs' claims for such relief are "rooted in the same theory and factual allegations" as their claims for damages: the theory that HP deceptively induced the plaintiffs to purchase printers based on their allegedly false and misleading statements and omissions. *Elgindy*, 2021

WL 1176535, at *15. But because the plaintiffs may be able to articulate an alternative legal theory under which equitable monetary relief—but not damages—is available, the plaintiffs' claims for restitution, disgorgement, and other forms of equitable monetary relief are dismissed with leave to amend. Any amended complaint must be filed within 21 days of this order.

IT IS SO ORDERED.

Dated: November 15, 2021

VINCE CHHABRIA
United States District Judge