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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MOBILE EMERGENCY HOUSING
CORP., et al.,

Plaintiffs,

v.

HP, INC.,

Defendant.

Case No. 20-cv-09157-SVK

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS PLAINTIFFS'
THIRD AMENDED COMPLAINT**

Re: Dkt. Nos. 44, 45, 46, 47, 49, 50

Defendant HP, Inc. d/b/a HP Computing and Printing Inc. (“Defendant” or “HP”) moves to dismiss Plaintiffs Mobile Emergency Housing Corp. (“Mobile Emergency”), Track Rat Enterprises, Inc. d/b/a Performance Automotive & Tire Center (“Performance Automotive”), and David Justin Lynch’s (“Lynch”) (collectively, “Plaintiffs”) Third Amended Complaint (“TAC”) (Dkt. 42) pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and/or move to strike Plaintiffs’ requests for injunctive relief pursuant to Rule 12(f). Dkt. 44. The Parties have consented to the jurisdiction of a magistrate judge. Dkts. 15, 21, 33.

Pursuant to Civil Local Rule 7-1(b), the Court deems the motion to dismiss suitable for determination without oral argument. Having carefully considered the Parties’ submissions, the case file, and the relevant law, and for the reasons discussed below, the Court **GRANTS IN PART AND DENIES IN PART** Defendant’s motion to dismiss the TAC.

I. BACKGROUND

This discussion of the background facts is based on the allegations of Plaintiffs’ TAC. Plaintiffs allege that HP transmits firmware updates without authorization to HP printers through

1 “adding, deleting or altering code, diminishing the capabilities of HP printers, and rendering the
2 competitors’ supply cartridges incompatible with HP printers.” *Id.* ¶¶ 1, 24, 26. Further, while
3 users are told that the HP printers have a “supply problem,” HP intentionally caused the issue by
4 sending this malware to render third-party supplies incompatible with HP products. *Id.* ¶¶ 5, 24,
5 26, 29, 30. Plaintiffs allege that as a result of this malware, HP printer owners are either forced to
6 buy HP cartridges or they cannot use their printers until third parties can develop workarounds in
7 their products. *Id.* ¶ 3. Plaintiffs also allege that “HP uses this firmware update process to conceal
8 that it is actually collecting data on whether consumers are using HP or its competitors’
9 cartridges” without their consent. *Id.* ¶¶ 1, 27.

10 Plaintiff Mobile Emergency, through its authorized representative, purchased an HP Color
11 LaserJet Pro M254 for \$238.96 on August 21, 2019 from a Staples store in New York. *Id.* ¶ 35.
12 The printer came with an initial set of model 202 HP-brand toner supply cartridges. *Id.* ¶ 37.
13 When those supply cartridges were exhausted, Mobile Emergency purchased a set of model 202
14 Greensky toner supply cartridges that were advertised to be compatible with this HP printer from
15 Amazon.com for \$52.49. *Id.* ¶ 39. Plaintiffs allege that on or around November 18, 2020, HP sent
16 or activated a transmission to HP printers, which “altered the code and data” of the printer,
17 rendering the printer incompatible with third-party toner supply cartridges, including the Greensky
18 cartridges purchased by Mobile Emergency. *Id.* ¶ 40. HP did not notify Mobile Emergency of the
19 transmission, and Mobile Emergency only discovered this when the authorized representative
20 attempted to print a document, received an error message stating “[s]upply problem,” and the
21 printer ceased printing. *Id.* ¶¶ 41, 42. On December 1, 2020, Mobile Emergency purchased a
22 black HP toner cartridge for \$71.68 from Staples to replace the Greensky cartridges. *Id.* ¶ 44.

23 Plaintiff Performance Automotive, through its authorized representative, used rewards
24 points to purchase an HP Color LaserJet Pro MFP M281fdw Laser Multifunction Printer from HP
25 in November 2018. *Id.* ¶¶ 46-47. The printer came with an initial set of model 202 HP-brand
26 toner supply cartridges. *Id.* ¶ 49. When those supply cartridges were exhausted, Performance
27 Automotive purchased model 202 GPC Image, Linkyo, and Greensky toner cartridges for

1 Amazon.com. *Id.* ¶ 51. Plaintiffs allege that on or around November 18, 2020, HP sent or
2 activated a transmission to HP printers, which “altered the code and data” of the printer, rendering
3 the printer incompatible with third-party toner supply cartridges, including the GPC Image,
4 Linkyo, and Greensky cartridges purchased by Performance Automotive. *Id.* ¶ 52. HP did not
5 notify Performance Automotive of the transmission, and Performance Automotive only discovered
6 the effects of the transmission when it attempted to print a document and received an error
7 message stating “[s]upply problem.” *Id.* ¶ 53. Performance Automotive’s printer ceased printing
8 and when its authorized representative checked the printer, he saw that the BIOS version had been
9 changed. *Id.* ¶ 54. The authorized representative researched the issue and discovered that HP Had
10 issued a “Bios Update,” which caused the printer to cease working. *Id.* ¶ 55. As a result of the
11 update, Performance Automotive’s printer and supply cartridges were disabled, and it purchased a
12 printer from a different printer manufacturer. *Id.* ¶ 56.

13 Plaintiff Lynch purchased an HP Color LaserJet Pro M254dw Wireless Printer for \$239.25
14 from Best Buy on March 3, 2020. *Id.* ¶ 58. The printer came with an initial set of model 202 HP-
15 brand toner supply cartridges. *Id.* ¶ 59. When those supply cartridges were exhausted, Lynch
16 purchased a set of high-capacity model 202 toner cartridges for \$215.46 from Express-Inks that
17 were advertised to be compatible with this HP printer. *Id.* ¶ 60. In January 2021, HP sent or
18 activated a transmission which altered the code and data of the printer, rendering the printer
19 incompatible with third-party toner supply cartridges, including the Express-Inks cartridges
20 purchased by Lynch. *Id.* ¶ 62. HP did not notify Lynch of the transmission, and Lynch only
21 discovered the effects of the transmission when he attempted to print a document, his printer
22 ceased printing, and he received an error message stating “[s]upply problem.” *Id.* ¶¶ 63-65. The
23 printer also displayed an error message stating that “[t]he indicated supplies are not
24 communicating correctly with the printer. Try reinstalling the supplies. If the problem persists,
25 replace the supplies to continue printing.” *Id.* ¶ 66. As a result of the transmission, Lynch
26 purchased new HP cartridges from Amazon.com to get the printer operating again. *Id.* ¶¶ 68-69.

27 Plaintiffs bring this action to seek damages and injunctive and other equitable relief as a
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1 Device Owner Class: All persons and entities in the United States who
own a Class Printer.¹

2 Damages Subclass: All persons and entities in the United States who
3 own a Class Printer that displayed a diagnostic error, such as “Supply
4 Problem” or other similar error code, as a result of HP’s transmission
of a firmware update.

5 State Consumer Subclass: All persons and entities residing in
6 California and States with a similar consumer protection statute to
7 Cal. Civ. Code 1770(a)(15), who own a Class Printer that displayed a
diagnostic error, such as “Supply Problem” or other similar error
code, as a result of HP’s transmission of a firmware update.

8 *Id.* ¶ 74.

9 **II. REQUEST FOR JUDICIAL NOTICE AND INCORPORATION BY REFERENCE**

10 **A. Legal Standard**

11 There are two doctrines that allow district courts to consider material outside the pleadings
12 without converting a motion to dismiss into a motion for summary judgment: judicial notice under
13 Federal Rule of Evidence 201 and incorporation by reference. *Khoja v. Orexigen Therapeutics,*
14 *Inc.*, 899 F.3d 988, 998 (9th Cir. 2018), *cert. denied sub nom. Hagan v. Khoja*, — U.S. —, 139 S.
15 Ct. 2615, 204 L. Ed. 2d 264 (2019). “The court may judicially notice a fact that is not subject to
16 reasonable dispute.” Fed. R. Evid. 201(b). A fact is “not subject to reasonable dispute” if it “is
17 generally known” or “can be accurately and readily determined from sources whose accuracy
18 cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). However, “[j]ust because the
19 document itself is susceptible to judicial notice does not mean that every assertion of fact within
20 that document is judicially noticeable for its truth.” *Khoja*, 899 F.3d at 999.

21 Incorporation by reference is a judicially created doctrine that allows a court to consider
22 certain documents as though they are part of the complaint itself. *Khoja*, 899 F.3d at 1002. “The
23 doctrine prevents plaintiffs from selecting only portions of documents that support their claims,
24 while omitting portions of those very documents that weaken—or doom—their claims.” *Id.* A

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¹ Plaintiffs allege that “[s]ubject to information learned in discovery, the Class Printers comprise
HP Color LaserJet printers and all-in-one devices, in the following non-exhaustive list of products
and product series: HP Color LaserJet Pro M254, HP Color LaserJet Pro MFP M280, HP Color
LaserJet Pro MFP M281, and all other models affected by HP malware transmissions in the way

1 defendant can seek to incorporate a document into the complaint “if the plaintiff refers extensively
2 to the document or the document forms the basis of the plaintiff’s claim.” *U.S. v. Ritchie*, 342
3 F.3d 903, 908 (9th Cir. 2003) (citations omitted). While the “mere mention” of the existence of a
4 document is insufficient to incorporate a document, it is proper to incorporate a document if the
5 claim “necessarily depended” on them. *Khoja*, 899 F.3d at 1002.

6 After a defendant offers such a document, the district court can treat the document as part
7 of the complaint, and “thus may assume that its contents are true for purposes of a motion to
8 dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at 908. However, “[w]hile this is generally true,
9 it is improper to assume the truth of an incorporated document if such assumptions only serve to
10 dispute facts stated in a well-pleaded complaint.” *Khoja*, 899 F.3d at 1003. Indeed, using
11 extrinsic documents to “resolve competing theories against the complaint risks premature
12 dismissals of plausible claims that may turn out to be valid after discovery” and it is “improper to
13 do so only to resolve factual disputes against the plaintiff’s well-pled allegations in the
14 complaint.” *Id.* at 998, 1014.

15 **B. Analysis**

16 Defendant asks the Court to take judicial notice of or incorporate by reference the
17 following documents:

- 18 (1) The “HP Printers – Dynamic Security Enabled Printers”
19 webpage (“Dynamic Security Page”), as it appeared on
20 November 11, 2020 (Dkt. 45-3 Exhibit A);
- 21 (2) The “Specs” tab of the HP store page for the HP Color
22 LaserJet Pro MFP M281fdw printer model, as it appeared on
23 April 22, 2018 (Dkt. 45-4 Exhibit B);
- 24 (3) The “Specs” tab of the HP store page for the HP Color
25 LaserJet Pro M254dw printer model, as it appeared on March
26 18, 2018 (Dkt. 45-5 Exhibit C);
- 27 (4) The “HP Color LaserJet Pro – 10.xx and Supplies Messages”
28 webpage (“Troubleshooting Page”) (Dkt. 45-6 Exhibit D);
- 29 (5) The online message board (Dkt. 45-7 Exhibit E); and
- 30 (6) The “What Data We Collect” section of the “HP Privacy
Statement” webpage (“Privacy Statement”), as it appeared on

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