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and all those similarly situated

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MOBILE EMERGENCY HOUSING CORP.,
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

**NOTICE OF MOTION AND MOTION FOR
LEAVE TO FILE FOURTH AMENDED
COMPLAINT**

Hearing: September 27, 2022

Time: 10:00 a.m.

1 PLAINTIFFS HEREBY PROVIDE NOTICE that on September 27, 2022, in Courtroom 6, on
2 the 4th Floor of the United States District Court for the Northern District of California, San Jose
3 Division, located at 280 South 1st Street, San Jose, California 95113, or if the Court prefers, via Remote
4 Videoconference, at 10:00 a.m., or as soon thereafter as the matter may be heard, Plaintiffs MOBILE
5 EMERGENCY HOUSING CORP., TRACK RAT ENTERPRISES, INC. d/b/a PERFORMANCE
6 AUTOMOTIVE & TIRE CENTER, and DAVID JUSTIN LYNCH (together, "Plaintiffs") will and
7 hereby do move the Court for leave to file Plaintiffs' [Proposed] Fourth Amended Complaint ("4AC")
8 a copy and redline version of which are concurrently filed with this Notice of Motion and Motion as
9 Exhibit "A" and "B" to the Declaration of Mark L. Javitch, ¶¶ 6-7 ("Javitch Decl.").

10 The relief sought by Plaintiffs is to file the 4AC to add claims of an additional plaintiff and
11 proposed class representative Paige Vollmer, and to amend the proposed class definitions in light of
12 Ms. Vollmer's involvement in the case.

13 The Motion for Leave to Amend will be based on this Notice of Motion and Motion, the
14 Memorandum of Points and Authorities in support, the proposed 4AC, the Javitch Declaration, and at
15 the Court's discretion, oral argument.

16
17 Date: August 22, 2022

By: /s/ Mark L. Javitch
Mark L. Javitch

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19 *One of the Attorneys for Plaintiffs*
20 *And those similarly situated*
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Even after this lawsuit was filed, HP refuses to stop its unlawful practices of purposefully disabling its own customers' printers using firmware "updates" that are actually malicious transmissions of code designed to block HP's competitors' supply cartridges. Plaintiffs continue to receive reports from users who fall victim to HP's practices. HP has sought to limit this lawsuit to LaserJet printers using toner cartridges, but HP's practices have a far greater impact, extending to InkJet printers with ink cartridges. Proposed plaintiff Paige Vollmer ("Vollmer")—who owns an InkJet printer that recently lost functionality with third party ink cartridges after a firmware update—seeks to assert claims in this lawsuit against HP for injuries virtually identical to those incurred by the other Plaintiffs and proposed Class members. Vollmer's experiences show that HP's disabling transmissions affect LaserJet *and* InkJet printers alike.

Pursuant to Federal Rule of Civil Procedure 15(a) and Civil L.R. 7-2, Plaintiffs, by and through their undersigned counsel, hereby respectfully move the Court for leave to file a Fourth Amended Complaint ("4AC") to plead facts relating to Defendant's virtually identical violations of law arising out of malicious firmware transmissions sent to Vollmer and other InkJet owners subsequent to the filing of the Third Amended Complaint. Counsel have met and conferred via telephone and have expressed opposing positions, necessitating this motion. *See* Declaration of Mark L. Javitch ("Javitch Decl.") ¶¶ 8–9.

Leave to amend should be granted because the amendment serves the interests of justice and no prejudice will arise from its filing at this early stage of the case. Pursuant to L.R. 10-1, the clean version of the proposed 4AC is attached as Exhibit A to the Javitch Declaration, and a redline version showing the proposed changes from Plaintiffs' April 8, 2021 Third Amended Complaint (Dkt. 42) is attached as Exhibit B to the Javitch Declaration.

II. FACTS & PROCEDURAL HISTORY

On December 17, 2020, Plaintiffs Mobile Emergency Housing Corp. and Track Rat Enterprises filed a Complaint alleging violations of the Computer Fraud and Abuse Act (“CFAA”) codified at 18 U.S.C. § 1030, *et seq.*, the California Comprehensive Computer Data Access and Fraud Act (“CDAFA”) codified at Cal. Penal Code § 502(c), Trespass to Chattels, and the fraudulent, unfair, and unlawful prongs of Bus. and Prof. Code § 17200. (Dkt. 1, Complaint). On March 2, 2021, Plaintiffs filed their First Amended Complaint, adding Plaintiff David Justin Lynch and claims for injunctive relief under the California Consumer Legal Remedies Act (“CLRA”). (Dkt. 30). On March 19, 2021, Plaintiffs filed their Second Amended Complaint to add a claim for damages under the CLRA. (Dkt. 39).

On April 8, 2021, Plaintiffs filed their Third Amended Complaint to allege that the Italian Competition Authority fined HP 10 million Euros for failing to sufficiently inform consumers that it was collecting data on whether its printers used HP or third party cartridges for the purpose of disabling and excluding support coverage to customers using competitors’ cartridges. Dkt. 42, ¶¶ 72-73. The Third Amended Complaint also added additional theories under Section 1030(a)(2)(C) of the CFAA for Defendant accessing a protected computer without authorization and obtaining information, and Sections 502(c)(2), (c)(3), and (c)(7) of the CDAFA for knowingly accessing these printers and data, using computer services belonging to others, all without permission. (Dkt. 42).

On May 24, 2021, HP filed its motion to dismiss and/or strike Plaintiffs’ Third Amended Complaint. (Dkt. 44). On October 15, 2021, the Court issued an Order granting in part and denying in part HP’s motion. (Dkt. 52). The Court dismissed Plaintiffs’ claims for relief under 18 U.S.C. § 1030(a)(2)(C), Cal. Penal Code § 502(c)(7), and Trespass to Chattels, but denied HP’s motion as to all of Plaintiffs’ remaining claims under 18 U.S.C. § 1030(a)(5)(A), Cal. Penal Code § 502(c)(1)-(5), False

1 Advertising Law, Cal. Bus. & Prof. Code § 17500, the fraudulent, unfair, and unlawful prongs of Bus.
2 and Prof. Code § 17200, and Cal. Civ. Code § 1770(a)(15) of the CLRA. *Id.*

3 Since the commencement of this lawsuit, and even after HP's motion to dismiss was largely
4 denied, HP has shown no signs that it will cease its unlawful practices that are the subject of this lawsuit.
5 HP continues to flagrantly send transmissions to its customers' printers that disable third party cartridges
6 under the guise of firmware "updates."

7
8 The new allegations in the proffered 4AC relating to proposed Plaintiff Vollmer are as follows.
9 Vollmer purchased an HP OfficeJet Pro 8025e Wireless Color All-in-One Inkjet Printer for
10 approximately \$225.00. 4AC, ¶ 70. Vollmer was satisfied using InkJet cartridges manufactured by HP's
11 competitor, Janmore, which she purchased on Amazon. *Id.* ¶¶ 71–72. In or around June 2022, Vollmer's
12 printer received a malicious transmission, rendering her printer incompatible with her Janmore
13 cartridges. *Id.* ¶¶ 74–75. HP did not advise Vollmer of the transmission. *Id.* ¶ 75. Vollmer discovered
14 the effects of the malware transmission when she attempted to print a document and an error message
15 said: "The indicated cartridges have been blocked by the printer firmware because they contain a non-
16 HP chip." *Id.* After HP's transmission, Vollmer's printer was disabled. *Id.* ¶ 79. Although Vollmer
17 wanted to continue printing with Janmore cartridges, after her printer became disabled, she was forced
18 to give up on her HP printer and purchase another printer altogether. *Id.* ¶ 80.

19
20 On July 29, 2022, Plaintiffs proffered to Defendants the 4AC, pleading the damage incurred by
21 Vollmer. (4AC ¶¶ 70–80.) On August 5, 2022, counsel for HP emailed that HP would not stipulate to the
22 filing of the 4AC. *See* Javitch Decl., ¶ 8. HP argues that Plaintiffs have had enough time to amend, the
23 product that Vollmer brings was not at issue, and that there is a separate case pending relating to InkJet
24 printers. On August 12, 2022, counsel held a telephonic meet and confer, but could not reach a
25 resolution, thereby necessitating this motion. *Id.* ¶ 9.
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