

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HENRY SO,
Plaintiff,
v.
HP, INC.,
Defendant.

Case No. 22-cv-02327-BLF

**ORDER DENYING IN PART AND
GRANTING IN PART MOTION TO
DISMISS WITH LEAVE TO AMEND
IN PART AND WITHOUT LEAVE TO
AMEND IN PART**

In this case, Plaintiff Henry So alleges that Defendant HP, Inc. (“HP”) remotely transmits firmware updates to HP printers that make third-party ink and toner supply cartridges incompatible with those HP printers. He brings common law and state and federal statutory claims, and he seeks to represent both a California and a nationwide class of consumers who purchased the identified HP printers.

Now before the Court is HP’s motion to dismiss under Rules 12(b)(1) and 12(b)(6). ECF No. 14 (“MTD”); *see also* ECF No. 19 (“Reply”). So opposes the motion. ECF No. 17 (“Opp.”). The Court held a hearing on the motion on October 27, 2022. *See* ECF No. 28. For the reasons discussed on the record and explained below, the Court DENIES IN PART the motion to dismiss and GRANTS IN PART the motion to dismiss WITH LEAVE TO AMEND in part and WITHOUT LEAVE TO AMEND in part.

I. BACKGROUND

As alleged in the Complaint, Defendant HP sells both printers and associated HP-branded ink and toner cartridges for use in its printers. ECF No. 1 (“Compl.”) ¶¶ 20-21. For a cartridge to be compatible with a printer, both the hardware and the software must align. *Id.* ¶ 25. Each model of HP printer is compatible only with the associated cartridge model. *Id.* ¶ 24. HP has

competitors in the market for cartridges, as consumers can choose to buy cartridges from HP (“HP cartridges”) or a different company (“third-party cartridges”). *Id.* ¶ 35. Third-party cartridges can be 25%-75% less expensive than HP cartridges. *Id.* ¶ 34.

So alleges that HP periodically pushes out firmware updates to its printers that prevent consumers from using third-party cartridges. Compl. ¶¶ 65-70. He claims that the firmware also causes the printer to “display a (false) error message” stating there is a “supply problem, cartridge communication error, or cartridge problem.” *Id.* ¶ 68. Further, So alleges that HP installs technology in its printers that records data about the consumer’s printing habits and transmits it back to HP without the consumer’s knowledge or consent. *Id.* ¶¶ 51, 54-57. He asserts that this happens with “all models of HP printers that use ink supply cartridges,” and he provides a “non-exhaustive list” of models that he alleges were affected (“Class Printers”). *Id.* ¶ 90.

So purchased a new HP OfficeJet Pro 6978 All-in-One Printer on November 22, 2018, and he purchased a new HP ENVY 7885 All-in-One Printer on April 10, 2021, both in California. Compl. ¶¶ 93-94. He had previously owned an HP OfficeJet 6962 All-in-One Printer, with which he used both HP cartridges and third-party cartridges. *Id.* ¶ 95. So alleges that HP sent out a firmware update in December 2020, and on or around December 16, 2021, his OfficeJet Pro 6978 stopped working with third-party cartridges, so he had to purchase an HP cartridge for the printer to function. *Id.* ¶¶ 98-99.

This lawsuit was filed on April 14, 2022. *See* Compl. The Complaint asserts claims for violation of the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. §§ 1030(a)(5)(A), 1030(a)(2)(C), and 1030(a)(4), Compl. ¶¶ 118-143 (Count 1); violation of the California Comprehensive Computer Data Access and Fraud Act (“CCDAFA”), Cal. Penal Code § 502 *et seq.*, Compl. ¶¶ 144-159 (Count 2); violation of all three prongs of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, Compl. ¶¶ 160-190 (Counts 3-5); violation of the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500 *et seq.*, Compl. ¶¶ 191-205 (Count 6); fraud by omission, Compl. ¶¶ 206-221 (Count 7); and violation of the Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et seq.*, Compl.

¶¶ 222-226 (Count 8). So seeks to represent three classes: (1) a nationwide class of all persons

and entities who own a Class Printer or similar HP InkJet Printer (the “device owner class”); (2) a nationwide class of all persons and entities who own a Class Printer that displayed a diagnostic error due to HP’s transmission of a firmware update (the “damages subclass”); and (3) a class of all persons and entities residing in California and states with similar consumer protection statutes who own a Class Printer that displayed a diagnostic error due to HP’s transmission of a firmware update (the “state consumer subclass”). *Id.* ¶¶ 105-117.

II. FAILURE TO STATE A CLAIM – RULE 12(B)(6)

“A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). But the Court need not “accept as true allegations that contradict matters properly subject to judicial notice” or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* On a motion to dismiss, the Court’s review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).

A. Fraud

1. Rule 9(b)

When a party pleads a cause of action for fraud or mistake, it is subject to the heightened

pleading requirements of Rule 9(b). “In alleging fraud or mistake, a party must state with

1 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b) (emphasis
 2 added). “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
 3 generally.” *Id.* Rule 9(b) requires that the circumstances constituting any alleged fraud be pled
 4 “specific[ally] enough to give defendants notice of the particular misconduct . . . so that they can
 5 defend against the charge and not just deny that they have done anything wrong.” *Kearns v. Ford*
 6 *Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Bly-Magree v. California*, 236 F.3d
 7 1014, 1019 (9th Cir. 2001)). Claims of fraud must be accompanied by the “who, what, when,
 8 where, and how” of the misconduct alleged. *Id.* If a “claim is said to be ‘grounded in fraud’ or to
 9 ‘sound to fraud,’ [then] the pleading of that claim as a whole must satisfy that particularity
 10 requirement of Rule 9(b).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir.
 11 2003).

12 The applicability of Rule 9(b) hinges not on the elements of the claim but rather on the
 13 nature of the allegations themselves: “Rule 9(b) applies to ‘averments of fraud’ in all civil cases in
 14 federal district court,” including “particular averments of fraud” even when fraud is not an
 15 essential element of the claim. *Vess*, 317 F.3d at 1103; *see also Kearns*, 567 F.3d at 1124 (“Where
 16 fraud is not an essential element of a claim, only those allegations of a complaint which aver fraud
 17 are subject to Rule 9(b)’s heightened pleading standard.”). Fraud can thus be averred “by
 18 specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word
 19 ‘fraud’ is not used).” *Vess*, 317 F.3d at 1105 (citations omitted).

20 2. UCL fraud prong, CLRA, FAL, and common law fraud by omission

21 Plaintiff brings four fraud-based claims: (1) violation of the fraud prong of the UCL,
 22 Compl. ¶¶ 180-190 (Count 5); (2) violation of the FAL, *id.* ¶¶ 191-205 (Count 6); (3) violation of
 23 the CLRA, *id.* ¶¶ 222-236 (Count 8); and (4) common law fraud by omission, *id.* ¶¶ 206-221
 24 (Count 7).

25 “Broadly stated: The UCL prohibits ‘any unlawful, unfair or fraudulent business act or
 26 practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by the
 27 FAL’ ([Cal. Bus. & Prof. Code] § 17200); the FAL prohibits advertising ‘which is untrue or
 28 misleading, and which is known, or which by the exercise of reasonable care should be known, to

be untrue or misleading’ ([*id.* at] § 17500); and the CLRA prohibits specified ‘unfair methods of competition and unfair or deceptive acts or practices’ ([Cal.] Civ. Code § 1770, subd. (a)).” *Hill v. Roll Int’l Corp.*, 195 Cal. App. 4th 1295, 1301 (2011) (alterations omitted). All three statutes prohibit fraudulent misrepresentations and omissions. *See In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 788 (N.D. Cal. 2017). Further, courts in this district have consistently held that “plaintiffs in misrepresentation cases must allege that they actually read the challenged representations” to state a claim. *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *27-28 (N.D. Cal. Aug. 30, 2017) (citation omitted) (dismissing UCL fraud claim for failure to plead actual reliance); *see also Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2014 WL 172111, at *6, *9 (N.D. Cal. Jan. 15, 2014) (citing *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)) (dismissing UCL, FAL, and CLRA claims for lack of statutory standing based on plaintiff’s failure to allege he viewed alleged misrepresentations).

“Under California law, a claim of fraud by omission requires a showing of (1) the concealment or suppression of material fact, (2) a duty to disclose the fact to the plaintiff, (3) intentional concealment with intent to defraud, (4) justifiable reliance, and (5) resulting damages.” *Edwards v. FCA US LLC*, No. 22-cv-01871-WHO, 2022 WL 1814144, at *3 (N.D. Cal. June 2, 2022) (quoting *Lewis v. Google LLC*, 851 F. App’x 723, 725 (9th Cir. 2021)).

a. Misrepresentation

HP argues that the fraud-based claims should be dismissed because So does not plead an affirmative consumer-facing misrepresentation with particularity as required by Rule 9(b), and he does not plead reliance on any alleged misrepresentations. MTD at 4-7. The Court agrees. As discussed at the hearing, So does not allege an affirmative misrepresentation made to consumers. The alleged misrepresentations identified in the Complaint, in which HP indicated printer owners could use HP cartridges or third-party cartridges, were in investor materials and a strategic plan. *See* Compl. ¶¶ 44, 46. And So does not plead reliance on an affirmative misrepresentation, as he does not allege that he saw any of the alleged misrepresentations. *See id.* He alleges that he “rightfully believed” he could use a third-party cartridge based on his experience with another HP

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