

1  
2  
3  
4  
5  
6  
7 HENRY SO,  
8 Plaintiff,  
9 v.  
10 HP, INC.,  
11 Defendant.

Case No. 22-cv-02327-BLF

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 **ORDER DENYING IN PART AND  
GRANTING IN PART MOTION TO  
DISMISS WITH LEAVE TO AMEND  
IN PART AND WITHOUT LEAVE TO  
AMEND IN PART**

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

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

23 **I. BACKGROUND**

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

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

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

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

19 This lawsuit was filed on April 14, 2022. *See* Compl. The Complaint asserts claims for  
20 violation of the federal Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. §§ 1030(a)(5)(A),  
21 1030(a)(2)(C), and 1030(a)(4), Compl. ¶¶ 118-143 (Count 1); violation of the California  
22 Comprehensive Computer Data Access and Fraud Act (“CCDAFA”), Cal. Penal Code § 502 *et*  
23 *seq.*, Compl. ¶¶ 144-159 (Count 2); violation of all three prongs of the California Unfair  
24 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq.*, Compl. ¶¶ 160-190 (Counts  
25 3-5); violation of the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500  
26 *et seq.*, Compl. ¶¶ 191-205 (Count 6); fraud by omission, Compl. ¶¶ 206-221 (Count 7); and  
27 violation of the Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et seq.*, Compl.

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

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

8 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a  
9 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation*  
10 *Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d  
11 729, 732 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts  
12 as true all well-pled factual allegations and construes them in the light most favorable to the  
13 plaintiff. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). But the Court need  
14 not “accept as true allegations that contradict matters properly subject to judicial notice” or  
15 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
16 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation  
17 marks and citations omitted). While a complaint need not contain detailed factual allegations, it  
18 “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
19 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
20 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the  
21 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* On a motion to  
22 dismiss, the Court’s review is limited to the face of the complaint and matters judicially  
23 noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int’l v.*  
24 *Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).

25 **A. Fraud**

26 **1. Rule 9(b)**

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

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

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

13 "Under California law, a claim of fraud by omission requires a showing of (1) the  
14 concealment or suppression of material fact, (2) a duty to disclose the fact to the plaintiff, (3)  
15 intentional concealment with intent to defraud, (4) justifiable reliance, and (5) resulting damages."  
16 *Edwards v. FCA US LLC*, No. 22-cv-01871-WHO, 2022 WL 1814144, at \*3 (N.D. Cal. June 2,  
17 2022) (quoting *Lewis v. Google LLC*, 851 F. App'x 723, 725 (9th Cir. 2021)).

18 a. Misrepresentation

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

# Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

### API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

### LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

### FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

### E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.