

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

RENEE ROBINSON, RICHARD MYERS,
ANNETTE FIRST, CASEY GADDY,
STEVEN GOUISIE, ROBERT PLUNKETT,
FRANCOIS STEIGER, James Ulrich,
GABRIEL VOILES, JOHN WAUDBY, and
LAKESHA WELLS, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

HP, INC., a Delaware corporation,

Defendant.

Case No.: 1:24-cv-00164 (MMP)

Hon. Martha M. Pacold

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS COMPLAINT**

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I. INTRODUCTION

Plaintiffs are consumers who purchased HP printers between 2016 and 2022. They seek to recover damages for an action that HP took in late 2022 and in 2023: it sent firmware updates to their printers so that it could determine whether consumers had installed non-HP-branded ink cartridges into their printers and if they had, disable the printer until an HP-branded ink cartridge was installed. The Complaint alleges that Plaintiffs had received no warnings that HP might do this when they purchased their HP printers, and that HP had provided some reassurances that HP would not do this.

HP's claim that it is entitled to dismissal depends on applying pleading standards that have no basis in the law of this circuit, refusing to draw reasonable inferences from the facts that were pleaded, and introducing purported facts that do not appear in the Complaint. The Motion must be denied. If the Court deems any of the bases for dismissal to be persuasive, dismissal should be without prejudice.

II. ALLEGATIONS IN THE COMPLAINT

This case arises under the Sherman Act, 15 U.S.C. §§ 1 and 2, the Computer Fraud and Abuse Act ("CFAA"), 18 U.S. C. § 1030, and dozens of state statutes. These laws all prohibit the anti-competitive conduct alleged here. The statutes bar tying schemes, and certain uses of software to accomplish that without permission, that would monopolize an aftermarket for replacement ink cartridges, when these results are achieved in a way that "take[s] advantage of customers' sunk costs." *Schor v. Abbott Lab'ys*, 457 F.3d 608, 614 (7th Cir. 2006) (construing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992)). That is what HP did.

Each of the Plaintiffs bought an HP printer that functioned with third-party ink at the time of purchase. Complaint. (Dkt. 1), ¶ 1;¹ *see also id.* ¶¶ 6-16 (describing printers purchased in 2016, 2020, 2021, and 2022). That functionality ended when HP sent firmware updates to Plaintiffs’ printers, disabling the ability to accept non-HP ink. ¶¶ 1, 42 (alleging third-party ink “would work in [Plaintiffs’] printers if not for the Dynamic Security updates”). After these illegal updates, the printers sent error messages to plaintiffs and class members when they attempted to print using a third-party ink cartridge, stating “The indicated cartridges have been blocked by the printer firmware because they contain a non-HP chip.” ¶ 28. Plaintiffs’ injuries consist of (i) the cost of the now useless third-party ink cartridges, and (ii) the inflated prices they have had to pay for HP ink cartridges since HP successfully monopolized the ink cartridge market.

Plaintiffs never entered into any contractual agreement to buy only HP-branded ink prior to receiving the firmware updates. ¶ 32 (alleging that HP’s website states “[t]he use of a non-HP refilled cartridge does not affect either the HP Limited Warranty to the end-user customer or any HP support contract with the end-user customer”). Based on experience, Plaintiffs understood “it [was] possible to use non-HP replacement cartridges.” ¶ 38. When they bought their printers, there was a thriving market for third-party ink being used in HP printers. ¶ 40.

HP’s goal was to monopolize the market for replacement ink cartridges. ¶ 42-43. By blocking cheaper ink from other suppliers, HP forced consumers to buy HP’s own ink cartridges at an inflated price. ¶¶ 1, 6-16. Thus, the “firmware updates lock[ed] them into purchasing HP-branded ink.” ¶ 41.

By first waiting until it achieved “substantial sales” of various printer models, then gradually blocking each model’s ability to use third-party ink through new firmware updates, HP sought to

¹ All “¶” references in this brief refer to the Complaint.

“take advantage of customers’ sunk costs.” *Schor*, 457 F.3d at 614. This is enough to state a cause of action under the Sherman Act and each of the relevant state statutes below. While HP advances many arguments to resist this conclusion, none is convincing. The motion to dismiss should be denied.

III. LEGAL STANDARD

In this Court, the standard for adjudicating a Rule 12 dismissal motion is:

Under Federal Rule of Civil Procedure 8(a)(2), a complaint generally need only include “ ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). A court may grant a motion to dismiss under Rule 12(b)(6) only if a complaint lacks “enough facts to state a claim for relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Chaney v. Extra Space Storage Inc., 2022 WL 4234969 at *1 (N.D. Ill Sept. 14, 2022)(Pacold, J.)

HP misstates the standard for determining whether allegations should be considered plausible. Defendant HP’s Memorandum in Support of Motion to Dismiss Plaintiffs’ Complaint (Dkt. 25)(hereinafter “Mem.”) at 1, 6. The existence of an “obvious alternative explanation” for allegedly tortious conduct is not a basis to dismiss a complaint; rather, “obvious alternative explanations must be overcome at the pleadings stage, . . . by a plausible showing that such alternative explanations may not account for the defendant’s conduct.” *Hughes v Northwestern University*, 63 F.4th 615, 629 (7th Cir. 2023)(cited by HP). A defendant’s disputing factual allegations pleaded in a Complaint does not make those facts implausible; it makes the truth of those facts a subject to be resolved at trial.

The Court may not consider materials outside of the Complaint when deciding a motion to dismiss the Complaint outside of narrowly defined purposes. *Bilal v. Rotec Indus.*, 325 Fed. Appx.

949, 954 (7th Cir. 2009)(“considering these supposed communications would have required the district court to consider facts outside of Bilal's complaint, a step that would have been improper when deciding a motion to dismiss.”). HP’s reliance on district court decisions from a different case, citing to purported documents relating to a single printer model referenced in a different complaint filed by a different plaintiff, as evidence that Plaintiffs were supposedly put on notice of the effect of HP’s firmware updates received during different time periods²—none of allegations which were incorporated into Plaintiffs’ Complaint—is entirely improper and in no way affects Plaintiffs’ claims against HP in this action.

IV. ARGUMENT

A. **The Complaint Properly Pleads That a Market for HP Replacement Cartridges Exists.**

1. **Legal Standard for Sherman Act Tying Claims**

Plaintiffs have alleged a tying claim asserting that HP has leveraged its position with consumers who have HP printers (the printer market) to monopolize the ink cartridge market.

Plaintiffs have pleaded all elements of the claim:

[T]he challenged tying arrangement must involve two separate products or services. From there the plaintiff must allege that the defendant has sufficient economic power in the tying product market to restrain free competition in the tied product market, that the tie affects a not-insubstantial amount of interstate commerce in the tied product, and that the defendant “has some economic interest in the sales of the tied product.

Siva v. American Board of Radiology, 38 F.4th 569, 574 (7th Cir. 2022)(internal citations omitted).

The test is the same whether the case involves a “single-brand aftermarket.”

² Mem. at 2, 10, and 36 (quoting *Parziale v. HP Inc.* 445 F.Supp. 3d 435 (N.D. Cal. 2020) (“*Parziale I*”) and *Parziale v. HP Inc.*, 2020 WL 5798274 (N.D. Cal. Sept. 29, 2020) (“*Parziale II*”).

The Complaint passes this test. It alleges two distinct products: printers, and replacement ink cartridges, ¶ 73; it states that HP’s economic power in the printer market is sufficient to restrain competition in the ink cartridge market, ¶ 75; that HP’s actions affect interstate commerce, and that HP has economic interests in both the printer and the ink cartridge markets, as it sells in both markets, ¶ 77. HP disputes the adequacy of pleading only the plausibility of whether a market for HP ink cartridges, and whether the “economic power” element has been met.

2. Plaintiffs Plead a Plausible Aftermarket for Replacement Ink Cartridges

Before addressing the facts establishing a lock-in, it is necessary to discuss the correct standard for a tying claim which ties a primary market for equipment to an aftermarket for replacement parts. As stated above, the Complaint clearly states that the aftermarket consists of the market for replacement ink cartridges compatible with listed HP printers. Plaintiffs allege that “[b]ecause replacement ink cartridges are available from numerous online sources, there is effectively a single nationwide market.” ¶ 40. HP claims that this is implausible, but cannot hide what is obvious: a replacement ink cartridge market, consisting of buyers and sellers, clearly exists.

HP relies on *Epic Games, Inc. v. Apple, Inc.*, 67 F. 4th 946 (9th Cir. 2023), a *post-trial opinion* that did not address pleading standards, to argue that several specific points must be pleaded. Mem. at 2, 9, 15. The pleading requirement is more simply described as follows. states that:

the focus in aftermarket repair cases should be on two interrelated circumstances. The first involves a change in policy after the consumer has made a significant expenditure in the product. But that doesn’t mean *a lack of knowledge and availability of information regarding repairs* after the consumer has made a significant expenditure in the product is irrelevant. Indeed, *this is the second circumstance* that a court should consider.

In re Deere & Co. Repair Serv. Antitrust Litig., 2023 WL 8190256 at *19 (N.D. Ill. Nov. 27, 2023) (emphasis added).³ “[A]n *Eastman Kodak* claim depends on the consumer’s unawareness of the supplier’s aftermarket and its terms when it purchased the primary-market product.” *In re Dealer Mgmt. Sys. Antitrust Litig.*, 313 F. Supp. 3d 931, 962-63 (N.D. Ill. 2018). Both of the interrelated circumstances are clearly present here: the firmware update represented a change of policy, enforced through technology rather than contract, and a future change of policy was not anticipated or known to plaintiffs before they purchased their printers--or before the firmware update occurred.

a. Plaintiffs Plead That any Intention of HP to Reduce the Functionality of Their Printers Was Not Known to Them and Was Not Generally Known.

HP argues that “Plaintiffs fail to allege that the challenged cartridge restrictions are not ‘generally known.’” Mem. at 10. This is not a requirement of pleading in this circuit. *Deere, supra*, at *19. Nonetheless, the following facts establish that the restrictions induced by HP’s firmware update were plausibly not “generally known” at the times Plaintiffs purchased printers: (i) Plaintiffs received no relevant warnings, and are typical consumers, ¶¶ 31, 48; (ii) HP represented in its End User License Agreement and Limited Warranty that the printers would continue to function with non-HP-branded ink cartridges, ¶ 32; (iii) HP had stated in a settlement agreement that it would *not* disable printers in the manner that the firmware update caused, ¶ 21; and (iv) that the Italian Competition Authority had found in 2020 that “HP has failed to adequately inform consumers” that its printers could be disabled by HP; ¶ 22.

In the last quarter of 2019, HP admitted it was facing “increased competition” from “imitation, refill or remanufactured alternatives” for “some of [its] LaserJet toner and InkJet

³ There is no relevant distinction between aftermarket repair cases such as *Deere*, and aftermarket parts cases such as this one.

cartridges.” HP, Inc. 10-Q Statement to Securities Exchange Commission, filed Aug. 31, 2019, at 54.⁴ In HP’s words to investors, it “expect[ed] this competition [would] continue”— precisely what Plaintiffs allege they expected:

Customers are increasingly using online and omnichannel resellers and distributors to purchase our products. These resellers and distributors often sell our products alongside competing products, including non-original supplies, or they may highlight the availability of lower cost non-original supplies. We expect this competition will continue, and it may negatively impact our financial performance, particularly if large commercial customers purchase competing products instead of HP products.

Id. Thus, HP’s own words show there was a thriving market for third-party ink, and that competition was placing downward pressure on ink prices. Such a market would not have existed if, as HP claims, customers “generally knew” HP would remotely disable their printers’ ability to use third-party ink. No rational customer would buy third-party ink if, at the time they purchased their printers, they were on notice that third-party ink would be blocked.

Additionally, Plaintiffs allege they were coerced into accepting HP’s inflated ink prices because (1) they did not know HP would engage in its firmware update when they bought their printers, and (2) the costs of switching to a new printer exceed the costs of buying HP’s ink. ¶¶ 25-30.

Plaintiffs have pled both a “change in policy after the consumer has made a significant expenditure in the product” and “a lack of knowledge and availability of information.” *Deere*, 2023 WL 8190256 at *19. The Complaint also establishes that HP used firmware updates to disable their

⁴ Available online at: <https://investor.hp.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=13619268> (last visited March 26, 2024).

The Court may take judicial notice of HP’s SEC filings...*Garden City Employees’ Retirement System v. Anizter Intern.* 2011 WL 1303387 at *12 (N.D.Ill. March 31, 2011) (“courts have concluded that judicial notice may be taken of the contents of public record disclosure documents filed with the SEC if the facts sought to be noticed are not subject to dispute.”).

printer models' use of third-party ink cartridges. ¶¶ 1, 40-43. Before the updates, "it [was] possible to use non-HP replacement cartridges" in these printer models.; ¶ 38. By making it impossible to use third-party ink in these models, HP changed its policy so that it may "take advantage of customers' sunk costs." *Schor*, 457 F.3d at 614. In asking the Court to find its "longstanding" actions are not a "change in policy" under *Kodak*, claiming the practice was "longstanding." Mem. at 18. HP ignores Plaintiffs' allegation that after discontinuing this practice years ago, HP entered a class settlement agreement in which—for the models previously affected—it agreed not to reinstate this practice "in the future." ¶ 21 & n.4. HP's actions and words did not suggest it would attempt to lock-in customers against their will as it had in the past.

The court in *So v. HP, Inc.*, 2023 WL 4596778 (N.D. Cal. July 17, 2023) a case that also involves firmware updates by HP, the Court found that the plaintiff stated a claim "that HP had a duty to disclose prior to sale that it would send out firmware that would make its printers incompatible with third-party cartridges," and did not accept HP's argument that "it did disclose [this] information." *So*, at *7-8. An earlier decision took judicial notice of HP's "may not work" disclaimer, but "decline[d] to find that Plaintiffs were on notice" that HP would alter their printers. *Mobile Emergency Hous. Corp. v. HP, Inc.*, 2021 WL 9867952, at *10 (N.D. Cal. Oct. 15, 2021). HP's cautionary language simply does not disclose "[t]he alleged omission, that HP *intentionally* use[s] a firmware update to disable printers that [are] using non-HP ink cartridges." *Id.* at *11 (emphasis added and internal citation omitted).

To argue that its blocking of third-party ink was "generally known," HP refers the court to *Parziale I*, which is *not* an antitrust case. Mem. at 2, 10-11.⁵ HP's assertions to the contrary, The

⁵ The court considered information from the "Support Page" for a single model of HP printer in testing the sufficiency of a complaint because part of the document had been quoted in that

Court should not consider the contents of pleadings in *Parziale I* as they have no probative value in this case. In *Parziale I*, the Court made no factual findings; it was determining only whether a pleading a cause of action under Florida law. In effect, Incredibly, HP seeks dismissal of this case on the basis of an allegation in a different complaint, filed by a different plaintiff, on behalf of a different class, seeking different relief arising from an entirely different allegedly tortious event. This is obviously not a legitimate basis to dismiss the Complaint here. This court can consider only the factual allegations in this case.

HP is attempting to raise a fact-bound challenge about consumers' knowledge—and the sole basis of the challenge is a factual contention taken from an unrelated pleading in a different lawsuit. This is not a proper argument for a Rule 12(b)(6) motion. A court in this district recently denied a similar motion to dismiss a *Kodak* tying claim, concluding that “[w]hether Plaintiffs knew of the repair policy and the extent of that knowledge is a factual dispute better resolved later in this case, rather than in a Rule 12 motion.” *Deere*, WL 8190256, at *20; *accord In re Apple & AT & TM Antitrust Litig.*, 596 F. Supp. 2d 1288, 1306 (N.D. Cal. 2008) (“The fact that Apple disputes whether Plaintiffs ‘knowingly placed [Apple] in a monopoly position’ merely creates a factual dispute better suited for resolution at a later stage of this litigation.”). This Court should reach the same conclusion here.

Aside from relying on facts and documents not pleaded in the complaint in this case, *Parziale I* does not support HP's contention that consumers generally knew they could not use third-party ink. In fact, the court found not only that HP “implic[d] that it [was] possible to use

complaint considered by the court. *Parziale I*, at 440 n.1 The same court later declined to consider this document in a motion to dismiss an amended complaint, because it was not cited in that complaint. *Parziale II* at *3. *Parziale I* was not an antitrust case, and the court was not considering, and did not decide, whether the information in the Support Page for that model of printer was “generally known” to purchasers of that printer or other model printers - the question relevant here.

non-HP ink cartridges,” but that when the printer was purchased, it actually “was possible to use non-HP cartridges.” *Parziale I*, 445 F. Supp. 3d at 444. Each time HP removes that possibility for a specific printer model, it enacts a *Kodak*-style “change in policy” for that model. By quietly sending firmware updates that disable more printer models over time, HP takes a gradual approach to locking in customers. ¶¶ 6-16 (explaining how various printer models, purchased between 2016 and 2022, were locked in by different updates). Through this strategy of controlled chaos, HP steadily locks in more customers than would have been possible had it targeted all models at once.

In addition, *Parziale I* at 444 holds, “[t]he [c]ourt agree[d] that the statement that HP ink produces ‘best results’ implie[d] that it [was] possible to use non-HP ink cartridges with the printer.” Thus, it supports Plaintiffs’ contention that HP’s disclosures contributed to their belief that they would be able to use non-HP-branded ink.

The *Parziale* court dismissed the case due to the state law theories presented. The plaintiff argued HP had “impl[ie]d that consumers would be able to use non-HP cartridges with their HP printers in perpetuity.” *Id.* But the court found HP had not guaranteed that all non-HP ink cartridges would work forever: In *Parziale II*, the court added that consumers could have scoured HP’s online “store page” and therefore “*could have* anticipated that any cartridges with non-HP chips . . . *might* become incompatible with the printer in the future.” *Parziale II*, 2020 WL 5798274, at * 6 (emphasis added). This limiting language, “could have” and “might,” reflects the plaintiff’s theory of the case. The plaintiff argued that HP had not disclosed its “*ability* to lock out” cartridges and should have disclosed “that a remote firmware update *could* render non-HP cartridges incompatible.” *Parziale I*, at 443-444 (emphasis added).

b. Plaintiffs Plead That They Would Face Significant Costs to Switch to Different Printers.

HP also claims the case should be dismissed because Plaintiffs will ultimately have to demonstrate that they faced significant costs if they were to switch from HP to a different printer, and “[o]ne court has held that switching costs of \$3,000 . . . were not sufficiently high to lock customers into a printer brand.” Mem. at 13 (citing *Xerox Corp. v. Media Scis., Inc.*, 660 F. Supp. 2d 535, 548 (S.D.N.Y. 2009)).⁶ Not so. This is a factual argument, not a legal basis for dismissing the Complaint. An ordinary consumer also faces uncertain printing needs over the printer’s life cycle. *See Kodak*, 504 U.S. at 474 (observing that among printer users, “lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of down-time”). A consumer who needs to print would therefore be rational in continuing to buy HP ink, however reluctantly, rather than incurring the highest cost of a new printer in response to HP’s lock-in. Plaintiffs allege that is what they, in fact, did. ¶¶ 28-30.

In fact, the *Xerox* court, ruling on summary judgment, did not say these costs were too low to lock in consumers. It merely found “[t]he significance of the \$3,100 price tag depends entirely on individual users’ cost structures.” *Xerox*, at 547. In that case, the printer model skewed towards “business user[s],” *id.* at 548, including “large customers [who] [we]re likely to be purchasing printers ‘all the time.’” *Id.* at 541. The court granted summary judgment against the plaintiff, Xerox’s competitor, only because it “offer[ed] *no evidence of actual user behavior* in the market for color workgroup printers.” *Id.* (emphasis added). The *Xerox* court itself denied a motion to

⁶ This argument would come as news to the 45% of Americans who report being unable to cover an emergency expense of \$1,000. <https://www.cnbc.com/2024/01/24/many-americans-cannot-pay-for-an-unexpected-1000-expense-heres-why.html> (last visited 3/20/2024).

dismiss, finding the complaint “adequately alleged” an aftermarket monopoly despite Xerox’s theory this could not occur due to “the modest cost of color printers.” *Xerox*. at 387.

Unlike the plaintiff in *Xerox*, Plaintiffs are consumers who purchased HP ink cartridges — despite preferring third-party cartridges—because the costs of switching printers was too steep. ¶¶ 28-30. For some Plaintiffs, their computers worked with non-HP ink for years, then stopped working due to the firmware updates. *Id.* ¶¶ 13-14. These facts establish the “actual consumer behavior” that was missing from the summary judgment record in *Xerox*.

c. Plaintiffs Allege that HP-branded and Non-branded Ink Cartridges are Interchangeable.

Contrary to defendants’ arguments regarding “interchangability,” Mem. at 14, the Complaint clearly alleges that before the firmware update, Plaintiffs were able to, and did, use non-branded ink cartridges without difficulty, ¶¶ 6, 9, 10, 11, 12, 13. This is sufficient to demonstrate that the different brands of ink cartridges were effectively interchangeable before the firmware update. Plaintiffs further allege that Counsel’s investigation revealed that each of the model numbers listed in the class definition had been affected by the firmware update, meaning that those models had once worked with non-HP-branded ink cartridges but no longer did, that interchangeable ink cartridges had been available for each of the listed model numbers. ¶ 44. Therefore, the pleading is sufficient.

B. HP Has Identified No Other Reason to Dismiss the Antitrust Claims

1. Plaintiffs Allege Tying in Violation of Section 1 of the Sherman Act

As explained above, Plaintiffs have pled all elements of tying required to show a Section 1 violation: a “change in policy after the consumer has made a significant expenditure in the product” and “a lack of knowledge and availability of information.” *Deere*, 2023 WL 8190256, at *19.

HP is wrong to suggest Plaintiffs must allege market power in the primary market for printers, in addition to market power in the aftermarket for HP-compatible ink cartridges. Mem. at 16-17. This argument is based entirely on pre-Kodak case law,⁷ and cannot be reconciled with *Kodak*. “Kodak lacked market power in the primary equipment market; after all, that was the premise of the question presented to the Supreme Court.” *Deere*, 2023 WL 8190256 at *17. Faced with that question, the Court held “there is no immutable physical law” that “competition in the equipment market cannot coexist with market power in the aftermarkets.” *Kodak*, 504 U.S. at 471. “Even if a manufacturer does not have power in a primary market, it still may have power in an aftermarket and be liable under the antitrust laws for conduct in that market.” *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1345 (Fed. Cir. 2014).

Nonetheless, Plaintiffs allege that HP holds a 34% share of market for printers. ¶ 19. An “undisputed 33% market share, coupled with [others] unique factors” can be enough to make “the existence of [defendant’s] market power a question of material fact.” See *Sea-Land Serv., Inc. v. Atl. Pac. Int’l, Inc.*, 61 F. Supp. 2d 1102, 1110 (D. Haw. 1999). While HP’s impressive market share is not necessary for a *Kodak* claim, it is a plus factor. See *Deere*, 2023 WL 8190256 at *21 (“Notably, in *Kodak*, there was an absence of market power but in this case the Complaint alleges that Deere possesses substantial market share in the Tractor Market.”)

HP seeks dismissal on a grab bag of arguments premised on either misreading the law or the Complaint. HP’s assertion that tying requires an explicit contractual agreement is wrong. Mem. at 18. These arguments are incompatible with a *Kodak* tying claim, likely explaining why HP relies

⁷ HP cites *Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); *Will v. Comprehensive Acct. Corp.*, 776 F.2d 665 (7th Cir. 1985); and *Carl Sandburg Vill. Condo. Ass’n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203 (7th Cir. 1985).

solely on a single footnote from a pre-*Kodak* case. *See id.* (citing *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 724 n.29 (7th Cir. 1979)).

More recently, the Seventh Circuit held, “When a defendant adopts a policy that makes it unreasonably difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it ‘forces’ buyers to buy the tied product from the defendant and not from competitors.” *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 471 (7th Cir. 2020) (quoting *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 272 (6th Cir. 2015)). In *Collins*, the tie-in was achieved “by conditioning access to printheads on purchases of Kodak ink.” *Collins*, 781 F.3d at 269.

This also tracks the tie-in discussed in *Kodak*, 504 U.S. at 458, where the Supreme Court revived a tying claim that turned on the defendant’s unilateral “policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines.” *Id.* Much like these coercive actions, HP’s firmware updates force consumers to buy HP-branded ink or give up the use of their printers. ¶¶ 1, 41-43.

HP’s argument that Section 1 liability is unavailable because Plaintiffs did not “agree” to HP’s condition, Mem. at 18, is also fallacious. The “agreement” in a Section 1 tying claim is usually between the seller of the tying product and the purchaser. An “agreement” occurred when Plaintiffs, finding their printers disabled by the firmware update, agreed to purchase HP-branded ink because HP altered their printers so they would not accept cheaper ink from competitors. ¶¶ 28-30. Put differently, HP’s firmware updates “ma[de] it unreasonably difficult” to use “the tying product,” HP printers, “without buying the tied product,” HP-branded ink. *Viamedia.*, 951 F.3d at 471; accord *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1418 (11th Cir.

1987) (“[C]oercion may be established by showing that the facts and circumstances surrounding the transaction as a practical matter forced the buyer into purchasing the tied product.”).

HP does not cite a single *Kodak*-style aftermarket tying claim case when it asserts that “technological tie[s] . . . are not within the ambit of the *per se* prohibitions of the Sherman Act,” and vaguely hints that more must be pleaded as a result. Mem. at 15-16. Of course, HP’s firmware updates are not a “technological integration of added functionality into software that serves as a platform for third-party applications,” for which there is “no close parallel in prior antitrust cases.” *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001). HP’s scheme is far more mundane and old-fashioned. When Plaintiffs bought their printers, it was “possible to use non-HP replacement cartridges.” ¶ 38. This printer capability was lost only after HP remotely disabled it. *Id.*, ¶ 41. So, HP misses the mark when it recasts the issue as a “duty to design printers to function with all third-party cartridges” or to “deal with third-party cartridge manufacturers.” Mem at 20.

HP’s conduct is not a cutting-edge innovation, but in fact caused decreased functionality. HP’s scheme is to simply sabotage printers after they are already purchased to preclude competition for ink. When a defendant “ma[kes] changes” to a primary product that “ma[ke] it effectively impossible for third parties” to compete in an existing aftermarket, a lawsuit based on such changes is “cognizable under antitrust law.” *AliveCor, Inc. v. Apple Inc.*, 592 F. Supp. 3d 904, 919 (N.D. Cal. 2022) (denying motion to dismiss where complaint alleged “that Apple made changes to the heart rate algorithm that made it effectively impossible for third parties to inform a user when to take an ECG,” and the “purpose and effect of the update was to prevent third parties . . . from offering competing heart rate analysis apps”); *see also Advance Bus. Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 66 (4th Cir. 1969) (upholding judgment against tying scheme involving

“misrepresentations” and “sabotage” that “were intended to disparage competitive supplies and thereby induce customers to use only SCM supplies”).

2. Plaintiffs Allege Exclusionary Conduct, in Violation of Section 2 of the Sherman Act.

HP’s argument that plaintiffs have inadequately pleaded “exclusionary conduct” also fails. As explained above, Plaintiffs have pleaded both a that HP had sufficient market power in the tying market to effect a monopoly in the tied market, and monopoly in a well-defined aftermarket for HP-compatible ink cartridges. The firmware update, which had the effect of preventing competitors from selling their products to owners of HP printers, is unquestionably exclusionary.

HP argues that it has no duty to “aid competitors,” Mem at 20. Setting aside whether HP had been aiding competitors before it transmitted the firmware update, this argument was rejected in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585, 601 (1985)(defendant cancelled an existing contract with its competitor in order to drive it out of business; jury verdict for plaintiff affirmed), and in *Viamedia, Inc.*, 951 F.3d at 434-35 (7th Cir. 2020)(Comcast terminated contracts with Viamedia in one market to drive it out of competing in a different market). Both cases find that a change from past practices that has the effect of is not immune from antitrust scrutiny, even if it could be characterized as a decision to stop cooperating with competitors. *Aspen*, 472 U.S. at 604 (“the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.”); *Viamedia* at 459 (citing *Aspen*). The firmware update was a change in existing practice that had the result of eliminating competition in the ink cartridge market, and is not immunized from antitrust liability.

3. *Illinois Brick* Does Not Bar Any of Plaintiffs’ Claims Because Two Class Representatives are Direct Purchasers, and For the Firmware Update Class, There is No “Direct Purchaser” Requirement.

HP also some of the Plaintiffs’ statutory standing to sue under the “direct purchaser” rule. Mem. at 20 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). But as HP admits, “two Plaintiffs allege that they purchased ink cartridges directly from HP.” Mem. at 5, citing ¶¶ 9, 12). While HP claims there is no allegation these purchases were made “after the non-HP cartridges they were using stopped working in their printer,” *id.*, the only reasonable inference from the pleadings is that they did. ¶ 12 (alleging that Plaintiff Steiger’s “printer no longer functioned until the ink cartridge was replaced with an otherwise identical cartridge branded by HP” and that “Plaintiff Steiger purchased HP-branded ink directly from HP, through its Instant Ink program”); *id.*, ¶ 9 (similar allegation as to Plaintiff Gaddy). Plaintiffs Steiger and Gaddy, therefore, are direct purchasers and may sue on behalf of the HP Ink Purchaser Class.

For the Firmware Update Class, *Illinois Brick* does not apply. Their damages stem not from HP’s ink cartridge overcharge, but from the damages they incurred in losing the value of their non-HP ink due to HP’s firmware updates. ¶ 44. The Firmware Update Class’ damages do not stem from an overcharge “arising from a single transaction” that is passed “along a chain of distribution.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474 (1982). “*Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution.” *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019). “Without the chain of distribution paradigm where some charge is being passed on . . . , the rationales underpinning *Illinois Brick*—especially the concern over duplicative recoveries—lose their bite.” *Deere*, 2023 WL 8190256, at *7.

In *McCready*, for example, the plaintiff sued her employer’s health insurer for its scheme of paying for psychiatrists’ services while refusing to cover psychologists’ care, in an effort to destroy the market for the latter. 457 U.S. at 474–75. The Court concluded the *Illinois Brick* rule did not apply because the plaintiff “has paid her psychologist’s bills,” so “her injury consists of Blue Shield’s failure to pay her.” *Id.* at 475. It was “not the employer as purchaser, but its employees as subscribers, who [were] out of pocket as a consequence of the plan’s failure to pay benefits.” *Id.* In much the same way, the Firmware Update class members are all out of pocket for the ink they purchased from third parties but cannot use due to HP’s post-sale alteration of their printers; ¶ 44.

To be sure, the HP Ink Purchaser class also has damages stemming from HP’s overcharge. But the fact that an overlapping class has a different type of damages does not change the nature of the Firmware Update Class’s damages. For the Firmware Update Class, “[t]his is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge. . . . Basic antitrust law tells us that the ‘mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another.’” *Pepper*, 139 S. Ct. at 1525 (internal citations omitted).

C. Plaintiffs Plead CFAA Claims

Plaintiffs have properly pled all elements of a private action for violations of the CFAA, ¶¶ 54-61. Relevant parts of the CFAA are:

(a)Whoever-- . . .

- (2) intentionally . . . exceeds authorized access, and thereby obtains- . . . information from any protected computer; . . . [Or]
- (5) (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; . . .

shall be punished as provided in subsection (c) of this section.

.....

- (e) (1) the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device; . . .
- (2) the term “protected computer” means a computer— . . .
 - (B) which is used in or affecting interstate or foreign commerce or communication, . . .
- (6) the term “exceeds authorized access” means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter; . . .

18 U.S.C. § 1030.

The Complaint contains all of the statutory elements for violations of §§(a)(2) and (a)(5)(A) of the CFAA: that HP printers fall within the definition of “computer,” and “protected computer,” ¶ 59; that plaintiffs had not authorized HP to provide updates that would degrade performance, so HP exceeded its authorized access, ¶ 60; that HP obtained information through its access to the printer, as demonstrated by the error messages Plaintiffs and Class members received, ¶ 28 (“The indicated cartridges have been blocked by the printer firmware because they contain a non-HP chip”). The alteration of “information” within the printers is demonstrated by the change in functionality: Before the alteration of firmware, the printers functioned with non-HP ink, and afterwards, as a consequence of an alteration of code, they did not. ¶¶ 28-31.

Although the subsection is not explicitly cited in the Complaint, the Complaint also contains all elements of a violation of § (a)(5)(A). The firmware update was a transmission of code; it damaged plaintiffs’ printers by preventing them from operating using non-HP ink cartridges; and the damage to the printer was not authorized; ¶ 60.⁸

⁸ Accessing a computer without authorization is not an element of this offense; the only limitation is that the *damage* not be authorized. By contract, CFAA §§ (a)(3), (a)(5)(B), and (a)(5)(C) all

The Complaint also alleges that individual offenses under the Act caused losses to one or more people aggregating at least \$5,000; ¶ 61.

HP accepts that all elements of the CFAA claim are properly pleaded, but asserts that the claims are insufficiently plausible. Mem. at 23. HP’s arguments have been rejected in other cases involving substantially identical conduct by HP: *So.* 2023 WL 4596778 at *10-11, and *Mobile Emergency Housing Corp. v. HP*, at *7-8, and should be rejected here as well.

1. Plaintiffs Plead That HP Was “Exceeding Authorized Access” When It Accessed Plaintiffs’ Printers to Determine Whether They Used HP-Branded Ink Cartridges.

HP’s argument that the complaint fails to plausibly allege that it exceeded authorized access to the plaintiffs’ computers when it reduced their functionality fails. The requirement imposed by *Van Buren v. United States*, 539 U.S. 374, 396 (2021) relied upon by HP, Mem.21-23, that a defendant exceeds authorization to access a computer only when they access “particular areas within a computer -- such as files, folders, or databases – to which their computer access does not extend” does not require dismissal of this cause of action. HP’s claim that it did not access any particular areas exceeding its authorization raises factual issues that cannot be resolved on a Rule 12 motion.⁹ It is plausible that the information that HP obtained from the ink cartridges was in “particular areas” of the computer that HP was not authorized to access; the error messages plaintiffs received indicate that HP accessed ink cartridges as well as the printers, and the Complaint does not allege that HP had any authorization to access ink cartridges, since such access seems unnecessary to improve either security or performance. In addition, the defendant in *Van*

limit liability to those who access computers without authorization. §§ (a)(1), (a)(2), and (a)(4) limit liability to those whose access exceeds their authorization.

⁹ *Van Buren* was a post-trial appeal of a felony conviction, and does not establish pleading standards for civil actions.

Buren did not exceed his authorization because he was authorized to use the computer system to access license plate information, and that is all that he did, albeit for an illicit purpose.¹⁰ Here, HP had no authorization to extract information from ink cartridges. ¶ 60.

2. Plaintiffs Allege That HP “Obtained Information” From Their Computers.

Plaintiffs also plead that HP, through its firmware update, obtained information from the printer. The “error message” that Class Members received demonstrates that HP used the firmware update to obtain information concerning whether or not the ink cartridge was HP-branded. The Complaint clearly pleads that this information was obtained through updated firmware, and that Plaintiffs know that HP obtained this information because it was included in error messages that were communicated back to the printer’s user ¶ 28 (“The indicated cartridges have been blocked by the printer firmware because they contain a non-HP chip.”). HP also acted upon the information it obtained from Plaintiff’s computer to disable the printer. ¶ 28

3. The Complaint Establishes That HP’s Conduct is an “An Offense” That Caused Over \$5,000 in Aggregate Losses.

Finally, HP questions whether the Complaint properly pleads that HP’s individual “offenses” caused damage that exceeds \$5,000 in the aggregate.¹¹ Mem. at 24. HP’s contention that claims brought by more than one person may not be aggregated to reach the \$5,000 threshold cannot be taken seriously, since the statute expressly directs that claims may be aggregated to reach

¹⁰ The dissenting justices argued that Van Buren had exceeded his authorization because he was not “entitled” to access the computer system for an illicit purpose, just as “[a]n employee who is entitled to pull the alarm in the event of a fire is not entitled to pull it for some other purpose, such as to delay a meeting for which he is unprepared.” 141 S.Ct. at 1664 (Thomas, J., dissenting).

¹¹ The CFAA requires that “A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i).” 18 U.S.C. § 1830(g). Subclause (I) of § (c)(4)(A)(i) prescribes penalties, “if the offense caused (or, in the case of an attempted offense, would, if completed, have caused)— loss to 1 or more persons during any 1-year period . . . aggregating at least \$5,000 in value.”

the \$5,000 threshold. Several courts have held that aggregation to reach the \$5,000 limit is appropriate where a single act of a defendant causes losses to many individuals within the one-year period. Following that rule, it is entirely plausible that a single offensive transmission of firmware to HP printers, which may cause an injury of as little as \$30 to each recipient, easily exceeds the \$5,000 statutory threshold. *So.*, 2023 WL 4596778 at *11; *Mobile Emergency*, 2021 WL 9867952 at *8.

HP's reliance on *Halperin v. International Web Service*, 70 Supp.3d 893, 899 (N.D. Ill. 2014) is to no avail since *Halperin* involves both facts and issues that are not present here. Mem. at 24. That court refused to aggregate claims of different class members because it found that each class member had been injured by a different "offense:" as the "offense occurred when the plaintiff downloaded the offending software. Here, by contrast, HP's "offense," delivery of firmware updates that required no action on the part of the recipient. ¶ 26. Since each delivery of firmware updates is alleged to have caused damage to large numbers of printers, it is precisely the situation for which the aggregation of claims to reach the \$5,000 threshold is appropriate.

D. The Class Definition Does Not Implicate Plaintiffs' Standing, and Should Not Be Decided Now.

1. Whether Plaintiffs Can Represent Class Members' State Law Claims in Different States Should Not Be Considered on a Rule 12 Motion.

HP also seeks dismissal of claims in two subcategories due to Class Representatives' purported lack of standing: claims on behalf of owners of HP printers that have different model numbers than those purchased by plaintiffs, and state law claims on behalf of class members who reside in different states than the named plaintiffs. Mem. at 25-29. These arguments should be rejected, since the scope of the class does not implicate any standing issues, and should be determined on a Class Certification motion, not on a Rule 12 motion.

The standing requirements for a plaintiff who seeks to be a class representative are clear: Class representatives must have standing to bring their own claims. *Morrison v. YTB Intern.*, 649 F.3d 533, 536 (7th Cir. 2011)(“Plaintiffs have standing if they have been injured, the defendants caused that injury, and the injury can be redressed by a judicial decision. . . . Nothing more is required for standing.”). Plaintiffs cannot and need not demonstrate their standing to recover based on the claims of other class members; such a requirement would make class actions seeking money damages impossible, because no plaintiff will have standing to bring a damage claims where a different individual suffered the loss:

Freeman's Article III standing on the damages claims is secure: she alleges that she suffered an injury in fact; the injury is fairly traceable to the allegedly false advertising; and the Court can redress the injury with money damages. For everyone else in the proposed class, she is proposing to serve as a class *representative*, not seeking to redress an injury specific to her—of course she herself did not pay for the pacifiers bought by each proposed class member. That is the whole point of a class action: to represent the interests of class members, *not* just the representative's *own* interests.

...

What MAM is really challenging is whether Freeman (or, actually, any Illinois resident who bought pacifiers only in Illinois) can satisfy the Civil Rule 23 class-certification requirements as applied to a nationwide and multi-state class. . . . Adequacy, commonality, and predominance can be tough questions in deciding whether to certify a multi-state class. So close scrutiny is warranted. But that is a question to be answered after discovery on the propriety of class certification—not right out of the box by an overbroad application of Article III standing to proposed class actions.

Freeman v. MAM USA Corporation, 528 F.Supp.3d 849, 859 (N.D. Ill. 2021)(citations omitted); *see also In re Broiler Chicken Antitrust Litig.*, 290 F.Supp.3d 772, 809-10 (N.D. Ill. 2017)(standing irrelevant to whether plaintiffs could represent class members whose claims were governed by statutes of other states). As HP does not challenge the standing of the Plaintiffs to bring their own claims, there is no occasion to dismiss any claims, or to modify the proposed class definition, on

standing-related grounds. While district courts are not unanimous, a clear majority have decided that determining whether class representatives can adequately represent class members show claims arise under the laws of different states should be decided at class certification, not on a Rule 12 motion.¹²

HP's contention that class members whose claims arise under the laws of different states *must* be dismissed at some stage of the case is a misstatement of Seventh Circuit law. Mem. at 26. A class of residents of different states, whose claims arise under state laws, may be certified if the laws are not significantly different. In *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 484 n.12 (N.D. Ill. 2009), *aff'd sub nom. Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010), the Court certified a consumer class consisting of purchasers in six states, noting “[t]he consumer fraud laws of the six states . . . have nearly identical elements...” although Class representatives came from only two of the states. The district court noted, “courts have permitted plaintiffs to represent class members from other states in which the representatives did not reside or make purchases.” *Id.* at 480. The Seventh Circuit affirmed the grant of class certification: “. . . the certification of the six state subclasses demonstrates that the district court carefully considered how the case would proceed, explicitly finding that the consumer protection acts of these six states have nearly identical elements.” 606 F.3d at 396. *Pella Corp.* has been followed in *In Re Fluidmaster, Inc.*, 149 F.Supp.3d 940, 946 (N.D. Ill. 2016) (sustaining complaint that defined a subclass consisting

¹² Courts in this District alone have rejected motions to dismiss claims brought by residents of different states in the following cases in the past two years: *Bohen v. ConAgra*, 2024 WL 1254128 at *6 (N.D. Ill. March 25, 2024); *In re Beyond Meat Inc, Protein Content Marketing and Sales Practices Litig.* 2024 WL 726838, at *5-6 (N.D. Ill. Feb. 21, 2024); *Batton v. National Association of Realtors*, 2024 WL 6899989 at *4 (N.D. Ill. Feb. 20, 2024); *Counts v. Ark Food Co.*, 2023 WL 7281851, at *6 (N.D. Ill. Nov. 3, 2023); *Clark v. Blue Diamond Growers*, 2023 WL 4351464, at *6 (N.D. Ill. July 5, 2023); and *Rawson v. ALDI, Inc.*, 2022 WL 1556395 at *5-6 (N.D. Ill. May 17, 2022).

of "individuals and entities residing in each of the states in which a named Plaintiff resides and each of the states where the laws are similar to each of the states in which a named Plaintiff resides.").

2. Whether Plaintiffs Can Represent Class Members Whose Printers Have Different Model Numbers Than Their Own Should Not be Considered on A Rule 12 Motion.

HP incorrectly suggests that there is an absolute bar on Plaintiffs representing others who have otherwise identical claims, but whose printers have different model numbers. While the Complaint lists model numbers of some printers, there are no allegations that there are any differences between the printer models other than the model numbers, which are completely arbitrary and irrelevant. If there are differences, the next questions will be whether any differences between different models mean that the Rule 23 factors required for class certification are not met. Plainly, if there is no difference between two models other than the model number, that would be immaterial. There is no principle of law that a class action may not include individuals who purchased different models of a product, and class certification orders frequently encompass purchasers of multiple models or products when the evidence supports such a class. *E.g. Kleen Products LLC v. International Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016)(affirming certification of class consisting of “All persons that purchased Containerboard Products directly from any of the Defendants or their subsidiaries or affiliates . . .”); *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359, 361, 363 (7th Cir. 2012) *vacated*, 569 U.S. 1015 (2013), *reinstated*, 729 F.3d 796 (7th Cir. 2013)(reversing denial of class certification of class containing purchasers of 27 different models of washing machine).

Most courts in this circuit have found that whether class representatives may represent purchasers of different models of a product is not a basis for dismissal of any claims. The proper

scope of the class does not implicate standing, and should be considered at the class certification stage. The reasoning of the courts is essentially the same as that in cases involving different state laws:

Because the named plaintiffs clearly have standing to sue Walmart for their own injuries, “[t]his is not a case where the named plaintiff[s] [are] trying to piggy-back on the injuries of the unnamed class members,” or acquire Article III standing through the back door. *Payton v. Cnty. of Kane*, 308 F.3d 673, 682 (7th Cir. 2002). Since Walmart's arguments on this point pertain solely to as-yet unidentified class members, Rule 23 issues are “logically antecedent” to the Article III concerns and are better addressed at the class certification stage. *Texas Hill Country [Landscaping v. Caterpillar, Inc.]*, 522 F. Supp. 3d 402, 408 (N.D. Ill. 2021) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 816 (1999)). Accordingly, the Court denies Walmart's motion to dismiss the plaintiffs’ claims brought as class representatives due to lack of standing.

Thomas v. Walmart Inc., 2024 WL 1050179, at *4 (N.D. Ill. March 11, 2024)(rejecting argument that plaintiffs who purchased purportedly mislabeled sheets could not represent other individuals who purchased sheets of different colors or sizes that had the same mislabeling issues,).

At the class certification stage, many courts have found in various situations that purchasers of one version or model of a product may represent purchasers of other models. *Vanzant v. Hill’s Pet Nutrition*, 2023 WL 6388300, at *4 (N.D. Ill. Sept. 29, 2023)(certifying class: “all of the products are Hill's PD pet food; all are marketed and sold as therapeutic despite not being evaluated or approved by the FDA (and so all are allegedly adulterated and mislabeled pursuant to the FD&C Act); all are named and labelled “Prescription Diet” (an alleged misrepresentation); and all are subject to a uniform prescription requirement that allegedly misleads purchasers because it indicates that the prescription is legally required, and that PD contains a drug or medicine. The differences in formula, intended benefits, and individual bases for veterinarian authorizations are irrelevant.”).

E. Unjust Enrichment

The facts alleged in the Complaint are sufficient to state valid claims for unjust enrichment under the laws of each state (and District of Columbia). However, to avoid any confusion caused by a single unjust enrichment count, as well as to account for any differences that may exist among the states, Plaintiffs request leave to amend and add additional counts as may be necessary.

F. Plaintiffs Have Pled Actionable State Law Claims Under the Applicable Antitrust and Consumer Protection Statutes.

HP, with virtually no substantive analysis of any of the 75 state statutory claims raised in the Complaint, makes the sweeping assertion that Plaintiffs failed to adequately allege *any* viable claims. But absent even a cursory explanation why Plaintiffs' claims are (purportedly) defective, let alone a detailed analysis of the specific state statutory claims it is challenging, dismissal under Rule 12(b)(6) is inappropriate.

1. Plaintiffs Have Stated Actionable Claims Under the Sherman Act and Therefore Have Also Pled Viable Claims Under the Various State Antitrust and Consumer Protection Statutes.

The anti-competitive and unfair conduct by HP described in the Complaint gives rise to valid claims under the Sherman Act¹³ and each of the state antitrust claims raised in the Complaint.¹⁴ As HP plainly acknowledges, the state statutes in question are based upon the same principles as federal antitrust law and adhere to the same requirements as the Sherman Act. Thus,

¹³ See Compl. (Dkt. 1) at Counts II and III.

¹⁴ *Id.* at Counts VI (Alabama), VIII (Arizona), XI (California), XIV (Colorado), XVI (Connecticut), XIX (District of Columbia), XXIII (Hawaii), XXVI (Iowa), XXVIII (Kansas), XXXII (Maine), XXXIV (Maryland), XXXVIII (Michigan), XXXIX (Minnesota), XLV (Nebraska), XLVII (Nevada), XLVIII (New Hampshire), LI (New Mexico), LIII (New York), LV (North Carolina), LVI (North Dakota), LXII (Oregon), LXIV (Rhode Island), LXVIII (South Dakota), LXX (Tennessee), LXXVII (West Virginia), and LXXIX (Wisconsin).

for the same reasons that Plaintiffs have pled actionable antitrust claims under federal law, they have likewise pled proper state statutory claims. *See* section I-II, *supra*.

2. The Factual Allegations in the Complaint are More Than Sufficient to Establish Violations of the Relevant Consumer Protection Statutes.

a. HP Has Not Identified Any Specific Deficiencies With Respect to the State Consumer Protection Statutes.

HP attacks Plaintiffs’ consumer protection claims¹⁵ as pled in “conclusory, pro forma fashion, failing to explain how HP violated any of those statutes” and “fail[ing] to account for any consequential differences that may exist among the undifferentiated state-law claims.” Mem. at 34. Yet, paradoxically, HP not only fails to identify any material variations between the statutes, it “does not specifically challenge any element of any individual consumer protection claim.” *Jones v. Varsity Brands, LLC*, 618 F. Supp.3d 725, 767-68 (W.D. Tenn 2022) (denying motion to dismiss “conclusory” state law consumer fraud claims where defendant failed to identify any pleading deficiencies with respect to any particular state law claim). This approach has “no merit” under Rule 12(b)(6). *Id.* at 768. “If [HP] believes that specific elements of consumer protection claims have not been met, that is [its] obligation to identify those specific elements.” *Staley v. Gilead Sciences, Inc.*, 446 F. Supp.3d 578, 633-34 (N.D. Cal. 2020) (denying motion to dismiss state consumer protection claims as “conclusorily pled” where defendant failed to explicitly identify

¹⁵ *Id.* at Counts V (Illinois), VII (Alaska), IX-X (Arizona), XII-XIII (California), XV (Colorado), XVII (Connecticut), XVIII (Delaware), XX (District of Columbia), XXI (Florida), XXII (Georgia), XXIV (Idaho), XXV (Indiana), XXVII (Iowa), XXIX (Kansas), XXX (Kentucky), XXXI (Louisiana), XXXIII (Maine), XXXV (Maryland), XXXVI (Massachusetts), XXXVII (Michigan), XL-XLI (Minnesota), XLII (Mississippi), XLIII (Missouri), XLIV (Montana), XLVI (Nebraska), XLIX (New Hampshire), L (New Jersey), LII (New Mexico), LIV (New York), LVII (North Dakota), LVIII (Ohio), LX (Oklahoma), LXI (Oregon), LXIII (Pennsylvania), LXV (Rhode Island), LXVI (South Carolina), LXIX (South Dakota), LXXI (Tennessee), LXXII (Texas), LXXIII (Utah), LXXIV (Vermont), LXXV (Virginia), LXXVI (Washington), LXXVIII (Wisconsin), and LXXX (Wyoming).

any deficiencies under any specific state statute). HP's vague and generalized assertion that Plaintiffs have not pled their state law claims with the requisite specificity is not a legitimate basis to dismiss Plaintiffs' claims.¹⁶

HP's suggestion that it is unable to decipher the specific nature of Plaintiffs' consumer protection claims against it (*i.e.*, whether HP's alleged practices are deceptive, unfair, unconscionable, or unlawful) ignores the plain language of the Complaint. Indeed, the Complaint identifies several specific acts of wrongdoing underlying the consumer protection claims, including that: (i) HP, without Plaintiffs' knowledge, transmitted software and firmware updates to their printers that disabled the printing function if third-party ink was installed, effectively rendering the printers inoperable ¶¶ 20-23; (ii) HP purposefully concealed at the time the printers were purchased that it would be sending out firmware updates ¶¶ 25-31; and (iii) that HP's conduct was intended to create an unfair and illegal monopoly in the aftermarket for replacement ink cartridges and allow HP to charge supracompetitive prices. ¶ 23. These allegations establish that HP engaged in conduct that was deceptive, unfair, *and* unlawful—thus satisfying the pleading requirements of the relevant consumer protection statutes, including the Arkansas Deceptive Trade Practices Act. *Varsity Brands*, 618 F. Supp. 3d at 768 (*citing MacQuarie Group. Ltd. v. Pac. Corporate Group, LLC*, 2009 WL 539928 at *9 (S.D. Cal. March 2, 2009) (recognizing that “courts routinely treat[] antitrust violations as deceptive acts”)) and *In re Effexor Antitrust Litig.*, 357 F. Supp. 3d 363, 398 (D.N.J. 2018) (denying motion to dismiss on basis that allegations of

¹⁶ The decisions in *In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4743425 (S.D. N.Y. Sept. 15, 2014), *In re Opana ER Antitrust Lit.*, 163 F. Supp. 3d 704 (N.D. Ill. 2016), and *In re Aggrenox Antitrust Lit.* 94 S. Supp. 3d 224 (D. Conn. 2015) are not helpful to HP's arguments. Unlike the present case, the defendant in each of those cases undertook a detailed analysis of the specific state statutes on a statute-by-statute basis and established that the plaintiffs' conclusory allegations of anti-competitive conduct were not sufficient to establish consumer fraud or deceptive business practices.

defendants' anticompetitive actions were sufficient to establish deceptive conduct for purposes of New York consumer protection statute)). At bottom, unlike the defendants in *In re Aluminum Warehousing Antitrust Litig.*, HP cannot say that it is left "to determine how and why the alleged conduct violated a particular statute." 2014 WL 4277510 at *38. Plaintiffs' factual allegations, on their face, create a "reasonable inference that [HP] is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678..

HP points to three inadvertent citations in the Complaint. "[T]he failure in a complaint to cite a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters." *Albert v. Carovano*, 851 F. 2d 561, 771 n. 3 (2d Cir. 1988). With respect to the Indiana Deceptive Consumer Sales Act (Ind. Code § 24-5-0.5-3), Plaintiffs' inclusion of subsection (b)(17) was a scrivener's error. Plaintiffs' claims are limited only to subsections (a), (b)(2), (b)(6) and (b)(8)—which relate to the following entirely appropriate causes of action: unfair, abusive, or deceptive acts or omissions in connection with a consumer transaction; deceptive transactions involving a particular standard or quality; deceptive transactions concerning a price advantage; and deceptive transaction involving warranties and other rights, remedies and obligations. Similarly, Plaintiffs miscited the Minnesota Deceptive Trade Practices Act, which is Minn. Stat. Ann. § 352D.43-.48 not § 325F.43-.48. ¶¶ 348-51. Finally, the same facts giving rise to Plaintiffs' claims under the New Hampshire Antitrust Law (N.H. Rev. State §§ 356:1 et seq.) also serve as the basis for their claims under the New Hampshire Consumer Protection Act (N.H. Rev. Stat. §§ 358-A:1 et seq.). *LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.S. 88, 94 (2007) (holding that violations of New Hampshire's Antitrust Law can also serve as a basis for claims under the Consumer Protection Act). However, the Complaint should have clarified that Plaintiffs'

claim under the latter is being brought under section 358-A:2 rather than section 356:2, 3. ¶¶ 410-11.

The above errors do not undermine Plaintiffs' substantive allegations and are not a basis to dismiss the Complaint. *Quinn-Hunt v. Bennett Enterprises, Inc.*, 122 Fed. Appx. 205, 207 (6th Cir. 2005) (reversing dismissal of discrimination action, holding that plaintiff's failure to specifically cite Title VII or § 1981 in complaint did not bar recovery where factual allegations were sufficient to state a viable statutory claim.).

b. Plaintiffs' Factual Allegations of Deceptive and Fraudulent Conduct Satisfy the Heightened Pleading Standard of Rule 9(b).

HP contends that the consumer protection claims necessarily fail because Plaintiffs did not allege statutory violations with the specificity required under Rule 9. (Mem. at 36). Two fundamental problems cause this argument to fail. First, like its arguments regarding the supposed "conclusory" and "formulaic" nature of Plaintiffs' consumer protection claims, HP insists that the Complaint does not articulate valid claims "under the laws of a number of states" without actually identifying the specific claims it is challenging. Indeed, HP conspicuously avoids any substantive analysis of the statutory claims in the Complaint, leaving Plaintiffs to guess the supposed deficiencies. This tactic, as discussed above, is ineffective on a Rule 12(b)(6) motion under *Varsity Brands* and *Staley, supra*.

More substantively, HP misconstrues the specific factual allegations in the Complaint. To be clear, Plaintiffs unequivocally and explicitly allege that HP purposefully misled them by failing to disclose that its "Dynamic Security" firmware updates would disable HP printers that were fitted with replacement ink cartridges. The Complaint makes clear that Plaintiffs were unaware at the time they purchased their printers that HP's firmware updates would cause their printers to cease functioning with third-party ink installed. ¶31. The factual allegations further establish that none

of the materials that HP made available to Plaintiffs after the respective printers were purchased, including the software license agreement, printer manuals, marketing inserts and limited warranty, put Plaintiffs on notice of the effects of the firmware updates. ¶¶ 25, 27, 32, 38-39. In fact, certain language contained in the software license agreement and limited warranty found on HP's website suggest that HP's printers *would* function properly with non-HP replacement cartridges. ¶¶ 32, 38-39.

HP's reliance on *Parziale II* for the proposition that Plaintiffs cannot properly allege a failure to disclose is misplaced and unpersuasive. As discussed above, *Parziale II* does not support HP's assertion that it is generally known that third-party ink is incompatible with HP printers. In *Parziale II*, an HP consumer brought suit under the Florida Deceptive and Unfair Trade Practices Act alleging that he relied upon misleading statements written on HP's printer boxes and contained in an online webpage in making his purchase decision. *Parziale*, 2020 WL 5798274 at *1. The court, taking judicial notice of the numerous exhibits referred to or quoted to the complaint, dismissed the consumer's suit concluding that he was reasonably aware that non-HP ink might be incompatible and thus had adequate notice of the firmware updates their potential effects. *Id.* at *6-7.¹⁷

¹⁷ Mem. at 36. The Court considered the "Store Page" for a single model of HP Printer because the plaintiff pleaded in an Amended Complaint that he had relied on it in purchasing a printer. *Parziale II* at *3 ("Store Page"). There was no allegation that plaintiff had seen the document and relied on it in deciding to purchase an HP printer. The Court also explained that the "Store Page" was no longer available on HP's website by the time of the court's ruling in September 2020, casting further doubt on whether the contents of that page could have been available to anyone who purchased an HP printer, even of the same model number, at any time other than the date of the plaintiff's 2017 purchase. This court has no basis for taking judicial notice of this document on the current motion since it was never cited in this complaint.

Parziale II is entirely distinguishable from the present action. Here, Plaintiffs claims are not premised on any misleading statements by HP. The claims arise from HP's failure to disclose the purpose and effect of its firmware updates. There are no allegations that Plaintiffs relied upon HP's statements in deciding to purchase HP printers and HP has not requested that the Court take judicial notice of any materials. Stated plainly, the circumstances leading to the dismissal of the consumer's claims in *Parziale II* are not present in this case.

This case is squarely on all fours with a different set of HP cases, namely *So v. HP, Inc.*, *supra.*, *Mobile Emergency*, *supra.*, and *San Miguel v. HP, Inc.*, 317 F. Supp. 3d 1075 (N.D. Cal. 2018). Similar to the case at bar, the plaintiff consumers in *So*, *Mobile Emergency* and *San Miguel* asserted claims for deceptive and unfair conduct under California's and Florida's consumer protection statutes based upon a fraudulent omission theory. HP's motions to dismiss were denied in each case; the allegation that HP failed to disclose its practice of using firmware updates to disable printers with non-HP ink cartridges was sufficient to state a "fraud by omission" claim under the respective statutes. *So*, 2023 WL 4596778 at *8; *Mobile Emergency*, 2021 WL 9867952 at *11-12; *San Miguel*, 317 F. Supp. 3d at 1090; *see also ABN AMRO, Inc. v. Capital Int'l*, 595 F. Supp. 2d 805, 849 (N.D. Ill. 2008) (allegation that issuer of secured note intentionally failed to disclose transfer restriction policy to buyer was sufficient to state a claim under Illinois' consumer fraud statute). Tellingly, the *So* and *Mobile Emergency* courts specifically rejected the same "duty to disclose" argument advocated by HP in the present case. *So*, 2023 WL 4596778 at *7-8 (allegation that HP intentionally withheld information regarding firmware updates and their effect on a printer's ability to print—which is "central to the printer's function"—was sufficient to state a claim for fraudulent omission under state consumer protection statutes); *Mobile Emergency*, 2021 WL 9867952 at *11.

HP's final argument, that Plaintiffs' claims fail under "many of the consumer-protection statutes under which they allege causes of action" because they "do not allege that they rely on misrepresentations by HP" is puzzling. (Mem. at 37-38). While HP makes much of the fact that "the words 'relied' and 'reliance' don't appear in their 648-paragraph complaint," HP conveniently overlooks that Plaintiffs specifically allege that HP intended for consumers to "rely" on their material omissions regarding the firmware updates and that, as a result of HP's "silence," Plaintiffs not only accepted HP's firmware updates but also purchased non-HP replacement ink cartridges following the firmware update. ¶¶25-28. At a minimum, the factual allegations in the complaint create the reasonable inference that Plaintiffs relied upon HP's deceptive and fraudulent omission and suffered harm as a result. *Vesuvius USA Corp. v. American Commercial Lines LLC*, 910 F. 3d 331, 333 (7th Cir. 2018) ("when considering a motion to dismiss under Rule 12(b)(6), a court must draw all reasonable inferences in favor of the non-moving party."). Plaintiffs have alleged all that is needed to state a claim.

c. Plaintiffs' Consumer Protection Claims Arising from HP's Unfair and Anticompetitive Conduct are Properly Pled

HP insists that because Plaintiffs' federal antitrust claims (supposedly) fail, the state claims must also be dismissed. But HP's single-paragraph argument on this point is superficial and should be rejected. Indeed, to the extent Plaintiffs' claims are dependent upon their federal antitrust claims, the state law claims are valid. *See* section IV(A) and(B), *supra*.

HP makes a second, cursory argument in a footnote challenging Plaintiffs' standing to pursue 18 state consumer protection claims under the *Illinois Brick* doctrine. (Mem. n. 11). This argument fails for several reasons. First, as detailed in section I.E., *supra*, *Illinois Brick* is inapplicable. At least two of the HP Ink Purchaser Class Plaintiffs are direct purchasers whereas

the Firmware Update Class Plaintiffs are subject to the exception articulated in *McCready*, 475 U.S. at 475.

Second, with the exception of the consumer protection statutes in Kentucky (Count XXX), Texas (Count LXXII), and Oklahoma (Count LIX), HP fails to cite *any* authority to support its argument that the remaining 15 states identified in its motion follow *Illinois Brick*. In fact, courts have specifically recognized that indirect purchasers have standing to bring antitrust claims under the consumer protection statutes in Florida (Count XXL),¹⁸ Montana (Count XLIV),¹⁹ New Jersey (Count L),²⁰ Pennsylvania (Count LXIII)²¹ and Wyoming (Count LXXX).²² *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 818-21 (N.D. Ill. 2017) (Florida and Montana); *In re Generic Pharms Pricing Antitrust Litig.*, 368 F. Supp. 3d 814, 841 (E.D. Pa. 2019) (Montana and New Jersey); *In re Suboxone Antitrust Litig.*, 64 F. Supp. 3d 365, 710 (E.D. Pa. 2014) (Pennsylvania); *In re Static Random Access Memory*, 580 F. Supp. 2d 896, 910 (N.D. Cal. 2008) (Wyoming, for injunctive relief only). Similarly, despite applicable state laws arguably bar indirect purchaser class actions, Plaintiffs are nevertheless entitled to pursue their current claims under the consumer protection statutes in Illinois (Count V),²³ Alaska (Count VII),²⁴ Arkansas (Count X),²⁵ Georgia (Count XXII),²⁶ South Carolina (Count LXVI)²⁷, and Washington (Count LXXVI)²⁸ under *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-415 (2010)—which provides

¹⁸ F.S.A. § 542.201(2).

¹⁹ MCA § 30-14-101 et seq.

²⁰ N.J.S. §56:8-2

²¹ 73 Pa. Stat. Ann. § 201-9.2.

²² WY ST § 40-4-114.2.

²³ 740 ILCS 10/7(2).

²⁴ AS § 45.50.577(i).

²⁵ Ark Code Ann. § 4-88-107.

²⁶ O.C.G.A. § 10-1-193.

²⁷ SC ST § 39-5-140.

²⁸ RCWA § 19.86.080(3)

that Rule 23 applies to all federal civil suits and will displace any conflicting state statute that bars class actions. *See In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 553 (N.D. Ill. 2019); *In re Lithium Ion Batteries Antitrust Litig.*, 2014 WL 4955377, at *20-21 (N.D. Cal. Oct. 2, 2014).

d. State Statutory Notice Requirements are Unenforceable in Federal Courts

HP's argument, Mem. at 39-40, that the failure to allege compliance with state law pre-suit notice requirements in California, Georgia, Indiana, Maine, Massachusetts, Mississippi, Texas, and Wyoming dooms Plaintiffs' consumer protection claims in those states runs directly counter to *Shady Grove* and its progeny and should be summarily rejected. It is no coincidence that, with the exception of a single, entirely inapplicable 50-year-old California appellate court case,²⁹ HP provides *no* supporting authority for its positions with respect to any of the state laws in question. Merely referencing eight separate state statutes without any substantive discussion of the specific statutes does not suffice.

The notice provisions referenced by HP (Mem. at 39 n. 12) are state procedural rules that directly conflict with Rule 23 and thus are displaced and unenforceable in federal court. *Shady Grove*, 559 U.S. at 410. Courts in numerous jurisdictions have addressed this precise issue and have concluded that statutes requiring pre-suit notice of consumer fraud and/or consumer protections place restrictions beyond what is required under Rule 23 and are thus preempted under *Shady Grove*. *See In re Dealer Mgmt. Sys. Antitrust Litig.*, 2023 WL 4305901 *46 (N.D. Ill. June 29, 2023) (denying summary judgment motion, the Court held that state statutes in Hawaii, Utah and New Jersey that require pre-suit notice to bring class actions are procedural, not substantive,

²⁹ *See Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30 (1975).

in nature and conflict with Rule 23; consequently, they are unenforceable in federal court under *Shady Grove*); *In re Restasis Antitrust Litig.*, 355 F. Supp. 3d 145, 155-56 (E.D.N.Y. 2018) (denying motion to dismiss on basis that pre-suit notice statutes conflict with Rule 23 and are insufficient to bar class action under Rule 12(b)(6)); *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 253–54 (D. Conn. 2015) (a “plain reading” of Hawaii’ pre-suit notice statute reflects that the notice requirement is procedural); *see also In re Generic Pharms Pricing Antitrust Litig.*, 368 F. Supp. 3d at 834-35 (denying motion to dismiss because compliance with state pre-notice statutory requirements does “not alter the substantive elements of Plaintiffs’ claims and are not a pleading requirement for the Complaint. Therefore, this argument is not a basis for dismissal of [the] state antitrust claims.”). HP’s motion should be denied accordingly.

e. Plaintiffs Claim for Equitable Relief Under the California UCL is Not Subject to Dismissal Given the Availability of Monetary Under Different Legal Theories.

HP contends that Plaintiffs should be barred from asserting a claim under California’s Unfair Competition Law³⁰—which only provides for equitable relief—because their injuries can be remedied with monetary damages. Mem. at 40. HP correctly notes that *Sonner*³¹ stands for the proposition that a plaintiff must establish a lack of an adequate remedy at law to state a claim under the UCL. However, HP overlooks that numerous courts in the Ninth Circuit have refused to follow it. For example, in *Ferry v. Porsche Cares of N. Amer., Inc.*, 2022 WL 1769120, at *4-5 (C.D. Cal. March 11, 2022), the district court declined to follow *Sonner*, concluding that the Ninth Circuit’s contrary holding in *Moore v. Mars Petcare U.S., Inc.*, 966 F.3d 1007 (9th Cir. 2020) was more persuasive. In *Moore*, the Ninth Circuit concluded that a plaintiff was entitled to seek equitable

³⁰ Cal. Bus. & Prof. Code § 17200

³¹ *Sonner v. Premier Nutrition Corp.*, 971 F. 3d 834 (9th Cir. 2020)

relief under the UCL in addition to monetary damages under California's other consumer protection statutes on the grounds that "[t]he UCL, FAL, and CLRA explicitly provide that the remedies under each act are cumulative to each other." *Id.* at 1021 n.13. Similarly, in *Belgian v. Mercedes-Benz USA, LLC*, 2023 WL 3150113, at *5 (C.D. Cal. Feb. 15, 2023), the district court denied a motion to dismiss based upon *Sonner*, recognizing that "the application of *Sonner* at the pleading stage is a contentious and rapidly evolving area of the law." *See also Carroll v. Myriad Genetics, Inc.*, 2022 WL 16860013 at *6 (N.D. Cal. Nov. 9, 2022) (declining to follow *Sonner* at the pleading stage). Other courts have limited *Sonner* to claims seeking "equitable restitution" under the UCL, specifically permitting plaintiffs to pursue claims for injunctive relief under the UCL while simultaneously pursuing damages under different statutes. *Mobile Emergency*, 2021 WL 9867952 at *10; *Brooks v. Thomson Reuters Corp.*, 2021 WL 3621837 at 10 (N.D. Cal. Aug. 16, 2021).

In light of the ongoing "judicial turbulence," this Court should follow the guidance from the Ninth Circuit as stated in *Moore* and "should not deprive [Plaintiffs] of [their] claims without clearer direction from a higher court." *Belgian*, 2023 WL 3150113 at *5. HP's motion to dismiss should be denied with respect to the UCL.

V. CONCLUSION

The Complaint puts HP on notice of what the case is about. That is what a complaint should do; there is no reason to dismiss any part of it, and therefore Plaintiffs request the Motion to Dismiss be denied. If the Court finds that any allegations or claims are not plausibly pleaded, those claims should be dismissed without prejudice. The Complaint has not previously been amended, there is no reason to believe amendment would be futile, and permitting amendment would not prejudice HP.

Dated: April 8, 2024

Respectfully submitted,

/s/ S. Jarret Raab

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