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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE BANK OF AMERICA
CALIFORNIA UNEMPLOYMENT
BENEFITS LITIGATION**

Case No. 3:21-md-02992-LAB-MSB

**PLAINTIFFS' *EX PARTE*
APPLICATION FOR LEAVE TO
FILE MOTION FOR
RECONSIDERATION**

This Document Relates to All Actions

Judge: Hon. Larry Alan Burns

I. INTRODUCTION

Pursuant to the Court’s Standing Order in Civil Cases §3(e), Plaintiffs make this *ex parte* application for leave to file a motion to reconsider the dismissal of their Unfair Competition Law (“UCL”) claim, which the Court dismissed with prejudice for failure to “allege inadequate legal remedies.” Dkt. 126 (“MTD Order”) at 31–33. Plaintiffs respectfully submit that, in dismissing this claim, the Court committed four clear errors of law: (1) overlooking that Plaintiffs’ UCL claim sought *prospective injunctive relief* based on future irreparable harms for which no legal remedies exist, *see* Dkt. 72 (“MCC”) ¶¶5, 9–33, 111–13, 285, 584; (2) overlooking that Plaintiffs’ UCL claim alleged that the Bank’s challenged practices, even if not “unlawful,” are nonetheless actionable under the UCL as “*unfair*” practices, for which no legal remedies are available; (3) dismissing the UCL claim *without leave to amend* even though, if amendment were permitted, Plaintiffs could allege inadequate legal remedies; and (4) dismissing the UCL claim *with prejudice* to Plaintiffs’ ability to re-file that claim in state court, which is contrary to Ninth Circuit precedent governing dismissals for lack of equitable jurisdiction.

II. PROCEDURAL HISTORY

In May 2021, the plaintiffs in member case *Yick v. Bank of Am., N.A.*, No. 21-cv-01092-VC, obtained a preliminary injunction and provisional class certification based on a “strong likelihood of success” on their EFTA, contract, and UCL claims. 539 F.Supp.3d 1023, 1025 (N.D. Cal. 2021). On June 2, 2021, the *Yick* court entered the Preliminary Injunction. *Yick*, Dkt. 103; MCC ¶¶109–10 & Exs. A–B. Two days later this MDL was created. Dkt. 1. Plaintiffs subsequently filed their MCC, which included a UCL claim challenging the Bank’s practices as “unlawful” and “unfair,” for which Plaintiffs sought restitution and prospective injunctive relief, including “an order making the existing Preliminary Injunction permanent.” MCC ¶¶575–84, Prayer.

In October 2021, the Bank moved to dismiss that claim for lack of equitable jurisdiction, arguing Plaintiffs had “an adequate remedy at law.” Dkt. 84-1 at 32:1.

1 Plaintiffs opposed, including on the ground that their UCL claim sought prospective
2 injunctive relief to permanently enjoin the Bank’s “continued implementation of its
3 challenged business practices.” Dkt. 90 at 43:13–18 (citing, as an example, MCC ¶111).
4 Plaintiffs also requested leave to amend if the Bank’s motion were granted. *Id.* at
5 14:3–4, 50:12–15. The Bank’s reply brief did not respond to Plaintiffs’ argument that
6 a damages remedy could not prevent future harm. *See* Dkt. 92 at 19:27–20:23.

7 On May 25, 2023, the Court ruled that Plaintiffs’ MCC “fails to state a UCL
8 claim” under *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020),
9 because it “doesn’t allege inadequate legal remedies.” MTD Order at 33:8, 33:11–13.
10 The Court then dismissed the UCL claim in its entirety “with prejudice,” *id.* at 33:14–
11 15, 75:3–4, without stating why it denied leave to amend or why the dismissal was
12 with prejudice. Elsewhere in the MTD Order, the Court allowed claims that “seek
13 prospective injunctive relief” to proceed. *Id.* at 46:4–5.

14 **III. LEGAL STANDARD**

15 Reconsideration is appropriate if “the district court ... committed clear error or
16 the initial decision was manifestly unjust.” *Dixon v. Robinson*, 2007 WL 2700732, at
17 *1 (S.D. Cal. Sept. 12, 2007) (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255,
18 1263 (9th Cir. 1993)); *see also* Fed. R. Civ. P. 59(e), 60(b)(6); S.D. Cal. Civ. L.R. 7.1(i);
19 Hon. Larry A. Burns’ Standing Order in Civil Cases §3(e)(3).

20 **IV. SUMMARY OF ARGUMENT**

21 **A. It was clear error to rule that the MCC does not allege that damages** 22 **are inadequate to prevent future harm.**

23 “[U]nder *Sonner*, a plaintiff must plead inadequate legal remedies in the
24 operative pleading to allege claims for equitable relief.” *Brand v. KSF Acquisition*
25 *Corp.*, 2023 WL 3225409, at *4 (S.D. Cal. Mar. 17, 2023) (quoting *Rivera v. Jeld-*
26 *Wen, Inc.*, 2022 WL 3702934, at *12 (S.D. Cal. Feb. 4, 2022)). A complaint meets
27 this requirement when its allegations “demonstrate the inadequacy of a legal remedy.”
28 MTD Order at 33:6-8 (quoting *Sharma v. Volkswagen AG*, 524 F.Supp.3d 891, 907

(N.D. Cal. 2021)). What matters is not whether plaintiffs make a boilerplate allegation of inadequate legal remedies, but whether they “allege facts suggesting that damages are insufficient.” *Antonyan v. Ford Motor Co.*, 2022 WL 1299964, at *6 (C.D. Cal. Mar. 30, 2022).¹ When injunctive relief is sought to prevent future harms, the general rule is that “legal damages are typically inadequate.” *Kryzhanovskiy v. Amazon.com Servs., Inc.*, 2022 WL 2345677, at *4 (E.D. Cal. June 29, 2022).

Although the MCC does not contain a boilerplate allegation that legal remedies are “inadequate,” it amply satisfies *Sonner* by repeatedly alleging that Plaintiffs are suffering “irreparable harm” (MCC ¶¶5, 285) and “irreparable injury” (MCC ¶¶9–33). “Irreparable injury” is “[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction,” and is synonymous with “irreparable harm” and “nonpecuniary injury.” BLACK’S LAW DICTIONARY, *Injury* (11th ed. 2019). The MCC also incorporates by reference the Preliminary Injunction’s finding of irreparable harm, which included a finding that the Bank’s conduct “will likely cause [class members] to be evicted, go hungry, or be denied necessary medical care.” MCC ¶109 & Ex. A at 2.

“[R]etrospective damages are not an adequate remedy for the prospective harm that injunctions are designed to prevent.” *Graham v. Cent. Garden & Pet Co.*, 2023 WL 2744391, at *4 (N.D. Cal. Mar. 30, 2023).² The *prospective* nature of the injunctive

¹ *Accord Clevenger v. Welch Foods Inc.*, 2022 WL 18228288, at *4–5 (C.D. Cal. Dec. 14, 2022); *McNamara v. Wells Fargo & Co.*, No. 21-cv-1245-LAB, Dkt. 20 at 17–18 (S.D. Cal. Mar. 30, 2022) (dismissing without prejudice UCL claim seeking restitution where plaintiff “doesn’t allege any facts suggesting that legal remedies are insufficient,” and “doesn’t seek injunctive relief that might suggest the insufficiency of legal remedies”).

² *Accord Warren v. Whole Foods Mkt. Cal., Inc.*, 2022 WL 2644103, at *9 (N.D. Cal. July 8, 2022); *Dekker v. Vivint Solar, Inc.*, 2022 WL 827246, at *3 (N.D. Cal. Mar. 18, 2022); *Souter v. Edgewell Pers. Care Co.*, 2022 WL 485000, at *12–13 (S.D. Cal. Feb. 16, 2022); *Brooks v. Thomson Reuters Corp.*, 2021 WL 3621837, at *11 (N.D. Cal. Aug. 16, 2021); *Andino v. Apple, Inc.*, 2021 WL 1549667, at *5 (E.D. Cal. Apr. 20, 2021).

1 relief sought here distinguishes it from cases dismissing requests for *retrospective*
2 relief under *Sonner*. *See, e.g., Kryzhanovskiy*, 2022 WL 2345677, at *4 (collecting
3 cases). Accordingly, the MCC plausibly alleges that Plaintiffs’ legal remedies are
4 inadequate to prevent future harm, and it was clear error to rule otherwise.

5 **B. It was clear error to rule that the MCC does not allege that damages**
6 **are inadequate to remedy conduct that, even if deemed not to be**
7 **“unlawful,” is nevertheless “unfair.”**

8 The MCC alleges the Bank’s challenged conduct is actionable under the UCL
9 because (1) it is “unlawful” to the extent it violates predicate statutes, regulations, or
10 common law, and in the alternative, (2) it is “unfair,” because the harm caused by the
11 Bank’s conduct outweighs its potential benefits. *See* MCC ¶¶576–82; Cal. Bus. &
12 Prof. Code §17200. In dismissing Plaintiffs’ UCL claim on the ground that their other
13 claims for relief provide adequate legal remedies, the Court overlooked that Plaintiffs
14 sought restitution and injunctive relief under the UCL for challenged practices that, if
15 deemed not to be unlawful, would be actionable as “unfair.” MCC ¶¶577–78; *see* Dkt.
16 90 (MTD Opp.) at 40–43. In that circumstance, Plaintiffs would have *no* adequate
17 remedy at law because no “law” would have been violated. *See Shuman v. SquareTrade*
18 *Inc.*, 2021 WL 5113182, at *10 (N.D. Cal. Nov. 3, 2021) (legal remedies are inadequate
19 “when an equitable claim for restitution relies on a different theory” than plaintiff’s
20 legal claims); *In re JUUL Labs, Inc., Mktg., Sales Pracs. & Prod. Liab. Litig.*, 497
21 F.Supp.3d 552, 639 (N.D. Cal. 2020) (similar, particularly where UCL “allegations
22 regarding unfair conduct are not [] coextensive with plaintiffs’ legal claims”).

23 **C. It was clear error to deny Plaintiffs leave to amend their UCL claim**
24 **to more clearly allege inadequate legal remedies.**

25 Alternatively, the Court committed clear error by denying Plaintiffs leave to
26 amend. Courts “should freely give leave [to amend] when justice so requires,” Fed.
27 R. Civ. P. 15(a)(2), and this command should be “applied with extreme liberality.”
28 *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154–55 (9th Cir. 2014). District

1 courts routinely grant leave to amend UCL claims that they dismiss under *Sonner*,
2 particularly where, as here, there has been no previous order of dismissal. *See, e.g.,*
3 *Guthrie v. Transamerica Life Ins. Co.*, 561 F.Supp.3d 869, 875 (N.D. Cal. 2021).
4 Indeed, this Court has often dismissed claims under *Sonner* with leave to amend. *See,*
5 *e.g., McCraner v. Wells Fargo & Co.*, 2023 WL 2728719, at *8–9 (S.D. Cal. Mar. 30,
6 2023); *Brand*, 2023 WL 3225409, at *4, *9; *McNamara*, *supra* note 1, Dkt. 20 at 17–
7 18. Because Plaintiffs can amend their UCL claim to allege the inadequacy of legal
8 remedies, including for each of the reasons stated above, it was clear error to have
9 denied them that opportunity.

10 **D. It was clear error to dismiss the UCL claim with prejudice to**
11 **Plaintiffs’ ability to re-file that claim in state court.**

12 Even if this Court were to conclude that it appropriately dismissed the UCL
13 claim without leave to amend for failure to allege inadequate legal remedies, binding
14 Ninth Circuit precedent provides that “the district court should have dismissed
15 [Plaintiffs’] UCL claim without prejudice to refiling the same claim in state court.”
16 *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1314 (9th Cir. 2022), *cert. denied sub*
17 *nom. Polaris Indus. Inc. v. Albright*, No. 22-987, 2023 WL 3937623 (U.S. June 12,
18 2023). This is because “a federal court that dismisses a claim for lack of equitable
19 jurisdiction necessarily declines to assume the jurisdiction and decide the cause.” *Id.*
20 “Thus, a federal court’s pre-merits determination to withhold relief is binding on
21 other federal courts, but not on courts outside the federal system that might properly
22 exercise their own jurisdiction over the claim.” *Id.*; *accord Clevenger v. Welch Foods*
23 *Inc.*, 2022 WL 18228288, at *5 n.3 (C.D. Cal. Dec. 14, 2022).

24 **V. CONCLUSION**

25 For the foregoing reasons, Plaintiffs respect seek leave to file a motion to
26 reconsider the dismissal with prejudice of their UCL claim.

1 Dated: June 21, 2023

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Andrew F. Kirtley, hereby certify that the content of this document is acceptable to all the signatories herein and that I have obtained counsel's authorization to affix their electronic signatures to this document.

/s/ Andrew F. Kirtley
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