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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

IN RE: BANK OF AMERICA CALIFORNIA UNEMPLOYMENT BENEFITS LITIGATION

Case No. 21-MD-02992-LAB-MSB

DEFENDANT BANK OF AMERICA, N.A.'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF DISMISSAL WITH PREJUDICE OF UCL CLAIM

Date: August 28, 2023
Time: 11:30 a.m.
Ctrm: 14A – 14th Floor
Judge: Hon. Larry A. Burns

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INTRODUCTION

Plaintiffs seek the extraordinary remedy of reconsideration because, they say, the Court committed "clear error" when it dismissed with prejudice their claims under California's Unfair Competition Law ("UCL"). But Plaintiffs' Motion for Reconsideration ("Motion" or "Mot.") (Dkt. No. 151-1) identifies no clear error. It simply rehashes the same arguments Plaintiffs made in opposition to Bank of America, N.A.'s ("BANA") motion to dismiss. The Court plainly understood that Plaintiffs' UCL claims sought the equitable remedy of a forward-looking injunction. *See* Order Granting in Part and Denying in Part BANA's Motion to Dismiss ("MTD Order") (Dkt. No. 126) at 33. But the Court found—correctly—that Plaintiffs had not plausibly alleged entitlement to that relief because their Master Consolidated Complaint ("MCC") (Dkt. No. 72) included *neither* a boilerplate allegation that legal remedies are inadequate *nor* facts to support such an allegation. *See* MTD Order at 33. Plaintiffs' Motion offers nothing to support a different result. It should be denied.

PROCEDURAL HISTORY

Plaintiffs' MCC included a UCL claim alleging that BANA engaged in "unfair" and "unlawful" business practices. MCC ¶¶ 575–584. In redress, Plaintiffs sought, among other things, "injunctive relief (a) prohibiting the Bank from continuing its unfair and unlawful business practices, and (b) requiring the Bank to take reasonable measures to prevent future unauthorized use of EDD Debit Cards and Accounts, and (c) requiring the Bank to ensure timely and adequate processing of Cardholders' claims regarding unauthorized or fraudulent use of their Cards or Accounts." *Id.* ¶ 584. The MCC said nothing more about the UCL injunction, but it did request "an order making the existing Preliminary Injunction permanent" in the Prayer for Relief. *Id.* at Prayer for Relief ¶ 2.

BANA moved to dismissed Plaintiffs' UCL claims on the basis that the UCL provides only for equitable remedies, not money damages, and Plaintiffs had not pled facts that would entitle them to any equitable remedy. BANA's Motion to Dismiss

("MTD") (Dkt. No. 84-1) at 44; *see also* BANA's Reply In Further Support of Motion to Dismiss ("MTD Reply") (Dkt. No. 92) at 28. BANA acknowledged that Plaintiffs' UCL claims sought an "injunction prohibiting unspecified practices and requiring unspecified measures," but BANA argued that Plaintiffs' vague request did not plausibly allege either the inadequacy of legal remedies or Plaintiffs' standing to seek injunctive relief based on the hypothetical risk that Plaintiffs' accounts will be compromised in the future. *See* MTD at 44; MTD Reply at 28. In response, Plaintiffs asserted that they had alleged both "unfair" and "unlawful" acts or practices, that it was "premature" to conclude that they had an adequate legal remedy, and that "the request for injunctive relief seeks to prevent future harm." Plaintiffs' Opposition to BANA's Motion to Dismiss (Dkt. No. 90) at 57–58.

The Court's May 25, 2023 Order on BANA's motion to dismiss held that although "the MCC pleads claims for equitable relief under the UCL," it "doesn't allege inadequate legal remedies," and therefore "fails to state a UCL claim under *Sonner* [*v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020)]." MTD Order at 33. Plaintiffs now move for reconsideration of that decision.

ARGUMENT

I. RECONSIDERATION REQUIRES AN EXTRAORDINARY SHOWING.

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); *see also 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Due to the exceptional nature of reconsideration, it is only appropriate in limited circumstances, and this Court's Standing Order expressly disfavors such requests, providing for their summary denial in the absence of (1) new evidence, (2) a change in controlling law, or (3) clear error. *See* S.D. Cal. Judge Larry Alan Burns, "Standing Order in Civil Cases" § 3(e); *see also Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Plaintiffs concede there is no newly discovered evidence or change of law here. Plaintiffs argue only that the Court's decision to dismiss Plaintiffs' UCL claims with prejudice was clear error. Mot. at 6.

"Clear error occurs when 'the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.'" *Smith v. Clark County School Dist.*, 727 F.3d 950, 955 (9th Cir. 2013), citing *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "Mere disagreement with a court's analysis in a previous order is not a sufficient basis for reconsideration. Nor does reassertion of arguments already extended and rejected provide an appropriate justification for reconsidering the Court's Order." *Gallagher v. San Diego Unified Port. Dist.*, No. 08CV0886 AJB (WVG), 2011 WL 4014469, at *2 (S.D. Cal. Sept. 8, 2011).

II. THE MTD ORDER IS NOT CLEARLY ERRONEOUS.

With respect to the UCL claim, the MTD Order is correct and contains no error, let alone clear error justifying the "extraordinary remedy" of reconsideration. *See Carroll*, 342 F.3d at 945. Plaintiffs' Motion identifies four purported "clear errors of law," asserting that the Court "overlook[ed]" that (A) Plaintiffs' UCL claim sought "prospective injunctive relief" and (B) challenged "unfair" business practices, for which no legal remedies are available, and that Plaintiffs should have been (C) given leave to amend their UCL allegations in this action or (D) permitted to re-file their UCL claims in state court. Mot. at 6. None of these arguments justify reconsideration.

A. The MTD Order Did Not Overlook Plaintiffs' Request for Prospective Injunctive Relief.

Plaintiffs' first argument for reconsideration of the MTD Order is that the Court committed clear error by failing to consider that Plaintiffs said in the MCC that they were continuing to suffer "irreparable harm" and "irreparable injury" (Mot. at 9) and that Plaintiffs' UCL claims sought "injunctive relief to prevent future harm" (*id.* at 11). Not so. *First*, the Court did consider Plaintiffs' request "for equitable relief under the UCL," but nonetheless found that the MCC lacked the plausible allegations of "inadequate legal remedies" required to state a UCL claim based on the standard set by the Ninth Circuit in *Sonner*. MTD Order at 33. *Second*, Plaintiffs have no standing to seek a further prospective injunction against BANA, as BANA's July 2022 consent order with the CFPB already permanently enjoins the business practices Plaintiffs complain about.

1. The MTD Order Considered And Rejected Plaintiffs' Allegations Regarding Irreparable Harm.

The MTD Order correctly held that, under *Sonner*, a complaint does not state a claim under the UCL "if the pleading does not *demonstrate* the inadequacy of a legal remedy." MTD Order at 33 (emphasis added), quoting *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 907 (N.D. Cal. 2021). Plaintiffs *concede* that the MCC "did not contain" any allegation that legal remedies were inadequate. Mot. at 9. They nonetheless argue that the MCC "fully satisfied *Sonner* by repeatedly alleging that Plaintiffs were continuing to suffer 'irreparable harm' (MCC ¶¶5, 285) and 'irreparable injury' (MCC ¶¶9–33)" (Mot. at 9) and by requesting injunctive relief (*id.* at 11). Plaintiffs' arguments are without merit.

Sonner requires a UCL plaintiff to "*plausibly* allege 'an inadequate remedy at law' before pursuing equitable relief in the form of restitution or an injunction." *Stafford v. Rite Aid Corp.*, No. 17-CV-1340 TWR (JLB), 2023 WL 2876109 (S.D. Cal. Apr. 10, 2023) (emphasis added), quoting *Shay v. Apple Inc.*, No. 20CV1629-GPC (BLM), 2021 WL 1733385, at *5 (S.D. Cal. May 3, 2021). As a threshold matter, Plaintiffs' failure to include any allegation—not even a "boilerplate allegation"—that legal remedies were inadequate renders the MCC facially deficient. On this point, *Sonner* is clear. The Ninth Circuit found the UCL claim insufficient because "the operative complaint does not allege that [the plaintiff] lacks an adequate legal remedy." *Sonner*, 971 F.3d at 844. Courts in this district have followed suit. For example, in *Stafford*, the court dismissed the UCL claim as "facially deficient" because the operative complaint *"[did] not even contain the phrase 'inadequate remedy at law.'"* *Stafford*, 2023 WL 2876109, at *4 (emphasis added).[1]

Plaintiffs' conclusory allegations in the MCC of "irreparable injury" and "irreparable harm" do not plausibly allege an inadequate remedy at law. Plaintiffs specifically point to MCC paragraphs 5, 9–33, and 285, but none of these allegations are adequate—merely repeating the words "irreparable harm" or "irreparable injury" does not alone suffice to plausibly plead that *no* legal remedy exists. The MCC paragraphs Plaintiffs cite do no more than generally allege that Plaintiffs have suffered "irreparable" harm without any indication as to why a legal remedy cannot address that harm.[2] As Plaintiffs concede, "[w]hat matters is . . . whether they 'allege *facts* suggesting that damages are insufficient.'" Mot. at 9 (emphasis added), citing *Antonyan v. Ford Motor Co.*, No. CV 21-0945-DMG (RAOx), 2022 WL 1299964 (C.D. Cal. Mar. 30, 2022). There are no factual allegations in the MCC demonstrating that legal remedies are inadequate, and Plaintiffs do not (and cannot) direct the Court to any.

Plaintiffs' cited case, *Antonyan*, proves the point. The complaint in that case, like the MCC, merely alleged irreparable harm in a conclusory and vague manner, and sought to enjoin future violations of the UCL. *See Antonyan* Complaint, No. CV 21-0945-DMG (RAOx) (Dkt. No. 17) ¶ 131 ("Plaintiff requests that this

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[1] Plaintiffs' addition of the "boilerplate allegation" to their First Amended Master Consolidated Complaint that "legal remedies are inadequate to prevent future harm from the Bank's unlawful and unfair conduct" (First Amended Master Consolidated Complaint ("FAMCC") (Dkt. No. 136) ¶ 285) is still insufficient because Plaintiffs must *plausibly allege* with *facts* why money damages are inadequate.

[2] *See, e.g.*, MCC ¶ 5 (Defendant's "acts and omissions have caused substantial financial and other harm to Plaintiffs and Class Members, and unless promptly enjoined will cause them and the public to suffer immediate and irreparable harm."); ¶¶ 9–33 (Defendant "failed to comply with its legal obligations as alleged herein, causing [class representative plaintiff] to suffer immediate and irreparable injury."); and ¶ 285 ("Plaintiffs and Class Members have been deprived of unemployment benefits and other public benefits to which they are entitled by law, for weeks or months, causing them great, immediate, and irreparable harm.").

Court . . . enjoin Defendant from continuing these unfair practices in violation of the UCL in the future. Otherwise, Plaintiff and the broader general public will be irreparably harmed and/or denied an effective and complete remedy."). The court found that there was "*nothing* in [the complaint] to suggest that damages would fail to make [plaintiff] whole" and dismissed the UCL claims. *Antonyan*, 2022 WL 1299964, at *6 (emphasis added). Similarly, here, Plaintiffs allege no facts to suggest that damages would not make them whole—particularly where the crux of their complaint is that they were deprived of money.

On this record, the Court's decision to dismiss the UCL claims was not clear error, and Plaintiffs' request to reconsider that decision should be denied.

2. Plaintiffs Have No Standing To Seek Further Injunctive Relief, In Light of BANA's CFPB Consent Order.

Finally, even assuming, *arguendo*, that Plaintiffs' conclusory allegations about "irreparable harm" and "irreparable injury" and request for a vague, unspecified UCL "injunction" are sufficient to plausibly allege that Plaintiffs lack an adequate legal remedy (they are not), that would not be the end of the inquiry. Plaintiffs "must also have standing to assert injunctive relief premised on future harm." *Goldstein v. General Motors LLC*, No. 19CV1778-LL-AHG, 2022 WL 484995, at *7 (S.D. Cal. Feb. 16, 2022); *see also B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). The MCC does not plausibly allege that Plaintiffs have standing to seek further injunctive relief, and Plaintiffs have no such standing as a matter of fact.

To establish standing, among other requirements, "[t]he plaintiff must demonstrate that he has suffered or is threatened with a 'concrete and particularized' legal harm coupled with 'a *sufficient likelihood that he will again be wronged in a similar way*,'" *and* that the plaintiff's alleged "injury is 'likely' to be 'redressed by a favorable decision.'" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (emphasis added), quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Further, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

As explained above, the UCL injunction sought by the MCC would enjoin BANA from a number of unspecified business practices, *see* MCC at ¶ 584, that Plaintiffs still have not identified—not even in their latest FAMCC. Indeed, the only specificity about the prospective injunction that Plaintiffs seek is their request in the Prayer for Relief for "an order making the existing Preliminary Injunction permanent." *Id.* at Prayer for Relief ¶ 2. However, Plaintiffs cannot plausibly allege a threat of future harm that could possibly be remedied by making the existing Preliminary Injunction permanent. As Plaintiffs know, and even themselves brought to the attention of the Court (*see* Plaintiffs' Notice of Request for Status Conference (Dkt. No. 106)), since July 2022, BANA has been subject to a regulatory Consent Order with the CFPB that already permanently enjoins the business practices complained about in the MCC and addressed by the Preliminary Injunction. For example, the Preliminary Injunction precludes BANA from using the fraud filter to deny EDD cardholders' unauthorized transaction claims or freeze EDD cardholders' accounts, and it further requires BANA to take steps to ensure adequate customer service for EDD cardholder accounts. *See* Preliminary Injunction (Dkt. No. 72) Ex. A. The Consent Order imposes these same requirements, among others. *See* Consent Order (Dkt. No. 106) Ex. 1).[3] Plaintiffs do not seek to require BANA to do anything beyond what it has been ordered to do by its federal regulators, and in any event, neither the MCC nor the FAMCC contains any plausible allegations to support such a request.

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[3] Simultaneous with the CFPB Consent Order, the OCC also ordered BANA to provide remediation to EDD cardholders. *See* Plaintiffs' Notice of Request for Status Conference (Dkt. No. 106) at 2. Plaintiffs acknowledge that, like the CFPB Consent Order, the OCC Order also "substantially overlaps with many of the claims and requests for relief at issue in this Multi-District Litigation." *Id.*

B. The MTD Order Did Not Overlook Plaintiffs' Allegations Regarding The Adequacy of Legal Remedies For BANA's Allegedly "Unfair" Practices.

Plaintiffs' next argument for reconsideration is that the Court committed clear error by failing to consider whether they alleged an inadequate legal remedy for the allegedly "unfair" business practices challenged in the MCC (as there is quite obviously an adequate legal remedy for the allegedly "unlawful" challenged business practices). Mot. at 11–14. Plaintiffs are also wrong under this argument.

In order to obtain leave to file this motion, Plaintiffs cited *Shuman v. SquareTrade Inc.*, No. 20-cv-02725-JCS, 2021 WL 5113182 (N.D. Cal. Nov. 3, 2021) and *In re JUUL Labs, Inc., Mktg., Sales Pracs. & Prod. Liab. Litig.*, 497 F. Supp. 3d 552, 639 (N.D. Cal. 2020) for the general rule that where a claim for restitution under the UCL is based on a *different theory* than the complaint's legal claims, the UCL claim is not barred. Application for Leave to File Motion for Reconsideration (Dkt. No. 141) at 5. This *undermines*—not supports—Plaintiffs' argument. Plaintiffs point to nothing in the MCC to demonstrate that their UCL claims relying on "unfair" conduct are based on a different theory than the MCC's many other claims seeking monetary damages, nor do they identify any different theory for their "unfair" claim. Indeed, they *concede* that the challenged practices underlying both the "unlawful" and "unfair" prongs of the UCL are the same. Mot. at 13 (arguing that MCC asks the Court to find the same business practices to be either "unlawful" and/or "unfair").

A plaintiff cannot maintain a UCL "unfair" claim simply as a back-up in the event that their legal claims based on the same facts and theories of liability fail. *Shuman* rejected the argument that a UCL claim can be maintained in these circumstances, dismissing the plaintiff's "unfair" UCL claim because it was based on the same factual predicate and theory as the plaintiff's breach of contract claim. *Shuman*, 2021 WL 5113182, at *11; *see also Bazarganfard v. Club 360 LLC*, 2023 WL 2354810, at *13 (C.D. Cal. Jan. 26, 2023) (plaintiff failed to demonstrate he had no adequate remedy at law where his UCL claims under the unlawful and unfair prongs were based on the same theory underlying his claim for damages). Plaintiffs' other cited case, *In re JUUL Labs*, also confirms that allegations regarding "unfair" conduct cannot be "coextensive with plaintiffs' legal claims." *In re JUUL Labs*, 497 F. Supp. 3d at 639.

Perhaps realizing that it runs counter to their position, Plaintiffs abandon *Shuman* in their Motion, relying instead on *Elgindy v. AGA Serv. Co.*, No. 20-CV-06304-JST, 2021 WL 1176535 (N.D. Cal. Mar. 29, 2021), which *Shuman* itself cites. But *Elgindy* offers no help to Plaintiffs. First, the quote from *Elgindy* that Plaintiffs cite is from the court's discussion of the "fraudulent prong" of the UCL, which is not at issue here. Mot. at 13, quoting *Elgindy*, 2021 WL 1176535, at *15. Second, the reason the *Elgindy* court found that the plaintiffs lacked an adequate legal remedy was because the legal claims "rooted in the same theory" as the "fraudulent" UCL claims, *had been dismissed for failure to state a claim.* 2021 WL 1176535, at *15. Plaintiffs misleadingly suggest that the *Elgindy* court allowed "unfair" UCL claims to proceed alongside legal claims "rooted in the same theory," (Mot. at 13), but it did no such thing.

C. It Was Not Clear Error To Deny Plaintiffs Leave To Amend Their UCL Claims.

Next, Plaintiffs argue that it was clear error for the Court to deny them leave to amend their UCL claims. Mot. at 14–15. Again, Plaintiffs are incorrect. Although it is true that leave to amend should be given freely, dismissal without leave is appropriate "where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile." *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

Plaintiffs say—without support—that they "could amend their UCL claims to allege the inadequacy of legal remedies." Mot. at 15. But the only amendment that

Plaintiffs could (and did) make on this point in the FAMCC was to add the boilerplate allegation that "legal remedies are inadequate to prevent future harm." FAMCC ¶ 285. This is not enough. Neither the FAMCC nor Plaintiffs' Motion contain any additional facts to explain *why* legal remedies are inadequate or describe the nature of the alleged irreparable harm Plaintiffs face as a result of alleged UCL violations. As discussed above, Plaintiffs must allege *facts* that *plausibly* suggest their entitlement to the relief they seek. They have now had two opportunities to identify any such facts to support their conclusory allegations (once in the FAMCC and once in the Motion), and failed to do so both times. The Court's decision to dismiss the UCL claims without leave to amend in the MTD Order was not clear error, and Plaintiffs fail to provide a reason to reconsider that decision now.

D. It Was Not Clear Error To Dismiss Plaintiffs' UCL Claims With Prejudice.

Finally, Plaintiffs argue that "binding Ninth Circuit precedent" requires that the Court dismiss the UCL claims "*without* prejudice to refiling the same claim in state court." Mot. at 16 (emphasis in original), quoting *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1314 (9th Cir. 2022), cert. denied sub nom. *Polaris Indus. Inc. v. Albright*, No. 22-987, 2023 WL 3937623 (U.S. June 12, 2023). For the reasons stated above, and in BANA's motion to dismiss (*see generally* MTD at 43–47), Plaintiffs have not and cannot adequately plead their claims for a violation of the UCL, and therefore the Court's decision to dismiss those claims with prejudice was not clear error.

CONCLUSION

For the foregoing reasons, BANA respectfully requests that the Court deny Plaintiffs' Motion.

Dated: August 14, 2023 Respectfully submitted,

By: *s/ James W. McGarry*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on **August 14, 2023**. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: August 14, 2023

s/James W. McGarry
JAMES W. McGARRY