JOSEPH W. COTCHETT (SBN 36324)
jcotchett@cpmlegal.com
BRIAN DANITZ (SBN 247403)
bdanitz@cpmlegal.com
KARIN B. SWOPE (Pro Hac Vice)
kswope@cpmlegal.com
ANDREW F. KIRTLEY (SBN 328023)
akirtley@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax: (650) 697-0577

MICHAEL RUBIN (SBN 80618)
mrubin@altber.com
STACEY M. LEYTON (SBN 203827)
sleyton@altber.com
MATTHEW MURRAY (SBN 271461)
mmurray@altber.com
CONNIE K. CHAN (SBN 284230)
cchan@altber.com
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Fax: (415) 362-8064

Co-Lead Counsel for Plaintiffs and the Proposed Class
(Additional Counsel Listed Below)

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' MOTION FOR RECONSIDERATION OF DISMISSAL WITH PREJUDICE OF UCL CLAIM**
This Document Relates to All Actions	Date: August 28, 2023 Time: 11:30 a.m. Dept. Courtroom 14A, 14^{th} Fl. Judge: Hon. Larry Alan Burns

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, Civil Local Rule 7.1(i), and the Court's August 1, 2023 Order Granting Leave to File Motion for Reconsideration (Dkt. 148), Plaintiffs respectfully submit this motion for reconsideration of the Court's dismissal of Plaintiffs' Unfair Competition Law ("UCL") claim, with prejudice, on the ground that Plaintiffs had failed to "allege inadequate legal remedies." Dkt. 126 ("MTD Order") at 31–33.

As stated in Plaintiffs' application for leave to file this motion (Dkt. 141 at 1) and in the Court's subsequent order (Dkt. 148 at 2), Plaintiffs submit that the Court committed four clear errors of law in dismissing Plaintiffs' UCL claim with prejudice: **(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 independently 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 (N.D. Cal.), obtained a preliminary injunction and provisional class certification based on having established a "strong likelihood of success" on their Electronic Fund Transfers Act ("EFTA"), breach-of-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 filed their Master Consolidated Complaint ("MCC") (Dkt. 72) in this MDL in August 2021. That complaint included a UCL claim alleging that the Bank's challenged practices were both "unlawful" and "unfair." Plaintiffs' requested remedies for those UCL violations were restitution and prospective injunctive relief, including "an order making the existing Preliminary Injunction permanent." MCC ¶¶575–84 & Prayer. Although the MCC did not contain a boilerplate allegation that legal remedies are inadequate, it expressly alleged, and set forth detailed allegations showing, that the Bank's UCL violations had caused and were continuing to cause Plaintiffs to suffer "irreparable harm" (MCC ¶¶5, 285) and "irreparable injury" (MCC ¶¶9–33).[1]

In October 2021, the Bank moved to dismiss the UCL claim for lack of equitable jurisdiction, arguing that Plaintiffs' request for damages in connection with their *other* claims for relief provided them "an adequate remedy at law" with respect to their UCL claim. Dkt. 84-1 at 32:5. Plaintiffs opposed, including on the ground that their UCL claim sought prospective injunctive relief to "prevent future harm" from the Bank's "continued implementation of its challenged business practices." Dkt. 90 at 43:13–18 (citing, as an example, MCC ¶111). Plaintiffs also requested leave to amend their UCL claim if the Bank's motion were granted. *Id.* at 14:3–4, 50:12–15. The

---

[1] *See also* MCC ¶51 (alleging the Bank "continues" to freeze and block EDD debit card accounts); MCC ¶56 (alleging the Bank's "ongoing failure to secure Plaintiffs' and Class Members' Cardholder Information … continues to violate" the CCPA and other laws); MCC ¶107 (alleging the Bank "continues to block the Accounts of legitimate Cardholders based solely on the results of the Bank's Claim Fraud Filter, without any reasonable investigation"); MCC ¶111–12 (similar); MCC ¶542 (alleging the "volume of calls from EDD Debit Cardholders to the Bank's customer service to report unauthorized transactions … continues to be, so great, and the Bank's customer service department is so understaffed, that the Bank routinely causes EDD Debit Cardholders to wait on hold for multiple hours"); MCC ¶584 (seeking injunctive relief "prohibiting the Bank from continuing its unfair and unlawful business practices," and "requiring the Bank to take reasonable measures to prevent future unauthorized use of EDD Debit Cards and Accounts").

Bank's reply brief did not respond to Plaintiffs' argument that a damages remedy could not prevent future harm. *See* Dkt. 92 at 19:27–20:23.

In May 2023, the Court granted in part and denied in part the Bank's motion to dismiss the MCC and granted Plaintiffs leave to amend certain dismissed claims. *See* MTD Order (Dkt. 126). With respect to the UCL claim, the Court ruled that the MCC "fails to state a UCL claim" under *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020), because it "doesn't allege inadequate legal remedies." *Id.* at 33:8, 33:11–13. The Court then dismissed the UCL claim in its entirety "with prejudice," *id.* at 33:14–15, 75:3–4, without stating why the Court denied leave to amend or why the dismissal was with prejudice.

In June 2023, Plaintiffs filed their now-operative First Amended Master Consolidated Complaint ("FAMCC") (Dkt. 136). The FAMCC includes an express allegation, incorporated by reference into Plaintiffs' UCL claim, that Plaintiffs' "legal remedies are inadequate to prevent future harm from the Bank's unlawful and unfair conduct that is the subject of this Complaint, and that is or would be ongoing but for the preliminary injunction the consolidated *Yick* plaintiffs obtained in June 2021." FAMCC ¶¶285, 575. The FAMCC's UCL claim also notes that the Court had "dismissed this claim with prejudice for failure to allege inadequate legal remedies" and that "Plaintiffs intend to seek leave to file a motion to reconsider that ruling." FAMCC ¶¶575–84 & n.34.

Shortly after the Court ruled on the Bank's Motion to Dismiss, Plaintiffs timely filed an ex parte application for leave to file a motion for reconsideration regarding the Court's dismissal of the UCL claim. Dkt. 136. The Court granted that application (Dkt. 148), and this motion now follows.

III. LEGAL STANDARD

Reconsideration is appropriate if "the district court … committed clear error or the initial decision was manifestly unjust." *Dixon v. Robinson*, No. 07-cv-00553-LAB, 2007 WL 2700732, at *1 (S.D. Cal. Sept. 12, 2007) (quoting *Sch. Dist. No. 1J v.*

ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993)); *see also* Fed. R. Civ. P. 59(e), 60(b)(6); S.D. Cal. Civ. L.R. 7.1(i); Hon. Larry A. Burns' Standing Order in Civil Cases §3(e)(3).

IV. ARGUMENT

A. Damages for past violations is not an adequate remedy to prevent future harm.

"[U]nder *Sonner*, a plaintiff must plead inadequate legal remedies in the operative pleading to allege claims for equitable relief." *Brand v. KSF Acquisition Corp.*, No. 22-cv-00392-LAB, 2023 WL 3225409, at *4 (S.D. Cal. Mar. 17, 2023) (quoting *Rivera v. Jeld-Wen, Inc.*, No. 21-cv-01816-AJB, 2022 WL 3702934, at *12 (S.D. Cal. Feb. 4, 2022)). A complaint satisfies this requirement when its allegations "demonstrate the inadequacy of a legal remedy." 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 include a boilerplate allegation of inadequate legal remedies, but whether they "allege facts suggesting that damages are insufficient." *Antonyan v. Ford Motor Co.*, No. 21-cv-00945-DMG, 2022 WL 1299964, at *6 (C.D. Cal. Mar. 30, 2022); *accord 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"). When prospective injunctive relief is sought, the general rule is that "legal damages are typically inadequate to remedy the future harms from ongoing violations." *Kryzhanovskiy v. Amazon.com Servs., Inc.*, No. 21-cv-01292-DAD, 2022 WL 2345677, at *4 (E.D. Cal. June 29, 2022).

Although the MCC did not contain a boilerplate allegation that legal remedies were "inadequate," it fully satisfied *Sonner* by repeatedly alleging that Plaintiffs were continuing to suffer "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 incorporated 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.

Even if the MCC had not contained express allegations of "irreparable harm" and "irreparable injury," it is well established that "retrospective damages are not an adequate remedy for the prospective harm that injunctions are designed to prevent." *Graham v. Cent. Garden & Pet Co.*, No. 22-cv-06507-JSC, 2023 WL 2744391, at *4 (N.D. Cal. Mar. 30, 2023); *accord Warren v. Whole Foods Market California, Inc.*, No. 21-cv-04577-EMC, 2022 WL 2644103, at *9 (N.D. Cal. 2022) ("because the injunctive relief that Plaintiffs request 'is prospective' and their 'remedy at law, damages, is retrospective,' their claim for an injunction does not appear to be barred by *Sonner*" (citations omitted)); *Dekker v. Vivint Solar, Inc.*, No. 19-cv-07918-WHA, 2022 WL 827246, at *3 (N.D. Cal. 2022) ("A remedy at law may provide adequate relief for certain harms but fail to remedy others, necessitating equitable relief. … Manifest differences thus exist between, for example, the retrospective equitable remedy of restitution and the prospective equitable remedy of an injunction." (citations omitted)); *Souter v. Edgewell Personal Care Co.*, No. 20-cv-01486-TWR, 2022 WL 485000, at *13 (S.D. Cal. 2022) ("Plaintiff seeks relief based on a likelihood of future harm for which there is no adequate remedy at law; therefore, Plaintiff has properly sought and alleged entitlement to an equitable remedy." (citation omitted)); *Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418-EMC, 2021 WL 3621837, at *11 (N.D. Cal. 2021) ("courts have declined to apply *Sonner* to bar UCL claims for injunctive relief, recognizing that the prospect of paying damages is sometimes insufficient to deter a defendant from engaging in an alleged unlawful, unfair, or fraudulent business practice" (citing cases)); *Andino v. Apple, Inc.*, No. 20-cv-01628-

JAM, 2021 WL 1549667, at *5 (E.D. Cal. 2021) ("Money damages are an inadequate remedy for future harm, as they will not prevent Defendant from continuing the allegedly deceptive practice.").

The MCC made clear that Plaintiffs were seeking injunctive relief to prevent future harm, both specifically under the UCL claim for relief and in the Prayer for Relief. *See* MCC ¶584 (seeking all available "equitable relief, including 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"); MCC Prayer 2 (seeking "permanent injunctive relief prohibiting Bank of America from engaging in the wrongful conduct alleged herein, including but not limited to an order making the existing Preliminary Injunction permanent"). The *prospective* nature of the injunctive relief sought by Plaintiffs distinguishes this case from those in which courts dismissed requests for *retrospective* relief under *Sonner*. *See, e.g.*, *Kryzhanovskiy*, 2022 WL 2345677, at *4 (collecting cases).

Accordingly, the MCC sufficiently pleaded that legal remedies would be inadequate to prevent future harm to Plaintiffs, and it was clear error to rule otherwise.

B. Damages are not available for conduct that, although not "unlawful," nonetheless violates the UCL because it is "unfair."

Plaintiffs' UCL claim for relief in the MCC alleged the Bank's challenged conduct, even if not found to be "unlawful," would nonetheless be actionable under the UCL as "unfair" conduct. MCC ¶¶577–78. In dismissing Plaintiffs' claim under the UCL's "unfair" prong, the Court independently erred because the only relief available to remedy conduct that, although found to be not unlawful, is found to be "unfair," are the equitable remedies provided by the UCL.

California's UCL broadly prohibits "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. Code §17200. "Each of these three adjectives captures 'a separate and distinct theory of liability.'" *Rubio v. Cap. One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010) (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009)). The California Legislature intended the "unfair" prong to be "intentionally broad," *Candelore v. Tinder, Inc.*, 19 Cal.App.5th 1138, 1155–56 (2018) (internal quotation marks omitted), to enable courts to address "the innumerable new schemes which the fertility of man's invention would contrive," *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal.4th 163, 181 (1999) (cleaned up).

The UCL's plain statutory language and the uniformly consistent California case law make clear that a defendant's conduct may be actionable under the UCL as "unfair" "even if not specifically proscribed by some other law." *Id.* at 180; *see, e.g.*, *Zuniga v. Bank of Am., N.A.*, No. 14-cv-06471-MWF, 2014 WL 7156403, at *7 (C.D. Cal. Dec. 9, 2014) (declining to dismiss the plaintiff's UCL "unfair" prong claim after rejecting Bank of America's argument on a motion to dismiss that the entirety of the plaintiff's "UCL claim fails because the [] underlying fraud claim fails"). Indeed, just earlier this year, the Ninth Circuit affirmed a trial court's judgment in favor of plaintiff Epic Games on its UCL claim against Apple under the "unfair" prong, notwithstanding the plaintiff's failure to prove that Apple had violated any antitrust law. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1000–02 (2023).

Here, the MCC alleged the Bank's challenged conduct is actionable under the UCL both because (1) it is "unlawful" to the extent it violates predicate statutes, regulations, or common law, and *in the alternative*, because (2) even if not unlawful, that conduct is "unfair" because it offends public policy and constitutes immoral, unethical, oppressive, and unscrupulous activities that caused substantial injury to Plaintiffs and class members, and because the harm caused by the Bank's conduct outweighs its potential benefits. *See* MCC ¶¶576–82.

In dismissing the UCL claim on the ground that Plaintiffs' *other* claims for relief, if successful, would provide adequate legal remedies, the Court overlooked that Plaintiffs had sought the equitable remedies of restitution and injunctive relief under the UCL to remedy the Bank's challenged practices on the theory that, even if the Court ultimately concluded that those practices were not unlawful, it could still find them to be actionable under the UCL as "unfair" business practices. MCC ¶¶577–78; *see* Dkt. 90 (MTD Opp.) at 40–43. In that circumstance, Plaintiffs would have *no* remedy at law (much less an *adequate* one) because no "law" would have been violated. *See Zeiger v. WellPet LLC*, 526 F.Supp.3d 652, 687 (N.D. Cal. 2021) ("The core equitable rule is that simply having *any* remedy at law is not sufficient to foreclose equitable relief; instead, the remedy must be *adequate*"). Even when a plaintiff's legal and equitable claims are "rooted in the same theory," a plaintiff has no adequate remedy at law when the "elements of a [legal] claim require proof of conduct beyond that which must be shown to establish liability under the UCL …." *Elgindy v. AGA Serv. Co.*, No. 20-cv-06304-JST, 2021 WL 1176535, at *15 (N.D. Cal. Mar. 29, 2021); *see also In re JUUL Labs, Inc., Mktg., Sales Pracs. & Prod. Liab. Litig.*, 497 F.Supp.3d 552, 639 (N.D. Cal. 2020) (*Sonner* does not bar a UCL claim where the "allegations regarding unfair conduct are not [] coextensive with plaintiffs' legal claims").

In *Elgindy*, the court held that *Sonner* did not bar plaintiffs' claims seeking restitution under the fraudulent prong of the UCL and False Advertising Law because their common-law fraud claim, though based on the same theory and factual allegations as their UCL fraud claim, required proof of additional elements. *See* 2021 WL 1176535, at *15. Likewise here, Plaintiffs' legal claims require proof of different elements than their claims under the UCL "unfair" prong, the latter of which only requires a showing that "'the utility of the defendant's conduct'" is outweighed by "'the gravity of the harm to [Plaintiffs].'" *Epic Games*, 67 F.4th at 1000 (quoting *Progressive W. Ins. Co. v. Superior Court*, 135 Cal.App.4th 263, 285 (2005)) (explaining that the "balancing test" for unfairness applies in consumer cases, while the "tethering test" for unfairness applies in competitor cases).[2] *Sonner* therefore does not preclude Plaintiffs from pursuing their UCL claims for restitution and injunctive relief under the "unfair" prong, and it was clear error for the Court to conclude otherwise.

C. It was clear error to deny Plaintiffs leave to amend their UCL claim to allege inadequate legal remedies more specifically.

One possible reading of the Court's MTD Order (Dkt. 126) is that the Court dismissed Plaintiffs' UCL claim with prejudice because the MCC did not expressly allege that Plaintiffs had no adequate remedy at law. If that were one of the grounds for dismissal, the Court's failure to allow Plaintiffs leave to amend to include that allegation was also clear error.

Courts "should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), and this command should be "applied with extreme liberality." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154–55 (9th Cir. 2014). District courts routinely grant leave to amend UCL claims that they dismiss under *Sonner*, particularly where, as here, there has been no previous order of dismissal. *See, e.g.*,

---

[2] The "tethering test" requires the alleged unfairness to be "tied to a 'legislatively declared' policy." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007). Even if the tethering test were applicable here, Plaintiffs alleged facts showing that the Bank's unfair conduct directly undermined the legislatively declared public policy of various laws. For example, Plaintiffs alleged that the Bank engaged in "unfair" conduct by "failing to provide reasonable or adequate customer service assistance to Plaintiffs and other Class Members who complained of fraud, despite representing to them that such assistance would be available '24/7,' and despite the Bank's awareness of rampant third-party fraud on EDD Debit Cards and Accounts," and by "establishing 'customer service' procedures designed to frustrate and obstruct efforts by Plaintiffs and Class Members to file their fraud claims." MCC ¶577(g)–(h), (o); *see also* FAMCC ¶577(g)–(h), (o). Even if such conduct does not itself violate EFTA, it contravenes the spirit and legislatively declared purpose of EFTA, "[t]he primary objective" of which "is the provision of individual consumer rights," 15 U.S.C. §1693(b), including the right to seek and timely receive reimbursement for unauthorized transactions on one's account, 15 U.S.C. §1693f.

Guthrie v. Transamerica Life Ins. Co., 561 F.Supp.3d 869, 875 (N.D. Cal. 2021). Indeed, this Court itself, when dismissing claims under *Sonner*, has often granted leave to amend. *See, e.g.*, *McCraner v. Wells Fargo & Co.*, No. 21-cv-1246-LAB, 2023 WL 2728719, at *8–9 (S.D. Cal. Mar. 30, 2023); *Brand*, 2023 WL 3225409, at *4, *9; *McNamara v. Wells Fargo & Co.*, No. 21-cv-1245-LAB, Dkt. 20 at 17–18 (S.D. Cal. Mar. 30, 2022). Because Plaintiffs could amend their UCL claim to allege the inadequacy of legal remedies, including for each of the reasons stated above, it was clear error to have denied them that opportunity.

The FAMCC, which is now the operative complaint, expressly alleges that Plaintiffs have no adequate remedy at law—both with respect to their request for prospective injunctive relief, and for equitable restitution to remedy the Bank's unfair business practices under the UCL. *See* FAMCC ¶285 (alleging that Plaintiffs' "legal remedies are inadequate to prevent future harm from the Bank's unlawful and unfair conduct that is the subject of this Complaint, and that is or would be ongoing but for the preliminary injunction the consolidated *Yick* plaintiffs obtained in June 2021"); FAMCC ¶575 (incorporating this allegation in the UCL claim for relief). If an express allegation is required, that statement, viewed in conjunction with the FAMCC's substantive allegations, should be sufficient to allege inadequate legal remedies at this threshold pleading stage.

If the Court were nonetheless to conclude that the FAMCC is still insufficient to satisfy *Sonner* even with the addition of this allegation at ¶285, Plaintiffs should be permitted to amend their UCL claim to address whatever concerns the Court expresses with respect to those allegations, so that Plaintiffs can attempt to cure whatever remaining defects the Court identifies.

D. It was clear error to dismiss the UCL claim with prejudice, and thereby to preclude Plaintiffs from re-filing that claim in state court.

Even if this Court were to conclude that it appropriately dismissed Plaintiffs' UCL claim without leave to amend for failure to allege inadequate legal remedies, binding Ninth Circuit precedent provides that "the district court should have dismissed [Plaintiffs'] UCL claim *without* prejudice to refiling the same claim in state court." *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) (emphasis added). This is because "a federal court that dismisses a claim for lack of equitable jurisdiction necessarily declines to assume the jurisdiction and decide the cause." *Id*. "Thus, a federal court's pre-merits determination to withhold relief is binding on other federal courts, but not on courts outside the federal system that might properly exercise their own jurisdiction over the claim." *Id.*; *accord Clevenger v. Welch Foods Inc.*, No. 20-cv-1859-CJC, 2022 WL 18228288, at *5 n.3 (C.D. Cal. Dec. 14, 2022). Simply stated, if this Court lacks equitable jurisdiction over a particular state court claim, the required approach under Ninth Circuit law is to dismiss without prejudice, and thus to enable Plaintiffs to refile that claim in a state court that *does* have equitable jurisdiction.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate its dismissal with prejudice of the UCL claim, and deny Defendant's motion to dismiss the UCL claim, based on the following rulings:

(1) Plaintiffs' MCC sufficiently pled that their legal remedies are inadequate with respect to preventing future harm; and

(2) Plaintiffs' MCC sufficiently pled that their legal remedies are inadequate because no legal remedies exist for their UCL claims under the "unfair" prong.

In the alternative, Plaintiffs respectfully request that the Court vacate its dismissal of the UCL claim with prejudice, based on the following rulings (presented here in Plaintiffs' order of preference):

(3) Plaintiffs were entitled to leave to amend their UCL allegations to plead inadequate legal remedies, and Plaintiffs' now-operative complaint sufficiently pleads inadequate legal remedies (*see, e.g.*, FAMCC ¶285); or

(4) Plaintiffs were not entitled to leave to amend their UCL allegations to plead inadequate legal remedies, and Plaintiffs' UCL claim is dismissed without prejudice to their ability to refile that claim in state court.

Respectfully submitted,

Dated: August 7, 2023 **COTCHETT, PITRE & McCARTHY, LLP**

By: *<u>/s/ Brian Danitz</u>*

JOSEPH W. COTCHETT
BRIAN DANITZ
KARIN B. SWOPE
ANDREW F. KIRTLEY

Dated: August 7, 2023 **ALTSHULER BERZON LLP**

By: *<u>/s/ Michael Rubin</u>*

MICHAEL RUBIN
STACEY M. LEYTON
MATTHEW MURRAY
CONNIE K. CHAN

Co-Lead Counsel for Plaintiffs and the Proposed Class

DAVID S. CASEY, JR. (SBN 060768)
dcasey@cglaw.com
GAYLE M. BLATT (SBN 122048)
gmb@cglaw.com
JEREMY ROBINSON (SBN 188325)
jrobinson@cglaw.com
P. CAMILLE GUERRA (SBN 326546)
camille@cglaw.com
CATHERINE McBAIN (SBN 303911)
kmcbain@cglaw.com
CASEY GERRY SCHENK FRANCAVILLA BLATT & PENFIELD, LLP
110 Laurel Street
San Diego, CA 92101
Telephone: (619) 238-1811
Fax: (619) 544-9232

Liaison Counsel for Class Plaintiffs

JOSHUA B. SWIGART (SBN 225557)
josh@swigartlawgroup.com
JULIANA G. BLAHA (SBN 331066)
juliana@swigartlawgroup.com
SWIGART LAW GROUP, APC
2221 Camino Del Rio South. Suite 308
San Diego, CA 92108
Telephone: (866) 219-3343
Fax: (866) 219-8344

DANIEL G. SHAY (SBN 250548)
danielshay@tcpafdcpa.com
LAW OFFICE OF DANIEL G. SHAY
2221 Camino Del Rio South, Suite 308
San Diego, CA 92108
Telephone: (619) 222-7429
Fax: (866) 431-3292

Liaison Counsel for Individual Plaintiffs

DANIEL L. WARSHAW (SBN 185365)
dwarshaw@pswlaw.com
BOBBY POUYA (SBN 245527)
bpouya@pswlaw.com
PEARSON, SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, CA 91403
Telephone: (818) 788-8300
Fax: (818) 788-8104

FRANCIS A. BOTTINI, JR. (SBN 175783)
fbottini@bottinilaw.com
ANNE B. BESTE (SBN 326881)
abeste@bottinilaw.com
ALBERT Y. CHANG (SBN 296065)
achang@bottinilaw.com
YURY A. KOLESNIKOV (SBN 271173)
ykolesnikov@bottinilaw.com
BOTTINI & BOTTINI, INC.
7817 Ivanhoe Avenue, Suite 102
La Jolla, CA 92037
Telephone : (858) 914-2001
Fax : (858) 914-2002

Attorneys for Plaintiff Lindsay McClure and the Proposed Class

RAYMOND P. BOUCHER (SBN 115364)
ray@boucher.la
BOUCHER LLP
21600 Oxnard Street, Suite 600
Woodland Hills, CA 91367
Telephone: (818) 340-5400
Fax: (818) 340-5401

Attorneys for Plaintiffs Jonathan Smith, Alex Yuan, and the Proposed Class

THOMAS E. FRAYSSE (SBN 104436)
tef@knoxricksen.com
MAISIE C. SOKOLOVE (SBN 239665)
mcs@knoxricksen.com
AMANDA M. PLOWMAN (SBN 317462)
amp@knoxricksen.com
KNOX RICKSEN LLP
2033 N. Main Street, Suite 340
Walnut Creek, CA 94596
Telephone: (925) 433-2500
Fax: (925) 433-2505

Attorneys for Plaintiff Robert L. Wilson and the Proposed Class

ADAM MCNEILE (SBN 280296)
adam@kbklegal.com
KRISTIN KEMNITZER (SBN 278946)
kristin@kbklegal.com
KEMNITZER, BARRON & KRIEG, LLP
42 Miller Avenue, 3rd Floor
Mill Valley, CA 94941
Telephone: (415) 632-1900
Fax: (415) 632-1901

Attorneys for Plaintiffs Roland Oosthuizen, Rosemary Mathews, and the Proposed Class

CHRISTOPHER J. HAMNER (SBN 197117)
chamner@hamnerlaw.com
EVELINA M. SERAFINI (SBN 187137)
eserafini@hamnerlaw.com
HAMNER LAW OFFICES, APLC
26565 West Agoura Road, Suite 200
Calabasas, CA 91302
Telephone: (888) 416-6654

Attorneys for Plaintiffs Jory Zoelle, Cindy Baker, Ursula Auburn, and the Proposed Class

MARY E. ALEXANDER (SBN 104173)
malexander@maryalexanderlaw.com
BRENDAN D.S. WAY (SBN 261705)
bway@maryalexanderlaw.com
ARIN R. SCAPA (SBN 283400)
ascapa@maryalexanderlaw.com
CATALINA S. MUÑOZ (SBN 317856)
cmunoz@maryalexanderlaw.com
MARY ALEXANDER & ASSOCIATES, P.C.
44 Montgomery Street, Suite 1303
San Francisco, CA 94104
Telephone: (415) 433-4440
Fax: (415) 433-5440

Attorneys for Plaintiff Clara Cajas and the Proposed Class

JAMES V. NOLAN (SBN 84239)
jvnolan@yololaw.com
ROBERT P. NAKKEN (SBN 77550)
rnakken@yololaw.com
DAVID W. JANES (SBN 71334)
dwjanes@yololaw.com
GARDNER, JANES, NAKKEN, HUGO & NOLAN LAWYERS
429 First Street
Woodland, CA 95695
Telephone: (530) 662-7367
Fax: (530) 666-9116

Attorneys for Plaintiff Brian Wiggins and the Proposed Class

BENJAMIN GUBERNICK (SBN 321883)
ben@gubernicklaw.com
GUBERNICK LAW, P.L.L.C.
10720 W. Indian School Rd., Suite 19
Phoenix, AZ 85037
Telephone: (734) 678-5169

DAVID N. LAKE (SBN 180775)
david@lakelawpc.com
LAW OFFICES OF DAVID N. LAKE
16130 Ventura Boulevard, Suite 650
Encino, CA 91436
Telephone: (818) 788-5100
Fax: (818) 479-9990

Attorneys for Plaintiffs Julie Hicks, Kuang Ting Chong, Stephanie Moore, and the Proposed Class

ANDRE L. VERDUN (SBN 365436)
Andre@VerdunLaw.com
LAW OFFICES OF ANDRE L. VERDUN
1777 N. Ventura Avenue
Ventura, CA 93001
Telephone: (619) 880-0110
Fax: (866) 786-6993

Attorneys for Plaintiffs Rosa Alvarez, Elana Martina Rojas de Charolet, and Jessie Verdun

THOMAS MARTIN III (SBN 218456)
tom@mblawapc.com
NICHOLAS J. BONTRAGER (SBN 252114)
nick@mblawapc.com
MARTIN & BONTRAGER, APC
4605 Lankershim Blvd., Suite 535
Toluca Lake, CA 91602
Telephone: (323) 940-1700
Fax: (323) 328-8095

Attorneys for Plaintiff Steven Hart

SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I, Brian Danitz, 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/ Brian Danitz
BRIAN DANITZ