





1 Court denied Plaintiff's motion because Plaintiff failed to indicate what portions of the  
2 Memorandum he sought to file under seal. *Id.*

3 On January 25, 2012, pursuant to the Court's January 18, 2012 Order, Plaintiff filed revised  
4 proposed redacted versions of Plaintiff's Memorandum and exhibits to the Elkins Declaration.  
5 ECF No. 80. HP also submitted the Declaration of Jonathan R. Sturz in Support of Plaintiff's  
6 Administrative Motion to Seal Pursuant to Local Rule 79-5(d) ("Sturz Decl."), ECF No. 84,  
7 wherein HP withdrew the confidentiality designation as to Exhibits K, M through N, and T through  
8 X. *Id.* Accordingly, Plaintiff shall publicly e-file Exhibits K, M through N, and T through X to the  
9 Elkins Declaration. Thus, the Court considers whether it is appropriate to file under seal the  
10 proposed redacted portions of Plaintiff's Memorandum and the entirety of Exhibits B through C, I,  
11 J, L, and O through S.

12 The Court has reviewed the proposed redactions to Plaintiff's Memorandum and concludes  
13 that the proposed redactions are sealable. The proposed redactions contain HP's confidential  
14 product development information, the disclosure of which could harm HP's competitive advantage  
15 in the marketplace.

16 The Court has also reviewed the relevant exhibits to the Elkins Declaration and rules as  
17 follows. Exhibit B is an excerpt of a log of HP's customers' complaints regarding HP's products.  
18 The Court finds that this exhibit is not properly sealable in its entirety. To the extent that Plaintiff  
19 seeks to file under seal the substance of the customers' complaints, these complaints are not  
20 confidential, "because they are known by third parties—the customers reporting the complaints."  
21 *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 924 (D. Nev. 2006). However, Exhibit B is  
22 sealable to the extent that it contains HP's customers' personal information. For example, page 10  
23 of Exhibit B contains a customer's personal email address, and page 11 contains a customer's name  
24 and phone number. Accordingly, Plaintiff must file a revised proposed redacted version of Exhibit  
25 B that redacts only HP's customers' personal information including name, address, phone number,  
26 and email address.

1 The Court has determined that Exhibit C, a summary of HP's sales data, is sealable in its  
2 entirety because it contains HP's confidential pricing and sales information, the disclosure of which  
3 could harm HP's competitive advantage in the marketplace. Exhibit I, an email sent internally  
4 within HP, is sealable in its entirety because it contains HP's confidential financial data, including  
5 warranty impact estimates. Exhibits L and P are sealable in their entirety because they contain  
6 HP's propriety firmware code information. Exhibits J, O, Q, R, and S are likewise sealable in their  
7 entirety because they contain HP's confidential product testing and evaluation process.  
8 Furthermore, all of these exhibits contain information from documents or are documents that were  
9 designated "Restricted Information" or "Restricted Outside Counsel Only Information" under the  
10 Protective Order.

11 Accordingly, the Court GRANTS IN PART and DENIES IN PART Plaintiff's first sealing  
12 motion. The Court GRANTS the motion as to the proposed redactions of Plaintiff's Memorandum  
13 and as to Exhibits C, I, J, L, and O through S to the Elkins Declaration in their entirety. Plaintiff  
14 shall e-file under seal the redacted Memorandum and Exhibits C, I, J, L, and O through S. The  
15 Court DENIES the motion, without prejudice, as to Exhibit B to the Elkins Declaration. Plaintiff  
16 shall file a renewed motion to file Exhibit B under seal and amended proposed redactions by 5:00  
17 p.m. on March 19, 2012.

18 **C. Plaintiff's Motion to Remove Incorrectly Filed Documents**

19 On January 25, 2012, Plaintiff filed a motion to remove two incorrectly filed documents  
20 from the ECF system. ECF No. 83. Specifically, Plaintiff sought to remove Exhibits 2B and 2C to  
21 ECF No. 80, which correspond to Exhibits B and C to the Elkins Declaration. Plaintiff  
22 inadvertently e-filed these two exhibits publicly, even though HP had designated the information  
23 contained in these exhibits as "Restricted Information" and "Restricted Outside Counsel Only  
24 Information" under the Protective Order. ECF Nos. 83, 84. As discussed above, Plaintiff filed an  
25 administrative motion to file these two exhibits under seal. Thus, under Civil Local Rule 79-5 and  
26 General Order 62, Plaintiff was required to lodge these documents with the Court rather than filing  
27 them electronically.

1           Accordingly, the Court GRANTS Plaintiff's motion to remove Exhibits 2B and 2C to ECF  
2 No. 80. However, as discussed above, Exhibit 2B is not sealable in its entirety. Accordingly,  
3 Plaintiff shall publicly e-file a proposed public redacted version of Exhibit B of the Elkins  
4 Declaration as an exhibit to its renewed motion to file under seal pursuant to the Court's December  
5 1, 2011 Standing Order Regarding Motions to File Under Seal.

6                           **D. Plaintiff's Second Administrative Motion to File Under Seal**

7           On February 24, 2012, Plaintiff filed a second motion to file under seal ("Plaintiff's second  
8 sealing motion").<sup>1</sup> Specifically, Plaintiff seeks to file under seal portions of Plaintiff's Reply Brief  
9 in Further Support of Plaintiff's Motion for Class Certification ("Reply Brief") and the entirety of  
10 Exhibits A, C, and D to the Supplemental Declaration of Joel Elkins in Further Support of  
11 Plaintiff's Motion for Class Certification ("Supplemental Elkins Declaration"). ECF No. 94. On  
12 March 1, 2012, HP filed the Declaration of Jonathan R. Sturz in support of Plaintiff's motion to  
13 seal in accordance with Civil Local Rule 79-5(d) ("Second Sturz Decl."). ECF No. 96.

14           The Court has reviewed the Reply Brief and Exhibits A, C, and D to the Supplemental  
15 Elkins Declaration. The Court finds that Exhibits A, C, and D -- internal HP emails -- are not  
16 sealable in their entirety. As discussed above, the information from HP's interactions with its  
17 customers is not confidential, *see Saini*, 434 F. Supp. 2d at 924, and are therefore not sealable.  
18 However, the portions of these documents that reveal HP's confidential product testing and  
19 evaluation process are sealable. Thus, Plaintiff's second sealing motion is DENIED WITHOUT  
20 PREJUDICE as to Exhibits A, C, and D to the Supplemental Elkins Declaration. Plaintiff shall  
21 meet and confer with HP and file, by 5:00 p.m. on March 19, 2012, a renewed motion redacting  
22 only information related to HP's confidential product testing and evaluation process. HP shall file  
23 its declaration pursuant to Civil Local Rule 79-5(d) by March 20, 2012.

24           The Court has reviewed the proposed redactions to Plaintiff's Reply Brief and finds that the  
25 proposed redactions are not sealable. HP argues that the information quotes from and references

26 \_\_\_\_\_  
27 <sup>1</sup> Although Plaintiff styled the motion as an administrative motion pursuant to Civil Local Rule 79-  
28 5(b), the motion is properly analyzed under Civil Local Rule 79-5(d), which governs the filing of a  
document designated confidential by another party.

1 Exhibits A, C, and D to the Supplemental Elkins Declaration, and is therefore sealable. The Court  
2 finds, however, that none of the quoted or referenced information relates to HP's confidential  
3 testing and evaluation process or is otherwise sealable. For example, page 5, line 24 quotes from  
4 Exhibit K to the Elkins declaration, for which HP has withdrawn the confidentiality designation.  
5 Sturz Decl. ¶ 16. Accordingly, Plaintiff's second sealing motion is DENIED WITH PREJUDICE  
6 as to Plaintiff's Reply Brief. Plaintiff shall publicly e-file his Reply Brief by 5:00 p.m. on March  
7 19, 2012.

#### 8 **E. HP's Administrative Motion to File Under Seal**

9 On February 10, 2012, HP filed a motion ("HP's sealing motion"), pursuant to Civil Local  
10 Rule 79-5(b) & (c). Specifically, HP seeks to file the following under seal: (1) portions of Hewlett-  
11 Packard Company's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for  
12 Class Certification ("Opposition"); (2) the Declaration of Jacqueline Chua ("J. Chua Declaration")  
13 and Exhibit A thereto; (3) the Declaration of Leong Soon Chua ("Leong Soon Declaration") and  
14 Exhibits A, B, D, and E thereto; (4) the Declaration of Shyh Chije Leong ("Shyh Chije  
15 Declaration") and Exhibits A through G thereto; and (5) portions of the Declaration of Blaine H.  
16 Evanson ("Evanson Declaration"). ECF No. 91.

17 The Court has reviewed the materials and rules as follows. The J. Chua Declaration and  
18 Exhibit A thereto are sealable in their entirety because they contain HP's confidential and sensitive  
19 business information, the disclosure of which could harm HP's competitive advantage in the  
20 marketplace. Specifically, the declaration discusses the total number of 8500 printers HP shipped  
21 for sale in North America between January 2009 and April 2010, as well as confidential  
22 information regarding HP's product testing and evaluation. Exhibit A of the J. Chua Declaration  
23 contains confidential pricing and sales information and was designated "Restricted Outside  
24 Counsel Only Information" under the Protective Order. Accordingly, HP's sealing motion is  
25 GRANTED as to the J. Chua Declaration and Exhibit A thereto.

26 The Leong Soon Declaration and Exhibits A, B, D, and E thereto are sealable in their  
27 entirety because they contain HP's confidential and sensitive business information, the disclosure

1 of which could harm HP's competitive advantage in the marketplace. Specifically, the Leong Soon  
2 Declaration contains confidential information about HP's product testing and evaluation process.  
3 Exhibit A to the Leong Soon Declaration is a table containing confidential information about HP's  
4 product testing and evaluation process and was designated "Restricted Outside Counsel Only  
5 Information" under the Protective Order. Exhibits B, D, and E are internal HP emails containing  
6 confidential information about HP's product testing and evaluation procedures and were designated  
7 "Restricted Outside Counsel Only Information" under the Protective Order. Accordingly, HP's  
8 sealing motion is GRANTED as to the Leong Soon Declaration and Exhibits A, B, D, and E  
9 thereto.

10 The Shyh Chije Declaration and Exhibits A through G thereto are also sealable in their  
11 entirety because they contain confidential and sensitive business information, the disclosure of  
12 which could harm HP's competitive advantage in the marketplace. Specifically, the Shyh Chije  
13 Declaration contains confidential information about HP's product testing, development, and  
14 evaluation processes. Exhibits A through G contain the relevant portions of various test results on  
15 HP's 8500 Printer and were all designated either "Restricted Information" or "Restricted Outside  
16 Counsel Only Information" under the Protective Order. Accordingly, HP's sealing motion is  
17 GRANTED as to the Shyh Chije Declaration and Exhibits A through G thereto.

18 Paragraph 19 of the Evanson Declaration is not sealable in its entirety. Paragraph 19  
19 contains confidential and sensitive information about HP's sales, which was designated "Restricted  
20 Counsel Only Information" under the Protective Order. However, as discussed above, the data  
21 regarding customer complaints in Paragraph 19 are not confidential, *see Saini*, 434 F. Supp. 2d at  
22 924, and are therefore not sealable. Accordingly, HP's sealing motion as to Paragraph 19 of the  
23 Evanson Declaration is GRANTED IN PART and DENIED IN PART WITHOUT PREJUDICE.  
24 HP shall file, by 5:00 p.m. on March 19, 2012, a renewed motion and amended proposed  
25 redactions to Paragraph 19 of the Evanson Declaration that redact only HP's confidential sales  
26 information.

1 Finally, the Court has reviewed HP's proposed redactions of HP's Opposition and finds that  
2 the proposed redactions are narrowly tailored and sealable because they quote from or otherwise  
3 reference information that has been found sealable above, with one exception: on page 8, line 19,  
4 the number of complaints received is not confidential business information, and is therefore not  
5 sealable. Accordingly, HP's sealing motion is DENIED WITH PREJUDICE as to the proposed  
6 redactions on page 8, line 19, and GRANTED as to all other proposed redactions. Plaintiff shall  
7 publicly e-file a redacted opposition brief consistent with this Order.

8 **F. HP's Motion for Leave to File a Surreply**

9 On March 1, 2012, HP filed a motion for leave to file a surreply pursuant to Civil Local  
10 Rule 7-3. ECF No. 95. The Court DENIES HP's motion for leave to file a surreply because it  
11 finds additional argument unnecessary to resolve the merits of Plaintiff's motion. Accordingly, the  
12 Court does not rely on the arguments in HP's proposed surreply.

13 **II. Plaintiff's Class Certification Motion**

14 **A. Factual and Procedural Background**

15 This putative class action arises out of the marketing and sale of allegedly defective HP  
16 Office Jet Pro all-in-one printer, fax, copier, and scanner of the 8500 series ("8500 Printer"). A  
17 more complete factual background is set forth in this Court's Order Denying Defendant's Motion  
18 to Dismiss Plaintiff's Second Amended Complaint. *See* ECF No. 57. The Court recites only those  
19 facts alleged in Plaintiff's Second Amended Complaint ("SAC"), ECF No. 52, necessary for  
20 determining Plaintiff's Class Certification Motion.

21 Plaintiff is a resident of Passaic County, New Jersey. SAC ¶ 9. HP is a California  
22 corporation operating and doing business throughout California and the United States, with its  
23 principal place of business in Palo Alto, California. *Id.* ¶ 10.

24 Plaintiff alleges that HP manufactured, marketed, and sold thousands of defective 8500  
25 Printers nationwide, including California, and has made misrepresentations and concealed material  
26 information in the marketing, advertising, and sale of those printers. *Id.* ¶ 2.

27 Specifically, Plaintiff alleges that HP represented that the 8500 Printer had an Automatic  
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1 Document Feeder (“ADF”) with a capacity of 50 pages and had the ability to scan, copy, and fax  
2 pages from the ADF at the following speeds: (1) scanning and copying at up to 34 pages per  
3 minute in color; (2) scanning and copying at up to 35 pages per minute in black and white; and (3)  
4 faxing at approximately 3 pages per minute. *Id.* ¶ 28.

5 Plaintiff alleges that HP knew or should have known that the 8500 Printers were inherently  
6 defective and randomly skipped pages when scanning, copying, and faxing pages fed through the  
7 ADF. *Id.* ¶ 4. Plaintiff alleges that, as a result of this defect, the ADF is useable for only two to  
8 three sheets at a time, *id.* ¶ 4, and that the 8500 Printer is unable to achieve the scanning, copying,  
9 and faxing speeds that HP advertised. *Id.* ¶ 67.

10 Plaintiff purchased an 8500 Printer directly from HP’s website on or around July 2, 2009.  
11 *Id.* ¶¶ 30, 33. Plaintiff alleges that he and other putative class members reasonably relied on HP’s  
12 representations about the 8500 Printer’s ADF capacity and scanning, copying, and faxing speeds  
13 when deciding to purchase the 8500 Printer. *Id.* ¶ 72.

14 Plaintiff filed his original complaint in state court on March 30, 2010. ECF No. 1. HP  
15 removed the case on May 20, 2010. *Id.* In the SAC, the operative complaint for this motion,  
16 Plaintiff asserts claims on behalf of himself and all others similarly situated under the following  
17 California statutes: (1) the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et*  
18 *seq.*, and (2) the Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.* ECF  
19 No. 52 ¶¶ 75-105. Plaintiff seeks the following remedies: restitution; disgorgement; actual,  
20 statutory and punitive damages; injunctive relief; attorneys’ fees and costs; and prejudgment  
21 interest. *Id.* ¶¶ 24-25. On August 10, 2011, the Court denied HP’s motion to dismiss the SAC on  
22 August 10, 2011. ECF No. 57.

23 On January 6, 2012, Plaintiff moved to certify a nationwide class for the claims asserted  
24 under the UCL and the CLRA. ECF No. 71. Plaintiff defines the proposed class as follows:

25 All persons residing in the United States who purchased an HP Office Jet Pro All-  
26 in-One printer in the 8500 series (“8500 Printers”) [between January 1, 2009 and  
27 April 30, 2010]. Excluded from the Class are Defendant Hewlett-Packard Company  
28 (“HP” or “Defendant”), Defendant’s officers, directors and employees, the trial  
judge in this case and those who purchased for the purpose of resale.

1 ECF No. 72 at 1. Plaintiff also seeks to be appointed Class Representative, and for his  
2 counsel to be appointed Class Counsel. *Id.* HP filed an opposition on February 10, 2012. *See* ECF  
3 No. 91-2 (proposed public redacted version). Plaintiff submitted a reply brief on February 24,  
4 2012. *See* ECF No. 94-2 (proposed public redacted version).

5 **B. Legal Standard**

6 Class certification of Plaintiff’s claims is governed by Rule 23 of the Federal Rules of Civil  
7 Procedure. Whether or not to certify a class is within the discretion of the Court. *United Steel,*  
8 *Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Service Workers Int’l Union, AFL–CIO*  
9 *CLC v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010).

10 Under Rule 23(a), Plaintiff must establish that: “(1) the class is so numerous that joinder of  
11 all members is impracticable; (2) there are questions of law or fact common to the class; (3) the  
12 claims or defenses of the representative parties are typical of the claims or defenses of the class;  
13 and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed.  
14 R. Civ. P. 23(a). These requirements are typically referred to as the numerosity, commonality,  
15 typicality and adequacy requirements. “The United States Supreme Court requires district courts to  
16 engage in a ‘rigorous analysis’ of each Rule 23(a) factor when determining whether plaintiffs  
17 seeking class certification have met the requirements of Rule 23.” *Ellis v. Costco Wholesale Corp.*,  
18 657 F.3d 970, 980 (9th Cir. 2011) (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161  
19 (1982)).

20 Plaintiff bears the burden of establishing that all four requirements of Rule 23(a) are met, as  
21 well as one requirement of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186  
22 (9th Cir. 2001). Here, Plaintiff seeks certification pursuant to 23(b)(3), which allows the Court to  
23 certify the class if it finds that “questions of law or fact common to class members predominate  
24 over any questions affecting only individual members, and that a class action is superior to other  
25 available methods for fairly and efficiently adjudicating the controversy.” “The Rule 23(b)(3)  
26 predominance inquiry” is meant to “tes[t] whether proposed classes are sufficiently cohesive to  
27 warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623  
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1 (1997). The Ninth Circuit has held that “there is a clear justification for handling the dispute on a  
2 representative rather than an individual basis” if “common questions present a significant aspect of  
3 the case and they can be resolved for all members of the class in a single adjudication . . . .”

4 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

5 **C. A**

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1 590. The majority further held that “each class member’s consumer protection claim should be  
2 governed by the consumer protection laws of the jurisdiction in which the transaction took place.”  
3 *Id.* at 594. Finally, the majority concluded that “[b]ecause the law of multiple jurisdictions applies  
4 here to any nationwide class of purchasers or lessees of Acuras including a CMBS system,  
5 variances in state law overwhelm common issues and preclude predominance for a single  
6 nationwide class.” *Id.* at 597. Plaintiff offers no argument, other than asserting that *Mazza* was  
7 wrongly decided, to circumvent *Mazza*’s holding, which precludes the certification of a nationwide  
8 class asserting claims under the UCL and the CLRA. Moreover, although the plaintiffs in *Mazza*  
9 have filed for rehearing *en banc*, the *Mazza* majority’s opinion continues to be, as Plaintiff  
10 acknowledges, binding on this Court. Accordingly, Plaintiff’s motion for class certification is  
11 DENIED.

12 However, because “an order that grants or denies class certification may be altered or  
13 amended before final judgment,” Fed. R. Civ. P. 23(c)(1)(3), the denial is without prejudice. The  
14 Court gives Plaintiff leave to file an amended complaint to comply with *Mazza* and renew its  
15 motion for class certification thereafter. Plaintiff must file his amended complaint within 30 days  
16 and a renewed motion for class certification within 90 days of this Order. The Court will set a new  
17 case schedule at the March 15, 2012 case management conference.

18 The Court need not reach the other class certification requirements under Rule 23, or  
19 whether Plaintiff and his counsel are an appropriate Class Representative and Class Counsel,  
20 respectively. As the Ninth Circuit has held, “courts should not render advisory opinions upon  
21 issues which are not pressed before the court, precisely framed and necessary for decision.” *United*  
22 *States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 214 (9th Cir. 1989). A finding that common  
23 questions do not predominate is sufficient to deny the certification of the proposed nationwide class  
24 here. Thus, any discussion of the other class certification requirements or the suitability of Plaintiff  
25 and his counsel as Class Representative and Class Counsel would not be necessary for the  
26 determination of Plaintiff’s Motion for Class Certification. Accordingly, the Court does not reach  
27 these other issues.

1           **III. Conclusion**

2           In summary, for the foregoing reasons, the Court rules as follows:

- 3           1. Plaintiff's first sealing motion is GRANTED IN PART and DENIED IN PART as set forth  
4           above.
- 5           2. Plaintiff's motion to remove incorrectly filed documents is GRANTED.
- 6           3. Plaintiff's second sealing motion is DENIED WITH PREJUDICE IN PART and DENIED  
7           WITHOUT PREJUDICE IN PART as set forth above.
- 8           4. HP's sealing motion is GRANTED IN PART, DENIED WITHOUT PREJUDICE IN  
9           PART, and DENIED WITH PREJUDICE IN PART as set forth above.
- 10          5. HP's motion to file a surreply is DENIED.
- 11          6. Plaintiff's motion for class certification is DENIED WITHOUT PREJUDICE. Plaintiff  
12          shall file an amended complaint within 30 days and a renewed motion for class certification  
13          within 90 days from the date of this Order.

14       **IT IS SO ORDERED.**

15       Dated: March 14, 2012

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge