

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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OLUWASEUN FASUGBE and LUKE HUCKABA, on behalf of themselves and all others similarly situated,

NO. CIV. 2:10-2320 WBS KJN

MEMORANDUM AND ORDER RE:
MOTIONS TO DISMISS AND TO
STRIKE

Plaintiffs,

v.

JESSE WILLMS, an individual,
1524948 ALBERTA LTD., a
Canadian corporation d/b/a
TERRA MARKETING GROUP d/b/a
SWIPEBIDS.COM, SPHERE MEDIA,
LCC, a Nevada limited
liability company, and JOHN
DOES 1-50 inclusive,

Defendants.

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24 Plaintiffs Oluwaseun Fasugbe and Luke Huckaba brought
25 this action against defendants Jesse Willms, 1524948 Alberta Ltd.
26 d/b/a Terra Marketing Group d/b/a Swipebids.com ("Terra
27 Marketing"), and Sphere Media, LLC ("Sphere Media"), alleging
28 violations of California's False Advertising Law ("FAL"), Cal.

1 Bus. & Prof. Code §§ 17500-17606, Consumer Legal Remedies Act
2 ("CLRA"), Cal. Civ. Code §§ 1750-1785, and Unfair Competition Law
3 ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210, as well as fraud
4 in the inducement, conspiracy to commit fraud in the inducement,
5 and "restitution/unjust enrichment." Jurisdiction is predicated
6 upon diversity of citizenship, 28 U.S.C. § 1332. Terra Marketing
7 and Sphere Media now move to dismiss plaintiffs' First Amended
8 Complaint ("FAC") for failure to state a claim pursuant to
9 Federal Rule of Civil Procedure 12(b)(6) and to strike
10 plaintiffs' class allegations pursuant to Rule 12(f). Willms
11 moves to dismiss and to strike on the same grounds and also moves
12 to dismiss pursuant to Rule 12(b)(2) on the ground that the court
13 lacks personal jurisdiction over him.

14 I. Factual and Procedural Background

15 Terra Marketing is a seller of online auction currency,
16 or "bids," which consumers use to bid on products in online
17 auctions. (FAC ¶¶ 4, 16.) Willms, a citizen of Canada, is
18 allegedly a "principal" of Terra Marketing and Sphere Media.
19 (Id. ¶ 3.) Sphere Media is allegedly a subsidiary of Terra
20 Marketing and is based in Nevada. (Id. ¶ 5.)

21 Plaintiffs allege that defendants run an online auction
22 website, SwipeBids.com, which is advertised via sponsored links,
23 banner advertisements, and links in fake news articles and fake
24 blogs. (Id. ¶¶ 16-24.) The links direct consumers to a webpage¹
25 titled "SwipeBids Registration," which explains the steps
26 consumers must take to "win" "government auctions," "warehouse

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28 ¹ Plaintiffs provided screenshots of the relevant
webpages in their FAC. (FAC ¶ 25.)

1 clearance auctions," and "overstocked surplus auctions." (Id. ¶
2 25.) A graphic in the middle of the page states: "Winning is
3 Easy: Step 1: JOIN & RECEIVE BIDS Step 2: PLACE BIDS on AUCTIONS
4 Step 3: WIN GREAT PRODUCTS!" (Id.) Below, the page states: "WIN
5 Great Prizes at Incredible Prices!," with an arrow pointing to
6 the right side of the page stating "Register Now! It's Easy!"
7 (Id.) On the right, consumers are prompted to enter their name,
8 gender, e-mail address, create a username and password, and then
9 click "Continue." (Id.)

10 Consumers are then brought to another page that states
11 "STEP 2 OF 2: Congratulations, final step! Scroll down to finish
12 registering." (Id.) A number of images from the first page are
13 repeated, with a few additional images. One image states
14 "SwipeBids Member Wins New 2010 Honda Civic" and describes
15 someone who "Spends \$150 to get \$16,356 Civic" and in smaller
16 print states as a testimonial "I spent \$150 on a membership, and
17 now I'm driving a \$16,356 Honda Civic that I won on SwipeBids.
18 The membership has really paid off in so many ways"
19 (Id.) Below, another graphic states "Check Out Some of These
20 INCREDIBLE SAVINGS Our Members Recently Got" with a list of
21 products that were recently purchased, and then states "Savings
22 Could Be Yours! Membership \$250 \$150." (Id.) The webpage does
23 not include any fields in which credit card information could be
24 entered. The FAC only alleges that "consumers are deceptively
25 induced to enter their credit and bank account information in
26 order to pay for their 'Winning Auctions,'" when in fact they are
27 charged an initial "membership" fee. (Id. ¶¶ 26-27.)

28 Consumers who complain about SwipeBids allegedly often

1 do so by way of an online chat with a SwipeBids representative.
2 (Id. ¶ 31.) That representative allegedly sends the consumer a
3 link to a transaction page SwipeBids contends is the page on
4 which the consumer initially entered their payment information.
5 (Id.) Plaintiffs allege that defendants are fraudulently
6 directing complaining consumers to a page that is not the page
7 viewed by consumers when they initially registered with
8 SwipeBids. (Id. ¶ 35.) That allegedly fraudulent page is
9 essentially the same as the one plaintiffs alleged they initially
10 visited but with certain different graphics and with one addition
11 near the bottom of the second page: a section with two columns in
12 which consumers are directed to submit their credit card
13 information. The left column is titled "SwipeBids Access
14 Details" and describes "SwipeBids Access (Includes 300 Bids)" as
15 costing "53¢/bid (\$159 Total)," and states below that "ONLY \$159
16 GRANTS YOU ACCESS TO" government auctions and other deals.²
17 (Id. ¶ 32.) On the right, a field asks "Where Do We Send Your
18 Winning Auctions?," below which it states "INCREDIBLE SAVINGS
19 Could Be Yours! SwipeBids Access Just \$250 \$159 Today!" (Id.)
20 It then asks for "Shipping Information," including name and
21 address, and "Payment Information," including credit card type
22 and number. (Id.) Directly above a button that states "Start
23 Bidding," the page states "By clicking below you will be charged
24 \$159 and receive 300 bids." (Id.)

25 Plaintiff Fasugbe allegedly clicked on an advertisement
26

27 ² Plaintiffs do not allege that the discrepancy between
28 the \$150 charge and the \$159 charge is relevant. It appears that
SwipeBids simply raised the cost of membership.

1 displayed in an Internet search page while looking for a discount
2 on a flat-screen television, which directed him to an allegedly
3 fake news article describing the benefits to be gained by bidding
4 on items through SwipeBids. (Id. ¶ 40.) This site contained a
5 link routing Fasugbe to SwipeBids. (Id. ¶ 42.) Fasugbe
6 submitted his credit card information to SwipeBids, allegedly
7 believing that this would allow him to bid on SwipeBids items.
8 (Id. ¶¶ 43-44.) SwipeBids immediately charged him \$150; he has
9 not yet received a refund. (Id. ¶¶ 45-48.)

10 Plaintiff Huckaba allegedly responded to an online
11 advertisement offering a code that, upon registering with
12 SwipeBids, promised to provide him with a free \$25 Wal-Mart gift
13 card and 1000 free bids. (Id. ¶ 49.) SwipeBids charged him \$150
14 when he registered. (Id. ¶ 51.) He bid on several items using
15 the 1000 "free" bids, but never won an auction and never received
16 the free gift card. (Id. ¶ 52.) He has not yet received a
17 refund. (Id. ¶ 54.)

18 Plaintiffs bring this suit as a putative class action
19 with two classes: "Swipebids Class: All residents of the United
20 States who were charged a membership fee by Defendant Swipebids,"
21 and "John Doe Defendant Subclass: All residents of the United
22 States who were directed to a Swipebids.com landing page by the
23 John Doe Defendant advertising network and were charged a
24 membership fee by Swipebids.com." (Id. ¶ 55.)

25 II. Discussion

26 A. Personal Jurisdiction over Willms

27 A plaintiff has the burden of establishing that the
28 court has personal jurisdiction over a defendant. Doe v. Unocal

1 Corp., 248 F.3d 915, 922 (9th Cir. 2001). On a motion to
2 dismiss, a plaintiff "need make only a *prima facie* showing of
3 jurisdictional facts That is, the plaintiff need only
4 demonstrate facts that if true would support jurisdiction over
5 the defendant." Id. (quoting Ballard v. Savage, 65 F.3d 1495,
6 1498 (9th Cir. 1995)). When not directly controverted, a
7 plaintiff's version of the facts must be taken as true, and
8 conflicts between the facts contained in the parties' affidavits
9 should be resolved in favor of the plaintiff. Id. Once a
10 defendant has contradicted the allegations contained in the
11 complaint, however, a plaintiff may not rest on the pleadings,
12 but must present evidence which, if true, would support the
13 exercise of personal jurisdiction. Data Disc, Inc. v. Sys. Tech.
14 Assocs., Inc., 557 F.2d 1280, 1284-85 (9th Cir. 1977).

15 Only Willms moves to dismiss for lack of personal
16 jurisdiction; the corporate defendants do not dispute whether
17 they are properly subject to jurisdiction in this court.
18 Plaintiffs argue that the court has personal jurisdiction over
19 Willms because the corporate defendants are alter egos of Willms.

20 The fiduciary shield doctrine provides that "a person's
21 mere association with a corporation that causes injury in the
22 forum state is not sufficient in itself to permit that forum to
23 assert jurisdiction over the person." Davis v. Metro Prods.,
24 Inc., 885 F.2d 515, 520 (9th Cir. 1989). In other words, "[t]he
25 mere fact that a corporation is subject to local jurisdiction
26 does not necessarily mean its nonresident officers, directors,
27 agents, and employees are suable locally as well." Colt Studio,
28 Inc. v. Badpuppy Enter., 75 F. Supp. 2d 1104, 1111 (C.D. Cal.

1 1999). Though employees are not necessarily subject to liability
2 in a given jurisdiction due to the contacts of their employers,
3 "their status as employees does not somehow insulate them from
4 jurisdiction. Each defendant's contacts with the forum State
5 must be assessed individually." Calder v. Jones, 465 U.S. 783,
6 790 (1984).

7 The corporate form shielding an individual associated
8 with the corporation from personal jurisdiction may be ignored in
9 two circumstances: (1) where the corporation is the agent or
10 alter ego of the individual defendant; or (2) by virtue of the
11 individual's control of and direct participation in the alleged
12 activities. Wolf Designs, Inc. v. DHR Co., 322 F. Supp. 2d 1065,
13 1072 (C.D. Cal. 2004). Here, other than alleging that Willms was
14 "one of the primary architects of the fraudulent scheme," (FAC ¶
15 3), plaintiffs have not alleged that Willms controlled or
16 directly participated in the alleged activities, and they do not
17 argue in opposition to Willms' motion that he is subject to
18 personal jurisdiction by virtue of his direct participation in
19 the alleged activities. Therefore, the court will only consider
20 whether it has personal jurisdiction over Willms pursuant to the
21 alter ego theory.

22 In diversity actions, federal courts look to state law
23 to determine whether the alter ego doctrine applies. Whitney v.
24 Arntz, 320 Fed. App'x 799, 800 (9th Cir. 2009). The alter ego
25 doctrine may be invoked where (1) "there is such a unity of
26 interest and ownership that the individuality, or separateness,
27 of the [defendant] and corporation has ceased" and (2) "the facts
28 are such that an adherence to the fiction of the separate

1 existence of the corporation would, under the particular
2 circumstances, sanction a fraud or promote injustice."³ Wood v.
3 Elling Corp., 20 Cal. 3d 353, 365 n.9 (1977) (emphasis omitted).

4 In order to determine whether the requisite unity of
5 interest and ownership exists, courts look to a variety of
6 factors, including the level of control exerted by the supposed
7 alter ego, the level of ownership, commingling of funds, failure
8 to observe corporate formalities, and undercapitalization.

9 See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La.
10 Hydrolec, 854 F.2d 1538, 1543-44 (9th Cir. 1988) (applying
11 California law); RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543,
12 545 (9th Cir. 1985) (applying California law and holding
13 individual liable under an alter ego theory where he acted as the
14 president and sole officer, director, and stockholder of the
15 corporation at issue); Associated Vendors, Inc. v. Oakland Meat
16 Co., 210 Cal. App. 2d 825, 837-38 (1st Dist. 1963).

17 Plaintiffs do not set forth sufficient facts regarding
18 the requisite unity of interest and ownership between Willms and
19 Terra Marketing that, if true, would support a finding of
20 personal jurisdiction over Willms. See Doe, 248 F.3d at 922.

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25 ³ The alter ego doctrine can be used to "'pierce the
26 corporate veil' jurisdictionally" to determine whether a
27 corporation's contacts are attributable to an individual or
28 another corporation, ADO Fin., AG v. McDonnell Douglas Corp., 931
F. Supp. 711, 715 (C.D. Cal. 1996), or to establish that an
individual or another corporation is liable for the acts of its
alter ego corporation, RRX Indus., Inc. v. Lab-Con, Inc., 772
F.2d 543, 545-46 (9th Cir. 1985).

1 Willms is allegedly the "principal" of Terra Marketing.⁴
2 However, Terra Marketing had 18-20 employees during the relevant
3 period (Willms Decl. in Supp. of Mot. to Dismiss & to Strike ¶
4 5), and there is no evidence that Willms commingled Terra
5 Marketing's funds with his own, treated the assets of the
6 corporation as his own, or ignored corporate formalities in any
7 other way. See Minton v. Cavaney, 56 Cal. 2d 576, 579-80 (1961).
8 Plaintiffs have provided nothing beyond conclusory allegations
9 that Willms "ignored any corporate formalities and fraudulently
10 misused the corporate forms." (FAC ¶ 3.) Accordingly,
11 plaintiffs have not demonstrated that the court has personal
12 jurisdiction over Willms and his motion to dismiss for lack of
13 jurisdiction will be granted.

14 B. Motions to Dismiss under Rule 12(b)(6)

15 On a motion to dismiss, the court must accept the
16 allegations in the complaint as true and draw all reasonable
17 inferences in favor of the plaintiff. Scheuer v. Rhodes, 416
18 U.S. 232, 236 (1974), overruled on other grounds by Davis v.
19 Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322
20 (1972). "To survive a motion to dismiss, a complaint must
21 contain sufficient factual matter, accepted as true, to 'state a
22 claim to relief that is plausible on its face.'" Ashcroft v.
23 Iqbal, --- U.S. ----, ----, 129 S. Ct. 1937, 1949 (2009) (quoting
24 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This

25
26 ⁴ Plaintiffs allege that Willms is also a principal of
27 Sphere Media (FAC ¶ 3), which Willms denies. (Willms Decl. in
28 Supp. of Mot. to Dismiss & to Strike ¶¶ 5, 8.) Plaintiffs
provide no facts beyond this conclusory allegation that could
show that Sphere Media is an alter ego of Willms.

1 "plausibility standard," however, "asks for more than a sheer
2 possibility that a defendant has acted unlawfully," and "[w]here
3 a complaint pleads facts that are 'merely consistent with' a
4 defendant's liability, it 'stops short of the line between
5 possibility and plausibility of entitlement to relief.'" Iqbal,
6 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 556-57).

7 Defendants argue that plaintiffs' FAC contradicts their
8 Complaint. The court acknowledges that "there is nothing in the
9 Federal Rules of Civil Procedure to prevent a party from filing
10 successive pleadings that make inconsistent or even contradictory
11 allegations." PAE Gov't Servs., Inc. v. MPRI, Inc., 514 F.3d
12 856, 860 (9th Cir. 2007); id. at 859 (the court "has no free-
13 standing authority to strike pleadings simply because it believes
14 that a party has taken inconsistent positions in the litigation")
15 (emphasis added). However, the court need not ignore the prior
16 allegations in determining the plausibility of the current
17 pleadings. See Stanislaus Food Prods. Co. v. USS-POSCO Indus., -
18 -- F. Supp. 2d ----, ----, 2011 WL 1677957, at *13 (E.D. Cal.
19 2011) (O'Neill, J.) (noting that plausibility of Second Amended
20 Complaint, which alleged that agreement occurred in 2006, was
21 affected by allegation in First Amended Complaint that agreement
22 occurred in 1986, when First Amended Complaint was dismissed on
23 statute of limitations grounds); Cole v. Sunnyvale, No. C-08-
24 05017, 2010 WL 532428, at *4 (N.D. Cal. Feb. 9, 2010) ("The court
25 may . . . consider the prior allegations [in the original
26 complaint] as part of its 'context-specific' inquiry based on its
27 judicial experience and common sense to assess whether the Third
28 Amended Complaint plausibly suggests an entitlement to relief, as

1 required under Iqbal, 129 S. Ct. at 1950."). Thus, plaintiffs
2 may alter their allegations in an amended complaint, but the
3 court may properly consider the plausibility of the FAC in light
4 of the prior allegations.

5 The screenshot of the SwipeBids website in the
6 Complaint is identical to the screenshot in the FAC, with one
7 exception: Near the bottom of the webpage, the Complaint contains
8 a section for submitting payment information. (See Compl. ¶ 17;
9 FAC ¶ 25.) That section is similar but not identical to the
10 payment section in the version to which plaintiffs state they
11 were directed after complaining about the fee. The left column
12 is titled "Membership Details" and describes "1-Year Membership
13 (Includes 300 Bids)" as costing "50¢/bid (\$150 Total)," and
14 states below that "ONLY \$150 GRANTS YOU ACCESS TO" government
15 auctions and other deals. (Compl. ¶ 17.) On the right, a field
16 asks "Where Do We Send Your Winning Auctions?" (Id.) It then
17 asks for "Shipping Information," including name and address, and
18 "Payment Information," including credit card type and number.
19 (Id.) A button at the bottom states "Start Bidding."⁵ (Id.)

20 Plaintiffs attempt to explain the discrepancy between
21 the Complaint and the FAC:

22 [The Complaint version of] the screenshot depicts yet
23 another of the fabricated websites to which Swipebids
24 representatives direct customers after they complain that
25 membership fees levied against them were unauthorized.
The subject screenshot was a duplicate of the screenshots
already found on pages 16-19 of the amended Complaint
[regarding the fabricated websites to which customers
were sent after complaining], and was included in the
26

27 ⁵ Plaintiffs admit that the Complaint version "actually
28 discloses a \$150 membership fee." (Pls.' Opp'n at 8:19-20
(Docket No. 38).)

1 original complaint in error.

2 (Pls.' Opp'n at 9:1-4 (Docket No. 38).)

3 Plaintiffs' explanation is not plausible. The FAC
4 version is identical to the Complaint version with the sole
5 omission of the payment fields. Even the graphics, which are
6 allegedly "optimized" to change color, words used, placement of
7 words, font size, and placement of the Terms of Service, (FAC ¶
8 22), are identical. Contrary to plaintiffs' explanation, the
9 Complaint version is not identical or even particularly similar
10 to the version to which customers were sent after complaining.
11 Furthermore, plaintiffs' allegations simply do not make sense if
12 the screenshot in the FAC is an accurate, complete version, as
13 plaintiffs contend. Without a field in which plaintiffs could
14 enter their payment information, they could not have been
15 "deceptively induced to enter their credit and bank account
16 information," (id. ¶ 26), because they could not have entered
17 that information anywhere.

18 The court is thus faced with two possibilities: Either
19 the screenshot in the Complaint is accurate and plaintiffs
20 altered it in the FAC, or the screenshot in the FAC is accurate
21 and the webpage plaintiffs visited did not contain a payment
22 field and thus did not charge them \$150. The court will not
23 speculate as to what actually happened, but under either
24 scenario, plaintiffs' allegations that they were charged a \$150
25 membership fee without proper disclosures simply fail to state
26 any plausible claim to relief.

27 Plaintiffs' claims for violations of the FAL and UCL,
28 fraud in the inducement, conspiracy to commit fraud in the

1 inducement, "restitution/unjust enrichment," and portions of
2 their claim for violations of the CLRA all depend on the
3 allegations that defendants charged an undisclosed membership
4 fee. (See FAC ¶¶ 64, 73, 83-85, 90-101, 109-110, 116.) Because
5 plaintiffs have not plausibly alleged that defendants charged an
6 undisclosed membership fee, they have failed to state a plausible
7 claim to relief. Accordingly, the court will grant defendants'
8 motion to dismiss these claims.

9 The CLRA prohibits particular "unfair methods of
10 competition and unfair or deceptive acts or practices undertaken
11 by any person in a transaction intended to result or which
12 results in the sale or lease of goods or services to any
13 consumer." Cal. Civ. Code § 1770. Plaintiffs' CLRA claim is
14 distinct from the others because, in addition to allegations
15 regarding nondisclosure of the membership fee, plaintiffs allege
16 that defendants violated the CLRA by "using false testimonials to
17 misrepresent the source, sponsorship, approval, or certification
18 of Defendants' goods or services" and "misrepresenting the
19 affiliation, connection, or association with, or certification
20 by, third party news organizations and others in relation to
21 Defendants' products." (FAC ¶ 73.)

22 "Claims under the CLRA require proof of causation,
23 reliance and damages." Campion v. Old Republic Home Prot. Co.,
24 Inc., --- F.R.D. ----, ----, 2011 WL 42759, at *16 (S.D. Cal.
25 2011); see Cal. Civ. Code § 1780(a) ("Any consumer who suffers
26 any damage as a result of the use or employment by any person of
27 a method, act, or practice declared to be unlawful by [California
28 Civil Code] Section 1770 may bring an action against that

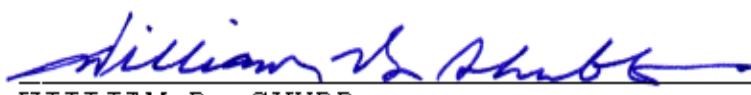
1 person."); Henderson v. Gruma Corp., No. CV 10-04173, 2011 WL
2 1362188, at *6 (C.D. Cal. Apr. 11, 2011) ("The CLRA requires a
3 demonstration of actual reliance for standing purposes."); Cattie
4 v. Wal-Mart Stores, Inc., 504 F. Supp. 2d 939, 946 (S.D. Cal.
5 2007) ("California requires a plaintiff suing under the CLRA for
6 misrepresentations in connection with a sale to plead and prove
7 she relied on a material misrepresentation."). Plaintiffs' only
8 alleged reliance and injury related to the representations about
9 the cost of membership, not the testimonials and news articles.
10 Plaintiffs have not alleged sufficient facts to state a plausible
11 claim for relief under the CLRA, and thus the court will grant
12 defendants' motion to dismiss that claim.

13 IT IS THEREFORE ORDERED that Jesse Willms's motion to
14 dismiss and to strike plaintiffs' First Amended Complaint be, and
15 the same hereby is, GRANTED on the ground that the court does not
16 have personal jurisdiction over Willms and DENIED as moot in all
17 other respects.

18 IT IS FURTHER ORDERED that Terra Marketing and Sphere
19 Media's motion to dismiss plaintiffs' First Amended Complaint be,
20 and the same hereby is, GRANTED, and their motion to strike the
21 class action allegations is DENIED as moot.

22 Plaintiffs have twenty days from the date of this Order
23 to file an amended complaint, if they can do so consistent with
24 this Order.

25 DATED: May 25, 2011

26 
27 WILLIAM B. SHUBB
28 UNITED STATES DISTRICT JUDGE