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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CAROL HILL CASTAGNOLA, et al.,

No. C 11-05772 JSW

10

Plaintiffs,

11

v.

12

HEWLETT-PACKARD COMPANY d/b/a
SNAPFISH.COM, et al.,**ORDER GRANTING MOTIONS
TO DISMISS, WITH LEAVE TO
AMEND, AND SCHEDULING
CASE MANAGEMENT
CONFERENCE**

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Defendants.

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INTRODUCTION

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This matter comes before the Court upon consideration of the motions to dismiss filed by Defendants, Hewlett-Packard Company dba Snapfish.com (“HP”) and Regent Group, Inc. dba Encore Marketing International (“Regent”) (collectively “Defendants”). The Court has carefully considered the parties’ papers, relevant legal authority, and the record in this case, and it finds the matter suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). The Court VACATES the hearing scheduled for June 15, 2012, GRANTS the motions to dismiss, and GRANTS Plaintiffs leave to amend.

24

BACKGROUND

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HP, through Snapfish.com, markets and sells photograph related goods and services. (Second Amended Complaint (“SAC”) ¶ 21.) Plaintiffs, Carol Hill Castagnola (“Ms. Castagnola”) and Ronda Maas (“Ms. Maas”) (collectively “Plaintiffs”), each purchased products through Snapfish.com. (*Id.* ¶¶ 16-17, 57, 72.) According to Plaintiffs, HP and Regent use the

1 checkout process to deceive consumers into enrolling in a fee-based membership. (*Id.* ¶ 4.)

2 In order to complete a purchase on Snapfish.com, a consumer proceeds through a
3 sequence of check-out screens, the first of which requires a consumer to click on a “Check Out”
4 button, from which he or she is taken to the delivery and coupon page of Snapfish.com. (*Id.* ¶¶
5 24-27.) After the consumer has selected a delivery method, and applied any coupons to the
6 order, the consumer is invited to click the “continue” button, which takes the consumer to the
7 billing page of Snapfish.com. (*Id.* ¶¶ 29-31.) The consumer then enters his or her billing
8 information, is invited to click a “continue” button and, at that point, is directed to the review
9 page of Snapfish.com. (*Id.* ¶¶ 32-34.) There, the consumer can either cancel the order or
10 complete the purchase. If the consumer completes the purchase, he or she clicks a “buy now”
11 button, at which point HP charges the consumer’s credit card, or other payment method, and the
12 consumer is taken to the receipt page of Snapfish.com. (*Id.* ¶¶ 35-37.)

13 At this stage, Regent enters the picture. Plaintiffs allege that consumers are directed
14 from the receipt page to a new webpage that looks as if it is it is a continuation of the
15 Snapfish.com website, which instead is operated by Regent (hereinafter the “Regent webpage”).
16 (*Id.* ¶ 40.) The top of the Regent webpage contains the following language “Snapfish
17 ValuepassSM” and “Claim your \$10 \$5 off gift code now! *SEE OFFER DETAILS.”¹ The
18 Regent webpage also contains the following language:

19 Claim your gift code below!

20 JUST ENTER YOUR EMAIL ADDRESS AND ZIP CODE AS YOUR
21 ELECTRONIC SIGNATURE AND CLICK THE YES BUTTON
22 BELOW TO ACTIVATE YOUR SNAPFISH VALUEPASSSM
23 MEMBERSHIP AS DESCRIBED IN OFFER DETAILS ON THIS
24 PAGE.

25 Email Address [Box] Zip [Box]

26 click “yes” to join Snapfish ValuepassSM and claim your savings!

27 **I want my \$10 gift code now! [Yes]**

28 By entering my email address and zip code and clicking the yes button
29 above, I am a [sic] activating my membership in Snapfish ValuepassSM

¹ The Court has attached the Regent webpage, as depicted in the SAC, as an appendix to this Order.

1 and authorizing Snapfish® to securely send my name, address and credit
2 card information to Snapfish ValuepassSM in accordance with the OFFER
3 DETAILS on this page.

4 ENCORE MARKETING INTERNATIONAL (EMI) IS THE OFFERER
5 AND ADMINISTRATOR OF SNAPFISH VALUEPASSSM, A
6 BRANDED MEMBERSHIP PROGRAM OFFERED TO SNAPFISH®
7 CUSTOMERS.

8 (*Id.* ¶¶ 41-44 (emphasis in bold and capitals in original); *see also* Appendix.)

9 The Offer Details are set forth on the left side of the Regent webpage and provide as
10 follows:

11 Activate your membership in Snapfish ValuepassSM to claim your \$10 gift
12 code good for your next Snapfish® order and start saving and enjoying all
13 the benefits and access for the next 30 days for just a **\$1.95 activation fee**
14 billed by Snapfish ValuepassSM to the credit card you used today on your
15 Snapfish order. Please note, by entering your e-mail address and zip code
16 (“Enrollment Details”) and clicking the “YES” Button, your Enrollment
17 Details as well as the following information from your most recent
Snapfish order will be transmitted securely through PGP and SSL
encryption to EMI, the Snapfish ValuepassSM Administrator, to be stored
and to secure and administer your membership: your name, credit card
information, billing address, billing telephone number and order ID
number. To continue after the introductory trial period, do nothing and all
the great benefits and savings will automatically continue for just **\$14.95**
18 **per month**, billed by Snapfish ValuepassSM to the same credit card. You
19 may cancel at anytime, with no further obligation, just by calling the toll-
free number contained in the membership information provided to you.
20 **And, you keep the \$10 Gift Code just for trying Snapfish ValuepassSM**
21 **for 30 days.**

22 (*See* ¶ 44 (emphasis in original); Appendix.)

23 Once a consumer clicks on the “Yes” button, Regent enrolls the consumer in the
24 Snapfish ValuepassSM program and charges the consumer a \$1.95 activation fee and then
25 \$14.95 per month thereafter. (*Id.* ¶ 51.) Each of the Plaintiffs purchased products from HP
26 through Snapfish.com, and, when presented with the Regent webpage, “clicked on the ‘yes’
27 button ... to enroll in the Snapfish Valuepass program, believing that the program was
28 provided by Snapfish, and believing that there were no payment obligations associated with
the program.” (*Id.* ¶¶ 66, 81.) Each of the Plaintiffs also allege that they did not see any
disclosures that the Regent webpage was not affiliated with Snapfish.com, that Regent, not
Snapfish.com, offered the Snapfish ValuepassSM program, or that they would be charged for
enrolling in the program. (*Id.* ¶¶ 64, 79.) Regent charged Ms. Castagnola \$14.95 per month,

1 from January 2010 through September 2010, for a total of \$134.95.² Regent charged Ms.
2 Maas \$14.95 per month, from April 2010 through September 2010, for a total of \$89.70.

3 Plaintiffs allege that by the time a consumer is shown the Regent webpage, HP
4 already has transferred their billing information to Regent, and they allege that neither HP
5 nor Regent notified consumers that HP would transfer billing information to Regent. (*Id.* ¶
6 45.) Plaintiffs also allege that Regent hides the fact that the Snapfish ValuepassSM program
7 is a fee based membership. Plaintiffs also allege that HP and Regent never disclose that
8 Regent will use their billing information to enroll consumers and charge them to participate
9 in the Snapfish ValuepassSM program. (*Id.* ¶¶ 27, 31, 34, 37.)

10 Although they acknowledge that this information is disclosed on the Regent webpage,
11 Plaintiffs allege that it is inconspicuous and “in much smaller text than used” to present the
12 offer. According to Plaintiffs, Regent designed the website to obfuscate this information,
13 and “[a] reasonable consumer viewing the Regent webpage would not understand that he or
14 she will be charged for enrolling in the Snapfish Valuepass program because the payment
15 terms are not clearly or conspicuously disclosed to consumers on the Regent webpage.
16 Rather, a reasonable consumer would believe that Snapfish Valuepass is a free perks
17 program offered by” HP. (*Id.* ¶¶ 46-51, 53.)

18 Plaintiffs allege that Defendants’ conduct violates California’s Unfair Competition
19 Law, Business and Professions Code section 17200, *et seq.* (the “UCL claim”), and
20 California’s Consumer Legal Remedies Act, Civil Code section 1750, *et seq.* (the “CLRA
21 claim”).³

22

23 ² This figure appears to be a typographical error. If Ms. Castagnola was
24 charged for nine months, the total would be 134.55. In addition, Plaintiffs’ total figures
regarding the amounts they were charged do not include the \$1.95 activation fee.

25 ³ On April 30, 2012 and May 11, 2012, the Court issued Orders to Plaintiffs
26 directing them to show cause why this matter should not be dismissed for lack of subject
27 matter jurisdiction, because it did not appear that the amount in controversy would satisfy the
28 amount in controversy required by the Class Action Fairness Act. (Docket Nos. 37, 41.) In
response, Plaintiffs filed two responses, a stipulation permitting them to file the Second
Amended Complaint, and the Second Amended Complaint, which is now the operative
pleading. The parties agree that Defendants’ motions apply to the SAC. (See Docket No.
42.) The Court has considered Plaintiffs’ response to the further order to show cause, and it

ANALYSIS

A. Legal Standard Applicable to a Motion to Dismiss.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). However, even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.... When a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

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finds that Plaintiffs have, at this stage, shown that the amount in controversy meets CAFA's jurisdictional minimum.

1 **B. The Court Dismisses Plaintiff Maas' Claims, With Leave to Amend.**

2 Defendants move to dismiss Ms. Maas' claims on the basis that she is a Minnesota
3 resident. A non-California resident may bring claims under the UCL and the CLRA, if they
4 can allege misconduct that occurs within or emanates from California. *See Northwest*
5 *Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222, 224-25 (1999) (citing *Diamond*
6 *Multimedia Syst., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1063-64 (1999)); *see also Wang*
7 *v. OCZ Tech Group., Inc.*, 276 F.R.D. 618, 629-30 (N.D. Cal. 2011); *Morgan v. Harmonix*
8 *Music Systems, Inc.*, 2009 WL 2031765, *2 (N.D. Cal. July 30, 2009).

9 Plaintiffs allege that Regent is a Delaware corporation based in Lanham, Maryland,
10 and they allege that HP is a Delaware corporation based in California. (*Id.* ¶¶ 18-19.)
11 Plaintiffs also allege that HP and Regent “conspired with each other to commit the
12 misconduct” described in the SAC. (*Id.* ¶ 20.) Ms. Maas does not specifically allege where
13 she accessed Snapfish.com or the Regent webpage. (*See* SAC ¶¶ 72-85.) It is clear,
14 however, that she relies on the fact that HP is headquartered in California to establish the
15 requisite nexus to show that she suffered harm that emanated from California. (Opp. Br. to
16 HP Mot. at 7:23-8:1.)

17 In the *Wang* case, the plaintiff alleged that the misleading marketing and advertising
18 materials at issue were “conceived, reviewed, approved or otherwise controlled from
19 [defendant’s] headquarters in California.” *Wang*, 276 F.R.D. at 630. The court concluded
20 that those allegations, taken in combination with the allegation that the defendant’s executive
21 office was located in California and that the defendant selected California law to resolve
22 web-based disputes were sufficient to establish the requisite nexus for extra-territorial
23 application of the UCL. *Id.*

24 In contrast, in the *Morgan* case, the court dismissed claims under the CLRA and the
25 UCL, because the complaint only alleged that one of the defendants was headquartered in
26 California and failed to otherwise “allege what conduct of the defendants, if any, that
27 violated the CLRA took place in California or how [plaintiff] was injured in California.” *Id.*
28 at *2 & n.5.

1 The Plaintiffs' allegations in this case are more like those in the *Morgan* case than the
2 allegations in the *Wang* case. Plaintiffs allege that HP is based in California, but they do not
3 include any factual allegations that show that the decision to create the Snapfish ValuepassSM
4 program or the manner in which it was marketed to consumers emanated from California.
5 Plaintiffs also do not include any allegations that HP had any input on the language used on
6 the Regency webpage. At best, Plaintiffs allege that HP transferred information to Regent,
7 but they do not allege that the transfer of billing information occurred in California.
8 Similarly, there are no specific allegations, other than the purported conspiracy, that Regent
9 took any action in California that harmed Ms. Maas. *See Standfacts Credit Services, Inc. v.*
10 *Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005) (finding
11 that non-resident plaintiffs could not state a UCL claim against non-resident defendants
12 based on co-conspirator liability).

13 Accordingly, for these reasons, the Court GRANTS Defendants' motions to dismiss
14 the claims brought by Ms. Maas. Because Plaintiffs may be able to allege facts that would
15 show Ms. Maas was injured by conduct that emanated from California, the Court will grant
16 Plaintiffs leave to amend.

17 **C. The Court Dismisses the UCL Claim, With Leave to Amend.**

18 Defendants also move to dismiss the UCL claim on the basis that Plaintiffs fail to
19 state a claim under the fraudulent, unfair and unlawful prongs. In their opposition, Plaintiffs
20 concede that they have not stated a claim under the unlawful prong. Accordingly, the Court
21 GRANTS Defendants' motions to dismiss the UCL claim on this basis. If Plaintiffs choose
22 to amend, they shall exclude the specific allegations that form the basis of the unlawful prong
23 as set forth in the SAC. HP separately moves to dismiss on the basis that Plaintiffs lack
24 standing to seek injunctive relief and have not alleged facts showing they would be entitled
25 to restitution from HP.

26 //

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28 //

1 **1. Plaintiffs Do Not Allege Facts to Show They Have Standing Under Article
2 III to Seek Injunctive Relief.**

3 HP moves to dismiss, in part, on the basis that Plaintiffs have not established that
4 they have standing to seek injunctive relief. Plaintiffs argue that, as to injunctive relief, “an
5 issue remains ripe when the challenged conduct may recur and affect the representative
6 plaintiffs or other members of the class.” (Opp. to HP Mot. at 9:12-14 (citing *Williams v.*
7 *Alioto*, 549 F.2d 136, 144 (9th Cir. 1977)). However, HP does not merely argue that the
8 issue is moot.⁴ Rather, HP argues that Plaintiffs lack standing under Article III of the United
9 States constitution to seek injunctive relief. Moreover, Plaintiffs, however, cannot rely on
10 the prospect of future injury to unnamed class members if they cannot establish they have
11 standing to seek injunctive relief. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 357 (1996);
12 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

13 To satisfy the Constitution’s standing requirements, a plaintiff must show (1) an
14 “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not
15 conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of
16 the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will
17 be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
18 (1992). In addition, “a plaintiff must demonstrate standing separately for each form of relief
19 sought.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.
20 167, 185 (2000) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)
21 (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to
22 pursue injunctive relief)).

23 When a plaintiff seeks prospective relief, in order to establish standing, he or she
24 must show that there is “a likelihood of future injury.” *See White v. Lee*, 227 F.3d 1214,
25 1242 (9th Cir. 2000) (internal quotations and citations omitted); *see also Gest v. Bradbury*,

27 ⁴ HP argues that the Snapfish ValuepassSM program stopped accepting new
28 members in March 2010, such that injunctive relief would be meaningless. Those facts are
not contained in the SAC, and HP does not submit evidence of this fact in support of its
motion. Thus, this argument does not provide a basis on which to grant HP’s motion.

1 443 F.3d 1177, 1181 (9th Cir. 2006) (plaintiff must show that he or she is “realistically
2 threatened by a *repetition* of the violation”) (internal citations and quotations omitted,
3 emphasis in original). “Past exposure to illegal conduct does not itself show a present case
4 or controversy regarding injunctive relief if unaccompanied by any continuing, present
5 adverse effects.” *Lujan*, 504 U.S. at 564 (internal quotations omitted).

6 Here, Plaintiffs do not allege that they intend to purchase products from Snapfish.com
7 in the future or that, if they did, they would seek to participate in the Snapfish ValuepassSM
8 program. Even if they did include such allegations, however, Plaintiffs now have knowledge
9 of the terms and conditions of the program, know that HP would transfer their billing
10 information to Regent, and know that Regent, rather than HP, administers the program.
11 Thus, the Court concludes they have not alleged facts showing a realistic threat that they
12 would be harmed by Defendants’ conduct in the future. *See, e.g., Campion v. Old Republic*
13 *Home Protection Company, Inc.*, – F. Supp. 2d –, 2012 WL 992104, at *5-*9 (S.D. Cal. Mar.
14 23, 2012) (granting motion for summary judgment); *In re Intel Laptop Battery Litig.*, 2011
15 WL 7290487, at *2-*3 (N.D. Cal. Apr. 7, 2011); *cf. Cattie v. Wal-Mart Stores*, 504 F. Supp.
16 2d 939, 951 (S.D. Cal. 2007) (noting that plaintiff might not have standing to pursue
17 injunctive relief for CLRA claim, where she was aware of true facts and did not state that she
18 would purchase product in the future).⁵

19 The Court GRANTS HP’s motion to dismiss on this basis.

20 **2. Plaintiffs Have Not Alleged Sufficient Facts to Show They Are Entitled to
21 Restitution from HP.**

22 HP also argues that Plaintiffs have not shown they are entitled to restitution from it,
23 rather than from Regent, because they do not allege that HP took any money from them or
24 that it has possession of the Snapfish ValuepassSM program fees that Plaintiffs were charged.

25 _____
26 ⁵ Although Plaintiffs may not be able to establish they have Article III standing
27 to seek injunctive relief, that would not necessarily preclude them from establishing statutory
28 standing under the UCL, if they can allege sufficient facts to state a claim. *See In re Intel*
Laptop Battery Litig., 2011 WL 7290487, at *2 n.8; *Jenkins v. Apple, Inc.*, 2011 WL
2619094 at *2 (N.D. Cal. July 1, 2011); *Cattie*, 504 F. Supp. 2d at 951.

1 Plaintiffs argue that, although the payments were made to Regent, HP “shared in this
2 revenue.” (Opp. Br. to HP Mot. at 8:17-18.) Plaintiffs’ argument has support in the law.
3 *See Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1338-1340 (2009); *Ferrington v.*
4 *McAfee, Inc.*, 2010 WL 3910169, at *7-*9 (N.D. Cal. Oct. 5, 2010). However, Plaintiffs do
5 not include facts in the SAC from which it is reasonable to infer that HP received those fees,
6 or some other benefit from Regent, either directly or indirectly. *Ferrington*, 2010 WL
7 3910169, at *8-*9.

8 Thus, the Court GRANTS HP’s motion to dismiss on this basis.

9 **2. Plaintiffs Fail to Allege Facts Sufficient to State a Claim.**

10 Defendants also move to dismiss the UCL claim on the basis that the allegedly
11 deceptive and unfair conduct was disclosed to Plaintiffs. Unfair or fraudulent business
12 practices claims under the UCL or the CLRA are governed by the “reasonable consumer”
13 test. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Freeman v.*
14 *Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). Under the reasonable consumer standard, a
15 plaintiff must “show that members of the public are likely to be deceived.” *Id.* (quotation
16 marks and citations omitted); *see also Bank of the West v. Superior Court*, 12 Cal. 4th 1254,
17 1267 (1992). The phrase “[l]ikely to deceive’ implies more than a mere possibility that the
18 advertisement might conceivably be misunderstood by some few consumers viewing it in an
19 unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a
20 significant portion of the general consuming public or of targeted consumers, acting
21 reasonably in the circumstances could be misled.” *Lavie v. Proctor & Gamble Co.*, 105 Cal.
22 App. 4th 496, 508 (2003).

23 Generally the question whether a business practice is deceptive is an issue of fact not
24 appropriate for decision on a motion dismiss. However, dismissal of such claims is
25 appropriate where the plaintiff fails to show the likelihood that a reasonable consumer would
26 be deceived. *Freeman*, 68 F.3d at 289-90; *see also Colgan v. Leatherman Tool Group., Inc.*,
27 135 Cal. App. 4th 663, 683 & n.15 (2006); *McKell v. Washington Mut. Inc.*, 142 Cal. App.
28 4th 1457, 1473 (2006).

1 Defendants rely on a number of district court cases in which courts have rejected
2 claims similar to those raised here, on the basis that the challenged practices were disclosed
3 to the plaintiffs and, thus, could not have been misleading. *See, e.g., Hager v. Vertrue Inc.*,
4 2011 WL 4501046, at *6 (D. Mass. Sept. 28, 2011) (dismissing unfair competition claim
5 brought under Massachusetts law); *Berry v. Webloyalty.com, Inc.*, 2011 WL 1375665, at *4-
6 *7 (S.D. Cal. Apr. 28, 2011) (dismissing UCL and false advertising claims); *Hook v. Intelius, Inc.*,
7 2011 WL 1196305, at *9-10 (M.D. Ga. Mar. 28, 2011) (dismissing unfair competition
8 claim under Georgia law); *Baxter v. Intelius, Inc.*, 2010 WL 3791487 (C.D. Cal. Sept. 16,
9 2010) (dismissing UCL, CLRA and false advertising claims); *In re Vistaprint Corp. Marketing and Sales Practices Litig.*, 2009 WL 2884727, at *4-8 (S.D. Tex. Aug. 31, 2009)
10 (dismissing all claims, including unfair competition claim under Massachusetts law), *aff'd sub nom., Bott v. Vistaprint USA, Inc.*, 392 Fed. Appx. 327, 2010 WL 3303692 (5th Cir. Aug. 23, 2010). However, other district courts within the Ninth Circuit have permitted similar
11 claims to go forward. *See, e.g., Keithly v. Intelius, Inc.*, 764 F. Supp. 2d 1257, 1266-1271 (W.D. Wash. 2011) (denying motion for judgment on the pleadings as to two of three of
12 defendants' marketing techniques); *Ferrington*, 2010 WL 3910169, at *9-*13; *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1171-72 (C.D. Cal. 2010).

13 This case can be distinguished in one key respect from the *Ferrington* and *In re Easysaver* cases. In each of those cases, the plaintiffs disputed both the accuracy and the
14 authenticity of the webpages containing the disclosures submitted by the defendants in
15 support of their motions. Therefore, the courts declined to take judicial notice of screenshots
16 or to apply the incorporation by reference doctrine. *Ferrington*, 2010 WL 3910169, at *3-*4; *In re Easysaver*, 737 F. Supp. 2d at 1167-70. Here, by contrast, Plaintiffs incorporate the
17 screenshots of the Defendants' webpages into their SAC. Thus, Plaintiffs have not disputed
18 the accuracy or the authenticity of the webpage and the disclosures at issue.

19 In the *Keithly* case, the court did consider screenshots provided by the defendants
20 and, relying in part on those screenshots, found that one of the three marketing practices
21 about which the plaintiffs complained was not deceptive as a matter of law. *Keithly*, 764 F.

1 Supp. 2d at 1261-62, 1269.⁶ In that case, one of the defendants, Intelius, was an on-line
2 information service that offered its customers the ability to purchase, *inter alia*, background
3 checks. *Id.* at 1262-63. During the course of the transaction, the defendants subjected
4 customers to various marketing techniques that were “designed to result in the sale of
5 products and/or services other than the one the customer initially sought.” *Id.* at 1263.

6 One such technique was to offer a reduced price on the service a customer originally
7 ordered, if they purchased an additional service. The additional service generally was
8 offered before the customer had completed his or her transaction and, in most cases, the
9 defendants did not provide their customers with meaningful disclosures about the service or
10 its price. The defendants also put the onus on the customer to remove the service or decline
11 the offer. *Id.* at 1267. The court also found that, in most cases, the disclosures “were the
12 least conspicuous elements on the page ... and are placed in such a way that a reasonable
13 consumer could skim the page, realizes that the surrounding materials are unimportant to the
14 goal of obtaining a background report, and miss the crucial details” of the additional offer.
15 *Id.* The court concluded that this scheme “presents a subscription service to the consumer in
16 such a way that a substantial portion of the population *is not even aware that an offer has*
17 *been made*, much less accepted....” *Id.* at 1269 (emphasis added).

18 In some cases, however, the defendants clearly advised a consumer of the price of the
19 additional service at the time a customer was providing their billing information. “Despite
20 all of the other design and transactional elements that tend[ed] to make the ... offer deceptive,
21 a reasonable consumer could not ignore or skim over the repeated disclosure of the ...
22 monthly cost, especially when it was presented at the moment the consumer was required to
23 authorize the purchase.” *Id.* Thus, court found that practice was not deceptive as a matter of
24 law.

25 In this case, Plaintiffs were not presented with the offer of the gift code and the
26 Snapfish ValuepassSM program until they had completed their order. Thus, Defendants did

27
28 ⁶ Although the *Keithly* case involved Washington’s Consumer Protection Act,
the plaintiff was required to show the defendants’ practices “had the capacity to deceive a
substantial portion of the purchasing public.” *Keithly*, 764 F. Supp. 2d at 1266.

1 not try to add this service on to Plaintiffs' order during the check-out process by offering the
2 product they wanted to purchase at a discount. Therefore, unlike the situation in *Keithly*, it
3 was clear that a new offer was in the making. Further, in order to enroll in the Snapfish
4 ValuepassSM program and obtain the gift code, Plaintiffs, like the plaintiffs in *Vistaprint* and
5 unlike the plaintiffs in *Ferrington*, had to proactively enter their email addresses and zip
6 codes. *Compare Vistaprint*, 2009 WL 2884727, at *5-6, with *Ferrington*, 2010 WL
7 3910169, at 11. Nor were Plaintiffs were enrolled in the Snapfish ValuepassSM simply by
8 clicking on a button.

9 This case is also distinguishable from the *Keithly* case in another respect. In that
10 case, the plaintiffs were purchasing reports from the defendants that could be obtained
11 immediately through the internet. The defendants also tried to upsell products at the time the
12 plaintiffs were searching for a means to obtain the information they had just purchased.
13 *Keithly*, 764 F. Supp. 2d at 1269-70. In this case, however, Plaintiffs were already aware that
14 the products they had purchased were going to be delivered to them by means other than the
15 Internet. Although the Plaintiffs were presented with an offer for a gift code and the
16 Snapfish ValuepassSM program, the Regent webpage specifically states that there are "offer
17 details" four times. In addition, immediately below that offer for the gift code, Plaintiffs
18 were advised that by entering their email address and zip code and clicking the "Yes" button,
19 they would be activating a Snapfish ValuepassSM membership as described in the offer
20 details "on this page." (SAC ¶ 44; Appendix.) *See, e.g., Berry*, 2011 WL 1365665, at *5
21 (distinguishing *Keithly* on similar basis); *Baxter*, 2010 WL 3791487, at *4 ("The disclosures
22 combined with affirmative steps for acceptance are sufficient that, as a matter o flaw, the
23 webpage is not deceptive.")

24 Plaintiffs allege that HP and Regent did not clearly disclose the lack of affiliation
25 between Regent and HP, such that it was not clear that Regent - rather than HP - offered the
26 Snapfish ValuepassSM program. A review of the screenshots depicted in the SAC support
27 Plaintiffs' allegations that the Regent webpage shares the overall look and feel of
28 Snapfish.com, by using similar colors and fonts. (*See* SAC ¶ 39 and *compare* SAC ¶¶ 27, 31,

1 34, 37 with ¶ 44.) The Regent webpage also includes language thanking a consumer for his
2 or her order, and there are no allegations that HP or Regent advised Plaintiffs that they were
3 being directed to a new website.

4 The Regent webpage also includes language that advises consumers that by entering
5 their email address and zip code and clicking on the “yes” button they are, *inter alia*,
6 “authorizing Snapfish® to securely send [their] name, address, and credit card information to
7 Snapfish ValuepassSM,” which could suggest that they were still dealing with Snapfish.com.
8 (SAC ¶ 44; Appendix.) If this were the only language on the Regent webpage, Plaintiffs’
9 argument might have more force. The Court, however, cannot look at the statements on the
10 webpage in isolation. Below the “YES” button is a statement that “Encore Marketing
11 International (EMI) is the offerer and administrator of Snapfish ValuepassSM, a branded
12 membership program offered to Snapfish® customers.” A similar disclosure is set forth on
13 the left side of the Regent webpage. (SAC ¶ 44; Appendix). The Regent webpage also has a
14 copyright reference at the bottom of the page which reads “©2011 Encore Marketing
15 International.” The Court finds that any ambiguity about who offers and administers the
16 Snapfish ValuepassSM program “is dispelled by the [webpage] as a whole.” *Freeman*, 68
17 F.3d at 290 (evaluating promotional material in its entirety).

18 Plaintiffs also allege that “[u]benknownst to consumers, by the time they are shown”
19 the Regent webpage, HP “has transferred their billing information (including their credit card
20 numbers and addresses to Regent.” (SAC ¶ 63.) Even if that was true, and the statement that
21 HP would transfer that information after a consumer entered his or her email address, zip
22 code and clicked the “YES” button was, therefore, false, there are no facts that would support
23 the conclusion that Plaintiffs lost money or property merely because of their information was
24 transferred, rather than used to bill them for unwanted services.

25 Plaintiffs also allege that Defendants did not clearly disclose that there were payment
26 obligations associated with the Snapfish ValuepassSM program. However, the Regent
27 webpage contains four references to the fact that there are “Offer Details.” The “Offer
28 Details” state that Regent would charge Plaintiffs an activation fee of \$1.95 and a monthly

1 fee of \$14.95. In the *Freeman* case, the plaintiffs claims were based on sweepstakes
2 mailings, which stated that in order to win, one must submit a winning number. *Freeman*, 68
3 F.3d at 287-88. The plaintiff in *Freeman* argued that members of the public “would be
4 deceived, since it is likely that the reader will review the large print and ignore the qualifying
5 language in small print.” *Id.* at 289. The court soundly rejected this argument, and stated
6 that the “promotions expressly and repeatedly state the conditions to which must be met in
7 order to win. None of the qualifying language is hidden or unreadably small. The qualifying
8 language appears immediately next to the representations it qualifies and no reasonable
9 reader could ignore it.” *Id.*; *Cf. Baxter*, 2010 WL 3791487, at *4.

10 In this case, as in the *Freeman* case as well as the *Vistaprint* case, the disclosures at
11 issue were on the same page and in close proximity to the box provided to enter the email
12 and zip code. Although the text of the offer details are in a smaller font than the font used to
13 promote the fit code, based on the screenshot in the SAC it is not unreadably small.
14 Moreover, the amounts that will be charged are in bold. (SAC ¶ 44; Appendix). Notably,
15 Plaintiffs do not contend that the actual language used to describe the “Offer Details” was
16 confusing or misleading. As with the “affiliation” argument, Plaintiffs focus on the manner
17 in which the information is presented on the Regent webpage. For example, the “Offer
18 Details” are in a smaller font than the statements “Claim your gift code below!” and “I want
19 my \$10 gift code now!” Again, however, the screenshot shows that the Offer Details are on
20 the same page and in close proximity to these statements.

21 Upon review of Plaintiffs’ allegations, and considering the fact that the webpages at
22 issue are incorporated by reference into the SAC, the Court finds that the facts of this case
23 are more like the facts presented in *Freeman*, *Berry*, *Baxter*, and *Vistaprint*, than like the
24 facts in the *Easysaver* or *Ferrington* cases. The Court also finds the allegations here to be
25 distinguishable from the practices found to be deceptive in *Keithly*. Although Plaintiffs
26 argue that the circumstances of this case are such that “a reasonable consumer would not be
27 expected to read the fine print on the webpage before providing his or her email address,” the
28 Court finds this argument unpersuasive. (Opp. Br. to HP Mot. at 6:7-9.) Simply put, the

1 Court finds apt the *Vistaprint* court's statement that “[a] consumer cannot decline to read
2 clear and easily understandable terms that are provided on the same webpage in close
3 proximity to the location where the consumer indicates his agreement to those terms and then
4 claim that the webpage, which the consumer has failed to read, is deceptive.” *Vistaprint*,
5 2009 WL 2884727, at *6.

6 The Court GRANTS the motions to dismiss the UCL claim on this basis as well.

7 **E. The Court Dismisses the CLRA Claim, With Leave to Amend.**

8 **1. The Venue Affidavit.**

9 Defendants move to dismiss the CLRA claim on the basis that Plaintiffs failed to file
10 the affidavit required by Civil Code section 1780(d), which provides in pertinent part:

11 In any action subject to this section, concurrently with the filing of the
12 complaint, the plaintiff shall file an affidavit stating facts showing that the
13 action has been commenced in a county described in this section as a
14 proper place for the trial of the action. If a plaintiff fails to file the affidavit
15 required by this section, the court shall, upon its own motion or upon
16 motion of any party, dismiss the action without prejudice.

17 Plaintiffs do not dispute that they did not file an affidavit pursuant to Section 1780(d).
18 They argue, however, that the requirement is procedural and, therefore, does not apply. The
19 Court finds Plaintiff's argument unconvincing. Federal courts have concluded that plaintiffs
20 must comply with Section 1780(d) to state a claim. *See, e.g., In re Apple & AT&T iPad
Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011) Indeed, even in
21 the *Easysaver* case, on which Plaintiffs rely, the court determined that the plaintiffs were
22 required to comply with the notice requirements of Section 1780. *Easysaver*, 737 F. Supp.
23 2d at 1178 (noting that although notice requirement was not jurisdictional, compliance is
24 necessary to state a claim but finding requirement satisfied where plaintiff, who was
subsequently dismissed, had filed required affidavit).

25 Accordingly, the GRANTS the motions to dismiss on this basis as well.

26 **2. The Plaintiffs Fail to Allege Facts Sufficient to State a Claim.**

27 Plaintiffs claims under the CLRA are premised upon the same conduct that support
28 their UCL claims. The CLRA proscribes certain “unfair methods of competition and unfair

1 or deceptive acts or practices undertaken by any person in a transaction intended to result or
2 which results in the sale or lease of goods or services to any consumer...." Cal. Civ. Code §
3 1770(a). For the reasons set forth above, because Plaintiffs have failed to allege facts
4 showing that Defendants' conduct was unfair or deceptive, Plaintiffs also fail to state a claim
5 under the CLRA.

6 Therefore, the Court GRANTS the motions to dismiss on this basis as well.

7 **CONCLUSION**

8 For the foregoing reasons, the Court GRANTS the motions to dismiss filed by HP
9 and Regent. Because the Court cannot say with certainty, that Plaintiffs could not state a
10 claim under the UCL or the CLRA, it shall grant Plaintiffs an opportunity to amend their
11 claims, if they so choose. Plaintiffs may file an amended complaint by no later than July 6,
12 2012. The Court sets this matter down for an initial case management conference on Friday,
13 August 31, 2012 at 1:30 p.m. The parties' Joint Case Management Conference statement
14 shall be due by no later than August 24, 2012.

15 If Plaintiffs choose not to amend, they shall file a notice to that effect by no later than
16 July 6, 2012, after which the Court will enter an order dismissing all claims with prejudice.

17 **IT IS SO ORDERED.**

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19 Dated: June 13, 2012

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21 JEFFREY S. WHITE
22 UNITED STATES DISTRICT JUDGE

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