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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIRCLE CLICK MEDIA LLC, et al.,)	Case No. 12-04000 SC
)	
Plaintiffs,)	ORDER DENYING MOTION FOR
)	LEAVE TO FILE AN AMENDED
v.)	COMPLAINT AND FOR
)	<u>RECONSIDERATION</u>
REGUS MANAGEMENT GROUP LLC, et)	
al.,)	
)	
Defendants.)	
)	
)	

I. INTRODUCTION

Now pending before the Court is Plaintiffs Circle Click Media LLC ("Circle Click") and CTNY Insurance Group LLC's ("CTNY") (collectively, "Plaintiffs") motion for leave to file a third amended complaint ("3AC") and for reconsideration of a prior order. ECF No. 130 ("Mot."). The Motion is fully briefed. ECF Nos. 139 ("Opp'n"), 152 ("Reply"),¹ and appropriate for resolution without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, the Motion is DENIED.

///

¹ Also pending before the Court is Defendants' administrative motion to file a surreply brief. ECF No. 155. The motion is DENIED as moot.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 As the Court has previously ruled on four motions to dismiss
4 in this matter, all parties are familiar with the facts. See ECF
5 Nos. 59 ("Jan. 2013 Order"), 77 ("Apr. 2013 Order"), 90 ("Aug. 2013
6 Order"), 117 ("Dec. 2013 Order"). To review, Defendants are in the
7 business of renting short-term commercial office space throughout
8 California and New York. Apr. 2013 Order at 2. In 2011,
9 Plaintiffs entered identical Office Service Agreements with
10 Defendant Regus Management Group LLP ("RMG"). Aug. 2013 Order at
11 2-3.

12 The Office Service Agreement is one page and merely sets forth
13 the location of the office space, the monthly office fee, the term
14 of the agreement, and the parties to it. Id. at 3. In signing the
15 Office Service Agreement, Plaintiffs acknowledged that they had
16 "read and understood" another document called the "Terms and
17 Conditions." Apr. 22 Order at 3. The Terms and Conditions is also
18 only one page, but it is printed in five-point font, making it
19 exceedingly difficult to read.² Id. The Terms and Conditions
20 reference another document, the "House Rules," which discloses a
21 number of fees, including a mandatory, "Kitchen Amenities /
22 Beverage Fee"; a "[s]tandard services" fee, including a fee "billed
23 upon service activation for applicable telecom and internet

24 _____
25 ² The Court granted Defendants' administrative motion to lodge with
26 the Court originals of certain documents, including the Terms and
27 Conditions. ECF No. 46. The purported original of the Terms and
28 Conditions is more legible than versions previously filed with the
Court. Plaintiffs dispute that the documents Defendants lodged
with the Court are actually originals. ECF No. 147. This dispute
has no bearing on the disposition of the instant motion for leave
to file an amended complaint. Accordingly, the Court declines to
rule on what is and is not an original document at this time.

1 services"; an "Office Set Up Fee"; and a "Business Continuity Fee."
2 Id. The House Rules reference yet another document, the Service
3 Price Guide, which lists the prices for a variety of services. Id.

4 The gravamen of Plaintiffs' case is that they were assessed
5 for charges that were not disclosed in the one-page Office
6 Agreement. For example, the monthly fee listed in Circle Click's
7 Office Service Agreement is \$2,461, but Circle Click allegedly
8 received monthly invoices ranging from \$2,559.67 to \$6,653.79.
9 Aug. 2013 Order at 3. Plaintiffs allege that Circle Click was
10 assessed additional charges for kitchen amenities (regardless of
11 whether these amenities were used), telephone lines, telecom,
12 handsets, office restoration, and business continuity services,
13 among other things. Id. at 3-4. Defendants contend that the Terms
14 and Conditions disclosed that additional charges would be assessed,
15 and that the House Rules and the Service Price Guide disclosed what
16 those charges would be. Defendants also contend that the Terms and
17 Conditions, House Rules, and Service Price Guide are incorporated
18 by reference into the Office Agreement.

19 **B. Procedural History**

20 Circle Click filed this putative class action in California
21 state court on May 8, 2012. ECF No. 1. RMG removed the action to
22 federal court in July 2012 and subsequently filed a motion to
23 dismiss. ECF Nos. 1, 7. Plaintiffs then filed a first amended
24 complaint, mooting the motion. ECF No. 24 ("1AC").

25 The 1AC added two new named plaintiffs: Metro Talent, LLC
26 ("Metro Talent") and CTNY. It asserted claims for violation of the
27 Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et
28 seq.; the False Advertising Law ("FAL"), id. § 17500;

1 concealment/suppression and intentional misrepresentation (i.e.,
2 fraud); negligent misrepresentation; unjust enrichment; and
3 violation of New York State General Business Law ("GBL") sections
4 349 and 359. Defendants filed a motion to dismiss the 1AC, which
5 the Court granted in part and denied in part. Jan. 2013 Order at
6 28. The Court dismissed Plaintiffs' fraud and negligent
7 misrepresentation claims on the ground that the additional charges
8 targeted by Plaintiffs were disclosed in the relevant agreements.
9 The Court granted Plaintiffs leave to amend to "specifically allege
10 what was not disclosed in the agreements they signed with
11 Defendants and/or what Defendants misrepresented to them about
12 their monthly fees and why it was reasonable for Plaintiffs to rely
13 on those misrepresentations despite the language of the
14 agreements." Id. at 22. The Court also dismissed Plaintiffs' UCL
15 and FAL claims with leave to amend. Id. at 28.

16 Plaintiffs subsequently filed a second amended complaint. ECF
17 No. 65 ("2AC"). Like the 1AC, the 2AC asserted claims for
18 violations of the UCL and FAL, fraud, negligent misrepresentation,
19 and unjust enrichment, though it asserted new predicate violations
20 of the UCL. It also asserted new claims for violations of the
21 Racketeer Influenced & Corrupt Organizations Act ("RICO"), 18
22 U.S.C. § 1961 et seq. Defendants filed another motion to dismiss,
23 ECF No. 69, which the Court granted in part and denied in part,
24 Apr. 2013 Order. The Court dismissed Plaintiffs' fraud claim with
25 prejudice. The Court reasoned that the claim was predicated on the
26 theory that Defendants had exclusive knowledge of the fees that
27 would be assessed, but judicially noticeable documents showed that
28 Plaintiffs had constructive notice of these fees. Id. at 9. The

1 Court also dismissed Plaintiffs' RICO claims with prejudice, but
2 left Plaintiffs' UCL and FAL claims largely undisturbed.

3 Following the April 2013 Order, Defendants filed an answer
4 asserting a number of counterclaims. ECF No. 78. In December
5 2013, after the Court resolved two rounds of motions to dismiss the
6 counterclaims, the parties finally moved beyond the pleading stage.
7 See Aug. 2013 Order, ECF No. 101 ("Amended Countercl."), Dec. 2013
8 Order.

9 On November 1, 2013, Metro Talent and Defendants stipulated to
10 dismiss with prejudice the claims and counterclaims they had
11 asserted against each other. ECF No. 111.

12 **C. Proposed Third Amended Complaint**

13 Plaintiffs now seek to reopen the pleadings by filing an
14 amended complaint, the 3AC. The 3AC would add a new named
15 plaintiff, Sacramento Transitions Group ("STG"), to replace Metro
16 Talent. Mot. Ex. 1 ("3AC"). Like Metro Talent and Circle Click,
17 STG rented office space from Defendants in California.

18 The 3AC would also reassert the fraud claim the Court
19 previously dismissed with prejudice. Plaintiffs contend that new
20 evidence produced through discovery warrants reconsideration of the
21 dismissal of the fraud claim. Specifically, Plaintiffs point to a
22 portion of an internal RMG training document from April 2004, which
23 states:

24
25 Avoiding objections: By eliminating all of the
26 recurring costs from the [Office] Service Agreement,
27 we will be able to avoid any potential objections
28 about the overall monthly cost by those people that
have to sign-off on the deal but are removed from the
original sales process.

1 3AC ¶ 31; ECF No. 131 ("Apr. 2004 Memo"). Plaintiffs assert that
2 this language shows that Defendants actively concealed the
3 additional fees at the time of contract formation.

4 To support their fraud claim, Plaintiffs also include a new
5 section in 3AC entitled "Predatory Sales Practices." 3AC ¶¶ 39-44.
6 In this section, Plaintiffs allege that Defendants have promulgated
7 uniform sales policies and procedures, instructing their employees
8 to communicate the following to prospective clients: "[w]e work
9 with a one page service agreement"; Defendants offer free domestic
10 phone calls and internet access; everything is included in one
11 monthly bill; and common areas include a fully-equipped kitchen,
12 business lounge, restrooms, and a welcoming reception. Id. ¶ 41.
13 Plaintiffs also allege, for the first time, that Circle Click did
14 not receive the House Rules or the Services Price Guide before it
15 executed the Office Services Agreement with RMG. Id. ¶ 68.

16 Though Plaintiffs do not mention it in their Motion, the 3AC
17 also asserts a new predicate UCL violation. Specifically, the 3AC
18 asserts that Defendants violated California Business and
19 Professions Code section 10130 by acting as unlicensed real estate
20 agents or brokers that lease real property in exchange for fees.
21 Id. ¶ 109.

22

23 **III. LEGAL STANDARD**

24 **A. Motion for Leave to Amend**

25 Federal Rule of Civil Procedure 15(a)(1) allows a plaintiff to
26 amend as a matter of course in a number of circumstances, none of
27 which are relevant here. Pursuant to Rule 15(a)(2), in all other
28 cases, a party may amend its pleading only with the opposing

1 party's written consent or with leave of the court. "The court
2 should freely give leave when justice so requires." Fed. R. Civ.
3 P. 15(a)(2).

4 In determining whether to grant leave to amend, "a court must
5 be guided by the underlying purpose of Rule 15 to facilitate
6 decision on the merits, rather than on the pleadings or
7 technicalities." United States v. Webb, 655 F.2d 977, 979 (9th
8 Cir. 1981). "Accordingly, Rule 15's policy favoring amendments to
9 pleadings should be applied with extreme liberality." Id.
10 (internal quotations omitted). Five factors are taken into account
11 to assess the propriety of a motion for leave to amend: "bad faith,
12 undue delay, prejudice to the opposing party, futility of
13 amendment, and whether the plaintiff has previously amended the
14 complaint." Johnson v. Buckley, 356 F.3d 1067, 1077 (9th Cir.
15 2004).

16 **B. Motion for Reconsideration**

17 Since Plaintiffs seek to reassert the fraud claim that was
18 previously dismissed with prejudice, they are also moving for
19 reconsideration. Motions for reconsideration are governed by Civil
20 Local Rule 7-9, which requires the moving party to show: (1) a
21 material difference in fact or law that was not previously known
22 and could not have been discovered in the exercise of reasonable
23 diligence; (2) the emergence of new material facts or a change of
24 law; or (3) a manifest failure by the Court to consider material
25 facts or dispositive legal arguments. Civ. L. R. 7-9(b).
26 "[A]bsent highly unusual circumstances," a motion for
27 reconsideration should be denied. 389 Orange St. Partners v.
28 Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

1 **IV. DISCUSSION**

2 For the purposes of the instant motion, the Court must
3 determine whether to allow Plaintiffs to (1) reassert their fraud
4 claim, (2) add STG as an additional named plaintiff, and (3) assert
5 new predicate violations of the UCL.

6 **A. Fraud**

7 The Court previously dismissed Plaintiffs' fraud claim with
8 prejudice. Thus, Plaintiffs cannot reassert the claim absent (1)
9 newly discovered evidence, (2) an intervening change in the
10 controlling law, or (3) a showing that the Court's committed clear
11 error in rendering its prior decision. Plaintiffs move under the
12 first ground.

13 As the Court previously held, there are at least four
14 circumstances in which nondisclosure may constitute actionable
15 fraud: "(1) when the defendant is in a fiduciary relationship with
16 the plaintiff; (2) when the defendant had exclusive knowledge of
17 material facts not known to the plaintiff; (3) when the defendant
18 actively conceals a material fact from the plaintiff; and (4) when
19 the defendant makes partial representations but also suppresses
20 some material facts." Apr. 2013 Order at 9 (quoting OCM Principal
21 Opportunities Fund v. CIBC World Markets Corp., 157 Cal. App. 4th
22 835, 859 (Cal. Ct. App. 2007)).

23 In the April 2013 Order, the Court dismissed the fraud claim
24 pleaded in the 2AC because Plaintiffs had failed to allege that
25 Defendants had exclusive knowledge of the relevant facts. Id. The
26 Court reasoned that "Plaintiffs had at least constructive knowledge
27 of [Defendants' allegedly illicit] fees." Id. The fees were
28 disclosed in the House Rules and the Service Price Guide. Id. at

1 9-11. While Plaintiffs argued that they had received neither
2 document, they had failed to make such an allegation in their 2AC.
3 Id. at 11. Moreover, by signing the Office Service Agreement,
4 Plaintiffs acknowledged that they had "read and understood" the
5 Terms and Conditions, which disclosed that the parties' agreements
6 included the House Rules. Id. at 10-11. The Court also reasoned
7 that the House Rules expressly referenced the Service Price Guide.
8 Id. at 9-11.

9 The new evidence offered by Plaintiffs does not change this
10 analysis. The April 2004 Memo states that RMG removed references
11 to additional fees from the Office Service Agreement "to avoid any
12 potential objections about the overall monthly costs." 3AC ¶ 31.
13 Plaintiffs argue that this shows that Defendants suppressed or
14 actively concealed a material fact. The Court disagrees. While
15 the Office Service Agreement no longer expressly discloses the
16 additional fees, it does reference the Terms and Conditions. As
17 the Court has repeatedly held, this is sufficient to defeat a fraud
18 claim, since the Terms and Conditions, as well as the documents it
19 references, put Plaintiffs on notice that additional fees might be
20 assessed. Plaintiffs cannot state a claim for fraud merely because
21 they turned a blind eye to information available to them.
22 Moreover, the April 2004 Memo does in fact instruct sales
23 representatives to discuss additional fees in certain situations:
24 "If the prospect asks for additional information for additional
25 services, present the Service[] [Price] Guide[,] including our
26 Monthly Package pricing. If the prospect requests an 'all-in'
27 monthly number (which typically includes office fees, phone[,] and
28

1 connectivity), provide them with that information." Apr. 2014 Mem.
2 at 1.

3 Nor do Plaintiffs' new allegations of predatory sales
4 practices warrant reconsideration of the Court's prior orders.
5 These allegations are not specific enough to support a claim for
6 fraud. Plaintiffs essentially allege that Defendants have a
7 uniform practice of making certain statements to prospective
8 renters and that these statements give the false impression that
9 renters will not be assessed additional monthly fees for services
10 such as internet, telephone, and kitchen amenities. But fraud must
11 be pleaded with particularity. See Fed. R. Civ. P. 9(b).
12 Plaintiffs cannot merely point to a general policy and ask the
13 Court to assume that the policy was implemented in a deceptive
14 manner. A plaintiff alleging fraud must plead "the who, what,
15 when, where, and how of the misconduct charged." United States ex
16 rel Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055
17 (9th Cir. 2011). Absent more specificity, the Court cannot
18 determine whether the challenged statements were in fact made to
19 Plaintiffs, whether the statements were actually false, or whether
20 Plaintiffs reasonably relied on them.³ In any event, as discussed
21 above (and at length in the Court's prior Orders), Plaintiffs'
22 fraud claims are barred because the documents referenced by the
23 Office Service Agreement disclose the additional fees.

24 ³ In their reply brief, Plaintiffs argue that they specifically
25 allege "that each of the Plaintiffs saw one or more of the
26 advertisements that this Court has held may proceed." Reply at 9.
27 The Court previously found that these advertisements could support
28 Plaintiffs' false advertising claims under the UCL and FAL, Apr.
2013 Order at 17-21, but never opined on whether they could support
a claim for fraud. Moreover, as the Court has discussed in prior
orders, the pleading standards for fraud are higher than those for
UCL and FAL violations, especially with respect to reliance. See
id. at 11-12, 19. Plaintiffs conflate the two standards here.

1 The Court also declines to reverse its prior orders because
2 Plaintiffs now plead -- for the first time -- that they did not
3 receive the House Rules or the Service Price Guide. It is unclear
4 why Plaintiffs did not plead this in their 2AC. More importantly,
5 Plaintiffs do not allege that Defendants actively concealed the
6 House Rules or the Service Price Guide. The House Rules are
7 expressly referenced in the Terms and Conditions, and Plaintiffs
8 acknowledged that they read and understood the Terms and Conditions
9 when they signed the Office Service Agreement. Plaintiffs argue
10 that the Terms and Conditions were not incorporated by reference
11 into the Office Service Agreement merely because the Office Service
12 Agreement contains a disclaimer that they read and understood the
13 Terms and Conditions. Reply at 9. But the pertinent question here
14 is not whether the Terms and Conditions are enforceable, but
15 whether Plaintiffs can state a claim for fraud. The Court
16 concludes that they cannot.

17 Accordingly, the Court declines to allow Plaintiffs to
18 reassert their fraud claim. Whether or not the conduct discussed
19 above constitutes unfair competition actionable under the UCL is a
20 separate question that the Court has addressed in prior orders.

21 **B. STG**

22 Defendants argue that Plaintiffs' request to add STG as a new
23 putative class representative can only serve to delay this action.
24 Opp'n at 15. STG would bring claims on behalf of all persons who
25 executed an Office Agreement for a RMG location in California and
26 who paid one or more of the allegedly unauthorized changes. 3AC ¶
27 91. Defendants contend that adding STG is unnecessary since the
28 putative class is already represented by Circle Click. Opp'n at

1 15. Plaintiffs respond that they should be permitted to replace
2 Metro Talent, which recently settled with Defendants.

3 The Court agrees with Defendants. Adding STG as a new
4 plaintiff might have been warranted had both Metro Talent and
5 Circle Click chosen to withdraw from this litigation. But Circle
6 Click remains in the case, and there is no indication that it is
7 unable to adequately represent the interests of the putative class,
8 including STG. Thus, at this point, adding STG would not alter
9 Plaintiffs' claims or the relief to which the class is entitled.
10 However, it would further delay this litigation, which has been
11 pending for almost two years now. Such a delay would not advance
12 the interests of the putative class.

13 Accordingly, the Court declines to allow Plaintiffs to add a
14 new class representative at this time. The Court may revisit this
15 issue if Circle Click settles, its claim is mooted, or if the Court
16 finds that it has engaged in conduct inconsistent with the
17 interests of the class.

18 C. UCL

19 Finally, the 3AC would add a new UCL claim. The UCL
20 prohibits, among other things, "unlawful practices." Cal. Bus. &
21 Prof. Code § 17200. Under this prong of the UCL, violations of
22 other laws, when committed pursuant to business activity, are
23 independently actionable under the UCL. Farmers Ins. Exch. v.
24 Super. Ct., 2 Cal. 4th 377, 383 (Cal. 1992). Plaintiffs are
25 already asserting a predicate violation of California Public
26 Utilities Code section 2890. In the 3AC, they assert a new
27 predicate violation of California Business and Professions Code
28 section 10130. 3AC ¶ 109.

1 Section 10130 provides that "[i]t is unlawful for any person
2 to engage in the business of, act in the capacity of, advertise as,
3 or assume to act as a real estate broker or a real estate
4 salesperson within this state without first obtaining a real estate
5 license" Cal. Bus & Prof. Code § 10130. The Business and
6 Professions Code defines the term "real estate broker" to mean one
7 who "[l]eases or rents or offers to lease or rent, or places for
8 rent, or solicits listings of places for rent, or solicits for
9 prospective tenants" Id. § 10131(b). Section 10131.01
10 exempts from these restrictions: (1) the manager of a hotel [or]
11 motel, or (2) any person or entity . . . who . . . solicits or
12 arranges, or accepts reservations or money, or both, for transient
13 occupancies described in [California Civil Code § 1940(b)(1)-(2)]."
14 Id. § 10131.01. Section 1940(b) describes such occupancies as
15 transient occupancies in a hotel, motel, residence club, or other
16 facility that is subject to certain taxes, as well as occupancies
17 at a hotel or motel where the innkeeper retains a right of access.
18 Cal. Civ. Code § 1940(b).

19 Defendants argue that Plaintiffs fail to explain why this
20 alleged violation was not raised in any of the prior three
21 iterations of the complaint. Next, Defendants argue that they are
22 exempt from section 10130 because the Terms and Conditions
23 expressly provides that the agreement "is the commercial equivalent
24 of an agreement for accommodation(s) in a hotel" and that "the
25 client accepts that this agreement creates no tenancy interest,
26 leasehold estate or other real property interest in the client's
27 favour with respect to the accommodations." Opp'n at 19-20 (citing
28 ECF No. 32 Ex. B). Defendants further argue that Plaintiffs lack

1 standing to bring a UCL claim predicated on a violation of section
2 10130 because Plaintiffs have failed to allege how the use of a
3 licensed real estate broker would have prevented the harm they
4 suffered as a result of the allegedly unauthorized charges. Id. at
5 20.

6 Plaintiffs respond that they only recently learned of the
7 violation through documents produced by Defendants, Reply at 14-15,
8 though it appears that Plaintiffs should have been able to
9 determine whether Defendants were acting as realtors long before
10 these documents were produced. Plaintiffs further argue that
11 Defendants are not exempt from section 10130, reasoning that the
12 section 10131.01 exemption is limited to hotels and transient
13 occupancies of dwelling units and that the Court previously held
14 that Defendants' services were different than those provided by
15 hotels and motels. Id. at 15 (citing April 2013 Order at 15).
16 Finally, Plaintiffs argue that there is a sufficient nexus between
17 the alleged violation of section 10130 and the alleged harm because
18 "[t]he purpose of the licensing requirement is to protect the
19 public from the perils incident to dealing with incompetent or
20 untrustworthy real estate practitioners." Id. (quoting GreenLake
21 Capital, LLC v. Bingo Investments, LLC, 185 Cal. App. 4th 731, 736
22 (Cal. Ct. App. 2010)).

23 The Court agrees with Defendants, at least with respect to
24 their argument concerning standing. The UCL only provides a
25 private right of action for persons who have "suffered injury in
26 fact and ha[ve] lost money or property as a result of the unfair
27 competition." Cal. Bus. & Prof. Code § 17204. Thus, where a UCL
28 action is based on an unlawful business practice, "there must be a

1 causal connection between the harm suffered and the unlawful
2 business activity." Daro v. Super. Ct., 151 Cal. App. 4th 1079,
3 1099 (Cal. Ct. App. 2007). "That causal connection is broken when
4 a complaining party would suffer the same harm whether or not a
5 defendant complied with the law." Id. In this case, Plaintiffs
6 have failed to establish a direct causal connection between the
7 alleged harm -- the assessment of additional, undisclosed fees --
8 and the alleged statutory violation -- failure to obtain a
9 realtor's license. While section 10130 may have been enacted to
10 protect the public against unscrupulous real estate practitioners,
11 it does not directly address the deceptive conduct alleged here.
12 Whether or not Defendants were required to obtain a license has no
13 bearing on whether their practice of assessing additional fees was
14 unfair or unlawful.

15 Accordingly, the Court finds that the proposed amendment
16 regarding section 10130 is futile and, therefore, denies Plaintiffs
17 leave to make such an amendment.

18

19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiffs motion for leave to file
21 a third amended complaint and for reconsideration of a prior order
22 is DENIED.

23

24 IT IS SO ORDERED.

25

26 March 19, 2014

27

28



UNITED STATES DISTRICT JUDGE