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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SHARON GENTGES, an individual,
MARION KERSTING, an individual,
JOHN NEKORANEC, an individual,
LEANNA NEKORANEC, an individual,
and LYLE J. HALS, an individual,
individually and on behalf of a class of
similarly situated persons,

Plaintiffs,

vs.

TREND MICRO INC., a California
corporation, and DOES 1-10, inclusive,

Defendants.

Case No: C 11-5574 SBA

**ORDER GRANTING
DEFENDANT'S MOTION
TO DISMISS**

Docket 47

Plaintiffs Sharon Gentges, Marion Kersting, John and Leanna Nekoranec, and Lyle J. Hals bring the instant putative class action against Defendant Trend Micro Inc. (“Trend Micro”), alleging state law claims based on violations of California’s Unfair Competition Law (“UCL”), California Business and Professions Code § 17200, et seq., and the California Consumer Legal Remedies Act (“CLRA”), California Civil Code § 1750, et seq. The gist of their claims is that Trend Micro fails to adequately disclose to consumers that software subscriptions purchased through its website will be automatically billed for software subscription renewals. Jurisdiction is predicated upon the Class Action Fairness Act, 28 U.S.C. §§ 1332(d)(2).

1 The parties are presently before the Court on Defendant Trend Micro’s Amended
2 Motion to Dismiss and Motion to Strike, pursuant to Federal Rules of Civil Procedure
3 12(b)(1) and 12(b)(6). Dkt. 47. Having read and considered the papers filed in connection
4 with this matter and being fully informed, the Court GRANTS the motion to dismiss for the
5 reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution
6 without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

7 **I. BACKGROUND**

8 **A. OVERVIEW**

9 **1. Summary of Allegations**

10 Defendant Trend Micro, a California corporation which maintains a business office
11 in Cupertino, California, sells computer security and anti-virus software to businesses and
12 individuals on its website, which is located at the URL, www.trendmicro.com. First Am.
13 Compl. (“FAC”) ¶ 2. As is common in commercial websites, Trend Micro’s site includes
14 information regarding the company and its software products, and contains a link to an on-
15 line “Store” where its products can be purchased. Id.; Hoen Decl. ¶ 4, Dkt. 25. Trend
16 Micro’s products are sold on a subscription basis for one or more years. Id. ¶ 3. The
17 software will cease to function once the term has expired, unless the subscription is
18 renewed. Id.

19 When purchasing a Trend Micro product through its website, a consumer must
20 proceed through a multi-step process. Id. ¶¶ 30-42. At Step 1, the consumer selects the
21 product she wishes to purchase. Id. ¶ 33. Under the product title, in smaller print, there is a
22 link for “(update Auto-Renew status) Auto-Renew.” Id. If the consumer clicks on this
23 link, a pop-up window appears that allows the consumer to turn off the Auto-Renew
24 feature. Id. Plaintiffs claim that a reasonable consumer would not notice the Auto-Renew
25 text or click on it, as it allegedly is not clearly and conspicuously disclosed as a material
26 term of the transaction. Id. At Step 2, the consumer is prompted to enter her billing and
27 payment information. Id. ¶¶ 39-40. Step 3 is the Order Complete page. Hoen Decl. Ex. D.

1 Each of the Plaintiffs allegedly purchased a one-year subscription to Trend Micro
2 anti-virus software and subsequently had their subscriptions renewed without their
3 knowledge or consent. Id. ¶ 7. Plaintiffs allege that the alleged lack of clear disclosure
4 regarding the Auto-Renew process is deceptive and misleading. However, none of the
5 Plaintiffs allege that they did not desire to renew their software subscription, that their
6 subscription was not renewed following payment or that the software was defective or not
7 worth the renewal price.

8 2. Ownership and Operation of the On-Line Store

9 The URL www.trendmicro.com is registered to Trend Micro. Rosenfeld Decl. Ex.
10 A, Dkt. 31-1. The on-line Store on the Trend Micro website, however, is owned, controlled
11 and operated by non-party Digital River, Inc. (“Digital River”), a Delaware corporation
12 with its principal place of business in Minnesota. Hoen Decl. ¶ 2 and Ex. A § II.A.2,
13 II.B.5. Digital River operates the Store under the auspices of two related agreements,
14 collectively referred to as the “Digital River-Trend Micro Agreement,” effective April 1,
15 2006. Id. ¶ 2 and Exs. A, B. The agreement was entered into by Trend Micro’s parent
16 entity, Trend Micro Incorporated (“TM Japan”), a Japanese corporation with its principal
17 place of business located in Tokyo, Japan, and Digital River and affiliated entities. Id.¹

18 Under the terms of the Digital River-Trend Micro Agreement, Digital River
19 purchases licenses wholesale from TM Japan for resale through the online Store. Id. ¶ 2;
20 Ex. A § I.A., II.A. Although the on-line Store is accessed through Trend Micro’s website,
21 once the consumer clicks on the “Buy Now” hyperlink to initiate the purchase, she is
22 rerouted to a server owned and operated by Digital River which is located in Minnesota.

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27 ¹ The other two signatories are Digital River Ireland Limited, a company organized
28 under the laws of Ireland, and Digital River Japan K.K., an entity organized under Japanese
law with its principal place of business in Tokyo, Japan. For simplicity, the Digital River
entities are collectively referred to as “Digital River.” Hoen Decl. ¶ 2.

1 Id. ¶ 22; Drew Decl. ¶ 4, Dkt. 24; Hoen Decl. Ex. A § II.A.3.² As an authorized reseller,
2 Digital River, not Trend Micro, sets prices, collects funds and pays taxes for sales of
3 software licenses through its Store. Id. Ex. A §§ I.A. and II.F.2. In addition, Digital River
4 is vested with “full control over the privacy policy, *terms and conditions of sale, and text of*
5 *pages* which are utilized in connection with the *Cart* [i.e., those parts of the Store that are
6 associated with the purchase process.]” Id. § II.A.2 (emphasis added). “Returns and
7 refunds are in the discretion of [Digital River.]” Id. § II.A.12. Trend Micro does not sell
8 any software licenses through www.trendmicro.com. Drew Decl. ¶ 4; Lau Decl. ¶ 2, Dkt.
9 26.

10 **B. PROCEDURAL HISTORY**

11 Plaintiffs filed their original Complaint in this Court on November 16, 2011, and
12 their First Amended Complaint (“FAC”) on February 2, 2012. The FAC alleges that
13 “Plaintiffs bring this action on their own behalf and as representatives of all persons:
14 a) who purchased a software membership product on the Trend Micro website, and b) who
15 were charged for the automatic renewal of that software product by Trend Micro on or after
16 November 15, 2007[.]” FAC ¶ 107. The FAC alleges two claims for violation of the UCL
17 and the CLRA.

18 Trend Micro has now filed a motion to dismiss the claims alleged in the FAC for
19 lack of subject matter jurisdiction and failure to state a claim. Dkt. 47. Principally, Trend
20 Micro argues that Digital River, not Trend Micro, owns and controls the Trend Micro on-
21 line Store and is solely responsible for the conduct that forms the basis of this action.
22 Trend Micro also contends that Plaintiffs lack standing on the grounds that the UCL and
23 CFRA do not apply to non-California consumers where the conduct giving rise to their
24 claims took place outside of California, and because Plaintiffs have failed to allege that
25 Trend Micro’s alleged lack of adequate disclosure regarding the Auto-Renew process

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27 ² To the consumer, this process is transparent, as the on-line Store appears at the
28 URL www.trendmicro.com. Drew Decl. ¶ 4. The on-line Store uses the Trend Micro URL
in order to avoid customer confusion about whether the software being sold is from a
legitimate, authorized reseller. Id.

1 affected their purchase decision. The motion has been fully briefed and is ripe for
2 adjudication.

3 **II. LEGAL STANDARD**

4 **A. RULE 12(B)(1)**

5 A complaint may be dismissed under Rule 12(b)(1) for lack of subject matter
6 jurisdiction. “A jurisdictional challenge under Rule 12(b)(1) may be made either on the
7 face of the pleadings or by presenting extrinsic evidence.” Warren v. Fox Family
8 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). In a “facial” challenge, the court
9 assumes the truth of plaintiff’s factual allegations and draws all reasonable inferences in its
10 favor. Doe v. Holy See, 557 F.3d 1066, 1073 (9th Cir. 2009). In the case of a “speaking”
11 motion, the court is not restricted to the face of the pleadings and “may review any
12 evidence, such as affidavits and testimony, to resolve factual disputes concerning the
13 existence of jurisdiction.” McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).
14 In that case, “[i]t then becomes necessary for the party opposing the motion to present
15 affidavits or any other evidence necessary to satisfy its burden of establishing that the court,
16 in fact, possesses subject matter jurisdiction.” Colwell v. Department of Health and Human
17 Servs., 558 F.3d 1112, 1121 (9th Cir. 2009) (internal quotation marks and citation omitted).
18 “Once challenged, the party asserting subject matter jurisdiction has the burden of proving
19 its existence.” Rattlesnake Coalition v. United States Env’tl. Protection Agency, 509 F.3d
20 1095, 1102 n.1 (9th Cir. 2007).

21 **B. RULE 12(B)(6)**

22 Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim if the
23 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support
24 a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir.
25 1990). In deciding a Rule 12(b)(6) motion, courts generally “consider only allegations
26 contained in the pleadings, exhibits attached to the complaint, and matters properly subject
27 to judicial notice.” Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The court is
28 to “accept all factual allegations in the complaint as true and construe the pleadings in the

1 light most favorable to the nonmoving party.” Outdoor Media Group, Inc. v. City of
2 Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

3 “[T]he tenet that a court must accept as true all of the allegations contained in a
4 complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a
5 cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v.
6 Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). To survive a motion to dismiss for
7 failure to state a claim, the plaintiff must allege “enough facts to state a claim to relief that
8 is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The
9 plaintiff must allege facts sufficient to “nudge his claims . . . across the line from
10 conceivable to plausible.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1951 (2009) (quoting
11 Twombly, 550 U.S. at 570). The allegations must “give the defendant fair notice of what
12 the . . . claim is and the grounds upon which it rests.” Twombly, 550 U.S. at 555. Where a
13 complaint or claim is dismissed, leave to amend generally is granted, unless further
14 amendment would be futile. Chaset v. Fleer/Skybox Int’l, 300 F.3d 1083, 1087-88 (9th Cir.
15 2002).

16 **III. DISCUSSION**

17 **A. STANDING**

18 The party seeking relief in a federal court action “bears the burden of showing that
19 he has standing for each type of relief sought.” Summers v. Earth Island Inst., 555 U.S.
20 488, 493. The doctrine of standing has both constitutional and prudential (i.e., non-
21 constitutional) components. See Nuclear Info. & Res. Serv. v. Nuclear Regulatory
22 Comm’n, 457 F.3d 941, 950 (9th Cir. 2006). Constitutional standing pertains to Article
23 III’s case or controversy requirement. Friends of the Earth, Inc. v. Laidlaw Envtl. Sys.
24 (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S.
25 555, 560-61 (1992)). Prudential standing considers whether “a particular plaintiff has been
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1 granted a right to sue by the statute under which he or she brings suit.” City of Sausalito v.
2 O’Neill, 386 F.3d 1186, 1199 (9th Cir. 2004).³

3 1. Constitutional Standing

4 Constitutional standing is a threshold requirement for federal court jurisdiction.
5 Lujan, 504 U.S. at 559-60. Under Article III of the Constitution, federal judicial power
6 extends only to “Cases” and “Controversies.” U.S. Const., art. III, § 2, cl. 1. “[I]n order to
7 have Article III standing, a plaintiff must adequately establish: (1) *an injury in fact* (i.e., a
8 concrete and particularized invasion of a legally protected interest); (2) *causation* (i.e., a
9 fairly traceable connection between the alleged injury in fact and the alleged conduct of the
10 defendant); and (3) *redressability* (i.e., it is likely and not merely speculative that the
11 plaintiff’s injury will be remedied by the relief plaintiff seeks in bringing suit).” Sprint
12 Comm’n Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 273-74 (2008) (citing Lujan, 504
13 U.S. at 560-561) (internal quotations and alterations omitted). The party invoking federal
14 jurisdiction bears the burden of establishing these elements, which are the “irreducible
15 constitutional minimum” requirements of standing. Lujan, 504 U.S. at 560-61.

16 The standing dispute in this case centers on what the Supreme Court has
17 characterized as “the causation requirement” of standing, i.e., “fair traceability.” Bennett v.
18 Spear, 520 U.S. 154, 167 (1997). “To show causation, the plaintiff must demonstrate a
19 causal connection between the injury and the conduct complained of—the injury has to be
20 fairly traceable to the challenged action of the defendant, and not the result of the
21 independent action of some third party not before the court.” Salmon Spawning &
22 Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1227 (9th Cir. 2008). “Although the
23 “traceability” of a plaintiff’s harm to the defendant’s actions need not rise to the level of
24 proximate causation, Article III *does* require proof of a substantial likelihood that the
25 defendant’s conduct caused plaintiff’s injury in fact.” Habecker v. Town of Estes Park,

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27 ³ While Article III standing may be raised in a Rule 12(b)(1) motion, questions of
28 prudential standing must be raised in a Rule 12(b)(6) motion. See Cetacean Cmty. v. Bush,
386 F.3d 1169, 1174-75 (9th Cir. 2004).

1 Colo., 518 F.3d 1217, 1225 (10th Cir. 2008) (citations and internal quotations omitted and
2 emphasis added).

3 Here, Plaintiffs have failed to carry their burden of establishing that their alleged
4 injury, i.e., the renewal of their software subscriptions without adequate prior notice, is
5 fairly traceable to Trend Micro. The evidence presented by Trend Micro, which is not
6 controverted by Plaintiffs, shows that it was Digital River—not Trend Micro—that engaged
7 in the disputed transactions with Plaintiffs. As the Digital River-Trend Micro Agreement
8 and record evidence makes clear, Trend Micro does not sell any software on its website.
9 Drew Decl. ¶ 4; Lau Decl. ¶ 2. Rather, all purchase transactions, including initial and
10 renewal payments, are controlled by Digital River through the on-line Store, which Digital
11 River owns and controls. Hoen Decl. Ex. A § I.A, II.A. Trend Micro’s complete lack of
12 involvement in the transactions forming the basis of this action is underscored by the fact
13 that all Plaintiffs’ payments (except for Plaintiff Leanna Nekoranec, who had no dealings
14 with Digital River or Trend Micro) were processed by Digital River, not Trend Micro.
15 Hoen Decl. ¶¶ 24-50.

16 Plaintiffs attempt to make much of the fact that the URL www.trendmicro.com is
17 registered to Trend Micro and that the on-line Store is accessed through that web address.
18 Opp’n at 6. However, Trend Micro’s ownership of the domain name is inapposite. The
19 practices at issue in this action pertain specifically to sale of Trend Micro products made
20 through its on-line Store, not the website in general. See FAC ¶¶ 30-42. As discussed,
21 Digital River owns the licenses for software which are resold to the public through the on-
22 line Store. Digital River, not Trend Micro, owns the Store and has “full control” over the
23 Store’s content and the “terms and conditions” governing sales made through it Store.
24 Hoen Decl. Ex. A § II.A.2. Although consumers are able to access the Store through
25 www.trendmicro.com, the actual purchase transaction is routed to Digital River’s servers in
26 Minnesota. Drew Decl. ¶ 4. The reason the Trend Micro domain name remains constant
27 throughout the purchase transaction is to avoid customer confusion as to whether Digital
28 River is an authorized reseller of authentic Trend Micro products. Id. Digital River’s

1 responsibility for the sales transaction is underscored by the emails confirming purchase
2 transactions which direct the purchaser to “contact Digital River” for any “billing questions
3 or additional assistance with your order.” Hoen Decl. Ex. H at 6.

4 Equally unavailing is Plaintiffs’ reliance on its “alternative” allegations that Trend
5 Micro retains the “right to control the content and functionality of the Trend Micro
6 website,” and therefore, their alleged injury is traceable to Trend Micro. See Opp’n at 6;
7 FAC ¶¶ 51-56. Not only is this argument conclusory and unsupported, it is belied by the
8 terms of the Digital River-Trend Micro Agreement, which unequivocally establish that
9 control of the purchase transaction and the renewal of subscriptions for Trend Micro
10 software are handled by Digital River, as opposed to Trend Micro.

11 2. Prudential Standing

12 a) *Extraterritorial Application of the UCL and CLRA*

13 Assuming arguendo that Plaintiffs sufficiently demonstrated Article III standing—
14 which they have not—Plaintiffs fail to meet their burden of showing prudential standing.
15 The UCL makes actionable any “unlawful, unfair or fraudulent business act or practice.”
16 Cal. Bus. & Prof. Code § 17200. Similarly, the CLRA prohibits “unfair methods of
17 competition and unfair or deceptive acts or practices.” Cal. Civ. Code § 1770. Trend
18 Micro contends that Plaintiffs, none of whom are California residents, lack standing to
19 pursue UCL or CLRA claims. Mot. at 15-17. The Court agrees.

20 California courts have long acknowledged a general presumption against the
21 extraterritorial applications of state laws. Sullivan v. Oracle Corp., 51 Cal.4th 1191, 1207
22 (2011). “Neither the language of the UCL nor its legislative history provides any basis for
23 concluding the Legislature intended the UCL to operate extraterritorially. Accordingly, the
24 presumption against extraterritoriality applies to the UCL in full force.” Id. Applying that
25 presumption, state and federal courts have concluded that the UCL and CLRA do not reach
26 claims of non-California residents arising from conduct occurring entirely outside of
27 California. Norwest Mortg., Inc. v. Super. Ct., 72 Cal. App. 4th 214, 222 (1999) (holding
28 that the UCL was inapplicable to “injuries suffered by non-California residents, caused by

1 conduct occurring outside of California’s borders, by defendants whose headquarters and
2 principal places of operations are outside of California”); In re Apple and AT & T iPad
3 Unlimited Data Plan Litig., 802 F. Supp. 2d 1070, 1076 (N.D. Cal. 2011) (dismissing
4 CLRA and UCL claims by non-California residents who purchased their iPad and data
5 plans outside of California); Churchill Vill., L.L.C. v. Gen. Elec. Co., 169 F. Supp. 2d
6 1119, 1126-27 (N.D. Cal. 2000) (rejecting claims by non-California consumers where none
7 of the defendant’s written or oral communications made in California was directed to
8 consumers outside the state), aff’d, 361 F.3d 566 (9th Cir. 2004).

9 Having reviewed the allegations of the FAC and matters subject to judicial notice,
10 the Court is persuaded that Plaintiffs lack standing to pursue claims under the UCL and
11 CFRA. None of the Plaintiffs resides in California and none of the conduct that forms the
12 basis of this action arose here. FAC ¶¶ 17-22. Although Trend Micro may own the URL
13 <www.trendmicro.com>, Digital River both owns and controls the content of the on-line
14 Store. Hoen Decl. Ex. A § II.A.2. In addition, the on-line Store was hosted, not on Trend
15 Micro’s server, but on Digital River’s server located outside of California. Id. § II.A.3.
16 Plaintiffs vague and conclusory allegations that Trend Micro provided unspecified
17 assistance to Digital River, see FAC ¶¶ 51-56, are directly contravened by the Digital
18 River-Trend Micro Agreement, which establishes precisely the opposite. A court is “not
19 required to accept as true conclusory allegations which are contradicted by documents
20 referred to in the complaint” or “that contradict matters properly subject to judicial notice.”
21 Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). That is the exact
22 circumstance here. In sum, the Court finds that there is little, if any nexus, between
23 Plaintiffs and their claims and California; therefore, Plaintiffs lack prudential standing to
24 assert claims under the UCL and CLRA.⁴

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26 ⁴ The Court also notes that Plaintiffs’ admitted failure to file the requisite certificate
27 under California Civil Code § 1780(d) also deprives them of standing to assert a CLRA
28 claim. See In re Apple & AT & T iPad Unlimited Data Plan Litig., 802 F. Supp. 2d 1070,
1077 (N.D. Cal. 2011) (dismissing CLRA claims where plaintiff failed to file § 1780(d)
affidavit); In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV
Television Litig., 758 F. Supp. 2d 1077, 1094 (S.D. Cal. 2010) (same).

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b) Causation

Even if the UCL and CFRA were deemed to apply extraterritorially, Plaintiffs have not alleged conduct within the purview of either statute. The UCL requires that a named class representative must demonstrate “actual reliance” to have standing to sue—i.e., the plaintiff must show “that the defendant’s misrepresentation or nondisclosure was an immediate cause of the plaintiff’s injury-producing conduct.” In re Tobacco II Cases, 46 Cal.4th 298, 328 (2009) (citations and internal quotations omitted). The same holds true for claims under the CLRA. Durell v. Sharp Healthcare, 183 Cal.App.4th 1350, 1366-67 (2010).

Here, Plaintiffs fail to allege that Trend Micro’s alleged lack of clear disclosure regarding the Auto-Renew process was an immediate cause of their injury. Nowhere in the FAC do Plaintiffs claim that they did not want to have their subscriptions renewed automatically. To the contrary, Plaintiffs merely allege that the lack of full disclosure, standing alone, was harmful. See FAC ¶¶ 50, 78, 88, 97. Such allegations are insufficient to establish standing under either the UCL or CLRA. E.g., Durell, 183 Cal.App.4th at 1363-64, 67 (affirming demurrer to UCL and CLRA claims where plaintiff alleged he was injured by defendant’s business practices but did not actually rely in any alleged misrepresentations); Hall v. Time, Inc., 158 Cal. App. 4th 847, 855 (2008) (holding that plaintiff lacked standing under the UCL to sue bookseller based on its failure to disclose that the book was sold with a 21-day trial period, where plaintiff “did not allege he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it.”).

IV. CONCLUSION

The Court finds that Plaintiffs lack constitutional and prudential standing to bring claims under the UCL and CFRA. Because that determination is dispositive and mandates the dismissal of the action, the Court need not reach Trend Micro’s remaining arguments. Accordingly,

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IT IS HEREBY ORDERED THAT Defendant Trend Micro’s Motion to Dismiss is GRANTED. The claims alleged in this action are dismissed without prejudice. The Clerk shall close the file and terminate all pending matters. All previously-scheduled dates and deadlines are VACATED.

IT IS SO ORDERED.

Dated: June 9, 2012



SAUNDRA BROWN ARMSTRONG
United States District Judge