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15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 JOSUE ROMERO and DEANNA HUNT, on
behalf of themselves and all others similarly
18 situated,

19 Plaintiffs,

20 vs.

21 PROVIDE-COMMERCE, INC., a Delaware
corporation; REGENT GROUP, INC. a
22 Delaware corporation dba ENCORE
MARKETING INTERNATIONAL; ENCORE
23 MARKETING INTERNATIONAL, INC., a
Delaware corporation; and DOES 1 through 50,
24 inclusive,

25 Defendants.

CASE NO.: 09-CV-02111-BEN-CAB

CLASS ACTION

SECOND AMENDED COMPLAINT FOR:

- 1. BREACH OF CONTRACT;
- 2. BREACH OF CONTRACT;
- 3. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING;
- 4. BREACH OF WARRANTY;
- 5. NEGLIGENT MISREPRESENTATIONS;
- 6. FRAUD;
- 7. VIOLATIONS OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT;
- 8. UNFAIR BUSINESS PRACTICE;
- 9. FALSE ADVERTISING;
- 10. CONVERSION; AND
- 11. UNJUST ENRICHMENT

[DEMAND FOR JURY TRIAL]

28

1 Plaintiffs, on behalf of themselves, and all others similarly situated, allege upon personal
2 knowledge as to themselves and their acts, and as to all other matters upon information and
3 belief, as follows:

4 **I. NATURE OF THE ACTION**

5 1. This is a class action brought against Defendant Provide-Commerce, Inc.
6 ("Provide-Commerce") who operates several internet businesses such as Red Envelope, Cherry
7 Moon Farms, Secret Spoon, Sharri's Berries, and ProFlowers. As part of its revenue generating
8 efforts, Provide-Commerce routinely and fraudulently transmits its customers' credit and debit
9 card information to third party marketing partners, Defendants Regent Group, Inc., doing
10 business under Encore Marketing International and Encore Marketing International, Inc.
11 (together referred to as "Encore"), who then fraudulently bill the credit and debit cards under the
12 guise that Provide-Commerce's customers authorized the billings when they supposedly joined a
13 savings program known as EasySaver Rewards, which Encore manages on Provide-Commerce's
14 behalf. The EasySaver Rewards program, however, is nothing more than a sham because,
15 among other things, it does not provide any savings benefits, products or services.

16 2. To elaborate, Provide-Commerce seemingly offers coupons, gift codes, and other
17 savings gifts to its customers as a "Thank You" for shopping at its store. When customers try to
18 obtain their gifts, they are directed to a webpage operated by Encore. Customers are then asked
19 to provide their email address and zip code to claim their coupon or gift code. By providing their
20 email address and zip code, customers unwittingly (1) join the EasySaver Rewards program, (2)
21 authorize Provide-Commerce to transmit their credit and debit card information to Encore, and
22 (3) authorize Encore to bill a \$1.95 activation fee and a \$14.95 monthly fee to their credit or
23 debit cards.

24 3. Customers who did not provide their email address and zip code were still billed
25 for joining the EasySaver Rewards program. Despite billing these customers for joining the
26 program, Encore never sent these customers an email confirming their membership, never
27 communicated with these customers about their membership or the program, and never provided
28 these customers with any coupons, gift codes, or any other savings benefits.

1 4. In short, Defendants touted the EasySaver Rewards program as legitimate when,
2 in fact, they used the program as a means to fraudulently bill credit and debit cards. Because this
3 conduct resulted in Defendants reaping unearned financial gains at the customers' detriment,
4 Defendants are subject to tort and statutory liability as alleged herein.

5 **II. JURISDICTION AND VENUE**

6 5. Plaintiff Josue Romero is an individual who at all times mentioned herein resides,
7 and continues to reside, in San Diego County, California, and entered into the transaction at issue
8 herein within the state of California.

9 6. Plaintiff Deanna Hunt is an individual who at all times mentioned herein resides,
10 and continues to reside, in Lexington, Kentucky.

11 7. Defendant Provide-Commerce operates at least five online stores: Red Envelope,
12 Cherry Moon Farms, Secret Spoon, Sharri's Berries, and ProFlowers. Provide-Commerce's
13 principal place of business is located in San Diego County, California.

14 8. Defendants Regent Group, Inc., doing business under Encore Marketing
15 International and Encore Marketing International, Inc. (together referred to as "Encore" or
16 "Defendant Encore") provide revenue enhancement solutions to internet merchants by offering
17 consumer benefit programs, including various membership clubs. Their principal places of
18 business are located in Lanham, Maryland.

19 9. The amount in controversy exceeds this Court's jurisdictional minimum.

20 **III. THE PARTIES**

21 Plaintiffs

22 10. Plaintiffs purchased merchandise from Provide-Commerce's online store, had
23 their personal and debit card information disclosed to Encore, suffered unauthorized billings to
24 their card and debit cards via the EasySaver Rewards program, and did not receive anything in
25 return for those billings.

26 The Class and Subclasses

27 11. Plaintiffs bring this class action against Defendants, pursuant to Rule 23 of the
28 Federal Rules of Civil Procedure, on behalf of themselves and all persons residing in the United

1 States who, during the period of time between August 19, 2005 and the date of Class Notice, (1)
2 purchased merchandise from Proflowers.com, Red Envelope, Cherry Moon Farms, Secret
3 Spoon, or Sharri's Berries; and (2) had their credit card, debit card, or PayPal account billed by
4 EasySaver Rewards (herein referred to as the "Class" or "Class Members".) Excluded from the
5 Class are Defendants, their corporate parents, subsidiaries and affiliates, officers and directors,
6 any entity in which Defendants have a controlling interest, and the legal representatives,
7 successors or assigns of any such excluded persons or entities, and the attorneys for Plaintiffs
8 herein.

9 **Subclass A**

- 10 a. All Class members who did not provide their email address or zip code or click
11 any green acceptance button to receive a gift code for their next purchase
12 transaction with Provide-Commerce.

13 **Subclass B**

- 14 b. All Class members who provided their email address and zip code and clicked a
15 green acceptance button to receive a gift code for their next purchase transaction
16 with Provide-Commerce.

17 **Defendants**

18 12. Defendant Provide-Commerce is an e-commerce company that operates at least
19 five online stores: Red Envelope, Cherry Moon Farms, Secret Spoon, Sharri's Berries, and
20 ProFlowers. Provide-Commerce initially launched Proflowers.com, which offers flowers direct
21 from growers. Thereafter, Provide-Commerce launched its other brands that offer fresh fruit,
22 chocolate and other gourmet foods direct from the suppliers.

23 13. Defendant Encore provides revenue enhancement solutions to internet merchants,
24 like Provide-Commerce, by offering consumer benefit programs, including various membership
25 clubs. Encore's membership clubs include a program known as EasySaver Rewards, which
26 claims to be savings club that offers discounted entertainment, travel, dining and shopping to its
27 members. Encore partnered with Provide-Commerce to create and manage an EasySaver
28 Rewards program aimed at Provide-Commerce's customers.

1 **DOE Defendants**

2 14. Plaintiffs are ignorant about the true names of Defendants sued as DOES 1
3 through 50, inclusive, and their wrongful conduct, and therefore sues these Defendants by
4 fictitious names. Plaintiffs will seek Court leave to amend this complaint to allege their true
5 names and capacities when ascertained.

6 15. Plaintiffs allege on information and belief that at all relevant times, DOES 1-50,
7 inclusive, were agents, servants, employees, representatives, partners, and related or affiliated
8 entities of Defendants, and in doing the things hereinafter mentioned, were acting in the course
9 and scope of their agency, employment, or retention with defendants' permission, consent,
10 authority and ratification.

11 **Defendants' Aiding and Abetting**

12 16. All Defendants, and each of them, aided and abetted, encouraged and rendered
13 substantial assistance to the other Defendants in breaching their obligations to Plaintiffs and the
14 Class, as alleged herein. In taking action, as particularized herein, to aid and abet and
15 substantially assist the commissions of these wrongful acts and other wrongdoings complained
16 of, Defendants each acted with an awareness of the primary wrongdoing and realized that its
17 conduct would substantially assist the accomplishment of the wrongful conduct, wrongful goals
18 and wrongdoing.

19 **IV. FACTUAL BACKGROUND**

20 17. Plaintiffs purchased flowers from Proflowers.com with their debit cards. After
21 Plaintiffs completed the purchase transaction, a window popped up that thanked Plaintiffs for
22 their order and offered a gift code for \$15.00 off their next purchase at ProFlowers. The window
23 also contained a link for Plaintiffs to click on to claim the gift code. Upon clicking the link,
24 Plaintiffs were directed to Encore's webpage. The webpage stated the following: "CLAIM
25 YOUR GIFT CODE BELOW! JUST ENTER YOUR E-MAIL ADDRESS AND ZIP CODE AS
26 YOUR ELECTRONIC SIGNATURE AND CLICK THE GREEN ACCEPTANCE BUTTON
27 BELOW TO ACTIVATE YOUR EASYSaver REWARDS MEMBERSHIP AS DESCRIBED
28 IN THE OFFER DETAILS ON THIS PAGE." Then in small print, in an obscure location, the

1 offer details indicated — in unconscionable terms — that by accepting the gift code, Plaintiffs
2 consented to (1) ProFlowers transmitting their personal and payment information to Encore and
3 (2) Encore billing a \$1.95 activation fee and a \$14.95 monthly fee to their debit card:

4 Activate your membership in EasySaver Rewards to claim your
5 \$15 Gift Code good for your next purchase and start saving and
6 enjoying all the benefits and access for the next 30 days for just a
7 **\$1.95 activation fee** billed by EasySaver Rewards to the credit
8 card or PayPal account you just entered during your ProFlowers
9 purchase. Please note, by entering your e-mail address and zip
10 code (“Enrollment Details”) and clicking the Green Acceptance
11 Button, your enrollment Details as well as the following
12 information from your most recent ProFlowers order will be
13 transmitted securely through PGP and SSI encryption to EMI, the
14 EasySaver Rewards Administrator, to be stored and to secure and
15 administer your membership: your name, credit card information
16 or PayPal billing ID number, billing address, billing telephone
17 number and order ID number. To continue after the introductory
18 trial period, do nothing and all the great benefits and savings will
19 automatically continue for just **\$14.95 per month**, billed by
20 EasySaver Rewards to the same credit card or PayPal account
21 where applicable. You may cancel at anytime, with no further
22 obligation, just by calling the toll-free number contained in the
23 membership information provided to you. **And, you keep the \$15**
24 **Gift Code just for trying EasySaver Rewards for 30 days.**
25 (Emphasis not added).

16 18. Plaintiff Romero did not want to become a member of EasySaver Rewards and
17 thus did not provide his email address and zip code to receive the \$15.00 Gift Code. Nor did
18 Plaintiff Romero click the green acceptance button. Instead Plaintiff Romero clicked on the “X”
19 at the top right corner of the webpage to close the window. After clicking on the “X”, Plaintiff
20 Romero was directed back to Proflowers’ website.

21 19. Shortly thereafter, Plaintiff Romero discovered that Encore via its EasySaver
22 Rewards Program made unauthorized billings to his debit card. Encore first billed Plaintiff
23 Romero’s debit card on February 14, 2009 for \$1.95. Plaintiff Romero initially did not notice
24 this bill because the amount was small. Then one month later, on March 17, 2009, Encore
25 charged \$14.95 to Plaintiff Romero’s debit card. Plaintiff Romero was completely surprised to
26 see this bill, as well as the previous bill, on his debit card since he did not provide Encore with
27 his email address and zip code, did not click on the green acceptance button on the signup page,
28 did not authorize Provide-Commerce to transfer any information to Encore, and did not authorize

1 Encore to charge his debit card. Moreover, Plaintiff Romero never received anything from
2 Encore. He did not receive any confirmation email for purportedly joining the EasySaver
3 Rewards Program, the \$15.00 Gift Code, nor any other benefits, savings or rewards.

4 20. On March 17, 2009, Plaintiff Romero called both Encore and Provide-Commerce
5 to have the billings removed from his debit account. When Plaintiff Romero called Encore's toll
6 free number for its EasySaver Rewards program, no one answered the phone. He then called
7 ProFlowers and spoke with a representative who indicated that she could not do anything about
8 the charges. The representative further indicated that she had been receiving numerous calls
9 about unauthorized charges by Encore via the EasySaver Rewards program.

10 21. Plaintiff Hunt likewise did not want to become a member of EasySaver Rewards.
11 Plaintiff Hunt provided her email address and zip code, believing that the information was
12 necessary to complete her transaction with ProFlowers and receive a complimentary Gift Code.
13 She did not knowingly consent to join any rewards program or pay any fees associated with any
14 rewards program. In fact, she did not even realize that she had been redirected away from
15 ProFlowers' website to Encore's website.

16 22. Like Plaintiff Romero, Plaintiff Hunt discovered unauthorized billing to her credit
17 card by Encore via its EasySaver Rewards Program. She also was surprised to discover the
18 billings on her debit card since she never intended to join the program or authorize Provide-
19 Commerce to transfer any of her information to Encore. Plaintiff Hunt did not receive any
20 confirmation email from anyone for purportedly joining the EasySaver Rewards Program, the
21 \$15.00 Gift Code, nor any other benefits, savings or rewards.

22 23. Because Plaintiff Hunt did not anticipate the unauthorized billings to her checking
23 account, she did not have enough funds in her account to cover those fees. The unauthorized
24 billings caused Plaintiff Hunt to bounce several checks and thus incur fees and charges as a result
25 of the bounced checks.

26 24. Plaintiffs believe that Provide-Commerce and Encore together engaged, and
27 continue to engage, in a systematic nationwide practice of making unauthorized charges to
28 customers' credit and debit cards under the guise of the EasySaver Rewards program. Even

1 though Plaintiff Romero did not click the green acceptance button to enroll in the EasySaver
2 Rewards program, Encore still billed his debit card the \$1.95 activation fee and the \$14.95
3 monthly fee. And despite Plaintiff Hunt actually clicking the green acceptance button, she did
4 not ever intend to enroll in the EasySaver Rewards program or in any other program for that
5 matter. Rather, she was deceptively tricked into providing her email address and zip code, and
6 then Proflowers transmitted her debit card information to Encore, which fraudulently billed her
7 card without her knowledge or consent.

8 25. Provide-Commerce is equally complicit in this scam because it, among other
9 things, operated and profited from the EasySaver Rewards program. More importantly, Provide-
10 Commerce intentionally transferred Plaintiffs' payment information to Encore without
11 authorization in violation of its own policy to facilitate the scam:

12 **EasySaver Rewards Policy**

13 One of our third-party marketing partners is Encore Marketing
14 International ("EMI"), who manages our EasySaver Rewards
15 program. By clicking on the promotional link on our order
16 confirmation page, or elsewhere on our website or emails as may
17 be indicated from time to time, you will be connected to an
18 EasySaver Rewards signup page hosted by EMI, and certain
19 information such as your email address, zip code, site/order ID and
20 survey responses ("Enrollment Details") will be transferred to the
21 EMI site. Should you choose to complete the application on such
22 signup page, your credit card information or PayPal Billing ID as
23 well as your name, billing address, and order ID number will be
24 PGP encrypted and transmitted through SSL encryption from your
25 most recent order to EasySaver Rewards. This information, as
26 well as your original Enrollment Details, will be stored and
27 processed on the EMI site to secure your membership.

28 26. Based on its on policy, Provide-Commerce claims that it will not disclose
customers' personal and payment information to Encore absent customers completing Encore's
signup page and affirmatively and knowingly agreeing to join the EasySaver Rewards program.
To the extent Provide-Commerce's policy allows it to transmit its customers' personal and
payment information to Encore without customers' informed consent or authorization, the policy
is unconscionable. Despite Provide-Commerce's written policy, Provide-Commerce disclosed
Plaintiff Romero's information to Encore absent Plaintiff Romero completing Encore's signup
page or otherwise affirmatively agreeing to become a member of the EasySaver Rewards

1 program. Provide-Commerce also disclosed Plaintiff Hunt's information to Encore absent her
2 giving informed consent. To the contrary, Plaintiff Hunt believed she was providing the
3 information to complete her transaction on ProFlowers.com and receive a complimentary \$15.00
4 Gift Code. Had Plaintiff Hunt known that it would cost her well over \$15.00 to purportedly
5 receive a \$15.00 Gift Code and that she did not need to provide her email address and zip code to
6 complete her transaction on ProFlowers.com, she would not have provided that information or
7 clicked the green acceptance button.

8 **V. PLAINTIFFS' CLASS ACTION ALLEGATIONS**

9 27. **Class Definition:** This lawsuit is brought on behalf of an ascertainable statewide
10 and nationwide Class consisting of all persons residing in the United States who, during the
11 period of time between August 19, 2005 and the date of Class Notice, (1) purchased merchandise
12 from Proflowers.com, Red Envelope, Cherry Moon Farms, Secret Spoon, or Sharri's Berries;
13 and (2) had their credit card, debit card, or PayPal account billed by EasySaver Rewards (herein
14 referred to as the "Class".)

15 a. **Subclass A:** All Class members who did not provide their email address or zip
16 code or click any green acceptance button to receive a gift code for their next
17 purchase transaction with Provide-Commerce.

18 b. **Subclass B:** All Class members who provided their email address and zip code
19 and clicked a green acceptance button to receive a gift code for their next
20 purchase transaction with Provide-Commerce.

21 28. **Excluded from Class:** Excluded from the Class are Defendants, their corporate
22 parents, subsidiaries and affiliates, officers and directors, any entity in which defendants have a
23 controlling interest, and the legal representatives, successors or assigns of any such excluded
24 persons or entities, and the attorneys for Plaintiffs herein.

25 29. **Numerosity:** Class members are so numerous that joinder of all members is
26 impracticable. While the exact numbers of Class members are unknown to Plaintiffs at this time,
27 such information can be ascertained through appropriate discovery from records maintained by
28 defendants and their agents.

1 30. **Superiority:** A class action is superior to other available methods for the fair and
2 efficient adjudication of this controversy because joinder of all members is impracticable, the
3 likelihood of individual Class members prosecuting separate claims is remote and individual
4 members do not have a significant interest in individually controlling the prosecution of separate
5 actions. Relief concerning Plaintiffs' rights under the laws alleged herein and with respect to the
6 Class as a whole would be appropriate. Plaintiffs know of no difficulty to be encountered in this
7 case's management that would preclude maintenance as a class action.

8 31. Certification of a nationwide class under the laws of California is appropriate
9 because, *inter alia*:

- 10 a. Defendants are conducting substantial business in California;
- 11 b. Defendant Provide-Commerce has its principal place of business located in
12 California, and California is where all significant decision-making with respect to
13 the conduct of Defendants as alleged herein occurred;
- 14 c. Defendants' marketing, promotional activities, and literature are coordinated at,
15 emanate from, and/or are developed in California;
- 16 d. The Unfair Competition and False Advertising Laws expressly apply to claims
17 asserted by out-of-state Class members regarding false representations and/or
18 omissions emanating from California; and
- 19 e. A significant number of Class members reside in California.

20 32. **Common Questions of Law and Fact Predominate:** There is a well-defined
21 community of interest in the questions of law and fact affecting the Class. The questions of law
22 and fact common to the Class predominate over questions affecting only individuals. Among the
23 questions of law and fact common to the Class are:

- 24 a. whether Class members joined the EasySaver Rewards Program;
- 25 b. whether Class members authorized Provide-Commerce to transfer their
26 personal and payment information to Encore;
- 27 c. whether Class members authorized Encore to bill anything to their credit or
28 debit cards;

- 1 d. whether Provide-Commerce complied with its privacy policy;
2 e. whether Defendants engaged in unfair or unlawful business practices;
3 f. whether Defendants engaged in false advertising;
4 g. whether Defendants breached their warranties;
5 h. whether Defendants made intentional or negligent misrepresentations;
6 i. whether Defendants breach the implied covenant of good faith and fair
7 dealing;
8 j. whether Defendants' contracts, agreements, or policies contained
9 unconscionable terms;
10 k. whether Plaintiffs and the Class are entitled to injunctive relief; and
11 l. whether Plaintiffs and the Class sustained damages and, if so, the proper
12 measure of those damages.

13 33. **Typicality:** Plaintiffs' claims are typical of other Class members' claims because
14 Plaintiffs, like every other Class member, was exposed to virtually identical conduct.

15 34. **Adequacy:** Plaintiffs can fairly and adequately represent the Class' interests;
16 Plaintiffs have no conflicts of interest with other Class members, and has retained counsel
17 competent and experienced in class action and complex civil litigation.

18 **FIRST CAUSE OF ACTION**
19 **(For Breach of Contract Against Defendant Provide-Commerce)**

20 35. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
21 forth fully herein.

22 36. At all times herein relevant, Provide-Commerce agreed to not disclose its
23 customers' personal and payment information to Encore unless customers affirmatively and
24 knowingly join the EasySaver Rewards program by providing their email address and zip code
25 on Encore's signup page, clicking the green acceptance button, and otherwise enrolling in the
26 EsaySaver Rewards program.

27 37. Provide-Commerce breached this agreement by transmitting Plaintiff Romero's
28 information to Encore even though Plaintiff Romero never completed the signup page, never

1 affirmatively agreed to become a member of the EasySaver Rewards program, and never
2 authorized Provide-Commerce to transmit the information.

3 38. Provide-Commerce also breached this agreement by transmitting Plaintiff Hunt's
4 information to Encore even though Plaintiff Hunt never knowingly or intentionally enrolled in
5 the EasySaver Rewards program, and never authorized Provide-Commerce to transmit her
6 information to Encore.

7 39. To the extent Provide-Commerce's website contains terms that allow it to transfer
8 its customers' personal and payment information to Encore absent informed consent to enroll in
9 the EasySaver Reward program, those terms are unconscionable and thus unenforceable.

10 40. As a direct and proximate result of defendant's aforementioned conduct, Plaintiffs
11 and the Class have been damaged in a sum to be proven at trial.

12 **SECOND CAUSE OF ACTION**
13 **(For Breach of Contract Against Defendants Regents Group, Inc. and**
14 **Encore Marketing International, Inc.)**

15 41. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
16 forth fully herein.

17 42. At all times herein relevant, Encore agreed to not obtain customers' personal and
18 payment information from Provide-Commerce or to bill them any fees or to otherwise enroll
19 them in the purported EasySaver Rewards program unless customers affirmatively and
20 knowingly join the EasySaver Rewards program by providing their email address and zip code
21 on Encore's signup page, and clicking the green acceptance button in agreement.

22 43. Encore breached this agreement by obtaining Plaintiff Romero's personal and
23 payment information from Provide-Commerce, billing activation fees and monthly fees to his
24 debit card, and otherwise purportedly enrolling him in the EasySaver Rewards program even
25 though Plaintiff Romero never completed the signup page, never affirmatively agreed to become
26 a member of the EasySaver Rewards program, and never authorized Provide-Commerce to
27 transmit the information.

28 44. Encore also breached this agreement by obtaining Plaintiff Hunt's information
from Provide-Commerce, billing activation fees and monthly fees to her debit card, and

1 otherwise purportedly enrolling her in the EasySaver Rewards program even though Plaintiff
2 Hunt never knowingly or intentionally agreed to become a member of the EasySaver Rewards
3 program, and never authorized Encore to have access to any of her information, particularly her
4 debit-card information.

5 45. Plaintiffs contend that they never entered into a valid contract with Encore
6 because they never knowingly consented to sign up for their rewards program. Alternatively,
7 Plaintiffs contend that Encore breached the purported contract by failing to provide any
8 meaningful consideration, by failing to provide any notice that Plaintiffs had been enrolled in the
9 program, and by violating the implied covenant of good faith and fair dealings. Encore took
10 affirmative steps to hide the fact that Plaintiffs has been enrolled in the rewards program so that
11 it could continue to bill Plaintiffs' debit cards for as long as possible without their knowledge,
12 and without providing them with any meaningful benefits.

13 46. To the extent Encore's website contains terms that allows it, among other things,
14 to bill activation fees and monthly fees to Plaintiffs debit cards without obtaining authorization
15 or informed consent and without providing any meaningful benefit in return, those terms are
16 unconscionable and thus unenforceable.

17 47. As a direct and proximate result of defendants' aforementioned conduct, Plaintiffs
18 and the Class have been damaged in a sum to be proven at trial.

19 **THIRD CAUSE OF ACTION**
20 **(For Breach of the Implied Covenant of Good Faith and Fair Dealing**
21 **Against Defendant Provide-Commerce)**

22 48. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
23 forth fully herein.

24 49. At all times herein relevant, Provide-Commerce agreed to act in good faith and
25 deal fairly with Plaintiffs and the Class when it: instituted a policy not to disclose its customers'
26 personal and payment information to Encore absent customers completing the signup page for
27 the EasySaver Rewards program.

28 50. Provide-Commerce obtained Plaintiffs and the Class' personal and payment
information in connection with processing purchase transactions and thus assumed a special

1 relationship with, and fiduciary obligations to, Plaintiffs and the Class, and agreed to abide by its
2 respective duties.

3 51. Provide-Commerce, however, refused and failed to act in good faith and deal
4 fairly with Plaintiffs and the Class, and breached said obligations by disclosing Plaintiffs and the
5 Class' personal and financial information to Encore, and by utilizing a deceptive practice to
6 intentionally trick its customers into unwittingly signing up for the EasySaver Reward Program.

7 52. Lacking a reasonable basis for doing so, and with full knowledge and/or
8 conscious disregard of the consequences, Provide-Commerce failed to protect and maintain
9 Plaintiffs and the Class' personal and payment information in violation of Provide-Commerce's
10 own policy and California law.

11 53. Provide-Commerce engaged, and continues to engage, in a course of conduct to
12 further its own economic interests and in violation of its own policy.

13 54. Because Provide-Commerce continues to engage in the above acts, Provide-
14 Commerce's actions constitute a continuing tort and continuing bad faith to Plaintiffs and the
15 Class, causing them to suffer continuing damages.

16 55. As a direct and proximate result of Provide-Commerce's aforementioned conduct,
17 Plaintiffs and the Class have been damaged in a sum to be proven at trial.

18 56. The acts alleged were part of Provide-Commerce's ordinary business practice to
19 increase revenue by facilitating unauthorized charges to Plaintiffs and the Class' credit and debit
20 cards. In doing so, Provide-Commerce acted despicably, willfully, wantonly, oppressively,
21 fraudulently and in conscious disregard of Plaintiffs and the Class' rights.

22 57. Plaintiffs and the Class thus seek exemplary damages in a sum to be set by the
23 jury in an amount sufficient to punish Provide-Commerce and to be certain that it never again
24 perpetrates such evils upon its customers.

25 **FOURTH CAUSE OF ACTION**
26 **(For Breach of Warranty Against All Defendants)**

27 58. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
28 forth fully herein.

1 59. Provide-Commerce represented and warranted that it would not transmit its
2 customers' personal and payment information to Encore without authorization. Plaintiff and the
3 Class relied upon this representation and warranty when deciding whether to purchase
4 merchandise from Provide-Commerce or to disclose their credit and debit card information to
5 Provide-Commerce. Despite its representations and warranties, Provide-Commerce did in fact
6 transmit its customers' personal and payment information under the above mentioned
7 circumstances, and thus breached its warranty obligations.

8 60. Additionally, Provide-Commerce, along with Encore, represented and warranted
9 that the EasySaver Rewards program was legitimate, providing coupons, gift codes, and other
10 savings benefits. To the extent any class member tried to receive their promised coupon or gift
11 code from Provide-Commerce as a "Thank You" gift for shopping at its store or tried to join the
12 EasySaver Rewards program, they relied upon defendants' representations and warranties. The
13 EasySaver Rewards program, however, provides no meaningful benefits, products or services.

14 61. As a direct and proximate result of defendants' breach, Plaintiffs and the Class
15 incurred damages in an amount to be proven at trial.

16 **FIFTH CAUSE OF ACTION**
17 **(For Negligent Misrepresentations Against All Defendants)**

18 62. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
19 forth fully herein.

20 63. Provide-Commerce represented to Plaintiffs and the Class that it would not
21 disclose their personal and payment information to Encore unless authorized to do so. But
22 Provide-Commerce concealed the fact that it intended to transmit Plaintiffs and the Class'
23 information to Encore regardless of whether it had authorization to do so. Provide-Commerce
24 also touted that the EasySaver Rewards programs was legitimate. Furthermore, Provide-
25 Commerce concealed the fact that the EasySaver Rewards program provided no meaningful
26 benefits to its purported members.

27 64. Likewise, Encore represented to Plaintiffs and the Class that it would not obtain
28 their personal and payment information from Provide-Commerce unless authorized to do so. Yet

1 Encore concealed the fact that it obtained Plaintiffs and the Class' information from Provide-
2 Commerce without authorization and that it billed Plaintiffs and the Class' credit and debit cards
3 for savings benefits that were never requested or provided.

4 65. Encore and Provide-Commerce further misrepresented that Plaintiffs could
5 receive a "free" gift simply by providing their email address and zip code. Hidden in an entirely
6 separate area on the website are deceptive terms and conditions stating that Plaintiffs would be
7 billed for enrolling in the reward program. Encore and Provide-Commerce knew, or reasonably
8 should have known that Plaintiffs would likely not see the hidden terms and conditions, and that
9 Plaintiff Hunt would not have provided her email and zip code if she knew Encore would
10 thereafter begin billing her debit card. Encore and Provide-Commerce further concealed the
11 terms and conditions and Plaintiffs' "enrollment" in the program by not providing any
12 confirmation of "enrollment" either at the time of enrollment or in a subsequent email
13 notification, and by intentionally not requesting Plaintiffs' debit card information at the time of
14 enrollment. Encore and Provide-Commerce knew that Plaintiffs would not provide their debit
15 card information or intentionally enroll in the rewards program if Encore requested Plaintiffs'
16 debit card information. So Provide-Commerce deceptively transmitted Plaintiffs' debit card
17 information to Encore without Plaintiffs' knowledge or consent.

18 66. Defendants' conduct resulted in Plaintiffs and the Class to suffer unauthorized
19 billings to their credit and debit cards for savings benefits that were never requested or provided.

20 67. Defendants' representations were false, and their omissions were material.

21 68. Defendants had no reasonable grounds for believing the representations set forth
22 above to be true and for not being aware of the material omissions.

23 69. At the time of defendants' representations and omissions, Plaintiffs and the Class
24 were ignorant of the representations' falsity and were ignorant of the omitted and/or concealed
25 facts. In reliance on these representations and without the benefit of the material omissions,
26 Plaintiffs and the Class were damaged by unauthorized billings to their credit and debit cards.
27 Had Plaintiffs and the Class known the actual facts, they would have not purchased merchandise
28 from Provide-Commerce.

1 70. Reliance on defendants' representations and omissions was justified because
2 Plaintiffs and the Class had no reason to believe that unauthorized billings were going to be
3 made to their credit and debit cards.

4 71. Plaintiffs and the Class have been damaged by defendants' negligent
5 misrepresentations in an amount to be proven at trial.

6 **SIXTH CAUSE OF ACTION**
7 **(For Common Law Fraud and Fraud in Violation of Cal. Civ. Code §§ 1709, 1710**
8 **Against All Defendants)**

9 72. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
10 forth fully herein.

11 73. Common law fraud is the making of a knowingly false representation with intent
12 to deceive or induce reliance that causes justifiable reliance and resulting damages. And
13 California Civil Code section 1710 defines deceit/fraud as either: (1) the suggestion, as a fact, of
14 that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of
15 that which is not true, by one who has no reasonable ground for believing it to be true; (3) the
16 suppression of a fact, by one who is bound to disclose it, or who gives information of other facts
17 which are likely to mislead for want of communication of that fact; or (4) a promise, made
18 without any intention of performing it.

19 74. Provide-Commerce represents through its policy that it will not transmit Plaintiffs
20 and the Class' personal and payment information absent authorization. Provide-Commerce
21 publishes their policy with the intent to induce Plaintiffs and the Class to purchase merchandise
22 from Provide-Commerce under the guise that Provide-Commerce will protect their information.
23 But in actuality, Provide-Commerce transmits the information to its partner Encore who then
24 makes unauthorized billings to Plaintiffs and the Class' credit and debit cards under the guise
25 that Plaintiffs and the Class enrolled in the EasySaver Rewards program, which they did not do.

26 75. Likewise, Encore represented that it would only obtain Plaintiffs and the Class'
27 personal and payment information from Provide-Commerce if Plaintiffs and the Class
28 affirmatively agreed to enroll in the EasySaver Rewards program by providing their email
address and zip code. Encore also represented that Plaintiffs and the Class would only be billed

1 for EasySaver activation and membership fees if they enrolled in the program by providing their
2 email address and zip code. In reality, Encore obtained Plaintiffs and the Class personal and
3 payment information from its partner, Provide-Commerce, without authorization; and billed
4 Plaintiffs and the Class' credit and debit cards without authorization.

5 76. Further, Encore, together with Provide-Commerce, touted the EasySaver Rewards
6 program as a legitimate savings club that provided coupons, gift cards, and other savings benefits
7 to its members. To the contrary, the EasySaver Rewards program was nothing more than a sham
8 that provided no meaningful benefits, products or services to its members.

9 77. Encore and Provide-Commerce further misrepresented that Plaintiffs could
10 receive a "free" gift simply by providing their email address and zip code. Hidden in an entirely
11 separate area on the website are deceptive terms and conditions stating that Plaintiffs would be
12 billed for enrolling in the reward program. Encore and Provide-Commerce knew, of reasonably
13 should have known that Plaintiffs would likely not see the hidden terms and conditions, and that
14 Plaintiff Hunt would not have provided her email and zip code if she knew Encore would
15 thereafter begin billing her debit card. Encore and Provide-Commerce further concealed the
16 terms and conditions and Plaintiffs' "enrollment" in the program by not providing any
17 confirmation of "enrollment" either at the time of enrollment or in a subsequent email
18 notification, and by intentionally not requesting Plaintiffs' debit card information at the time of
19 enrollment. Encore and Provide-Commerce knew that Plaintiffs would not provide their debit
20 card information or intentionally enroll in the rewards program if Encore requested Plaintiffs'
21 debit card information. So Provide-Commerce deceptively transmitted Plaintiffs' debit card
22 information to Encore without Plaintiffs' knowledge or consent.

23 78. Plaintiffs and the Class relied on Defendants' representations and were damaged
24 because unauthorized billings were made to their credit and debit cards. Further, Plaintiffs and
25 the Class received no benefits, services or products from the EasySaver Rewards program.
26 Defendants thus reaped unearned financial gains the unauthorized billings to Plaintiffs and the
27 Class' credit and debit cards, and from the EasySaver Rewards activation fees and membership
28 dues. This conduct is unjust and unlawful and thus violates California Civil Code section 1710.

1 79. As a proximate result of Defendants' fraud, Plaintiffs and the Class have been
2 damaged in an amount that was improperly billed to their credit and debit cards and all other
3 resulting damages. This amount will be proven at trial.

4 80. Plaintiffs and the Class are further informed and believe that defendants' conduct
5 as was motivated by malice, fraud, and oppression, and was done in conscious disregard of
6 Plaintiffs' rights. Punitive damages should be assessed against defendants in an amount that
7 would punish and deter defendants from further engaging in fraud.

8 **SEVENTH CAUSE OF ACTION**
9 **(For Violations of the Consumers Legal Remedies Act**
10 **California Civil Code section 1750 *et seq.* Against All Defendants)**

11 81. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
12 forth fully herein.

13 82. California Civil Code section 1770(a) provides that it is unlawful to use unfair
14 methods of competition and unfair or deceptive acts or practices in a transaction intended to
15 result or which results in the sale or lease of goods or services to any consumer.

16 83. Defendants have specifically violated California Civil Code section 1770(a) by,
17 among other things:

- 18 a. Misrepresenting the affiliation, connection, or association with, or certification
19 by, another, in violation of California Civil Code section 1770(a)(3);
- 20 b. Representing that goods or services have sponsorship, approval, characteristics,
21 ingredients, uses, benefits, or quantities which they do not have or that a person
22 has a sponsorship, approval, status, affiliation, or connection which he or she does
23 not have, in violation of California Civil Code section 1770(a)(5);
- 24 c. Advertising goods or services with intent not to sell them as advertised, in
25 violation of California Civil Code section 1770(a)(9);
- 26 d. Making false or misleading statements of fact concerning reasons for, existence
27 of, or amounts of price reductions, in violation of California Civil Code section
28 1770(a)(13);
- e. Representing that a transaction confers or involves rights remedies, or obligations

1 which it does not have or involve, or which are prohibited by law in violation of
2 California Civil Code section 1770(a)(14);

3 f. Representing that the consumer will receive a rebate, discount, or other economic
4 benefit, if the earning of the benefit is contingent on an event to occur subsequent
5 to the consummation of the transaction, in violation of California Civil Code
6 section 1770(a)(17); and

7 g. Inserting an unconscionable provision in the contract, in violation of California
8 Civil Code section 1770(a)(19).

9 84. As a direct and proximate result of Defendants' violations of the CLRA as alleged
10 herein, Plaintiffs and Class have been injured by, including but not limited to, the following:

11 a. The infringement of their legal rights as a result of being subjected to the common
12 course of fraudulent conduct alleged herein;

13 b. Being induced by Defendants utilizing a deceptive practice to intentionally trick
14 its customers into unwittingly signing up for the EasySaver Reward Program; and

15 c. Unknowingly being subjected to fraud and deceit as a result of Defendants'
16 conduct.

17 85. Plaintiffs seek an order enjoining the above-described wrongful acts and practices
18 of Defendants.

19 86. Defendants' acts, statements, representations, policies and procedures as
20 described herein were knowingly deceptive and were made with conscious disregard of the rights
21 and well-being of consumers. Accordingly, Defendants engaged in acts of fraud, malice, or
22 oppression and in conscious disregard of the rights and well-being of Plaintiffs and the Class.

23 **EIGHTH CAUSE OF ACTION**
24 **(For Unlawful Business Practices in Violation of Cal. Bus. & Prof. Code § 17200, et seq.**
25 **Against All Defendants)**

26 87. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
27 forth fully herein.

28 88. The Unfair Practices Act defines unfair competition to include any unfair,
unlawful or fraudulent business act or practice. Unlawful business acts are those which are in

1 violation of federal, state, county, or municipal statutes or codes, as well as federal and state
2 regulations.

3 89. Defendants' acts, practices, misrepresentations and omissions as herein alleged
4 are unlawful and violate the laws and statutes alleged herein, and thus amount to unfair
5 competition as set forth in California Business and Professions Code section 17200. Plaintiffs
6 and the Class suffered an injury in fact and have lost money by, among other things, suffering
7 unauthorized transmission of their personal and payment information and unauthorized billings
8 to their credit and debit cards.

9 90. To the extent Provide-Commerce's website contained terms that allowed it to
10 transfer its customers personal and payment information to Encore absent affirmative and
11 informed authorization, those terms are unconscionable and thus unenforceable. And to the
12 extent Defendant Encore's website contained terms that allowed it to charge activation fees and
13 monthly fees associated with customers purportedly enrolling or participating in the EasySaver
14 Rewards program, those terms are likewise unconscionable and thus unenforceable. As
15 discussed above, the EasySaver Rewards program is a scam because it does not provide any
16 meaningful coupons, gift codes, or other savings benefits.

17 91. Defendants' conduct constitutes a fraudulent and unfair business practice because
18 its practice is likely to mislead Plaintiffs, the Class, and the general public. Defendants do so by
19 deceiving and leading them to believe, among other things, that their personal and payment
20 information will be protect from unauthorized disclosures, that their credit and debit cards will
21 not be billed absent authorization, and that the EasySaver Rewards program offers legitimate
22 savings benefits to its members.

23 92. Defendants' unlawful, unfair, and fraudulent business practices, as described
24 herein, present a continuing threat to Plaintiffs, the Class, and the general public in that
25 Defendants continue to wrongfully tout the sham EasySaver Rewards program as a legitimate
26 savings program, continue to mishandle class members' personal and payment information, and
27 continue to bill class members' credit and debit cards without authorization. In addition,
28 defendants have been unjustly enriched as a result of its conduct. Plaintiffs and the Class seek

1 equitable relief because they have no other adequate remedy at law. Absent equitable relief,
2 Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the
3 public's interest, thus engendering a multiplicity of judicial proceedings.

4 93. Plaintiffs and the Class request that this Court issue preliminary and permanent
5 injunctions against such acts and practices. Additionally, Plaintiffs and the Class seek restitution
6 and recovery of attorneys' fees and litigation expenses pursuant to California Code of Civil
7 Procedure section 1021.5, the substantial benefit doctrine, the common fund doctrine or other
8 authority requiring Defendants to pay Plaintiffs' attorneys' fees and litigation expenses.

9 **NINTH CAUSE OF ACTION**
10 **(For False Advertising in Violation of Cal. Bus. & Prof. Code § 17500, et seq.**
Against All Defendants)

11 94. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
12 forth fully herein.

13 95. The Unfair Practices Act defines false advertising to include the making or
14 dissemination of any statements concerning property or services that are untrue or misleading,
15 and which are known, or should have been known, to be untrue or misleading.

16 96. Defendants' acts, practices, misrepresentations and omissions as herein alleged
17 are unlawful and amount to false advertising as set forth in California Business and Professions
18 Code section 17500. Defendants Provide-Commerce's policy, and its actions and inactions
19 during purchase transactions, likely mislead Plaintiffs, the Class, and the general public to
20 believe that their personal and payment information would not be misused or improperly
21 disclosed. Plaintiffs and the Class suffered an injury in fact by, among other things,
22 unauthorized billings to their credit and debit cards.

23 97. Defendants' conduct constitutes fraudulent and false advertising because its
24 practice is likely to mislead Plaintiffs, the Class, and the general public. Defendants do so by
25 deceiving and leading them to believe, among other things, that their personal and payment
26 information would not be misused or improperly disclosed.

27 98. Defendants' unlawful false advertising, as described herein, present a continuing
28 threat to Plaintiffs, the Class, and the general public because defendants: continue to wrongfully

1 tout the sham EasySaver Rewards program as a legitimate savings program; continue to
2 mishandle class members' personal and payment information; and continue to bill Class
3 members' credit and debit cards without authorization. In addition, defendants have been
4 unjustly enriched by their conduct. Plaintiffs, the Class, and the general public seek equitable
5 relief because they have no other adequate remedy at law. Absent equitable relief, defendants
6 are likely to continue to injure customers, reap unjust enrichment, and harm the public's interest,
7 thus engendering a multiplicity of judicial proceedings.

8 99. Plaintiffs and the Class request that this Court issue preliminary and permanent
9 injunctions against such acts and practices. Additionally, Plaintiffs and the Class seek restitution
10 and recovery of attorneys' fees and litigation expenses pursuant to California Code of Civil
11 Procedure section 1021.5, the substantial benefit doctrine, the common fund doctrine or other
12 authority requiring defendants to pay Plaintiffs' attorneys' fees and litigation expenses.

13 **TENTH CAUSE OF ACTION**
14 **(For Conversion Against All Defendants)**

15 100. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
16 forth fully herein.

17 101. Defendants together touted the sham EasySaver Rewards program as legitimate
18 and then used the program as an excuse to bill Plaintiffs and the Class' credit and debit cards
19 without authorization. Defendants converted the funds they fraudulently obtained from Plaintiff
20 and the Class for their own use.

21 102. As a result of this conversion, Plaintiffs and the Class are entitled to damages in
22 an amount sufficient to compensate them for their losses. These losses include the amount
23 Defendants were unjustly enriched by the unauthorized billings and interest in amount to be
24 proven at trial.

25 103. Defendants' acts were willful, wanton, malicious and oppressive, were undertaken
26 with the intent to defraud, and justify the awarding of exemplary and punitive damages.

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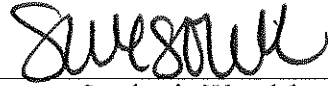
- I. For costs of the suit;
- J. For prejudgment interest at the legal rate; and
- K. For such other relief as the Court may deem proper.

Dated: October 16, 2009

HARRISON PATTERSON & O'CONNOR LLP

By: /s/ James R. Patterson
James R. Patterson
Alisa A. Martin
Attorneys for Plaintiffs and the Class

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct. Executed on October 16, 2009.

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