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FILED (5)
FEB 16 2011
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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 *Attorneys for Plaintiffs and the Class*

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

CV11 0729

15 **DANIEL COX and BRADLEY**
16 **BERENTSON, on behalf of themselves and**
17 **all others similarly situated,**

18 **Plaintiffs,**

19 **vs.**

20 **CLARUS MARKETING GROUP, LLC., a**
21 **Connecticut corporation; PROVIDE-**
22 **COMMERCE, INC., a Delaware**
23 **corporation; DOES 1 through 50, inclusive,**

24 **Defendants.**

- CASE NO.: _____
CLASS ACTION COMPLAINT FOR:
1. VIOL. OF ELEC. FUNDS TRANS. ACT
2. VIOL. OF ELEC. COMMUN. PRIV. ACT
3. CIVIL THEFT
4.-5. COMMON LAW NEGLIGENCE
6.-7. UNJUST ENRICHMENT
8.-9. FRAUD
10.-11. VIOL. OF UNFAIR BUSINESS PRAC. ACT
12. VIOL. OF CONST. RIGHT TO PRIVACY
13. UNLAWFUL INTRUSION

[JURY TRIAL DEMANDED]

24
25 Plaintiffs Daniel Cox and Bradley Berentson, on behalf of themselves and all others
26 similarly situated, allege upon personal knowledge, information and belief as follows:

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28 ///

1 **I. DEFENDANTS ADVERTISE A 'FREE' DISCOUNT AND THEN SLIP IN A**
2 **MONTHLY CHARGE FOR A MEMBERSHIP PROGRAM THAT WAS NOT**
3 **AUTHORIZED**

4 1. Plaintiffs Cox and Berentson bring this class action against defendants Clarus
5 Marketing Group, LLC ("CMG") and Provide-Commerce, Inc. ("Provide-Commerce") (together,
6 "Defendants") for unlawfully using their and absent class members' payment information to
7 generate remarkable monthly profits. The scam is simple: Plaintiffs and class members were
8 shopping at one of the many websites owned and operated by Provide-Commerce. As they were
9 completing their online purchases, Defendants provided them with an advertisement offering
10 them "Free Shipping" on this and 12 future transactions. By merely clicking on that ad – they
11 did not even have to accept the offer -- Plaintiffs and the Class unwittingly agreed to join a
12 membership program operated by CMG that costs around \$9.00 to \$15.00 per month.

13 2. This is no mistake or coincidence and has happened to thousands of people across
14 the country. CMG and Provide-Commerce have entered into an agreement whereby CMG is
15 given the capability to manipulate Provide-Commerce's website for the purpose of soliciting
16 Provide-Commerce's customers. This requires technological as well as logistical coordination of
17 their efforts. CMG and Provide-Commerce split the spoils – CMG pays Provide-Commerce
18 bounties on each "acquisition" -- as well as certain commissions. Both have made millions in
19 the process.

20 3. Plaintiffs are victims of this scam, as are thousands of Class members. They
21 never agreed to the subscription. How could they? They were told that this was a "Free
22 Shipping" offer as an inducement to shopping with Provide-Commerce. But it was not free at
23 all. The reality is that the true terms of the "free" shipping offer were purposefully obscured on
24 the operative pages. There was no indication whatsoever at any time during the transaction that
25 repeat billing was part of the deal. Plaintiffs and the Class reasonably interpreted Defendants'
26 offer to be a reward for shopping this time around plus an inducement to come back and shop
27 again later. That is how coupons work.

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1 4. The key to the scam is that Plaintiffs and the Class were not even required to enter
2 their credit card or debit card numbers, or billing information to enroll in CMG's membership
3 club. Rather, Provide-Commerce provides this information directly to CMG under the guise that
4 Plaintiffs and the Class authorized this to happen. Defendants directed Plaintiffs and the Class to
5 enter innocuous information such as an email address and zip code to create a pretext to charge
6 their debit and credit cards based on the silly claim that Plaintiffs and the Class could lawfully
7 "authorize" Provide-Commerce to pass their billing information to CMG, and "authorize" CMG
8 to begin billing their cards based solely on the provision of an email address or zip code. In
9 reality, Defendants know that consumers will not take the time to carefully read through the
10 misleading WebPages and disclosures that Defendants intentionally designed to mislead them if
11 all consumers have to do is enter their email addresses. Why would they? An email address is
12 relatively harmless means of contact that is generally freely exchanged and provided. It certainly
13 is not a signature, mark of acceptance, or in any way related to credit card billing or payment
14 information.

15 5. Defendants' scam is akin to a person walking into a retail store and being offered
16 a coupon to use in the store in exchange for providing his or her email address on a form. And
17 then having his or her credit or debit card information subsequently forwarded by the store to the
18 person standing outside with the form, who incidentally was wearing the store uniform, and
19 charged repeatedly by that person, based on the fact that somewhere on the form (and perhaps
20 even on the back or the second page) there was a disclosure that the customer was "authorizing"
21 this to happen. Nobody would contend that this is an acceptable business practice. Rather, the
22 person making the unauthorized charges and the store employee sharing the billing information
23 would be in jail! Defendants are doing the exact same thing, and likewise claiming that their
24 unsuspecting victims are to blame because they should have read all the disclosures before
25 providing their email addresses to "enroll" in the rewards program. But just as the shopper
26 walking into a store has no reason (and likely no time) to read a solicitor's forms before
27 providing his or her email address, Plaintiffs and the thousands of putative class members had no
28 reason, and most importantly, no obligation to read Defendants' form "enrollment" page before

1 providing their email addresses. Consumers simply have no reason to believe that they could
2 "authorize" someone to charge their credit or debit cards merely by giving out their email
3 address. And, in fact, they cannot.

4 6. Plaintiffs and the Class allege state and federal causes of action on behalf of
5 themselves and various classes of injured consumers. They seek an end to the practice, as well
6 as to recover their damages, restitution, punitive damages and attorneys' fees. In a word, they
7 seek justice.

8 **II. JURISDICTION AND VENUE**

9 7. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal
10 question), 15 U.S.C. § 1693m(g)(EFTA) and 18 U.S.C. §§2510, *et seq.* (ECPA). This Court has
11 supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

12 8. Pursuant to 28 U.S.C. § 1391(b), this Court is the proper venue for this action
13 because this Court has personal jurisdiction over the Defendants under 28 U.S.C. § 1391(c), and
14 a substantial amount of the events giving rise to the claim occurred in this District.

15 **III. THE PARTIES**

16 9. Plaintiff Daniel Cox is an individual who at all times mentioned herein resided,
17 and continues to reside, in Alameda County, California.

18 10. Plaintiff Bradley Berentson is an individual who at all times mentioned herein
19 resided, and continues to reside, in Omaha, Nebraska.

20 11. Defendant Provide-Commerce is a Delaware corporation with a principal place of
21 business located at 4840 Eastgate Mall, San Diego, California 92121. Provide-Commerce is an
22 e-commerce company that operates at least five online stores: RedEnvelope, ProFlowers, Cherry
23 Moon Farms, Secret Spoon, and Shari's Berries. At all times relevant to this dispute, Provide-
24 Commerce's principal place of business was California, it actively solicited and engaged in
25 business and commerce in this jurisdiction, all significant decision-making with respect to the
26 conduct alleged herein occurred in California, and it committed torts in this jurisdiction the
27 impacts of which were felt in this jurisdiction, directly and through its aiding and abetting of, and
28 conspiracy with, CMG in committing the acts complained of herein. Provide-Commerce's terms

1 and conditions of use published on its website contain a choice of law clause selecting California
2 law for any legal action “regardless of conflict of law principles”.

3 12. Defendant CMG is a Connecticut corporation with its principal place of business
4 at 449 Silas Deane Hwy., Wethersfield, Connecticut 06109. At all times relevant to this dispute,
5 CMG actively solicited and engaged in business and commerce in this jurisdiction, and
6 committed torts in this jurisdiction the impacts of which were felt in this jurisdiction. CMG
7 engaged in commerce and committed torts in this jurisdiction directly and through its aiding and
8 abetting of, and conspiracy with, Provide-Commerce in committing the acts complained of
9 herein. CMG’s membership agreements contain a provision indicating that Connecticut law
10 governs membership disputes and that nothing in the agreements will deprive anyone of the
11 benefits of their own state’s consumer protection laws.

12 13. Plaintiffs and the Class are ignorant about the true names of defendants sued as
13 DOES 1 through 50, inclusive, and their wrongful conduct, and therefore sue these defendants by
14 fictitious names. Plaintiffs and the Class will seek court leave to amend this complaint to allege
15 their true names and capacities when ascertained. Plaintiffs and the Class allege on information
16 and belief that at all relevant times, DOES 1-50, inclusive, were agents, servants, employees,
17 representatives, partners, and related or affiliated entities of defendants, and in doing the things
18 hereinafter mentioned, were acting in the course and scope of their agency, employment, or
19 retention with defendants’ permission, consent, authority and ratification.

20 **IV. FACTUAL BACKGROUND**

21 **Plaintiffs’ Experiences with FreeShipping.com Insiders-Club**

22 14. Plaintiff Cox purchased flowers from Provide-Commerce’s website,
23 ProFlowers.com, using his debit card. After inputting his payment information, and just before
24 he clicked on the transaction button, Provide-Commerce’s website generated an ad for free
25 shipping for this and 12 future transactions. Plaintiff Cox clicked to receive free shipping on his
26 purchase and to complete his purchase transaction. He was never requested to input any new
27 information, not even his payment information. Plaintiff Cox never believed he had joined any
28 type of membership program, including FreeShipping.com Insiders-Club and never intended to

1 do so.

2 15. A few months ago, Plaintiff Cox discovered unauthorized charges of \$8.97 each
3 month to his debit card by CMG. After closely examining his previous debit card statements, he
4 discovered that CMG had been charging his debit card for numerous months. When Plaintiff
5 Cox's debit card is charged, the money is immediately and directly withdrawn from his bank
6 account. He was surprised to see the charges since he never intended to join any membership
7 program or authorized Provide-Commerce to share access to his information with CMG.

8 16. Plaintiff Berentson likewise purchased merchandise from Provide-Commerce's
9 website, RedEnvelope.com, using his credit card. After inputting his payment information, and
10 just before he clicked on the transaction button, Provide-Commerce's website generated an ad
11 for free shipping for this and 12 future transactions. Plaintiff Cox clicked to receive free
12 shipping on his purchase and to complete his purchase transaction. He was never requested to
13 input any new information, not even his payment information. Plaintiff Berentson never
14 believed he had joined any type of membership program, including FreeShipping.com Insiders-
15 Club and never intended to do so.

16 17. Recently Plaintiff Berentson discovered unauthorized charges of \$14.95 to his
17 credit card by CMG. After closely examining his previous credit card statements, he discovered
18 that CMG had been charging his credit card for several months. He was surprised to discover the
19 charges since he never intended to join any membership program or authorized Provide-
20 Commerce to share access to his information with to CMG.

21 18. On information and belief, Plaintiffs are not alone: there are thousands just like
22 them.

23 19. In sum, Plaintiffs and the Class never intended to enroll in the FreeShipping.com
24 Insiders-Club program or in any other program for that matter. Defendants' scheme was
25 intentionally designed to "enroll" consumers into the Insiders-Club without their knowledge.
26 Plaintiffs and the Class were deceptively tricked into providing certain innocuous information or
27 clicking on certain links so Provide-Commerce could claim that it had authorization to transmit
28 to CMG (or allow CMG to intercept) their debit and credit card information, and so CMG could

1 claim that it had authorization to bill Plaintiffs and the Class' debit and credit cards. All the
2 while, Provide-Commerce and CMG had actual knowledge that Plaintiffs and the Class did not
3 intend to enroll in any paid membership club. And Defendants further knew, or reasonably
4 should have known, that Plaintiffs and the Class could not lawfully authorize the transfer of their
5 billing information, or charges to their debit and credit cards, merely by providing their email
6 addresses and/or zip codes.

7 **Defendants' Deceptive Sales Practices**

8 20. CMG and Provide-Commerce created a nefarious scheme to trick visitors to
9 Provide-Commerce's websites into enrolling in CMG's monthly programs. Provide-Commerce
10 received commissions, "kickbacks" and "bounties" to reward its participation.

11 21. Just like every other Class member, Plaintiffs were making a purchase on a
12 Provide-Commerce website (Proflowers.com and RedEnvelope.com). Just as they had provided
13 their debit and credit card information to Provide-Commerce, an advertisement appeared on
14 Plaintiffs' computer screen offering free shipping on the purchase and on future purchases.
15 When Plaintiffs clicked on a link to redeem the Free Shipping offer, they were redirected to an
16 ad-page that directed them to enter their email address and zip code to redeem the offer. For
17 instance, Plaintiff Cox was directed to an ad-page that stated:

18 **Exclusive OFFER ProFlowers® Get Free Shipping on THIS order!
19 PLUS, Free Shipping Rebates On 12 Future Proflowers® Orders!
20 One-Time Offer. Please Confirm Your Email And Zip Code As Your
21 Electronic Signature To Activate Your Benefits.**

21 Plaintiff Berentson encountered a similar ad-page.

22 22. There was no obvious indication that the electronic signature was for "benefits"
23 other than "Free Shipping on THIS order! PLUS, Free Shipping Rebates On 12 Future
24 Proflowers Orders" or RedEnvelope Orders. And there was no reason to believe that Plaintiffs
25 were in any danger whatsoever of accidentally signing up for some paid membership.
26 Consumers justifiably rely on the correct assumption that they cannot lawfully authorize
27 someone to begin charging their debit or credit cards merely by providing their email address or
28 zip code. An email address and zip code is not a signature, mark of consent, or in any way

1 associated with credit or debit billing information. It certainly is not a generally known or
2 accepted method to enter into or authorize a payment obligation. An email address is a means of
3 contact that is generally freely provided given its relatively harmless nature. Because an email
4 address and zip code cannot constitute lawful authorization for credit and debit card charges,
5 consumers have no obligation to carefully review Defendants' advertisements - which are
6 otherwise intentionally designed to deceive them - before providing this seemingly innocuous
7 information.

8 23. Plaintiffs were never told that they were no longer on the Proflowers.com and
9 RedEnvelope.com website anymore - or had unknowingly been directed to a CMG interface!
10 They also were never directed to the truth about what was going to happen to their debit and
11 credit card information - that by accepting the free shipping offer, they were unknowingly
12 "authorizing" CMG to begin billing a monthly fee to the debit and credit cards they had provided
13 to Provide-Commerce.

14 24. The hidden "small print" that Defendants claim to justify their nefarious activities,
15 states, for example:

16 Start your NO COST 30-day review period with our compliments
17 and claim the introductory cash-back rebate on your shipping
18 charges, up to \$15.00. If you decide not to continue your
19 FreeShipping.com Insiders-Club membership, simply log on to
20 cancel during your review period. Otherwise, we'll automatically
21 extend Insiders-Club benefits for just \$9.97 per month, billed by
22 FreeShipping.com to the credit card you entered during your
23 ProFlowers purchase. Please note, by signing up and clicking the
"Submit" button, your original Enrollment Details will be stored
on our servers, as will the following information which will be
PGP encrypted and transmitted securely through SSL encryption
from your most recent ProFlowers order to FreeShipping.com to
secure your membership: credit card information; name; billing
address; and order ID number. Your credit card will not be
charged during your NO COST 30-DAY REVIEW PERIOD.

24 This so-called disclosure is intentionally hidden from the consumer. But perhaps most
25 importantly, the disclosure assumes that Plaintiffs could lawfully authorize CMG to begin billing
26 their debit or credit card merely by entering their email and zip code somewhere else, and
27 without ever even providing their debit or credit card number, or billing information to CMG.
28 This is preposterous. Especially considering that Defendants know Plaintiffs and the Class did

1 not want to join CMG's Savings Club or had no idea they were authorizing CMG to begin billing
2 them, and considering that Defendants intentionally designed the enrollment process to enroll
3 Plaintiffs and the Class without this basic knowledge and understanding. Defendants should not
4 now be allowed to complain that Plaintiffs and the Class should have done more to investigate
5 the consequences of providing their email addresses and zip codes.

6 25. Once enrolled, Plaintiffs and the Class are billed monthly until they notice the
7 charges and cancel their memberships. Plaintiffs and the Class received no notice that they had
8 enrolled, and were not provided with a copy of their purported "authorization" for Provide-
9 Commerce to pass their billing information to CMG, and for CMG to begin billing them. The
10 relatively small monthly charges are often hard to detect and show up from an unfamiliar vendor.
11 This often allows Defendants' scam to go undetected for numerous months – even years.

12 **CMG And Provide-Commerce's Acted Jointly**

13 26. CMG paid Provide-Commerce commissions and bounties for each "subscriber"
14 that is ensnared by this deceptive business practice. This "business" model has been extremely
15 lucrative for both Provide-Commerce and CMG. Based on information and belief, Provide-
16 Commerce receives millions upon millions of dollars each year in payments from CMG, and
17 CMG generates tens of millions in revenue from unsuspecting consumers.

18 27. CMG intentionally designed its web strategy to infiltrate the interaction between
19 Provide-Commerce and its customers, to exploit the latter's ingrained habits and widely shared
20 assumptions about the usual steps involved in online shopping transactions.

21 28. Defendants made every effort to ensure that the Plaintiffs and the Class were
22 never alerted to the fact that they might be entering into a second transaction. Defendants made
23 sure that Plaintiffs and the Class were at most entering one or two pieces of benign information
24 under the mistaken assumption that they were cashing in on a "point of purchase" coupon that
25 also invited them to shop later on and get the same discount of future shipping. Defendants
26 intentionally and knowingly avoided requiring consumers to re-enter their credit or debit card
27 information as a condition of enrollment, which in turn ensured that Plaintiffs and the Class
28 would never be alerted to the fact that they were actually going to have to *pay* for this "free"

1 shipping offer that popped up.

2 29. Harvard Business School Professor, Benjamin Edelman stated, in connection with
3 a major U.S. Senate investigation of these very practices, that consumers routinely and habitually
4 rely on the request of complete billing information as notice that they may incur financial
5 obligations:

6 Consumers rely on the process of providing a credit card number
7 as a barrier to unexpected charges. Users rightly expect that by
8 clicking from site to site, button to button, they do not incur
9 financial obligation. This expectation is part of what makes the
10 web fun, flexible, and low-risk: Users believe they cannot incur
11 financial obligations except by typing their credit card numbers,
12 and users expect to be able to cancel an unwanted transaction if a
13 site requests a credit card number that a user does not care to
14 provide.

15 30. Provide-Commerce and CMG jointly implemented their scheme. Provide-
16 Commerce deceptively lured customers to its site to purchase goods and service it offered.
17 Provide-Commerce then gave CMG the access and capability of exacting its scam on Plaintiffs
18 and the Class. Through sleight of hand, CMG was able to obtain Plaintiffs and the Class'
19 confidential credit card, debit card and other private information necessary to extract money,
20 which generated substantial revenue. CMG could not have done it without Provide-Commerce's
21 help.

22 31. Provide-Commerce further acknowledges on its website that FreeShipping.com
23 Insiders-Club is a joint venture between the two companies.

24 **Provide-Commerce Breaks Its Own Rules**

25 32. Provide-Commerce's conduct violated its own published policy:

26 **Personally Identifiable Information:**

27 ...
28 Personally Identifiable Information might include your name, mailing
address, telephone number, mobile phone number, email address, and other
identification and contact information.... We may also collect certain
financial information, like your credit card number... whenever we do so,
we will attempt to provide a link to this Policy so that you can confirm how
this information will be used. With this information, we can fill your service
and product orders and better provide you with personalized services. You
also may have the option of importing information into certain Sites from
third-party software.

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3 Except as otherwise stated in this Policy, we do not sell, trade or rent your
4 Personally Identifiable Information collected on our Sites to others. The
5 information collected by our Sites is used to process orders, to keep you
6 informed about your order status, to notify you of products or special offers
7 that may be of interest to you, and for statistical purposes for improving our
8 Sites. We will disclose your Personally Identifiable Information to third
9 parties for tracking purposes, to charge your credit card (or process your
10 check or money order, as appropriate), fill your order, improve the
11 functionality of our Sites, customize our marketing efforts with you and
12 perform statistical and data analyses, deliver your order and deliver
13 promotional emails to you from us. These third parties may not use your
14 Personally Identifiable Information other than to provide the services
15 requested by us.

16 33. Based on its own policies, Provide-Commerce claims that it will not disclose
17 consumers' confidential billing information absent customers' express agreement. To the extent
18 Provide-Commerce's policy allows it to transmit its consumers' confidential billing information
19 to third parties, the policy suggests that it is only to effectuate the transaction with Provide-
20 Commerce. But, despite its written policy, Provide-Commerce shared access to Plaintiffs and
21 the Class' financial information with CMG. To the extent Provide-Commerce wanted to disclose
22 that it would maintain CMG's programs, its terms are unconscionable.

23 34. Due to Defendants' deceptive business practices, Plaintiffs and the Class thought
24 that they were completing their purchase transaction on Provide-Commerce's websites and
25 receiving a free savings offer from Provide-Commerce. Had Plaintiffs and the Class known that
26 they had to pay a monthly membership fee to a third party to receive free shipping on their
27 purchase, they would have ignored the unscrupulous offer.

28 **Numerous Consumers Have Posted Complaints About Defendants' Membership Programs**

35. Plaintiffs' experiences with Defendants mirror those of thousands of other
consumers. In fact, the Internet is replete with consumer complaints about CMG and its
membership programs, which can be found on various consumer protection websites such as
www.ripoffreport.com, and www.complaintsboard.com. These complaints evidence the uniform
nature and application of Defendants' deceptive business practices.

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The United States Senate Committee's Investigation

1
2 36. Because consumer complaints have been so pervasive, in May 2009, Senator John
3 D. Rockefeller IV, Chairman of the U.S. Senate Committee on Commerce, Science, and
4 Transportation launched an investigation into e-commerce marketing practices that generate
5 thousands of monthly charges to consumer credit and debit cards. The investigation focused on
6 three Connecticut-based direct marketing companies with the same business model as CMG, as
7 well as hundreds of online websites and retailers that partner with the companies.

8 37. The Senate Committee issued two reports finding, among other things, that the
9 data pass enrollment process was deceptive and misleading, particularly since "Consumers rely
10 on the process of providing a credit card number as a barrier to unexpected charges." The
11 Committee determined that companies such as CMG utilize a two-step business model: (1) to
12 improperly charge consumers' credit cards for services it knows consumers did not intend to
13 purchase and were not using, and (2) then refund as small a portion of this money as possible
14 after consumers discovered the charges.

15 38. The Committee found the companies such as CMG use "aggressive sales tactics
16 intentionally designed to mislead online shoppers. [It] exploits shoppers' expectations about the
17 online purchasing process to charge millions of consumers each year for services the consumers
18 do not want and do not understand that they have purchased." (Exhibit. 1, Preliminary Report at
19 p. 30, "Conclusion")(emphasis supplied).

20 39. The Senate described the entire process utilized by sham marketing companies
21 such as CMG:

22 These tactics involve selling unfamiliar membership programs to consumers
23 who are in the process of purchasing familiar products offered by trusted
24 websites.... [C]ompanies gain access to online consumers by entering into
25 financial agreements with reputable online websites and retailers. In
26 exchange for "bounties" and other payments, reputable on-line retailers
27 agree to let [the companies] sell club memberships to consumers as they are
28 in the process of buying movie tickets, plane tickets, or other online goods
and services. The sales tactics used by these [companies] exploit
consumers' expectations about the online 'checkout' process.

With the cooperation of their online 'partners,' [companies] insert their
sales offers into the 'post-transaction' phase of an online purchase, after
consumers have made a purchase but before they have completed the sale
confirmation process. These offers generally promise cash back rewards

1 and appear to be related to the transaction the consumer is in the process of
2 completing. Misleading 'Yes' and 'Continue' buttons cause consumers to
3 reasonably think they are completing the original transaction, rather than
entering into a new, ongoing financial relationship with a membership club
operated by [an unrelated third party].

4 Even more misleading and confusing is the 'data pass' process [these
5 companies] and their partners use to automatically transfer consumers'
6 credit or debit card information from the familiar web seller to the third-
7 party membership club. Passing consumers' billing information directly to
8 the [third-party membership club], without requiring consumers to re-enter
9 it, deprives consumers of notice that they are entering a new, ongoing
financial relationship with an unfamiliar company. After a 30-day 'free
trial' period, [the companies] begin charging the consumer a monthly fee of
\$10-\$20 dollars until the consumer cancels the membership. (Exh. 1,
Preliminary Report at i-ii.)

10 40. In its' second and final report, the Senate concluded:

11 "Once they had acquired consumers' billing information and deceptively
12 enrolled consumers in their [] membership clubs, [marketing companies]
13 made money so long as consumers took no action. [They] charged
14 consumers month after month for services the consumers did not use and
15 did not understand that they had purchased. ... This abusive "post-
16 transaction" sales industry was able to flourish because reputable websites
17 were willing to share their customers' billing information ... and because
18 the credit card systems processed millions of unauthorized charges.

16 (Exhibit 2 at p. 20, "Conclusion")(emphasis supplied).

17 **The Data Pass Process Utilized By CMG Violates Credit Card Company Operating Rules And**
18 **Generally Accepted Practices**

19 41. The Senate Committee determined that companies such as CMG are not
20 following credit card processing rules, noting that "the 'data pass' process used by online
21 merchants to enroll consumers in membership clubs appeared to violate both the generally-
22 accepted norms of online commerce and the credit card companies' rules for online
23 transactions." (Exh. 2 at 2)

24 42. American Express, MasterCard, and Visa have long-established rules for
25 merchants who accept their credit cards, and even more specific rules for merchants who charge
26 consumers' credit cards through "card-not-present" transactions, such as online transactions
27 where the merchant does not physically handle the credit card.

28 ///

1 43. In response to the Committee's request for information about these rules,
2 MasterCard and Visa acknowledged that the data pass method utilized by companies such as
3 CMG violated a number of their general rules for merchants or their specific rules for card-not
4 present transactions.

5 44. MasterCard informed the Committee that the targets of the investigation violated
6 MasterCard Rule 5.10.2, which states, "A Merchant must not request or use Card account
7 number or personal Cardholder information for any purpose that it knows or should have known
8 to be fraudulent or in violation of the Standards, or for any purpose that the Cardholder did not
9 authorize." On information and belief, CMG has likewise violated MasterCard's rules.

10 45. Visa informed the Committee that the target companies failed to comply with four
11 different Visa U.S.A. Operating Regulations that require adequate disclosures to cardholders.
12 On information and belief, CMG also has not complied with these Visa operating regulations.

13 46. As determined by the Senate investigation, there is no doubt that Defendants'
14 business model is to improperly charge consumers' credit and debit cards for services it knew
15 consumers did not intend to purchase and were not using, and then refund as small a portion of
16 this money as possible after consumers discovered the charges. CMG and Provide-Commerce
17 are knowingly and intentionally creating consumer confusion with these membership programs
18 and perpetrating a scam.

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

20 47. **The Class.** This lawsuit is brought on behalf of an ascertainable nationwide Class
21 consisting of:

22 All persons residing in the United States who (1) made or attempted to
23 make a purchase on a Provide-Commerce e-commerce site, (2) did not
24 provide their credit card number, debit card number, or billing information
25 directly to Clarus Marketing Group ("CMG"), and (3) had their credit or
26 debit card charged, or bank account debited, by CMG for membership fees
or dues in FreeShipping.com Insiders-Club, Internet Insiders-Club, Movie
Ticket Discounts, Insiders Coupons, or any other membership program
maintained by CMG at any time from four years preceding the filing of this
case until present.

27 48. **The Debit Card Subclass.** This lawsuit is also brought on behalf of an
28 ascertainable nationwide subclass consisting of:

1 All Class Members whose debit cards or bank accounts were charged by
2 CMG.

3 49. **California Subclass:** This lawsuit is also brought on behalf of an ascertainable
4 subclass consisting of:

5 All Class Members that were residents of the State of California at the time
6 that they were enrolled in any CMG membership program and/or had their
7 credit or debit card charged, or bank account debited, by CMG.

8 50. **Excluded from Class and Subclasses:** Excluded from the Class and Subclasses
9 are defendants, their corporate parents, subsidiaries and affiliates, officers and directors, any
10 entity in which defendants have a controlling interest, and the legal representatives, successors or
11 assigns of any such excluded persons or entities, and Plaintiffs' attorneys. Also excluded from
12 the Class and Subclasses are any judges presiding over these proceedings and their immediate
13 family.

14 51. **Numerosity:** The Class and Subclasses members are so numerous that joinder of
15 all members is impracticable. While the exact numbers are unknown to Plaintiffs at this time,
16 Plaintiffs are informed and believe that the Class and each Subclass consists of thousands of
17 individuals. Class members are readily ascertainable through appropriate discovery from records
18 maintained by defendants and their agents.

19 52. **Superiority:** A class action is superior to other available methods for the fair and
20 efficient adjudication of this controversy because joinder of all members is impracticable, the
21 likelihood of individual Class members prosecuting separate claims is remote and individual
22 members do not have a significant interest in individually controlling the prosecution of separate
23 actions. No difficulty will be encountered in this case's management to preclude maintenance as
24 a class action.

25 53. **Common Questions of Law and Fact Predominate:** Questions of law and fact
26 common to the Class predominate over questions affecting only individuals. Among the
27 common questions are:

28 a. whether Class members can lawfully authorize Provide-Commerce to transfer
their credit card or debit card information to CMG merely by providing their email address and

- 1 zip code on an internet form;
- 2 b. whether Class members can lawfully authorize CMG to bill their credit cards
- 3 merely by providing their email and zip code;
- 4 c. whether Defendants conduct violates the rules and terms of use established by
- 5 Credit Card companies such as MasterCard, Visa, and American Express;
- 6 d. whether Class members can lawfully authorize CMG to bill their debit card
- 7 merely by providing their email and zip code;
- 8 e. whether an email and/or zip code on a web page constitutes a "written
- 9 authorization" for purposes of the Electronic Funds Transfer Act ("EFTA");
- 10 f. whether CMG provided Debit Card Subclass members with a copy of their
- 11 purported written authorization to begin charging their debit cards, as required by the EFTA.
- 12 g. whether Class members were enrolled in CMG's membership programs;
- 13 h. whether Class members were deceived;
- 14 i. whether Class members' billing information was obtained CMG without consent;
- 15 j. whether CMG "intercepted" Class members' billing information;
- 16 k. whether CMG charged Plaintiffs and the Class' credit or debit cards without
- 17 consent;
- 18 l. whether defendants engaged in civil theft;
- 19 m. whether defendants engaged in fraud;
- 20 n. whether defendants obtained unjust enrichment;
- 21 o. whether defendants engaged in conversion;
- 22 p. whether defendants engaged in unfair or unlawful business practices;
- 23 q. whether defendants engaged in false advertising;
- 24 r. whether defendants made intentional or negligent misrepresentations;
- 25 s. whether defendants breached its contractual obligations;
- 26 t. whether defendants' contracts, agreements, or policies contained unconscionable
- 27 terms;
- 28 u. whether CMG violated the EFTA;

- 1 v. whether CMG violated the Electronic Communications Privacy Act;
- 2 w. whether Plaintiffs and the Class are entitled to declaratory relief;
- 3 x. whether Plaintiffs and the Class are entitled to injunctive relief; and
- 4 y. whether Plaintiffs and the Class sustained damages and, if so, the proper measure
- 5 of those damages.

6 54. **Typicality:** Plaintiffs' claims are typical of other Class members' claims because
7 they, like every other Class member, were exposed to virtually identical conduct.

8 55. **Adequacy:** Plaintiffs can fairly and adequately represent the Class' interests;
9 they have no conflicts of interest with other Class members, and they have retained counsel
10 competent and experienced in class action and complex civil litigation.

11 **VI. CLAIMS FOR RELIEF**

12 **FIRST CLAIM**

13 **For Violations of the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.***
14 **Brought by Plaintiff Cox and the Debit Card Subclass**
15 **Against CMG**

16 56. Plaintiff Cox refers to and incorporates by reference the above paragraphs as
17 though set forth fully herein.

18 57. The Electronic Funds Transfer Act or EFTA provides a basic framework
19 establishing the rights, liabilities, and responsibilities of participants in an electronic fund
20 transfer system. 15 U.S.C. § 1693. The primary objective of the EFTA "is the provision of
21 individual consumer rights." *Id.*

22 58. Plaintiff Cox and the Debit Card Subclass each maintained an "account" as that
23 term is defined in 15 U.S.C. § 1693a(2), and are "consumers" as that term is defined in 15 U.S.C.
24 § 1693a(5).

25 59. CMG engaged in "unauthorized electronic funds transfers," as that term is defined
26 in 15 U.S.C. § 1693a(11), by debiting the bank accounts of Plaintiff Cox and the Debit Card
27 Subclass without express authorization.

28 60. The EFTA provides that "[a] preauthorized electronic fund transfer from a
consumer's account may be authorized by the consumer only in writing, and copy of such

1 authorization shall be provided to the consumer when made.” 15 U.S.C. § 1693e(a). “In case of
2 preauthorized transfers from a consumer’s account to the same person which may vary in
3 amount...the designated payee shall, prior to each transfer, provide reasonable advance notice to
4 the consumer, in accordance with the regulations of the Board, of the amount to be transferred
5 and the scheduled date of the transfer.” 15 U.S.C. § 1693e(b).

6 61. The EFTA’s implementing regulations, known as Regulation E and codified at 12
7 C.F.R. §§ 205 *et seq.*, provide: “Preauthorization electronic fund transfers from a consumer’s
8 account may be authorized only by a writing signed or similarly authenticated by the consumer.
9 The person that obtains the authorization shall provide a copy to the consumer.” 12 C.F.R. §
10 205.1(d). According to the Official Staff Interpretations (“OSI”) of Regulation E, the EFTA’s
11 requirement that electronic fund transfers “be authorized by the consumer ‘only in writing’
12 cannot be met by a payee’s signing a written authorization on the consumer’s behalf with only an
13 oral authorization from the consumer.” Regulation E, Supp. I, Part 10(b), ¶ 3. When “a third-
14 party payee fails to obtain the authorization in writing or fails to give a copy to the consumer...it
15 is the third-party payee that is in violation of the regulation.” *Id.* at ¶ 2.

16 62. CMG violated the EFTA because it initiated electronic fund transfers from
17 Plaintiff Cox’s account, as well as the Debit Card Subclass’ accounts, without obtaining prior
18 written authorization. Neither an email address, nor a zip code constitutes a “written
19 authorization” or a “writing signed or similarly authenticated” for purposes of the EFTA.

20 63. CMG also violated the EFTA because it initiated electronic fund transfers from
21 Plaintiff Cox’s account, as well as the Debit Card Subclass’s accounts, without providing
22 Plaintiff Cox or the Debit Card Subclass with copies of their written authorizations or providing
23 reasonable advance notice of the amount to be transferred and the scheduled date of the transfer.
24 On information and belief, CMG does not even obtain or keep a copy of the completed forms
25 bearing Plaintiff Cox’ and the Class’ supposed written authorizations. And CMG certainly did
26 not provide Plaintiff Cox and the Class with copies of these completed forms.

27 64. Under 15 U.S.C. § 1693m, Plaintiff Cox and the Debit Card Subclass seek
28 damages, statutory damages, costs of suit, including reasonable attorneys’ fees, and such other

1 further relief as the Court deems appropriate.

2 **SECOND CLAIM**
3 **For Violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2510**
4 **Brought by Plaintiffs and the Class**
5 **Against CMG**

6 65. Plaintiffs refer to and incorporate by reference the above paragraphs as though set forth fully herein.

7 66. The Electronic Communications Privacy Act ("ECPA") seeks to protect
8 individuals from interception and monitoring of their electronic communications. The ECPA
9 provides that liability may be imposed on any individual who "intentionally intercepts,
10 endeavors to intercept, or procures any person to intercept or endeavor to intercept, any wire,
11 oral, or electronic communication." 18 U.S.C. § 2511(1) (a).

12 67. The transmission of data between Plaintiffs' and the Class' computers and various
13 internet websites constitutes "electronic communications" within the meaning of 18 U.S.C. §
14 2510.

15 68. CMG intentionally intercepted these electronic communications without
16 Plaintiffs' and the Class' knowledge, consent or authorization. Specifically, Plaintiffs and the
17 Class transmitted data from their computers to Provide-Commerce, for the purpose of purchasing
18 products from Provide-Commerce's website only.

19 69. While Plaintiffs and the Class were in the process of transmitting this information,
20 CMG intercepted Plaintiffs' and the Class' data without their knowledge or consent.

21 70. CMG intercepted Plaintiffs' and the Class' communications for the purpose of
22 committing a wrongful tortious or unlawful act — to make and profit from unauthorized charges
23 to Plaintiffs' and the Class' credit or debit accounts.

24 71. Under 18 U.S.C. § 2520, Plaintiffs and the Class are entitled to preliminary,
25 equitable and declaratory relief, in addition to statutory damages of the greater of \$40,000 or
26 \$100 per day per violation, actual and punitive damages, reasonable attorneys' fees, and CMG's
27 profits obtained from the above described violations.

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THIRD CLAIM
For Civil Theft – Treble Damages
Brought by Plaintiffs and the Class
Against CMG

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

6 73. Connecticut General Statutes § 52-564 provides that: “Any person who steals any
7 property of another, or knowingly receives and conceals stolen property, shall pay the owner
8 treble his damages.”

9 74. CMG explicitly or implicitly made false representations and statements of
10 existing facts with the intent to deceive Plaintiffs and the Class by concealing or omitting the
11 following material facts: (a) while completing a transaction with Provide-Commerce, CMG
12 would gain access to Plaintiffs’ and the Class’ confidential billing information; (b) CMG would
13 automatically charge Plaintiffs and the Class a monthly fee for CMG’s membership programs,
14 including FreeShipping.com Insiders-Club; and (c) Provide-Commerce and CMG profit from
15 Plaintiffs and the Class being enrolled in CMG’s membership programs.

16 75. Simply put, CMG stole money from Plaintiffs and the Class when it knowingly
17 deceived them into believing that by clicking on the advertisement, they would be receiving a
18 **free** savings benefit. Instead, when Plaintiffs and the Class clicked on the advertisement, they
19 were unknowingly enrolled into a membership program, like FreeShipping.com Insiders-Club,
20 that charged around \$9.00 to \$15.00 monthly fee. This scheme is the basis for the civil theft
21 claim, and is equivalent of each Class member having money stolen from his or her wallet each
22 month.

23 76. CMG’s silence and omissions as to the material facts outline above were material
24 insofar as such silence and omissions caused Plaintiffs and the Class, without their knowledge, to
25 enable CMG to steal around \$9.00 to \$15.00 per month from each of them.

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FOURTH CLAIM
For Common Law Negligence
Brought by Plaintiffs and the Class
Against Provide-Commerce

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4 77. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
5 forth fully herein.

6 78. Provide-Commerce owed a duty of care to Plaintiffs and the Class to reasonably
7 protect their confidential identifying information and payment information, and to reasonably
8 inform them of the use of that information for purposes other than the one for which they were
9 visiting Provide-Commerce's site.

10 79. Provide-Commerce negligently failed to take reasonable steps to protect
11 Plaintiffs' and the Class' identifying information and payment information from being
12 intercepted, obtained, and/or used by another person without authorization.

13 80. Provide-Commerce negligently failed to comply with Credit Card company
14 standard operating procedures and generally accepted practices when passing Plaintiffs' and the
15 Class members' credit card information to CMG, knowing that CMG intended to charge the
16 credit cards without proper authorization.

17 81. Provide-Commerce negligently permitted CMG to interact with Plaintiffs and the
18 Class in a manner that allowed them to obtain and use their confidential identifying information
19 and payment information without authorization.

20 82. Provide-Commerce negligently failed to take affirmative steps to alert Plaintiffs
21 and the Class of CMG's intent of and means to obtaining and using their confidential identifying
22 and payment information.

23 83. Provide-Commerce negligently represented to Plaintiffs and the Class that it
24 would not disclose to or share their billing information with CMG unless authorized to do so.

25 84. Provide-Commerce negligently omitted to inform Plaintiffs and the Class that
26 CMG would be able to access and/or intercept their billing information.

27 85. Provide-Commerce negligently shared its customers' billing information with
28 CMG without informed authorization, and while knowing that CMG was going to charge

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1 Plaintiffs' and the Class' credit and debit accounts for a sham membership program without
2 consent.

3 86. Provide-Commerce further misrepresented that Plaintiffs and the Class could
4 receive a "free" benefit by providing certain information, such as an email address and zip code.

5 87. Provide-Commerce knew, or reasonably should have known that Plaintiffs and
6 the Class would likely not see the hidden terms and conditions, and that Plaintiffs and the Class
7 would not have provided any personal information if they knew Provide-Commerce via CMG
8 would thereafter begin billing their credit or debit cards.

9 88. Provide-Commerce also knew or should have known that Plaintiffs and the Class
10 would not have intentionally enrolled in any membership program if CMG openly asked for their
11 credit or debit card information

12 89. Provide-Commerce's conduct caused Plaintiffs and the Class to suffer
13 unauthorized charges to their credit and debit cards.

14 90. Provide-Commerce's representations were false, and their omissions were
15 material.

16 91. At the time of Provide-Commerce's representations and omissions, Plaintiffs and
17 the Class were ignorant of the representations' falsity and were ignorant of the omitted and/or
18 concealed facts. In reliance on these misrepresentations and without the benefit of the material
19 omissions, Plaintiffs and the Class were damaged by unauthorized charges to their credit and
20 debit cards. Had Plaintiffs and the Class known the actual facts, they would have not purchased
21 merchandise from Provide-Commerce or tried to obtain the seemingly complimentary savings
22 benefit.

23 92. Reliance on Provide-Commerce's representations and omissions was justified
24 because Plaintiffs and the Class had no reason to believe that unauthorized charges were going to
25 be made to their credit and debit accounts.

26 93. Plaintiffs and the Class have been damaged by Provide-Commerce's negligent
27 misrepresentations in an amount to be proven at trial.

28 ///

1 94. CMG accessed and received payments from Plaintiffs and the Class' credit and
2 debit card accounts without their legal consent and thus knowingly received a benefit from
3 Plaintiffs and the Class.

4 95. CMG had no lawful or legitimate basis to access and charge Plaintiffs and the
5 Class' credit and debit cards for fees associated with its membership programs, like
6 FreeShipping.com Insiders-Club.

7 96. Provide-Commerce received, and continues to receive, substantial fees from
8 CMG's charging of Plaintiffs' and the Class' credit and debit card accounts and/or using
9 Plaintiffs and the Class' billing information to earn money for itself.

10 97. These fees, compensation, and/or profits constitute unjust enrichment for Provide-
11 Commerce and must be disgorged, and restored to Plaintiffs and the Class.

12 98. By billing Plaintiffs' and the Class' credit and debit accounts without
13 authorization as set forth herein, Provide-Commerce received unearned financial gains and
14 unjustly retained the financial gains at Plaintiffs and the Class' expense, which it would be
15 inequitable for Provide-Commerce to retain.

16 **FIFTH CLAIM**
17 **For Common-Law Negligence**
18 **Brought By Plaintiffs and the Class**
19 **Against CMG**

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

22 100. CMG owed a duty of care and honesty to Plaintiffs and the Class to ensure that
23 CMG was not obtaining and using Plaintiffs and the Class' confidential identifying and payment
24 information under misleading circumstances.

25 101. CMG breached its duty by obtaining and using Plaintiffs and the Class'
26 confidential identifying and payment information without ensuring that Plaintiffs and the Class
27 had given informed consent.

28 102. CMG negligently failed to comply with Credit Card company standard operating
procedures and generally accepted practices by utilizing the data pass process to obtain Plaintiffs

1 and the Class members' credit card information from Provide-Commerce, and then charging their
2 cards without proper authorization.

3 103. CMG breached its duty and represented to Plaintiffs and the Class that they would
4 receive a "free" benefit from Provide-Commerce by providing limited personal information, such
5 as an email address and zip code, but neglected to inform Plaintiffs and the Class in a meaningful
6 way that they would be charged a monthly fee.

7 104. CMG knew, or reasonably should have known that Plaintiffs and the Class
8 would likely not see the hidden terms and conditions, and that Plaintiffs and the Class would not
9 have provided their email addresses or zip codes if they knew CMG would thereafter bill their
10 credit and debit cards. CMG further knew that Plaintiffs and the Class would not have
11 intentionally enrolled in CMG's membership programs if CMG openly asked for their complete
12 billing information. So CMG obtained Plaintiffs' and the Class' complete billing information
13 without their knowledge or consent.

14 105. CMG's conduct caused Plaintiffs and the Class to suffer unauthorized charges to
15 their credit and debit cards.

16 106. CMG's representations were false, and their omissions were material.

17 107. CMG would have, through reasonably diligent efforts, discussed that the material
18 omissions were misleading and rendered the advertising and disclosures false.

19 108. At the time of CMG's representations and omissions, Plaintiffs and the Class
20 were ignorant of the representations' falsity and were ignorant of the omitted and/or concealed
21 facts. In reliance on these misrepresentations and without the benefit of the material omissions,
22 Plaintiffs and the Class were damaged by unauthorized charges to their credit and debit cards.
23 Had Plaintiffs and the Class known the actual facts, they would have not tried to obtain the
24 seemingly complimentary savings offer.

25 109. Reliance on CMG's representations and omissions was justified because Plaintiffs
26 and the Class had no reason to believe that unauthorized charges were going to be made to their
27 credit and debit accounts.

28 ///

1 110. Plaintiffs and the Class have been damaged by CMG's negligent
2 misrepresentations in an amount to be proven at trial.

3 **SIXTH CLAIM**
4 **For Unjust Enrichment**
5 **Brought by Plaintiffs and the Class**
6 **Against Provide-Commerce**

7 111. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
8 forth fully herein.

9 112. Provide-Commerce received fees, kickbacks or bounties from CMG for
10 permitting CMG to obtain and/or intercept Plaintiffs' and the Class' personal and private credit
11 and debit card information, which CMG then charged for its' unlawful membership program, and
12 thus has knowingly received benefits from Plaintiffs and the Class. Provide-Commerce received
13 multi-millions of dollars in fees, kickbacks, or bounties from CMG.

14 113. Provide-Commerce did not contract with Plaintiffs or the Class to provide any
15 benefit in exchange for these fees. Provide-Commerce had no business, lawful or legitimate
16 basis for accepting payments from CMG, which were actually payments CMG obtained from
17 Plaintiffs and the Class by charging their credit and debit cards for fees associated with CMG's
18 membership programs.

19 114. Provide-Commerce received, and continues to receive, substantial fees from
20 CMG as a result of CMG's scheme of unlawfully charging Plaintiffs' and the Class' credit and
21 debit card accounts and/or using their billing information to earn money for itself.

22 115. These fees, compensation, and/or profits constitute unjust enrichment for Provide-
23 Commerce and must be disgorged.

24 116. Plaintiffs and the Class are entitled to recover from Provide-Commerce all
25 amounts wrongfully collected and improperly retained by Provide-Commerce plus interest
26 thereon.

27 117. As a direct and proximate result of Provide-Commerce's unjust enrichment,
28 Plaintiffs and the Class have suffered injury and are entitled to reimbursement, restitution and
disgorgement from Provide-Commerce of the benefit conferred by Plaintiffs and the Class.

1 118. It would be inequitable for Provide-Commerce to retain the profits, benefits, and
2 other compensation obtained from their wrongful conduct as alleged herein.

3 **SEVENTH CLAIM**
4 **Unjust Enrichment**
5 **Brought By Plaintiffs and the Class Against CMG**

6 119. Plaintiffs refer to and incorporate by reference the above paragraphs as though
7 set forth fully herein.

8 120. CMG wrongly obtained and/or intercepted Plaintiffs' and the Class' personal and
9 private credit and debit card information, which CMG used to charge its illegal membership
10 program fees and thus has knowingly received benefits from Plaintiffs and the Class.

11 121. CMG had no contractual, lawful or legitimate basis for charging Plaintiffs' or the
12 Class' credit and debit cards for fees associated with CMG's membership programs.

13 122. Each of CMG's membership terms allowing, and CMG's act of charging Plaintiffs
14 and the Class a monthly fee without Plaintiffs' and the Class' knowing authorization was and is
15 unconscionable and against public policy.

16 123. The membership and initiation fees, compensation, and/or profits constitute
17 unjust enrichment for CMG and must be disgorged. Plaintiffs and the Class are entitled to
18 recover from CMG all amounts wrongfully collected, plus interest thereon.

19 124. It would be inequitable for CMG to retain the profits, benefits, and other
20 compensation obtained from its wrongful conduct as alleged herein.

21 **EIGHTH CLAIM**
22 **For Fraudulent Misrepresentations/Omissions**
23 **Brought by Plaintiffs and the Class Against CMG**

24 125. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
25 forth fully herein.

26 126. Common law fraud is the making of a knowingly false representation or
27 concealment of a material fact with intent to deceive or induce reliance that causes justifiable
28 reliance and resulting damages. California Civil Code section 1710 further defines deceit/fraud
as either: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to
be true; (2) the assertion, as a fact, of that which is not true, by one who has no reasonable

1 ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose
2 it, or who gives information of other facts which are likely to mislead for want of communication
3 of that fact; or (4) a promise, made without any intention of performing it.

4 127. CMG, through Provide-Commerce's website, and with Provide-Commerce's
5 assistance, appeared to offer Plaintiffs and the Class a "free" savings benefit. But in reality it
6 was enrolling Plaintiffs and the Class in a membership program. CMG touted its various savings
7 offers and membership programs, like FreeShipping.com Insiders-Club, as a legitimate savings
8 club that provides free shipping, coupons, gift cards, and other savings benefits to its members.
9 The membership programs, however, provided no meaningful benefits, products or services and
10 functioned as a pretext for CMG to begin charging Plaintiff Cox's and the Class' credit and debit
11 cards.

12 128. CMG further misrepresented that Plaintiffs and the Class could receive a "free"
13 savings offer by providing some innocuous information, like their email address and zip code.
14 Hidden in an entirely separate area on the webpage were deceptive terms and conditions stating
15 that Plaintiffs and the Class would be charged for enrolling in the membership program. CMG
16 knew, or reasonably should have known, that Plaintiffs and the Class likely would not see the
17 hidden terms and conditions and would not have provided any personal information if they knew
18 CMG would thereafter bill their credit or debit cards. CMG intentionally did not directly request
19 Plaintiffs and the Class to provide their complete billing information — including their name,
20 billing address, and credit or debit card number — because it knew that would have likely put
21 Plaintiffs and the Class on notice that they were about to enter into a separate transaction with
22 CMG, and they would have declined to proceed.

23 129. CMG also concealed material information about the savings offer and
24 membership programs from Plaintiffs and the Class. CMG failed to disclose that Plaintiffs and
25 the Class would be enrolled in the program and subject to monthly fees.

26 130. The concealed information is material in that a reasonable consumer would find
27 information important when deciding whether to purchase products from CMG's and Provide-
28 Commerce's websites. Had the concealed information been disclosed to Plaintiffs and the Class,

1 they would have not have attempted to retrieve the purported free savings offers, or would have
2 immediately canceled their membership before they were charged.

3 131. CMG was and continues to be under a duty to Plaintiffs and the Class to disclose
4 these facts because:

5 a. CMG is in a superior position to know the truth about the reward membership
6 programs and the business practice of receiving billing through a data pass system; and

7 b. CMG actively concealed from Plaintiffs and the Class the true nature of the
8 programs and its true practices with respect to the use of billing information.

9 132. CMG intentionally represented and concealed from and/or failed to disclose to
10 Plaintiffs and the Class the facts described above with the intent to defraud, and for the purpose
11 of inducing Plaintiffs and the Class to involuntarily enroll in illusory membership programs.

12 133. Plaintiffs and the Class relied on CMG's misrepresentations and omissions and
13 were damaged because unauthorized charges were made to their credit and debit accounts.
14 Plaintiffs and the Class also received no meaningful benefits, services or products from CMG's
15 membership programs. CMG thus reaped unearned financial gains from the unauthorized
16 charges to Plaintiffs' and the Class' credit and debit cards. This conduct is unjust and unlawful
17 and thus violates common law and California Civil Code section 1710.

18 134. As a direct and proximate cause of CMG's misconduct, Plaintiffs and the Class
19 suffered actual damages in that they have paid monthly fees without receiving any benefits,
20 discounts or savings.

21 135. On information and belief, CMG's misconduct was done intentionally and with
22 malice, and it is wanton and reckless and shows a reckless indifference to the interests of others.

23 136. Plaintiff Cox and the California Subclass demand judgment against CMG for
24 actual and punitive damages for themselves and each California Subclass member, plus
25 attorneys' fees for the establishment of a common fund, interest, and costs.

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NINTH CLAIM
For Fraudulent Misrepresentations/Omissions
Brought by Plaintiffs and the Class
Against Provide-Commerce

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4 137. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
5 forth fully herein.

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

14 139. Provide-Commerce represented through its website that it would not transmit
15 Plaintiffs and the Class' billing information without authorization. Provide-Commerce makes
16 this representation with the intent to induce Plaintiffs and the Class to purchase merchandise
17 from Provide-Commerce under the belief that Provide-Commerce would protect their
18 information. In actuality, Provide-Commerce transmits the information to its partner CMG
19 and/or allows CMG to intercept the information during Class members' purchase transactions.
20 CMG then makes unauthorized charges to Plaintiffs' and the Class' credit and debit accounts
21 under the guise that Plaintiffs and the Class enrolled in a membership program, which they did
22 not knowingly enroll in. Provide-Commerce then receives bounties or kickbacks from the
23 unauthorized charges.

24 140. Provide-Commerce also appears to offer Plaintiffs and the Class a complimentary
25 savings benefit when, in reality, they are trying to enroll them in membership programs without
26 their knowledge. Provide-Commerce also touts various programs, like FreeShipping.com
27 Insiders-Club, as a legitimate savings club that provides coupons, gift cards, and other savings
28 benefits to its members. In reality, the programs provide no meaningful benefits, products or

1 services, and the enrollment is simply a pretext to begin charging Class members' debit and
2 credit cards.

3 141. Provide-Commerce further misrepresents that Plaintiffs and the Class could
4 receive a "free" savings offer by providing some personal information, like their email address
5 and zip code. Hidden in an entirely separate area on the webpage are deceptive terms and
6 conditions stating that Plaintiffs and the Class would be charged for enrolling in the membership
7 program. Provide-Commerce knew, or reasonably should have known, that Plaintiffs and the
8 Class would likely not see the hidden terms and conditions and would not have provided any
9 information if they knew Provide-Commerce would send their billing information to CMG, and
10 that CMG would thereafter begin billing their credit and debit cards. Provide-Commerce
11 intentionally hid and failed to disclose the fact that Plaintiffs and the Class were about to enter
12 into a separate transaction with CMG. Instead, Provide-Commerce and CMG made the
13 advertisements appear like they were coming from Provide-Commerce as a free gift for being
14 loyal Provide-Commerce customers and to encourage future business.

15 142. Additionally, Provide-Commerce concealed material information about the
16 savings offer and membership programs from Plaintiffs and the Class and failed to disclose that
17 Plaintiffs and the Class would be enrolled in the program and subject to monthly fees.

18 143. Provide-Commerce also concealed the material fact that it was transmitting
19 Plaintiffs' and the Class' billing information to CMG without authorization. At the same time,
20 Provide-Commerce made representations to Plaintiffs and the Class that billing information
21 would not be transmitted or used without authorization beyond what was necessary to fill
22 customers' original orders. Plaintiffs and the Class were unwittingly enrolled in membership
23 programs while attempting to obtain a seemingly free savings benefit. Provide-Commerce also
24 concealed and failed to disclose that it was financially benefiting from its partnership with CMG.

25 144. Provide-Commerce were and continue to be under a duty to Plaintiffs and the
26 Class to disclose these facts because:

27 a. Provide-Commerce is in a superior position to know the truth about the club
28 membership programs and the business practice of transmitting billing information to CMG

1 through a data pass system; and

2 b. Provide-Commerce actively concealed from Plaintiffs and the Class the true
3 nature of the club membership programs and their true practices with respect to the use of billing
4 information.

5 145. Provide-Commerce intentionally represented and concealed from and/or failed to
6 disclose to Plaintiffs and the Class the facts described above with the intent to defraud, and for
7 the purpose of inducing Plaintiffs and the Class to provide their billing information, which was
8 later transmitted to CMG to involuntarily enroll Plaintiffs and the Class in illusory club
9 membership programs. By concealing this material information, Provide-Commerce sought to
10 ensure that Plaintiffs and the Class would complete their transaction on the Provide-Commerce's
11 website while allowing them to still profit by giving that information to CMG without
12 authorization to enroll Plaintiffs and the Class in the sham program. Provide-Commerce knew
13 that Plaintiffs and the Class would not have provided their billing information if all material
14 information was disclosed. Despite this, Provide-Commerce fraudulently enrolled, or assisted
15 with fraudulently enrolling, Plaintiffs and the Class into membership programs so that CMG
16 could charge their credit and debit accounts without authorization and provide Provide-
17 Commerce with financial kickbacks.

18 146. The misrepresentations and omissions are material in that a reasonable consumer
19 would find this information important when deciding whether to purchase products from
20 Provide-Commerce's website. Had the misrepresented and concealed information been
21 disclosed to Plaintiffs and the Class, they would have acted differently by not providing their
22 billing information to Provide-Commerce, not attempting to receive the purported free savings
23 benefit, or by immediately canceling their membership before they were charged.

24 147. Plaintiffs and the Class relied on Provide-Commerce's misrepresentations and
25 omissions and were damaged because unauthorized charges were made to their debit and credit
26 cards. Further, Plaintiffs and the Class received no benefits, services or products from
27 FreeShipping.com Insiders-Club or any other CMG membership program. Provide-Commerce
28 thus reaped unearned financial gains the unauthorized charges to Plaintiffs' and the Class' credit

1 and debit cards. This conduct is unjust and unlawful and thus violates California Civil Code
2 section 1710.

3 148. Plaintiffs and the Class are further informed and believe that Provide-Commerce's
4 conduct was motivated by malice, fraud, and oppression, and was done in conscious disregard of
5 their rights. Punitive damages should be separately assessed against Provide-Commerce in an
6 amount that would punish and deter them from further engaging in fraud.

7 149. Plaintiffs and the Class demand judgment against Provide-Commerce for actual
8 and punitive damages for themselves and each member of the Class, plus attorneys' fees for the
9 establishment of a common fund, interest, and costs.

10 **TENTH CLAIM**
11 **For Unlawful Business Practices in Violation of Cal. Bus. & Prof. Code § 17200, et seq.**
12 **Brought by Plaintiff Cox and the California Subclass**
13 **Against CMG**

14 150. Plaintiff Cox refers to and incorporates by reference the above paragraphs as
15 though set forth fully herein.

16 151. The Unfair Competition Law, Business & Professions Code § 17200, *et seq.*
17 ("UCL") defines unfair competition to include any unfair, unlawful or fraudulent business act or
18 practice. Unlawful business acts are those that violate federal, state, county, or municipal
19 statutes or codes, common law, or federal and state regulations.

20 152. CMG's acts, practices, misrepresentations and omissions as herein alleged are
21 unlawful and violate the laws and statutes alleged herein, and thus amount to unfair competition
22 as set forth in the UCL. As a direct and proximate cause of CMG's violations of the UCL,
23 Plaintiff Cox and the California Subclass suffered an injury in fact and have lost money because,
24 among other things, they suffered unauthorized transmission or interception of their billing
25 information and unauthorized charges to their credit and debit cards, and because they were
26 charged for services and benefits they did not receive.

27 153. To the extent CMG's advertisements contained terms that allowed CMG to obtain
28 Plaintiff Cox and the California Subclass' billing information absent affirmative and informed
authorization, those terms are unconscionable and thus unenforceable. And to the extent CMG
and Provide-Commerce's websites contained terms that allowed CMG to charge activation fees

1 and monthly fees associated with consumers purportedly enrolling or participating in any
2 membership programs, those terms are likewise unconscionable and thus unenforceable. As
3 discussed above, CMG's savings offers and membership programs are a sham.

4 154. CMG's unlawful, unfair and fraudulent business practices, as described herein,
5 present a continuing threat to Plaintiff Cox, and the California Subclass, and the general public in
6 that they continue to wrongfully tout their sham savings offers and membership programs as
7 legitimate, continue to wrongfully obtain and mishandle the California Subclass members'
8 billing information, and continue to bill their credit and debit cards without authorization. In
9 addition, CMG has been unjustly enriched as a result of its conduct. Plaintiff Cox and the
10 California Subclass seek equitable relief because they have no other adequate remedy at law.
11 Absent equitable relief, CMG is likely to continue to injure consumers, reap unjust enrichment,
12 and harm the public's interest, thus engendering a multiplicity of judicial proceedings.

13 155. CMG's acts and practices are unlawful because they violate California Civil Code
14 §§ 1572, 1668, 1709, 1710, 1770(a)(3), 1770(a)(5), 1770(a)(9), 1770(a)(14) and/or 1770(a)(17),
15 as described above.

16 156. CMG's acts and practices are also unlawful because it violates, among other
17 things, §17500 of the Business and Professions Code, the Electronic Funds Transfer Act, 15
18 U.S.C. § 1693 *et seq.*, the Electronic Communications Privacy Act, 18 U.S.C. § 2510, and
19 common law, as alleged herein.

20 157. CMG violated the UCL by fraudulently misrepresenting and concealing from
21 and/or intentionally failing to disclose to Plaintiff Cox and the California Subclass the true facts
22 about its savings offers, its business practice of transmitting billing information without
23 authorization and its membership programs, as alleged herein.

24 158. CMG's conduct was fraudulent and deceptive in violation of the UCL because
25 CMG actively misrepresented in, and/or concealed and omitted from, its advertising, marketing
26 and other communications, material information about the savings offers, membership programs
27 and the practices with respect to the use of consumers' personal billing.

28 ///

1 159. As alleged herein, Plaintiff Cox and the California Subclass relied on these
2 misrepresentations and omissions when providing Provide-Commerce with their billing
3 information and purchasing products on its websites and, as a result, suffered an injury in fact
4 and lost money.

5 160. CMG's conduct was unfair in violation of the UCL, because the injury to Plaintiff
6 Cox and the California Subclass greatly outweighs any alleged countervailing benefit to
7 consumers or competition under all of the circumstances.

8 161. CMG's conduct was also unfair as it violates the Credit Card companies' standard
9 operating procedures and generally accepted business practices.

10 162. To this day, CMG continues to violate the UCL by continuing to misrepresent and
11 actively conceal material information regarding its savings offers, membership programs, and
12 data pass practices.

13 163. As a proximate result of CMG's violation of the UCL, CMG has been unjustly
14 enriched and should be required to make restitution to Plaintiff Cox and the California Subclass
15 and/or disgorge their ill-gotten profits pursuant to Business & Professions Code § 17203.

16 164. Plaintiff Cox and the California Subclass demand judgment against CMG for
17 injunctive relief, restitution, and/or proportional disgorgement of profits earned as a result of the
18 conduct alleged herein, including promised discounts and savings that were not given, along with
19 interest, attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5.

20 165. Plaintiff Cox and the California Subclass request that this Court issue preliminary
21 and permanent injunctions against such acts and practices. Additionally, Plaintiff Cox and the
22 California Subclass seek the recovery of attorneys' fees and litigation expenses pursuant to
23 California Code of Civil Procedure section 1021.5, the substantial benefit doctrine, the common
24 fund doctrine or other authority requiring CMG to pay Plaintiff Cox and the Class' attorneys'
25 fees and litigation expenses.

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1 conduct. Plaintiffs and the Class seek equitable relief because they have no other adequate
2 remedy at law. Absent equitable relief, Provide-Commerce is likely to continue to injure
3 consumers, reap unjust enrichment, and harm the public's interest, thus engendering a
4 multiplicity of judicial proceedings.

5 171. Provide-Commerce's acts and practices are unlawful because they violate
6 California Civil Code §§ 1572, 1668, 1709, 1710, 1770(a)(3), 1770(a)(5), 1770(a)(9),
7 1770(a)(14) and/or 1770(a)(17), as described above.

8 172. Provide-Commerce's acts and practices also are unlawful because they violate,
9 among other things, §17500 of the Business and Professions Code, and common law, as alleged
10 herein.

11 173. Provide-Commerce violated the UCL by fraudulently misrepresenting and
12 concealing from and/or intentionally failing to disclose to Plaintiffs and the Class the true facts
13 about its saving offers and business practice of transmitting billing information without
14 authorization to CMG.

15 174. Provide-Commerce's conduct was fraudulent in violation of the UCL, in that
16 Provide-Commerce actively misrepresented in, and/or concealed and omitted from, its
17 advertising, marketing and other communications, material information about the savings offer
18 and membership program and the practices with respect to the use of private consumer
19 information, including billing information, in a manner that has deceived and is likely to
20 continue to deceive consumers and the public.

21 175. Plaintiffs and the 'Class relied on these misrepresentations and omissions when
22 providing Provide-Commerce with billing information and purchasing products on their websites
23 and, as a result, suffered an injury in fact and lost money.

24 176. Provide-Commerce violated the UCL by representing to Plaintiffs and the Class
25 that their billing information would be secure and not transmitted to unauthorized parties, while
26 knowing that the information would be transmitted to CMG without explicit authorization.

27 177. Provide-Commerce's conduct was unfair in violation of the UCL, because the
28 injury to Plaintiffs and the Class greatly outweighs any alleged countervailing benefit to

1 consumers or competition under all of the circumstances.

2 178. Provide Commerce's conduct was also unfair as it violates the Credit Card
3 companies' standard operating procedures and generally accepted business practices.

4 179. To this day, Provide-Commerce continues to violate the UCL by continuing to
5 misrepresent and actively conceal material information regarding the coupon offers, membership
6 programs, and data pass practices.

7 180. As a proximate result of Provide-Commerce's violations of the UCL, they have
8 been unjustly enriched and should be required to make restitution to Plaintiffs and the Class
9 and/or disgorge their ill-gotten profits pursuant to Business & Professions Code § 17203.

10 181. Plaintiffs and the Class demand judgment against Provide-Commerce for
11 injunctive relief, restitution, and/or proportional disgorgement of profits earned as a result of the
12 alleged conduct, including promised discounts and savings that were not given, along with
13 interest, attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5.

14 182. Provide-Commerce's unlawful, unfair, and fraudulent business practices present a
15 continuing threat to Plaintiffs, the Class, and the general public in that Provide-Commerce
16 continues to wrongfully tout the sham savings offers and membership programs as a legitimate,
17 continues to mishandle Class members' billing information, and continues to bill their credit and
18 debit cards without authorization. In addition, Provide-Commerce has been unjustly enriched as
19 a result of its conduct. Plaintiffs and the Class seek equitable relief because they have no other
20 adequate remedy at law. Absent equitable relief, Provide-Commerce is likely to continue to
21 injure consumers, reap unjust enrichment, and harm the public's interest, thus engendering a
22 multiplicity of judicial proceedings.

23 183. Plaintiffs and the Class request that this Court issue preliminary and permanent
24 injunctions against such acts and practices. Additionally, Plaintiffs and the Class seek the
25 recovery of attorneys' fees and litigation expenses pursuant to California Code of Civil
26 Procedure section 1021.5, the substantial benefit doctrine, the common fund doctrine or other
27 authority requiring Provide-Commerce to pay Plaintiffs' and the Class' attorneys' fees and
28 litigation expenses.

TWELFTH CLAIM

**For Invasion of the Constitutionally Protected Right To Privacy
Brought by Plaintiffs and the Class Against Provide-Commerce
And By Plaintiff Cox and the California Subclass Against CMG**

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4 184. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
5 forth fully herein.

6 185. The constitutionally guaranteed right of privacy unequivocally includes the right
7 to control the dissemination of one's personal information, including debit card and bank account
8 information, billing information, and home address ("Private Payment Information").

9 186. Plaintiffs and the Class and California Subclass have legally protectable privacy
10 interests in their Private Payment Information, and their ability to control the disclosure and
11 dissemination of this information.

12 187. Plaintiffs and the Class and California Subclass have reasonable expectations that
13 their Private Payment Information would remain private from CMG when they entered into
14 credit or debit card transactions with Provide-Commerce. They were certainly not aware that
15 Provide-Commerce would disclose to CMG, or allow CMG to obtain, this information. Provide-
16 Commerce did not disclose its intentions to provide Plaintiffs' and the Class' and California
17 Subclass' Private Payment Information to CMG. Provide-Commerce relied on the fact that
18 Plaintiffs and the Class and California Subclass did not know it would disclose their Private
19 Payment Information to CMG, and, instead, believed that Provide-Commerce would only use
20 their Private Payment Information to process their purchase of merchandise from one of Provide-
21 Commerce's websites, including Proflowers.com and RedEnvelope.com.

22 188. Plaintiffs and the Class and California Subclass have a reasonable expectation that
23 CMG – albeit an unknown entity to them at the time – would not attempt to obtain their private
24 information from Provide-Commerce and use it without ensuring that it had Plaintiffs' and the
25 Class' and California Subclass' express written consent. They were certainly not aware that
26 Provide-Commerce would disclose to CMG, or allow CMG to obtain, this information. CMG
27 did not disclose its intention of obtaining Plaintiffs' and the Class' and California Subclass'
28 Private Payment Information from Provide-Commerce in a manner that meaningfully gave

1 Plaintiffs or the Class and California Subclass sufficient awareness.

2 189. Defendants' actions constitute a "serious" invasion of privacy resulting in
3 Plaintiffs and the Class and California Subclass being charged millions of dollars in unauthorized
4 charges to the debit and credit cards, and having their Private Payment Information - including
5 their private billing information, credit and debit card information, and billing addresses -
6 disclosed to defendant CMG without their authorization or consent.

7 190. Defendants did not obtain Plaintiffs' or the Class' and California Subclass'
8 Private Payment Information from a public source. Defendants realize that customers protect
9 their privacy rights in their Private Payment Information.

10 191. As a proximate result of Defendants' above acts, Plaintiffs' and the Class' and
11 California Subclass' Private Payment Information was compromised and disclosed to defendant
12 CMG without their knowledge or consent, and all to the general damage in an amount according
13 to proof.

14 192. Provide-Commerce and CMG are each guilty of oppression, fraud, or malice by
15 using Private Payment Information with a willful and conscious disregard of Plaintiffs' and the
16 Class' and California Subclass' right to privacy.

17 193. Plaintiffs and the Class and California Subclass demand judgment against
18 Provide-Commerce and CMG for actual and punitive damages for themselves and each member
19 of the Class, plus attorneys' fees for the establishment of a common fund, interest, and costs.

20 194. Unless and until enjoined, and restrained by order of this Court, Defendants'
21 wrongful conduct will continue to cause Plaintiffs and the Class and California Subclass, and the
22 public great and irreparable injury in that Private Payment Information maintained by Provide-
23 Commerce can be disclosed to others for profit and that unauthorized charged can be made to
24 their credit and debit card accounts. Plaintiffs and the Class and California Subclass have no
25 adequate remedy at law for the injuries in that a judgment for the monetary damages will not end
26 the invasion of privacy for Plaintiffs and the Class and California Subclass, and the public.

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1 **THIRTEENTH CAUSE OF ACTION**

2 **For Violations of Invasion of Privacy – Intrusion Into Private Matters**
3 **Brought by Brought by Plaintiffs and the Class Against Provide-Commerce**
4 **And By Plaintiff Cox and the California Subclass Against CMG**

5 195. Plaintiffs refer to and incorporate by reference the above paragraphs as though set
6 forth fully herein.

7 196. One who intentionally intrudes upon the solitude or seclusion of another or his
8 private affairs or concerns is subject to liability for invasion of privacy. The Supreme Court of
9 California instructs that the tort of intrusion is not limited to physical invasions, but also lies
10 where the defendant “obtained unwanted access to data about the plaintiff.” Taus v. Loftus, 40
11 Cal.4th 683, 725, 54 Cal. Rptr. 3d 775, 807-808 (2007) (quoting Shulman v. Group W
12 Productions, Inc., 18 Cal.4th 200 (1998).

13 197. Plaintiffs and the Class and California Subclass had reasonable expectations that
14 their private payment and billing information would remain private from CMG when they
15 entered into transactions with Provide-Commerce. They certainly were not aware that Provide-
16 Commerce would disclose their billing information and billing addresses to CMG. Provide-
17 Commerce did not disclose its intentions to share Plaintiffs’ and the Class’ and California
18 Subclass’ payment and billing information with CMG, and instead assured Plaintiffs and the
19 Class and California Subclass that their private payment and billing information would not be
20 shared or disclosed without their informed consent.

21 198. Provide-Commerce assisted CMG in obtaining Plaintiffs’ and the Class’ and
22 California Subclass’ private billing information without their knowledge or consent. Provide-
23 Commerce represented to its customers that it would guard their private billing information and
24 would not disclose this information to anyone else absent informed authorization. But Provide-
25 Commerce passed this information on to CMG without obtaining authorization to do so. The
26 manner in which Defendants invaded Plaintiffs’ and the Class’ and California Subclass’ privacy
27 rights is highly offensive to a reasonable person, as evidenced by the thousands of consumer
28 complaints regarding Defendants’ practices.

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1 199. As a proximate result of the above acts, Plaintiffs' and the Class' and California
2 Subclass' billing information was used by Defendants for their own profit, all to the general
3 damage in an amount according to proof.

4 200. Defendants are guilty of oppression, fraud, or malice by disclosing the
5 information in a willful and conscious disregard of Plaintiffs' and the Class' and California
6 Subclass' rights to privacy.

7 201. Plaintiffs and the Class demand judgment against Provide-Commerce and CMG
8 for actual and punitive damages for themselves and each Class member, plus attorneys' fees for
9 the establishment of a common fund, interest, and costs.

10 202. Unless and until enjoined, and restrained by order of this Court, Defendants'
11 wrongful conduct will continue to cause Plaintiffs, Class members, and the public great and
12 irreparable injury in that their private billing information maintained by Defendants can be
13 disclosed to others for profit and that unauthorized charged can be made to their credit and debit
14 card accounts. Plaintiffs and the Class and California Subclass have no adequate remedy at law
15 for the injuries in that a judgment for the monetary damages will not end the invasion of privacy.

16 **VII. PRAYER FOR RELIEF**

17 Plaintiffs, the Class, and the Subclasses pray for judgment against defendants as follows:

- 18 A. An order certifying the Class and Subclasses and designating Plaintiffs as the
19 Class Representatives and Plaintiffs' counsel as Class Counsel;
- 20 B. That the Court preliminarily and permanently enjoins defendants from engaging
21 in the conduct alleged herein;
- 22 C. Other injunctive and declaratory relief as may be appropriate;
- 23 D. Restitution and disgorgement any ill-gotten profits from defendants to the extent
24 permitted by applicable law, together with interest thereon from the date of
25 payment;
- 26 E. For statutory damages according to proof;
- 27 F. For general damages according to proof;
- 28 G. For special damages according to proof;

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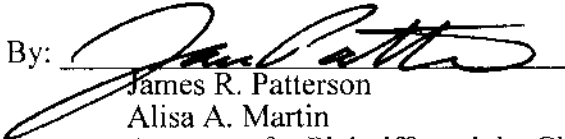
- 1 H. For exemplary or punitive damages;
- 2 I. A declaration that defendants are financially responsible for notifying the Class
- 3 about the pendency of this action;
- 4 J. Reasonable costs and attorneys' fees;
- 5 K. Statutory pre-judgment interest; and
- 6 L. For such other relief as the Court may deem proper.

7 **DEMAND FOR JURY TRIAL**

8 Plaintiffs, on behalf of themselves and the Class, demand a jury trial for all of the claims
9 so triable.

10 Dated: February 15, 2011

HARRISON PATTERSON & O'CONNOR LLP

11
12 By: 
13 James R. Patterson
14 Alisa A. Martin
15 Attorneys for Plaintiffs and the Class

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