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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LARYSSA GALVEZ, JUDITH LINDLEY, and NATALIE ANDERSON,

Plaintiffs,

v.

DRAPER JAMES, LLC, REESE WITHERSPOON, and DOES 1 THROUGH 10,

Defendants.

CASE NO. 2:20-cv-04976-FMO-SK

DEFENDANTS DRAPER JAMES, LLC'S AND REESE WITHERSPOON'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Hearing:
Date: August 13, 2020
Time: 10:00 a.m.
Courtroom: 6D, 6th Floor
Judge: Hon. Fernando M. Olguin

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 13, 2020, at 10:00 a.m., or as soon thereafter as may be heard by the Honorable Fernando M. Olguin, in Courtroom 6D of this Court, Defendants Draper James, LLC ("Draper James") and Reese Witherspoon will and hereby do move the Court to dismiss with prejudice claims asserted by Plaintiffs Laryssa Galvez, Judith Lindley, and Natalie Anderson ("Plaintiffs") in the above-captioned action under Federal Rule of Civil Procedure 12(b)(6).

Plaintiffs' lawsuit seeks to punish Defendants for a goodwill offer of a limited number of free dresses to teachers, in recognition of their efforts to continue educating children during the COVID-19 pandemic. But as a matter of law, Plaintiffs cannot turn Defendants' desire to acknowledge teachers into a lawsuit for several reasons: (1) all claims fail because they lack allegations of both causation and any injury; (2) the breach-of-contract claims rely on a gross mischaracterization of the promotion; (3) the claims of unjust enrichment, violations of the California Legal Remedies Act, and violations of the California Business and Professions Code § 17200 all fail to establish the lack of an adequate remedy at law; (4) Plaintiffs fail to establish that they are "consumers" under the California Legal Remedies Act or allege that any reliance or misrepresentation occurred; and (5) Plaintiffs fail to establish any unfair, unlawful, or fraudulent conduct under California Business and Professions Code § 17200.

Defendants' Motion to Dismiss is based on this Notice of Motion and Memorandum of Points and Authorities submitted herewith, Plaintiffs' Complaint, and other such matters that the Court may consider.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on June 24, 2020.

RELIEF SOUGHT

Defendants seek an order dismissing the entirety of Plaintiffs' Complaint with prejudice.

DATED: July 10, 2020

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Theane Evangelis*
Theane Evangelis

Attorneys for DEFENDANTS DRAPER JAMES, LLC, AND REESE WITHERSPOON

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit is an unjust attempt to exploit Draper James' good intentions to honor the teacher community by gifting hundreds of free dresses. To acknowledge the efforts of educators during the COVID-19 pandemic, Draper James issued the below social media post explaining that teachers were eligible to apply for a free dress, and that the offer was "valid while supplies last":

Request for Judicial Notice ("RJN") Ex. A (emphases added).[1]

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[1] The Instagram post is "incorporated into the complaint by reference" and thus appropriate to consider "when ruling on 12(b)(6) motions to dismiss." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see* Doc. 1-2 ¶¶ 4, 26, 31; *see also Rivas v. Coverall N. Am., Inc.*, No. SACV181007JGBKKX, 2019 WL 7166972, at *2 (C.D. Cal. Feb. 28, 2019) ("[T]he 'incorporation by reference' doctrine . . . permits [courts] to take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading.") (citation omitted).

Plaintiffs attempt to avoid common sense, and the plain language of the Instagram post, by arguing that this promotion obligates Draper James to give a free dress to every teacher who responded. No reasonable respondent would share Plaintiffs' belief that a boutique clothing line would be awarding a limitless supply of free dresses. And the words "apply," "winners," and the phrase "offer valid while supplies last" made clear that entrants had an *opportunity* to receive a free dress—an opportunity that they received. Plaintiffs never explain how they could have been harmed by Draper James' good intentions, and its free promotion of a limited number of dresses for hard-working teachers. Plaintiffs' inability to articulate any deception, the absence of any harm, and the other fundamental pleading flaws detailed below all require that this case be dismissed with prejudice.

II. FACTUAL BACKGROUND

Plaintiffs Laryssa Galvez, Judith Lindley, and Natalie Anderson bring this lawsuit because they are disappointed that they were not among the hundreds of lucky teachers who received a free Draper James dress. Doc. 1-2 ¶¶ 1–3, 9. They claim the free dress giveaway was actually an unlimited, binding contract that required Draper James to send a free dress to "close to a million" teachers across the country. *Id.* ¶¶ 2–3, 19. Plaintiffs bring this putative class action on behalf of all persons "who signed up for the Draper James offer" and "provided personal information" in order to enter the promotion. *Id.* ¶ 17.

The Instagram post that Plaintiffs point to as the "offer," however, did not promise a free dress to all who responded. Doc. 1-2 ¶ 26. Instead, it said the company wanted to "say thank you," and recognize the hard work of the teacher community "[d]uring quarantine." *Id.* It instructed those interested to "apply" for a free dress by clicking on a link on the Draper James Instagram page. *Id.* The promotion expressly stated it was valid "while supplies last." RJN Ex. A; Doc. 1-2 ¶¶ 4, 31.

Plaintiffs notably do not allege that they actually signed up for the giveaway, much less that they saw the Instagram post, or that they relied on it in any way. Doc.

1-2 ¶ 9. Plaintiffs also neglect to include in their Complaint the Instagram post that they claim is at the center of their lawsuit.

Plaintiffs have nonetheless incorporated the Instagram post by reference and Defendants have submitted the Instagram post with their request for judicial notice. As the Instagram post makes clear (*see ante* 9), there was never a suggestion that every respondent would receive a free dress. The offer was "valid while supplies last." Doc. 1-2 ¶¶ 4, 31. It also announced that "winners" would be selected on April 7, 2020. *Id.* ¶ 26. Plaintiffs admit that such disclosures were made, but claim they were "vague illusory comment[s]" that provided "no indication" as to the limited number of dresses available. *Id.* ¶ 31. According to the Complaint, the failure to include a "*specific* limitation on quantity" made it unclear that the giveaway "was limited to 250 dresses." *Id.* ¶ 4 (emphasis added). Plaintiffs, however, do not allege that they (or anyone else for that matter) would have refused to participate had the original Instagram post detailed the specific number of dresses being awarded.

Those interested in the promotion could sign up by clicking a link on the Draper James Instagram page, which directed potential participants to an entry form. *Id.* ¶ 27. To participate in the giveaway, the form asked applicants to supply their contact information, including information to allow Draper James to verify they were teachers. *Id.* Plaintiffs maintain that this information "could be exploited by cyber-criminals" or "sold." *Id.* ¶ 2. There are no allegations in the Complaint that any of those hypothetical events have occurred, and Plaintiffs do not allege that *they* actually submitted any personal identification information as a part of any submission to participate in the promotion.

The announcement of the giveaway on Instagram was accompanied by a list of "Frequently Asked Questions" ("FAQ") published on Draper James' website. Plaintiffs allege that "nothing in any initial FAQ disseminated by Defendants disclosed a limitation this offer was limited," and that there was "no indication this was some form of lottery." *Id.* ¶ 31. But in addition to reiterating that the offer was valid "while

supplies last," the FAQ, which is incorporated by reference in the Complaint, explicitly disclosed that applicants would be "vetted and *selected in a lottery*." RJN Ex. B (emphasis added).

As Plaintiffs state, the announcement of the giveaway was received with widespread public support. Doc. 1-2 ¶ 33–34. The Instagram post reached a broad audience, and many teachers—even those who were not selected to receive a free dress—commented on the importance of the giveaway to them in a time of crisis. *Id.* ¶ 35. The overwhelming response to the giveaway prompted Draper James to provide non-winning entrants with a 30% discount on the Draper James website. *Id.* ¶ 41.

Plaintiffs attempt to cast Draper James' sincere appreciation for educators as some sort of alleged scheme. They bring five causes of action against Defendants, claiming breach of contract, promissory estoppel, unjust enrichment, violations of the California Legal Remedies Act ("CLRA"), and violations of California Business and Professions Code § 17200 ("UCL"). Doc. 1-2 ¶¶ 49–100. They seek damages, injunctive relief, specific performance, and attorneys' fees and costs, and interest. *Id.* at 26–27, Prayer for Relief (1)–(6).

III. LEGAL STANDARD

To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although a court analyzing a motion to dismiss "must accept the allegations of the complaint as true," it "is not required to accept legal conclusions" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Capaci v. Sports Research Corp.*, No. 19-CV-3440-FMO, 2020 WL 1482313, at *2–3 (C.D. Cal. Mar. 26, 2020) (citations omitted). After stripping away the conclusory statements, the remaining factual allegations in a

complaint must do more than "create[] a suspicion of a legally cognizable right of action"; they must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (citation, internal quotation marks, and brackets omitted). "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Plaintiffs' fraud-based claims under the UCL and CLRA also must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff "state with particularity the circumstances constituting fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (applying Rule 9(b) to UCL and CLRA claims). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted).

Dismissal with prejudice is appropriate where amendment would be futile. *Painter v. Blue Diamond Growers*, No. 17-cv-2235, 2017 WL 4766510, at *3 (C.D. Cal. May 24, 2017); *see also Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009).

IV. ARGUMENT

There is no legal basis for any of Plaintiffs' claims. Not only have they failed to allege that they even participated in the giveaway, the breach-of-contract claims defy common sense and are based on a gross mischaracterization of the Instagram post. Plaintiffs' UCL, CLRA, and unjust enrichment claims fail to allege that a reasonable consumer would believe that everyone who responded was guaranteed a free dress, and the claims are also precluded by the adequate-remedy-at-law doctrine. This suit should be dismissed with prejudice.

A. All of Plaintiffs' Claims Fail Because Plaintiffs Do Not Allege They Entered into the Giveaway, Much Less Allege that Defendants Caused Them Harm.

A bedrock element missing from of each of Plaintiffs' claims is any allegation

that they actually signed up for the promotion. Without alleging facts showing how and why they purportedly signed up to receive a free dress, all of Plaintiffs' claims fail.

For their breach-of-contract claim, Plaintiffs must adequately allege that the "breach of contract was a substantial factor in causing [their] harm." Judicial Council of California Civil Jury Instructions (2020) No. 303; *see also Haley v. Casa Del Rey Homeowners Assn.*, 153 Cal. App. 4th 863, 871–72 (2007). Similarly, promissory estoppel and unjust enrichment require a causal connection to the defendant that resulted in harm. *US Ecology, Inc. v. State of California*, 129 Cal. App. 4th 887, 904–05 (2005); *Griffith Co. v. Hofues*, 201 Cal. App. 2d 502, 508 (1962); 1 Witkin, *Summary 11th Contracts* § 1053 (2019). Likewise, to establish statutory standing under the UCL, a plaintiff must show that he "suffered injury in fact and [] lost money or property *as a result of*" the defendant's conduct. Cal. Bus. Prof. Code § 17204 (emphasis added).[2] And the CLRA requires a "consumer" to suffer "*damage as a result of*" a misrepresentation, Cal Civ. Code § 1780 (emphasis added), which requires a plaintiff to allege that he "purchased a product from the defendant, and [] that 'the purchase would not have been made but for the misrepresentation.'" *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016) (citation omitted).

Here, the Complaint discloses only *two facts* about the named Plaintiffs: their names, and that they are "each natural persons." Doc. 1-2 ¶ 9. There is no allegation that Plaintiffs were eligible for the promotion, that they entered into the giveaway, or that they actually saw and relied on the various "misrepresentations" they allege. *See id.* ¶ 38. There are also no allegations that Plaintiffs suffered any actual harm.

Without any facts to indicate participation, reliance, or harm, the Complaint comes nowhere close to establishing the causal connection and injury needed to support each of the pleaded claims. This Court regularly dismisses complaints at the

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[2] And under the UCL, personal information is not considered "lost money or property." *Pitre v. Wal-Mart Stores, Inc.*, No. SACV171281DOCDFMX, 2017 WL 11093619, at *4 (C.D. Cal. Nov. 8, 2017); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 714–15 (N.D. Cal. 2011).

pleading stage where, as here, "plaintiffs fail to allege how defendants' conduct caused the harm they suffered." *Walker v. NDeX W. LLC*, No. 14-CV-2940-FMO, 2015 WL 12732460, at *4 (C.D. Cal. Feb. 20, 2015) (dismissing plaintiffs' UCL claim). Plaintiffs cannot establish either causation or harm—from what is pleaded in the Complaint, it is entirely possible that Plaintiffs never applied at all, or that they did not even see any of the statements that the Complaint attacks.[3]

B. The Claims Sounding in Contract Also Fail Because Plaintiffs Do Not Allege They Entered Into an Agreement Nor That It Was Breached.

Plaintiffs' lawsuit is based on the premise that "Defendants made an offer that promised to render performance (providing new dresses) in exchange for something requested by Defendants (personal sensitive information from Plaintiffs and class members)." Doc. 1-2 ¶ 2. But Plaintiffs never allege that they entered into an agreement in the first place, and this characterization of the "contract" rests on a gross misstatement of the plain language of the promotion.

Plaintiffs allege no facts indicating that they signed up for the giveaway or provided any personal sensitive information based on an expectation that they would be guaranteed a free dress by doing so. *Id.* ¶ 51. Thus, Plaintiffs fail to set forth facts describing the terms of the contract, and they also fail to allege facts demonstrating that Plaintiffs did anything to accept the purported contract. *Brown v. Superior Court*, 199 Cal. App. 4th 971, 992 (2011) (binding contract is not created unless plaintiff demonstrates acceptance of a valid offer). Plaintiffs' failure to allege they *accepted* the alleged offer, and failure to allege that the terms of the offer were communicated to them, require the contract claims be dismissed.

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[3] It is also unclear whether Plaintiffs may invoke the law they seek to apply, as there are no details as to where they reside. "Courts in the Ninth Circuit have consistently held that a plaintiff in a putative class action lacks standing to assert claims under the laws of states other than those where the plaintiff resides or was injured." *Chansue Kang v. P.F. Chang's China Bistro, Inc.*, No. CV 19-02252 PA (SPX), 2020 WL 2027596, at *3 (C.D. Cal. Jan. 9, 2020) (citation omitted).

Even if Plaintiffs could allege that they saw the terms of the promotion, and responded, the claims would still fail. There is no support for Plaintiffs' argument that the Instagram post guaranteed every entrant a free dress. The actual words in the Instagram post instructed individuals to "*apply*" through an entry form. RJN Ex. A (emphasis added). It announced that "*winners*" would be notified on April 7. *Id.* (emphasis added). To reinforce these points, the Instagram post stated that the offer was available "while supplies last." *Id.* Common sense and ordinary experience also confirm that the giveaway was of a limited quantity, and that not everyone would be receiving a free dress. Rather than indicating some sort of guarantee, the words and context made clear that signing up made one *eligible* to receive a dress ("apply"), and that *some* entrants would be selected to receive one ("winners"). Plaintiffs' claim that there was "no indication this was some form of lottery," Doc. 1-2 ¶ 31, is again contradicted by the terms of the promotion referring to winners, applicants, and a limited supply. Doc. 1-2 ¶¶ 4, 26. In addition, the FAQ Plaintiffs cite in their Complaint expressly told applicants that they would be "*vetted and selected in a lottery*." RJN Ex. B (emphasis added).

It is telling that Plaintiffs never claim to have believed that there was *no limitation on quantity whatsoever*, or that they thought that a free dress would be delivered to them if they signed up for the promotion. *Id.* ¶ 31. Any such assertion would be completely implausible in any event. *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (dismissing lawsuit based on magazine sweepstakes solicitation because "[a]ny reasonable recipient, even if unsophisticated, understands that these [materials are] part of an advertising campaign"). Because Plaintiffs do not, and cannot, allege that they expected to receive a free dress based on the written terms of the promotion, they have failed to allege any facts that would show they received anything less than was being offered, much less that a contract existed and was breached.

The language in the Instagram post here is far more clear than the announcement in *Freeman v. Time, Inc.*, where the Ninth Circuit considered two personalized mailers for a "Million Dollar Dream Sweepstakes" promotion. 68 F.3d 285, 287 (9th Cir. 1995). Large type on the mailers in *Freeman* read: "If you return the grand prize winning number, we'll officially announce that MICHAEL FREEMAN HAS WON $1,666,675.00 AND PAYMENT IS SCHEDULED TO BEGIN," while smaller type included language that the "selection of the winner" would take place by April 1, 1994. *Id.* The Ninth Circuit rejected the same argument that Plaintiffs make here: that the promotional language left "room for the reader to draw an inference that he or she *has* the winning number." *Id.* at 290. It explained that "no reasonable addressee could believe that the mailing announced that the addressee was already the winner," as any ambiguity was "dispelled by the promotion as a whole." *Id.* (citing *Haskell*, 857 F. Supp. at 1403). If the broad announcement that an individual "*has won*" over a million dollars and "*payment is scheduled to begin*" was not enough to guarantee a prize in *Freeman*, then allowing entrants to "apply" to a "while supplies last" promotion cannot create a contractual obligation to provide a limitless supply of free dresses here.

In the end, those who signed up for the promotion received exactly what they expected: an opportunity to win a free dress. That the Plaintiffs may not have been selected as one of the lucky recipients does not give rise to a breach-of-contract claim. Plaintiffs do not, and could not, allege they understood the Instagram post as a guarantee of a free dress to all. *See In re iPhone 4s Consumer Litig.*, 637 F. App'x 414, 416 (9th Cir. 2016). Plaintiffs' breach-of-contract claims should be dismissed.

C. The Equitable Claims Also Fail Because There Is an Adequate Remedy at Law.

Plaintiffs' equitable claims have another independent flaw—they are unavailable because Plaintiffs have not established that they lack adequate remedies at law. "[T]he UCL provides only for equitable remedies," *see Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284 (2006), "[u]njust enrichment is an equitable rather than a legal

claim," *McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1091 (9th Cir. 2003), and Plaintiffs seek only equitable relief under the CLRA. Doc. 1-2 ¶ 91 ("Defendants should be ordered to pay restitution as well as be enjoined . . . ."). Because Plaintiffs have not demonstrated an inadequate remedy at law, their claims for equitable relief under these statutes cannot proceed.

As the Ninth Circuit explained last month, "the traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution . . . in a diversity action." *Sonner v. Premier Nutrition Corp.*, No. 18-15890, 2020 WL 3263043, at *7 (9th Cir. June 17, 2020). Thus, Plaintiffs must establish that they "lack[] an adequate remedy at law before securing equitable restitution for past harm under the UCL, . . . CLRA," *id.*, and unjust enrichment. *Larsen v. Vizio, Inc.*, No. 14-SACV-1865, 2017 WL 3084273, at *6 (C.D. Cal. June 26, 2017). The question is not whether Plaintiffs are *likely* to prevail on their legal claims, but whether, assuming they *could* prevail, the available remedy would be "adequate." *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2018 WL 510139, at *2 (N.D. Cal. Jan. 23, 2018). Even where plaintiffs have inadequately pleaded claims at law, as in this case, courts still dismiss plaintiffs' equitable causes of action. *See, e.g., Gomez v. Jelly Belly Candy Co.*, No. 17-CV-0575, 2017 WL 8941167, at *2 (C.D. Cal. Aug. 18, 2017); *Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1203 (N.D. Cal. 2016).

Here, Plaintiffs seek monetary relief for their breach-of-contract claims, *see* Doc. 1-2 ¶¶ 58, 64, and plead no facts suggesting these legal remedies would be inadequate. Accordingly, they cannot bring UCL, CLRA, or unjust enrichment claims as a matter of law.

D. The CLRA Claim Has Other, Additional Flaws that Require Dismissal.

On top of the lack of causation and harm, and the fact that their CLRA claim is unavailable as a matter of law, there are three additional reasons the CLRA claim fails

as a matter of law: (1) Plaintiffs are not "consumers"; (2) the CLRA specifically allows while-supplies-last promotions; and (3) no reliance or misrepresentation occurred.

First, Plaintiffs are not "consumers" who can invoke the CLRA. *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 864 (N.D. Cal. 2011). This "strict requirement," *id.*, mandates that only "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes" may invoke the statute. Cal. Civ. Code § 1761(d). The phrase "by purchase or lease" requires money to be exchanged: the "generalized notion that the phrase 'purchase' or 'lease' contemplates any less than tangible form of payment . . . finds no support under the specific statutory language of the CLRA." *Claridge*, 785 F. Supp. 2d at 864; *Casillas v. Northgate Gonzalez Markets, Inc.*, No. SACV1600064CJCKESX, 2016 WL 10966424, at *3 (C.D. Cal. May 11, 2016) (plaintiff who "sought a free concert ticket" not a "'consumer'"). For this reason, federal courts in California have repeatedly rejected the "theory" Plaintiffs offer here, namely that the "transfer of [personally identifiable] information" constitutes a "'purchase' or 'lease' under the CLRA." *Id.*; *see also Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at *12 (N.D. Cal. Mar. 26, 2013); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *33 (N.D. Cal. Aug. 30, 2017) (rejecting "Plaintiffs' theory that the mere transfer of [personally identifiable information] renders . . . a 'purchase' or 'lease'" under the CLRA). Because Plaintiffs allege only that "consumers" provided their "personal information" to Defendants, Doc. 1-2 ¶¶ 8, 44, and do not allege that they actually paid any money to participate in the promotion, this Court should dismiss their claim under the CLRA for failure to establish that Plaintiffs are consumers.

Second, even if Plaintiffs could invoke the statute, the CLRA specifically *allows* for while-supplies-last promotions. The "unfair or deceptive acts" described in the CLRA include "[a]dvertising goods or services with intent not to supply reasonably expectable demand, *unless the advertisement discloses a limitation of quantity*." Cal.

Civ. Code § 1770(a)(10) (emphasis added). The complaint assails Defendants for failing to include a "*specific* limitation on quantity" that the giveaway "was limited to 250 dresses." Doc. 1-2 ¶ 4 (emphasis added). But there is nothing in section 1770(a)(10) that requires the limitation of quantity to be "specific," or precise as to the exact number of goods available. It simply requires a disclosure of "a limitation"—exactly what Draper James did in the Instagram post.

Finally, Plaintiffs' CLRA claim fails because no misrepresentation occurred. Courts dismiss CLRA claims where "it is not plausible that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 966 (9th Cir. 2016) (citation omitted). As explained previously, *see ante* 15–17, it is not plausible that a significant portion of the public would believe that Draper James was offering an unlimited supply of free dresses through its promotion. *See In re iPhone 4s Consumer Litig.*, 637 F. App'x at 416.

E. Plaintiffs' UCL Claim Also Fails Because the Promotion Was As Advertised.

Plaintiffs' UCL claim fails for all the reasons described above: Plaintiffs failed to adequately allege causation and harm and thus lack standing, and there is an adequate remedy at law. In addition, Plaintiffs cannot plausibly allege that Defendants' conduct was unfair, unlawful, or fraudulent. "An act or practice is unfair if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Saitsky v. DirecTV, Inc.*, No. CV 08-7918 AHM (CWX), 2009 WL 10670629, at *2 (C.D. Cal. Sept. 22, 2009) (*quoting Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006)).

Plaintiffs have failed to plausibly allege any injury at all—much less one not outweighed by countervailing benefits. *See ante* 13–15. Plaintiffs cannot transform the plain text of the Instagram post into a "practice [that] offends an established public

policy" or is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," as is required for "unfair" conduct under the UCL. *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1263 (2006). Nor can Plaintiffs transform the giveaway into something "unlawful." Plaintiffs allege that Defendants' conduct was "unlawful" because it violated the CLRA, the California Consumer Privacy Act (CCPA), Cal. Civ. Code § 1781.100, and Business & Professions Code § 17500, which applies to false or misleading statements in advertising. Doc. 1-2 ¶ 96–97.

Defendants have already explained that the CLRA does not apply. *See ante* 18–20. The CCPA, meanwhile, cannot be used as a "basis for a private right of action under any other law." Cal. Civ. Code § 1798.150(c). And Plaintiffs' argument as Business & Professions Code § 17500 fails for the same reasons as their arguments as to Defendants' "fraudulent" conduct: there is no fraud when a plaintiff "read[s] a true statement" and then "assume[s] things . . . *other than* what the statement actually says." *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW AGRX, 2012 WL 5504011, at *3 (C.D. Cal. Oct. 25, 2012). Because the giveaway was as advertised, and caused no harm to Plaintiffs, no unfair, unlawful, or fraudulent conduct occurred. This Court should dismiss the UCL claim with prejudice.

V. CONCLUSION

Draper James gifted hundreds of free dresses to honor the teacher community doing incredible work under trying circumstances. The post clearly explained that the dresses would be given to "winners" "while supplies last." Plaintiffs never allege that they even signed up for the promotion. And even if they did, there was nothing fraudulent, misleading, or otherwise unlawful about it—indeed, Plaintiffs never allege that they actually thought that they would be guaranteed a free dress if they simply submitted an entry. And no amendment to the complaint can make the Instagram post say anything other than that a limited supply of dresses were being given away to

lucky teachers who applied and were selected as winners. Future amendment would therefore be futile, and this Court should dismiss the complaint with prejudice.

Dated: July 10, 2020

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Theane Evangelis*
Theane Evangelis

Attorneys for DEFENDANTS DRAPER JAMES, LLC AND REESE WITHERSPOON