

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KIMBERLY YORDY,  
Plaintiff,

v.

PLIMUS, INC,  
Defendant.

Case No. 12-cv-00229-TEH

**ORDER DENYING CLASS  
CERTIFICATION**

This matter came before the Court on March 3, 2014, on Plaintiff’s renewed motion for class certification. Having considered the arguments of the parties and the papers submitted, the Court now DENIES Plaintiff’s motion for the reasons set forth below.

**BACKGROUND**

The Court has already outlined the relevant background in its October 29, 2013 order denying Plaintiff’s original motion for class certification. In brief, however, Plaintiff Kimberly Yordy (“Yordy”) alleges that three Unlimited Download Websites, (“UDWs”) purported to offer bestselling media titles for a one-time fee, but in fact only provided content which was already available for free or provided illegal content that violated copyright laws. Yordy claims that the fraudulent marketing scheme behind these three UDWs was developed, encouraged and promoted by Defendant Plimus, Inc. (“Plimus”). Plimus denies any involvement in advertising and marketing, and claims it only processed payments for the UDWs.

Yordy sues Plimus on behalf of herself and all others similarly situated for violations of California’s False Advertising Law, California Business and Professions Code sections 17500 *et seq.* (“FAL”); Consumers Legal Remedies Act, California Civil Code sections 1750, *et seq.* (“CLRA”); and Unfair Competition Law, California Business and Professions Code sections 17200 *et seq.* (“UCL”); as well as fraud in the inducement,

United States District Court  
Northern District of California

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1 fraud by omission, negligent misrepresentation, and breach of contract.

2 Yordy previously moved to certify a class of all those who paid to access a  
3 collection of nineteen UDWs. The Court denied that motion finding that Plaintiff had  
4 failed to meet Federal Rule of Civil Procedure Rule 23's requirements of commonality,  
5 typicality, and adequacy. Plaintiff now moves to certify a much narrower class of only  
6 three UDWs, MyPadMedia.com, TheNovelNetwork.com, and the ReadingSite.com, which  
7 were all operated by a single company, MyPadMedia.

### 8 9 **LEGAL STANDARD**

10 Federal Rule of Civil Procedure 23 governs class certification. Rule 23(a) requires  
11 that a party seeking certification demonstrate that:

- 12 (1) the class is so numerous that joinder of all members is impracticable,  
13 (2) there are questions of law or fact common to the class,  
14 (3) the claims or defenses of the representative parties are typical of the claims or  
15 defenses of the class, and  
16 (4) the representative parties will fairly and adequately protect the interests of the  
17 class.

18 Fed. R. Civ. P. 23(a) (paragraph breaks added).

19 While Rule 23(a) does not expressly require a class to be ascertainable, courts have  
20 read the rule to imply this additional requirement. *In re TFT-LCD (Flat Panel) Antitrust*  
21 *Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010). A class is "ascertainable" if it can be  
22 described by a set of common characteristics sufficient to allow a member of that group to  
23 identify himself or herself as having a right to recover based on the class description.  
24 *Hanni v. Am. Airlines, Inc.*, No. C-08-00732 CW, 2010 WL 289297, at \*9 (N.D. Cal. Jan.  
25 15, 2010) (internal quotation marks omitted).

26 A party seeking certification must also demonstrate that the suit falls into one of the  
27 categories of class actions set out within Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*,  
28 253 F.3d 1180, 1186 (9th Cir. 2001). Yordy seeks certification under both subsections

1 (b)(2) and (b)(3). Subsection (b)(2) requires that the defendant acted or failed to act on  
2 grounds generally applicable to the proposed class, “so that final injunctive relief or  
3 corresponding declaratory relief is appropriate.” Fed. R. Civ. P. 23(b)(2). Subsection  
4 (b)(3) requires that “questions of law or fact common to class members predominate over  
5 any questions affecting only individual members, and that a class action is superior to  
6 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.  
7 Civ. P. 23(b)(3).

8 To determine whether a party seeking certification has met its burden of providing  
9 facts to support certification, the court must conduct a “rigorous analysis.” *Zinser*, 253  
10 F.3d at 1186. Generally, the court is not to consider the merits of a plaintiff’s claims at  
11 this stage, but it may do so where class “considerations . . . are enmeshed in the factual and  
12 legal issues comprising the plaintiff’s cause of action.” *Wal-Mart Stores, Inc. v. Dukes*,  
13 131 S. Ct. 2541, 2551-52 (2011) (quotation marks omitted).

## 14 15 **DISCUSSION**

16 Plimus does not dispute that Yordy meets Rule 23(a)’s numerosity requirement and  
17 its implied ascertainability requirement. The Court’s analysis therefore focuses on the next  
18 Rule 23(a) requirement – commonality.

19 In order to satisfy commonality, a plaintiff’s “claims must depend upon a common  
20 contention” that is “of such a nature that it is capable of classwide resolution – which  
21 means that determination of its truth or falsity will resolve an issue that is central to the  
22 validity of each of the claims in one stroke.” *Dukes*, 131 S. Ct. at 2551. To support a  
23 finding of commonality, Yordy puts forth the following questions as common to the class  
24 and capable of being answered on a class-wide basis: (1) whether Plimus knew that the  
25 products offered by the UDWs were fraudulent, but failed to suspend the UDWs or  
26 demand changes; (2) whether Plimus is liable for facilitating and promoting the content of  
27 the UDWs; and (3) whether the class members suffered the same form of injury and are  
28 entitled to damages.

1 Plimus responds that even if these questions are capable of classwide determination,  
2 the answers to these questions have no bearing on the “validity of each of [Plaintiff’s]  
3 claims” as required by *Dukes*, 131 S. Ct. at 255. Specifically, Plimus contends that the  
4 FAL, UCL, and CLRA all require that a defendant directly participate in the alleged  
5 unlawful activity, and that there is no vicarious liability under these statutes. Therefore,  
6 whether Plimus “facilitated” the UDWs or “knew” of their fraud does not resolve the  
7 question of its liability.

8 Under the UCL, a defendant’s liability must be based on his “personal participation  
9 in the unlawful practices” and “unbridled control” over the unlawful practices; vicarious  
10 liability is insufficient. *Emery v. Visa Int’l Serv. Ass’n*, 95 Cal. App. 4th 952, 960 (2002).  
11 In *Emery*, for example, the court found that defendant Visa had not personally participated  
12 in the alleged wrong of soliciting participation in a foreign lottery, when its logo was used  
13 in the solicitation, and it accepted and processed credit card payments for the lottery. In  
14 *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, the Ninth Circuit upheld the district court’s  
15 dismissal of UCL claims against defendant Visa, holding that although Visa processed  
16 payments for websites that infringed copyrights, “[b]ecause ‘Visa itself played no part in  
17 preparing or sending any ‘statement’ that might be construed as untrue or misleading under  
18 the unfair business practices statutes,’ it could not be liable for unfair competition.” 494  
19 F.3d 788, 808-09 (9th Cir. 2007) (quoting *Emery*, 95 Cal. App. 4th at 964).

20 Likewise, for an FAL claim, mere knowledge of the falsity of a third-party’s  
21 statements is insufficient to support direct liability or an aiding-and-abetting theory of  
22 liability, and the FAL includes “no duty to investigate the truth of statements made by  
23 others.” *Emery*, 95 Cal. App. 4th at 964; *see also Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*,  
24 494 F.3d 788, 809 (9th Cir. 2007). In *In re Jamster*, plaintiffs claimed that Defendant T-  
25 Mobile violated the UCL, FAL, and CLRA because it “knew of complaints concerning  
26 deceptive advertising undertaken by” third-party Jamster to lure customers into a  
27 subscription service, but continued to charge those who were fraudulently induced to  
28 subscribe to Jamster’s services. *In re Jamster Mktg. Litig.*, No. MDL 1751, 2009 WL

1 1456632, at \*8-9 (S.D. Cal. May 22, 2009). The court dismissed the plaintiffs' claims,  
2 concluding "that T-Mobile knew of complaints concerning deceptive marketing [was]  
3 insufficient to show that [it] controlled, participated, approved, marketed or otherwise  
4 adopted [Jamster's] advertising practices." *In re Jamster Mktg. Litig.*, 2009 WL 1456632,  
5 at \*8. Similarly, many courts have held that CLRA liability also requires "personal  
6 participation" and "unbridled control." *See In re Jamster Mktg. Litig.*, No. MDL 1751,  
7 2009 WL 1456632, at \*9; *see also, Dorfman v. Nutramax Labs., Inc.*, No. 13-CV-0873,  
8 2013 WL 5353043, at \*14 (S.D. Cal. Sept. 23, 2013) (holding that defendant Rite-Aid's  
9 creation of deceptive packaging and repetition of false statements on their own website  
10 constituted personal participation in the false statements to support a CLRA claim).

11 Based on the legal standards applicable to Yordy's UCL, FAL, and CLRA claims,  
12 Yordy's proposed common questions regarding Plimus's "facilitation" of, "promotion" of,  
13 and "knowledge" of the UDWs are not central to Plimus's liability. *See Dukes*, 131 S. Ct.  
14 at 255 (explaining that for a discrimination claim, reciting questions that are unrelated to  
15 liability such as "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have  
16 discretion over pay? Is that an unlawful employment practice? What remedies should we  
17 get?" is "insufficient to obtain class certification"). Yordy's proposed common questions  
18 also do not resolve Plimus's liability on Yordy's common law claims. Common law fraud  
19 also requires more than mere knowledge of falsity or general facilitation. *See Lazar v.*  
20 *Super. Ct.*, 12 Cal. 4th 631, 638 (1996) (describing the elements of common law fraud as  
21 (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter  
22 or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e)  
23 resulting damage). Thus, whether Plimus facilitated the websites' activity, or promoted  
24 them to other marketers, or had knowledge of their fraud does not determine whether  
25 Plimus is liable for the violations Yordy alleges. These questions are therefore  
26 "insufficient to obtain class certification." *Dukes*, 131 S. Ct. at 255.

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1           Looking beyond Yordy’s proposed common questions, the Court also considers the  
2 evidence Yordy offers to see if it may support certification. The Court is careful not to  
3 delve into the merits of the claims at issue here, and is mindful of the Supreme Court’s  
4 warning that “[m]erits questions may be considered to the extent—but only to the extent—  
5 that they are relevant to determining whether the Rule 23 prerequisites for class  
6 certification are satisfied.” *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S.  
7 Ct. 1184, 1195 (2013). Adhering to that limitation, the Court concludes that Yordy offers  
8 no evidence that Plimus operated in similar manner with respect to all three websites such  
9 that its liability can be assessed as to all three websites together. Yordy only offers that  
10 Plimus assigned MyPadMedia an account manager, Pl’s Ex. 30, and that it reformatted the  
11 payment processing pages of MyPadMedia’s three websites, Pl’s Ex. 31. Reformatting the  
12 payment processing pages of the UDWs, however, does not reflect how Plimus was  
13 involved in the advertising content of any of the UDWs on a common basis. Similarly, the  
14 assignment of a single account manager for MyPadMedia does not support Plimus’s class-  
15 wide involvement with advertising and promotions. Finally, Yordy’s claim that Plimus  
16 changed the content of MyPadMedia’s offer e-mails is belied by the record, which plainly  
17 describes the e-mails in question as “thank you” e-mails, sent to persons who had already  
18 purchased access to websites, not offer e-mails intended to solicit purchases. Pl.’s Ex. 31.  
19 As with Yordy’s previous motion for class certification, there is no evidence that Plimus’s  
20 involvement with the allegedly false advertising – the crux of the claims at issue here – is  
21 common across the UDWs.

22           As Yordy has failed to establish that there is a common contention that “is central to  
23 the validity of each of the claims” and that can be resolved across the class, she has failed  
24 to establish Rule 23(a)’s commonality requirement. *See Dukes*, 131 S. Ct. at 2551.  
25 Because commonality has not been met, the Court refrains from discussing Rule 23(a)’s  
26 other requirements of typicality and adequacy or Rule 23(b)’s requirements.

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**CONCLUSION**

For the foregoing reasons, Plaintiff’s renewed motion for class certification is DENIED.

**IT IS SO ORDERED.**

Dated: 4/15/14



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THELTON E. HENDERSON  
United States District Judge

United States District Court  
Northern District of California