SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 12, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV410659	Sims v. Google LLC, et al. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 2	20CV374355	Silvaco, Inc. v. Andersen, et al.	See tentative ruling. The Court will prepare the final order.
LINE 3	22CV399353	Ocanas v. Catholic Charities of Santa Clara County (Class Action)	OFF CALENDAR, as this motion has been withdrawn.
LINE 4			
LINE 5			
LINE 6			
LINE 7			
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
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LINE 13			

Calendar Line 1

Case Name: *Sims v. Google LLC, et al.*
Case No.: 23CV410659

This is a putative class action arising from the automatic renewal of subscriptions for digital content offered by Defendants Google LLC, d/b/a YouTube and YouTube, LLC ("Defendants" or "YouTube").

Before the Court is YouTube's demurrer to each of the claims asserted in Plaintiff Richard Sims' operative complaint. For the reasons explained below, the Court SUSTAINS the demurrer, but gives 30 days' leave to amend.

I. BACKGROUND

A. Factual

As alleged in the operative complaint,[1] Defendants own and operate a media-sharing platform, YouTube, which contains videos created by individuals and entities that have registered with YouTube and uploaded their videos to a "channel." (Complaint, ¶ 1.) YouTube is accessible as a website at youtube.com (the "YT Website"), or on a mobile application or application on a set-top streaming device (the "YT Apps") (together with the YT Website, the "YouTube Platform"). (*Ibid*.) Through the YouTube Platform, Defendants market, advertise, and sell paid memberships to certain auto-renewing membership programs. (*Ibid*.)

Among these programs are (a) YouTube Premium and (b) YouTube Music (collectively, the "YT Subscriptions"). (Complaint, ¶ 2.) The YT Subscriptions are subscription-based services that offer, among other things, premium and ad-free music streaming and ad-free access to all YouTube content, including exclusive content commissioned from notable YouTube personalities. (*Ibid*.) Consumers may sign up for Defendants' YT Subscriptions through the YT Website and, in some cases, the YT Apps. (*Ibid*.) They purchase these subscriptions either by choosing a free trial that automatically converts to a paid subscription at the end of the trial period, or a paid monthly annual subscription. (Complaint, ¶ 5.)

Plaintiff alleges that the enrollment process for the YT Subscription violates various provisions of California's Automatic Renewal Law ("ARL"), Business and Professions Code section 17600, et seq.[2] (Complaint, ¶ 5.) Specifically, Plaintiff alleges that Defendants systematically violate the ARL by: (1) failing to present automatic renewal terms in a clear and conspicuous manner and in visual proximity to the request for consent to the offer before the subscription or purchasing agreement is fulfilled, in violation of Section 17602(a)(1); (2) charging consumers' credit card, debit card, or third-party payment account ("Payment

[1] In the introductory paragraph of the Complaint, Plaintiff pleads that this action is related to another lawsuit in this Court that concerns YouTube, *Dutcher v. Google LLC d/b/a YouTube, et al*., Case No. 20CV366905 ("*Dutcher*").
[2] All subsequent statutory reference are to the Business and Professions Code unless otherwise stated.

Method") without first obtaining their affirmative consent to the agreement containing the automatic renewal offer terms, in violation of Section 17602(a)(2); and (3) failing to provide an acknowledgment that includes automatic renewal offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer, in direct violation of Sections 17602(a)(3). (*Id*., ¶ 6.) The acknowledgment also allegedly violates Section 17602(c) by failing to disclose a toll-free telephone number or describe another cost-effective, timely, and easy-to-use mechanism for cancellation. (*Ibid*.)

Plaintiff alleges that YouTube utilizes "dark patterns" in its user interfaces to trick users into doing things they might not otherwise do, like signing up for recurring bills. (Complaint, ¶ 26.) Defendants have used these alleged dark patterns "to prevent user unsubscription from the YT Subscriptions by adopting complex cancellation procedures to increase the friction in the subscription cancellation process," making it difficult (if not impossible) for subscribers to cancel and leading to an increase in unintentional enrollments in paid subscriptions. (*Ibid*.) Many angry customers have complained of these practices. (*Id*., ¶¶ 27-31.)

Plaintiff Richard Sims resides in California. (Complaint, ¶ 9.) In January 2022, Mr. Sims signed up for a free trial of Defendants' monthly YouTube Music subscription from their website. (*Id*., ¶¶ 9, 63.) He alleges that at the time of enrollment, Defendants failed to disclose all required automatic renewal offer terms associated with the subscription or obtain his affirmative consent to those terms in violation of the ARL. (*Id*., ¶¶ 9, 64-65.) Plaintiff alleges that he was not aware that upon the expiration of his subscription, Defendants would automatically convert his free trial into a paid, automatically renewing subscription. (*Ibid*.) Nor did Defendants adequately disclose, he pleads, the length of his free trial, when the first charge would occur, or the full terms of the applicable cancellation policy. (*Ibid*.) The acknowledgment email Plaintiff received upon his enrollment also failed to provide him with the complete automatic renewal terms that applied to his offer (including the cancellation policy or information regarding how to cancel) as required. (*Id*., ¶¶ 9, 66.)

As a result of the foregoing violations, Plaintiff was not aware that his subscription to YouTube Music would automatically renew after the initial free trial period, or of the length of the free trial period (or the length of the paid renewal period after the trial's expiration), or of when the first charge would occur, or the complete cancellation policy for a YouTube Music subscription. (Complaint, ¶¶ 9, 67.)

Approximately one month after he first signed up for his subscription, Defendants converted Mr. Sims' free trial to YouTube Music to a paid YT Subscription and automatically charged him the full standard monthly rate associated with Defendants' paid monthly YouTube Music subscription. (Complaint, ¶¶ 9, 68.) Thereafter, Defendants continued to automatically renew Plaintiff's YT Subscription and charge him on a monthly basis, a fact that Plaintiff did not become aware of until late 2022. (*Id*., ¶¶ 9, 70.) Plaintiff struggled to cancel the YT Subscription due to Defendants' confusing cancellation policy, and was ultimately unable to do so until December 2022. (*Id*., ¶¶ 9, 74.) Plaintiff alleges that had Defendants complied with the ARL and made the requisite disclosures, he would not have subscribed to YouTube Music in the first place or would have subscribed on materially different terms, or would have cancelled earlier. (*Id*., ¶¶ 9, 80.)

B. Procedural

Based on the foregoing allegations, Plaintiff filed his Complaint on February 1, 2023, asserting the following causes of action: (1) violations of Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200, et seq.; (2) conversion; (3) violations of False Advertising Law ("FAL") (Bus. & Prof. Code, §§ 17500, et seq.); (4) violations of Consumer Legal Remedies Act ("CLRA") (Civ. Code, §§ 1750, et seq.); (5) unjust enrichment/restitution; (6) negligent misrepresentation; and (7) fraud.

II. DEMURRER

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

B. Discussion

Defendants demur to each of the seven cause of action asserted in the Complaint on the ground of failure to state facts sufficient to constitute a cause of action, arguing that all of Plaintiff's claims fail because YouTube complies with the ARL. Defendants explain that this action advances the same claims and theories that the plaintiff in *Dutcher* did, but whereas the Court overruled their demurrer in its entirety in *Dutcher*, it should sustain it here because this case is materially different, to wit: (1) the Court's ruling in *Dutcher* turned entirely on the so-called "24-hour policy" pertaining to the YouTube TV service, but such a service is not at issue here; (2) YouTube has refined and improved its disclosures and these disclosures are more comprehensive than those in *Dutcher*; and (3) in the recently decided case of *Walkingeagle v. Google LLC* (D. Or. 2023) 2023 U.S. LEXIS 102, which is nearly identical to the action at bench, the court held that YouTube's disclosures complied with Oregon's automatic renewal law, which was modeled on the ARL.

The ARL was enacted "to end the practice of ongoing charging of consumer credit or debit cards … without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." (Bus. & Prof. Code, § 17600.) As relevant here, the law requires a consumer's affirmative consent to any subscription agreement automatically renewed for a new term when the initial term ends. (Bus. & Prof. Code, § 17602, subd. (a)(2).) It further requires "clear and conspicuous" disclosure of the offer terms and an

acknowledgment that includes automatic renewal offer terms, cancellation policy, and "information regarding how to cancel in a manner that is capable of being retained by the consumer." (Bus. & Prof. Code, § 17602, subd. (a)(1) and (3).)

1. *YouTube Music and YouTube Premium Enrollment Process and Disclosure of "automatic renewal offer terms" Prior to Completion of Purchase*

According to the allegations of the Complaint, the enrollment process for each YT Subscription is substantially the same. Those who enroll on the YT Website are directed to a final webpage (the "Checkout Page") where prospective subscribers are prompted to input their payment information and then invited to complete their purchases. (Complaint, ¶ 44.) Plaintiff maintains that relevant portions of the Checkout Page fail to comply with the ARL.

a. "Automatic Renewal Offer Terms"

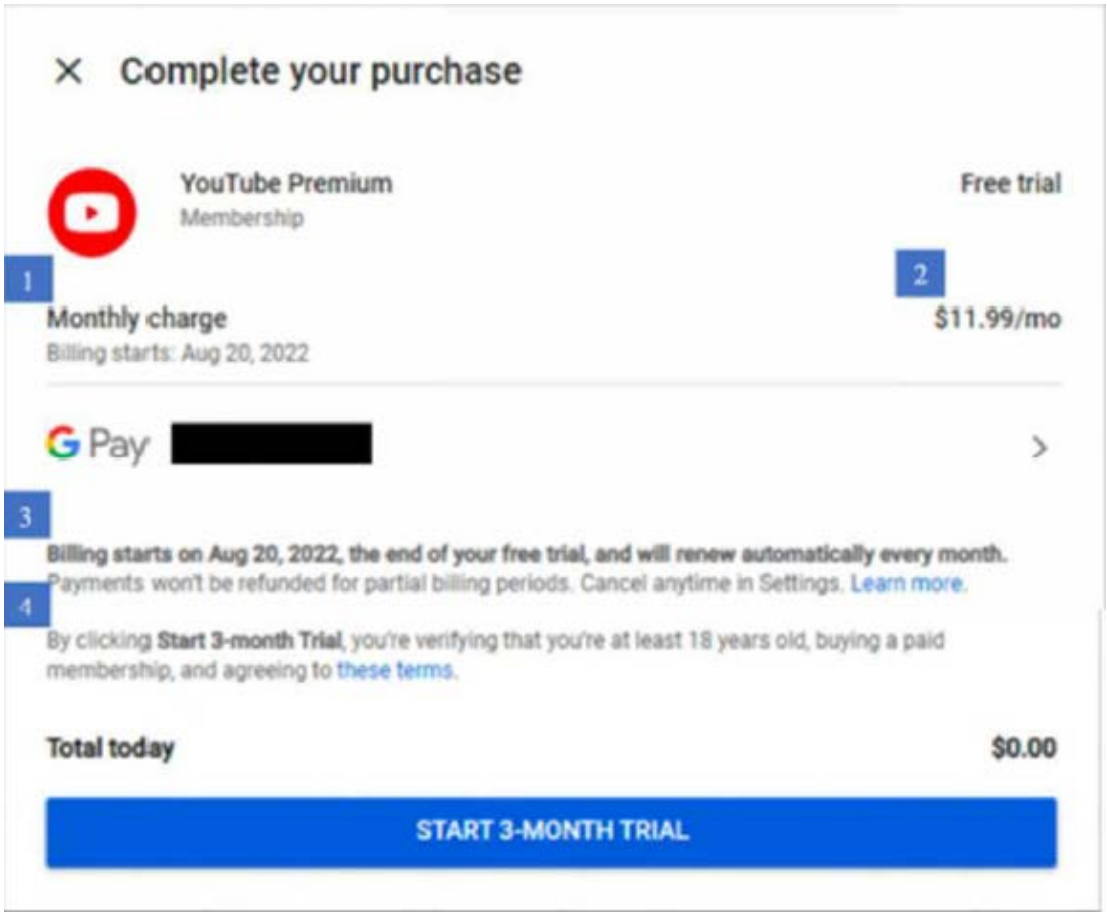
The ARL requires disclosure of "automatic renewal offer terms" prior to completion of purchase (Bus. & Prof. Code, § 17602, subd. (a)(1)), which includes the following information:

- That the subscription or purchasing agreement will continue until the consumer cancels;
- A description of the cancellation policy that applies to the offer;
- The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known;
- The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer;
- The minimum purchase obligation, if any.

(Bus. & Prof. Code, § 17601, subd. (b).)

These terms must be presented in a "clear and conspicuous manner" before the subscription is fulfilled, and must also be presented in "visual proximity … to the request for consent to the offer."[3] As set forth in the Complaint, an individual who navigates the enrollment process for the YT Subscriptions is presented with the following prior to completing his or her purchase:

[3] As evidenced by numerous authorities, the Court may properly determine whether disclosures are clear and conspicuous and thus comply with the ARL based on the pleadings, i.e., as a matter of law. (See, e.g., *Becerra v. Dr. Pepper/Seven Up, Inc.* (9th Cir. 2019) 945 F.3d 1225, 1228-1229 [affirming dismissal of claims of customer confusion based on deceptive labeling].) This is primarily because, as YouTube maintains, the ARL defines "clear and conspicuous" in terms of the *action* a business must take, and *not* in terms of its *effect* or *impact* on consumers. (Bus. & Prof. Code, § 17601, subd. (c).) The Legislature could have elected to enact a statute that focused on the latter rather than the former, but one can discern why it opted not to take such an approach. To do so would have likely lead to a deluge of lawsuits requiring courts to determine the effect on consumers, which is varied and subjective. Instead, by setting forth the actions that a business must take, an objective standard is provided from which courts can determine compliance by the particular defendant.



Does above image comply with the ARL? Plaintiff first alleges that it does not because a "reasonable consumer" would find the statement regarding monthly payments unclear as to whether recurring payments will continue or whether "formal cancellation" is necessary to prevent that from happening. (Complaint, ¶ 49.) But the Checkout Page states clearly that billing "will start" at the "end of the free trial" and then "will renew *automatically* every month." Plaintiff insists that the foregoing is "vague and ambiguous," but the Court does not see how this is the case. The disclosure leaves no ambiguity that billing will *automatically* begin at the conclusion of the free trial until cancelled. The fact that the foregoing is almost immediately followed by the phrase "[c]ancel any time in settings" supports this conclusion, as cancellation is clearly necessary to avoid the billing that would otherwise automatically begin at the conclusion of the free trial.

Next, Plaintiff pleads that the foregoing fails to adequately disclose the recurring amount to be charged each billing period because the text in the "Total Today" portion does not place consumers on notice of what that exact amount will be. But next to "Monthly charge," the Checkout Page clearly shows the *specific* amount of "recurring charges that will be charged" for the first renewal period of the consumer's *paid* subscription (and indeed very month thereafter unless it is cancelled). Thus, the consumer is adequately placed on notice of this amount and the fact that the "Total Today" portion does not also indicate that amount is appropriate because it is only referring to a singular charge for the specific day of enrollment.

Plaintiff next takes issue with the disclosure of the length of the automatic renewal terms, insisting that it is inadequate because the phrase "will renew automatically every month" fails to make clear the precise date of a given month or bill period that a consumer will be charged, i.e., does it refer to the precise calendar date of enrollment or to four-week intervals? (Complaint, ¶ 52.) The Court disagrees.

As YouTube responds to this contention, the ARL only requires "clear and conspicuous" disclosure of "[t]he length of the automatic renewal term *or* that the service is continuous." (Bus. & Prof. Code, § 17601, subd. (b)(4) [emphasis added].) The Checkout Page discloses that "Billing starts on [date] and *will renew automatically every month*," which makes it clear that the subscription "will continue [i.e., is continuous] … until the consumer cancels." (*Id*.) Further, a reasonable consumer would understand that the foregoing not only means that the YT Subscription is continuous, but also that he or she will be charged on the *same* day every month; numerous courts are in accord that the term "month" is not ambiguous. (See, e.g., *Kennedy v. Pilot Life Ins. Co.* (1969) 165 S.E. 2d. 676, 678 [citing numerous federal and state authorities around the county and stating "[t]he word 'month' has a clear and well-defined meaning, and refers to a particular time. Unless an intention to the contrary is expressed, it signifies a *calendar month*, regardless of the number of days it contains."].)

Next, Plaintiff alleges that Defendants have violated the ARL because the Checkout Page fails to present a complete "description of the cancellation policy that applies to the offer," which would include *how* to cancel, that the subscription must be cancelled before the end of trial period to avoid charges and how to obtain a refund upon cancellation. (Complaint, ¶ 51.) As the Court has already concluded above, the language on the Checkout Page makes clear that formal cancellation is necessary to prevent future charges prior to the end of the free trial by stating that billing "will start" at the "end of the free trial" and then "will renew automatically every month." Accordingly, the cancellation policy is adequately disclosed in this regard.

Turning to Plaintiff's other allegations, as articulated above, the ARL requires clear and conspicuous disclosure of "[t]he *description* of the cancellation policy that applies to the offer." (Bus. & Prof. Code, § 17601, subd. (b)(2); see also Bus. & Prof. Code, § 17602, subd. (a)(1).) The Court places emphasis on the foregoing because there is no language in the ARL that requires disclosure of the *complete* cancellation policy before the subscription or purchasing agreement is fulfilled, as Plaintiff suggests. (See, e.g., *Walkingeagle v. Google LLC*, 2023 U.S. LEXIS 102, *5.) Thus, the questions before the Court become, what is subsumed within the phrase "description of the cancellation policy that applies to the offer," and do the disclosures at issue include them? Defendants insist that the disclosure that users can "Cancel anytime in settings" is adequate and fulfills this requirement of the ARL because the policy of cancellation *has* been described- it is one of cancellation at any time which can be effectuated in settings. The Court finds this contention persuasive given the language used by the Legislature in the ARL for this requirement as compared to other portions of the statute. As YouTube notes, Section 17602, subdivision (a)(3), which pertains to the acknowledgment that must be provided to consumers *after* purchase, states that said acknowledgment must include, among other things, "[the] cancellation policy, and information regarding *how* to cancel in a manner that is capable of being retained by the consumer …." If the Legislature wished to require entities such as YouTube to describe specifically *how* to cancel the subscription *prior* to purchase, it would have done so.

While Plaintiff insists in his opposition that YouTube's disclosure in this regard is inadequate, he fails to identify a statutory basis for his contention that the "complete" cancellation policy must be disclosed on the Checkout page. Instead, citing to *Johnson v. Pluralsight, LLC* (9th Cir. 2018) 728 Fed. Appx. 674, 677 and *Lopez v. Stages of Beauty* (S.D. Cal. 2018) 307 F.Supp.3d 1058, 1071-1072, he maintains that courts have already rejected substantially the same argument as advanced by Defendants here.

In *Johnson*, the court concluded that the plaintiff had sufficiently pleaded a UCL claim predicated on a violation of the ARL by alleging that the defendant "charg[ed] him without first providing information on how to cancel the subscription." (*Johnson, supra,* at 677.) But the court reached this conclusion without any specific statutory analysis, much less any discussion concerning or acknowledging the difference between a "description of the cancellation policy" and "information regarding how to cancel." (*Compare* Bus. & Prof. Code, § 17602, subd. (a)(1) *with* § 17602, subd. (a)(3).) As for *Lopez*, the court concluded that the defendant's notification to the subscriber to "call the phone number provided to cancel" did not adequately describe the cancellation policy because it failed to instruct the consumer that they needed to call the number at *least one day prior* to the date the next monthly delivery shipped in order to effectuate the cancellation. Thus, the inadequacy turned on the nature of the policy, which contained a limitation that affected the subscriber's ability to avoid further damages. No such limitation has been alleged to exist here, where the Checkout Page also advises consumers that "[p]ayments won't be refunded for partial billing periods." Consequently, neither of the foregoing decisions compel the Court to conclude that the phrase "Cancel anytime in settings" on the Checkout Page does not meet the requirements of the ARL concerning a "description of the cancellation policy that applies to the offer."

Finally, the Court does not find persuasive Plaintiff's contention that the disclosures pertaining to Defendants' cancellation policy fail to comply with the ARL because they do not place consumers on notice of terms pertaining to refunds, particularly that in order to receive a refund upon cancellation, the customer must have "not commenced using the relevant [YT Subscription] ordered and [the customer must make the] request no later than 7 working days after [his or her] order is completed" in order to receive a refund, which is disclosed elsewhere on the YT Website." (Complaint, ¶ 51.) What Plaintiff is describing is not a policy pertaining to *cancellation*, but a *refund*. This is because it involves recovery of amounts *already paid*, rather than amounts that might be charged in the future if the customer does not cancel the subscription. Further, contrary to what Plaintiff appears to suggest, the inclusion of the word "cancel" does not transform the character of the refund policy to one of cancellation. A refund is only permissible in this context if the subscription has been cancelled, and thus this is why the word "cancel" is included, but ultimately the policy still only addresses how to request money back from YouTube and not how to prevent *future* charges.

Given the foregoing, the Court rejects Plaintiff's contention that Defendants have not adequately disclosed the cancellation policy.

b. "Clear and Conspicuous" and "Visual Proximity" Requirements

Plaintiff also takes issue with the nature of how the required disclosures are presented on the Checkout page, insisting that they are not "clear and conspicuous" and do not conform to the ARL's requirement of "visual proximity" to the "request for consent to the offer." (Bus. & Prof. Code, § 17602, subd. (a).) With respect to the former requirement, Plaintiff maintains

that it is not met because the disclosures are not presented "in a manner that clearly calls attention to the language" and could be "easily overlooked by consumers." (Opp. at 8, 13.) As for the latter, Plaintiff asserts that it is not met because of the distance between the final blue checkout button at the bottom of the Checkout Page and the recurring amounts to be charged. (Complaint, ¶ 50.) Upon review, the Court is not persuaded that Checkout Page fails to meet these requirements.

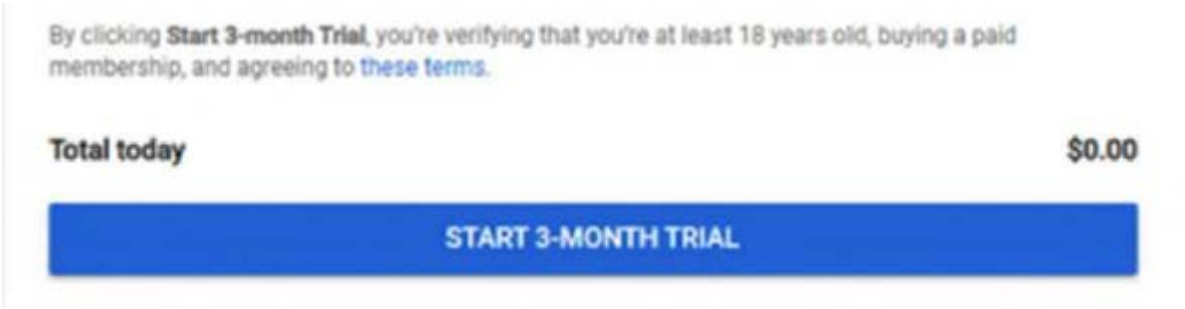
Under the ARL, disclosures are "[c]lear and conspicuous" if they are in "larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language." (Bus. & Prof. Code, § 17601, subd. (c).) The Court agrees with Defendants that the disclosures are clear and conspicuous because they use "text with contrasting type as the surrounding text," and the "key offer terms are featured in bold font, and a gray line divides the page to further demarcate the terms." (See, e.g., *Walkingeagle*, 2023 U.S. Dist. LEXIS 102499, *11.) The renewal term and price are bolded, as is the disclosure that billing for the membership renews "automatically every month," and the text stating that members can "[c]ancel anytime" but will not be refunded for partial months is set off from the line immediately above in contrasting type. None of the required disclosures are buried in a wall of text or presented in a "miniscule font" that would be likely to be overlooked by the consumer.

As for visual proximity, Plaintiff insists that the automatic renewal terms, including the recurring price to be charged, must appear in the block text "immediately" above the blue final checkout button in order to be compliant with the statute. But nowhere in the ARL is the phrase "visual proximity" defined as "immediate," and the Court agrees with Defendants that the requirement is met here because the automatic renewal terms, *including* the recurring price to be charged, are featured on the same page as the final checkout button *without* the need to scroll. Further, the space between the recurring charge in particular and the final checkout button is relatively sparse in terms of text, with no clutter or extraneous language that might draw the consumer's attention away from the disclosures. (See *Hall v. Time* (9th Cir. 2021) 857 Fed. Appx. 385, 386 [explaining that the "'visual proximity' requirement of the ARL requires 'visual *proximity*,' not immediate *adjacency*, between the 'automatic renewal offer terms' and 'the request for consent.'"].) Plaintiff offers no authority which provides for the level of stringency that he maintains is required here. The Court also rejects any notion that whether the disclosures are sufficiently close to the request for consent must be made "from the perspective of the reasonable consumer" and, thus, is a question of fact. The ARL already sets the applicable standard for the distance between the automatic renewal terms and the request for consent- "visual proximity"- and therefore there is no space for consideration of the preferences of different consumers in this regard. The Court concludes that the requirement of visual proximity is met.

c. Affirmative Consent

Plaintiff also alleges that Defendants violated the ARL because at no point during the checkout process do they require consumers to read or affirmatively agree to any terms of service associated with their YT Subscriptions, i.e., by requiring consumers to select or click a "checkbox" next to the offer terms to complete the checkout process. (Complaint, ¶ 34.)

The ARL provides that a consumer's proffered method of payment (his or her "credit or debit card" or "account with a third party") may not be charged for an automatic renewal "without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms …." (Bus. & Prof. Code, § 17602, subd. (a)(2).)



Here, all of the requisite "automatic renewal offer terms" are presented on the same page as the button that consumers must click on in order to complete the enrollment process, and immediately above the button, consumers are advised "By clicking Start 3-month Trial you're verifying that you're at least 18 years old [and] *buying a paid membership* …." The Court agrees with Defendants that the foregoing complies with the ARL because it places consumers on clear notice that, by clicking the "Start 3-Month Trial" button, they are "buying a paid membership" subject to the ARL terms on that exact page. There is simply nothing in the statute that requires a "checkbox" or similar mechanism next to the offer terms as Plaintiff alleges, and such a requirement was explicitly rejected by the Ninth Circuit in *Hall v. Time, Inc.*, *supra*, with the Court explaining that "[h]ad the legislature intended to require a consumer's affirmative consent to the automatic renewal terms *specifically*, it could have omitted the words 'the agreement containing' from the [applicable] provision. It did not, and we decline to rewrite the statute and impose a requirement that is absent from the text." (*Hall*, 857 Fed. Appx. 385, 387 [emphasis added].) The cases Plaintiff relies on his opposition to support a contrary conclusion are distinguishable because they involve circumstances in which the required terms were accessible through a *hyperlink* next to the request for consent that took the consumer to *another page*. (See *Turnier v. Bed Bath & Beyond Inc.* (S.D. Cal. 2021) 517 F.Supp.3d 1132, 1139.) While the Checkout Page includes a hyperlink immediately preceding the checkout button, the automatic renewal terms are also disclosed on the *same page* and thus there is no need to consult that link in order to determine what one is consenting to. The Court therefore rejects Plaintiff's contention that Defendants' fail to meet the ARL's requirement of affirmative consent.

2. *Acknowledgment After Purchase of YT Subscriptions*

Next, Plaintiff alleges that the post-checkout acknowledgments sent to YouTube Music and YouTube Premium subscribers suffer from the same deficiencies as the pre-checkout disclosures featured on the relevant portions of the Checkout Pages, above, i.e., they do not clearly and conspicuously provide: that the subscriptions will continue until the consumer cancels; the amount they will be charged each billing period; the length of the automatic renewal term; and the offer's cancellation policy or how to cancel YT Subscriptions. (Complaint, ¶ 59.)

The ARL makes it unlawful for a business to "[f]ail to provide an acknowledgment that includes the automatic renewal offer terms or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer." (Bus. & Prof. Code, § 17602, subd. (a)(3).) Defendants provide the following acknowledgment to the consumer subsequent to the conclusion of the enrollment process described above:

YouTube

Hi Qin,

Welcome to your 1 month free trial of Music Premium membership! The payment method you provided will be charged monthly starting [go/ytfmt-test go/ytfmt#medium_date 2020-11-09T00:25:48.948Z US/Pacific en].

As a member you can explore, manage, and cancel your membership any time by visiting YouTube account settings.

GET STARTED

Welcome aboard!
The YouTube Team

Membership details

Music Premium Free Trial	[go/ytfmt-test go/ytfmt#currency (0 USD) en]
Music Premium Subscription *Monthly, starting [go/ytfmt-test go/ytfmt#medium_date 2020-11-09T00:25:48Z US/Pacific en]*	[go/ytfmt-test go/ytfmt#currency (9.99 USD) en]
Tax	[go/ytfmt-test go/ytfmt#currency (0 USD) en]
Total today Paid with Visa ···· [redacted]	**[go/ytfmt-test go/ytfmt#currency (0 USD) en]**

Order Date
[go/ytfmt-test go/ytfmt#medium_date 2020-10-08T23:26:06.666Z US/Pacific en]

Order Number
YTR.RDBK-WXBH-LL4H-T67J

Cancellations: You can cancel your Music Premium membership any time. If you cancel, you'll still have access to Music Premium benefits until the end of your billing period. Refund policy

Need help? Contact support or go to our Help Center. Please don't reply to this email.

Help Center · Email options

You received this email to provide information and updates around your YouTube product or account.

YouTube

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Paid Service Terms of Service

The Court concludes that the foregoing complies with the ARL as it provides the consumer with: (1) the automatic renewal offer terms (stating that the first month is free followed by monthly billing in the specified amount and that the subscription can be cancelled at any time); (2) the cancellation policy (cancellation at any time); and (3) how to cancel in a manner that is capable of being retained by the consumer (the provision of a hyperlink that the consumer can follow to effectuate cancellation).

Plaintiff insists that the text concerning cancellation is not "clear and conspicuous" because it is "buried" at the bottom of the email in gray font of "significantly" smaller size than the text presented above it in the body. But as Defendants respond, not only does the ARL *not* impose a "clear and conspicuous" requirement for acknowledgment emails (see Bus. & Prof. Code, § 17602, subd. (a)(3)), but even if it did, the requirement would be met because the email uses different colors, backgrounds, and hyperlinks to set off and distinguish the requisite key information. Plaintiff therefore has not stated a violation of the ARL based on the acknowledgment email.

3. *Mechanism for Cancellation*

Finally, Plaintiff alleges that Defendants violate the ARL because the "mechanism for cancellation" of the YT Subscriptions is not one that he or reasonable consumers would consider "timely" or easy-to-use," with consumer complaints indicating that paying subscribers have encountered a wide variety of cancellation issues during the class period. (Complaint, ¶ 60.)

Under the ARL, the consumer must be provided, in the acknowledgment, with "a toll-free telephone number, electronic email address, a postal address if the seller directly bills the consumer, *or* … another cost-effective, timely, and easy-to-use mechanism for cancellation …." (Bus. & Prof. Code, § 17602, subd. (c) [emphasis added].) The Court concludes that such a mechanism has been provided here with the provision in the acknowledgment email of a hyperlink to "YouTube account settings" that the consumer can follow to effectuate cancellation of their YT Subscription at any time. Further, the email addresses cancellation more than once, in both the beginning and end of the communication. Other than an assertion in the introduction of his opposition that Defendants fail to provide an "easy and efficient mechanism" for users to cancel their subscriptions, Plaintiff never articulates specifically *how* the cancellation mechanisms provided in the acknowledge email are inadequate. In failing to do so, Plaintiff impliedly concedes the merits of Defendants' argument.

Lastly, even assuming, for the sake of argument, that there *was* a problem with the cancellation mechanism, Defendants are correct that Plaintiff fails to allege that he was harmed by it, i.e., lost money and property as a result. While there are various screenshots in the Complaint that purport to reflect numerous consumers experiencing difficulties in cancelling their subscriptions, Plaintiff does not allege that he experienced any such difficulty in connection with the actual cancellation mechanism that was provided to him in the acknowledgment email. Thus, no claim for violation of the ARL has been stated based on the mechanism for cancellation.

Given the foregoing, the Court concludes that the disclosures at issue comply with the ARL as a matter of law. Consequently, Plaintiff has failed to state a claim for relief based on the disclosures.

III. CONCLUSION

Defendants' demurrer to the Complaint on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED. Plaintiff has 30 days' leave to amend his complaint if he chooses.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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Calendar Line 2

Case Name: *Silvaco, Inc. v. Ole Christian Andersen, et al.*
Case No.: 20CV374355

Plaintiff Silvaco, Inc. acquired Nangate, Inc. under a stock purchase agreement ("SPA"). The SPA provides for ongoing earn-out payments to Defendants/Cross-Complainants Ole Christian Andersen, Jens Michelsen, and JPTB Family Holding ApS ("JPTB"), all of whom are former Nangate shareholders. Disputes have arisen about those payments and associated issues.

In its operative Complaint, Silvaco seeks declaratory relief concerning these payments, while in the Third Amended Cross-Complaint ("TAXC"), Cross-Complainants seek damages and other relief against Silvaco and Kathy and Iliya Pesic ("the Pesics"), based on various contractual breach and business tort theories.

Before the Court is Defendants/Cross-Complainants Ole Christian Andersen, Jens Michelsen, and JPTB Family Holding ApS's ("JPTB") (collectively, "Cross-Complainants") motion to compel Silvaco and Ms. Pesic (collectively, "Silvaco") to produce documents withheld on the basis of privilege over their "litigation consultants." The motion is opposed by Silvaco. For the reasons discussed below, the Court DENIES the motion to compel.

IV. BACKGROUND

A. Silvaco's TAC

Silvaco commenced this action by filing a complaint for declaratory relief ("Complaint") in early December 2020. The Complaint names as defendants Mr. Christian Andersen, Mr. Michelsen, and JPTB, as well as Guileherme Simoes Schlinker, who is also a party to the SPA.[4]

Silvaco develops and markets electronic design automation ("EDA") software and semiconductor design intellectual property, among other things. The Complaint alleges that on March 2, 2018, Silvaco entered into the SPA as part of its acquisition of the stock of Nangate and Nangate Denmark ApS (the "Stock"). (Complaint, ¶ 9.) The purpose of the SPA was to acquire all of the rights to Nangate's products, including tools and services for the creation, optimization, characterization, and validation of standard cell library IP. (*Ibid.*)

Under the SPA, Silvaco acquired the Stock in exchange for an initial cash payment and its agreement to make certain earn-out payments to Defendants based on a percentage of the revenue generated by the Nangate products for a period of 5 years following the sale. (Complaint, ¶ 10.) The earn-out compensation was to be paid quarterly based on the revenue from: (i) the ongoing sale of products that were part of Nangate's business at the SPA closing and (ii) the sale of new products and services to the extent they included the "Nangate

[4] In a February 2021 stipulation, Mr. Schlinker agreed to be bound by any orders or judgment that the Court may enter on the Complaint, and Silvaco agreed that he need not appear or participate in the case going forward.

Characterizer" tool and a version of Silvaco's "SmartSpice" that can be executed only by using Nangate Characterizer. (*Ibid.*)

Various disputes have arisen between Silvaco and Defendants concerning the earn-out payments, including about the extent to which Defendants are entitled to compensation for new products of Silvaco. (Complaint, ¶ 14.) According to Silvaco, Mr. Christian Andersen has contended that Defendants are entitled to earn-out payments on the entire "Foundation IP" of Silvaco, "arguably including standard cells, I/O activities, and memory and presumably without regard to whether such Foundation IP incorporates any Nangate products." (*Ibid.*) Silvaco seeks a declaration that "(i) in order for a new Silvaco product with I/O to qualify for an earn-out payment under the SPA, the new product must include both the Nangate Characterizer tool and SmartSpice; (ii) new memory products do not qualify for earn-out payments under the SPA; and (iii) Defendants's request for an audit of 2nd Quarter 2020 and for resolution of earn-out payment disputes for 4th Quarter 2019 and 1st Quarter 2020 are untimely and shall not proceed." (*Id.*, p. 5, ¶ 3.)

B. Defendants TAXC

Mr. Christian Andersen, Mr. Michelsen, and JPTB filed the TAXC in January 2022, after the Court sustained the Pesics' demurrers to the First and Second Amended Cross-Complaints. They allege that Nangate was a thriving smaller EDA company in a market dominated by three major players. (TAXC, ¶¶ 1–2.) Silvaco is also an EDA company, and embarked on a plan to grow its business through serial acquisitions to compete with these larger competitors. (*Id.*, ¶ 2.)

To induce Nangate's shareholders to sell, Silvaco supposedly made a number of false representations and promises regarding its "commitment and ability to invest in the business, hire additional engineers to execute plans for Nangate products under development and planned for development at the time of the acquisition, provide necessary resources and equipment to develop new products, and generally grow revenues to a level that would support meaningful earn-out payments to cover the cost of acquisition." (TAXC, ¶ 5.) Silvaco "promised to make these meaningful earnout payments within 30 days of the end of each quarter, and that it had the financial means to do so." (*Ibid.*) "During negotiations and prior to closing, Silvaco and the Individual Defendants told Cross-Complainants that the earn out payments would be at least $13.5 million." (*Ibid.*)

But Silvaco was unable to make the very first earn-out payment under the SPA, so that Nangate's shareholders had to accept payment in four installments. (TAXC, ¶ 6.) "And at all times after closing, Silvaco has continually failed to live up to its promises to promote, support, and grow Nangate's business, refusing to add the additional hires that were promised before closing, terminating Nangate's sales staff with no adequate replacement in place, and terminating or reassigning employees who held important responsibilities…." (*Ibid.*) This resulted in a significant decline in revenue that has left Cross-Complainants substantially undercompensated in relation to their expected earn-out payments contemplated under the SPA. (*Ibid.*) Silvaco has refused to comply with the dispute and audit processes provided by the SPA for challenging the calculation of earn-out payments; has improperly excluded certain products and services from the revenue base for calculating such payments; and employed unsavory tactics in response to challenges to its calculations, including firing Mr. Michelsen in retaliation for his complaints. (*Id.*, ¶ 7.)

Cross-Complainants filed the TAXC on January 10, 2022, asserting claims for: (1) breach of contract (against Silvaco); (2) breach of the implied covenant of good faith and fair dealing (against Silvaco); (3) fraudulent inducement – false promise (against all Cross-Defendants); (4) fraud (against all Cross-Defendants); (5) negligent misrepresentation (against all Cross-Defendants); (6) unfair competition (against all Cross-Defendants); and (7) declaratory judgment (against Silvaco). The Pesics' demurrer to the TAXC was overruled by the Court on May 13, 2022.

V. MOTION TO COMPEL

A. Discovery Dispute

Silvaco served written objections and responses to Cross-Complainants' first set of Requests for Production ("RFPs") on May 14, 2021 and to their second set of RFPs on June 3, 2022. On July 12, 2022, Silvaco served a privilege log reflecting responsive items that were being withheld on the grounds that they were privileged. This version of the log contained the following language:

> In addition to the privileged documents itemized herein, and pursuant to the agreement of counsel, [Silvaco] claim the attorney-client and attorney work product privilege as to the following categories of documents generally for the time frame after the Complaint was filed on December 4, 2020: … all emails, notes, and communications between Haynes and Boone, LLP and Attorney Work Product Consultant A between 5/11/2021 and 11/13/2021; all emails, notes, and communications between Haynes and Boone, LLC and Attorney Work Product Consultant B between 3/30/2021 and 6/15/2022 and ongoing; and all emails, notes, and communications between Haynes and Boone, LLP and Attorney Work Product Consultant C between 11/1/2021 and 3/23/2022 and ongoing.

On May 12, 2023, Silvaco served an amended privilege log. On July 14, 2023, the day that briefing was due for the July 18th IDC requested by Silvaco, Cross-Complainants raised for the first time their intent to challenge portions of the privilege log. At the IDC, the Court discussed with the parties the issue of disclosure of the identities of Silvaco's undesignated experts. Subsequent to the IDC, the parties met and conferred on the issue, but were unable to resolve their dispute.

On August 11, 2023, Cross-Complainants filed the instant motion to compel.

B. Timeliness

As a threshold matter, Silvaco maintains that this motion must be denied because it is untimely. The Court agrees.

The stated statutory basis for Cross-Complainants' motion is Code of Civil Procedure section 2031.310, which provides, in pertinent part, that a party who has propounded a request for production may move for an order compelling a further response to the request if the party deems that a statement of compliance with the demand is incomplete, a representation of

inability to comply is inadequate, incomplete or evasive, or an objection in the response is without merit or too general. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must be served within 45 days of a verified response, otherwise the demanding party *waives* the right to compel any further response to the production demand. (Code Civ. Proc., § 2031.310, subd. (c); see *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) Critically, the 45-day time limit is mandatory and jurisdictional, which means that a court has no authority to grant an untimely motion. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.)

Here, Silvaco asserts that the 45-day time period was triggered by the service of the original privilege log on July 12, 2022, because the entries which are the subject of the instant motion remained substantially the same in the amended log served on May 12, 2023. The Court agrees. Cross-Complainants should have sought an IDC, and then moved to compel, on this "litigation consultant" issue back in 2022. There

Even using the latter of the two dates, this motion was still filed well beyond the 45-day period.[5] In their opposition, Cross-Complainants insist that their motion is not untimely because they are not seeking a "supplemental response" but merely (1) the identities of the consultants and (2) as appropriate after the identities are revealed, production of the documents or communications that are not protected by privilege. But where a responding party has objected to a production demand based on a claim of privilege or attorney work product and a privilege log is necessary to provide the information needed by other parties to evaluate the merits of those objections, the privilege log is part of the response. (Code Civ. Proc., §§ 2031.240, subds. (b) and (c).) Here, Cross-Complainants are challenging portions of the privilege log, claiming that it includes items that do not qualify as privileged and accordingly must be produced, and therefore *are* moving to compel a further "response" as contemplated by Code of Civil Procedure section 2031.310 and its attendant 45-day jurisdictional time limit.

Given that this motion was filed well beyond 45 days after the service of the subject privilege log, it is untimely and must be denied.

VI. CONCLUSION

Cross-Complainants' motion to compel is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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[5] Cross-Complainants do not argue that the May or June 2023 request for an IDC, which ended up covering this dispute, tolled the 45-day clock. Therefore, the Court does not address that potential argument. In any event, this argument does not affect the Court's conclusion that Cross-Complainants should have sought an IDC, and then moved to compel, on the July 2022 privilege log.

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