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

16 MATTHEW LOPEZ, individually and on
behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 NAC MARKETING COMPANY, LLC, a
20 Delaware limited liability company; and
DOES 1 – 10, inclusive,

21 Defendants.
22
23
24
25
26

Case No. 3:15-cv-02522-AJB-JLB

FIRST AMENDED CLASS ACTION
COMPLAINT FOR:

1. VIOLATIONS OF CALIFORNIA’S
AUTOMATIC RENEWAL LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17600-17604); and
2. VIOLATIONS OF CALIFORNIA’S
UNFAIR COMPETITION LAW
(BUSINESS AND PROFESSIONS
CODE §§ 17200-17204).

DEMAND FOR JURY TRIAL

Filed: November 9, 2015

1 Plaintiff Matthew Lopez (“Plaintiff”), on behalf of himself and all others similarly
2 situated, complains and alleges as follows:

3 INTRODUCTION & OVERVIEW OF CLAIMS

4 1. Plaintiff brings this class action on behalf of himself and a class of others
5 similarly situated consisting of all persons in California who, within the applicable
6 statute of limitations period, purchased subscriptions for any products (such as the
7 ‘Ageless Male’ testosterone supplement) from NAC Marketing Company, LLC
8 (“NAC” or “Defendant”). The class of others similarly situated to Plaintiff is referred
9 to herein as “Class Members.” The claims for damages, restitution, injunctive and/or
10 other equitable relief, and reasonable attorneys’ fees and costs arise under California
11 Business and Professions Code (hereinafter “Cal. Bus. & Prof. Code”) §§ 17602,
12 17603, and 17604) and 17200, *et seq.*, and California Code of Civil Procedure § 1021.5.
13 Plaintiff and Class Members are consumers for purposes of Cal. Bus. & Prof. Code §§
14 17600-17606.

15 2. During the Class Period, Defendant made automatic renewal or continuous
16 service offers to consumers in and throughout California and (a) at the time of making
17 the automatic renewal or continuous service offers, failed to present the automatic
18 renewal offer terms or continuous service offer terms, in a clear and conspicuous
19 manner and in visual proximity to the request for consent to the offer before the
20 subscription or purchasing agreement was fulfilled in violation of Cal. Bus. & Prof.
21 Code § 17602(a)(1); (b) charged Plaintiff’s and Class Members’ credit or debit cards,
22 or third-party account (hereinafter “Payment Method”) without first obtaining
23 Plaintiff’s and Class Members’ affirmative consent to the agreement containing the
24 automatic renewal offer terms or continuous service offer terms in violation of Cal.
25 Bus. & Prof. Code § 17602(a)(2); and (c) failed to provide an acknowledgment that
26 includes the automatic renewal or continuous service offer terms, cancellation policy,
27 and information regarding how to cancel in a manner that is capable of being retained
28 by the consumer in violation of Cal. Bus. & Prof. Code § 17602(a)(3). As a result, all

1 goods, wares, merchandise, or products sent to Plaintiff and Class Members under the
2 automatic renewal of continuous service agreements are deemed to be an unconditional
3 gift pursuant to Cal. Bus. & Prof. Code § 17603.

4 3. As a result of the above, Plaintiff, on behalf of himself and Class
5 Members, seeks damages, restitution, declaratory relief, injunctive relief and reasonable
6 attorneys' fees and costs pursuant to Cal. Bus. & Prof. Code, §§ 17603, 17203, and
7 17204, and Code of Civil Procedure § 1021.5.

8 **JURISDICTION AND VENUE**

9 4. This Court has diversity jurisdiction over this class action pursuant to 28
10 U.S.C. § 1332 as amended by the Class Action Fairness Act of 2005 because the
11 amount in controversy exceeds five million dollars (\$5,000,000.00), exclusive of
12 interest and costs, and is a class action in which some members of the class are citizens
13 of different states than Defendant. *See* 28 U.S.C. § 1332(d)(2)(A).

14 5. This Court also has personal jurisdiction over Defendant because
15 Defendant currently does business in this state.

16 6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because
17 Defendant is subject to personal jurisdiction in this District and a substantial portion of
18 the conduct complained of herein occurred in this District.

19 **PARTIES**

20 7. Plaintiff purchased a subscription plan from Defendant in California
21 during the Class Period. Plaintiff and Class Members are consumers as defined under
22 Cal. Bus. & Prof. Code § 17601(d).

23 8. Defendant NAC Marketing Company, LLC is a Delaware limited liability
24 company with its principal place of business located at New Vitality, 260 Smith Street,
25 Farmingdale, New York 11735. Defendant operates in California and has done
26 business throughout California at all times during the Class Period. Also during the
27 Class Period, Defendant made, and continues to make, automatic renewal or continuous
28 service offers to consumers in California. Defendant operates a website which markets

1 subscriptions for products that purport, among other things, to boost a man's "free
2 testosterone," "support energy production," "promote muscle with workouts," and
3 "increase sex drive and performance."

4 9. The true names and capacities of the Defendants sued herein as DOES 1
5 through 10, inclusive, are currently unknown to Plaintiff, who therefore sue such
6 Defendants by fictitious names. Each of the Defendants designated herein as a DOE is
7 legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of
8 Court to amend this Complaint to reflect the true names and capacities of the DOE
9 Defendants when such identities become known.

10 10. At all relevant times, each and every Defendant was acting as an agent
11 and/or employee of each of the other Defendants and was acting within the course
12 and/or scope of said agency and/or employment with the full knowledge and consent of
13 each of the Defendants. Each of the acts and/or omissions complained of herein were
14 alleged and made known to, and ratified by, each of the other Defendants (NAC
15 Marketing Company, LLC and DOE Defendants will hereafter collectively be referred
16 to as "Defendant").

17 **FACTUAL BACKGROUND**

18 **California Business Professions Code §§ 17600-17606**

19 11. On December 1, 2010, sections 17600-17606 of the Cal. Bus. & Prof.
20 Code came into effect. The Legislature's stated intent for this Article was to end the
21 practice of ongoing charges to consumers' Payment Methods without consumers'
22 explicit consent for ongoing shipments of a product or ongoing deliveries of service.
23 *See* Cal. Bus. & Prof. Code § 17600.

24 12. Cal. Bus. & Prof. Code § 17602(a) makes it unlawful for any business
25 making an automatic renewal or continuous service offer to a consumer in this state to
26 do any of the following:

- 27 i) Fail to present the automatic renewal offer terms or
28 continuous service offer terms in a clear and conspicuous

1 manner before the subscription or purchasing agreement is
2 fulfilled and in visual proximity, or in the case of an offer
conveyed by voice, in temporal proximity, to the request for
consent to the offer.

3 ii) Charge the consumer's credit or debit card or the consumer's
4 account with a third party for an automatic renewal or
5 continuous service without first obtaining the consumer's
6 affirmative consent to the agreement containing the automatic
renewal offer terms or continuous service offer terms.

7 iii) Fail to provide an acknowledgment that includes the
8 automatic renewal or continuous service offer terms,
9 cancellation policy, and information regarding how to cancel
10 in a manner that is capable of being retained by the consumer.
11 If the offer includes a free trial, the business shall also
disclose in the acknowledgment how to cancel and allow the
consumer to cancel before the consumer pays for the goods or
services.

12 13. Cal. Bus. & Prof. Code § 17601(a) defines the term “Automatic renewal”
13 as a “plan or arrangement in which a paid subscription or purchasing agreement is
14 automatically renewed at the end of a definite term for a subsequent term.”

15 14. Cal. Bus. & Prof. Code § 17601(b) defines the term “Automatic renewal
16 offer terms” as “the following clear and conspicuous disclosures: (1) That the
17 subscription or purchasing agreement will continue until the consumer cancels. (2) The
18 description of the cancelation policy that applies to the offer. (3) The recurring charges
19 that will be charged to the consumer's credit or debit card or payment account with a
20 third party as part of the automatic renewal plan or arrangement, and that the amount of
21 the charge may change, if that is the case, and the amount to which the charge will
22 change, if known. (4) The length of the automatic renewal term or that the service is
23 continuous, unless the length of the term is chosen by the consumer. (5) The minimum
24 purchase obligation, if any.”

25 15. Pursuant to Cal. Bus. & Prof. Code § 17601(c), “clear and conspicuous” or
26 “clearly and conspicuously” means “in larger type than the surrounding text, or in
27 contrasting type, font, or color to the surrounding text of the same size, or set off from
28

1 the surrounding text of the same size by symbol ls or other marks, in a manner that
2 clearly calls attention to the language.”

3 16. Section 17603 of Cal. Bus. & Prof. Code provides: “In any case in which a
4 business sends any goods, wares, merchandise, or products to a consumer, under a
5 continuous service agreement or automatic renewal of a purchase, without first
6 obtaining the consumer’s affirmative consent as described in Section 17602, the goods,
7 wares, merchandise, or products shall for all purposes be deemed an unconditional gift
8 to the consumer, who may use or dispose of the same in any manner he or she sees fit
9 without any obligation whatsoever on the consumer’s part to the business, including,
10 but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares,
11 merchandise, or products to the business.”

12 **Defendant’s Business**

13 17. Defendant provides, on a monthly basis, a subscription for products such
14 as its Ageless Male product, which costs consumers, initially, \$19.95 plus \$6.99 for
15 shipping, and then \$39.95 plus \$6.99 for shipping and handling per month thereafter.
16 Defendant’s product and services plan constitutes an automatic renewal and/or
17 continuous service plan or arrangement for the purposes of Cal. Bus. & Prof. Code §
18 17601.

19 **Defendant’s Terms & Conditions**

20 18. During the Class Period, Defendant’s webpage, found at
21 www.agelessmale.com and similar pages for other products contained a notation that to
22 move further and submit an order, the prospective subscriber must check a box which
23 states: “By checking this box and clicking ‘Submit Order,’ I agree to the Terms &
24 Conditions and I am electronically signing my order and authorizing you to charge
25 payment(s) against the payment method above.” This sentence contains a link to the
26 Terms & Conditions on the website. **This is a lengthy document that does not set
27 forth any information concerning the recurring nature of Defendant’s
28 subscription programs or the manner in which the subscriptions may be cancelled.**

THIS OFFER IS NOT AVAILABLE IN STORES
 FILL OUT THE FORM BELOW TO ORDER YOUR AGELESS MALE™ SUPPLEMENT TODAY!

EXCLUSIVE WEB SPECIAL
 SAVE 50%
 NOW ONLY \$19.95 (was \$39.95) S&H

AGELESS MALE HELPS:

- Boost Free Testosterone**††
- Support Energy Production*†
- Promote Muscle with Workouts*††
- Increase Sex Drive & Performance*†

*Individual results can not be seen as typical and may vary

STEP 1: Enter your billing information

Enter your credit card information

Card Number: [input]
 Expiration Date: [input] [input] | 2015 | [input]
 CV2: [input] [input] [input]

Enter your billing information

*Full Name: [input]
 ADDRESS: [input]
 *Phone: [input]
 *Email: [input]

Check if your shipping address is different than your billing address.

STEP 2: Checkout

OFFER DETAILS:
 Pay only \$19.95 + \$6.99 shipping and handling for your risk-free 30-day supply, and for added convenience, we also include membership to our exclusive preferred customer program - so you never have to miss a day of Ageless Male. Starting 30 days from your order date, you'll receive a new 30-day supply of Ageless Male every month at the guaranteed discounted price of just \$39.95 plus \$6.99 S&H, which will automatically be charged to the card you provide today unless you call to cancel. There is no commitment, no minimum to buy and you can cancel at any time. To customize this future shipment are changed, call customer service anytime at 1-800-275-1115. Every Ageless Male™

By checking this box and clicking "Submit Order" I agree to the [Terms & Conditions](#) and I am electronically signing my order and authorizing you to charge payments against the payment method above.

Indicates Required Field

PROCESS ORDER

*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. †Effect of TESTOPEN on safety, anabolic activity and factors affecting Exercise Physiology. Wankhede et al. ††As part of a strength training/exercise program. ‡Individual results can not be seen as typical and may vary.

OFFER DETAILS:
 Pay only \$19.95 + \$6.99 shipping and handling for your risk-free 30-day supply, and for added convenience, we also include membership to our exclusive preferred customer program - so you never have to miss a day of Ageless Male. Starting 30 days from your order date, you'll receive a new 30-day supply of Ageless Male every month at the guaranteed discounted price of just \$39.95 plus \$6.99 S&H, which will conveniently be charged to the card you provide today unless you call to cancel. There is no commitment, no minimum to buy and you can cancel at any time. To customize this

Defendant’s Terms & Conditions Fail to Provide Clear and Conspicuous Disclosures As Required by Law.

19. Within the Terms & Conditions, Defendant failed to state in clear and conspicuous language (*i.e.*, 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 of other marks, in a manner that clearly calls attention to the language) that:

- i) The subscription or purchasing agreement will continue until the consumer cancels;
- ii) Describes the cancellation policy that applies to the offer;
- iii) Recurring charges that will be charged to the consumer’s Payment Method account with a third party as part of the automatic renewal

1 plan or arrangement, and that the amount of the charge may change,
2 if that is the case, and the amount to which the charge will change, if
3 known; and

4 iv) The length of the automatic renewal term or that the service is
5 continuous unless the length of tile term is chosen by the consumer.

6 **Defendant Failed to Present the Automatic Renewal Offer Terms or Continuous**
7 **Service Offer Terms in a Clear and Conspicuous Manner Before the Subscription**
8 **or Purchasing Agreement was Fulfilled and in Visual Proximity to the Request for**
9 **Consent to the Offer in Violation of Cal. Bus. & Prof. Code § 17602(a)(1).**

10 20. During the Class Period, Defendant made, and continues to make, an
11 automatic renewal offer for its subscriptions plans to Consumers in California,
12 including Plaintiff and Class Members. On the initial page on its website, Defendant
13 advertises an “Exclusive Web Special” for its Ageless Male product, and the potential
14 subscriber is invited to click on a button entitled “Order Now.” This webpage did not,
15 and does not, contain automatic renewal offer terms or continuous service offer terms
16 as defined by Cal. Bus. & Prof. Code § 17601(b).

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The screenshot shows the Ageless Male website with the following content:

- Header:** Ageless MALE BOOST FREE TESTOSTERONE AND BE MORE LIKE THE MAN YOU USED TO BE*†
WORLDWIDE TESTOSTERONE BEST-SELLER!
- Sub-header:** TRY THE "GAME CHANGING" FORMULA FOR SUPPORTING FREE TESTOSTERONE IN MEN!†
- Left Side:** A man with arms crossed. Text: "I am feeling much better now than I did in my 30s. I have more energy and a healthy sex drive. I recommend this product to all men over 40." - Richard †
- Center:** Ageless Male product bottle. Text: "EXCLUSIVE WEB SPECIAL", "30 DAY RISK-FREE GUARANTEE", "SAVE 50%", "NATURALLY \$39.95", "NOW ONLY \$19.95 -S&H", "ORDER NOW".
- Right Side:** Dr. Darren Clair M.D., Age Management Specialist. Text: "WITH NATURAL INGREDIENTS SHOWN TO HELP"
 - Boost Free Testosterone*††
 - Support Energy Production ††
 - Promote Muscle with Workouts*††
 - Increase Sex Drive & Performance*†
- Bottom Left:** "THE ORIGINAL & BEST-SELLING FORMULA FOR MEN". Text: "Love it. I thought it was going to be difficult to stay muscular at 54. With this product, I have been able to maintain and increase my testosterone for working out and everything else." - Joe †
- Bottom Right:** "NATURALLY BOOST FREE TESTOSTERONE!*†". Text: "For years, Ageless Male has been the name men trust for testosterone support. That's because it's made with a natural extract from the fenugreek plant - that was shown in a double-blind human clinical trial to significantly boost free testosterone in men! †† Men who use Ageless Male see real..."

21. After the potential subscriber is invited to “Order Now,” the customer sees a screen entitled “This Offer Is Not Available In Stores,” with two steps: Step 1 is “Enter your billing information,” and Step 2 is “Checkout.” The customer then invited to click on “Process Order.” In the “Checkout” section, *in small print on a scroll*, it states:

“**OFFER DETAILS:** Pay only \$19.95 + \$6.99 shipping and handling for your risk-free 30-day supply, and for added convenience, we also include membership to our exclusive preferred customer program – so you never have to miss a day of Ageless Male.

“Starting 30 days from your order date, you’ll receive a new 30-day supply of Ageless Male at the guaranteed discounted price of just \$39.99 plus \$6.99 S&H, which will conveniently be charged to the card you provide today unless you call to cancel. There is no commitment, no minimum to buy and you can cancel at any time. To customize this program or future shipments and charges, call customer service anytime

1 at 1-888-278-5115. Every Ageless Male purchase includes a 30-day money back
2 guarantee of the purchase price less shipping and handling.

3 “Taxable states: CA, NY, SC, TX, VA, WA, MI & NC

4 “Your satisfaction is our Guarantee

5 “100% Money Back Guarantee – We want you to be completely satisfied with
6 every product that you purchase from New Vitality. Every purchase comes with a 30
7 day money back guarantee beginning the date of delivery. You may use any New
8 Vitality product for 30-days absolutely risk free and if you do not see or feel the results
9 that you expected, you can return it within 30-days and you’ll receive a prompt and
10 complete refund of your purchase price less shipping and handling. If you have
11 purchase more than one bottle of any single product and you wish to return your
12 purchase, return the opened bottle with any sealed bottles within 30 days beginning the
13 date of delivery and you’ll receive a prompt and complete refund of your purchase price
14 less shipping and handling. No questions or explanation required. . . your complete
15 satisfaction is guaranteed. Period!”

16 Apart from this language *in small print on a scroll*, this webpage did not, and
17 does not, contain automatic renewal offer terms or continuous service offer terms as
18 defined by Cal. Bus. & Prof. Code § 17601(b).

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THIS OFFER IS NOT AVAILABLE IN STORES
 FILL OUT THE FORM BELOW TO ORDER YOUR AGELESS MALE™ SUPPLEMENT TODAY!

EXCLUSIVE WEB SPECIAL
 SAVE 50%
 NOW ONLY \$19.95 (was \$39.95)

AGELESS MALE HELPS:

- Boost Free Testosterone**††
- Support Energy Production*†
- Promote Muscle with Workouts**††
- Increase Sex Drive & Performance*†

*Individual results can not be seen as typical and may vary

STEP 1: Enter your billing information

Enter your credit card information

Card Number: [input]
 Expiration Date: [input] [input] | 2015 | [input]
 CVV2: [input] [input] [input]

Enter your billing information

*Full Name: [input]
 *Address: [input]
 *Phone: [input]
 *Email: [input]

Check if your shipping address is different than your billing address.

STEP 2: Checkout

OFFER DETAILS:
 Pay only \$19.95 + \$6.99 shipping and handling for your risk-free 30-day supply, and for added convenience, we also include membership to our exclusive preferred customer program - so you never have to miss a day of Ageless Male. Starting 30 days from your order date, you'll receive a new 30-day supply of Ageless Male every month at the guaranteed discounted price of just \$39.95 plus \$6.99 S&H, which will automatically be charged to the card you provide today unless you call to cancel. There is no commitment, no minimum to buy and you can cancel at any time. To customize this future shipment and change, call customer service anytime at 1-800-275-1115. Every Ageless Male™

By checking this box and clicking "Submit Order" I agree to the Terms & Conditions and I am electronically signing my order and authorizing you to charge payments against the payment method above.

Indicates Required Field

PROCESS ORDER

*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease. †Effect of TESTOPEN on safety, anabolic activity and factors affecting Exercise Physiology. Wankhede et al. †As part of a strength training/exercise program. ‡Individual results can not be seen as typical and may vary.

OFFER DETAILS:
 Pay only \$19.95 + \$6.99 shipping and handling for your risk-free 30-day supply, and for added convenience, we also include membership to our exclusive preferred customer program - so you never have to miss a day of Ageless Male. Starting 30 days from your order date, you'll receive a new 30-day supply of Ageless Male every month at the guaranteed discounted price of just \$39.95 plus \$6.99 S&H, which will conveniently be charged to the card you provide today unless you call to cancel. There is no commitment, no minimum to buy and you can cancel at any time. To customize this

22. As a result, prior to charging Plaintiff and Class Members, Defendant failed, and continues to fail, to obtain Plaintiff's and Class Members' affirmative consent to the Terms & Conditions or the language noted above containing the automatic renewal offer terms or continuous service offer terms.

23. Because of Defendant's failure to gather affirmative consent to the automatic renewal terms, all goods, wares, merchandise, or products, sent to Plaintiff and Class Members under the automatic renewal or continuous service agreement are deemed to be an unconditional gift pursuant to Cal. Bus. & Prof. Code § 17603, and Plaintiff and Class Members may use or dispose of the same in any manner they see fit without any obligation whatsoever on their part to Defendant, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise or products.

///

Defendant Failed to Provide an Acknowledgment as Required by Cal. Bus. & Prof. Code §17602(a)(3)

24. Furthermore, and in addition to the above, after Plaintiff and Class Members subscribed to one of Defendant’s subscription plans, Defendant sent to Plaintiff and Class Members a document entitled “Thank You! Your order is complete,” but has failed, and continues to fail, to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members in violation of Cal. Bus. & Prof. Code § 17602(a)(3). Moreover, Defendant failed to provide Plaintiff and Class Members with an acknowledgement regarding how to cancel the subscription and allow Plaintiff and Class Members to cancel before payment.

BOOST FREE TESTOSTERONE AND BE MORE LIKE THE MAN YOU USED TO BE*‡
NUMBER ONE SELLING TESTOSTERONE BOOSTER!

Thank You! Your order is complete.

Your Order Number Is: [REDACTED]

Address Information
[REDACTED]

Shipping Information
[REDACTED]



Item	Description	Quantity	Subtotal
AGMSR00284	Ageless Male - 30 Day Supply	1	\$19.95
		Sub Total	\$19.95
		Shipping	\$6.99
		Tax	\$2.16
		Order Total	\$29.10

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CLASS ACTION ALLEGATIONS

1
2 25. Plaintiff brings this action, on behalf of himself and all others similarly
3 situated, as a class action pursuant to Rule 23(a) of the Federal Rules of Civil
4 Procedure. The proposed Class (the “Class”) that Plaintiff seeks to represent is
5 composed of and defined as:

6 **“All persons within California that, within the applicable statute of**
7 **limitations period, purchased any product or service in response to an**
8 **offer constituting an “Automatic Renewal” as defined by § 17601(a)**
9 **from NAC Marketing Company, LLC, its predecessors, or its**
10 **affiliates.”**

11 26. This action is brought and may be properly maintained as a class action
12 pursuant to the provisions of Federal Rule of Civil Procedure 23(a)(1)-(4) and 23(b)(1)-
13 (3). This action satisfies the numerosity, typicality, adequacy, predominance and
14 superiority requirements of those provisions.

15 27. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual
16 joinder of all of its members is impractical. While the exact number and identities of
17 Class members are unknown to Plaintiff at this time and can only be ascertained
18 through appropriate discovery, Plaintiff is informed and believes the Class includes
19 hundreds of thousands of members. Plaintiff alleges that the Class may be ascertained
20 by the records maintained by Defendant.

21 28. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all
22 members of the Class which predominate over any questions affecting only individual
23 members of the Class. These common legal and factual questions, which do not vary
24 from class member to class member, and which may be determined without reference to
25 the individual circumstances of any class member, include, but are not limited to, the
26 following:

- 27 i) (a) Whether Defendant failed to present the automatic renewal offer
28 terms, or continuous service offer terms, in a clear and conspicuous

1 manner before the subscription or purchasing agreement was
2 fulfilled and in visual proximity to the request for consent to the
3 offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1);

4 ii) Whether Defendant failed to provide an acknowledgment that
5 describes a cost-effective, timely, and easy-to-use mechanism for
6 cancellation in violation of Cal. Bus. & Prof. Code § 17602(b);

7 iii) Whether Defendant charged Plaintiff's and Class Members'
8 Payment Method for an automatic renewal or continuous service
9 without first obtaining the Plaintiff's and Class Members'
10 affirmative consent to the Terms and Conditions containing the
11 automatic renewal offer terms or continuous service offer terms in
12 violation of Cal. Bus. & Prof. Code § 17602(a)(2);

13 iv) Whether Defendant failed to provide an acknowledgement that
14 included the automatic renewal or continuous service offer terms,
15 cancellation policy, and information on how to cancel in a manner
16 that is capable of being retained by Plaintiff and Class Members, in
17 violation of Cal. Bus. & Prof. Code § 17602(a)(3);

18 v) Whether Defendant's Terms of Service contained the automatic
19 renewal offer terms and/or continuous service offer terms as defined
20 by Cal. Bus. & Prof. Code § 17601;

21 vi) Whether Plaintiff and the Class Members are entitled to restitution
22 of money paid in circumstances where the goods and services
23 provided by Defendant are deemed an unconditional gift in
24 accordance with Cal. Bus. & Prof. Code § 17603;

25 vii) Whether Plaintiff and Class Members are entitled to restitution in
26 accordance with Cal. Bus. & Prof. Code §§ 17200, 17203;

27 viii) Whether Plaintiff and Class Members are entitled to attorneys' fees
28 and costs under California Code of Civil Procedure § 1021.5; and

1 ix) The proper formula(s) for calculating the restitution owed to Class
2 Members.

3 29. [Fed. R. Civ. P. 23(a)(3)] Plaintiff's claims are typical of the claims of the
4 members of the Class. Plaintiff and all members of the Class have sustained injury and
5 are facing irreparable harm arising out of Defendant's common course of conduct as
6 complained of herein. The losses of each member of the Class were caused directly by
7 Defendant's wrongful conduct as alleged herein.

8 30. [Fed. R. Civ. P. 23(a)(4)] Plaintiff will fairly and adequately protect the
9 interests of the members of the Class. Plaintiff has retained attorneys experienced in the
10 prosecution of class actions, including complex consumer and mass tort litigation.

11 31. [Fed. R. Civ. P. 23(b)(3)] A class action is superior to other available
12 methods of fair and efficient adjudication of this controversy, since individual litigation
13 of the claims of all Class members is impracticable. Even if every Class member could
14 afford individual litigation, the court system could not. It would be unduly burdensome
15 to the courts in which individual litigation of numerous issues would proceed.
16 Individualized litigation would also present the potential for varying, inconsistent, or
17 contradictory judgments and would magnify the delay and expense to all parties and to
18 the court system resulting from multiple trials of the same complex factual issues. By
19 contrast, the conduct of this action as a class action, with respect to some or all of the
20 issues presented herein, presents fewer management difficulties, conserves the
21 resources of the parties and of the court system, and protects the rights of each Class
22 member.

23 32. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by
24 thousands of individual Class members would create the risk of inconsistent or varying
25 adjudications with respect to, among other things, the need for and the nature of proper
26 notice, which Defendant must provide to all Class members.

27 33. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by
28 individual class members would create a risk of adjudications with respect to them that

1 would, as a practical matter, be dispositive of the interests of the other Class members
2 not parties to such adjudications or that would substantially impair or impede the ability
3 of such non-party Class members to protect their interests.

4 34. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects
5 generally applicable to the Class, thereby making appropriate final injunctive relief with
6 regard to the members of the Class as a whole.

7 **FIRST CAUSE OF ACTION**

8 **FAILURE TO PRESENT AUTOMATIC RENEWAL OFFER TERMS OR**
9 **CONTINUOUS SERVICE OFFER TERMS CLEARLY AND**
10 **CONSPICUOUSLY AND IN VISUAL, PROXIMITY TO THE REQUEST FOR**
11 **CONSENT OFFER (CAL. BUS. & PROF. CODE§ 17602(a)(1))**

12 **(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

13 35. The foregoing paragraphs are alleged herein and are incorporated herein
14 by reference.

15 36. Cal. Bus. Prof. Code§ 17602(a)(1) provides:

16 (a) It shall be unlawful for any business making an automatic renewal or
17 continuous service offer to a consumer in this state to do any of the
18 following:

19 (1) Fail to present the automatic renewal offer terms or continuous
20 service offer terms in a clear and conspicuous manner before the
21 subscription or purchasing agreement is fulfilled and in visual
22 proximity, or in the case of an offer conveyed by voice, in temporal
23 proximity, to the request for consent to the offer.

24 37. Defendant failed to present the automatic renewal offer terms, or
25 continuous service offer terms, in a clear and conspicuous manner and in visual
26 proximity the request for consent to the offer before the subscription or purchasing
27 agreement was fulfilled.

28 38. As a result of Defendant's violations of Cal. Bus. & Prof. Code §
§17602(a)(1), Defendant is subject under Cal. Bus. & Prof. Code § 17604 to all civil

1 remedies that apply to a violation of Article 9, of Chapter 1, of Part 3, of Division 7 of
2 the Cal. Bus. & Prof. Code.

3 39. Plaintiff, on behalf of himself and Class Members, requests relief as
4 described below.

5 **SECOND CAUSE OF ACTION**

6 **FAILURE TO OBTAIN CONSUMER'S AFFIRMATIVE CONSENT**

7 **BEFORE THE SUBSCRIPTION IS FULFILLED**

8 **(CAL BUS. & PROF. CODE §§ 17602(a)(2) and 17603)**

9 **(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

10 40. The foregoing paragraphs are alleged herein and are incorporated herein
11 by reference.

12 41. Cal. Bus. & Prof. Code § 17602(a)(2) provides:

13
14 (a) It shall be unlawful for any business making an automatic renewal or
15 continuous service offer to a consumer in this state to do any of the
following:

16 (2) Charge the consumer's credit or debit card or the consumer's
17 account with a third party for an automatic renewal or continuous
18 service without first obtaining the consumer, s affirmative consent to
the agreement containing the automatic renewal offer terms or
19 continuous service offer terms.

20 42. Defendant charged, and continues to charge Plaintiff's and Class
21 Members' Payment Method for an automatic renewal or continuous service without
22 first obtaining Plaintiff's and Class Members affirmative consent to the Terms of
23 Service containing the automatic renewal offer terms or continuous service offer terms.

24 43. As a result of Defendant's violations of Cal. Bus. & Prof. Code §
25 17602(a)(2), Defendant is liable to provide restitution to Plaintiff and Class Members
26 under Cal. Bus. & Prof. Code § 17603.

27 44. Plaintiff, on behalf of himself and Class Members, requests relief as
28 described below.

THIRD CAUSE OF ACTION

**FAILURE TO PROVIDE ACKNOWLEDGMENT WITH
AUTOMATIC RENEWAL TERMS AND INFORMATION REGARDING
CANCELLATION POLICY**

(CAL. BUS. & PROF. CODE §§ 17602(a)(3), 17602(b))

(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)

45. The foregoing paragraphs are alleged herein and are incorporated herein by reference.

46. Cal. Bus. & Prof. Code § 17602(a)(3) provides:

(a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:

(3) Fail to provide an acknowledgment that includes the automatic renewal 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. If the offer includes a free trial, the business shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.

Cal. Bus. & Prof. Code § 17602(b) provides:

“A business making automatic renewal or continuous service offers shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a).”

47. Defendant failed to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members.

48. As a result of Defendant’s violations of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b), Defendant is subject to all civil remedies under Cal. Bus. &

1 Prof. Code § 17604 that apply to a violation of Article 9, of Chapter 1 of Part 3, of
2 Division 7 of the Cal. Bus. & Prof. Code.

3 49. Plaintiff, on behalf of himself and Class Members, requests relief as
4 described below.

5 **FOURTH CAUSE OF ACTION**

6 **VIOLATION OF THE UNFAIR COMPETITION LAW**

7 **(CAL. BUS. & PROF. CODE§ 17200 *et. seq.*)**

8 **(By Plaintiff, on his own behalf and on behalf of the Class, against All Defendants)**

9 50. The foregoing paragraphs are alleged herein and are incorporated herein
10 by reference.

11 51. Cal. Bus. & Prof. Code § 17200, *et seq.* (the “UCL”) prohibits unfair
12 competition in the form of any unlawful or unfair business act or practice. Cal. Bus. &
13 Prof. Code § 17204 allows “a person who has suffered injury in fact and has lost money
14 or property” to prosecute a civil action for violation of the UCL. Such a person may
15 bring such an action on behalf of himself or herself and others similarly situated who
16 are affected by the unlawful and/or unfair business practice or act.

17 52. Since December 1, 2010, and continuing to the present, Defendant has
18 committed unlawful and/or unfair business acts or practices as defined by the UCL, by
19 violating Cal. Bus. & Prof. Code § 17602(a)(3). The public policy which is a predicate
20 to a UCL action under the unfair prong of the UCL is tethered to a specific statutory
21 provision. *See* Cal. Bus. & Prof. Code §§ 17600, 17602.

22 53. As a direct and proximate result of Defendant’s unlawful, and/or unfair
23 acts and practices described herein, Defendant has received, and continues to hold,
24 unlawfully obtained property and money belonging to Plaintiff and Class Members in
25 the form of payments made for subscription agreements by Plaintiff and Class
26 Members. Defendant has profited from its unlawful and/or unfair acts and practices in
27 the amount of those business expenses and interest accrued thereon.

28 ///

1 54. Plaintiff and similarly-situated Class Members are entitled to restitution
2 pursuant to Cal. Bus. & Prof. Code § 17203 for all monies paid by Class Members
3 under the subscription agreements from December 1, 2010, to the date of such
4 restitution at rates specified by law. Defendant should be required to disgorge all the
5 profits and gains it has reaped and restore such profits and gains to Plaintiff and Class
6 Members, from whom they were unlawfully taken.

7 55. Plaintiff and similarly situated Class Members are entitled to enforce all
8 applicable penalty provisions pursuant to Cal. Bus. & Prof. Code § 17202, and to obtain
9 injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203.

10 56. Plaintiff has assumed the responsibility of enforcement of the laws and
11 public policies specified herein by suing on behalf of himself and other similarly-
12 situated Class Members. Plaintiff's success in this action will enforce important rights
13 affecting the public interest. Plaintiff will incur a financial burden in pursuing this
14 action in the public interest. An award of reasonable attorneys' fees to Plaintiff is thus
15 appropriate pursuant to California Code of Civil Procedure § 1021.5.

16 57. Plaintiff, on behalf of himself and Class Members, request relief as
17 described below.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff requests the following relief:

20 A. That the Court determine that this action may be maintained as a class
21 action under Rule 23(a) of the Federal Rules of Civil Procedure, and define the Class as
22 requested herein;

23 B. That the Court find and declare that Defendant has violated Cal. Bus. &
24 Prof. Code § 17602(a)(1) by failing to present the automatic renewal offer terms, or
25 continuous service offer terms, in a clear and conspicuous manner and the visual
26 proximity to the request for consent to the offer before the subscription or purchasing
27 agreement was fulfilled;

28 ///

1 C. That the Court find and declare that Defendant has violated Cal. Bus. &
2 Prof. Code § 17602(b) by failing to provide an acknowledgment that describes a toll-
3 free telephone number, electronic mail address, a postal address only when the seller
4 directly bills the consumer, or another cost-effective, timely, and easy-to-use
5 mechanism for cancellation.

6 D. That the Court find and declare that Defendant has violated Cal. Bus. &
7 Prof. Code § 17602(a)(2) by charging Plaintiff's and Class Members' Payment Method
8 without first obtaining their affirmative consent to the Terms and Conditions containing
9 the automatic renewal offer terms or continuous service terms;

10 E. That the Court find and declare that Defendant has violated Cal. Bus. &
11 Prof. Code § 17602(a)(3) by failing to provide an acknowledgement that includes the
12 automatic renewal or continuous service offer terms, cancellation policy and
13 information on how to cancel in a manner that is capable of being retained by Plaintiff
14 and Class Members;

15 F. That the Court find and declare that Defendant has violated the UCL and
16 committed unfair and unlawful business practices by violating Cal. Bus. & Prof. Code §
17 17602.

18 G. That the Court award to Plaintiff and Class Members damages and full
19 restitution in the amount of the subscription payments made by them pursuant to Cal.
20 Bus. & Prof. Code § 17603, in an amount to be proved at trial;

21 H. That Defendant be ordered to pay restitution to Plaintiff and the Class due
22 to Defendant's UCL violations, pursuant to Cal. Bus. & Prof. Code §§ 17200-17205 in
23 the amount of their subscription agreement payments;

24 I. That the Court find that Plaintiff and Class Members are entitled to
25 injunctive relief pursuant to Cal. Bus. & Prof. Code § 17203;

26 J. That Plaintiff and the Class be awarded reasonable attorneys' fees and
27 costs pursuant to California Code of Civil Procedure § 1021.5, and/or other applicable
28 law; and

1 K. That the Court award such other and further relief as this Court may deem
2 appropriate.

3
4 Dated: January 21, 2016

NEWPORT TRIAL GROUP, APC

5
6 By: /s/ Scott J. Ferrell

Scott. J. Ferrell

7 Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, I electronically filed the foregoing **FIRST AMENDED CLASS ACTION COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Scott J. Ferrell
Scott. J. Ferrell

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