

**IN THE CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS
18TH JUDICIAL CIRCUIT**

DANIEL O’MALLEY, LUCAS YOUNG, and
CHARLES BUCKINGHAM, *individually and
on behalf of all others similarly situated,*

Plaintiffs,

v.

FLOSPORTS, INC.,

Defendant.

2023LA000516
Case No.

JURY TRIAL DEMANDED

Candice Adams
e-filed in the 18th Judicial Circuit Court
DuPage County
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CLASS ACTION COMPLAINT

Plaintiffs Daniel O’Malley, Lucas Young, and Charles Buckingham (“Plaintiffs”) bring this action individually and on behalf of all others similarly situated against Defendant FloSports, Inc. (“FloSports” or “Defendant”). Plaintiffs make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge.

NATURE OF ACTION

1. This is a putative class action lawsuit against Defendant for engaging in an illegal “automatic renewal” scheme with respect to its subscription sports broadcasting and streaming services across its network sites (collectively, the “FS Subscriptions,” enumerated below) through its website, <https://www.flosports.tv/> (the “FloSports Website”). Defendant is a Texas-based subscription sports broadcaster and streaming service that, among other activities, streams live sporting events to audiences around the world. Relevant to Plaintiffs’ allegations, when customers sign up for an FS Subscription to gain access to a live stream through the FloSports Website, Defendant enrolls customers in a program that automatically renews customers’ FS Subscription on a monthly or yearly basis and results in monthly or yearly charges to

customer's credit card, debit card, or third-party payment account (collectively, "Payment Method"). In doing so, Defendant fails to provide the requisite disclosures and authorizations required to be made to and obtained from Plaintiff and the Class Members in violation of the multi-state Automatic Renewal Laws (the "ARLs"),¹ and in violation of the various counts asserted herein.

2. Through the FloSports Website, Defendant markets, advertises, and sells to consumers in Illinois and throughout the United States paid memberships to the FS Subscriptions,² which include broadcasting and streaming services for numerous sports channels (collectively, the "FS Subscriptions"). To sign up for one of Defendant's FS Subscriptions through the FloSports Website, customers must provide Defendant with their billing information and Defendant then automatically charges customers' Payment Method as payments are due, typically on a monthly or yearly basis. Defendant is able to unilaterally charge its customers' renewal fees without their consent, as Defendant is in possession of its customers' billing information. Thus, Defendant has made the deliberate decision to charge Plaintiff and other similarly situated customers on a monthly or yearly basis, absent their consent under the ARLs, absent the requisite disclosures under the ARLs, and in reliance on consumer confusion and inertia to retain customers, combat consumer churn, and bolster its revenues.

¹ The applicable ARLs include but are not limited to Cal. Bus. & Prof. Code §§ 17601, *et seq.*, D.C. Code §§ 28A-201; 815 ILCS 601/1, *et seq.*; N.C.G.S. § 75-41, *et seq.*; Or. Rev. Stat. §§ 646A.292, *et seq.*

² The sport channels include: FloBikes, FloBowling, FloCheer, FloComba, FloDance, FloElite, FloFC, FloFootball, FloGrappling, FloGymnastics, FloHockey, FloHoops, FloLive, FloMarching, FloRacing, FloRodeo, FloRugby, FloSoftball, FloSwimming, FloTrack, FloVoice, FloVolleybal, FloWrestling, and Varsity.

3. As will be discussed below, the enrollment process for the FloSports Subscriptions through the FloSports Website uniformly violates the counts asserted herein.

4. Specifically, Defendant systematically violates the laws asserted herein by: (i) failing to present the automatic renewal offer terms in a clear and conspicuous manner to the request for consent to the offer before the subscription or purchasing agreement is fulfilled; (ii) charging consumers' Payment Method without first obtaining their affirmative consent to the agreement containing the automatic renewal offer terms; and (iii) failing to provide an acknowledgment that includes the automatic renewal offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumers. Plaintiffs and Class Members thus suffered monetary damages as a result of Defendant's deceptive business practices through its FS Subscription offerings.

JURISDICTION AND VENUE

5. The Court has jurisdiction over the Defendant and over this action pursuant to 735 ILCS 5/2-209, and in accord with the Illinois Constitution and the Constitution of the United States. Defendant conducts substantial business in Illinois, and committed the tortious acts complained of in substantial part in Illinois. Defendant has, at all times relevant hereto, promoted, marketed, and sold its FS Subscriptions to residents within this forum and throughout the United States.

6. Venue is proper in this forum pursuant to 735 ILCS 5/2-101 because the transactions or some part thereof out of which the causes of action arose occurred in this county.

PARTIES

7. Plaintiff Daniel O'Malley is a citizen of Illinois, residing in Darien, Illinois. On or around April 2, 2022, Mr. O'Malley purchased a yearly FS Subscription ("FloGrappling") from

Defendant's Website while in Illinois. During the enrollment process, but before finally consenting to Defendant's subscription offering, Mr. O'Malley provided his Payment Method information directly to Defendant. At the time that Mr. O'Malley enrolled in his FS Subscription program, Defendant did not disclose to Mr. O'Malley all of the required automatic renewal offer terms associated with the subscription program or obtain Mr. O'Malley's affirmative consent to those terms. Further, after Mr. O'Malley completed his initial order, Defendant sent Mr. O'Malley an email confirmation and receipt for his purchase of and enrollment in the FS Subscription (the "Acknowledgment Email"). However, the Acknowledgment Email, too, failed to provide Mr. O'Malley with the complete automatic renewal terms that applied to Defendant's offer, a description of Defendant's full cancellation policy, or information regarding how to cancel Mr. O'Malley's FS Subscription in a manner capable of being retained by him. Mr. O'Malley did not receive any other acknowledgment that contained the required information. As a result, Mr. O'Malley was not placed on notice of several material terms associated with his FS Subscription. In particular, Mr. O'Malley was not made aware of the recurring price to be charged upon renewal, the length of the renewal term, when the first charge would occur, or the complete cancellation policy associated with his FS Subscription: the most crucial aspects of which were missing from the Checkout Page and Acknowledgment Email. In any case, shortly after Mr. O'Malley first signed up for his FS Subscription, Mr. O'Malley learned upon reviewing his billing statements and banking history that, notwithstanding the confusing terms of his FS Subscription, Defendant enrolled Mr. O'Malley into its year-long automatic-renewal subscription and, without Mr. O'Malley's affirmative consent, charged Mr. O'Malley's Payment Method for a full annual rate of \$149.99 associated with his FS Subscription—resulting from Defendant's inadequate ARL disclosures and its deceptive Checkout Page design which

prominently displayed on the center of the webpage that the purchase price was \$12.50. Had Defendant complied with the ARL, Mr. O'Malley would have been able to read and review the auto-renewal terms prior to purchase, and he would not have subscribed to FS Subscription at all or on the same terms. As a direct result of Defendant's violations of the ARL, Mr. O'Malley suffered an economic injury.

8. Plaintiff Lucas Young is a citizen of California, residing in Sonoma, California. On or around August 14, 2021, Mr. Young purchased a yearly FS Subscription ("FloGrappling") from Defendant's Website while in California. During the enrollment process, but before finally consenting to Defendant's subscription offering, Mr. Young provided his Payment Method information directly to Defendant. At the time that Mr. Young enrolled in his FS Subscription program, Defendant did not disclose to Mr. Young all of the required automatic renewal offer terms associated with the subscription program or obtain Mr. Young's affirmative consent to those terms. Further, after Mr. Young completed his initial order, Defendant sent Mr. Young an email confirmation and receipt for his purchase of and enrollment in the FS Subscription (the "Acknowledgment Email"). However, the Acknowledgment Email, too, failed to provide Mr. Young with the complete automatic renewal terms that applied to Defendant's offer, a description of Defendant's full cancellation policy, or information regarding how to cancel Mr. Young's FS Subscription in a manner capable of being retained by him. Mr. Young did not receive any other acknowledgement that contained the required information. As a result, Mr. Young was not placed on notice of several material terms associated with his FS Subscription. In particular, Mr. Young was not made aware of the recurring price to be charged upon renewal, the length of the renewal term, when the first charge would occur, or the complete cancellation policy associated with his FS Subscription: the most crucial aspects of which were missing from

the Checkout Page and Acknowledgment Email. In any case, shortly after Mr. Young first signed up for his FS Subscription, Mr. Young learned upon reviewing his billing statements and banking history that, notwithstanding the confusing terms of his FS Subscription, Defendant enrolled Mr. Young into its year-long automatic-renewal subscription and, without Mr. Young's affirmative consent, charged Mr. Young's Payment Method for a full annual rate of \$149.99 associated with his FS Subscription—resulting from Defendant's inadequate ARL disclosures and its deceptive Checkout Page design which prominently displayed on the center of the webpage that the purchase price was \$12.50. After this discovery, Mr. Young emailed Defendant through the FloSports Website to avoid incurring any future charges in connection with FS Subscription. Further, Mr. Young notified Defendant that he did not authorize – and to request a refund of – the unauthorized charge to his Payment Method. However, Defendant denied Mr. Young's refund request and, on August 20, 2022, attempted to auto-renew Mr. Young's FS Subscription for yet another year by charging his Payment Method. Had Defendant complied with the ARL, Mr. Young would have been able to read and review the auto renewal terms prior to purchase, and he would not have subscribed to FS Subscription at all or on the same terms, or he would have canceled his FS Subscription earlier, *i.e.*, prior to the expiration of the initial subscription. As a direct result of Defendant's violations of the ARL, Mr. Young suffered an economic injury.

9. Plaintiff Charles Buckingham is a citizen of New York, residing in New York, New York. On or around March 8, 2019, Mr. Buckingham purchased a yearly FS Subscription (“FloGrappling”) from Defendant's Website while in New York. During the enrollment process, but before finally consenting to Defendant's subscription offering, Mr. Buckingham provided his Payment Method information directly to Defendant. At the time that Mr. Buckingham enrolled in

his FS Subscription program, Defendant did not disclose to Mr. Buckingham all of the required automatic renewal offer terms associated with the subscription program or obtain Mr. Buckingham's affirmative consent to those terms. Further, after Mr. Buckingham completed his initial order, Defendant sent Mr. Buckingham an email confirmation and receipt for his purchase of and enrollment in the FS Subscription (the "Acknowledgment Email"). However, the Acknowledgment Email, too, failed to provide Mr. Buckingham with the complete automatic renewal terms that applied to Defendant's offer, a description of Defendant's full cancellation policy, or information regarding how to cancel Mr. Buckingham's FS Subscription in a manner capable of being retained by him. Mr. Buckingham did not receive any other acknowledgment that contained the required information. As a result, Mr. Buckingham was not placed on notice of several material terms associated with his FS Subscription. In particular, Mr. Buckingham was not made aware of the recurring price to be charged upon renewal, the length of the renewal term, when the first charge would occur, or the complete cancellation policy associated with his FS Subscription: the most crucial aspects of which were missing from the Checkout Page and Acknowledgment Email. In any case, shortly after Mr. Buckingham first signed up for his FS Subscription, Mr. Buckingham learned upon reviewing his billing statements and banking history that, notwithstanding the confusing terms of his FS Subscription, Defendant enrolled Mr. Buckingham into its year-long automatic-renewal subscription and, without Mr. Buckingham's affirmative consent, charged Mr. Buckingham's Payment Method for a full annual rate of \$149.99 associated with his FS Subscription—resulting from Defendant's inadequate ARL disclosures and its deceptive Checkout Page design which prominently displayed on the center of the webpage that the purchase price was \$12.50. On March 8, 2020, Mr. Buckingham discovered that his subscription was auto-renewed by Defendant for yet another year. Defendant charged

Mr. Buckingham’s Payment Method for a full annual rate of \$149.99 associated with his FS Subscription. Had Defendant complied with the ARL, Mr. Buckingham would have been able to read and review the auto-renewal terms prior to purchase, and he would not have subscribed to FS Subscription at all or on the same terms, or he would have canceled his FS Subscription earlier, *i.e.*, prior to the expiration of the initial subscription. As a direct result of Defendant’s violations of the ARL, Mr. Buckingham suffered an economic injury.

10. Defendant FloSports, Inc. (“FloSports” or “Defendant”) is a Delaware corporation with its principal place of business at 979 Springdale Rd, Ste 120, Austin, Texas, 78702. Defendant is one of the largest subscription sports broadcasting and streaming service providers for niche sports such as mixed martial arts, gymnastics, and racing competitions. The growth of FloSports has been unprecedented. Currently, “FloSports boasts five million monthly unique viewers across its platforms, which offer live or on-demand coverage of over 200,000 competitions from more than 25 sports around the world, including basketball, cycling, rugby, ice hockey and gymnastics.”³ Relevant here, Defendant offers access to certain exclusive FloSports content, products, and/or services on a contract or fee basis to customers who enroll in the automatically renewing FS Subscriptions. Defendant wholly owns and operates the FS Subscriptions, which it markets to consumers through the FloSports Website. Defendant is responsible for the promotion, advertisement, and/or marketing of the FS Subscriptions, and it owns and operates the FloSports Website. Defendant sells—and, at all times during the applicable Class Periods, sold—the FS Subscriptions to Plaintiffs and the Class Members via the FS Website.

³ SportsPro, “*We not only survived, we started to thrive*”: *Catching up with FloSports CEO Mark Floreani* (November 16, 2021). <https://www.sportspromedia.com/insights/flosports-ceo-mark-floreani-sportel-monaco-hockeytech-college-sports-ncaa>.

FACTUAL ALLEGATIONS

A. Background On The Subscription e-Commerce Market

11. The e-commerce subscription model is a business model in which retailers provide ongoing goods or services “in exchange for regular payments from the customer.”⁴ Subscription e-commerce services target a wide range of customers and cater to a variety of specific interests. Given the prevalence of online and e-commerce retailers, subscription e-commerce has grown rapidly in popularity in recent years. Indeed, the “subscription economy has grown more than 400% over the last 8.5 years as consumers have demonstrated a growing preference for access to subscription services[.]”⁵ Analysts at UBS predict that the subscription economy will expand into a \$1.5 trillion market by 2025, up from \$650 billion in 2020.⁶ That constitutes an average annual growth rate of 18%, which makes the subscription economy “one of the fastest-growing industries globally.”⁷

⁴ See <https://www.coredna.com/blogs/ecommerce-subscription-services>.

⁵ Business Insider, *Taco Bell’s taco subscription is rolling out nationwide — here’s how to get it* (January 6, 2022), <https://www.businessinsider.com/taco-bell-subscription-launching-across-the-country-2022-1> (internal quotation marks omitted).

⁶ See UBS, *Investing in digital subscriptions* (March 10, 2021), <https://www.ubs.com/global/en/wealth-management/our-approach/marketnews/article.1525238.html> (“[A]t close to USD 650 billion in 2020, we expect the subscription economy to expand into a USD 1.5 trillion market by 2025, implying an average annual growth rate of 18%.”). See also *Subscribed, UBS Declares: It’s Worth Investing in the Subscription Economy* (April 17, 2021), <https://www.subscribed.com/read/news-and-editorial/ubs-declares-its-worth-investing-in-the-subscription-economy>; Business 2 Community, *The Subscription Economy Is Booming Right Now. But Are You Reaping the Full Benefits?* (October 7, 2021), <https://www.business2community.com/ecommerce/the-subscription-economy-is-booming-right-now-but-are-you-reaping-the-full-benefits-02434851>.

⁷ UBS, *Investing in digital subscriptions* (Mar. 10, 2021), *supra* (“[Growth] was seen across many areas, including e-commerce, video streaming, gaming, cloud-based applications, etc.”); see also Juniper Research, *Subscriptions For Physical Goods To Overtake Digital Subscriptions By 2025; Growing To Over \$263bn Globally* (Oct. 12, 2020), <https://www.juniperresearch.com/press/subscriptions-for-physical-goods-to-overtake> (acknowledging “the significant lead the digital sector has had in th[e] area[of digital service subscriptions]”).

12. As noted above, the production, sale, and distribution of subscription-based products and services is a booming industry that has exploded in popularity over the past few years. According to Forbes, “[t]he subscription e-commerce market has grown by more than 100% percent a year over the past five years, with the largest retailers generating more than \$2.6B in sales in 2016, up from \$57.0M in 2011.”⁸ Following 2016, market growth within the industry increased exponentially, reaching \$650 billion in 2020.⁹ “As such, the financials of companies with subscription business models[] ... improved dramatically in 2020 thanks to limited revenue volatility and strong cash flow generation.”¹⁰ Thus, “[t]he share prices of most subscription companies have performed well in recent years.”¹¹

13. The expansion of the subscription e-commerce market shows no signs of slowing. “We’re now in the subscriptions era, and the pandemic is accelerating its takeover. During the COVID-19 lockdowns, many digital-based subscription business models fared well due to their promise of convenience and strong business continuity.”¹² According to *The Washington Post*, “[s]ubscriptions boomed during the coronavirus pandemic as Americans largely stuck in shutdown mode flocked to digital entertainment[.] ... The subscription economy was on the rise

⁸ *The State Of The Subscription Economy*, 2018, Forbes (Mar. 4, 2018), <https://www.forbes.com/sites/louiscolombus/2018/03/04/the-state-of-the-subscription-economy-2018/#6ad8251a53ef>.

⁹ See UBS, *Investing in digital subscriptions* (Mar. 10, 2021), available at <https://www.ubs.com/global/en/wealth-management/our-approach/marketnews/article.1525238.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² UBS, *Investing in digital subscriptions* (Mar. 10, 2021), <https://www.ubs.com/global/en/wealth-management/our-approach/marketnews/article.1525238.html>.

before the pandemic, but its wider and deeper reach in nearly every industry is expected to last, even after the pandemic subsides in the United States.”¹³

14. However, as *The Washington Post* has noted, there are downsides associated with the subscription-based business model. While the subscription e-commerce market has low barriers and is thus easy to enter, it is considerably more difficult for retailers to dominate the market due to the “highly competitive prices and broad similarities among the leading players.”¹⁴ In particular, retailers struggle with the fact that “[c]hurn rates are high, [] and consumers quickly cancel services that don’t deliver superior end-to-end experiences.”¹⁵ Yet, retailers have also recognized that, where the recurring nature of the service, billing practices, or cancellation process is unclear or complicated, “consumers may lose interest but be too harried to take the extra step of canceling their membership[s].”¹⁶ As these companies have realized, “[t]he real money is in the inertia.”¹⁷ As a result, “[m]any e-commerce sites work with third-party vendors to implement more manipulative designs.”¹⁸ That is, to facilitate consumer inertia, a number of subscription e-commerce companies, including Defendant, “are now taking advantage of

¹³ The Washington Post, *Everything’s becoming a subscription, and the pandemic is partly to blame* (June 1, 2021), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/> (noting that “e-commerce and entertainment subscriptions to sites such as Netflix, Hulu and Disney Plus made headlines during the pandemic for soaring growth”).

¹⁴ McKinsey & Company, *Thinking inside the subscription box: New research on e-commerce consumers*, (February 2018), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/thinking-inside-the-subscription-box-new-research-on-e-commerce-consumers#0>.

¹⁵ *Id.*

¹⁶ Washington Post, *Little-box retailing: Subscription services offer new possibilities to consumers, major outlets* (April 7, 2014), https://www.washingtonpost.com/business/economy/tktktktk/2014/04/07/f68135b6-a92b-11e3-8d62-419db477a0e6_story.html.

¹⁷ *Id.*

¹⁸ Business Insider, *A new study from Princeton reveals how shopping websites use 'dark patterns' to trick you into buying things you didn't actually want* (June 25, 2019), <https://www.businessinsider.com/dark-patterns-online-shopping-princeton-2019-6>.

subscriptions to trick users into signing up for expensive and recurring plans. They do this by intentionally confusing users with their app’s design and flow, ... and other misleading tactics[,]” such as failure to fully disclose the terms of its automatic-renewal programs.¹⁹

15. To make matters worse, once enrolled in the subscription, “[o]ne of the biggest complaints consumers have about brand/retailers is that it’s often difficult to discontinue a subscription marketing plan.”²⁰ Moreover, “the rapid growth of subscriptions has created a host of challenges for the economy, far outpacing the government’s ability to scrutinize aggressive marketing practices and ensure that consumers are being treated fairly, consumer advocates say.”²¹ Thus, although “Federal Trade Commission regulators are looking at ways to make it harder for companies to trap consumers into monthly subscriptions that drain their bank accounts [and] attempting to respond to a proliferation of abuses by some companies over the past few years[,]”²² widespread utilization of these misleading dark patterns and deliberate omissions persist.

16. Defendant has successfully implemented this tactic. According to Bloomberg, as of date, FloSports has more than 500,000 subscribers.²³ In 2021 alone, “FloSports saw its subscriber base grow by more than 50% year-over-year[] and saw 100% growth in traffic on its

¹⁹ TechCrunch, *Sneaky subscriptions are plaguing the App Store* (October 15, 2018), <https://techcrunch.com/2018/10/15/sneaky-subscriptions-are-plaguing-the-app-store/>.

²⁰ The Washington Post, *Everything’s becoming a subscription, and the pandemic is partly to blame* (June 1, 2021), <https://www.washingtonpost.com/business/2021/06/01/subscription-boom-pandemic/> (“‘Subscription services are a sneaky wallet drain,’ said Angela Myers, 29, of Pittsburgh. ‘You keep signing up for things and they make it really hard to cancel.’”); *see also* New Media and Marketing, *The problem with subscription marketing* (Mar. 17, 2019), <https://www.newmediaandmarketing.com/the-problem-with-subscription-marketing/>.

²¹ *Id.*

²² *Id.*

²³ Bloomberg, *Niche Sports Streaming Service Expands While Giants Retrench* (December 8, 2020), <https://www.bloomberg.com/news/articles/2020-12-08/niche-sports-streaming-service-expands-while-giants-retrench#xj4y7vzkg>.

platform. Revenue grew by more than 50%.”²⁴ Defendant’s rapid growth of its audience base is directly linked to its aggressive, and deceptive, marketing tactics. For example, to promote its 2021 Tour De France cycling broadcast, “FloSports grew its YoY programmatic advertising revenue by 96% across social media platforms including Facebook and YouTube... lead[ing] to a 588% increase in video views, a 100% increase in engagement rates, and 465% increase in the number of engagements.”²⁵

B. Defendant’s Dark Patterns And Online Consumer Complaints About The FS Subscriptions

17. Defendant’s recent growth in revenues and subscriber count with respect to its FS Subscriptions coincides with a sharp decline in subscriber satisfaction as the FloSports Website and accompanying marketing have become riddled with “dark patterns.” Dark patterns “are tricks used in websites and apps that make you do things that you didn’t mean to, like buying or signing up for something.”²⁶ Consumers have complained on social media outlets both about Defendant’s misleading enrollment process as well as its unclear cancellation process. On a Reddit thread, with hundreds of other users voicing the same frustrations, a consumer complained “Flograpping misleading people, Says you only be charged one time fee for watching an event then they charge for a whole year’s membership, they know exactly what they

²⁴ Austin Business Journal, *FloSports' growth trajectory means new headquarters, more sports being streamed, tons of hiring* (February 28, 2022), <https://www.bizjournals.com/austin/news/2022/02/28/flosports-new-hq-streaming-sports.html>.

²⁵ Sports Video Group, *After Partnership With Grabyo, FloSports Sees 96% Year-Over-Year Increase in Social Ad Revenue During 2021 Tour De France* (August 24, 2021), <https://www.sportsvideo.org/2021/08/24/after-partnership-with-grabyo-flosports-sees-96-year-over-year-increase-in-social-ad-revenue-during-2021-tour-de-france/>

²⁶ <https://www.deceptive.design/>

are doing and have over 800 complaints of this same issue on Better Business Bureau.”²⁷ Indeed, as Truth in Advertising²⁸ has pointed out, Defendant uses “bait-and-switch” dark patterns by “offer[ing] subscriptions to live video coverage of dozens of underexposed sports and competitive activities, ranging from wrestling and rodeos to singing and dancing, with plans starting at \$12.50 a month according to its website. But what FloSports doesn’t make clear on the signup pages for these subscriptions (linked above) is that this low monthly rate is contingent on signing up for an annual plan, which costs \$150 a year.”²⁹ Defendant’s utilization of these dark patterns – especially in conjunction with its failure to fully disclose the actual price and terms of its automatic-renewal programs (discussed further below) – has led to a reduction in churn rates by making it next to impossible for subscribers to cancel their FS Subscriptions. It has further led to an increase in accidental or unintentional sign-ups by consumers for paid FS Subscriptions plans, in effect increasing subscriber count and, thus, Defendant’s overall revenues from renewal fees.

18. In fact, Defendant’s conduct has drawn the attention and ire of customers across the country, with countless angry customers taking to the Internet to voice their discontent over Defendant’s broken promises. For instance, numerous subscribers have left scathing reviews on

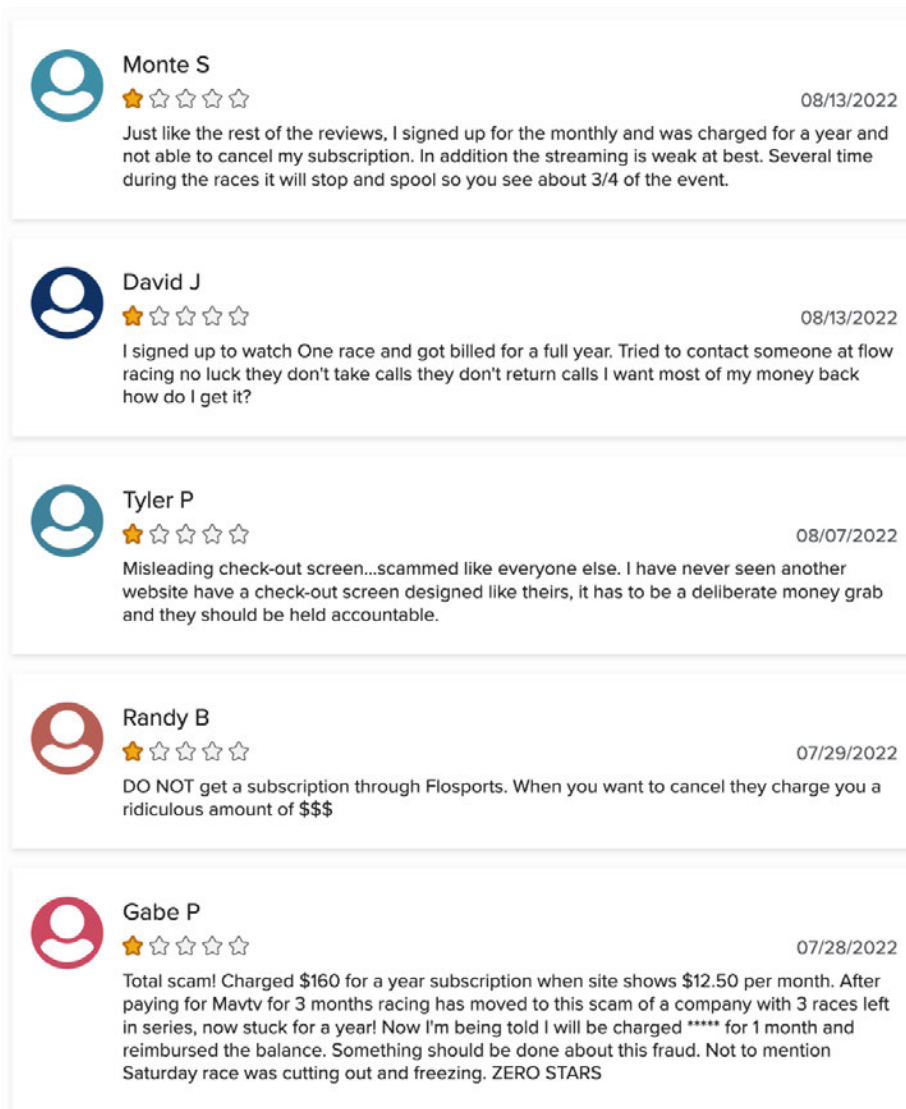
²⁷

https://www.reddit.com/r/bjj/comments/s9sdmk/flograppling_misleading_people_says_you_only_be/

²⁸ Truth in Advertising is a nonprofit organization devoted to consumer protection that regularly publishes articles about deceptive marketing and sends complaint letters to the Federal Trade Commission (“FTC”) for regulatory action.

²⁹ Truth in Advertising, *Streaming service advertises a monthly rate for a wrestling package that has no monthly plan* (February 13, 2019), <https://truthinadvertising.org/articles/floports-flowrestling/>

the Better Business Bureau website, on a near daily basis, complaining of the unclear billing practices and confusing cancellation policy associated with Defendant's FS Subscriptions:³⁰



The image shows a vertical list of five customer reviews from the Better Business Bureau website. Each review includes a profile picture, the reviewer's name, a star rating, the date of the review, and the text of the complaint. All reviews are negative, with one star ratings and complaints about being charged for a year instead of a month, poor streaming quality, and misleading check-out screens.

Monte S
★☆☆☆☆ 08/13/2022
Just like the rest of the reviews, I signed up for the monthly and was charged for a year and not able to cancel my subscription. In addition the streaming is weak at best. Several time during the races it will stop and spool so you see about 3/4 of the event.

David J
★☆☆☆☆ 08/13/2022
I signed up to watch One race and got billed for a full year. Tried to contact someone at flow racing no luck they don't take calls they don't return calls I want most of my money back how do I get it?

Tyler P
★☆☆☆☆ 08/07/2022
Misleading check-out screen...scammed like everyone else. I have never seen another website have a check-out screen designed like theirs, it has to be a deliberate money grab and they should be held accountable.

Randy B
★☆☆☆☆ 07/29/2022
DO NOT get a subscription through FloSports. When you want to cancel they charge you a ridiculous amount of \$\$\$

Gabe P
★☆☆☆☆ 07/28/2022
Total scam! Charged \$160 for a year subscription when site shows \$12.50 per month. After paying for Mavtv for 3 months racing has moved to this scam of a company with 3 races left in series, now stuck for a year! Now I'm being told I will be charged ***** for 1 month and reimbursed the balance. Something should be done about this fraud. Not to mention Saturday race was cutting out and freezing. ZERO STARS

³⁰ See <https://www.bbb.org/us/tx/austin/profile/digital-media/floports-inc-0825-1000108975/complaints>.

19. Other subscribers to FS Subscriptions left similar complains on Amazon.com: ³¹

From the United States



S. Watson

★★★★☆ **Not a monthly fee but YEARLY**

Reviewed in the United States on May 1, 2022

Verified Purchase

Subscribed to this streaming service so my elderly boyfriend could hopefully sit at home and enjoy our local short track race. Streaming was good, but the website is very misleading. Site states that is \$12.50 per month, but once you subscribe, you are charged for a whole year plus tax. Granted this is still cheaper than going to the track, but very misleading. I was charged \$165.00 when the website states you pay only \$150.00. BUYER BEWARE!

One person found this helpful

Helpful

Report abuse



CKWiggins

★★★★☆ **Definitely not monthly charge as stated!**

Reviewed in the United States on March 15, 2022

Verified Purchase

Quality is ok. Only certain games can be viewed. I guess I thought they streamed everything I wanted! Lol!
You are charged for the year! No option to choose **monthly** making it more difficult because you have to contact them to get it changed.

Helpful

Report abuse



TMD

★★★★☆ **Too expensive and streaming quality is not great!**

Reviewed in the United States on December 31, 2021

Verified Purchase

I have used this service 3x already and the streaming quality is lackluster. Lots of spinning and buffering. It's also too expensive for a **monthly** subscription to watch a few sports games.

Helpful

Report abuse



Tri Mike

★★★★☆ **Lack of non-full-year subscription option is very disappointing. Did not order.**

Reviewed in the United States on October 6, 2020

Verified Purchase

No option for **monthly** or partial-year subscription. \$150 for the full year was nowhere near the value for money. Would be willing to pay a **monthly** multiple to get month-to-month pricing instead of having to pay for a full year. "Cancel anytime" seems to indicate you pay the full year and can cancel whenever you want but don't get a partial refund for unused time. Either clarify this or add a **monthly** pricing option.

16 people found this helpful

Helpful

Report abuse



D MOORE

★★★★☆ **Rip off sports app**

Reviewed in the United States on July 14, 2022

Verified Purchase

Too pricey **monthly** fee with limited offerings

Helpful

Report abuse



Amazon Customer

★★★★☆ **Misleading and poor performance!!**

Reviewed in the United States on February 9, 2022

Verified Purchase

Misleading and poor performance!! Leads you think you can subscribe **monthly** but this only happens after you are charged for a year. Then the live feed was inconsistent and I missed my sons events. Wifi was strong and my 5G connection was strong and nether worked. No refund was available and I would not recommend, out athletic director tried getting resolutions and decided not to us this service in the future.

Helpful

Report abuse

³¹ https://www.amazon.com/FloSports-Inc/productreviews/B07Q3T4JWK?reviewerType=all_reviews

20. The above reviews are just a sampling of the backlash over the widespread pattern of uniform unlawful conduct by Defendant, underscoring the artifice devised and employed by Defendant to lure and deceive millions of consumers into enrolling, and remaining enrolled, in its paid FS Subscription programs.

C. Defendant's Business: The Subscription Enrollment Process

21. At all relevant times, Defendant offered, via the FloSports Website, the FS Subscriptions, which give consumers access to its video streaming services. These paid subscriptions are offered on a recurring basis for monthly and/or yearly renewal terms, and all plans automatically renew at the end of the defined renewal term unless the subscriber cancels. For example, customers that sign up for a monthly FS Subscription are, at the end of the initial one-month period, automatically renewed and typically charged the full amount for the next month, and every month thereafter if they do not cancel. Similarly, customers enrolled in an annual FS Subscription are, at the end of the initial one-year period, automatically renewed and typically charged the full amount for the next year, and every year thereafter if they do not cancel. Defendant's FS Subscriptions constitute automatic renewal and/or continuous service plans or arrangements for the purposes of the ARLs.

22. To sign up for one of Defendant's FS Subscriptions, the consumer must first select a program. From the FloSports Website, prospective subscribers can review features of—and find links to the individual enrollment webpages for—each of Defendant's subscription offerings, including the FS Subscriptions at issue.

23. Consumers can sign up for one of Defendant's subscription plans through the FloSports Website, on either its mobile or desktop format. Defendant automatically enrolls

customers who purchase a paid FS Subscription via the FS Website in their chosen FS Subscription program going forward, by default.

24. The enrollment process for each FS Subscription is substantially the same, regardless of the medium used. After selecting a subscription option, consumers are directed to subsequent webpages on the FloSports Website, where they are prompted to create a membership account and input their billing information. After these steps, consumers are directed to another, final webpage (the “Checkout Page”), where prospective subscribers are invited to complete their purchases. For the purposes of the ARLs and this Complaint, the “relevant portion of the Checkout Page” refers to the text of that portion of the Checkout Page that appears in visual proximity to the request for consent to the offer, which in this case pertains to the block of text located immediately above the final red “Start Watching” button that customers must press to complete the checkout process.

25. By way of example, at least as of August 2022, when a consumer signed up for a FS Subscription via his or her computer web browser, the “relevant portion of the Checkout Page” refers to the disclosures in the block of text above the red “Start Watching” button (i.e., the “request for consent”), which contains the following language and appearance (red box added for emphasis):³²

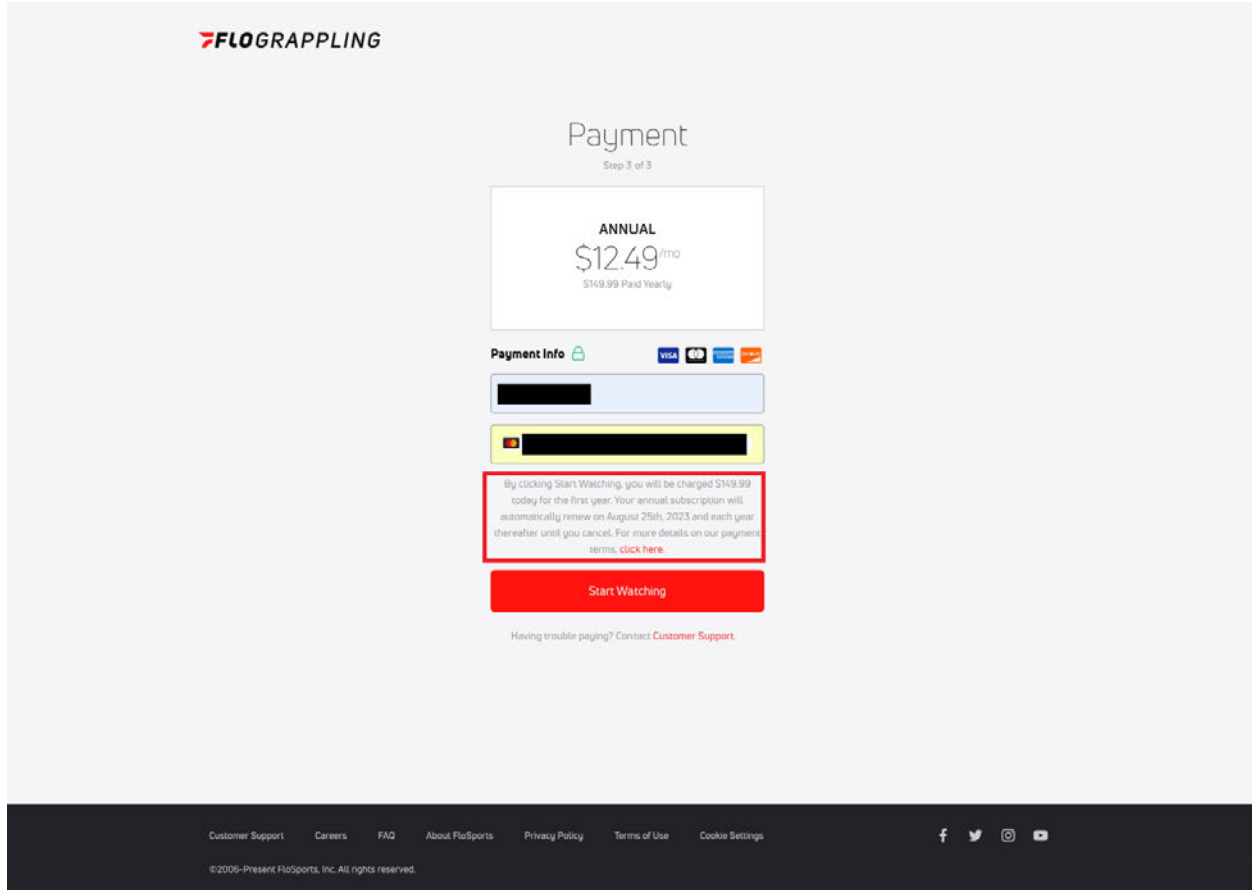
///

///

///

///

³² The Checkout Page for the monthly subscription is identical in design and layout as the FS yearly subscription plans. The only difference between the two is that the monthly ARL disclosure is even more inadequate, it merely states: “Recurring billing cancel any time. By clicking start watching you agree to our **Payment Terms**.” (emphasis in original)



26. Regardless of how the consumer subscribes (via the FloSports Website on its mobile or desktop format), and irrespective of which particular FS Subscription plan the consumer selects, Defendant fails to disclose the full terms of its auto-renewal program either before or after checkout, and it never requires the individual to read or affirmatively agree to any terms of service, *i.e.*, by requiring consumers to click a checkbox next to the automatic renewal offer terms before consumers complete the checkout process and submit their orders for Defendant’s FS Subscriptions. Consequently, Defendant uniformly fails to obtain any form of consent from – or even provide effective notice to – its subscribers before charging consumers’ Payment Methods on a recurring basis.

D. Defendant Violates The Automatic Renewal Laws

27. At all relevant times, Defendant failed to comply with the ARLs in three ways: (i) Defendant failed to present the automatic renewal offer 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 was fulfilled; (ii) Defendant charged Plaintiff's and the proposed Class Members' Payment Methods without first obtaining their affirmative consent to the agreement containing the automatic renewal offer terms; and (iii) Defendant failed to provide an acknowledgment that included the automatic renewal offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the Plaintiff and the Class Members.

i. Defendant Fails To Clearly And Conspicuously Present The FS Subscription Automatic Renewal Terms

28. As explained in greater detail below, the relevant portion of Defendant's Checkout Page does not clearly and conspicuously present the complete automatic renewal terms as defined by the ARLs. First, Defendant fails to clearly and conspicuously disclose that its FS Subscriptions will automatically renew until they are canceled. As illustrated by the Checkout Page above, although the relevant portion mentions that "Your annual subscription will automatically renew on [the year after the enrollment date] and each year thereafter until you cancel" this disclosure is inadequate because it fails to specify that the consumer is even enrolling in an "annual subscription" in the first place. Specifically, the preceding text to that sentence, states "By clicking Start Watching, you will be charged \$149.99 today for the first year." That call to action does not clearly state that consumers are agreeing to an "annual subscription," rather, it states that they are agreeing to a single charge to be placed that day. Thus, any reference to the recurring basis of the "annual subscription" is anomalous because it is

not tied to what consumers are purportedly agreeing to—*i.e.*, a single charge on the given day of purchase. Aside from being inconspicuous, as discussed in greater depth below, the Checkout Page thus fails to disclose that its FS Subscription will continue to automatically renew until they are canceled in the manner required by the ARLs. For the same reasons stated above, Defendant also fails to disclose the actual length of the FS Subscription as defined by the ARLs.

29. Second, Defendant fails to disclose the full cancellation policy that applies to the FS Subscriptions as required by the ARLs. Specifically, although the Checkout Page states that the “subscription will automatically...until you cancel,” it fails to indicate the cutoff date for doing so. For instance, the cancellation policy on the Checkout Page does not disclose that a consumer’s “subscription automatically renews unless auto-renew is ***turned off at least 24-hours before the end of the current period.***”³³ Further, neither the Checkout Page nor the terms of service on the FloSports Website indicate the time zone that applies to the cutoff date—*e.g.*, Eastern, Central, or Pacific Time. Aside from being inconspicuous, as discussed in greater depth below, the Checkout Page thus fails to disclose the full cancellation policy that applies to its FS Subscriptions as required under the ARLs.

30. Finally, Defendant fails to disclose the amount of the recurring charges associated with FS Subscriptions as required by the ARLs. Specifically, although the Checkout Page indicates that consumers’ “subscription will automatically renew,” and that they “will be charged \$149.99 today for the first year,” Defendant does not indicate how much money consumers will be charged for ***each subsequent year.*** To make matters worse, the Checkout Page also fails to disclose that “the amount billed each Monthly Period or Yearly Period ***may vary*** due to

³³ <https://www.floports.tv/terms-of-service/>

promotional offers, changes in your subscription, and changes in applicable taxes.”³⁴ Aside from being inconspicuous, as discussed in greater depth below, the Checkout Page fails to disclose the amount of the recurring charges associated with its FS Subscriptions.

ii. **Defendant Fails To Clearly And Conspicuously Present The FS Subscription Terms Before The Subscription Agreement Is Fulfilled And In Visual Proximity To The Request For Consent To The Offer.**

31. Because Defendant failed to present the full automatic renewal terms of its FS Subscriptions on its Checkout Page, as required by the ARLs, it, therefore, failed to present the material terms of its FS Subscriptions before Plaintiffs and the Class Members made their purchases in violations of the ARLs. Further, even if Defendant has presented the full automatic renewal terms of its FS Subscription (it did not), those terms were not presented in a “clear and conspicuous” manner to the request for consent of the FS Subscriptions in violation of the ARLs.

32. Pursuant to ARLs, “clear and conspicuous” or “clearly and conspicuously” generally means in a manner that clearly calls attention to the language, such as using 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. Defendant’s inadequate automatic renewal terms fall well short of the mark of being conspicuous as defined under the ARLs. Specifically, the terms are not “clear and conspicuous” because they are smaller than the text featured in and under the “Payment,” and “Payment Info” headers above, which fill up at least 60% of the Checkout Page. Additionally, the terms, which appears in a gray 10-point font, without emphasis, and against a grey background are illegible to the naked eye, even on a large computer screen, without increasing the zoom level. At the same time, the illegible terms are much less obvious or

³⁴ <https://www.flosports.tv/terms-of-service/>

noticeable than the text in the middle of the Checkout Page which states, in a black 30-point bolded font, that the purchase price is “\$12.49.” This text is three times larger than the inadequate terms and also directly contradicts the \$149.99 annual purchase price text in the terms. Finally, the terms are clearly overshadowed by the large call-to-action button which immediately turns red after a consumer finishes entering their payment information (drawing attention away from the faint grey text at issue). The “Start Watching” text within the call-to-action button also appears in a larger 12-point white font which is prominently contrasted against the red background of the button. It is clear from the design of Defendant’s Checkout Page that Defendant intends to mislead prospective consumers, and has misled Plaintiffs and the Class Members, into purchasing its FS Subscriptions under false pretenses. Based on the above, Defendant’s deceptive Checkout Page does not clearly and conspicuously call attention to its otherwise inadequate automatic renewal terms in violation of the ARLs.

iii. Defendant Fails To Obtain Consumers’ Affirmative Consent To The Automatic Renewal Terms Associated With The FS Subscriptions.

33. Furthermore, Defendant unlawfully charged Plaintiff’s and the Class Members’ Payment Methods without first obtaining their affirmative consent to the agreement containing the automatic renewal terms, including their promotional and discounted prices, in violation of the ARLs.³⁵ Specifically, Defendant does not at any point during the checkout process require consumers to read or affirmatively agree to any terms of service associated with their FS Subscriptions, *e.g.*, by requiring consumers to select or click a “checkbox” next to the automatic renewal offer terms to complete the checkout process. In fact, as discussed above, the only terms

³⁵ Although not all of the ARLs explicitly state this requirement, it is implied within the language of the statutes. The following ARLs specifically reference this requirement: Cal. Bus. & Prof. Code § 17602(a)(2); HRS § 481-9.5(e); N.Y. Gen. Bus. Law § 527-a(1)(b); N.D.C.C. § 51-37-02(4); Or. Rev. Stat. § 646A.295(1)(b); 9 V.S.A. § 2454a(a)(2); Va. Code Ann. §§ 59.1-207.46(A)(2).

that Plaintiffs and the Class Members could have purportedly agreed to, even without a checkbox manifesting affirmative consent, was that “[b]y clicking Start Watching, you will be charged \$149.99 today for the first year.” That call to action, however, does not otherwise state that by clicking the call-to-action button consumers were also agreeing to an “annual subscription.” Thus, at no point, during the enrollment process or on the Checkout Page, was there an unambiguous or affirmative consent to Defendant’s automatic renewal terms in violation of the ARLs.

iv. **Defendant Fails To Provide A Post-Checkout Acknowledgment That Clearly And Conspicuously Discloses The Required FS Subscription Offer Terms.**

34. Finally, after Plaintiff and the Class Members subscribed to one of Defendant’s FS Subscription plans, Defendant sent email follow-ups regarding their purchases (the “Acknowledgment Emails”).

35. By way of example, as of 2021, the subject line of the email stated: “Subscription Confirmation” The body of the email contained, in relevant part, the following text and images:

///

///



You've joined a community of passionate fans. Now you're closer to the events and athletes more than ever before.

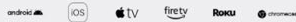
Your login unlocks access to live events and premium content across every sport in the FloSports network.

– Your dedicated FloGrappling Support Team

Invoice Summary

Plan	PRO - Yearly
Payment Date	August 15, 2021
Active Through	August 15, 2022
Subtotal	\$12.50/mo billed \$149.99 annually
Sales Tax	\$0.00
Total	\$149.99

Watch anytime, on any device.



For questions about this email, contact [support](#).

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979 Springdale Road, Suite 120, Austin, TX 78702

36. The Acknowledgment Email contains even less of the required information than is featured on the relevant portion of the Checkout Page, discussed above. As such, the Acknowledgment Email fails to include FS Subscription automatic renewal terms, and

information regarding how to cancel, in a manner that was capable of being retained by Plaintiffs and the Class Members, in violation of the counts asserted herein.

37. At all relevant times, Defendant has been well aware that its FS Subscriptions fail to comply with the ARLs: as evidenced by the number of complaints lodged against it in the Better Business Bureau website. The facts giving rise to the Plaintiffs' claims are materially the same as the Class Members.

38. By and through these actions, Defendant has been unjustly enriched, violated the Electronic Funds Transfer Act, as well as New York G.B.L. § 349 and conversion.

CLASS ALLEGATIONS

39. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

40. Plaintiffs seek to represent a class defined as all persons in California, Washington D.C., Florida, Hawaii, Illinois, New York, North Carolina, North Dakota, Oregon, Vermont, and Virginia, who, within the applicable statute of limitations period, up to and including the date of final judgment in this action, enrolled in an automatically renewing FloSports subscription and paid fee(s) in connection with such subscription (the "Class").

41. Plaintiff O'Malley also seeks to represent a subclass of all persons in Illinois who, within the applicable statute of limitations period, up to and including the date of final judgment in this action, enrolled in an automatically renewing FloSports subscription and paid fee(s) in connection with such subscription (the "Illinois Subclass").

42. Plaintiff Buckingham also seeks to represent a subclass of all persons in New York who, within the applicable statute of limitations period, up to and including the date of final

judgment in this action, enrolled in an automatically renewing FloSports subscription and paid fee(s) in connection with such subscription (the “New York Subclass”).

43. Plaintiff Young also seeks to represent a subclass of all persons in California who, within the applicable statute of limitations period, up to and including the date of final judgment in this action, enrolled in an automatically renewing FloSports subscription and paid fee(s) in connection with such subscription (the “California Subclass”).

44. Specifically excluded from the Class are Defendant and any entities in which Defendant has a controlling interest, Defendant’s agents and employees, the judge to whom this action is assigned, members of the judge’s staff, and the judge’s immediate family.

45. Plaintiffs reserve the right to amend the definitions of this Class if discovery or further investigation reveals that the Class should be expanded or otherwise modified.

46. Numerosity. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, the Class comprises at least thousands of consumers. The precise number of Class Members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class Members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant.

47. Existence and predominance of common questions of law and fact. Common questions of law and fact exist as to all Class Members and predominate over questions affecting only individual Class Members. Common legal and factual questions include, but are not limited to:

(a) whether Defendant failed to present the automatic renewal offer terms in a clear and conspicuous manner before the subscription or purchasing agreement was fulfilled and

in visual proximity to the request for consent to the offer, in violation of the counts asserted herein;

(b) whether Defendant charged Plaintiffs' and the Class Members' Payment Method for an automatic renewal service without first obtaining their affirmative consent to the automatic renewal offer terms in violation of the counts asserted herein;

(c) whether Defendant failed to provide an acknowledgement that included the automatic renewal terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and the Class Members, in violation of the counts asserted herein;

(d) whether Defendant's conduct alleged herein constitutes conversion and/or unjust enrichment;

(e) whether Plaintiff and the Class Members are entitled to damages and/or restitution;

(f) whether Defendant should be enjoined from further engaging in the misconduct alleged herein; and

(g) whether Plaintiffs and the Class Members are entitled to attorneys' fees and costs.

48. Typicality. The claims of Plaintiff are typical of the claims of the Class Members in that Plaintiff and the Class sustained damages as a result of Defendant's uniform wrongful conduct, based upon Defendant's failure to obtain Plaintiffs' and the Class Members' affirmative consent to the automatic renewal offer terms or continuous service offer terms associated with the FS Subscriptions before charging their Payment Methods. All Class Members were

comparably injured by Defendant's wrongful conduct as set forth herein. Further, there are no defenses available to Defendant that are unique to Plaintiffs.

49. Adequacy of Representation. Plaintiffs will fairly and adequately protect the interests of the Class Members. Plaintiffs have retained counsel that is highly experienced in complex consumer class action litigation, and Plaintiffs intend to vigorously prosecute this action on behalf of the Class Members. Furthermore, Plaintiffs have no interests that are antagonistic to those of the Class Members.

50. Superiority. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class Members are relatively small compared to the burden and expense of individual litigation of their claims against Defendant. It would, thus, be virtually impossible for the Class Members to obtain effective redress on an individual basis for the wrongs committed against them. Even if the Class Members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. It would also increase the delay and expense to all parties and the court system from the issues raised by this action. The class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances.

51. In the alternative, the Class and Subclasses may also be certified because:

(a) the prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Defendant;

(b) the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class Members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

(c) Defendant has acted or refused to act on grounds generally applicable to the Class Members as a whole, thereby making appropriate final declaratory and/or injunctive relief with respect to the Class Members as a whole.

COUNT I
Violation of the Illinois Consumer Fraud and Deceptive Business Practices Act
815 ILCS 505/1, *et seq.*

52. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

53. Plaintiff O'Malley brings this cause of action against Defendant individually and on behalf of the Illinois Subclass.

54. Plaintiff O'Malley asserts that Defendant violated Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. ("ICFA"), which prohibits the use of "unfair and deceptive practices" in the conduct of trade or commerce. The ICFA is to be liberally construed to effectuate that purpose.

55. Plaintiff O'Malley and Illinois Subclass members are consumers as defined in 815 ILCS 505/1(c) and (e).

56. Defendant's misconduct, including the misrepresentations and/or omissions in connection with its FS Subscription offerings, took place in the course of trade or commerce in Illinois, arose out of transactions that occurred in Illinois, and/or harmed individuals located in Illinois.

57. Defendant's activities and actions, in particular with respect to its FS Subscriptions, emanated from the State of Illinois.

58. By undertaking the conduct at issue herein, Defendant has engaged in unfair or deceptive acts prohibited by the ICFA.

59. If not for Defendant's deceptive and unfair acts, including Defendant's false and misleading business practices as alleged herein in connection with its FS Subscription offerings, Plaintiff O'Malley and the Subclass Members would not have purchased FS Subscriptions or would have paid significantly less for them.

60. Defendant, at all relevant times, knew or should have known that Plaintiff O'Malley and the Subclass Members did not know and could not have reasonably discovered their deceptive and unfair acts prior to their purchases of the FS Subscriptions.

61. As a direct and proximate result of Defendant's violations of the ICFA, Plaintiff O'Malley and Subclass Members sustained damages in an amount to be proven at trial.

62. In addition, Defendant's conduct showed malice, motive, and reckless disregard of the truth such that on account of Defendant's conduct, Plaintiff O'Malley and the Subclass Members seek statutory and actual damages, punitive damages, injunctive relief, attorneys' fees and costs, and all other relief allowed under the ICFA.

COUNT II
Violation of the Illinois Uniform Deceptive Trade Practices Act
815 ILCS § 510/2, *et seq.*
(On behalf of the Illinois Subclass)

63. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

64. Plaintiff O'Malley brings this cause of action against Defendant individually and on behalf of the Illinois Subclass.

65. Defendant is a “person” as defined by 815 ILCS §§ 510/1(5).

66. Defendant engaged in deceptive trade practices in the conduct of its business, in violation of 815 ILCS §§ 510/2(a), through the conduct asserted herein. As a result of its deceptive acts and practices, Defendant has sold FS Subscriptions unsuspecting consumers across Illinois. If Defendant had advertised its FS Subscriptions truthfully and in a non-misleading fashion, Plaintiff O’Malley and other Illinois Subclass Members would not have purchased them or would not have paid as much as they did for them.

67. Defendant’s representations and omissions were material because they were likely to deceive reasonable consumers.

68. The above unfair and deceptive practices and acts by Defendant were immoral, unethical, oppressive, and unscrupulous. The acts caused substantial injury to Plaintiff O’Malley and Class Members that they could not reasonably avoid; this substantial injury outweighed any benefits to consumers or to competition.

69. As a direct and proximate result of Defendant’s deceptive acts and practices, Plaintiff O’Malley and Class Members have suffered and will continue to suffer injury, ascertainable losses of money or property, and monetary and non-monetary damages, including from not receiving the benefit of their bargain in purchasing the FS Subscriptions.

70. Plaintiff O’Malley is entitled to such injunctive relief to ensure that Defendant ceases its unlawful acts and practices

71. Plaintiff O’Malley and Illinois Subclass Members seek all relief allowed by law, including injunctive relief, damages, and reasonable attorney’s fees.

COUNT III
Unjust Enrichment

72. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

73. Plaintiffs bring this claim individually and on behalf of the Members of the Class under the laws of California, Washington D.C., Florida, Hawaii, Illinois, New York, North Carolina, North Dakota, Oregon, Vermont, and Virginia.

74. Plaintiffs and the Class Members conferred benefits on Defendant by purchasing the FS Subscriptions.

75. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiffs' and the Class Members' purchases of the FS Subscriptions. Retention of those monies under these circumstances is unjust and inequitable because of Defendant's allegedly deceptive and/or misleading practice of renewing Plaintiffs' and Class Members' FS Subscriptions.

76. Specifically, Defendant failed to disclose the material terms of the FS Subscriptions which induced Plaintiffs and the Class Members to purchase the FS Subscriptions under false and/or misleading pretenses. Defendant's actions caused injuries to Plaintiffs and the Class Members because they would not have purchased the FS Subscriptions at all if the true facts were known.

77. Because Defendant's retention of the non-gratuitous benefits conferred on them by Plaintiffs and Class Members is unjust and inequitable, Defendant has been unjustly enriched in an amount to be determined at trial.

COUNT IV
Violation of the Electronic Funds Transfer Act
15 U.S.C. 1693, *et seq.*

78. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

79. Plaintiffs bring this claim individually and on behalf of the Members of the Class.

80. The EFTA provides a basic framework establishing the rights, liabilities, and responsibilities of participants in an electronic fund transfer system. 15 U.S.C. §§ 1693 *et seq.*

81. The “primary objective” of the EFTA “is the provision of individual consumer rights.” *Id.* § 1693(b).

82. Any waiver of EFTA rights is void. “No writing or other agreement between a consumer and any other person may contain any provision which constitutes a waiver of any right conferred or cause of action created by this subchapter.” 15 U.S.C. § 1693i.

83. Defendant’s transfer of monies via debit card from the bank accounts of Plaintiffs and Class Members are “electronic fund transfers” within the meaning of the EFTA and the EFTA’s implementing regulations, known as Regulation E and codified at 12 C.F.R. §§ 205, *et seq.*

84. An “electronic fund transfer” means “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account.” 15 U.S.C. § 1693a(7). The term is expressly defined to include “[t]ransfers resulting from debit card transactions, whether or not initiated through an electronic terminal.” 12 C.F.R. § 205.3(b)(v).

85. The EFTA defines the term “preauthorized electronic transfer” as “an electronic fund transfer authorized in advance to recur at substantially regular intervals.” 15 U.S.C. § 1693a(9). The Official Staff Interpretation of Regulation E describes a “preauthorized electronic transfer” as “one authorized by the consumer in advance of a transfer that will take place on a recurring basis, at substantially regular intervals, and will require no further action by the consumer to initiate the transfer.” 12 C.F.R. Part 205, Supp. I, § 205.2(k), cmt. 1.

86. Section 1693e(a) of the EFTA prohibits preauthorized electronic transfers without written authorization: “A preauthorized electronic fund transfer from a consumer’s account may be authorized by the consumer only in writing, and a copy of such authorization shall be provided to the consumer when made.” 15 U.S.C. § 1693e(a). Similarly, Regulation E provides: “Preauthorized electronic fund transfers from a consumer’s account may be authorized only by a writing signed or similarly authenticated by the consumer. The person that obtains the authorization shall provide a copy to the consumer.” 12 C.F.R. § 205.10(b).

87. Plaintiffs and members of the Class each maintained an “account” as that term is defined in 15 U.S.C § 1693a(2) and are “consumers” within the meaning of 15 U.S.C. § 1693a(5).

88. Defendant uniformly and routinely initiated preauthorized electronic fund transfers and took money from the bank accounts of the Plaintiffs and Class Members without obtaining their written authorization for the transfers, as required by the EFTA and Regulation E. Defendant also uniformly and routinely failed to provide a copy of any such written authorization to Plaintiffs and the Nationwide EFTA Subclass members from whose bank accounts Defendant took preauthorized electronic fund transfers for monthly membership fees.

89. Defendant took funds from bank accounts managed by Plaintiffs via debit card. In none of these instances did Defendant obtain Plaintiffs' written authorizations, nor did Defendant provide Plaintiffs with copies of any such written authorizations.

90. The Official Staff Interpretation of Regulation E explains, "when a third-party payee," such as Defendant, "fails to obtain the authorization in writing or fails to give a copy to the consumer ... it is the third-party payee that is in violation of the regulation." 12 C.F.R. Part 205, Supp. I, § 205.10(b), cmt. 2.

91. As a direct and proximate result of Defendant's violations of the EFTA and Regulation E, Plaintiffs and Class Members have suffered damages in the amount of the unauthorized debits taken by Defendant. 15 U.S.C. § 1693m. As a further direct and proximate result of Defendant's violations of the EFTA and Regulation E, Plaintiffs and Class Members are entitled to recover statutory damages in the amount of "the lesser of \$500,000 or 1 per centum of the net worth of the defendant." *Id.* § 1983m(a)(2)(B).

92. Pursuant to 15 U.S.C. § 1693m, Plaintiffs and Class Members are also entitled to recover costs of suit and attorneys' fees from Defendant.

COUNT V **Conversion**

93. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

94. Plaintiffs bring this claim individually and on behalf of the Members of the Class.

95. As a result of charges made by Defendant to Plaintiffs' and the Class Members' Payment Methods without authorization, Defendant has taken money that belongs to Plaintiffs and the Class Members.

96. The amount of money wrongfully taken by Defendant is capable of identification.

97. As a result of Defendant's actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial.

COUNT VI
Violation of New York General Business Law ("GBL") § 349

98. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

99. Plaintiff Buckingham brings this claim individually and on behalf of New York Subclass Members.

100. New York's consumer fraud statute prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." *See* GBL § 349.

101. Defendant's marketing and billing practices are consumer-oriented in that they are directed at members of the consuming public.

102. By engineering and implementing fraudulent billing and advertising practices, Defendant engaged in, and continues to engage in, deceptive acts and practices in violation of GBL § 349.

103. Defendant has violated GBL § 349 statute by engaging in a marketing and billing program that is likely to mislead a reasonable consumer acting reasonably under the circumstances, using a billing mechanism that automatically charges customers without their awareness or consent and failing to provide adequate disclosures regarding the charges that will be imposed, omitting material information in order to prevent customers from cancelling their trial before the last day of the trial period, failing to provide customers with an "agreement" or "terms of service" adequately disclosing all material terms and cancellation instructions before

locking them into a subscription plan; and curtailing customers' ability to easily cancel their subscription to Defendant prior to the expiry of the trial period.

104. The aforementioned acts are unfair, unconscionable and deceptive and are contrary to the public policy of New York, which aims to protect consumers.

105. As a direct and proximate result of Defendant's unlawful and deceptive marketing and billing practices, the Class has suffered injury and monetary damages in an amount to be determined at the trial of this action.

106. Plaintiff Buckingham and the New York Subclass Members further seek an order declaring Defendant's practices to be unlawful, an order enjoining Defendant from engaging in any further unlawful conduct, and an order directing Defendant to refund to the Plaintiff and the Class all monthly fees wrongfully assessed and/or collected on its automatically renewing FS Subscriptions.

COUNT VII
Violation of The Automatic Renewal Laws

107. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

108. Plaintiffs bring this claim individually and on behalf of the Members of the Class.

109. At all relevant times, Defendant has violated, and continues to violate, the Automatic Renewal Laws of the Class through its offerings of the FS Subscription., as alleged in the above paragraphs of this complaint, which are incorporated herein by reference.

110. Specifically, Defendant failed, and continues to fail, to: (a) provide the automatic renewal terms associated with its FS Subscriptions in a clear and conspicuous manner and in visual proximity to the request for consent to the offer before the subscription or purchasing agreement was fulfilled; (b) obtain the affirmative consent of Plaintiff and the Class Members to

those terms before charging their Payment Method; and (c) 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 Plaintiffs and the Class Members. Defendant also makes it exceedingly difficult and unnecessarily confusing for Plaintiffs and the Class Members to cancel their FS Subscriptions.

111. Defendant's violation of the ARLs renders the FS Subscription offerings to be void, unconditional gifts, and/or a deceptive business practice.³⁶

112. As a result of Defendant's violations of the ARLs, which resulted in unfair or deceptive business and trade practices under the consumer protection laws of California, Washington D.C., Florida, Hawaii, Illinois, New York, North Carolina, North Dakota, Oregon, Vermont, and Virginia, Plaintiffs and the Class Members are entitled to damages, restitution, injunctive relief, attorneys' fees and any other relief that the court deems proper.

COUNT VIII
Violations of California's Unfair Competition Law ("UCL"),
Cal. Bus. & Prof. Code §§ 17200, *et seq.*

113. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

114. Plaintiff Young brings this claim individually and on behalf of the members of the proposed California Subclass against Defendant.

115. The UCL prohibits unfair competition in the form of "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and

³⁶ Cal. Bus. & Prof. Code §§ 17603-04; D.C. Code § 28A-203(d), D.C. Code § 28-3904; Fl. St. § 501.165; Haw. Rev. Stat. § 481-9.5(d), Hawaii Rev. Stat. § 480-2; 815 ILCS 601/15, 815 ILCS 505/1 *et seq.*; N.C.G.S. § 75-41(e); Or. Rev. Stat. § 646A.295(5); Va. Code Ann. §§ 59.1-207.47, 49, Va. Code Ann. §§ 59.1-200(A)(58), (67); NY Gen. Bus. Law. § 527-a; N.D.C.C. §§ 51-37-05, 06; 9 V.S.A. § 2454a(c), 9 V.S.A. § 2453.

any act[.]” Cal. Bus. & Prof. Code § 17200. The UCL allows “a person who has suffered injury in fact and has lost money or property” to prosecute a civil action for violation of the UCL. Cal. Bus. & Prof. Code § 17204. Such a person may bring such an action on behalf of himself or herself and others similarly situated who are affected by the unlawful and/or unfair business practice or act.

116. As alleged in more detail below, Defendant’s acts and practices alleged herein are “unlawful” within the meaning of the UCL because they violated the following laws, regulations, and rules, including the Automatic Renewal Law (“ARL”), Cal. Bus. & Prof. Code §§ 17600, *et seq.*, as well as the CLRA, FAL, and all other consumer protection statutes and common laws as discussed herein.

Violations of California’s Automatic Renewal Law

117. Additionally, at all relevant times, Defendant has violated, and continues to violate, the UCL’s proscription against engaging in unlawful and/or unfair conduct as a result of its violations of the ARL, Cal. Bus. & Prof. Code §§ 17600, *et seq.*, as alleged in the above paragraphs of this complaint, which are incorporated herein by reference.

118. Specifically, Defendant failed, and continues to fail, to: (a) provide the automatic renewal terms associated with its FS Subscription “in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity[] ... to the request for consent to the offer[,]” in violation of Cal. Bus. & Prof. Code § 17602(a)(1); (b) obtain the affirmative consent of Plaintiff and the Class to those terms before charging their Payment Method, in violation of Cal. Bus. & Prof. Code § 17602(a)(2); and (c) 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, in violation of Cal. Bus. & Prof. Code §§ 17602(a)(3). Defendant also makes it exceedingly difficult and unnecessarily confusing for consumers to cancel their FS Subscriptions, in violation of Cal. Bus. & Prof. Code § 17602(b).

119. Each of these acts and practices constitutes an independent violation of the ARL, and thus an independent violation of the UCL.

120. All products received from Defendant in violation of the ARL, Cal. Bus. Prof. Code §§ 17602, *et seq.*, constitute “unconditional gifts.” *See* Cal. Bus. Prof. Code § 17603.

121. As a direct and proximate result of Defendant’s unlawful and/or unfair practices described herein, Defendant has received, and continues to hold, unlawfully obtained property and money belonging to Plaintiff and the California Subclass in the form of payments made by Plaintiff and the California Subclass for their FS Subscriptions. Defendant has profited from its unlawful and/or unfair acts and practices in the amount of those business expenses and interest accrued thereon. Thus, Plaintiff Young has suffered injury in fact and lost money or property as a result of Defendant’s violations of California’s ARL.

122. Defendant was prohibited from making these charges and taking Plaintiffs’ money without the required affirmative consent. If Defendant had complied with the law, Defendant could not have made the charges, and would not have obtained this money from Plaintiff.

Violations of Other Statutes and Common Laws

123. Furthermore, alleged below, Defendant has committed unlawful and/or unfair business practices under the UCL by: (a) representing that Defendant’s goods and services have certain characteristics that they do not, in violation of Cal. Civil Code § 1770(a)(5); (b) advertising goods and services with the intent not to sell them as advertised, in violation of Cal.

Civil Code § 1770(a)(9); and (c) converting to Defendant's own use and benefit money that rightfully belongs to Plaintiff Young and the California Subclass.

124. Defendant's acts and omissions as alleged herein violate obligations imposed by statute, are substantially injurious to consumers, offend public policy, and are immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct.

125. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein.

126. Defendant's acts, omissions, nondisclosures, and misleading statements as alleged herein were and are false, misleading, and/or likely to deceive the consuming public.

127. Plaintiff Young and the members of the California Subclass have suffered a substantial injury in fact and lost money by virtue of Defendant's acts of unfair competition, which caused them to purchase the FS Subscriptions. Had Defendant complied with its disclosure obligations under the ARL, Plaintiff Young and members of the California Subclass would not have purchased their FS Subscriptions or would have canceled their FS Subscriptions prior to the renewal of the subscriptions, so as to not incur additional fees. Thus, Plaintiff Young and members of the Class were damaged and have suffered economic injuries as a direct and proximate result of Defendant's unlawful and/or unfair business practices

128. Defendant's violations have continuing and adverse effects because Defendant's unlawful conduct is continuing, with no indication that Defendant intends to cease this unlawful course of conduct. The public and the California Subclass are subject to ongoing harm because the unlawful and/or unfair business practices associated with the FS Subscriptions are still used by Defendant today.

129. Plaintiff Young and the California Subclass seek restitution pursuant to Cal. Bus. & Prof. Code § 17203 of all amounts that Defendant charged or caused to be charged to Plaintiff's and the California Subclass's Payment Methods in connection with their FS Subscriptions during the four years preceding the filing of this Complaint. Defendant should be required to disgorge all the profits and gains it has reaped and restore such profits and gains to Plaintiff and the California Subclass from whom they were unlawfully taken.

130. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff Young and members of the California Subclass seek a court order enjoining Defendant from such future misconduct, and any other such orders that may be necessary to rectify the unlawful business practices of Defendant.

COUNT IX
Violations of California's Consumers Legal Remedies Act ("CLRA"),
Cal. Civ. Code §§ 1750, *et seq.*

131. Plaintiffs hereby incorporate by reference and re-allege herein the allegations contained in all preceding paragraphs of this complaint.

132. Plaintiff Young brings this claim individually and on behalf of the members of the proposed California Subclass against Defendant.

133. Plaintiff Young and the members of the California Subclass are "consumers" within the meaning of Cal. Civil Code § 1761(d) in that Plaintiff Young and the California Subclass sought or acquired Defendant's goods and/or services for personal, family, or household purposes.

134. Defendant's selection and/or subscription offers and the video, music, and other products pertaining thereto are "goods" and/or "services" within the meaning of Cal. Civil Code

§ 1761(a) and (b). The purchases by Plaintiff Young and the Class are “transactions” within the meaning of Cal. Civil Code § 1761(e).

135. The acts and practices of Defendant as described above were intended to deceive Plaintiff Young and the California Subclass as described herein, and have resulted, and will result, in damages to Plaintiff Young and the California Subclass. These actions violated, and continue to violate, the CLRA in at least the following respects: (a) Defendant’s acts and practices constitute representations or omissions deceiving that the FS Subscriptions have characteristics, uses, and/or benefits, which they do not, in violation of Cal. Civil Code §1770(a)(5); and (b) Defendant’s acts and practices constitute the advertisement of the goods in question without the intent to sell them as advertised, in violation of Cal. Civil Code § 1770(a)(9).

136. Plaintiff Young and the California Subclass suffered economic injury as a direct result of Defendant’s misrepresentations and/or omissions because they were induced to purchase FS Subscriptions and/or pay renewal fees they would not have otherwise purchased and/or paid. Had Defendant fully and clearly disclosed the terms and purchase price associated with the FS Subscriptions, Plaintiff Young and the California Subclass would have not subscribed to the FS Subscriptions, or they would have cancelled their FS Subscriptions earlier, i.e., prior to the expiration of the initial subscription period.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- (a) For an order certifying this case as a class action on behalf of the Class and Subclass defined above, appointing Plaintiffs as representatives of the Class and Subclasses, and appointing their counsel as Class Counsel to represent the Class and Subclasses;

- (b) For an order declaring the Defendant's conduct violates the statutes referenced herein;
- (c) For an order finding in favor of Plaintiffs and the Class and Subclasses on all counts asserted herein;
- (d) For actual, compensatory, statutory, and/or punitive damages in amounts to be determined by the Court and/or jury;
- (e) For prejudgment interest on all amounts awarded;
- (f) For an order of restitution and all other forms of equitable monetary relief;
- (g) For injunctive relief as pleaded or as the Court may deem proper; and
- (h) For an order awarding Plaintiffs and the Subclasses their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury of any and all issues in this action so triable as of right.

Dated: May 17, 2023

Respectfully submitted,

By: /s/ J. Dominick Larry
J. Dominick Larry

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** Pro Hac Vice Application Forthcoming*

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