



Superior Court of California, County of Santa Clara
MINUTE ORDER

Mayron V. Google, Inc.
2015-1-CV-275940

9:00 AM Hearing: Demurrer

Date of Hearing: February 05, 2016

Heard By: Kirwan, Peter
Courtroom Reporter:

Location: Department 1
Courtroom Clerk: Ingrid C Stewart
Court Interpreter:
Court Investigator:

Parties Present:

Kramer, David H. Attorney
Willen, Brian M Attorney

Future Hearings:

Exhibits:

- Additional parties present: Chowning Poppler, Kristin Moody and Julian Hammond on court call are present.

Tentative ruling contested.

Tentative ruling adopted as amended. See below.

This is a putative class action brought by plaintiff Eric Mayron (Plaintiff). (Complaint, 1.) Plaintiff alleges that defendant Google, Inc. (Google) offers free and paid storage plans for Google Drive, which gives subscribers the ability to reach stored-data files from any smartphone, tablet, or computer. (Complaint, 17.) Defendant offers subscribers 15 gigabytes of storage for free. (Ibid.) Defendant also offers the ability to upgrade membership to its paid service by purchasing a storage plan. (Ibid.) In connection with the subscriptions, Plaintiff alleges:

Defendant made automatic renewal or continuous service offers to consumers in California and (a) at the time of making the automatic renewal or continuous service offers, failed to present the automatic renewal offer terms, or continuous service 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 in violation of Cal. Bus. & Prof. Code 17602(a)(1); (b) charged Plaintiff s and Class Members credit or debit cards, or third-party account [sic] . . . without first obtaining Plaintiff s and Class Members affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms in violation of Cal. Bus. & Prof. Code 17602(a)(2); and (c) failed 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 in violation of Cal. Bus. & Prof. Code 17602(a)(3).

(Complaint, 2.)

The Complaint, filed on January 23, 2015, sets forth the following causes of action: [1] Failure to Present the Automatic Renewal Offer Terms or Continuous Service Offer Terms Clearly and Conspicuously and in Visual Proximity to the Request for Consent Offer (Cal. Bus. & Prof. Code 17602(a)(1)); [2] Failure to Obtain the Consumer s Affirmative Consent Before the Subscription is Fulfilled (Cal. Bus. & Prof. Code



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17602(a)(2) and 17603); [3] Failure to Provide Acknowledgment with Automatic Renewal Terms and Information Regarding Cancellation Policy (Cal. Bus. & Prof. Code 17602(a)(3)); [4] Unfair Competition Law Violations (Cal. Bus. & Prof. Code 17200, et seq.); and [5] Injunctive Relief (Cal. Bus. & Prof. Code 17535). Defendant now demurs to each cause of action on the grounds that they fail to state facts sufficient to constitute a cause of action against Defendant.

I. Plaintiff's Request for Judicial Notice

In opposition to Defendant's demurrer, Plaintiff requests judicial notice of Legis. Counsel's Digest, Sen. Bill 340 (2009-2010 Reg. Session), 2009 Cal. Legis. Serv. Ch. 340 (West). Plaintiff's request for judicial notice is GRANTED. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37 [discussing categories of documents that constitute cognizable legislative history for purposes of judicial notice].)

II. Substantive Analysis

a. First, Second, and Third Causes of Action

The first, second, and third causes of action are all brought pursuant to the Automatic Renewal Law. Defendant argues that the Automatic Renewal Law does not create a private right of action and therefore Plaintiff cannot maintain these causes of action.

Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages. (*Vikco Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 62, emphasis in original.) That intent need not necessarily be expressed explicitly, but if not it must be strongly implied. (*Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.)

The Automatic Renewal law provides, generally:

(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:

(1) Fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner before the subscription or purchasing agreement is 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.

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

(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



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goods or services.

(b) 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).

(c) In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in this state, the business shall provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer.

(d) The requirements of this article shall apply only prior to the completion of the initial order for the automatic renewal or continuous service, except as follows:

(1) The requirement in paragraph (3) of subdivision (a) may be fulfilled after completion of the initial order.

(2) The requirement in subdivision (c) shall be fulfilled prior to implementation of the material change.

(Bus. & Prof. Code, 17602.)

There is no express provision in the Automatic Renewal Law authorizing a private right of action. Section 17604 of the Business and Professions Code states that all available civil remedies that apply to a violation of this article may be employed. However, the use of the language all available indicates that no new private right of action has been created; rather, a party can rely on civil remedies that already exist. For example, a party could bring an action under the UCL.

Plaintiff cites to two cases that Plaintiff contends have held that Section 17602 creates a private right of action - *Noll v. eBay Inc.* (N.D. Cal. 2013) 2013 WL 2384250 and *In re Trilegiant Corp., Inc.* (D. Conn. 2014) 11 F.Supp.3d 82. In *Noll*, however, the court did not find that Section 17600, et seq. creates a private right of action; the Court only found that recovery under Section 17600, et seq. is limited to California consumers. (*Noll v. eBay Inc.*, supra, 2013 WL 2384250 at *6.) The *In re Trilegiant Corp., Inc.* court also found that Section 17600, et seq. could not be relied on by non-California customers. (*In re Trilegiant Corp., Inc.*, supra, 11 F.Supp.3d at p. 126.) While that court stated that the Automatic Renewal law created a private right of action for California residents, that statement was dicta and also incorrectly interpreted the holding of *Noll*. Therefore, the case law does not support Plaintiff's position.

Plaintiff also relies on Business and Professions Code section 17603, which states:

In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent as described in Section 17602, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.



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Plaintiff contends that the plain language of this statute shows the Legislature's intent to allow individual consumers to bring actions against businesses violating the statute. It is telling that, while the Section 17600 refers to ongoing shipments of a product or ongoing deliveries of service, thereby distinguishing between products and services, Section 17603 refers to goods, wares, merchandise, or products and does not include services. In other words, this section only applies to tangible goods or products. Defendant argues that Section 17603 is only intended as a shield against a seller seeking payment for a good sent in violation of the Automatic Renewal Law; it is not intended to authorize a consumer to bring an action. This interpretation makes sense in light of the fact that Section 17603 only applies to tangible goods. In other words, a consumer could keep a good or product that is sent in violation of the Automatic Renewal Law, but there is nothing to keep when it is only a service that is provided.

In sum, Plaintiff has not established that Section 17600, et seq. provides for a private right of action. Accordingly, Defendant's demurrer to the first, second, and third causes of action is SUSTAINED WITHOUT LEAVE TO AMEND.

b. Fourth and Fifth Causes of Action

The fourth and fifth causes of action are UCL claims. Defendant first argues that Plaintiff lacks standing to sue under the UCL. Proposition 64 amended section 17204 to provide that no private party has standing to prosecute a UCL action unless he or she has suffered injury in fact and has lost money or property as a result of the unfair competition. (Law Offices of Mathew Higbee v. Expungement Assistance Services (2013) 214 Cal.App.4th 544, 555.) Defendant contends Plaintiff has not alleged he was injured in any way, let alone that any injury could be traced to any allegedly unlawful conduct by Defendant. Specifically, Defendant asserts that Plaintiff has not alleged, for example, (1) that he was not aware at the time he upgraded that his paid Google Drive account would renew automatically unless he cancelled it; (2) that he would not have upgraded or would not have maintained his subscription had Defendant provided more conspicuous notice; (3) that he was billed for a service he did not want or did not use; or (4) that he ever cancelled the subscription or asked Defendant for a refund.

Plaintiff responds that he suffered economic injury in the form of Defendant automatically charging his credit card without complying with the provisions of the Automatic Renewal Law. Plaintiff argues that his state of mind is irrelevant and he does not need to show reliance on any representation by Defendant.

Defendant is correct that a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct. (In re Tobacco II Cases (2009) 46 Cal.4th 298, 328.) Plaintiff here has not alleged that any representation by Defendant caused Plaintiff economic injury. Moreover, even if Defendant's conduct is looked at as simply a violation of statute, Plaintiff has not alleged that he lost money as a result of that statutory violation.

Plaintiff alleges that he was charged for a subscription to Google Drive. (Complaint, 64, 72.) Plaintiff does not allege that he did not receive and use Google Drive. In other words, the allegations show that Plaintiff received the service for which he paid. There are no allegations that Plaintiff tried to cancel the service, or even that he did not want the service. If Plaintiff used the service for which he was charged, then it is not apparent how he has lost money or property as a result of any allegedly unlawful conduct



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by Defendant; Defendant simply charged Plaintiff for a service provided to Plaintiff that Plaintiff used. Consequently, Plaintiff has not established standing to bring a UCL claim. This defect is fatal to the fourth and fifth causes of action. Accordingly, Defendant's demurrer to the fourth and fifth causes of action is SUSTAINED WITH 10 DAYS LEAVE TO AMEND.
