

1 PACIFIC TRIAL ATTORNEYS
A Professional Corporation
2 Scott J. Ferrell, Bar No. 202091
sferrell@pacifictrialattorneys.com
3 Victoria C. Knowles, Bar No. 277231
vknowles@pacifictrialattorneys.com
4 4100 Newport Place, Ste. 800
Newport Beach, CA 92660
5 Tel: (949) 706-6464
Fax: (949) 706-6469

6 Attorneys for Plaintiff

7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11 KYLE JOHNSON, individually and on
behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 CARBONITE, INC., a Delaware
15 corporation; and DOES 1 – 10, inclusive,

16 Defendants.

Case No.

CLASS ACTION COMPLAINT FOR:

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

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

3 **INTRODUCTION & OVERVIEW OF CLAIMS**

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

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

1 renewal of continuous service agreements are deemed to be an unconditional gift
2 pursuant to Cal. Bus. & Prof. Code § 17603.

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

7 **JURISDICTION AND VENUE**

8 4. Jurisdiction is proper in this Court pursuant to the Class Action Fairness
9 Act, 28 U.S.C. §1332(d), because members of the proposed Class are citizens of states
10 different from Defendant's home state, there are more than 100 Class Members, and the
11 amount-in-controversy exceeds \$5,000,000 exclusive of interest and costs.

12 5. This Court has jurisdiction over the Defendant named herein because
13 Defendant has sufficient minimum contacts with California and/or otherwise
14 intentionally avails itself of the laws and markets of California, through the promotion,
15 sale, marketing and distribution of its goods and services in California, to render the
16 exercise of jurisdiction by the California courts permissible.

17 6. Venue is proper in this District under 28 U.S.C. §1391(b) because
18 Defendant's improper conduct alleged in this complaint occurred in, was directed from,
19 and/or emanated from this judicial district, because Defendant has caused harm to Class
20 Members residing in this district, and/or because the Defendant is subject to personal
21 jurisdiction in this district.

22 **PARTIES**

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

26 8. Plaintiff is informed and believes, and upon such information and belief
27 alleges, that Defendant Carbonite, Inc. is a Delaware corporation with its principal
28 place of business located at 2 Avenue de Lafayette, Boston, Massachusetts 02111 .

1 Defendant operates in California and has done business in California at all times during
2 the Class Period. Also during the Class Period, Defendant made, and continues to
3 make, automatic renewal or continuous service offers to consumers in California.
4 Defendant operates a website which markets cloud and data backup protection and
5 related products.

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

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

18 **FACTUAL BACKGROUND**

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

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

25 12. Cal. Bus. & Prof. Code § 17602(a) makes it unlawful for any business
26 making an automatic renewal or continuous service offer to a consumer in this state to
27 do any of the following:
28

- 1 (1) Fail to present the automatic renewal offer terms or continuous
2 service offer terms in a clear and conspicuous manner before the
3 subscription or purchasing agreement is fulfilled and in visual
4 proximity, or in the case of an offer conveyed by voice, in temporal
5 proximity, to the request for consent to the offer.
- 6 (2) Charge the consumer's credit or debit card or the consumer's
7 account with a third party for an automatic renewal or continuous
8 service without first obtaining the consumer's affirmative consent to
9 the agreement containing the automatic renewal offer terms or
10 continuous service offer terms.
- 11 (3) Fail to provide an acknowledgment that includes the automatic
12 renewal or continuous service offer terms, cancellation policy, and
13 information regarding how to cancel in a manner that is capable of
14 being retained by the consumer. If the offer includes a free trial, the
15 business shall also disclose in the acknowledgment how to cancel
16 and allow the consumer to cancel before the consumer pays for the
17 goods or services.

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

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

15 15. Pursuant to Cal. Bus. & Prof. Code § 17601(c), “clear and conspicuous” or
16 “clearly and conspicuously” means “in larger type than the surrounding text, or in
17 contrasting type, font, or color to the surrounding text of the same size, or set off from
18

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

3 16. Section 17602(b) provides: “A business making automatic renewal or
4 continuous service offers shall provide a toll-free telephone number, electronic mail
5 address, a postal address only when the seller directly bills the consumer, or another
6 cost-effective, timely, and easy-to-use mechanism for cancellation that shall be
7 described in the acknowledgment specified in paragraph (3) of subdivision (a).”

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

17 **Defendant’s Business**

18 18. Defendant offers at its website, www.carbonite.com, various subscriptions
19 for cloud and data backup protection and related products, including a Personal Plus
20 plan for \$99.99 per year. Defendant’s product and services plan constitutes an
21 automatic renewal and/or continuous service plan or arrangement for the purposes of
22 Cal. Bus. & Prof. Code § 17601.

23 **Defendant’s Terms of Use and Services Agreement**

24 19. During the Class Period, Defendant’s webpage, found at
25 www.carbonite.com, contained a section entitled “Terms of Use”. **This is a document**
26 **in which any information concerning the recurring nature of Defendant’s**
27 **subscription programs or the manner in which the subscriptions may be canceled**
28 **is not set forth in clear and conspicuous language, as required by the applicable**

1 statutes and as set forth below. Indeed, there is no mention of these issues in the
2 Terms of Use.

3 **Defendant's Terms of Use and Services Agreement Fails to Provide Clear and**
4 **Conspicuous Disclosures As Required by Law.**

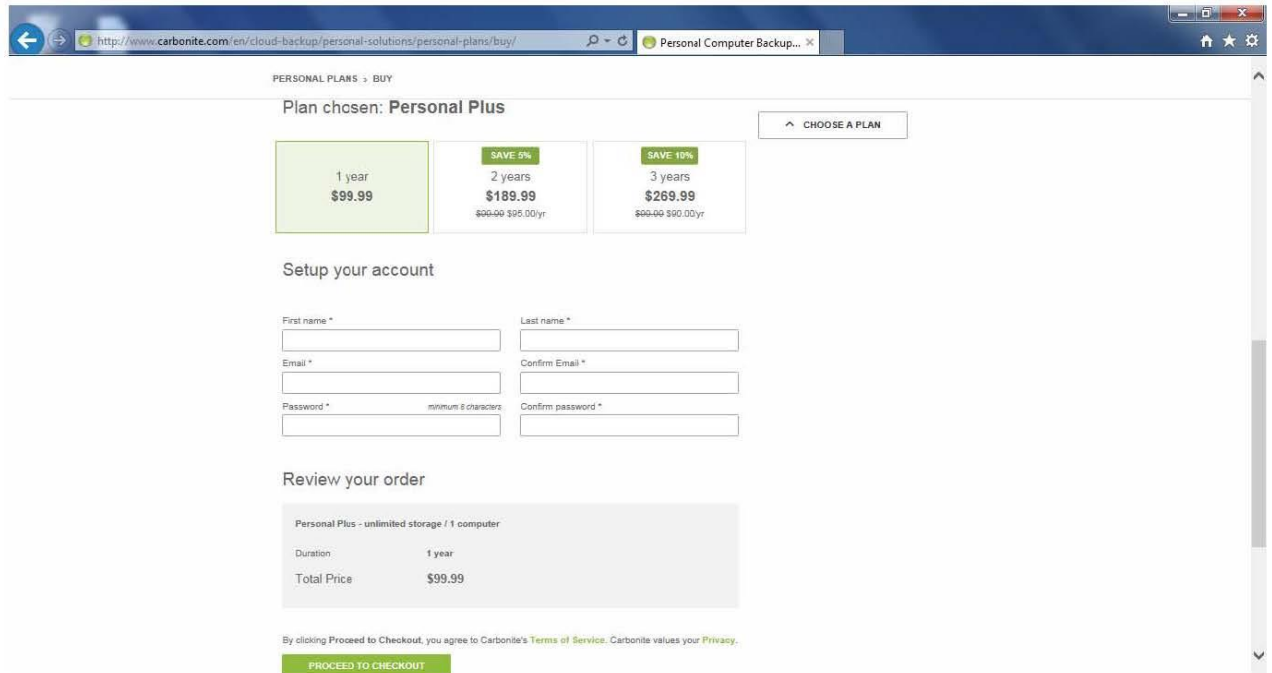
5 20. Within the Terms of Use, Defendant failed to state in clear and
6 conspicuous language (*i.e.*, in larger type than the surrounding text, or in contrasting
7 type, font, or color to the surrounding text of the same size, or set off from the
8 surrounding text of the same size by symbols of other marks, in a manner that clearly
9 calls attention to the language) that:

- 10 i) The subscription or purchasing agreement will continue until the
11 consumer cancels (there is language in capitals stating that the
12 subscription will continue after the free trial period unless canceled,
13 but language concerning recurring charges thereafter is not so
14 prominently displayed);
- 15 ii) Described the cancellation policy that applies to the offer;
- 16 iii) Recurring charges that will be charged to the consumer's Payment
17 Method account with a third party as part of the automatic renewal
18 plan or arrangement, and that the amount of the charge may change,
19 if that is the case, and the amount to which the charge will change, if
20 known; and
- 21 iv) The length of the automatic renewal term or that the service is
22 continuous unless the length of tile term is chosen by the consumer.

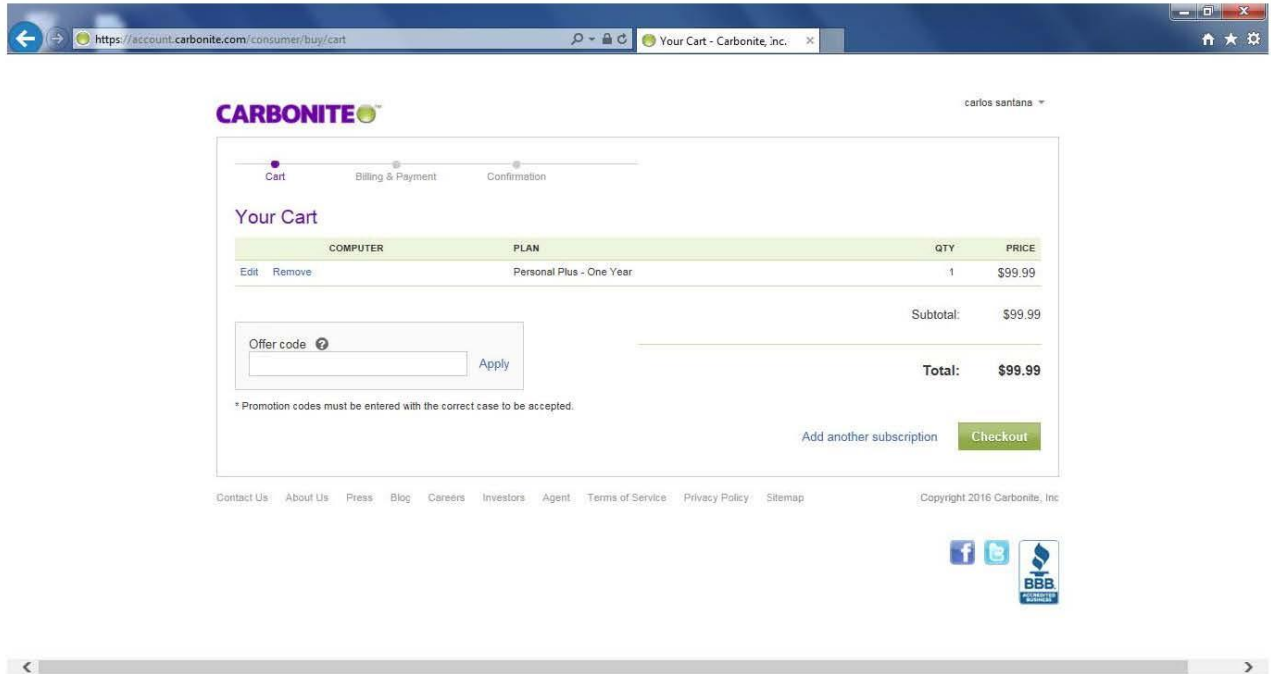
23 **Defendant Failed to Present the Automatic Renewal Offer Terms or Continuous**
24 **Service Offer Terms in a Clear and Conspicuous Manner Before the Subscription**
25 **or Purchasing Agreement was Fulfilled and in Visual Proximity to the Request for**
26 **Consent to the Offer in Violation of Cal. Bus. & Prof. Code § 17602(a)(1), (2).**

27 21. During the Class Period, Defendant made, and continues to make, an
28 automatic renewal offer for its subscriptions plans to Consumers in the United States,

1 including Plaintiff and Class Members. On the pages where the subscriber makes the
2 purchase, there is no description of that policy. Accordingly, the website did not, and
3 does not, contain automatic renewal offer terms or continuous service offer terms as
4 defined by Cal. Bus. & Prof. Code § 17601(b).



5
6
7
8
9
10
11
12
13
14
15
16
17
18
19 ///
20 ///
21 ///
22 ///
23 ///



22. As a result, prior to charging Plaintiff and Class Members, Defendant failed and continues to fail to obtain Plaintiff’s and Class Members’ affirmative consent to the automatic renewal offer terms or continuous service offer terms as required by Cal. Bus. & Prof. Code § 17602(a)(1), (2).

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

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

24. Furthermore, and in addition to the above, after Plaintiff and Class

1 Members subscribed to one of Defendant's subscription plans, Defendant sent to
2 Plaintiff and Class Members email follow-ups to their purchase, but has failed, and
3 continues to fail, to provide an acknowledgement that includes the automatic renewal or
4 continuous service offer terms, cancellation policy, and information on how to cancel in
5 a manner that is capable of being retained by Plaintiff and Class Members in violation
6 of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b).

7 On Wednesday, February 10, 2016 2:41 PM, Carbonite <carbonite@cloud.carbonite.com> wrote:



8
9 **Order Receipt**

10 Dear Carbonite User,
11 Thank you for subscribing to Carbonite Online Backup. Below is a summary of your recent
12 purchase:

13 **BILLING SUMMARY**


14 Invoice: [REDACTED] Invoice date: 2/10/2016
15 Billed to: Carbonite User
16 Total order amount \$59.99 was charged to your Amex card.

17 **ORDER DETAILS**

Computer Name	Subscription Type	Subtotal
Merc-Ops	Carbonite Personal Basic - One Year	59.99
	Order Subtotal:	\$59.99
	Order Total:	\$59.99

18 If you have any questions, please [contact customer support](#). You can also log into your
19 account to view your account summary.
20
21
22
23
24
25
26
27
28

Sincerely,
Carbonite



Referral Program
It Pays to Share
 It's easy (and rewarding) to pass along the benefits of cloud backup. When you refer a friend or small business, you and your referral will earn a gift card worth up to \$75 with each new subscription.
[Join the Referral Program today](#)

GIVE A GIFT  REFER FRIENDS  FOLLOW US  LIKE US 

Copyright 2016 Carbonite, Inc

This email was sent to: [REDACTED]
This email was sent by: Carbonite, Inc., 2 Avenue de Lafayette, Boston, MA 02111, USA

Carbonite respects your right to privacy: [View our policy](#)
[Manage communications from Carbonite](#)

From: "Carbonite" <carbonite@cloud.carbonite.com>
Date: February 24, 2017 at 7:03:53 AM PST
To: [REDACTED]
Subject: Your Carbonite Order Confirmation ([REDACTED])
Reply-To: "Carbonite" <reply@cloud.carbonite.com>



Order Receipt

Hi Carbonite User,

Thank you for subscribing to Carbonite Online Backup. Below is a summary of your recent purchase:

BILLING SUMMARY

Invoice: [REDACTED] **Invoice date:** 2/24/2017

Billed to: Carbonite User

Total order amount **\$59.99** was charged to your **Amex** card.

ORDER DETAILS

Computer Name	Subscription Type	Subtotal
Merc-Ops	Carbonite Personal Basic - One Year	59.99

Order Subtotal: \$59.99

Order Total: \$59.99

If you have any questions, please [contact customer support](#). You can also log into your account to view your account summary.

Sincerely,
Carbonite

GIVE A GIFT



REFER FRIENDS



FOLLOW US



LIKE US



Copyright 2017 Carbonite, Inc

This email was sent to: [REDACTED]

This email was sent by: Carbonite, Inc., 2 Avenue de Lafayette, Boston, MA 02111, USA

Carbonite respects your right to privacy: [View our policy](#)

[Manage communications from Carbonite](#)

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this class action for damages and other monetary and injunctive relief on behalf of the following class:

“All persons within California that, within the applicable statute of limitations period, purchased any product or service in response to an offer constituting an “Automatic Renewal” as defined by § 17601(a) from Carbonite, Inc., its predecessors, or its affiliates.”

26. Excluded from the Class are governmental entities, Defendant, any entity in which Defendant has a controlling interest, and Defendant’s officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns, and individuals bound by any prior settlement. Also excluded from the Class is any judge, justice, or judicial officer presiding over this matter, and any callers who did receive a warning that their calls were recorded.

27. The proposed Class is so numerous that individual joinder of all its members is impracticable. Due to the nature of the trade and commerce involved, however, Plaintiff believes that the total number of Class members is at least in the tens of thousands and members of the Class are numerous and geographically dispersed across the United States. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate

1 investigation and discovery. The disposition of the claims of the Class members in a
2 single class action will provide substantial benefits to all parties and to the Court.

3 28. There is a well-defined community of interest in the questions of law and
4 fact involved affecting the plaintiff class and these common questions predominate over
5 any questions that may affect individual Class members. Common questions of fact and
6 law include, but are not limited to, the following:

- 7 i. Whether Defendant failed to present the automatic renewal offer
8 terms, or continuous service offer terms, in a clear and conspicuous
9 manner before the subscription or purchasing agreement was
10 fulfilled and in visual proximity to the request for consent to the
11 offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1);
- 12 ii. Whether Defendant charged Plaintiff's and Class Members'
13 Payment Method for an automatic renewal or continuous service
14 without first obtaining the Plaintiff's and Class Members'
15 affirmative consent to the automatic renewal offer terms or
16 continuous service offer terms in violation of Cal. Bus. & Prof.
17 Code § 17602(a)(2);
- 18 iii. Whether Defendant failed to provide an acknowledgement that
19 included the automatic renewal or continuous service offer terms,
20 cancellation policy, and information on how to cancel in a manner
21 that is capable of being retained by Plaintiff and Class Members, in
22 violation of Cal. Bus. & Prof. Code § 17602(a)(3);
- 23 iv. Whether Defendant failed to provide an acknowledgment that
24 describes a cost-effective, timely, and easy-to-use mechanism for
25 cancellation in violation of Cal. Bus. & Prof. Code § 17602(b);
- 26 v. Whether Plaintiff and the Class Members are entitled to restitution
27 of money paid in circumstances where the goods and services
28

1 provided by Defendant are deemed an unconditional gift in
2 accordance with Cal. Bus. & Prof. Code § 17603;

3 vi. Whether Plaintiff and Class Members are entitled to restitution in
4 accordance with Cal. Bus. & Prof. Code §§ 17200, 17203;

5 vii. Whether Plaintiff and Class Members are entitled to injunctive relief
6 under Cal. Bus. & Prof. Code § 17203;

7 viii. Whether Plaintiff and Class Members are entitled to attorneys' fees
8 and costs under California Code of Civil Procedure § 1021.5; and

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

11 29. Plaintiff's claims are typical of the claims of the members of the Class.
12 Plaintiff and all members of the Class have been subjected to Defendant's common
13 course of unlawful conduct as complained of herein and are entitled to the same
14 statutory damages based on Defendant's wrongful conduct as alleged herein.

15 30. Plaintiff will fairly and adequately represent and protect the interests of the
16 Class. Plaintiff has retained counsel with substantial experience in handling complex
17 class action litigation. Plaintiff and his counsel are committed to vigorously
18 prosecuting this action on behalf of the Class and have the financial resources to do so.

19 31. A class action is superior to other available methods for the fair and
20 efficient adjudication of the present controversy. Individual joinder of all members of
21 the class is impracticable. Even if individual class members had the resources to pursue
22 individual litigation, it would be unduly burdensome to the courts in which the
23 individual litigation would proceed.

24 32. The conduct of this action as a class action conserves the resources of the
25 parties and of the judicial system and protects the rights of the class members.
26 Furthermore, for many, if not most, a class action is the only feasible mechanism that
27 allows an opportunity for legal redress and justice.

28 ///

FIRST CAUSE OF ACTION

**FAILURE TO PRESENT 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))**

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

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

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

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

(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.

35. Plaintiff and Class Members purchased Defendant’s cloud and data backup protection and related products for personal, family or household purposes. Defendant failed to present the automatic renewal offer terms, or continuous service offer terms, in a clear and conspicuous manner and in visual proximity the request for consent to the offer before the subscription or purchasing agreement was fulfilled.

36. As a result of Defendant’s violations of Cal. Bus. & Prof. Code § 17602(a)(1), Defendant is subject under Cal. Bus. & Prof. Code § 17604 to all civil remedies that apply to a violation of Article 9, of Chapter 1, of Part 3, of Division 7 of the Cal. Bus. & Prof. Code.

37. Plaintiff, on behalf of himself and Class Members, requests relief as described below.

///

///

SECOND CAUSE OF ACTION

FAILURE TO OBTAIN CONSUMER’S AFFIRMATIVE CONSENT

BEFORE THE SUBSCRIPTION IS FULFILLED

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

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

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

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

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

(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.

40. Plaintiff and Class Members purchased Defendant’s cloud and data backup protection and related products for personal, family or household purposes. Defendant charged, and continues to charge Plaintiff’s and Class Members’ Payment Method for an automatic renewal or continuous service without first obtaining Plaintiff’s and Class Members affirmative consent to the Terms of Service containing the automatic renewal offer terms or continuous service offer terms.

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

42. Plaintiff, on behalf of himself and Class Members, requests relief as described below.

///

///

///

THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

46. Plaintiff and Class Members purchased Defendant’s cloud and data backup protection and related products for personal, family or household purposes. Defendant failed to provide an acknowledgement that includes the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Plaintiff and Class Members.

1 47. As a result of Defendant’s violations of Cal. Bus. & Prof. Code §§
2 17602(a)(3) and 17602(b), Defendant is subject to all civil remedies under Cal. Bus. &
3 Prof. Code § 17604 that apply to a violation of Article 9, of Chapter 1 of Part 3, of
4 Division 7 of the Cal. Bus. & Prof. Code.

5 48. Plaintiff, on behalf of himself and Class Members, requests relief as
6 described below.

7 ///

8 **FOURTH CAUSE OF ACTION**

9 **VIOLATION OF THE UNFAIR COMPETITION LAW**

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

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

12 49. The foregoing paragraphs are alleged herein and are incorporated herein
13 by reference.

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

20 51. Since December 1, 2010, and continuing to the present, Defendant has
21 committed unlawful and/or unfair business acts or practices as defined by the UCL, by
22 violating Cal. Bus. & Prof. Code §§ 17602(a)(1), 17602(a)(2), 17602(a)(3) and
23 17602(b). The public policy which is a predicate to a UCL action under the unfair
24 prong of the UCL is tethered to a specific statutory provision. *See* Cal. Bus. & Prof.
25 Code §§ 17600, 17602.

26 52 Plaintiff has standing to pursue this claim because he suffered injury in
27 fact and has lost money or property as a result of Defendant’s actions as set forth
28

1 herein. Plaintiff purchased Defendant's cloud and data backup protection and related
2 products for personal, family, or household purposes.

3 53. As a direct and proximate result of Defendant's unlawful and/or unfair
4 business acts or practices described herein, Defendant has received, and continues to
5 hold, unlawfully obtained property and money belonging to Plaintiff and Class
6 Members in the form of payments made for subscription agreements by Plaintiff and
7 Class Members. Defendant has profited from its unlawful and/or unfair business acts or
8 practices in the amount of those business expenses and interest accrued thereon.

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

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

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

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

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff requests the following relief:
28

1 A. That the Court determine that this action may be maintained as a class
2 action, and define the Class as requested herein;

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

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

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

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

22 F. That the Court find and declare that Defendant has violated the UCL and
23 committed unfair and unlawful business practices by violating Cal. Bus. & Prof. Code §
24 17602;

25 G. That the Court award to Plaintiff and Class Members damages and full
26 restitution due to Defendant's UCL violations, pursuant to Cal. Bus. & Prof. Code §§
27 17200-17205 in the amount of their subscription agreement payments;

28

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

3 I. That Plaintiff and the Class be awarded reasonable attorneys' fees and
4 costs pursuant to California Code of Civil Procedure § 1021.5, and/or other applicable
5 law; and

6 J. That the Court award such other and further relief as this Court may deem
7 appropriate.

8
9 Dated: April 17, 2017

PACIFIC TRIAL ATTORNEYS, APC

10 By /s/ Scott. J. Ferrell
11 Scott. J. Ferrell
12 Attorneys for Plaintiff
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28