

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

ZARA LEVENTHAL, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

STREAMLABS LLC,

Defendant.

Case No. 22-cv-01330-LB

**ORDER DENYING MOTION TO
DISMISS**

Re: ECF No. 32

INTRODUCTION

The plaintiff, on behalf of a nationwide class, contends that Streamlabs LLC deceives consumers into signing up for a subscription product that carries an automatic monthly fee of \$5.99. Streamlabs has software that allows content creators to (1) stream their videos on platforms (such as YouTube) and (2) collect donations from viewers through third-party payment processors (such as PayPal). The subscription product is Streamlabs Pro, which allows donors to add GIFs or other effects (such as hearts, stars, or confetti) to the messages that accompany the viewers' donations. The plaintiff in this case added a GIF to a donation and contends that Streamlabs' subsequent disclosure to her — that adding a GIF or effect required joining Streamlabs Pro for \$5.99 per month — was deceptive because it suggested that it was a one-time fee and did not disclose that the \$5.99 monthly fee would renew automatically, in violation of California's Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL).

1 Streamlabs moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6),
 2 generally on the ground that the plaintiff did not plausibly allege claims. The plaintiff alleges facts
 3 that violate two requirements of California’s Automatic Renewal Law (ARL): conspicuous
 4 disclosure of subscription terms and a consumer’s affirmative consent to automatic renewal. She
 5 parrots the ARL’s language but does not cite it, possibly because the ARL protects only California
 6 consumers and she resides in New York. Streamlabs contends that she thus cannot rely on the
 7 ARL, the CLRA’s reasonable-consumer test otherwise does not require the ARL’s conspicuous
 8 disclosure and consumer consent, and, alternatively, the plaintiff must provide a more definite
 9 statement that cites the ARL explicitly so that Streamlabs can assert its ARL defenses. It also
 10 contends that the plaintiff did not plead fraud with the particularity required by Rule 9(b), unfair
 11 conduct in violation of the UCL, or an entitlement to equitable relief under the UCL.

12 The court denies the motion. The plaintiff’s fact allegations, if true, plausibly plead that
 13 Streamlabs deceived consumers with its disclosures about the \$5.99 fee. The complaint’s reliance
 14 on ARL requirements does not bar the claims.

16 STATEMENT

17 Streamlabs is a California-based company that allows content creators (known as “streamers”)
 18 to post live videos on platforms such as YouTube and — if they create a donation page — collect
 19 donations from viewers through payment processors such as PayPal.¹ When viewers donate, they
 20 can add a GIF or other effects to the message through a subscription product called Streamlabs Pro
 21 that costs \$5.99 per month and is renewed automatically every month.²

22 In August 2020, the plaintiff made a \$5 donation to a streamer, added a GIF, was taken to a
 23 confirmation page, and subscribed there to Streamlabs Pro. Streamlabs then charged her \$5.99 per
 24 month, which she did not realize until May 2021.³ She challenges the sufficiency of Streamlabs’

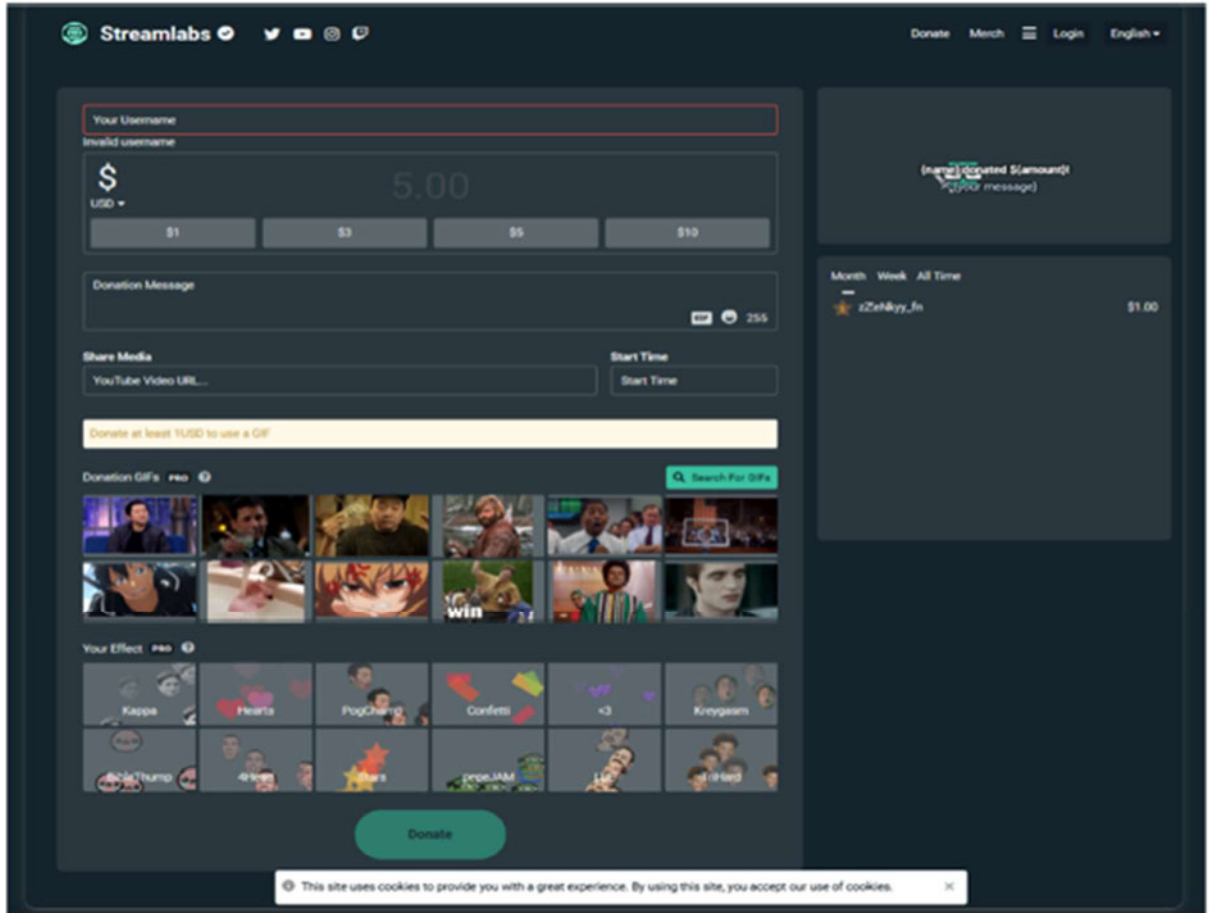
26 ¹ Am. Compl. – ECF No. 31 at 3 (¶ 9), 4 (¶¶ 14–15). Citations refer to material in the Electronic Case
 27 File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

27 ² *Id.* at 5–8 (¶¶ 17–18, 20–30).

28 ³ *Id.* at 10–12 (¶¶ 38–43).

1 disclosures: she contends that the disclosures suggest a one-time fee of \$5.99, when in fact, the
 2 monthly fee is an automatically recurring fee. To illustrate the donation process, the complaint
 3 shows the webpages that viewers encounter when donating.

4 At the time of her donation, the streamers' donation page looked like this:⁴



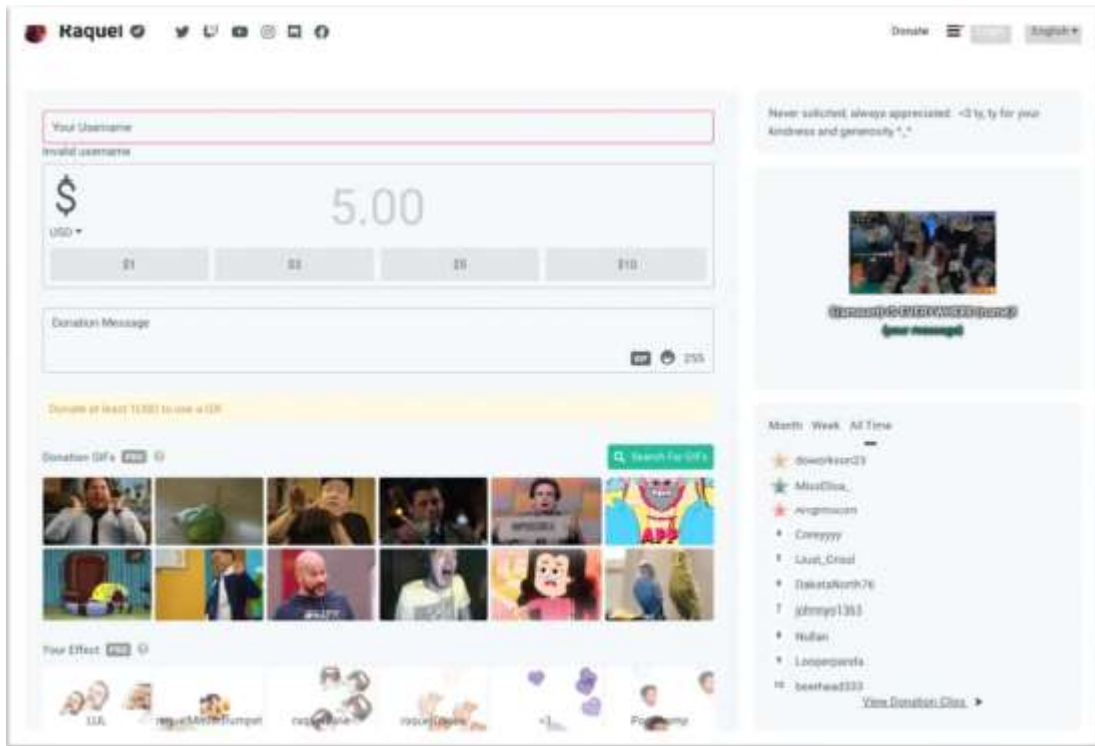
19
20 Among other features, the page has a place to specify a donation amount, a place to send a
 21 message to the streamer, the message “Donate at least 1USD to use a GIF,” thumbnail pictures of
 22 GIFs and effects (with the word “Pro” next to them), and a green “donate” button to submit the
 23 donation. It says nothing about subscription fees.

24 The complaint has a donation page “that matches what the [donation] page looked like when
 25 [plaintiff] Leventhal donated.” It has the same content as the previous image:⁵

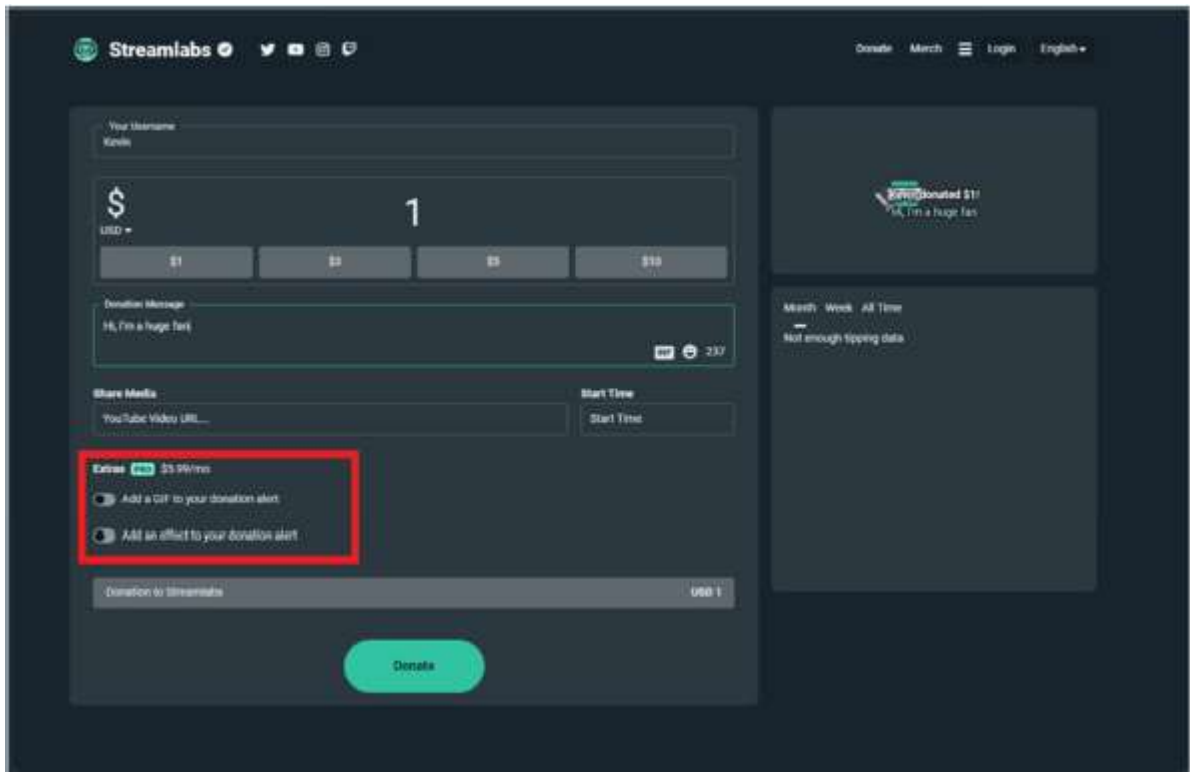
26
27 ⁴ *Id.* at 6.

28 ⁵ *Id.* at 10–11 (¶ 39).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



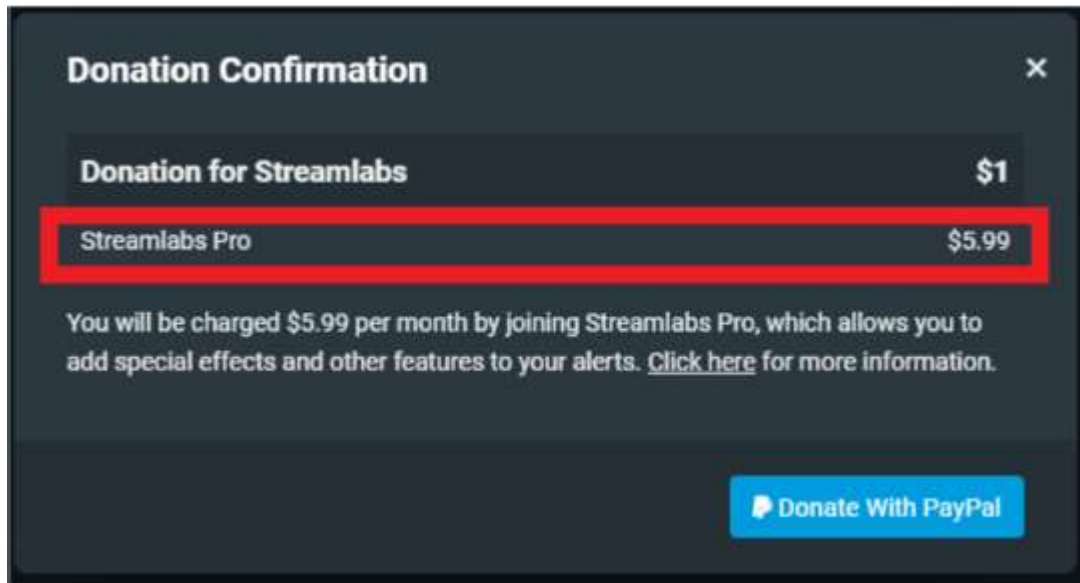
The current donation page is similar and looks like this:⁶



⁶ *Id.* at 5.

1 It has areas for the donation amount, a message to the streamer, and the “donate” button.
2 Instead of thumbnail pictures, it has a red box with “Extras Pro \$5.99/mo” and slide buttons that
3 allow a viewer to add a GIF or effect.

4 For both versions of the donation page, when a viewer clicks “Donate,” a “Donation
5 Confirmation” page pops up:⁷



15 It shows the donation amount and, in a red box, shows a \$5.99 charge for Streamlabs Pro.
16 Underneath the red box, there is a notice: “You will be charged \$5.99 per month by joining
17 Streamlabs Pro, which allows you to add special effects and other features to your alerts. [Click here](#)
18 for more information.” The \$5.99 charge and the notice have a font that is smaller in size and lighter
19 in color than the bolded font used for the donation amount.⁸ Also, the page does not say that the
20 Streamlabs Pro subscription and the \$5.99 monthly charge are renewed automatically each month
21 until the viewer cancels the subscription.⁹ If viewers click “[Click here](#) for more information,” a
22 Streamlabs Pro page (<https://streamlabs.com/content-hub/post/streamlabs-pro>) pops up. It “explains
23 the benefits, monthly cost, [and] cancellation and refund policy of Streamlabs Pro subscription[s],”
24

25
26 ⁷ *Id.* at 7.

27 ⁸ *Id.* (¶ 24) (citing <https://streamlabs.com/content-hub/post/streamlabs-pro>, which the plaintiff accessed
on January 7, 2022).

28 ⁹ *Id.* at 8 (¶ 26).

1 but it does not “disclose that Streamlabs will keep charging Streamlabs Pro subscribers \$5.99 per
2 month on their credit or debit cards until the subscribers cancel the plan.”¹⁰

3 “Streamlabs failed to present the automatic renewal function of [the] Streamlabs Pro
4 subscription . . . in a clear and conspicuous way that called the attention of Donators” because
5 “from the moment Donators added a GIF or effect . . . to the moment” that Streamlabs charged
6 them, “they were not notified [or] asked to give consent to the automatic renewal function of [the]
7 Streamlabs Pro subscription.”¹¹ “As a result, thousands of Donators who subscribed to Streamlabs
8 Pro have been unknowingly charged \$5.99 per month when their subscription automatically
9 renewed.” Some “were charged for many months without realizing it.”¹²

10 The complaint has additional fact allegations about the process and webpages (displayed
11 above) that the plaintiff encountered when she made her \$5 donation in August 2020. The
12 donation page gave her the option to add a GIF or an effect. It said “PRO” on top of the GIFs and
13 effects, but “it did not explain what [PRO] means [or] how much it costs.” It “did not contain any
14 information about [a] Streamlabs Pro subscription, such as its automatic renewal feature, the cost
15 of each renewal, the future monthly charges on a subscriber’s credit or debit cards, the
16 cancellation policy, and the length of the renewal term.”¹³ “Without knowing that she would be
17 automatically signed up for a Streamlabs Pro subscription and that she would be charged every
18 month when the subscription automatically renews, [plaintiff] Leventhal added a GIF or an effect
19 to her donation . . . and proceeded to checkout.” At the Donation Confirmation page, “Streamlabs
20 again failed to disclose any information about the automatic renewal function of [the] Streamlabs
21 Pro subscription.” As a result, the plaintiff “made the payment without knowing that she would be
22 charged \$5.99 per month for the subscription until she cancel[ed] the plan.” Streamlabs charged
23 her that day with her \$5 donation and the \$5.99 fee and charged her \$5.99 per month thereafter.¹⁴

24
25 ¹⁰ *Id.* (¶ 27).

26 ¹¹ *Id.* (¶¶ 28–29).

27 ¹² *Id.* (¶ 30).

28 ¹³ *Id.* at 10 (¶ 39).

¹⁴ *Id.* at 11 (¶¶ 40–42).

1 The plaintiff did not discover the recurring monthly charges until May 2021, when PayPal
2 emailed her about them. She “did not even have an account with Streamlabs at the time.” She
3 created an account with the email linked to her PayPal account to try to cancel the subscription,
4 but “she could not find a way to cancel the subscription.” On May 10, 2021, she contacted
5 Streamlabs customer support to ask about the charges and told them “that she had never agreed to
6 enroll in any Streamlabs subscriptions and that she had been completely unaware of the charges.”
7 On May 12, 2021, a Streamlabs representative responded that they would cancel her Streamlabs
8 Pro account, refunded her \$5.99 for the most recent subscription month, and refused to refund the
9 rest. The total charges for the ten months were \$59.90. The representative also said that “to avoid
10 being automatically signed up for Streamlabs Pro, she should ‘make sure to not toggle on Pro
11 effects or GIFs’ when she donates.”¹⁵

12 By “at the latest[] early 2019,” Streamlabs knew about consumer complaints from threads on
13 Twitter, Reddit, and YouTube where customers complained about their unknowing enrollment in
14 the subscription service and Streamlabs’ refusal to contact them about refunds and cancellation of
15 the subscriptions.¹⁶ For example, in a 2017 Twitter thread, “many Twitter users tagged
16 [Streamlabs’] official Twitter account and complained about the \$5.99 monthly charges,” and
17 Streamlabs’ official Twitter account “responded to most of the complaints.” The complaint cites
18 two complaints on Twitter in May 2019. One said that the user was charged for two months for
19 “unk[n]owingly [] being a Streamlabs Pro member. I didn’t even know it existed at all?! All I have
20 been using Streamlabs for so far has been opening it up, and starting streams. Not even click[ing]
21 anything that allowed me to be charged.” The second said,

22 What the actual hell guys? I was charged for a pro service that I never signed up
23 for. If you automatically sign people up who donate[,] that seems mighty
24 unscrupulous. I will need my refund back for the last two months or I will have to
report this to the proper authorities.¹⁷

25 _____
¹⁵ *Id.* at 11–12 (¶¶ 43–46).

26 ¹⁶ *Id.* at 2–3 (¶ 4), 8–9 (¶¶ 31, 34, 37), 12–13 (¶¶ 47–49) (giving specific examples of complaints
27 starting with a Twitter thread in 2017, two complaints in May 2019, and other complaints without
reference to time).

28 ¹⁷ *Id.* at 9 (¶¶ 35–36).

1 The complaint has other, undated consumer complaints. A Reddit user said,

2 Did a donation to a twitch streamer I was watching a few months back, but I don't
3 remember signing up for a 5.99\$ per month subscription. Just found out now and
4 good thing it has only been two months of charges without my consent. Did a bit of
5 research and this has been an ongoing issue for years. A thread I came upon has
6 one of the Streamlabs staff replying that they are hoping to find a fix. Well it's
7 already been years and people are still having this issue.

8 Are they not fixing this obviously because they are earning a lot from accidental
9 signups? Which I think is yes because there ha[ve] [been] a lot of reports,
10 discussions about it even from years ago, up to now. This just means there's
11 obviously [something] wrong with the donation system. This is not even counting
12 people that are not aware of this issue and ha[ve] recurring charges without . . .
13 their consent. . . .¹⁸

14 A Twitter user said,

15 If [you've] ever donat[ed] to a creator and used Streamlabs[,] you may want to
16 check if you automatically got signed up for their more premium service . . . since
17 you already gave them your credit card info[,] they just use that to sign you up for
18 Streamlabs at \$5 a month.[] Did it to me.¹⁹

19 Despite knowing about the complaints, Streamlabs did not “take any effective measures to
20 ensure [that] Donators are clearly made aware of the automatic renewal nature of Streamlabs Pro,
21 nor did it change its billing practices to obtain affirmative consent from the Donators before it
22 placed monthly charges on their credit or debit cards.”²⁰ Its “representations about Streamlabs Pro
23 were motivated by an intent to deceive, and to lure Donators into unknowingly signing up for the
24 membership.” It knew from the donor complaints about “their unknowing enrollment in
25 Streamlabs Pro” “since 2019, if not before,” and still maintained its deceptive practice of not
26 disclosing the automatic-renewal feature. Evidence of its intent to deceive also is shown by the
27 font size on the Donation Confirmation page (displayed above): the \$5.99 charge and the notice
28 have a font that is smaller in size and lighter in color than the bolded font used for the donation
amount.²¹ After the plaintiff filed the complaint, Streamlabs “changed its website to add specific

26 ¹⁸ *Id.* at 12 (¶ 48).

27 ¹⁹ *Id.* at 12–13 (¶ 49).

28 ²⁰ *Id.* at 9 (¶ 34).

²¹ *Id.* at 9–10 (¶ 34, 37).

1 information about its automatic renewal policy . . . [and] about how to cancel a Streamlabs Pro
2 automatic subscription.”²²

3 On behalf of a nationwide class, the plaintiff claims that the automatic-renewal process creates
4 the impression that \$5.99 is a one-time charge, rather than an automatically recurring monthly
5 charge, and thus is an unlawful misrepresentation, in violation of the CLRA, Cal. Civ. Code §
6 1770(a)(5), and deceptive advertising, in violation of the CLRA, *id.* § 1770(a)(9).²³ She claims
7 that the process violates the UCL: it is fraudulent (and thus is unfair competition) because
8 Streamlabs concealed the fact that the subscription would renew automatically and impose
9 recurring charges until cancelled, thus deceiving thousands of consumers.²⁴ It is unlawful because
10 it is fraud, in violation of Cal. Civil Code §§ 1572, 1709, and 1710, and deceptive advertising, in
11 violation of California’s False Advertising Law (FAL), Cal. Bus & Prof. Code § 17500.²⁵

12 The class is “all persons in the United States who were enrolled in the Streamlabs Pro
13 automatic renewal subscription after adding a GIF or effect to their donation, and were then billed
14 \$5.99 per month for the subscription.”²⁶

15 The court has jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2). All
16 parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.²⁷ The court held a hearing
17 on December 22, 2022.

18 STANDARDS OF REVIEW

19 A complaint must contain a “short and plain statement of the claim showing that the pleader is
20 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon
21 which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A
22 complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the
23

24 ²² *Id.* at 13 (¶ 50).

25 ²³ *Id.* at 15–17 (¶¶ 60–74).

26 ²⁴ *Id.* at 17 (¶ 78).

27 ²⁵ *Id.* at 18 (¶ 80).

28 ²⁶ *Id.* at 13 (¶ 52).

²⁷ Consents – ECF Nos. 12, 14.

1 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
2 recitation of the elements of a cause of action will not do. Factual allegations must be enough to
3 raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (cleaned up).P

4 Put another way, a complaint must contain sufficient factual allegations that, when accepted as
5 true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
6 (2009); *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 838 F. App’x 231,
7 234 (9th Cir. 2020). “[O]nly the *claim* needs to be plausible, and not the facts themselves.”
8 *NorthBay*, 838 F. App’x at 234 (citing *Iqbal*, 556 U.S. at 696); see *Interpipe Contracting, Inc. v.*
9 *Becerra*, 898 F.3d 879, 886–87 (9th Cir. 2018) (a court must accept the fact allegations “as true
10 and construe them in the light most favorable to the plaintiff”) (cleaned up). “A claim has facial
11 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
12 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The
13 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer
14 possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are
15 merely consistent with a defendant’s liability, it stops short of the line between possibility and
16 plausibility of ‘entitlement to relief.’” *Id.* (cleaned up). Still, “a formulaic recitation of the
17 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

18 Fraud allegations elicit a more demanding standard. “In alleging fraud . . . , a party must state
19 with particularity the circumstances constituting fraud Malice, intent, knowledge, and other
20 conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). This means that
21 “[a]llegations of fraud must be accompanied by the ‘who, what, when, where, and how’ of the
22 misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). “The
23 plaintiff must [also] set forth what is false or misleading about a statement, and why it is false.” *Id.*
24 (cleaned up). Like the basic “notice pleading” demands of Rule 8, a driving concern behind Rule
25 9(b) is that defendants be given fair notice of the charges against them. *In re Lui*, 646 F. App’x
26 571, 573 (9th Cir. 2016) (“Rule 9(b) demands that allegations of fraud be specific enough to give
27 defendants notice of the particular misconduct . . . so that they can defend against the charge and
28 not just deny that they have done anything wrong.”) (cleaned up); *Odom v. Microsoft Corp.*, 486

1 F.3d 541, 553 (9th Cir. 2007) (Rule 9(b) requires particularity “so that the defendant can prepare
2 an adequate answer”).

3 If a court dismisses a complaint, it should give leave to amend unless the “pleading could not
4 possibly be cured by the allegation of other facts.” *United States v. United Healthcare Ins. Co.*,
5 848 F.3d 1161, 1182 (9th Cir. 2016) (cleaned up).

7 ANALYSIS

8 Streamlabs contends that the New York plaintiff predicates her CLRA and UCL fraud claims on
9 the ARL, cannot do so because the ARL protects only California consumers, and otherwise does not
10 plead claims, in part because the CLRA test does not require the ARL’s conspicuous disclosure or
11 explicit consumer consent and in part because she does not plead fraud with particularity. (The
12 parties do not dispute that the claims generally are grounded in fraud.) Streamlabs also contends
13 that the plaintiff did not plead unfair conduct that violates the UCL or an entitlement to equitable
14 relief under the UCL.²⁸ The court denies the motion to dismiss because the plaintiff alleged facts
15 that, if true, plausibly plead Streamlabs’ misrepresentations and deceptive advertising.

17 1. The ACL Predicate

18 Streamlabs contends that the plaintiff is predicating her claims on the ARL, she cannot
19 because she is a New York resident, and the ARL thus does not apply to her or the nationwide
20 class. It points to the complaint’s copying of ARL language without citing the statute. For
21 example, the ARL makes it unlawful to “[f]ail to present the automatic renewal offer terms . . . in
22 a clear and conspicuous manner.” Cal. Bus. & Prof. Code § 17602(a)(1). The complaint alleges
23 that Streamlabs “failed to present the automatic renewal function . . . in a clear and conspicuous
24 way.” The ARL defines “clear and conspicuous” as “in larger type than the surrounding text, or in
25 contrasting type, font, or color to the surrounding text,” *id.* § 17601(c), and the complaint alleges
26 the smaller font and lighter color. The ARL requires a consumer’s affirmative consent to an

27
28 ²⁸ Mot. – ECF No. 32 at 9–10, 13–28.

1 automatic renewal, *id.* § 17602(a)(2), and the complaint alleges Streamlabs’ failure to obtain
 2 consumers’ affirmative consent. The ARL makes it unlawful to fail to provide the cancellation
 3 policy, *id.* § 17602(a)(3), and the complaint charges that Streamlabs did not provide the
 4 cancellation policy.²⁹ The plaintiff disavows a reliance on the ARL: it does not create a private
 5 right of action, and she charges fraud.³⁰ The court denies the motion. The complaint’s fact
 6 allegations (about Streamlabs’ misrepresentations and false advertising that also violate the ARL)
 7 do not defeat the claim.

8 The plaintiff alleges that Streamlabs’ display of a \$5.99 per month charge suggests that it is a
 9 one-time charge, not a recurring monthly charge that persists until a consumer cancels the
 10 subscription. She thus claims an unlawful misrepresentation and deceptive advertising, in violation
 11 of the CLRA, and fraud and false advertising in violation of the UCL, predicated on the California
 12 Civil Code and the FAL.³¹ The plaintiff describes the fee process, including how Streamlabs
 13 displays the \$5.99 fee, alleges plausibly that “per month” suggests a one-time charge, alleges that
 14 she was confused, points to other consumer confusion, points to the absence of a notice-of-
 15 cancellation policy, and describes how she could not find a cancellation policy online. Her
 16 allegations support her misrepresentation and false-advertising claims. Some may parrot the ARL,
 17 but they are at core fact allegations about Streamlabs’ processes and the resulting consumer
 18 confusion. Thus, while the plaintiff as a New York resident cannot predicate a UCL claim on a
 19 violation of the ARL, she can support her claims with fact allegations about Streamlabs’ “failure to
 20 fairly apprise consumers of the terms they were accepting.” *Robbins v. Plushcare, Inc.*, No. 21-cv-
 21 03444-MMC, 2022 U.S. Dist. LEXIS 85595, at *2 (N.D. Cal. May 11, 2022).

22 Given that the plaintiff does not rely on the ARL as a predicate statute, the court also denies
 23 Streamlabs’ motion for a more definite statement that cites the ARL by section. A party may move
 24 for a more definite statement of a pleading that is “so vague or ambiguous that the party cannot
 25

26 ²⁹ *Id.* at 14–16 (citing the ARL and the complaint).

27 ³⁰ Opp’n – ECF No. 39 at 9–11.

28 ³¹ Am. Comp. – ECF No. 31 at 15–18 (¶¶ 60–74, 78, 80).

1 reasonably prepare a response.” Fed. R. Civ. P. 12(e). “The rule is aimed at unintelligibility rather
 2 than lack of detail and is only appropriate when the defendants cannot understand the substance of
 3 the claim asserted.” *Griffin v. Cedar Fair, L.P.*, 817 F. Supp. 2d 1152, 1156 (N.D. Cal. 2011). The
 4 Rule 12(e) standard is not met here: the plaintiff’s fact allegations are not unintelligible and are —
 5 as discussed in the next section — sufficiently specific for Streamlabs to prepare a response. *Izzetov*
 6 *v. Tesla Inc.*, No. 5:19-cv-03734-EJD, 2020 WL 1677333, at *5–6 (N.D. Cal. Apr. 6, 2020).

8 **2. CLRA and UCL Fraud and Unlawful Claims**

9 The next issue is whether the plaintiff pleaded fraud with particularity under Rule 9(b). She did.

10 Claims under the CLRA, the UCL fraudulent prong, and the FAL are governed by the
 11 “reasonable consumer” test. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).
 12 Courts often analyze claims under these statutes together. *Hadley v. Kellogg Sales Co.*, 273 F.
 13 Supp. 3d 1052, 1063 (N.D. Cal. 2017). “Under the reasonable consumer standard, [plaintiffs] must
 14 show that ‘members of the public are likely to be deceived.’” *Williams*, 552 F.3d at 938 (cleaned
 15 up). This requires the plaintiff to “plead facts showing that a ‘significant portion of the general
 16 consuming public . . . , acting reasonably in the circumstances, could be misled.’” *Freeman v.*
 17 *Indochino Apparel, Inc.*, 443 F. Supp. 3d 1107, 1111 (N.D. Cal. 2020) (quoting *Lavie v. Procter &*
 18 *Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003)).

19 “Where the advertising or practice is targeted to a particular group or type of consumers, either
 20 more sophisticated or less sophisticated than the ordinary consumer, the question whether it is
 21 misleading . . . will be viewed from the vantage point of members of the targeted group”
 22 *Lavie*, 105 Cal. App. 4th at 512. Where “tech-savvy consumers [are] targeted,” they can be
 23 expected to know certain things about the relevant technology, such as how software changes over
 24 time and how popular apps work. *Baird v. Samsung Elecs. Am., Inc.*, 522 F. Supp. 3d 679, 688–89
 25 (N.D. Cal. 2021).

26 Generally, determining “whether a reasonable consumer would be deceived” is a question of
 27 fact. *Cheslow v. Ghirardelli Chocolate Co.*, 445 F. Supp. 3d 8, 16 (N.D. Cal. 2020); *Reid v.*
 28 *Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015). Nonetheless, in rare situations, “a court

1 may determine, as a matter of law, that the alleged violations of the UCL . . . and CLRA are
2 simply not plausible.” *Cheslow*, 445 F. Supp. 3d at 16 (cleaned up); *Becerra v. Dr Pepper/Seven*
3 *Up, Inc.*, No. 17-cv-05921-WHO, 2018 WL 1569697, at *7 (N.D. Cal. Mar. 30, 2018).

4 Under California law, “[t]he essential allegations for an action in fraud or deceit are false
5 representation as to a material fact, knowledge of its falsity, intent to defraud, justifiable reliance[,]
6 and resulting damage.” *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1330–
7 31 (1986); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 72–73 (1990).

8 It is plausible that a reasonable consumer (including tech-savvy consumers) could be deceived
9 by the process illustrated in the Statement and conclude that the \$5.99 per month fee was a one-
10 time fee. The disclosures did not say that the fee was an automatic monthly fee. There is evidence
11 of actual consumer confusion, by the plaintiff and the consumer reviews. Similarly, for the
12 standalone fraud claims, the allegations are sufficiently specific that Streamlabs’ process misled
13 consumers that the \$5.99 per month fee was a one-time donation, not an automatic monthly fee.

14 In sum, the plaintiff plausibly pleads the fraud-based claims specifically, allowing Streamlabs
15 to answer the complaint. *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1019–20 (9th Cir.
16 2020). This conclusion includes the plaintiff’s specifically pleading facts that, if true, show a
17 material misrepresentation, the plaintiff’s reliance on that misrepresentation, and her resulting
18 damages in the form of the monthly fees incurred until PayPal notified her of the recurring fee.

19 In its motion, Streamlabs also noted the plaintiff’s failure to file the venue affidavit required
20 by Cal. Civ. Code § 1780(d).³² She filed the affidavit, curing any error,³³ and “Streamlabs does not
21 object to venue in this [c]ourt.”³⁴ “A court need not dismiss a CLRA claim based on the fact that
22 the venue affidavit was not filed concurrently with the complaint.” *Cork v. CC-Palo Alto, Inc.*,
23 534 F. Supp. 3d 1156, 1182 (N.D. Cal. 2021); *Ladore v. Sony Comput. Ent. Am., LLC*, 75 F. Supp.
24 3d 1065, 1074 (N.D. Cal. 2014).

25
26 _____
27 ³² Mot. – ECF No. 32 at 27.

28 ³³ Leventhal Aff. – ECF No. 40.

³⁴ Reply – ECF No. 41 at 19 n.6.

1 **3. UCL Unfair Claim and Equitable Relief**

2 The unlawful and fraud UCL claims survive. The last issue is whether the plaintiff plausibly
3 pleaded unfair conduct and her entitlement to equitable relief under the UCL in the form of
4 restitution.³⁵ She did.

5 When analyzing unfair UCL claims, “the Ninth Circuit has approved the use of either the
6 balancing or the tethering tests in consumer actions.” *Hadley*, 243 F. Supp. 3d at 1104 (citing
7 *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735–36 (9th Cir. 2007)). Under the balancing
8 test, the court “must weigh the utility of the defendant’s conduct against the gravity of the harm to
9 the alleged victim.” *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012) (cleaned
10 up). The complaint is predicated on the balancing test.³⁶ *Hadley*, 243 F. Supp. 3d at 1104
11 (analyzing only the test alleged in the complaint); *Lozano*, 504 F.3d at 736 (“[T]he district court
12 did not apply the wrong legal standard by relying on the balancing test . . .”).

13 The amended complaint satisfies the balancing test. It alleges consumer confusion sufficiently
14 and that the deception about the subscription outweighs its benefits, given that consumers “don’t
15 believe they are enrolled in and, therefore, don’t use” the subscription.³⁷ *Robinson v. OnStar, LLC*,
16 No. 15-cv-1731 JLS (BGS), 2019 WL 13108704, *11 (S.D. Cal. Mar. 18, 2019) (it is plausible
17 that the harm of an inadequately disclosed subscription outweighs the utility of the subscription
18 even where a free trial was provided first).

19 Streamlabs contends that the plaintiff did not plausibly plead her right to equitable relief in the
20 form of restitution because money damages are available to her.³⁸ Citing cases from this district,
21 the plaintiff counters that the claim survives because she pleads it as an alternative form of relief.³⁹
22 “[T]here is no binding precedent that holds that pleading equitable restitution in the alternative is
23 improper.” *Jeong v. Nexo Fin. LLC*, No. 21-cv-02392-BLF, 2022 WL 174236, at *27 (N.D. Cal.
24

25 ³⁵ Mot. – ECF No. 32 at 23–26.

26 ³⁶ Am. Compl. – ECF No. 31 at 19 (¶ 84).

27 ³⁷ *Id.*

28 ³⁸ Reply – ECF No. 41 at 16–19.

³⁹ Opp’n – ECF No. 39 at 16–17.

1 Jan. 19, 2022). The court thus does not dismiss the UCL claim for equitable relief in the form of
2 restitution.

3 **CONCLUSION**

4 The court denies the motion to dismiss the amended complaint. This resolves ECF No. 32.

5 **IT IS SO ORDERED.**

6 Dated: December 23, 2022

7 

8 _____
9 LAUREL BEELER
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California