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Attorneys for Plaintiff  
JENNIFER HABELITO, individually and on  
behalf of all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

CONFORMED COPY  
OF ORIGINAL FILED  
Los Angeles Superior Court

JAN 22 2013

John A. Clarke, Executive Officer/Clerk  
By SHAURVA WESLEY Deputy

JENNIFER HABELITO, individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

GUTHY-RENKER LLC, a California  
limited liability company; and DOES 1  
through 10, inclusive,

Defendants.

CASE NO.

BC 499558

CLASS ACTION

COMPLAINT FOR:

1. VIOLATION OF CALIFORNIA'S  
AUTOMATIC RENEWAL LAW, CAL.  
BUS. & PROF. CODE § 17600 *ET SEQ.*;
2. VIOLATION OF CALIFORNIA'S  
CONSUMER LEGAL REMEDIES ACT,  
CAL. CIV. CODE § 1750 *ET SEQ.*;
3. VIOLATION OF CALIFORNIA'S  
UNFAIR COMPETITION LAW, CAL.  
BUS. & PROF. CODE § 17200 *ET SEQ.*;
4. FRAUD;
5. NEGLIGENT MISREPRESENTATION/  
NEGLIGENCE PER SE
6. BREACH OF CONTRACT

DEMAND FOR JURY TRIAL

1 Plaintiff Jennifer Habelito (“Plaintiff” or “Ms. Habelito”), individually and on behalf of  
2 all others similarly situated, alleges for her complaint against defendant Guthy-Renker LLC as  
3 follows:

4 **SUMMARY OF THE CLAIMS**

5 1. By means of this class action, Plaintiff seeks to redress the unlawful and deceptive  
6 automatic renewal billing practices employed by defendant Guthy-Renker LLC in connection  
7 with its Proactiv brand line of skin care products. Plaintiff is informed and believes that Guthy-  
8 Renker LLC is a billion dollar plus company primarily engaged in the business of direct-response  
9 marketing of numerous types of products, including skin care, fitness, entertainment, and others  
10 types of goods through the internet, infomercials, commercials, and other types of marketing.  
11 Plaintiff is informed and believes that Defendant is the owner of the Proactiv brand line of skin  
12 care products, which account for the bulk of the company’s revenue, and that it sells its Proactiv  
13 products primarily, if not exclusively, using so-called “negative option” billing programs. A  
14 “negative option” billing program is one in which a consumer, by means of his or her single  
15 purchase of a product, is automatically enrolled in continuous additional shipments of and  
16 charges for additional products at regular intervals in perpetuity until the consumer affirmatively  
17 opts-out of future deliveries. Such automatic renewal billing policies are recognized as plainly  
18 predatory in nature and, as a consequence, disfavored by law. Although such negative option  
19 billing programs are allowed, they are heavily regulated and permitted only if a seller meets  
20 certain legally prescribed requirements. As relevant here, and as set forth in detail below,  
21 California law specifically mandates that a seller may impose such an automatic billing policy  
22 upon a consumer only if the seller clearly and conspicuously discloses the terms of the automatic  
23 renewal policy to the consumer, obtains the consumer’s express and affirmative consent to the  
24 specific automatic renewal terms, provides a written acknowledgment to the consumer of the  
25 terms of the policy in a manner capable of being retained by the consumer, provides a  
26 cancellation policy that meets certain detailed requirements, and covers the costs of shipment for  
27 any product returned by a consumer that was shipped in violation of these requirements. *See* Cal.  
28 Bus. & Prof. Code § 17600 *et seq.*

1           2.       As set forth in detail below, Defendant's own conduct with respect to its Proactiv  
2 products violates each of these and other requirements, giving rise to claims for violation of Cal.  
3 Bus. & Prof. Code § 17600, violation of the California Consumer Legal Remedies Act, Cal. Civ.  
4 Code § 1750, violation of California' unfair competition law, Cal. Bus. & Prof. Code § 17200,  
5 fraud, negligence, and breach of contract, and entitling Plaintiff and the class she seeks to  
6 represent to compensatory and actual damages for all unauthorized billings and shipping costs,  
7 restitution and disgorgement of ill-gotten gains, injunctive relief, punitive damages, attorneys'  
8 fees, costs of suit, and all such other further relief authorized by these statutes.

9   **THE PARTIES**

10           3.       Plaintiff Jennifer Habelito is an individual and is and was at all relevant times  
11 herein a citizen of California.

12           4.       On information and belief, defendant Guthy-Renker LLC is a California limited  
13 liability company with its corporate headquarters and principal place of business at 3340 Ocean  
14 Park Boulevard, Santa Monica, California, 90405, which is within Los Angeles County (Guthy-  
15 Renker LLC is herein sometimes referred to herein as "Defendant," "Proactiv," and/or "Guthy-  
16 Renker").

17           5.       The true names and capacities, whether individual, corporate, associate or  
18 otherwise, of the defendants named herein as DOES 1 through 10, inclusive, are unknown to  
19 Plaintiff and Plaintiff therefore sues said defendants by such fictitious names. Plaintiff will  
20 amend this complaint to show their true names and capacities when ascertained. Plaintiff is  
21 informed and believes, and on that basis alleges, that each of such fictitiously named defendants  
22 is responsible in some manner for the matters herein alleged.

23           6.       Plaintiff is informed and believes, and on that basis alleges, that at all times  
24 mentioned herein Defendants were the agents, servants, employees, or alter ego of their co-  
25 Defendants and, in doing the things hereinafter mentioned, were acting within the scope of their  
26 authority as such agents, servants, and employees, with the permission and consent of their co-  
27 Defendants.

28           7.       Plaintiff brings this action on behalf of herself, on behalf of the general public as a

1 Private Attorney General pursuant to California Code of Civil Procedure § 1021.5 and on behalf  
2 of a class of similarly situated persons pursuant to Code of Civil Procedure § 382 and Civil Code  
3 § 1781.

#### 4 **JURISDICTION & VENUE**

5 8. This Court has jurisdiction over all causes of action asserted herein pursuant to the  
6 California Constitution, Article VI, § 10, because this case is a cause not given by statute to other  
7 trial courts.

8 9. This Court has general personal jurisdiction over defendant Guthy-Renker LLC  
9 because it has systematic and continuous contacts with the state of California in that it is a  
10 California limited liability company, is registered with the California Secretary of State to do  
11 business in California, is headquartered in Santa Monica, California, and conducts large volumes  
12 of sales within California. The Court also has specific personal jurisdiction over Guthy-Renker  
13 LLC because the claims alleged herein arise directly from its specific contacts with the state of  
14 California, namely its sales of Proactiv products to California citizens using billing programs that  
15 violate California law.

16 10. Venue is proper in this Court pursuant to California Civil Procedure Code §§ 393  
17 and 395.5 and Civil Code § 1780(d) because, among other reasons, Defendant resides in Los  
18 Angeles County, is headquartered in Los Angeles County, conducts sales transactions within Los  
19 Angeles County that are the subject of this complaint, and because Plaintiff's and the Class's  
20 claims arose here.

#### 21 **FACTUAL BACKGROUND**

##### 22 **Proactiv's Automatic Renewal Billing Policies**

23 11. As referenced above, defendant Guthy-Renker LLC owns the Proactiv line of skin  
24 care products and also owns and operates the website, www.proactiv.com, which sells the  
25 products online. The website offers, among other things, group packages of skin care products  
26 ranging from \$19.95 to \$29.95. After a consumer selects a package to purchase and places his or  
27 her order online, the website proceeds to take the consumer's payment via credit card and collects  
28 the consumer's shipping/delivery information. The website then generates an e-mail

1 confirmation of the purchase, after which the ordered goods are shipped to the consumer in a box  
2 that contains both the products and a physical receipt of the purchase.

3 12. The website fails to disclose, however, or fails to adequately disclose in a clear and  
4 conspicuous manner, that Proactiv will charge the consumer again one to three months later for  
5 another shipment the consumer never ordered, and that Proactiv will continue to charge the  
6 consumer in perpetuity at regular intervals for new and additional shipments on a continuing  
7 basis. To the extent any reference is made to these continuing shipments on the Proactiv website,  
8 there are no disclosures presented in a clear and conspicuous manner, as that term is defined by  
9 statute as described below. Rather, any such renewal terms are presented in violation of  
10 California law, as described herein, in a small or less conspicuous font than the surrounding text,  
11 or in the same font as the surrounding text, in a manner designed to prevent the consumer from  
12 noticing the terms. Indeed, any such terms are buried after other terms regarding free gifts to  
13 consumers that appear in a larger font, in an apparent attempt by Proactiv to distract consumers  
14 from the later, smaller fonted terms regarding automatic renewal that appear afterward, all in  
15 violation of California law, as described herein.

16 13. The Proactiv website does not even allow consumers the option of making a single  
17 time purchase. Rather, every purchase through the Proactiv website automatically enrolls every  
18 consumer in Proactiv's auto-delivery and automatic renewal billing policy.

19 14. Likewise, Proactiv does not allow any consumers the option of making a single  
20 time purchase. Rather, every other means of purchase of Proactiv product, including for example  
21 through a phone order, automatically enrolls every consumer in Proactiv's auto-delivery and  
22 automatic renewal billing policy.

23 15. Proactiv never obtains the consumer's affirmative consent to any automatic  
24 renewal terms. During the purchase process, Proactiv never requires the consumer to  
25 affirmatively check or click any box or button stating that the consumer agrees specifically to the  
26 automatic renewal terms, or otherwise have the consumer agree specifically to the automatic  
27 renewal terms. Indeed, on the initial webpage where an order's terms are presented, Proactiv  
28 nowhere asks the consumer to check or click any box expressly or affirmatively agreeing to any

1 terms and conditions. Rather, a consumer must scroll down a lengthy webpage, enter the  
2 consumer's credit card information at the bottom of the page, and only after then clicking a box  
3 labeled "continue your order" is a consumer asked to finally click his assent to Proactiv's  
4 "terms". But the "terms and conditions" linked to on the bottom of the website say nothing  
5 regarding automatic renewal of future charges and shipments. Rather, those terms are silent as to  
6 any automatic renewal, or future shipments or charges. And, at the time that a consumer is finally  
7 asked to click his assent to Proactiv's terms, which are silent as to automatic renewal billing, any  
8 terms previously provided to the consumer in inconspicuous and unclear language in violation of  
9 California law are no longer presented on screen.

10 16. The e-mail confirmation of purchase sent by Proactiv also fails to disclose at all, or  
11 adequately disclose, the automatic renewal terms or provide consumers with any contact  
12 information they can use to call Proactiv to cancel the automatic renewal. Indeed, the e-mail  
13 confirmation is silent as to these issues. Likewise, any paper receipts included with the physical  
14 shipment, putting aside that they often arrive 2-3 weeks after the initial order when it is too late to  
15 cancel the next shipment, also fail to adequately disclose the renewal terms in a clear and  
16 conspicuous manner.

17 17. Proactiv further allows consumers to access their account via the Proactiv website,  
18 where consumers can login to access their account information, track their order, and modify the  
19 frequency of future shipments. The online access, however, does not allow consumers to cancel  
20 via the website.

21 18. Plaintiff is informed and believes that all other non-internet orders of Proactiv, for  
22 example including telephone orders, likewise impose upon consumers auto-delivery and  
23 automatic renewal and billing for future shipments, and that Defendant's representations or  
24 omissions during these non-internet orders regarding its automatic billing policy are the same as  
25 during its internet orders, and/or do not differ in any material way.

26 19. Plaintiff is informed and believes that Proactiv's prescribed intervals for automatic  
27 redelivery of unordered merchandise impose upon consumers more product they want or could  
28 even use before Proactiv sends them yet another shipment of product. On information and belief,

1 in crafting its automatic delivery and billing polices, Proactiv has focused simply on profits,  
2 maximizing its revenue by imposing upon consumers as much unwanted product as possible and  
3 charging them accordingly, regardless of the frequency with which an individual consumer might  
4 even need replacement.

5 20. To the extent that a consumer, surprised by an unwanted additional shipment of  
6 products and an associated unauthorized charge, calls Proactiv to complain and cancel, Proactiv  
7 makes it unreasonably difficult to do so, often refuses, and, in any event, requires that the  
8 consumer ship unwanted, unordered products back at the consumer's own expense, in violation of  
9 California law, as described herein.

### 10 **Plaintiff's Facts**

11 21. Plaintiff Jennifer Habelito ordered a shipment of Proactiv products online in or  
12 around September 2011, and believed that it was a one-time transaction due to the lack of any  
13 disclosures, or clear and conspicuous disclosures, throughout the ordering process. Indeed,  
14 Plaintiff noticed no automatic renewal terms on the website at all. Plaintiff never gave her  
15 explicit consent or affirmative consent to any automatic renewal terms. Plaintiff received an e-  
16 mail confirmation of the purchase, which did not include any information regarding the automatic  
17 renewal terms nor any reference to a means to cancel.

18 22. Plaintiff later received the shipment of the products she ordered, along with a  
19 receipt that again did not disclose any automatic renewal terms in a clear and conspicuous  
20 manner. Plaintiff believed that was the end of her transaction.

21 23. Yet, just a few weeks later, before Plaintiff had even come close to finishing her  
22 supply of the products she initially ordered, she was surprised to receive an additional shipment  
23 of product and learn that she had been charged again but for products she never ordered nor  
24 needed. Moreover, Plaintiff learned that Proactiv had improperly modified the amount of  
25 products from her initial order and the correspondence price. Had Plaintiff known of Defendant's  
26 plan to automatically charge her for such additional and different amounts, she would never have  
27 contracted with Defendant for her initial purchase in the first place.

28 24. Plaintiff called to complain, was informed for the first time of Proactiv's automatic

1 renewal and cancellation policies by a Proactiv customer service representative, and was  
2 informed that to send the additional unwanted products back she would have to do so at her own  
3 expense. Plaintiff explained that she never consented to an automatic renewal of her order. Yet  
4 Proactiv unlawfully charged Ms. Habelito for automatic renewals of her order, imposing one or  
5 more charges for products beyond her initial purchase.

6 25. As set forth below, Proactiv's billing practices described above are unlawful and  
7 give rise to liability under various California state statutes and common law. As authorized by  
8 statute and in compliance with the provisions of the California Legal Remedies Act, Cal. Civ.  
9 Code § 1782, Plaintiff, on or about October 26, 2012, gave notice to Defendant of her intention to  
10 file an action for monetary damages under CLRA § 1750 *et seq*, on behalf of herself and all other  
11 similarly situated, unless Defendant agreed to rectify its fraudulent billing practice by making  
12 restitution to all consumers who were charged for shipments of Proactiv products beyond their  
13 initial orders. Plaintiff's counsel has since engaged in several discussions with Defendant and its  
14 counsel regarding potential resolutions to this matter, but Defendant has so far indicated it  
15 disputes liability and prefers to proceed to litigation.

#### 16 **CLASS ACTION ALLEGATIONS**

17 26. This case is brought as a class action pursuant to California Civil Procedure Code  
18 § 382. Plaintiff seeks certification of this action as a class action on behalf of the following  
19 defined class (the "Class"):

20 **Class Definition:** All California citizens who, during the applicable statute of  
21 limitations period, purchased Proactiv products from Defendant and, as a result of  
22 their purchase, were automatically enrolled in Defendant's automatic delivery and  
23 automatic renewal billing policy and charged for additional products and  
24 shipments beyond their initial purchase.

25 Plaintiff reserves the right under California Rule of Court 3.765 to amend or modify the class  
26 description with greater particularity or further division into subclasses or limitation to particular  
27 issues.

28 27. Defendant has engaged in a common course of misconduct by maintaining a



1 practice of automatically billing customers for additional products beyond their initial purchase  
2 without adequately disclosing that it would do so and also by refusing to refund charges for such  
3 repeat shipments when consumers call to complain.

4 28. Membership in the Class is so numerous that separate joinder of each member is  
5 impracticable. The number of Class members is unknown, but can be readily determined from  
6 Defendant's records.

7 29. Plaintiff is a member of the Class of victims described herein. Plaintiff contracted  
8 with Defendant for a single purchase of Proactiv products, Defendant did not effectively disclose  
9 its automatic renewal policy to Plaintiff, Defendant imposed automatically renewed shipments  
10 and charges upon Plaintiff, refused to refund Plaintiff when she complained of the unwanted  
11 additional shipment(s), purported to require Plaintiff to have to pay the shipping charges for the  
12 unwanted additional product, and Plaintiff suffered monetary damage as a result.

13 30. There are numerous and substantial questions of law and fact common to all Class  
14 members that control this litigation and predominate over any individual issues. Included within  
15 these common questions are:

- 16 a. Whether Defendant has a corporate policy of automatically billing Proactiv  
17 purchasers for continuous, repeated, additional shipments of products;
- 18 b. Whether Defendant discloses its automatic billing policy to consumers at all;
- 19 c. Whether Defendant discloses its automatic billing policy to consumers in a clear  
20 and conspicuous manner as required by law;
- 21 d. Whether Defendant has a corporate policy of refusing to refund charges for  
22 additional unauthorized shipments when consumers learn of unauthorized charges  
23 and call to complain;
- 24 e. Whether Defendant obtains consumers' express and/or affirmative consent to its  
25 automatic billing policy;
- 26 f. Whether Defendant provides to consumers a proper written acknowledgement of  
27 the terms of its automatic billing policy;
- 28 g. Whether Defendant's cancellation policies and procedures comply with California

- 1 law;
- 2 h. Whether Defendant requires consumers who complain of unwanted repeat
- 3 shipments and charges to bear the shipping costs to return the unwanted product;
- 4 and, if so, whether doing so violates California law;
- 5 i. The frequency with which consumers attempt to cancel repeat shipments or obtain
- 6 refunds of unauthorized charges but are not allowed by Defendant to do so;
- 7 j. Whether Defendant crafted its automatic delivery and billing policies to impose
- 8 upon customers more product they need or could possibly use;
- 9 k. Whether Defendant trained or directed its agents to conceal or not disclose its
- 10 automatic renewal terms;
- 11 l. Whether Defendant's failure to adequately disclose the material terms of its
- 12 automatic billing policy is unlawful, unfair, and/or fraudulent, misleading, or
- 13 deceitful;
- 14 m. Whether the acts of Defendant violated, *inter alia*, California Business &
- 15 Professions Code § 17200 *et seq.*, California Civil Code §1750 *et seq.*, California
- 16 Business & Professions Code § 17600 *et seq.*, and/or any other applicable state,
- 17 common, and/or statutory law;
- 18 n. Whether Defendant breached its contracts with consumers by delivering additional
- 19 product and charging amounts different from and in addition to those agreed to
- 20 during its transactions with consumers.
- 21 o. Whether Defendant devised and deployed a scheme or artifice to defraud, or
- 22 engaged in a common course of conduct which acted to defraud or deceive
- 23 Plaintiff and the Class;
- 24 p. Whether Defendant deliberately misrepresented or failed to disclose material facts
- 25 to Plaintiff and the Class members regarding the true nature and amounts and time
- 26 periods of charges associated with Proactiv products sold to them;
- 27 q. Whether Plaintiff and the Class members have been damaged, and, if so, the
- 28 proper method for calculating the damages suffered by Plaintiff and Class

- 1 members;
- 2 r. Whether Plaintiff and Class members are entitled to an award of restitution, and, if
- 3 so, the proper method for calculating the amount of restitution;
- 4 s. Defendant's intent behind the wrongful acts alleged herein;
- 5 t. Whether Plaintiff and Class members are entitled to an award of punitive damages
- 6 against Defendant;
- 7 u. Whether Plaintiff and Class members are entitled to declaratory, injunctive, and/or
- 8 other equitable relief; and
- 9 v. Whether Plaintiff and Class members are entitled to an award of attorneys' fees
- 10 and costs.

11 31. Plaintiff's claims are typical of the claims of the Class, she possesses no interests

12 that are antagonistic to the interests of other Class members, and she has retained counsel

13 experienced and competent in consumer fraud class actions and similar types of complex

14 litigation.

15 32. Plaintiff seeks injunctive and equitable relief including, but not limited to,

16 restitution and disgorgement of all profits, compensatory, and punitive damages on behalf of the

17 entire Class because Defendant has acted or refused to act on grounds generally applicable to the

18 entire Class.

19 33. A class action is superior to other available methods for the fair and efficient

20 adjudication of this controversy for at least the following reasons:

- 21 a. Given the size of the claims of individual Class members, as well as the sources of
- 22 Defendant, few, if any, Class members could afford to seek legal redress
- 23 individually for the wrongs alleged herein;
- 24 b. Once the liability of Defendant to Plaintiff is established, the Court and a jury can
- 25 determine the claims of each Class member;
- 26 c. This action will permit an orderly and expeditious administration of the claims of
- 27 Class members, will foster economies of time, effort, and expense, and will ensure
- 28 uniformity of decisions; and

1 d. Without a class action, Class members will have suffered damages and Defendant  
2 will have been allowed to retain the substantial proceeds derived from its wrongful  
3 and unlawful conduct.

4 **FIRST CAUSE OF ACTION**

5 (Violation of California's Automatic-Renewal Law,  
6 Business & Professions Code § 17600 *et seq.*,  
7 By All Plaintiffs Against All Defendants)

8 34. Plaintiff hereby incorporates by reference each of the preceding paragraphs as  
9 though fully set forth herein.

10 35. California Business & Professions Code § 17600 declares that: "It is the intent of  
11 the Legislature to end the practice of ongoing charging of consumer credit or debit cards or third  
12 party payment accounts without the consumers' *explicit consent* for ongoing shipments of a  
13 product or ongoing deliveries of service" (emphasis added).

14 36. To effectuate that goal, § 17602(a) states:

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

17 (1) Fail to present the *automatic renewal offer terms* or continuous service  
18 offer terms in a *clear and conspicuous* manner before the subscription or  
19 purchasing agreement is fulfilled and in *visual proximity . . . to the request*  
20 *for consent to the offer*.

21 (2) Charge the consumer's credit or debit card or . . . for an automatic  
22 renewal or continuous service without first obtaining the consumer's  
23 *affirmative consent* to the agreement containing the automatic renewal  
24 offer terms or continuous service offer terms.

25 (3) Fail to provide an *acknowledgment* that includes the automatic renewal  
26 or continuous service offer terms, cancellation policy, and information  
27 regarding how to cancel in a manner that is capable of being retained by  
28 the consumer.

(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.

1 Cal. Bus. & Prof. Code § 17602 (emphasis added).

2 37. Section 17601(c) defines “clear and conspicuous” or “clearly and conspicuously,”  
3 stating that:

4 “Clear and conspicuous” or “clearly and conspicuously” means *in larger type than*  
5 *the surrounding text*, or in *contrasting type, font, or color to the surrounding text*  
6 of the same size, or *set off from the surrounding text* of the same size by *symbols*  
7 *or other marks*, in a manner that *clearly calls attention to the language*.

8 Cal. Bus. & Prof. Code § 17601(c) (emphasis added).

9 38. Section 17601(b)(1)-(5) further defines the exact terms that must be disclosed  
10 clearly and conspicuously under § 17602(a)(1):

11 “Automatic renewal offer terms” means the following clear and conspicuous  
12 disclosures:

13 (1) That the subscription or purchasing agreement will continue until the  
14 consumer cancels.

15 (2) The *description of the cancellation policy* that applies to the offer.

16 (3) The recurring charges that will be charged to the consumer’s credit or  
17 debit card or payment account with a third party as part of the automatic  
18 renewal plan or arrangement, and *that the amount of the charge may*  
19 *change*, if that is the case, and the amount to which the charge will change,  
20 if known.

21 (4) The *length of the automatic renewal term or that the service is*  
22 *continuous*, unless the length of the term is chosen by the consumer.

23 (5) The minimum purchase obligation, if any.

24 Cal. Bus. & Prof. Code § 17601(b)(1)-(5) (emphasis added).

25 39. Section 17603 further provides that:

26 In any case in which a business sends any goods, wares, merchandise, or products  
27 to a consumer, under a continuous service agreement or automatic renewal of a  
28 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*.

Cal. Bus. & Prof. Code § 17603 (emphasis added).

40. Proactiv’s practices as described above violate these statutory provisions for a  
litany of reasons. First, Proactiv never obtains consumers’ “explicit consent” or “affirmative  
consent” to the automatic renewal terms, as required by § 17600 and § 17602(a)(2). During the  
purchase process, Proactiv never requires the consumer to affirmatively check or click any box or

1 button stating that the consumer agrees specifically to the automatic renewal terms, or otherwise  
2 have the consumer agree specifically to the automatic renewal terms. At the end of the online  
3 order form, Proactiv does require the consumer to check a box indicating that it agrees to  
4 Proactiv's "terms," but the "terms and conditions" linked to on the bottom of the website say  
5 nothing regarding automatic renewal of future charges and shipments (and, even if they did, that  
6 would be insufficient, because agreement to terms and conditions as a whole does not constitute  
7 explicit and affirmative consent specifically to the automatic renewal terms).

8 41. Second, putting aside that Proactiv never obtains consumers' explicit or  
9 affirmative consent specifically to the automatic renewal terms, Proactiv violates § 17602(a)(1)  
10 because its automatic renewal terms are never even disclosed properly to consumers in a clear and  
11 conspicuous manner, as "clear and conspicuous" is defined by § 17601(c), nor in visual proximity  
12 to the request for consent to the offer. The terms are not displayed in "larger type than the  
13 surrounding text," "in contrasting type, font, or color to surrounding text of the same size," or "set  
14 off from the surrounding text of the same size by symbols or other marks" in a manner that  
15 "clearly calls attention to the language." Rather, the terms appear in the same size and font as the  
16 description of the product being purchased, and the terms appear in *smaller* font than the  
17 immediately preceding text regarding the consumer's free gift, which appears in all caps whereas  
18 the automatic renewal terms do not. There is no setoff of the automatic renewal terms from other  
19 terms, nor any symbols marking the automatic renewal terms. The terms provided are therefore  
20 not intended to "clearly call attention to the language" regarding automatic renewal, but to bury  
21 that language after a larger display about a free gift and distract consumers from the automatic  
22 renewal language. Moreover, the automatic renewal terms are not displayed in visual proximity  
23 to the request for consent from the consumer to the offer. To the contrary, the button a consumer  
24 clicks to place the order and consent to terms is at the bottom of the online order form webpage,  
25 where a consumer must scroll down far away from the inconspicuous automatic renewal terms,  
26 which appear closer to the top of the page. Indeed, it would be impossible on nearly any  
27 computer screen to have the automatic renewal terms and the consent button appear on the screen  
28 at the same time.

1           42.     Third, even if the disclosures made by Proactiv were clear and conspicuous and in  
2 appropriate visual proximity, which they are not, they do not address each issue required to be  
3 addressed by §17601(b)(1)-(5) and 17602(a)(1). On the online order form Proactiv does not  
4 adequately describe its cancellation policy (failing, among other things, to inform consumers that  
5 they will improperly be forced to incur shipment charges to return unwanted and unordered  
6 merchandise or provide a cancellation number to call). Proactiv also fails to tell consumers that  
7 the future amounts charged may change from the initial amounts, as occurred with Plaintiff.  
8 Proactiv further fails to specifically inform consumers that the future shipments will continue in  
9 perpetuity.

10           43.     Fourth, Proactiv violates § 17602(a)(3) because it does not provide a proper  
11 acknowledgement to the consumer of his or her order that contains the automatic renewal terms.  
12 Rather, as referenced above, the confirmation e-mail is silent as to automatic renewal, silent as to  
13 the cancellation policy, and silent as to how to cancel future shipments. The paper receipt  
14 included with the physical shipment is likewise insufficient because, putting aside that it arrives  
15 too late, weeks after the order when the future shipment is already in the works, it does not  
16 adequately disclose any of these terms either, or at least not in a clear and conspicuous manner.

17           44.     Finally, Proactiv violates § 17603 because it charges consumers for unwanted  
18 merchandise and requires that the consumer pay for shipping charges if he or she desires to return  
19 the merchandise, when in fact the unordered merchandise should be treated as an unconditional  
20 gift without obligation to Proactiv, including no obligation to pay for return shipping charges.

21           45.     Plaintiff is informed and believes that Proactiv's violations of these provisions  
22 occur in the same way with respect to non-internet orders, as alleged above, and that Defendant's  
23 disclosures, if any, during other such orders regarding its automatic billing policy are the same or  
24 similar as with its internet orders and do not differ in any material way.

25           46.     Plaintiff, on behalf of herself and all others similarly situated, seeks all available  
26 remedies for Defendant's violations of these provisions, pursuant to California Business &  
27 Professions Code § 17604, including, among other things, compensatory and actual damages,  
28 restitution, injunctive relief, any statutory damages authorized by law, punitive damages,

1 attorneys' fees, and costs of suit.

2 **SECOND CAUSE OF ACTION**

3 (Violation of California Consumer Legal Remedies Act,  
4 California Civil Code § 1750 *et seq.*,  
5 By All Plaintiffs Against All Defendants)

6 47. Plaintiff hereby incorporates by reference each of the preceding paragraphs as  
7 though fully set forth herein.

8 48. This cause of action is brought pursuant to the California Consumer Legal  
9 Remedies Act, California Civil Code § 1750 *et seq.* (the "CLRA").

10 49. This action may be maintained as a class action under § 1781 of the CLRA for the  
11 reasons set forth above.

12 50. Plaintiff and all of the members of the Class are "consumers" within the meaning  
13 of CLRA §§ 1761(d) and 1770(a) in that Plaintiff and all members of the Class purchased  
14 products from Defendant for personal, family, or household purposes.

15 51. The CLRA protects consumers against "unfair and deceptive business practices"  
16 and is to be "liberally construed" to achieve that purpose. *See* Cal. Civil Code § 1760.

17 52. The CLRA prohibits 23 specific business practices. *Id.* § 1770. As relevant here,  
18 the CLRA specifically prohibits:

19 (4) ***Using deceptive representations*** or designations of geographic origin ***in***  
20 ***connection with goods*** or services.

21 (5) ***Representing that goods*** or services ***have*** sponsorship, approval,  
22 characteristics, ingredients, uses, benefits, or ***quantities which they do not have*** or  
23 that a person has a sponsorship, approval, status, affiliation, or connection which  
24 he or she does not have.

25 (9) ***Advertising goods*** or services ***with intent not to sell them as advertised.***

26 (14) ***Representing that a transaction confers or involves rights, remedies, or***  
27 ***obligations which it does not have or involve, or which are prohibited by law.***

28 (16) ***Representing that the subject of a transaction has been supplied in***  
***accordance with a previous representation when it has not.***

(19) Inserting an ***unconscionable*** provision in the contract.

*Id.* § 1770(a) (emphasis added). Proactiv's billing practices violate these provisions due to



1 Proactiv's lack of disclosures or adequate disclosures discussed above.

2 53. Proactiv violates §1770(a)(4) because, due to its inadequate disclosures, it  
3 deceptively represents to consumers that their transactions involve a one-time fee, when in fact  
4 Proactiv later goes on to charge consumers additional amounts for later, unordered products.

5 54. Proactiv violates § 1770(a)(5) because, due to its inadequate disclosures, it  
6 represents that its goods shipped to consumers will involve a single quantity, when in fact  
7 Proactiv goes on to ship additional unordered quantities to consumers and impose additional  
8 unauthorized charges.

9 55. Proactiv violates § 1770(a)(9) because, due to its inadequate disclosures, it  
10 advertises its goods as involving a single shipment of one set of products, when in fact the  
11 products offered by Proactiv come with an inadequately disclosed and illegal obligation toward  
12 future shipments and charges.

13 56. Proactiv violates § 1770(a)(14) because, due to its inadequate disclosures,  
14 Proactiv's transactions with consumers do not legally obligate consumers to pay for additional,  
15 future, unordered products, yet Proactiv charges consumers for such additional products anyway,  
16 representing that consumers are, in fact, obligated to pay for them when they are not.

17 57. Proactiv violates § 1770(a)(16) because it represents that its future shipments are  
18 in accordance with the parties' initial transaction, when in fact, due to Proactiv's inadequate  
19 disclosures, Proactiv cannot legally charge consumers for these future shipments.

20 58. Proactiv violates § 1770(a)(19) because its automatic renewal terms are  
21 unconscionable because, among other reasons, they are not adequately disclosed, but also because  
22 they impose upon consumers unreasonable amounts of product that they cannot possibly use. The  
23 amounts of cream and lotions in Proactiv's bottles are so large that a reasonable customer would  
24 not have consumed anywhere near the total amount before Proactiv sends the customer additional,  
25 unordered, unauthorized shipments. As a result, consumers are left stuck with a bill for months  
26 and months of unordered products, and mountains of skin care products in amounts larger than  
27 they know what to do with.

28 59. As referenced above, Plaintiff complied with the requirements of Cal. Civ. Code §

1 1782 by providing to Defendant on or around October 26, 2012, a letter outlining her and the  
2 Class's claims asserted here. The letter was sent via certified mail, return receipt requested and  
3 received.

4 60. Plaintiff, on behalf of herself and the Class, seeks all remedies authorized by the  
5 CLRA, including actual damages, injunctive relief, restitution, punitive damages, any other relief  
6 that the court deems proper, attorneys' fees, and costs of suit.

7 **THIRD CAUSE OF ACTION**

8 (Unfair Competition in Violation of  
9 California Business & Professions Code § 17200 *et seq.*,  
By All Plaintiffs Against All Defendants)

10 61. Plaintiff hereby incorporates by reference each of the preceding paragraphs as  
11 though fully set forth herein.

12 62. California's unfair competition law, codified in California Business & Professions  
13 Code § 17200 *et seq.*, makes actionable "any unlawful, unfair *or* fraudulent business act or  
14 practice and unfair, deceptive, untrue or misleading advertising." *See* Cal. Bus. & Prof. Code §  
15 17200 (emphasis added). It allows plaintiffs to seek injunctive relief as well as restitution. *Id.* §  
16 17203. The law's scope "is quite broad. . . . Because the statute is framed in the disjunctive, a  
17 business practice need only meet one of the three criteria to be considered unfair competition.  
18 *McKell v. Wash. Mutual, Inc.*, 142 Cal. App. 4th 1457, 1471 (2006). Here, Defendant's practice  
19 meets all three criteria, any of which would be sufficient to give rise to liability.

20 63. Defendant's practice is "unlawful" because it violates the Cal. Bus. & Prof. Code §  
21 17600 *et seq.* and the CLRA, as set forth above.

22 64. The practice is also "unfair" because it "violates established public policy" and "is  
23 immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs  
24 its benefits," *see id.* at 1473, and because it threatens incipient violations of the antitrust laws,  
25 including by having anticompetitive and price-fixing effects. Indeed, there is no benefit to  
26 Proactiv's deceptive practice. As set forth above, the practice leaves consumers left stuck with a  
27 bill for months and months of unordered products, and mountains of skin care products in  
28 amounts larger than they know what to do with, and does not even allow consumers the option of

1 making a one-time purchase.

2 65. The practice is also “fraudulent.” In explaining what is actionable under the  
3 “fraudulent” prong of the unfair competition law, the courts have held that “[a] fraudulent  
4 business practice is one which is likely to deceive the public. . . It may be based on  
5 representations to the public which are untrue, and ‘also those which may be accurate on some  
6 level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in  
7 such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose  
8 other relevant information, is actionable under’ the [unfair competition law]. . . . The  
9 determination as to whether a business practice is deceptive is based on the likely effect such a  
10 practice would have on a reasonable consumer.” *Id.* at 1471-72 (citations omitted). As explained  
11 above, in numerous instances Proactiv completely fails to disclose the terms of its automatic  
12 renewal policy. At a minimum, it fails to disclose these terms in a clear and conspicuous manner.  
13 Proactiv’s conduct therefore constitutes fraudulent misrepresentations and/or omissions that are  
14 likely to mislead the public regarding the true facts concerning Proactiv’s automatic billing  
15 practices and results in great harm to consumers by way unauthorized charges for unwanted  
16 services.

17 66. Defendant was unjustly enriched because Class members paid excessive,  
18 unauthorized charges beyond those associated with their initial purchase.

19 67. Pursuant to California Business & Professions Code § 17203, Plaintiff and the  
20 Class she seeks to represent are therefore entitled to: (a) an order requiring Defendant to cease  
21 the acts of unfair competition alleged herein; (b) an order enjoining Defendant from continuing to  
22 utilize this deceptive scheme; (c) full restitution and disgorgement by Defendant of all profits  
23 received by Defendant as a result of its wrongful practices; (d) interest at the highest rate  
24 allowable by law; and (e) the payment of their attorneys’ fees pursuant to, *inter alia*, California  
25 Code of Civil Procedure § 1021.5.

26 **FOURTH CAUSE OF ACTION**  
27 (Fraud, by all Plaintiffs Against All Defendants)

28 68. Plaintiff hereby incorporates by reference the allegations contained in the

1 foregoing paragraphs as if fully set forth herein.

2 69. In order to maintain and/or increase its sales and profits, both directly and  
3 indirectly, Defendant, through its authorized agents, advertising, promotional campaigns,  
4 marketing, and order forms, has intentionally misrepresented by the use of false statements and/or  
5 material omissions of fact the terms of its automatic billing policy.

6 70. Specifically, Defendant falsely represented to Plaintiff and Class members that  
7 they would be charged only for a set initial purchase. Defendant failed to disclose, or failed to  
8 adequately disclose, that it would automatically renew Plaintiff's and Class members' orders and  
9 impose additional charges for each additional order, notwithstanding that it had a duty to so  
10 disclose. That duty arose by virtue of law, the commercial relationship between Plaintiff and the  
11 Class members and Defendant, Defendant's superior knowledge regarding the charges and  
12 renewed terms it would impose, and the fact that after undertaking to make certain inaccurate  
13 statements Defendant became obligated to disclose all material information.

14 71. Defendant also falsely represented to complaining consumers, such as Plaintiff,  
15 that they had agreed to Defendant's automatic renewal policy when they actually had not, and  
16 that they were responsible for shipping charges to return unwanted additional orders when in fact  
17 they were not.

18 72. Defendant's statements, misrepresentations, and/or omissions were material in that  
19 there was a substantial likelihood that a reasonable consumer would have considered them  
20 important and would have relied upon them in choosing to purchase Defendant's Proactiv  
21 products or in failing to cancel future product shipments.

22 73. Plaintiff herself relied on Defendant's representations and omissions.

23 74. At the time Defendant made these misrepresentations and omissions of fact, as  
24 alleged throughout this complaint, it knew such misrepresentations were false or made them in  
25 reckless disregard for their truth or falsity. Defendant knew such information was material to  
26 Plaintiff and the Class members, and knew or was reckless in not knowing that the true  
27 information was not disclosed.

28 75. Defendant intended that the misrepresentations and omissions of fact be relied

1 upon by Plaintiff and the Class in choosing to contract with Plaintiff.

2 76. Plaintiff and Class members were unaware of the falsity of Defendant's  
3 representations and omissions of material facts at all relevant times to their transactions. Plaintiff  
4 and the Class members reasonably relied on Defendant's misrepresentations and omissions to  
5 their detriment by: (a) contracting with Defendant and paying Defendant for an initial purchase of  
6 Proactiv when they otherwise would have not; (b) being lulled into not cancelling future  
7 shipments of Proactiv as a result of Defendant's failure to adequately disclose its automatic  
8 billing policy; (c) suffering repeated orders and related charges; and (d) paying for shipping  
9 charges to return unwanted repeat shipments products

10 77. As a result of Defendant's false representations and failures to disclose the true  
11 facts, Plaintiff and the Class members have suffered injury entitling them to compensatory  
12 damages and punitive damages in an amount to be proven at trial.

13 **FIFTH CAUSE OF ACTION**

14 (Negligent Misrepresentation/Negligence Per Se,  
15 By All Plaintiffs Against All Defendants)

16 78. Plaintiff hereby incorporates by reference each of the preceding paragraphs as  
17 though fully set forth herein.

18 79. Defendant owed Plaintiff and the Class members a duty not to make false  
19 statements of material fact or omit material information relating to the transactions between  
20 Plaintiff and the Class members and Defendant. The duty arose by virtue of law, the commercial  
21 relationship between Plaintiff and the Class members and Defendant, Defendant's superior  
22 knowledge regarding the charges and renewed terms it would impose, and the fact that after  
23 undertaking to make certain inaccurate statements Defendant became obligated to disclose all  
24 material information.

25 80. In the course and scope of its business, through its authorized agents, advertising,  
26 promotional campaigns, marketing, and order forms, Defendant breached its duty to Plaintiff and  
27 Class members by supplying false material information and/or making material omissions of fact  
28 in statements to Plaintiff and Class members concerning Defendant's automatic billing policy.

81. Specifically, Defendant represented that it would charge only amounts for a set

1 initial purchase, simultaneously failed to disclose or to disclose in a clear and conspicuous  
2 manner the terms of its automatic billing policy, and then later represented to Plaintiff and Class  
3 members that they were obligated to pay for repeated orders and related charges based on the  
4 terms of the undisclosed automatic billing policy.

5 82. These representations were false. In reality, Defendant knew that it would charge  
6 for additional repeated shipments, that it had not disclosed or adequately disclosed the terms of its  
7 automatic billing policy to Plaintiff and Class members, and that many or all complaining Class  
8 members had not, in fact, agreed to Defendant's automatic renewal policy.

9 83. Defendant's statements, representations, and/or omissions were material in that  
10 there was a substantial likelihood that a reasonable consumer would have considered them  
11 important and would have relied upon them in choosing to purchase Defendant's product and in  
12 failing to cancel shipments of future products so as not to incur additional charges. Plaintiff  
13 indeed did review and rely on Defendant's statements and omissions.

14 84. At the time Defendant made these misrepresentations and omissions of fact, as  
15 alleged throughout this complaint, it had no reasonable grounds for believing them to be true.  
16 Defendant failed to exercise reasonable care or competence in providing information or  
17 communicate to Plaintiff and the Class members accurate information regarding its automatic  
18 billing policy.

19 85. Defendant intended that the misrepresentations and omissions of fact be relied  
20 upon by Plaintiff and the Class in choosing to purchase its Proactiv products and in failing to  
21 cancel future shipments and charges.

22 86. Plaintiff and Class members were unaware of the falsity of Defendant's  
23 representations and omissions of material facts at all relevant times to their transactions. Plaintiff  
24 and the Class members reasonably relied on Defendant's misrepresentations and omissions to  
25 their detriment by: (a) contracting with Defendant and paying Defendant for its Proactiv products  
26 when they otherwise would have not; (b) being lulled into not cancelling future shipments and  
27 charges as a result of Defendant's failure to adequately disclose its automatic billing policy; (c)  
28 suffering repeated shipments and related charges; and (d) paying for shipping charges to return

1 unwanted repeat shipments products.

2 87. Because Defendant's negligent conduct described herein violated state statutes,  
3 namely Cal. Bus. & Prof. Code §§ 17200 *et seq.* and 17600 *et seq.*, and Cal. Civil Code § 1750 *et*  
4 *seq.* as set forth above, Defendant has committed negligence *per se* and Plaintiff is entitled to a  
5 presumption of negligence.

6 88. As a result of defendant's false representations and failures to disclose the true  
7 facts, Plaintiff and the Class members have suffered injury entitling them to compensatory  
8 damages and punitive damages in an amount to be proven at trial.

9 **SIXTH CAUSE OF ACTION**

10 (Breach of Contract,  
By All Plaintiffs Against All Defendants)

11 89. Plaintiff hereby incorporates by reference each of the preceding paragraphs as  
12 though fully set forth herein.

13 90. As detailed above, Defendant contracted and continues to contract with Plaintiff  
14 and Class members for the provision of its Proactiv products. In each instance, Defendant offered  
15 to sell, and Plaintiff and the Class members agreed to buy, a single shipment of Proactiv product,  
16 and to pay the fee associated with that single time shipment. Many of Defendant's transactions  
17 are automated transactions as defined in the Uniform Electronic Transactions Act, California  
18 Civil Code § 1633.14(a)(1). Defendant's website constitutes an "electronic agent" as defined in  
19 California Civil Code § 1633(f).

20 91. Plaintiff and Class members accepted Defendant's offer and fully performed their  
21 obligations under the contact by, among other things, remitting to Defendant their credit card or  
22 other payment information and submitting payment to cover the specified cost of the single time  
23 purchase.

24 92. The amount of product and price at which Defendant agreed to sell Plaintiff and  
25 each of the Class members agreed to buy Proactiv products were material terms in the contracts  
26 between Defendant and Plaintiff/Class members.

27 93. Defendant's automatic delivery and billing policy terms were not terms of  
28 Defendant's contract with Plaintiff and Class members in that the terms were either not disclosed

1 at all, not disclosed in a clear and conspicuous manner as required by law, not provided to  
2 Plaintiff and Class members nor to Defendant, and not agreed to by Plaintiff or Class members,  
3 and because Defendant did not obtain Plaintiff's or Class members' express, affirmative, or  
4 explicit consent to those terms and otherwise violated the requirements of Cal. Bus. & Prof. Code  
5 § 17600.

6 94. Defendant failed to perform as required under the contracts and breached those  
7 contracts by charging amounts different from and in addition to those agreed to and for products  
8 different from and in addition to those agreed to. Specifically, Defendant breached its contracts  
9 with Plaintiff and Class members by automatically billing them for and delivering additional,  
10 unauthorized shipments of unwanted Proactiv products.

11 95. As a result of the foregoing, Plaintiff and the Class members suffered injury and  
12 are entitled to compensatory damages in an amount to be proven at trial.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, plaintiff Jennifer Habelito, on behalf of herself and members of the Class  
15 defined herein, prays for judgment and relief as follows:

- 16 A. An order certifying that this action may be maintained as a class action;
- 17 B. Compensatory and actual damages in an amount to be proven at trial, including any  
18 damages as may be provided by statute;
- 19 C. Punitive damages;
- 20 D. An order requiring the restitution and disgorgement of and/or imposing a constructive  
21 trust upon the ill-gotten gains derived from Defendant's deceptive scheme;
- 22 E. An order providing for temporary and permanent injunctive relief:
- 23 a. declaring that Defendant must provide clear and conspicuous disclosure of any  
24 and all automatic billing and delivery terms;
- 25 b. enjoining Defendant from automatically delivering and charging customers for  
26 additional products beyond their initial purchase where the terms of the  
27 automatic renewal policy have not been clearly and conspicuously disclosed to  
28 the consumer and where Defendant has not otherwise met the requirements of



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Cal. Bus. & Prof. Code § 17600 *et seq.*;

- c. enjoining Defendant from continuing the deceptive practices alleged herein;  
and
- d. granting other extraordinary equitable and/or injunctive relief as permitted by law; including specific performance, reformation, and imposition of constructive trust;


F. Prejudgment and post judgment interest at the prevailing legal rate;

G. Attorneys' fees and costs of suit, pursuant to, *inter alia*, California Civil Procedure Code § 1021.5, California Civil Code § 1780(e), and California Business & Professions Code § 17604; and

H. Such other and further relief as the Court may deem just and proper.

Dated: January 22, 2013

WUCETICH & KOROVILAS LLP

By: 

\_\_\_\_\_  
DIMITRIOS V. KOROVILAS  
Attorneys for Plaintiff Jenifer Habelito,  
individually and on behalf of  
all others similarly situated


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**JURY DEMAND**

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a trial by jury on all issues so triable.

Dated: January 22, 2013

WUCETICH & KOROVIKAS LLP

By: 

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DIMITRIOS V. KOROVIKAS  
Attorneys for Plaintiff Jenifer Habelito,  
individually and on behalf of  
all others similarly situated