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The Honorable Jamal N. Whitehead

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

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| FEDERAL TRADE COMMISSION, |) | |
| |) | |
| Plaintiff, |) | Case No. 2:24-cv-00569-JNW |
| |) | |
| v. |) | DEFENDANTS' MOTION TO DISMISS |
| |) | COMPLAINT |
| DOXO, INC, a corporation; STEVE |) | |
| SHIVERS, individually and as an officer |) | NOTED FOR CONSIDERATION: July 22, |
| of DOXO, INC.; and ROGER PARKS, |) | 2024 |
| individually and as an officer of DOXO, |) | |
| INC., |) | ORAL ARGUMENT REQUESTED |
| |) | |
| Defendants. |) | |

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1 Defendants Doxo, Inc. (“Doxo”), Steve Shivers, and Roger Parks hereby move to dismiss
2 the Complaint filed by the Federal Trade Commission, Dkt. 1, under Rules 12(b)(1) and 12(b)(6)
3 on the grounds of mootness and failure to state a claim upon which relief can be granted.

4 INTRODUCTION

5 Doxo is a small, innovative company that is transforming the bill-pay industry, increasing
6 competition, and helping consumers. It offers consumers a one-stop portal to conveniently pay
7 bills, as well as a host of related services. Doxo created a first-of-its-kind business that helps
8 consumers organize and pay bills in one place, using a variety of payment methods, with a
9 convenient and easy-to-use website.

10 The FTC’s Complaint paints a misleading picture of Doxo as a fly-by-night scam that hurts
11 consumers, when in fact it has a substantial and loyal customer following, has a long-standing and
12 successful business that adds value, and is decidedly pro-consumer. The reality is that this case
13 centers on a disagreement about font size and has nothing to do with a scam. The Complaint uses
14 a host of incendiary allegations that fail to stand up to closer scrutiny. Large swaths of the
15 Complaint are irrelevant rhetoric, unrelated to the claims asserted, and rely on incorrect or skewed
16 facts—*e.g.*, screenshots misleadingly cropped to remove language that defeats the claims. The
17 claims fail as a matter of well-settled law.

18 First, the Complaint alleges that Doxo violated the FTC Act because a reasonable consumer
19 would be deceived into believing that Doxo is an official billing channel for all billers. Judge
20 Jones of this Court recently rejected the same argument and held that no reasonable consumer
21 would believe Doxo is affiliated with all billers. The FTC also alleges that no reasonable consumer
22 would understand Doxo charges a fee for its service. But Doxo expressly and repeatedly states
23 that fees may apply and tells the user exactly what it is charging. Moreover, the FTC Act claims
24

1 are moot because Doxo already (and voluntarily) addressed the issues by making changes to its
2 website.

3 Second, the Complaint alleges a violation of the Gramm-Leach-Bliley Act (“GLB”), which
4 requires a literally false statement. There is no such allegation in the Complaint. Instead, it argues
5 that Doxo’s website is deceptive by implication, which is not actionable under the GLB.

6 Third, the Complaint alleges a violation of the Restore Online Shoppers’ Confidence Act
7 (“ROSCA”), which prohibits a “negative option” without clearly and conspicuously disclosing
8 material terms before obtaining the consumer’s billing information. But Doxo’s subscription
9 service does not use a negative option. Doxo discloses all terms clearly and conspicuously.

10 Finally, the Complaint should be dismissed against Roger Parks individually. The FTC
11 does not make the necessary allegations about Mr. Parks’ involvement in the conduct at issue to
12 warrant individual liability.

13 The clear-cut failure of the FTC’s claims raises the question of why this lawsuit was filed
14 in the first place. Before filing, Doxo participated in a year-long investigative process through
15 which it provided the FTC with voluminous internal documentation. Though Doxo did not violate
16 any laws, it agreed to changes in the spirit of being a responsible corporate citizen. The FTC,
17 however, was uninterested in voluntary compliance. Tellingly, the FTC has not sought preliminary
18 injunctive relief—for the simple reason that it is accomplishing through press what it cannot
19 through litigation, falsely telling consumers that Doxo is an “impersonator” and a “scam” that they
20 should avoid.¹ The publicity the FTC aggressively sought from filing this case is causing
21 incalculable harm to Doxo.

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23
24 ¹ *E.g.*, <https://consumer.ftc.gov/consumer-alerts/2024/04/pay-your-bills-not-impersonators> (“Pay your bills, not impersonators”).

1 The FTC, acting with the authority of the federal government, has the power to destroy a
2 small business merely by making allegations regardless of whether those allegations have any
3 prospect of success at trial. The FTC's claims are moot and lack legal merit, and therefore warrant
4 immediate dismissal. Short of that, Doxo will request an expedited trial at the Court's earliest
5 opportunity to remove this cloud over its business.

6 ARGUMENT

7 **I. THE FTC'S REQUESTS FOR INJUNCTIVE RELIEF ARE MOOT.**

8 "[A] federal court has no authority to give opinions upon moot questions," *Church of*
9 *Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quotation omitted), because "Article
10 III of the Constitution requires that there be a live case or controversy at the time that a federal
11 court decides the case," *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Rule 12(b)(1) is the proper
12 vehicle for challenging mootness, and the Court can rely on facts outside of the pleadings. *St.*
13 *Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) ("Unlike a Rule 12(b)(6) motion, a Rule
14 12(b)(1) motion can . . . rely on affidavits or any other evidence properly before the court.")

15 "Even if a court has jurisdiction under Article III to decide a case, prudential concerns may
16 militate against the use of judicial power, *i.e.*, the court should treat the case as moot for prudential
17 reasons." *Wallis v. IndyMac Fed. Bank*, 717 F. Supp. 2d 1195, 1198 (W.D. Wash. 2010). The
18 Court may dismiss a case as prudentially moot if there is no meaningful relief to be granted.
19 *Deutsche Bank Nat. Tr. Co. v. F.D.I.C.*, 744 F.3d 1124, 1135 (9th Cir. 2014). A claim for an
20 injunction against allegedly misleading advertising can be "rendered moot by the defendants'
21 subsequent act of removing the offending material from their websites." *Mut. Pharm. Co. v. Ivax*
22 *Pharms., Inc.*, 459 F. Supp. 2d 925, 944 (C.D. Cal. 2006); *see also Stokely-Van Camp, Inc. v.*
23 *Coca-Cola Co.*, 646 F. Supp. 2d 510, 524–25 (S.D.N.Y. 2009) (cessation of ads and commitment
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1 not to run them during lawsuit “obviate[d] the need for” injunction); *Moroccanoil, Inc. v.*
2 *Dermorganic Lab ’ys, Inc.*, 2009 WL 10675634, at *6 (C.D. Cal. Nov. 9, 2009).

3 **A. Background**

4 Doxo is an online bill-pay service. Its website is clear, simple, and intuitive. A description
5 of illustrative customer flows through the website is provided in the Declaration of Steven Shivers
6 (hereinafter, “Decl.”), Doxo’s CEO, submitted herewith. “Every page of doxo’s website, located
7 at doxo.com, prominently features the DOXO word mark, Doxo’s logo, and top and bottom
8 banners in the Doxo blue.” *CMRE Fin. Servs. Inc. v. Doxo Inc.*, 2022 WL 16701259, at *2 (W.D.
9 Wash. Oct. 7, 2022), *report and recommendation adopted*, 2022 WL 16699090 (W.D. Wash. Nov.
10 3, 2022); *see also* Decl. at ¶ 7.

11 Doxo offers a simple and secure all-in-one bill-pay system through which consumers can
12 pay their bills to more than 115,000 billers across the country. Decl. at ¶ 2; *see also* *CMRE*, 2022
13 WL 16701259, at *2. This streamlined system allows Doxo’s users to organize all their biller
14 accounts, manage all their due dates, and pay all their bills through a single site, with a single login.
15 Decl. at ¶ 2. Further, Doxo does not share customer payment account information with billers,
16 which improves the security of users’ information (from hacks and the like). *Id.* at ¶ 3. Since
17 Doxo’s inception, over 11 million users, across more than 95% of U.S. ZIP codes, have paid tens
18 of thousands of different billers on Doxo. *Id.* at ¶ 2.

19 If a biller is not in Doxo’s directory, any Doxo user can request that a new biller be added.
20 *Id.* at ¶ 8. When added, each biller is validated by Doxo and Doxo’s website is updated with a
21 biller profile page for the new biller. *Id.* A biller profile page organizes the relevant phone
22 numbers, emails, addresses, web links, and Doxo statistics for that biller, using a standardized
23 template across all billers in Doxo’s directory. *Id.* at ¶ 9. Users can therefore access relevant
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1 information for all their billers in one format, on a single application, with a uniform payment
2 experience, regardless of the industry or size of each respective biller. *Id.* at ¶ 10.

3 “The Doxo Biller Profile Page includes various items making clear that Doxo is not
4 affiliated with any one biller, for example, by listing other overlapping billers, including a payment
5 location map, and providing average payment amount.” *CMRE*, 2022 WL 16701259, at *2. Doxo
6 delivers payments to billers in its network using the same electronic and mailed check delivery
7 processes that bank bill-pay and other independent bill-pay services have for decades. Decl. at ¶
8 12. Some billers agree to contract directly with Doxo, in which case Doxo delivers direct payment
9 to them electronically. *Id.* at ¶ 13. To date, 2,394 billers have joined this network. *Id.* Doxo pays
10 other billers through the Mastercard Remote Payment and Presentment Service (“RPPS”), which
11 billers voluntarily enroll in to receive third-party payments, or via mailed checks. *Id.*

12 Doxo charges for its services, of course. The fee is clearly displayed at the time of
13 checkout. *Id.* at ¶ 14. The fee varies based on the amount of the bill, but a typical transaction fee
14 to deliver a bill payment is \$3.99. *Id.* If a user pays with a linked bank account, they can pay any
15 biller in the Doxo directory for free. *Id.* Users who pay with a debit or credit card may be subject
16 to a variable fee, which covers Doxo’s fee and the costs of third-party banks and payment
17 processors. *Id.*

18 Doxo also offers a subscription service, doxoPLUS, which provides consumers a number
19 of additional benefits, including \$1 million in identity theft protection, credit score monitoring,
20 overdraft fee reimbursement, and late fee reimbursement. *Id.* at ¶ 15. In fact, doxoPLUS is far
21 more affordable than standalone identity theft protection services. *Id.* And for bill payments,
22 doxoPLUS expands free payment methods to include transactions made with standard ACH and
23 most debit cards. *Id.* The vast majority of payments made by doxoPLUS subscribers are free
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1 (87% vs. 19% for non-subscribers). *Id.* at ¶ 16. Doxo has over 350,000 doxoPLUS members. *Id.*
2 at ¶ 17. Over 70% of Doxo’s transactions come from repeat customers. *Id.* at ¶ 11.

3 Doxo has been in business for over fifteen years and has over 95 employees. *Id.* at ¶ 4.
4 Doxo was founded on the principle of being pro-consumer. *Id.* at ¶ 5. The bill-payment market,
5 as it existed before Doxo, has been a tedious, high friction, and fragmented experience for
6 customers. *Id.* This unnecessary complexity in managing and staying on top of bills contributes
7 to huge expenses for U.S. households—amounting to over \$24 billion in late fees and another \$10
8 billion in overdraft fees every year. *Id.*

9 Satisfied customers are how Doxo stays in business. *See id.* at ¶¶ 6, 11, 20–23. Far from
10 the FTC’s misleading narrative, this is no fly-by-night scam. Simplifying the consumer experience
11 in this way brings cost savings and financial health benefits to consumers and billers alike. *See id.*
12 at ¶ 5. The idea is to make paying bills less time-consuming, more certain, and an easier experience
13 for customers. *See id.* at ¶¶ 2, 5, 10. The simplified user interface and taking the work out of the
14 process are what make Doxo so easy and popular. *See id.* at ¶ 10. Having all bills in one place
15 makes life easier, as does tracking deadlines and payments in one place. *See id.* This is why Doxo
16 consistently receives positive customer feedback. *See id.* at ¶¶ 6, 11, 20–23.

17 Doxo’s business is also pro-competition in a market that desperately needs it. *Id.* at ¶ 18.
18 The two prevalent legacy options for online bill pay are via each biller website, or via bank bill-
19 pay services. *Id.* Both have been around, and largely unchanged, for decades. *Id.* Most (but not
20 all) billers do offer a bill pay service on their own website (typically provided by a biller-selected
21 third party bill-pay company)—these services require users to set up logins separately with each
22 biller, share their sensitive payment account info each time, and, in tens of thousands of cases, also
23 charge fees for payments. *Id.* For example, in the utility category alone, 68% of billers have
24 payment fees. *Id.* Most banks also offer bill-payment services, but these services are in nearly all

1 cases tied to a single checking account. *Id.* Most Doxo consumers, however, use multiple payment
2 accounts to cover all their bills, and the majority of payments are with debit or credit cards (over
3 76% of bill payments on Doxo use debit or credit card). *Id.*

4 While Doxo’s all-in-one bill-pay service is innovative, the underlying bill payment
5 methods have a long history. Doxo delivers bill payments the same way bank bill-pay services
6 have for decades. *Id.* 71% of bills paid through Doxo are delivered electronically—27% directly
7 to billers that contract with Doxo and 44% through Mastercard RPPS. *Id.* at ¶ 13. The remaining
8 29% of payments are sent by paper check because the (generally small) biller is not on any
9 electronic remittance network. *Id.*

10 In December 2022, the FTC approached Doxo and issued civil investigative demands with
11 questions about Doxo’s business. *Id.* at ¶ 24. Doxo worked transparently to provide the FTC with
12 a wealth of information, both publicly available and confidential. *Id.* The information included
13 transaction details, customer support tickets and transcripts, internal emails, screenshots, and
14 hundreds of other data items. *Id.* In all, Doxo provided over 18,000 files (over 300,000 pages) to
15 the FTC. *Id.*

16 Prior to this case being filed, Doxo told the FTC that it was voluntarily addressing the
17 issues it had identified. *Id.* at ¶ 26. Doxo did not believe it had violated any laws, but at the same
18 time, its business is built on customer satisfaction, and it believes in open and transparent
19 communications with customers. *Id.* at ¶ 25. Doxo also was justifiably concerned with the impact
20 even an unmeritorious FTC complaint would have on its business. *Id.* Changes included adding
21 even more disclaimers reinforcing that Doxo is an independent third-party bill payment service,
22 making any fee paid by customers even more prominent, and making even clearer the material
23 terms of Doxo’s subscription service. *Id.* at ¶ 26.

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1 In addition, the FTC identified a glitch in Doxo’s website whereby customers could
2 inadvertently check the opt-in box for a subscription when clicking a link to review the
3 subscription terms of service (the “Glitch”). Specifically, the clickable area to check the opt-in
4 box overlapped with the clickable area to open and review the terms of use. *Id.* at ¶ 27. While
5 the action itself would not automatically enroll the user (a user would still have to click the Send
6 Payment button before enrollment would occur), it could have potentially caused accidental
7 enrollment. *Id.*

8 Upon learning of this Glitch, Doxo immediately fixed it, and notified the FTC that it had
9 done so before this case was filed. *Id.* at ¶ 28. It then contacted all 1,529 potentially affected
10 customers—less than 0.55% of total subscribers—and offered them full refunds. *Id.*

11 The FTC was not interested in Doxo’s changes or voluntary compliance, electing to file
12 this case instead. As a legal matter, however, the changes Doxo made to its system moot the FTC’s
13 injunction claims, whether as a matter of Article III mootness or prudential mootness.

14 **B. The FTC Act Claims Are Moot.**

15 The Complaint alleges violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Only
16 injunctive relief is available for these FTC Act claims—*i.e.*, monetary relief is not available. *See*
17 *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021).

18 The FTC alleges: (1) internet search results for bill payment services and Doxo’s website
19 suggest Doxo is the official payment channel for billers; and (2) consumers are confused that they
20 pay a fee for Doxo’s service. There has been no FTC Act violation, as discussed below.
21 Regardless, before this lawsuit was filed, Doxo addressed the FTC’s concerns by adding further
22 clarifications to search ads (to the extent it is permitted to) and to its website. Decl. at ¶ 26.

23 Regarding internet search results, neither the format nor the placement of those results is
24 within Doxo’s control—they are dictated by the internet search provider (such as Microsoft Bing

1 or Google). *Id.* ¶ 29. Those search results indicate whether the result is an ad or an organic search
2 result, as well as the name and URL of the company providing the result. Doxo added further
3 clarification to the content of its search ads with language specifying that Doxo is an
4 “independent,” “third-party,” or an “all in one” bill payment service. Further, to the extent the
5 FTC Act claims are based on what a reasonable consumer would think once they click through to
6 Doxo’s website, Doxo addressed these issues through several changes, which are detailed in Mr.
7 Shivers’ Declaration. Decl. at ¶¶ 26–32. These changes added clarifying language over and above
8 the Doxo website features that led this Court to hold that no reasonable consumer could be
9 deceived into thinking Doxo was the official payment channel for unaffiliated billers. *CMRE*,
10 2022 WL 16701259, at *9. Regarding the claim that a reasonable consumer would not understand
11 that Doxo charges a fee for its service, Doxo made several changes to further enhance its
12 disclosures, though Doxo’s website previously plainly and obviously disclosed its fee. Decl. at ¶¶
13 14, 26.

14 Doxo notified the FTC that it was voluntarily making these changes, permanently. *Id.* at ¶
15 32. The FTC was uninterested and filed this case nonetheless, with the related press releases.

16 Accordingly, any claim for injunctive relief is moot because Doxo agreed to make changes
17 eliminating any possible confusion.

18 **C. Count V Is Moot.**

19 Count V claims a violation of ROSCA for enrolling customers in a subscription service
20 without their express informed consent. The allegation appears to be based on Paragraphs 61 and
21 62 of the Complaint.² Count V apparently seeks an injunction prohibiting Doxo from
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23 ² The Complaint is far from clear on this point, incorporating all previous allegations so
24 as to make it impossible to discern the nature of the allegation. Courts have criticized this
“shotgun” approach to pleading. *See, e.g., Barmapov v. Amuial*, 986 F.3d 1321, 1324–26 (11th
Cir. 2021).

1 automatically checking the subscription box when customers click the link to review the
2 subscription terms of use, *i.e.*, the Glitch. As discussed, Doxo fixed the Glitch and has already
3 offered all potentially impacted customers refunds. Doxo will not reinstate this unintentional user
4 experience defect in the future. Decl. at ¶ 28. Count V is moot because the conduct ceased and
5 will not resume. *See Mut. Pharm. Co.*, 459 F. Supp. 2d at 944. Any consumer harm is therefore
6 remedied. *See* 15 U.S.C. § 57b(b) (authorizing the Court to “grant such relief as [it] finds
7 necessary to redress injury to consumers . . . resulting from the rule violation”).

8 **II. THE COMPLAINT FAILS TO STATE ACTIONABLE CLAIMS.**

9 A complaint that fails to state a claim upon which relief can be granted must be dismissed.
10 *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1175 (9th Cir. 2021). A plaintiff must “include
11 enough facts ‘to raise a right to relief above a speculative level,’ and ‘a formulaic recitation of the
12 elements of a cause of action will not do.’” *Id.*, at 1176 (quoting *Bell Atlantic Corp. v. Twombly*,
13 550 U.S. 544, 555 (2007)). Thus, to survive a motion to dismiss, a complaint must contain “well-
14 pleaded facts, not legal conclusions, that plausibly give rise to an entitlement to relief.” *Id.*
15 (cleaned up).

16 **A. The FTC Act Claims Fail.**

17 Shorn of rhetoric, Counts I and II boil down to two claims: (1) a reasonable consumer
18 would be deceived into believing that Doxo is an official billing channel for billers; and (2) a
19 reasonable consumer would not understand that Doxo charges a fee for its service. Compl. at ¶¶
20 76–78, 79–81. Neither claim meets the Rule 12(b)(6) standard.

21 To prove a violation of Section 5(a) of the FTC Act, the FTC must show that a defendant
22 made a material representation that “is likely to mislead consumers acting reasonably under the
23 circumstances.” *F.T.C. v. Intuit Inc.*, 2022 WL 1601403, at *1 (N.D. Cal. Apr. 22, 2022) (citing
24 *F.T.C. v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009)). The “reasonable consumer standard”

1 requires a complaint to demonstrate “a probability that a significant portion of the general
2 consuming public or of targeted consumers, acting reasonably in the circumstances, could be
3 misled.” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (internal quotation marks
4 omitted). A reasonable consumer, therefore, cannot be “selectively blind” and ignore explicit
5 disclaimers. *Hodges v. King’s Hawaiian Bakery W., Inc.*, 2021 WL 5178826, at *7 (N.D. Cal.
6 Nov. 8, 2021). Thus, the FTC must show more than a “mere possibility” that the material
7 representation “might conceivably be misunderstood by some few consumers viewing it in an
8 unreasonable manner.” *Ebner*, 838 F.3d at 965.

9 Where, as here, the representation at issue appears on a defendant’s website, the presence
10 of explicit statements contrary to the alleged misunderstanding cannot sustain a claim that a
11 reasonable consumer would be misled, and the complaint therefore may be dismissed at the Rule
12 12(b)(6) stage. *See CMRE*, 2022 WL 16701259, at *9–10 (dismissing Washington Consumer
13 Protection Act (“CPA”) claim because no reasonable consumer would confuse Doxo’s website for
14 that of unaffiliated entity); *Hodges*, 2021 WL 5178826, at *7 (website that included “explicit
15 statements” that product was made in California did not mislead reasonable consumer into
16 believing product was made in Hawaii).

17 To make this determination, the Court may consider the entirety of Doxo’s website under
18 the incorporation by reference doctrine. The doctrine “is intended to ‘prevent plaintiffs from
19 surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which their claims are
20 based.’” *Al-Bustani v. Alger*, 2023 WL 1778814, at *3 (W.D. Wash. Feb. 6, 2023) (quoting *Swartz*
21 *v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007)). On a motion to dismiss, the Court may consider
22 “evidence on which the complaint necessarily relies if: (1) the complaint refers to the document;
23 (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of
24 the copy attached to the 12(b)(6) motion.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998

1 (9th Cir. 2010) (cleaned up). Such evidence is, essentially, “part of the complaint.” *Id.*
2 Accordingly, courts “routinely consider the full page of a website where . . . a portion of the page
3 is quoted or relied on in the complaint.” *Browning v. Am. Honda Motor Co.*, 549 F. Supp. 3d 996,
4 1004 (N.D. Cal. 2021) (cleaned up).³

5 Alternatively, the Court may judicially notice that certain information is contained on
6 Doxo’s website, and Doxo requests that the Court do so. *See, e.g., Threshold Enters. Ltd. v.*
7 *Pressed Juicery, Inc.*, 445 F. Supp. 3d 139, 146 (N.D. Cal. 2020); FED. R. EVID. 201(b) (judicial
8 notice appropriate where fact “can be accurately and readily determined from sources whose
9 accuracy cannot reasonably be questioned”). This Court previously took judicial notice of Doxo’s
10 checkout web pages on a Rule 12 motion disposing of similar allegations because “Doxo need not
11 establish the truth of any content in the consumer checkout webpages, only that the information is
12 there.” *CMRE*, 2022 WL 16701259, at *4–5 (taking “judicial notice of [Doxo’s] checkout process
13 webpages for purposes of their existence and content”).

14 Finally, a complaint based on an alleged violation of Section 5 will not survive a motion to
15 dismiss unless it satisfies the heightened pleading standard of Rule 9(b). *F.T.C. v. Lights of Am.,*
16 *Inc.*, 760 F. Supp. 2d 848, 853 (C.D. Cal. 2010) (dismissing Section 5 claim under Rule 9(b)
17 standard where FTC “fail[ed] to allege the ‘who, what, when, where, and how’ of the Defendants’
18 course of conduct”); *F.T.C. v. D-Link Sys., Inc.*, 2017 WL 4150873, at *3 (N.D. Cal. Sept. 19,
19 2017) (dismissing Section 5 claims under Rule 9(b) standard that “lack[ed] enough specificity to
20 give [defendant] fair notice of its allegedly deceptive conduct”). The Complaint here fails to pass
21 muster even without this heightened standard.

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24 ³ Printouts of the additional web page screenshots—which were incorporated by
reference in the Complaint or should be judicially noticed—are attached as Decl. Exhibits B
through G.

1 **1. No Reasonable Consumer Could Be Deceived.**

2 The FTC alleges that a reasonable consumer would be misled into believing they are
3 conducting a transaction with a biller on Doxo’s website. In other words, if the customer is paying
4 a bill for the Acme Company, they would believe they are on the Acme Company’s website, or
5 that Doxo is the official bill payment service for the Acme Company. As a matter of law, a
6 reasonable consumer could not plausibly believe these things. Doxo’s directory page for each
7 biller itself states explicitly, in two locations, that Doxo is not affiliated with the biller.⁴ If a user
8 commences a payment, they again land on a page to enter their account information that provides
9 yet another disclaimer that Doxo is not affiliated with that biller.

10 This is not the first time this Court has addressed this very issue. The Court previously
11 held a reasonable consumer could not plausibly believe Doxo is a biller’s official payment channel.
12 *CMRE*, 2022 WL 16701259. In *CMRE*, two debt-collection agencies brought claims including
13 unfair competition under the Lanham Act and violations of the CPA,⁵ alleging Doxo falsely
14 represented itself as their affiliate and “misle[d] customers into believing that Plaintiffs endorse[d]
15 or sponsor[ed] Doxo’s bill-payment services.” *Id.*, at *1. Judge Jones adopted as an order of the
16 Court the magistrate judge’s Report and Recommendation finding, on a 12(c) motion applying the
17 same standard as here, that Doxo’s website clearly conveys that Doxo is not an official billing
18 channel: “The Doxo Biller Profile Page includes various items *making clear that Doxo is not*
19 *affiliated with any one biller*, for example, by listing other overlapping billers, including a payment
20 location map, and providing average payment amount.” *CMRE*, 2022 WL 16701259, at *2

21 ⁴ Doxo has contracts with certain billers to provide official services, but those billers are
22 not at issue here.

23 ⁵ The applicable texts of the CPA and the FTC Act are substantively identical. *Compare*
24 *RCW 19.86.020 with 15 U.S.C. § 45(a)(1)*. Like the FTC Act, the CPA requires application of the
reasonable consumer standard, and courts applying the CPA often look to decisions applying the
FTC Act. *See Young v. Toyota Motor Sales, U.S.A.*, 9 Wash. App. 2d 26, 33–34 (2019), *aff’d*, 196
Wash. 2d 310 (2020).

1 (emphasis added). Doxo’s users “encounter additional notices in the payment checkout process
2 *specifically disclaiming* any endorsement, sponsorship, or affiliation by any biller.” *Id.*, at *7
3 (emphasis added).

4 Indeed, as this Court noted, “[e]very page of Doxo’s website, located at doxo.com,
5 prominently features the DOXO word mark, Doxo’s logo, and top and bottom banners in the Doxo
6 blue.” *Id.*, at *2. Doxo’s “home page includes numerous other indications that Doxo is the source
7 of the website’s content, such as use of the terms doxoPLUS, doxoDIRECT, and doxoINSIGHTS,
8 and a copyright and trademark notice (‘© 2022 doxo inc., doxo is a registered trademark of doxo
9 inc.’).” *Id.* Thus, the Court held “it is *not plausible that any reasonable consumer accustomed to*
10 *navigating the internet would be confused.*” *Id.*, at *9 (emphasis added). And, accordingly, the
11 Court held that the plaintiffs failed to state a claim.

12 The Complaint’s allegations here mirror those made by the *CMRE* plaintiffs. *Compare*
13 *Compl. at ¶ 3* (alleging Doxo “disguise[es] itself as [consumers’] billers’ official payment
14 channel”) *with CMRE*, 2022 WL 16701259, at *1 (plaintiffs alleged Doxo’s website “misle[d]
15 customers into believing that Plaintiffs endorse or sponsor Doxo’s bill-payment services”). The
16 same reasonable consumer standard applies. And the same facts show the numerous ways in which
17 Doxo dispels any consumer confusion.

18 When a consumer sees an ad on a search engine (like Bing or Google), it is clear that it is
19 from Doxo. The image included in the Complaint shows that the search result is labeled as an
20 “Ad;” includes the phrase, “Submit Your [biller] Payment Online *with doxo*,” and includes a link
21 showing *Doxo’s* website, “<https://www.doxo.com/pay/labcorp>.” *Compl. at ¶ 15* (emphasis added).
22 Clicking on the link directs the consumer to what is plainly Doxo’s landing page, as this Court
23 previously held. *Id.* at ¶ 17. Though the Complaint includes an image of the landing page, it
24 selectively crops the image to remove multiple disclaimers. *Compare id. with Decl. Ex. B; cf. Al-*

1 *Bustani*, 2023 WL 1778814, at *3 (plaintiffs may not “surviv[e] a Rule 12(b)(6) motion by
2 deliberately omitting documents upon which their claims are based”). The non-altered image
3 clearly shows that the landing page is part of Doxo’s website, not a biller’s. *See* Decl. Ex. B. For
4 example, the landing page includes the following statements, all of which are omitted from the
5 Complaint:

- 6 • “doxo is *not an affiliate* of [biller].”
- 7 • “*No endorsement* has been given nor is implied.”
- 8 • “doxo is a secure all-in-one service to organize all your provider accounts in a single
9 app, enabling reliable payment to delivery to *thousands of billers*.”
- 10 • “Logos and other trademarks within this site are the property of *their respective*
11 *owners*.”

12 *See* Decl. Exs. B, C (emphasis added). The Complaint also selectively omits additional indicators
13 that clearly communicate the landing page is not the biller’s website, such as the following:

- 14 • Doxo’s logo.
- 15 • Links that read, “doxo.com,” “About the doxo Network,” “doxo for business,” and
16 “Preventing fraud with doxo.”
- 17 • Link to the *biller’s* website.
- 18 • List of other billers also paid by Doxo users.
- 19 • Other categories (*e.g.*, Loans & Credit Cards, Phone, TV, Internet, Insurance, etc.) of
20 billers that can be added.

21 *See* Decl. Exs. B, C. Links to the biller’s website are particularly pertinent because, as this Court
22 previously determined, they indicate that the biller is separate from Doxo. *CMRE*, 2022 WL
23 16701259, at *8. Further, in many cases, the Frequently Asked Questions on a biller’s landing
24 page states “What types of [biller] payments does doxo process?” *See* Decl. Ex. C.

1 The Complaint also conspicuously omits the page immediately following the landing page
 2 in Doxo’s checkout process. *See* Decl. Exs. D, E. There, Doxo once again explains that it “is a
 3 secure all-in-one service . . . enabling reliable payment to delivery to thousands of billers;” that it
 4 “is not an affiliate of [biller];” and that “[n]o endorsement has been given nor is implied.” *See*
 5 Decl. Exs. D, E.

6 Even without the omitted information, the selectively cropped images the FTC provided in
 7 the Complaint show that the landing page is part of *Doxo*’s website. For example:



18

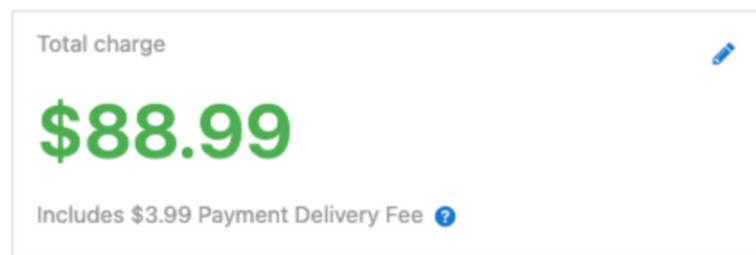
19 Compl. at ¶ 17 (emphasis added). A reasonable consumer could not plausibly understand “doxo .
 20 . . . is not an affiliate of or endorsed by LabCorp” to mean LabCorp endorses Doxo or is affiliated
 21 with Doxo, as that interpretation would directly contradict the statement’s explicit language. *See*
 22 *Hodges*, 2021 WL 5178826, at *6 (statement on package showing manufacturer’s address in
 23 California was “plainly sufficient to tell consumers” product was not manufactured in Hawaii).

24 Accordingly, Count I fails as a matter of law.

1 **2. The Complaint Fails To Allege Any Statement That Consumers Pay Only**
 2 **The Amount Of Their Bill With No Fee.**

3 Count II alleges a consumer would be misled into believing that there is no fee associated
 4 with Doxo’s service, such that it pays no more than the underlying bill they are paying. Compl. at
 5 ¶ 79.

6 The reasoning of *CRME* applies with equal force here. Doxo’s website expressly
 7 contradicts the Complaint’s allegation, and therefore no reasonable consumer could be misled. As
 8 a threshold matter, the Complaint fails to allege any misrepresentation that users will pay only the
 9 amount of their bill and no more. Additionally, the landing page from Doxo’s checkout process
 10 directly contradicts the FTC’s allegations because it explicitly states: “Payments are free with a
 11 Linked Bank Account. Other payments may have a fee, which will be clearly displayed before
 12 checkout.” Decl. Exs. B, C. The Complaint’s screenshot of Doxo’s landing page crops out that
 13 explicit statement. Compl. at ¶ 17. And then, Doxo does indeed disclose the amount of the fee (if
 14 applicable) prior to checkout completion. *Id.*; Compl. at ¶ 22. The consumer is shown the total
 15 charge (which obviously is greater than the amount the user entered if a fee applies), the fee they
 16 are paying, and a bright blue button for questions about the fee:



18 See Decl. Ex. D.

19 Doxo presents this information prior to completion of checkout and prior to finalizing the
 20 transaction. See Compl. at ¶¶ 22, 33.

21 Accordingly, Count II fails as a matter of law.
 22
 23
 24

B. The GLB Claims Fail.

The GLB prohibits obtaining certain customer financial information by “making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution.” 15 U.S.C. § 6821(a) (titled “Prohibition on obtaining customer information by false pretenses”). This is known as the “pretexting” provision. Specifically, it prohibits the use of such statements to obtain “customer information of a financial institution,” which is defined to mean “any information maintained by or for a financial institution which is derived from the relationship between the financial institution and a customer of the financial institution and is identified with the customer.” 15 U.S.C. § 6827(2). Thus, the Complaint must show Doxo made a “false, fictitious, or fraudulent statement or representation.” 15 U.S.C. § 6821(a).

The statute on its face requires that Doxo have made a false statement, not merely that consumers may be confused by its advertising or landing pages. The GLB mirrors 18 U.S.C. § 1001, which prohibits making “any materially false, fictitious, or fraudulent statement or representation.” Courts interpret that phrase to require literally false statements. *See, e.g., United States v. Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984) (“[A] defendant may not be convicted under § 1001 on the basis of a statement that is, although misleading, literally true”); *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013) (same); *United States v. Yates*, 16 F.4th 256, 274 (9th Cir. 2021) (relying on § 1001 case law to explain “When a statement is literally true, it is, by definition, not false and cannot be treated as such”).

By contrast, the FTC Act (Section 5) covers “deceptive” acts and practices, which has been read to cover more than literal falsehoods. *See, e.g., FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 424 (9th Cir. 2018) (Section 5 “does not require only technical accuracy”), *rev’d on other grounds, AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021); *see also F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). Doxo found no cases holding that

1 the GLB covers merely misleading statements. All published cases involve literally false
2 statements. *See, e.g., FTC v. RCG Advances, LLC*, 2023 WL 6281138, at *9–10 (S.D.N.Y. Sept.
3 27, 2023); *FTC v. Celsius Network Inc.*, 2023 WL 8603064, at *5 (S.D.N.Y. Dec. 12, 2023).

4 This interpretation is bolstered by the rule of lenity, which requires that any ambiguity be
5 resolved against the FTC. “[T]he rule of lenity applies” to a statute with “both criminal and
6 noncriminal applications” whether the court “encounter[s] its application in a criminal or
7 noncriminal context.” *Leocal v. Ashcroft*, 543 U.S. 1, 12 at n.8 (2004). The GLB is both a criminal
8 and noncriminal statute. *See* 15 U.S.C. § 6823. Therefore, to the extent there is any ambiguity
9 about whether the GLB covers misleading—as opposed to literally false—statements, that
10 ambiguity must be resolved against the government.

11 The GLB pretexting provisions were designed to deal with a practice defined as
12 “‘pretexting’—obtaining a consumer’s financial information from financial institutions under false
13 pretenses.” Second Annual Report To Congress Under Section 526(b) of the Gramm-Leach-Bliley
14 Act, 2002 WL 849740, at *1. In the first few years of the statute’s existence, the FTC enforced it
15 against companies engaged in aggregating and selling consumers’ financial information. *See id.*
16 (describing “Operation Detect Pretext”). The FTC’s enforcement of the pretexting provisions lay
17 dormant for years until *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021). There, the
18 Supreme Court unanimously rejected the FTC’s ability to obtain monetary relief for Section 5
19 violations (through FTC Act section 13(b)). *Id.* at 78–79.

20 No longer able to obtain monetary damages after *AMG*, the FTC now seeks to obtain
21 damages through the GLB, taking the view that any violation of the FTC Act that involves payment
22 with banking information necessarily violates the GLB. No court has so held. The FTC Act covers
23 a range of conduct that is not actionable under the GLB because the GLB requires a literally false
24

1 statement.⁶ This case appears to be the first in which the FTC reads the pretexting provisions as
 2 essentially co-extensive with Section 5, covering representations alleged to be deceptive but not
 3 false.⁷

4 Because the Complaint fails to allege any literally false statement actionable under the
 5 GLB, Count III fails as a matter of law.

6 **C. The ROSCA Claims Fail.**

7 Count IV alleges Doxo’s subscription service, doxoPLUS, is a negative option feature that
 8 violates ROSCA because the Doxo website does not clearly and conspicuously disclose all
 9 material terms of the transaction. Count V, which alleges that Doxo failed to obtain consumers’
 10 express informed consent for doxoPLUS, appears to concern the Glitch. *See supra* at 7. Both
 11 counts fail as a matter of law.

12 **1. DoxoPLUS Is Not A Negative Option Feature.**

13 The FTC alleges the doxoPLUS offering violates ROSCA, 15 U.S.C. §§ 8401–8405.
 14 Compl. ¶¶ 87–92. ROSCA’s requirements apply only to goods or services sold on the internet
 15 “through a negative option feature,” *i.e.*, “in an offer or agreement to sell or provide any goods or
 16 services, a provision under which the customer’s silence or failure to take an affirmative action to
 17 reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the
 18 offer.” 15 U.S.C. § 8403; 16 C.F.R. § 310.2(w).

19 The FTC’s allegations confirm the sale of doxoPLUS does not meet that definition. Doxo’s
 20 checkout page includes an offer to enroll in a “doxoPLUS Subscription.” Compl. ¶ 61. The offer
 21 states that the subscription costs “\$5.99 per month (plus tax where applicable),” that the consumer

22 ⁶ If the Court concludes that Counts I and II fail to state a claim, then a fortiori, Count III,
 23 which is subject to a higher standard, also fails. But the opposite is not true.

24 ⁷ In the past, the FTC brought deception claims analogous to those here and brought
 claims under different GLB provisions, *but not the pretexting provisions*. *See, e.g., FTC v.*
LendingClub Corp., d/b/a Lending Club, 2021 WL 3666189 (N.D. Cal. Apr. 25, 2021).

1 may “[c]ancel anytime,” and that the subscription is subject to the linked “User Terms of Service.”
2 *Id.* To accept the offer, the consumer must affirmatively check the box. *Id.*⁸

3 That process does not involve interpreting “the customer’s silence or failure to take an
4 affirmative action” as acceptance of an offer. 16 C.F.R. § 310.2(w). Rather, Doxo offers a long-
5 term contract in which the consumer makes monthly payments in exchange for services until either
6 the consumer or Doxo decides to terminate the deal, and the consumer takes an affirmative action
7 to accept that offer, forming a single contract. The FTC does not allege that the deal changes after
8 some period of time or that Doxo enrolls the consumer in other offers without agreement. That
9 describes a routine subscription, not a negative option feature. The monthly payments are based
10 on the consumer’s agreement to the initial offer of a long-term contract paid monthly, with a right
11 to terminate at any time. Rather than interpreting the consumer’s silence “as acceptance of [a new]
12 offer” each month—as the “negative option feature” definition would require, 16 C.F.R.
13 § 310.2(w)—the consumer here agrees up front to a subscription, which remains in effect unless
14 cancelled. By the FTC’s logic, a landlord and tenant who sign a 12-month lease providing for
15 monthly rent and an option to terminate early are not really signing a single contract but making
16 month-to-month deals based on the tenant’s continued failure to exercise the option to terminate.
17 That is not how contracts work. That the contract here lacks a fixed termination date does not
18 mean that every time a payment is due, the parties should be understood to be entering a brand-
19 new contract only until the next payment.

20 No binding precedent supports the FTC’s contrary view. Some cases involved free trials
21 converting to paid subscriptions based on the customer’s silence, *see, e.g., FTC v. Triangle Media*

22
23 ⁸ Even the Glitch does not constitute a negative option feature. While the Glitch was in
24 effect, the subscription box could be checked by clicking on the terms of service link, but the
consumer still had to take the affirmative step of completing the transaction. There was no
automatic enrollment.

1 *Corp.*, 2018 WL 4051701, at *1 (S.D. Cal. Aug. 24, 2018), *aff'd sub nom. FTC v. Hardwire*
2 *Interactive, Inc.*, 765 F. App'x 184 (9th Cir. 2019), while others involved time-limited
3 subscriptions that automatically renewed unless the customer objected, *see United States v.*
4 *MyLife.com, Inc.*, 567 F. Supp. 3d 1152, 1159 (C.D. Cal. 2021). Still others involved consumers
5 who enrolled in recurring shipments for which they never gave permission. *See FTC v. Cardiff*,
6 2020 WL 6540509 at *8 (C.D. Cal. Oct. 9, 2020) (“Defendants enrolled consumers who ordered
7 the Products into unauthorized autoship programs . . .”). The common thread in these cases is
8 that the consumer agreed to one thing (or nothing) and was ultimately signed up for something
9 else without taking any further action. *See, e.g., Washington v. Internet Order, LLC*, 2015 WL
10 918694, at *1, *5 (W.D. Wash. Mar. 2, 2015). By contrast, a consumer who signs up for
11 doxoPLUS gets exactly what she signed up for: a recurring subscription that costs \$5.99 per month.
12 Compl. ¶ 61. Defendants have not found any case holding that such an arrangement involves a
13 negative option feature. That is because the definition’s plain text does not cover simple
14 subscriptions like doxoPLUS.

15 **2. Doxo Clearly And Conspicuously Discloses Fees.**

16 The FTC’s ROSCA claims also fail because Doxo clearly and conspicuously discloses all
17 material terms of the subscription, including the doxoPLUS subscription and bill payment fees.

18 This Court recently addressed ROSCA’s “clear and conspicuous” requirement in *FTC v.*
19 *Amazon.com, Inc.*, 2024 WL 2723812 (W.D. Wash. May 28, 2024). Because the statute does not
20 define “clear and conspicuous,” courts look to the interpretation of analogous language in state
21 and federal statutes. *Id. at* *6–7. For example, under the Fair Credit Reporting Act and the Truth
22 in Lending Act, “[c]lear means reasonably understandable’ and ‘[c]onspicuous means readily
23 noticeable to the consumer.’” *Id. at* *7 (quotation omitted). Under the UCC, “a term is considered
24 conspicuous when it is so written, displayed, or presented that a reasonable person against which

1 it is to operate ought to have noticed it.” *Id.* (quotation omitted). The FTC acknowledged in
 2 *Amazon.com* that the “reasonable consumer standard applies” to ROSCA. *Id.* The FTC must show
 3 more than “a mere possibility” of misunderstanding “by some few consumers viewing [the
 4 webpage] in an unreasonable manner;” it must show “a probability that a significant portion of the
 5 general consuming public or targeted consumers, acting reasonably in the circumstances, could be
 6 misled.” *Ebner*, 838 F.3d at 965.

7 Here, the opt-in box clearly states that doxoPLUS is a “Subscription” and costs “\$5.99 per
 8 month (plus tax where applicable).” Compl. ¶ 61. Moreover, the opt-in box states: “By selecting
 9 the box above you agree to the User Terms of Service” with “User Terms of Service” being a
 10 hyperlink shown using the standard blue font used to denote a hyperlink. *Id.* The “Terms of
 11 Service” detail the features of the subscription, including the possibility of fees if a consumer uses
 12 a credit card. *See* Decl. Ex. G. The Terms explain:

13 An approved financial instrument must be used in order for the payment transaction
 14 fee for the biller payment to be waived. While a subscriber of doxoPLUS, you may
 15 make payments using non-approved financial instruments; however, **you will be**
 16 **charged that instrument’s transaction fee** which will be calculated and displayed
 17 to you at the time of the transaction. . . .

18 *Id.* (emphasis added). After a consumer checks the box electing a doxoPLUS subscription (after
 19 which the consumer can still change their payment method if desired), they must hit the “Send
 20 Payment” button to subscribe.⁹

21 This goes above and beyond disclosures that the Ninth Circuit has held to satisfy the
 22 reasonable consumer standard. *See Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 516 (9th Cir.

23 ⁹ “Regulated debit card” refers to cards issued by banks with \$10 billion or more in
 24 assets, which are subject to the 2011 Durbin Amendment capping transaction fees at 0.05% plus
 21 cents. *See* 15 U.S.C. § 1693o-2; 12 C.F.R. § 235. These low transaction fees make it
 possible for Doxo to offer free payments using regulated debit cards. Unregulated debit cards,
 those issued by banks with less than \$10 billion in assets, can have much higher transaction fees,
 making it uneconomical for Doxo to offer free payments using such cards.

1 2023) (notice that “[b]y continuing past this page and clicking [the button], you agree to our Terms
2 of Use” coupled with a “hyperlink . . . conspicuously distinguished from the surrounding text in
3 bright blue font” satisfied the standard); *Keebaugh v. Warner Bros. Ent. Inc.*, 100 F.4th 1005,
4 1020–21 (9th Cir. 2024) (statement “By tapping ‘Play’ I agree to the Terms of Service,” with the
5 link to the Terms of Service “conspicuously distinguished from the surrounding text,” met
6 reasonable consumer standard).

7 In applying the reasonable consumer test, the context of the transaction matters.
8 *Amazon.com*, 2024 WL 2723812, at *8. There is a difference between “a consumer who
9 ‘contemplate[s] some sort of continuing relationship’ and one who is ‘merely attempting to start a
10 free trial.’” *Id.* (quoting *Oberstein*, 60 F.4th at 512–13). Here, a consumer who signs up for
11 doxoPLUS is one who “contemplates some sort of continuing relationship”—there is no free trial
12 and the consumer must opt-in by checking a box labeled “Subscription” that clearly states a price
13 per month and links to the Terms of Service. Compl. ¶ 61.

14 The contrast to the Amazon Prime program is instructive. This Court concluded that
15 Amazon’s disclosures were not clear and conspicuous where Prime was presented as a supposed
16 “gift” and a free trial, consumers who chose Prime were signed up even if they did not complete
17 their purchase, and consumers had to choose between a bright button offering “FREE Two-Day
18 Delivery” and less conspicuous text reading “No thanks, I do not want fast, FREE delivery.”
19 *Amazon.com*, 2024 WL 2723812, at *9–10. Nothing like that is the case here—where a consumer
20 must affirmatively opt in to subscribe to doxoPLUS, is not offered a free trial, is clearly alerted to
21 the fact that they are signing up for a subscription, and a subscriber cannot checkout for a
22 subsequent payment using an instrument not on the approved instrument list without being notified
23 of that fact and prompted to switch to a free payment method. Decl. at ¶ 16. In such payment
24 checkouts, the subscriber can always select the free payment choice. *See* Decl. Ex. F.

1 Count V alleges “Defendants have failed to obtain a consumer’s express informed consent
2 before charging” the consumer. Compl. ¶ 93. It is unclear what allegations are supposed to form
3 the basis of this count, since the count incorporates every substantive paragraph of the Complaint.
4 *See Barmapov v. Amuial*, 986 F.3d 1321, 1324–25 (11th Cir. 2021) (“complaint containing
5 multiple counts where each count adopts the allegations of all preceding counts” was
6 impermissible “shotgun pleading”); *Resh, Inc. v. Skimlite Mfg. Inc.*, 666 F. Supp. 3d 1054, 1059
7 (N.D. Cal. 2023) (dismissing complaint under “well-established law in [Ninth] circuit that so-
8 called ‘shotgun pleadings’ do not satisfy Rule 8’s notice requirement”). To the extent this claim
9 is based on Paragraphs 61 and 62, it is moot as described above. To the extent it is based on the
10 same allegations as Count IV, it fails for the same reasons. *See Amazon.com*, 2024 WL 2723812,
11 at *11. To the extent that Count V is based on some other, unstated, basis, it fails to state a claim.

12 **III. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST PARKS.**

13 To prove individual liability under Section 5 of the FTC Act, the FTC must demonstrate
14 the individual “participated directly” in the misrepresentations at issue “or had authority to control
15 them.” *F.T.C. v. Swish Mktg.*, 2010 WL 653486, at *3 (N.D. Cal. Feb. 22, 2010) (dismissing claim
16 for individual liability for failing “to establish a factual nexus between [individual defendant] and
17 the corporate defendant’s alleged misrepresentations and omissions”). Even where a complaint
18 sufficiently pleads a Section 5 claim against an entity, “conclusory” or “boilerplate” allegations
19 against an individual are insufficient. *F.T.C. v. Wellness Support Network, Inc.*, 2011 WL
20 1303419, at *11 (N.D. Cal. Apr. 4, 2011) (claim for individual liability against officer of entity
21 failed Rule 8); *see also Swish*, 2010 WL 653486, at *5. The standard for individual liability under
22 ROSCA or the GLB pretexting provisions should be at least as high as under the FTC Act. *See*
23 *Amazon.com*, 2024 WL 2723812, at *16–18 (applying FTC case law to ROSCA claims). This is
24

1 different from the normal civil litigation process in that the FTC received substantial discovery in
2 advance of filing this case.

3 Here, the Complaint alleges neither that Defendant Parks is an officer, chief executive, or
4 director of Doxo, nor that Parks designed Doxo’s web page, devised any part of the checkout
5 process or subscription service, or had any authority over parties that did. *See* Compl. ¶¶ 12, 43–
6 45, 66, 68–69. Parks allegedly received notice of consumer complaints, responded to a state
7 inquiry, resolved an inquiry from an ad network partner, and had discussions with a credit card
8 company. *Id.* at ¶¶ 43–45. The Complaint alleges further that Parks attended presentations and
9 board meetings. *Id.* at ¶¶ 66, 68, 69. But the FTC makes *no attempt* to connect these allegations
10 to Doxo’s alleged misrepresentations.

11 By contrast, in *Amazon.com*, the FTC alleged the individual defendants “oversaw the
12 Amazon Prime subscription program, including the sign-up process and the cancellation process”
13 at issue; “[ran] the entire company;” managed and had “responsibility for the Prime subscription
14 program;” and had “authority over the Prime enrollment and cancellation process.” *Amazon.com*,
15 2024 WL 2723812, at *17.

16 Accordingly, Mr. Parks should be dismissed from this case.
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1 I certify that this memorandum contains 8,365 words, in compliance with the Local Civil
2 Rules.

3 I certify that counsel for Defendants met and conferred with counsel for the FTC to
4 determine whether this motion could be avoided and to afford the FTC an opportunity to amend
5 the Complaint.

6 Dated: June 24, 2024

Respectfully submitted,

7 /s/ Courtland L. Reichman

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