NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GREGORY LINCOLN KINNEY, Plaintiff and Appellant, v. YOUTUBE, LLC, Defendant and Respondent.	G054863 (Super. Ct. No. 30-2015-00776712) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Theodore R. Howard, Judge. Affirmed.

Law Offices of Allan E. Perry and Allan E. Perry for Plaintiff and Appellant.

Jassy Vick Carolan, Kevin L. Vick and Jean-Paul Jassy for Defendant and Respondent.

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INTRODUCTION

YouTube, LLC (YouTube) suspended the channel registered by Gregory Lincoln Kinney. More than two years later, Kinney sued YouTube, alleging causes of action sounding in tort and contract. The trial court granted YouTube's motion for summary adjudication on the ground all contract and tort claims were barred by the one-year statute of limitations contained in YouTube's Terms of Service, which Kinney had accepted when he initially registered with YouTube. The trial court also sustained a demurrer, without leave to amend, to Kinney's cause of action that YouTube had committed unfair business practices, in violation of Business and Professions Code section 17200 (section 17200).

We affirm. YouTube met its initial burden of making a prima facie showing of the nonexistence of any triable issue of material fact relating to the statute of limitations in the Terms of Service. Kinney failed to show that a triable issue of material fact existed. The trial court did not err in granting the motion for summary adjudication.

As for the section 17200 claim, the operative complaint—the fourth amended complaint—failed to allege an unfair business practice by YouTube directed at the public. The allegation that other YouTube channels might have been suspended at the same time and for the same reason as Kinney's channel does not convert a basic tort and contract case into an unfair business practice case. Kinney failed to show a reasonable possibility that his complaint could be amended to state a claim. The trial court did not err in sustaining the demurrer without leave to amend.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In June 2009, Kinney registered with YouTube and agreed to the then-current Terms of Service. Kinney posted videos to a channel titled "actionadventures."

In November 2012, YouTube suspended Kinney's account and removed his videos because Kinney had used automated robot or bot software, in violation of the Terms of Service. YouTube lifted Kinney's suspension in December 2014 and restored Kinney's account and videos. Kinney complained that the actionadventures channel was not restored to the same state it had been in before the suspension.

In May 2015, Kinney sued YouTube. YouTube filed a demurrer to Kinney's first amended complaint, which asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of section 17200, defamation, fraud, and conspiracy. The demurrer was overruled as to the breach of contract claim, sustained without leave to amend as to the defamation claim, and sustained with leave to amend as to all other claims.

Kinney's second amended complaint added new claims for breach of implied contract, and negligent and intentional interference with prospective economic advantage. YouTube moved for summary judgment and/or summary adjudication of all claims in the second amended complaint; the trial court granted summary adjudication of all claims except the claim for violation of section 17200. As to the section 17200 claim, the court treated the motion for summary adjudication as a motion for judgment on the pleadings, which it granted with leave to amend.

The court sustained YouTube's demurrer to the third amended complaint (which contained only a claim for violation of section 17200) with leave to amend. The trial court sustained the demurrer to the fourth amended complaint without leave to amend.

The trial court entered judgment, from which Kinney filed a timely notice of appeal.

DISCUSSION

I.

SUMMARY ADJUDICATION

"A trial court properly grants summary judgment if there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.] 'We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve all doubts about the evidence in that party's favor." (*Wassamann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 843.)

The trial court did not err in determining that all of Kinney's claims, with the exception of the claim for violation of section 17200, were barred by the applicable statute of limitations.

All of Kinney's causes of action arose out of or were related to YouTube's services. YouTube suspended Kinney's YouTube account in November 2012; this is the act Kinney alleges caused his damages. All of these causes of action were subject to a one-year statute of limitations. Paragraph 14 of the Terms of Service provides, in relevant part: "YOU AND YOUTUBE AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THE SERVICES MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED."

Kinney admitted in discovery that he had "agreed to YouTube's Terms of Service prior to starting the ActionAdventures Channel." Also, in Kinney's responses to special interrogatories, Kinney declared that the YouTube Terms of Service was the agreement with YouTube on which he was suing.

A contractual provision shortening the statute of limitations is enforceable. (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 76.) Specifically, California courts have upheld contractual terms shortening the four-year limitations period for a breach of written contract to one year (*Fageol Truck & Coach Co. v. Pacific Indem. Co.* (1941) 18 Cal.2d 748, 753; *C & H Foods v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1064), six months (*Beeson v. Schloss* (1920) 183 Cal. 618, 624), or even three months (*Tebbets v. Fidelity and Casualty Co.* (1909) 155 Cal. 137, 138-139; *Capehart v. Heady* (1962) 206 Cal.App.2d 386, 391). Kinney's claims were subject to a one-year limitations period, which began to run in November 2012. His complaint was filed in May 2015, after the limitations period had run.[1]

Kinney raises four arguments on appeal challenging the order granting summary adjudication, each of which we reject, as detailed *post*.

A.

Kinney Did Not Establish a Triable Issue of Material Fact.

Kinney argues he established a triable issue of material fact whether the one-year limitations period was included in the Terms of Service to which he agreed. YouTube's motion for summary judgment was supported by a declaration of a YouTube engineer who attached the Terms of Service in effect for YouTube in 2009, when Kinney created his account.[2] The Terms of Service included the one-year limitations period.

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[1] Even if they were not covered by the one-year statute of limitations in the Terms of Service, Kinney's causes of action for breach of an implied contract and intentional and negligent interference with prospective economic advantage were barred by the two-year statute of limitations in Code of Civil Procedure section 339, subdivision 1. (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1230 [breach of implied contract]; *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168 [interference with prospective economic advantage].)

[2] The evidence submitted in support of the motion for summary adjudication, all of which was included in the appellate record, included a printed copy of the YouTube Terms of Service that was in effect when Kinney created his account, the declaration of a YouTube engineer that Kinney could not have created his account without agreeing to the

The engineer's declaration included the following: "Within my role at Google, I am familiar with the methods of determining whether, at any given time, YouTube users had to agree to the Terms of Service Agreement as part of the process for their registering for the YouTube service. Throughout June 2009, all YouTube users who wanted to register and create a YouTube account were required to check a box affirming that they agreed to the Terms of Service Agreement as a condition for registering and creating their YouTube account. If a user did not check the box, they were notified that agreement to the Terms of Service Agreement was required, and they [*sic*] were prevented from proceeding with registration and creation of a YouTube account."

In opposition to the motion for summary judgment, Kinney declared: "I do not believe that the [Terms of Service] in existence in 2009 contained the one year statute of limitations. My basis for that is that in December 2014, I made a screen movie of the December 2014 link that, for example, sent me to a [Terms of Service] *without* the one-year clause. The November 2012 link is the same exact URL address."[3] Kinney's declaration also includes the following: "When I initially created an account with YouTube in June 2009, I recall having to click 'I agree' at one point during the online enrollment process. . . . I don't recall reading the [Terms of Service]."

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . [¶] . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his

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Terms of Service, and Kinney's discovery responses confirming that he agreed to the Terms of Service. At oral argument, Kinney's counsel contended that YouTube had failed to prove the existence of the Terms of Service signed by Kinney. The evidence cited here disproves that contention.

[3] Kinney did not provide the screen movie he made in December 2014 in opposition to the motion for summary judgment; it is not included in the appellate record.

burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, fns. omitted.)

YouTube met its initial burden of showing there was no triable issue of material fact as to the applicability of the one-year statute of limitations. Kinney's declaration failed to make a prima facie showing of the existence of a triable issue of material fact. Kinney admitted clicking the "I agree" button while registering his account, and further admitted he did not at that time read the Terms of Service. Kinney's belief about what the Terms of Service contained, based on what he claims to have read in a link five years later, cannot create a triable issue of material fact.

B.

The Limitations Period in the Terms of Service Was Not Unconscionable.

Kinney next argues that the one-year limitations period was unconscionable. Unconscionability is codified in Civil Code section 1670.5, subdivision (a): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Another panel of this court, in *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, provided a thorough explanation of the law of unconscionability in California: "In California, two separate approaches have developed for determining whether a contract or provision thereof is unconscionable. One, based upon the common law doctrine, was outlined by the California Supreme Court in *Graham v. Scissor-Tail*,

Inc. (1981) 28 Cal.3d 807 (*Graham*). Under *Graham*, the court first determines whether an allegedly unconscionable contract is one of adhesion. Upon making this finding, the court then must determine whether (a) the contract term was outside of 'the reasonable expectations of the [weaker] part[y],' or (b) was 'unduly oppressive or "unconscionable."' [Citation.] [¶] A separate test, based upon cases applying the Uniform Commercial Code unconscionability provision[,] views unconscionability as having 'procedural' and 'substantive' elements. [Citation.] 'The procedural element requires oppression or surprise. [Citation.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citation.] The substantive element concerns whether a contractual provision reallocates risks in an objectively unreasonable or unexpected manner.' [Citation.] Under this approach, both the procedural and substantive elements must be met before a contract or term will be deemed unconscionable. Both, however, need not be present to the same degree. A sliding scale is applied so that 'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Id.* at pp. 1317-1318, fn. omitted.)

"'Procedural unconscionability' concerns the manner in which the contract was negotiated and the circumstances of the parties at that time." (*Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) The Terms of Service constitutes a contract of adhesion, to which Kinney had no ability to negotiate. As explained in YouTube's motion for summary judgment, all YouTube users were required to agree to the Terms of Service "as a condition for registering and creating their YouTube account." However, there was no surprise regarding the contractual limitations period. As noted *ante*, the terms were included in all capital letters in a four-page document containing 14 different subjects.

We next turn to substantive unconscionability. "A provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.' [Citation.] The phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.' . . . 'With a concept as nebulous as "unconscionability" it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.'" (*Morris v. Redwood Empire Bancorp, supra,* 128 Cal.App.4th at pp. 1322-1323.)

We cannot conclude a one-year limitations period is harsh, oppressive, or shocking of the conscience. The one-year limitations period is not outside the reasonable expectations of the parties, and is not an unreasonable or unexpected reallocation of risk. A one-year limitations period has been upheld in many types of cases. (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1432; *Han v. Mobil Oil Corp.* (9th Cir. 1995) 73 F.3d 872, 877). Therefore, we conclude the limitations period in the Terms of Service was not unconscionable.

C.

The Continuous Accrual Doctrine Does Not Apply.

Kinney's claims were not saved by virtue of the continuous accrual doctrine. "Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' [Citation.] Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation [citation]—each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1199.)

The continuous accrual theory has been applied in cases where the plaintiff asserts a right to, or challenges the assessment of, periodic payments under contract or under California statutes or regulations. (See *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 818-822 [imposition of monthly municipal taxes]; *Green v. Obledo* (1981) 29 Cal.3d 126, 141 [welfare benefits]; *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 103-107 [back wages based upon ongoing discrimination]; *Dryden v. Board of Pension Commrs.* (1936) 6 Cal.2d 575, 580-581 [monthly pension benefits]; *Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 382 [overpayments of retired teachers' benefits]; see also *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 394 [each negligent release of hazardous substances was a separate violation].)

"Applied to contractual disputes, the rule is but an application of the doctrine of contractual severability. [¶] 'Where a contract is divisible and, thus, breaches of its severable parts give rise to separate causes of action, the statute of limitations will generally begin to run at the time of each breach; in other words, each cause of action for breach of a divisible part may accrue at a different time for purposes of determining whether an action is timely under the applicable statute of limitations.' [Citation.] [¶] The context of continuing—that is, periodic—accrual for periodic breach is to be distinguished from that of a single breach or other wrong which has continuing impact. [Citation.] . . . [¶] If the parties to its making intend an entire contract, not a severable one, the courts will not find it divisible despite periodic performance. [Citation.] Generally, the parties' intent is revealed by '"the nature and character of the agreement . . . ."'" (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1388-1389.) The YouTube Terms of Service is not a divisible contract, nor does it anticipate periodic performance.

The present case is far more like *NBCUniversal Media, LLC v. Superior Court, supra,* 225 Cal.App.4th 1222, than any of the cases cited by Kinney. The

plaintiffs in that case claimed the defendants exploited their idea for a reality television show, and sought recovery for each episode of the show as a separate breach. (*Id.* at p. 1226.) The court held that the continuous accrual theory did not apply: "[E]ach broadcast of a new episode of the *Ghost Hunters* series is part of a single breach. Each broadcast of *Ghost Hunters* would constitute not a new breach, but rather additional harm." (*Id.* at p. 1237, fn. 10.) The appellate court concluded that the statute of limitations began to run, at the latest, when the *Ghost Hunters* show first premiered and destroyed the marketability of plaintiffs' "idea of a paranormal-investigation reality television series." (*Ibid.*)

D.

Kinney Did Not Create a Triable Issue of Material Fact Regarding His Assent to the One-Year Statute of Limitations.

Finally, Kinney argues that he raised a triable issue of material fact whether he assented to the one-year limitations period.

By clicking on the box affirming that he had read and agreed to the Terms of Service in the process of registering at YouTube, Kinney assented to the Terms of Service. (*Meyer v. Uber Technologies, Inc.* (2nd Cir. 2017) 868 F.3d 66, 80 [applying California law; the plaintiff agreed to terms and conditions by clicking on the registration button]; *Hancock v. American Tel. and Tel. Co., Inc.* (10th Cir. 2012) 701 F.3d 1248, 1258-1259 [clicking "'I Agree'" and "'I Acknowledge'" buttons affirmatively manifests assent to terms of service]; *Applebaum v. Lyft, Inc.* (S.D.N.Y. 2017) 263 F.Supp.3d 454, 469-470 [laws of California, New York, and Illinois were the same regarding contract formation; the plaintiff assented to terms of service by clicking "I accept" after being advised "'Before you can proceed you must read & accept the latest Terms of Service'"]; *Bassett v. Electronic Arts, Inc.* (E.D.N.Y. 2015) 93 F.Supp.3d 95, 101-102 [no difference between California and New York law; affirmative assent to terms of service manifested

"when EA presented Plaintiff with the Terms of Service and Privacy Policy and Plaintiff clicked 'I Accept' in order to create an account and register for EA Online"]; *Song Fi, Inc. v. Google Inc.* (D.D.C. 2014) 72 F.Supp.3d 53, 56-57 [applying California law; to create YouTube account, user must check the box stating "'I agree to the Terms of Use and Privacy Policy'"]; *Sandler v. iStockphoto LP* (C.D.Cal. Feb. 5, 2016, No. 2:15-CV-03659-SVW-JEM) 2016 U.S.Dist. Lexis 31330, *4-*5 [applying California law; assent to membership agreement established by testimony of the defendant's employee that the plaintiffs could not have become members without agreeing online to the membership agreement]; *Swift v. Zynga Game Network, Inc.* (N.D.Cal. 2011) 805 F.Supp.2d 904, 911 [applying California law; "Plaintiff admits that she was required to and did click on an 'Accept' button directly above a statement that clicking on the button served as assent to the YoVille terms of service along with a blue hyperlink directly to the terms of service"]; *Feldman v. Google, Inc.* (E.D.Pa. 2007) 513 F.Supp.2d 229, 237-238 [holding that where user had to "click the 'Yes, I agree to the above terms and conditions' button in order to proceed" with the online transaction, there was reasonable notice of the terms and mutual assent to the contract]; *Riensche v. Cingular Wireless, LLC* (W.D.Wash. 2006, No. C06-13252) 2006 U.S.Dist. Lexis 93747 [concluding that plaintiff assented to arbitration clause when he indicated his agreement to the terms of service online]; *Hugger-Mugger, L.L.C. v. Netsuite, Inc.* (D.Utah Sep. 12, 2005, No. 2:04-CV-592TC) 2005 U.S.Dist. Lexis 33003 [applying California law; clicking on affirmative agreement to terms of service constitutes assent]; *Davidson & Associates. v. Internet Gateway* (E.D. Mo. 2004) 334 F.Supp.2d 1164, 1176-1177 [applying California law; clickwrap agreement enforceable]; *DeJohn v. The .TV Corp. Internat.* (N.D. Ill. 2003) 245 F.Supp.2d 913, 915-916 [applying California law; "electronic format of the contract required DeJohn to click on a box indicating [t]hat he had read, understood, and agreed to the terms of the contract in order to accept its provisions and obtain the registration or reject the provisions and cancel the application"].)

YouTube offered admissible evidence that Kinney was required to click on the button agreeing to the Terms of Service in order to register his account. Kinney admitted in his opposition to the motion for summary judgment that he did, in fact, click on the "I agree" button. There is no triable issue of material fact as to Kinney's assent to the Terms of Service.

II.

DEMURRER

A.

The Cause of Action for Violation of Section 17200 Did Not State a Claim.

The trial court sustained YouTube's demurrer to the cause of action for violation of the Unfair Competition Law without leave to amend. We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, any attachments to the complaint, and the facts that reasonably can be inferred from those expressly pleaded. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We must construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) "We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons." (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848.)

Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice." The statute is written in the disjunctive, and thus prohibits "'three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Kinney's fourth amended complaint claimed that YouTube's business practices violated the "unfair" prong. "'"[A]n 'unfair' business practice occurs when that

practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]"' [Citation.] '"[W]here a claim of an unfair act or practice is predicated on public policy, . . . the public policy which is a predicate to the action must be 'tethered' to specific constitutional, statutory or regulatory provisions."'" (*Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1303.)

Reading Kinney's fourth amended complaint as liberally as possible, he alleges the following unfair business practices against YouTube:

— "Plaintiff was essentially lured and enticed by YouTube, through its own advertising and promotions, to sign up for his account in June 2009 and build a channel and community gathering."

— "YouTube also enticed Plaintiff and took his money in its promoting-videos program, AdWords, which is a Google product, and/or 'YouTube Promoted Videos.'"

— "YouTube terminated *actionadventures* without warning or notification of any violation."

— "YouTube published to the world that Plaintiff was a violator and was a wrongdoer which undoubtedly affected his credibility and popularity with his subscribers and substantial following that he took over 3 years to build."

— "YouTube may have possibly suspended and/or terminated *actionadventures* for using tubetoolbox.com because suddenly many of those members had also been suspended at the same time. After 3.4 years of use, YouTube never gave any warnings whatsoever to tubetoolbox.com or Plaintiff on his channel *actionadventures* of any misunderstanding or misuse of the guidelines. YouTube never gave any warning or red flag of any sort of misconduct whatsoever."

— "YouTube left the message to the world that Plaintiff was a violator for over two years when he was not, and ultimately reinstated his account, but only after

Plaintiff sent numerous emails addressing the issue, which were left ignored by YouTube."

— "All of Plaintiff's time and effort that he spent on his YouTube channel and posting comments on other people's channels, networking and connecting with others, were all lost based on YouTube's illegitimate acts of suspending/terminating Plaintiff's account for no reason at all."

— "YouTube has refused to acknowledge the broken status of Plaintiff's channel and chose to ignore Plaintiff's many attempts and requests for YouTube to remedy the issues."

Kinney's fourth amended complaint does not allege any constitutional, statutory, or regulatory provisions to which a violation of public policy can be tethered. Further, the complaint does not allege any business practice by YouTube that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

The allegations are the same as those Kinney made in his other causes of action, which were resolved on summary judgment. "A UCL action "'is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he 'overarching legislative concern [was] to provide a streamlined procedure for prevention of ongoing or threatened acts of unfair competition.'" [Citation.] As a result, the remedies available to private individuals for violation of the UCL are limited to restitution and injunctive relief; damages cannot be recovered." (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 609-610.)

Kinney's allegation that YouTube may have suspended other users' channels at the same time it suspended his channel is not an allegation of an unfair practice directed at the public by YouTube. To the contrary, the allegation emphasizes the true nature of Kinney's claim—an individual claim against YouTube based on

contract and tort principles. The trial court did not err in sustaining YouTube's demurrer to Kinney's section 17200 claim.

B.

The Trial Court Did Not Err in Denying Leave to Amend.

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"Furthermore, where the plaintiff requests leave to amend the complaint, but the record fails to suggest how the plaintiff could cure the complaint's defects, 'the question as to whether or not [the] court abused its discretion [in denying the plaintiff's request] is open on appeal . . . .' [Citation.] Because the trial court's discretion is at issue, we are limited to determining whether the trial court's discretion was abused as a matter of law. [Citation.] Absent an effective request for leave to amend the complaint in specified ways, an abuse of discretion can be found '"only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case."'" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 507, overruled in part on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939.)

In *Lincoln Property Co., N.C., Inc. v. Travelers Indemnity Co.* (2006) 137 Cal.App.4th 905, 916, the appellate court held: "[W]e find no abuse of discretion in the trial court's denial of leave to amend. Although [the plaintiff] has consistently requested leave to amend, it has never suggested what facts it is prepared to allege that would cure the defect in its complaint. There is nothing in the record that suggests that [the plaintiff]

could amend its complaint to state a cause of action which would not similarly be barred."

Kinney argues the trial court erred in sustaining the demurrer without leave to amend. Kinney contends the trial court should have articulated the deficiency in Kinney's pleading and permitted Kinney to amend. Having had five opportunities to plead his case, Kinney cannot contend that he was not provided sufficient opportunity to amend his complaint. Nowhere in his appellate briefs does Kinney indicate how he could have amended his complaint to state a cause of action for violation of section 17200. Kinney has therefore failed to carry his burden of showing there is a reasonable possibility the defects in the pleading of his section 17200 claim can be cured by amendment. We therefore conclude the demurrer was properly sustained without leave to amend.

DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.