

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 02/04/2022

TIME: 09:30:00 AM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack

CLERK: Terry Abas

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: Deputy Paul Tomcavage

CASE NO: **37-2021-00029564-CU-BT-CTL** CASE INIT.DATE: 07/12/2021

CASE TITLE: **Marvel vs Cox Communications INC [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Demurrer / Motion to Strike

MOVING PARTY: Cox Communications Inc, CoxCom LLC

CAUSAL DOCUMENT/DATE FILED: Demurrer, 09/24/2021

EVENT TYPE: Motion Hearing (Civil)

EVENT TYPE: Civil Case Management Conference

MOVING PARTY: James Marvel

CAUSAL DOCUMENT/DATE FILED: Complaint, 07/12/2021

APPEARANCES

DANIEL M HATTIS, counsel, present for Plaintiff(s) via remote audio conference.

Paul Karl Lukacs, counsel, present for Plaintiff(s).

Frederick K Taylor, counsel, present for Defendant(s) via remote video conference.

The Court orally advises the parties of its tentative ruling, after which oral argument is conducted. Upon completion of oral argument, the court makes the below ruling:

I.

INTRODUCTION

This is a demurrer or, in the alternative, a motion to strike, brought by defendants Cox Communications, Inc., and CoxCom, LLC (hereinafter collectively referred to as "Cox") to the first amended complaint ("FAC") of plaintiff James Marvel ("Marvel").

II.

APPLICABLE LAW

a. Demurrer

"[I]n considering the merits of a demurrer, the facts alleged in the pleading are deemed true, however, improbable they may be." *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034. However, the court does not assume the truth of "contentions, deductions, or conclusions of fact or law." *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125. The question of plaintiff's ability to prove the allegations or the possible difficulty in making such proof is of no concern to the court in ruling on a demurrer. *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496. Moreover, a demurrer can be used only to challenge defects that appear on the face of the pleading under attack or matters outside the pleading that are judicially noticeable. *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968, 994.

b. Motion to Strike

CCP §436 provides:

The court may, upon a motion made pursuant to Section 435, or at any time in its discretion and upon terms it deems proper:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of the state, a court rule, or an order of the court.

III.

ANALYSIS

In this action, Marvel contends that he was duped into signing up for a 2-year television and internet package for a "guaranteed" monthly price of \$99.99, only to later find out that the \$99.99 monthly charge was subject to additional service charges consisting of the "Broadcast Surcharge" and the "Regional Sports Surcharge."

The FAC alleges six causes of action:

1. Violation of California Civil Code §1750 ("CLRA")
2. Violation of California Business & Professions Code §17500 ("FAL")
3. Violation of California Business & Professions Code §17200 ("UCL")
4. Breach of Contract
5. Breach of the Implied Covenant of Good Faith and Fair Dealing
6. Declaratory Relief

Cox's demurrer is based upon the premise that because its \$99.99/month guaranteed service agreement provision expressly excluded "fees for non-services (like taxes and surcharges) which may change," "charges for equipment," and "applicable taxes, fees and surcharges," it cannot, as a matter of

law, be held liable under the CLRA, the FAL, or the UCL.

The problem with Cox's position is the FAC's plausible assertion that these two so-called surcharges are, in fact, simply service charges to provide broadcast and local sports channels. See Complaint at ¶¶4 and 6. According to the FAC, these two surcharges are disguised additional charges for services which Cox utilizes to charge a higher monthly rate without having to advertise the actual, higher price. Simply stated, Cox cannot market a *guaranteed fixed* price for full services and then increase the price by simply labeling the charge for some services as "fees" or "surcharges."

Furthermore, to the extent that there may exist an argument that the subject two surcharges can be properly excluded from the guaranteed price, such clearly must await the ultimate determination of the trier of fact. "Whether a practice is deceptive, fraudulent, or unfair, is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer." *Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164. "The question whether consumers are likely to be deceived is a question of fact that can be decided on a demurrer only if the facts allege in the complaint, and facts judicially noticed, compel the conclusion as a matter of law that consumers are not likely to be deceived." *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 226-227. See *Tillage v. Comcast Corp.* (N.D. Cal.) 2021 WL 3417940, at p. *1 ("[I]f Comcast advertised a base price for a cable package and merely noted that this price did not include 'fees' without further specification, such an advertisement could likely be deceptive because the Broadcast TV Fees and Regional Sports Fees are not the types of fees that an ordinary consumer would expect to be added to the base price (in contrast to the more typical government-imposed fees).").

Specific to the CLRA cause of action (third cause of action), however, the court finds that Cox's offer of correction to refund fees to Marvel and make no further charges for the two subject surcharges eliminates Marvel's claim for damages under the CLRA. *Kagan v. Gibraltar Savings & Loan Association* (1984) 35 Cal.3d 582, 590 ("If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such correction within a reasonable time, no cause of action for damages will lie.").

The court notes that Marvel has sought public injunctive relief in addition to damages. Since the 30-day notice requirement does not apply to CLRA claims for injunctive relief (Civil Code §1782(d)), the motion to strike is granted only as to Marvel's CLRA's damage claim, leaving intact Marvel's claim for injunctive relief.

IV.

CONCLUSION

Cox's demurrer to the first, second, third, and sixth causes of action are overruled. Cox's motion to strike the damages claim (but not the claim for injunctive relief) within the first cause of action ("CLRA") is granted.

Cox shall file its answer to the FAC on or before February 18, 2022.

Civil Case Management Conference

Pursuant to California Rules of Court 3.714, the Court, after having met and conferred with counsel, categorizes this case as one that will be disposed of within 12 months.

All Motions and Discovery are to be completed 11/10/22. Motion for Summary Judgment / Summary Adjudication will be heard pursuant to code. First expert exchange to be completed by 9/9/22. Second expert exchange to be completed by 9/23/22. Posting of jury fees is pursuant to code.

DOE defendants are NOT dismissed.

The Trial Readiness Conference (Civil) is scheduled for 11/23/2022 at 09:00AM before Judge Gregory W Pollack.

The Civil Jury Trial is scheduled for 12/09/2022 at 08:45AM before Judge Gregory W Pollack.

Estimated length of trial: 6 days



Judge Gregory W Pollack

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Marvel vs Cox Communications INC [IMAGED]

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:
37-2021-00029564-CU-BT-CTL

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 02/08/2022.

Clerk of the Court, by:  T. Abas, Deputy

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Additional names and address attached.

CLERK'S CERTIFICATE OF SERVICE BY MAIL