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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SEAN JAQUEZ, Plaintiff and Appellant, v. PROTECTION ONE ALARM MONITORING, INC. et al., Defendants and Respondents.	B245829 (Los Angeles County Super. Ct. No. JCCP4587)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed in part, reversed in part, and remanded.

The Law Office of Minh T. Nguyen and Minh T. Nguyen for Plaintiff and Appellant.

Kirkland & Ellis, C. Robert Boldt and Alexander M. Bastian; Buchalter Nemer, and Mark T. Cramer for Defendants and Respondents.

Sean Jaquez appeals from a judgment of dismissal entered after the trial court sustained a demurrer to his first amended complaint without leave to amend. Jaquez challenges the early termination fee charged by Protection One Alarm Monitoring, Inc. (Protection One) on the grounds it is a fraudulent and deceptive practice and violates the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200), and the Consumers Legal Remedies Act (CLRA; Civ. Code, § 7150). We find Jaquez has alleged facts sufficient to state a claim for fraud. Accordingly, we reverse and remand.

FACTS[1]

Jaquez purchased a new home in Alhambra which had an existing Protection One alarm system in place. On February 19, 2005, Jaquez contracted with Protection One to activate the alarm and set up a monitoring system. Fran Morse, a Protection One employee, provided Jaquez with a standard preprinted contract entitled the "Residential Alarm System and Service Agreement." Morse explained what she considered the "important" terms of the agreement and filled in Jaquez's personal information on the front page of the agreement. Morse did not mention that the agreement was for a predetermined length of time or that there would be an early termination fee if Jaquez cancelled prior to the expiration of the contract. Morse also provided Jaquez with a notice of cancellation in a separate document. The notice of cancellation advised Jaquez he had a three-day cooling off period under California law during which time he could review a duplicate copy of the agreement and cancel the contract for any reason without penalty. That night, Jaquez reviewed the agreement and noted that only the front page had any writing. He then agreed to be bound by the terms of the agreement and allowed the three-day cooling off period to expire.

On March 14, 2005, Morse and two technicians from Protection One activated the preexisting security alarm system. Once the system was activated, one of the technicians handed Jaquez a purported copy of the agreement and asked him to sign it to acknowledge that the system was activated. Because he was asked to sign only the front

[1] The facts and allegations are taken from the first amended complaint, which is the operative complaint.

page and believed it to be an exact copy of the agreement he had previously signed, Jaquez did not notice there was writing on the second page, which contained an early termination provision in lightly-shaded font. The second page stated the agreement was for an initial term of three years with automatic one-year renewals. It also stated: "If this contract is terminated prior to the end of the then-current term, except as otherwise provided herein, you agree to pay us an early cancellation fee as liquidated damages for cancellations in the initial term. The cancellation fee is $750. . . . However, in no event shall the cancellation fee exceed the amounts that you would have paid through the remaining portion of the term. The cancellation fee is presumed to be the amount of damages sustained by your breach of this agreement, as it would be impracticable or extremely difficult to fix the actual damage." "The Initial Term will start on the date your alarm system is installed and operational, and when the necessary communications connection is completed."

On November 10, 2006, Jaquez decided to discontinue the alarm monitoring system with Protection One. When he informed them, Protection One demanded that Jaquez pay a $449.35 cancellation penalty, which represented the amount due through the remaining term. Jaquez was not aware of the cancellation fee or that there were any terms on the second page of the agreement until he was directed to it when he called to cancel. Jaquez paid $89.95 under protest for the period between December 12, 2006 to March 15, 2007. He then paid an additional $359.40, again under protest, to cover the time period between March 16, 2007 and March 15, 2008. He was then able to cancel the contract at the end of the initial three year term without penalty.

Jaquez sued Protection One, along with its employees,[2] on November 7, 2008. Jaquez asserted causes of action under the UCL, the CLRA and for fraud and deceit. Jaquez alleged, "it is Defendants' policy and practice to encourage Protection One sales representatives and technicians to knowingly deter customers from discovering and/or reviewing material provisions contained in the standard [agreement], including those

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[2] For ease of reference, we will refer to all defendants, including Protection One employees sued by Jaquez, collectively as Protection One.

provisions related to the initial term, renewal term, and early termination/cancellation penalty." He accused Protection One of altering the agreement "to purposefully make material provisions—such as the initial term—less apparent to customers." He also accused Protection One of seeking to restrain competition by obfuscating the terms of the agreement and then imposing burdensome cancellation fees that deter customers from switching to a competing alarm service company.

Jaquez attached a copy of the agreement to his complaint. On the first page of the agreement, directly above the signature line, is the following warning: "THIS CONTRACT AUTOMATICALLY RENEWS AT THE END OF THE TERM. IF I CANCEL EARLIER THAN PROVIDED, I MAY BE CHARGED A CANCELLATION FEE. I UNDERSTAND THAT I MAY CANCEL THIS CONTRACT WITHIN THREE (3) BUSINESS DAYS BY GIVING NOTICE TO PROTECTON ONE AS INDICATED ON THE ATTACHED NOTICE OF CANCELLATION. I HAVE READ AND UNDERSTAND THIS CONTRACT."

The trial court granted Protection One's motion for judgment on the pleadings with leave to amend. Jaquez filed a first amended complaint on September 26, 2011, and Protection One demurred. The trial court sustained the demurrer without leave to amend. Judgment was entered in favor of Protection One on June 7, 2012. Jaquez filed a timely appeal.

DISCUSSION

On appeal, Jaquez contends the trial court erred when it sustained Protection One's demurrer, without leave to amend, in its entirety. We agree. We find Jaquez has alleged sufficient facts to state a cause of action for fraud and deceit. These factual allegations also underlie the claims for violation of the UCL based on a fraudulent business practice. Therefore, the UCL claims survive on that limited basis. As to the remaining cause of action for violation of the CLRA, the trial court properly sustained the demurrer.

I. Standard of Review

A demurrer tests the legal sufficiency of the complaint. (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43.) Accordingly, in reviewing whether a trial court erred in sustaining a demurrer, we accept as true all facts properly pleaded along with those that might be implied or inferred from those expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) Although on demurrer a reviewing court ordinarily assumes as true the facts alleged in the complaint, a pleader's legal characterization of a contract is not controlling, particularly when the contract is attached to the pleading. (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1315 (*Morris*).) We review the trial court's action de novo and exercise our own independent judgment whether a cause of action has been stated under any legal theory. (*Ibid.*; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

II. Fraud and Deceit

Jaquez alleges in the fourth cause of action that Protection One deceived him by representing that the agreement he initially signed was the full and complete agreement. However, Protection One failed to give him the second page, which specified that it was a three-year contract and outlined the early termination fee. Although he read the agreement during the three-day cooling off period, Jaquez was not made aware of the three-year term and the early termination fee provision until after he entered into the contract. Jaquez asserts Protection One intentionally concealed the terms of the contract to ensure customers signed with Protection One rather than one of its competitors. As a result, Jaquez contracted with Protection One and was harmed in that he was forced to pay an early termination fee. We find these allegations sufficient to state a cause of action for fraud and deceit.

The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Each element of a fraud count must be pleaded with particularity so as to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action, although less specificity is required if the defendant would likely have greater knowledge of the facts than the plaintiff. (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 216-217.)

Protection One contends that Jaquez failed to allege justifiable reliance, a crucial element to a fraud claim. "Because multiple provisions on the first page of the contract indicate that there was more to the contract than that first page, and because Jaquez alleges that he is a California lawyer who 'read' the contract 'carefully' [], it was not reasonable or justifiable for Jaquez to rely on that first page as the entire contract." We find Jaquez has sufficiently alleged justifiable reliance because he alleged he agreed to the terms of the contract before he knew all of its terms since the second page was initially withheld from him.

The California Supreme Court has held a contract to be void for fraud in the execution where " ' "the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, [and] mutual assent is lacking . . . ." ' " (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415 (*Rosenthal*).) Thus, a party claiming fraud in the execution of a contract must prove that he had no reasonable opportunity to learn the character or the essential terms of the document he was signing. (*Id*. at p. 423.) The *Rosenthal* court held that "misrepresentation does not render the contract *void* unless the misled party, before making the agreement, lacked a reasonable opportunity to learn its terms." (*Id.* at p. 421.) The *Rosenthal* court found justifiable reliance was adequately shown where a blind woman relied on the oral representations of a salesman who failed to alert her to the existence of an arbitration clause. The court declined to find the woman negligent even though she failed to take additional steps to learn the contents of the contract, such as ask her sister, who was not blind, to read the contract to her. (*Id.* at p. 429.)

Based on the record before us, Jaquez likewise had no reasonable opportunity to learn the essential terms of the document he signed as a result of Protection One's purported failure to provide him with the second page of the agreement. Although the agreement warns a potential customer that he *may* be charged a cancellation fee, that statement alone would not have informed a reasonable person that he *would* be charged an early termination fee, much less one for $750 or the remaining amount due under the agreement. Jaquez was not negligent in failing to take additional steps to ascertain what *may* be charged as an early termination fee. While the law is clear that a consumer is generally not excused from reading a contract, Protection One has provided no legal authority for the proposition that a consumer is obligated to question and investigate any provisions which merely allude to a potential fee.

Contrary to Protection One's characterization, the agreement on its face does not indicate there is more than one page to the agreement. The document specifies that it is "page 1 of __" with the number 1 handwritten and any indication that there were additional pages left blank. We are also not convinced by Protection One's argument that the terms of the contract themselves indicate to a reasonable reader that there is a second page. For example, Protection One notes the first page states that "this contract contains provisions significantly limiting [Protection One's] liability . . ." and "this contract . . . provid[es] for arbitration of any disputes [bold and capitalization excluded]," yet does not contain a full arbitration provision or limited liability provision. Whether these statements are sufficient to alert a reasonable reader to the existence of a second page is a question of fact. They do not, at the pleading stage, overcome Jaquez's allegations that Protection One actively hid the second page of the agreement from him. Finally, we reject Protection One's argument that Jaquez was provided with a second page at the time the system was activated. Jaquez was already bound by the agreement by then. Protection One does not contend otherwise. Under the terms of the agreement, Jaquez would have been responsible for the full $750 "early" termination fee even if he cancelled immediately after activation.

III. Claim for Unfair Competition

Jaquez asserts two causes of action under the UCL: one on behalf of the general public under the private attorney general theory and the second for a class action. Both causes of action are premised on the same alleged unlawful, unfair, and fraudulent business practice. Primarily, Jaquez complains of a "bait and switch" tactic by Protection One where it deceived customers by initially presenting an agreement that did not contain all of the terms (i.e., there was no second page) and then later tricked customers into signing a second document appearing to be a copy of the agreement, but which instead contained additional provisions in small, faint print on the previously withheld second page. "Customers are not made aware of and do not notice the new provisions because they are on the reverse side of the document in very small, extraordinarily faint type[.]"

Jaquez asserts that Protection One's conduct constituted unfair competition under the UCL. "Unfair competition" under the UCL includes any "unlawful, unfair or fraudulent business act or practice . . . ." (Bus. & Prof. Code, § 17200.) In particular, Jaquez alleges the early termination fee is unlawful because it violates Civil Code, sections 1670.5 (unconscionability), 1671 (liquidated damages), and 1770(a)(16)(agreement not in accordance with previous representations) as well as the requirements of Business and Professions Code section 7159(c)(1)-(2) and the CLRA. Jaquez also asserts Protection One's conduct violates the UCL because it is unfair and fraudulent. We address each of the bases for Jaquez's UCL causes of action below.

A. UCL Claim Based On Unlawful Conduct

The UCL reaches beyond deceptive or fraudulent acts, and extends to any unlawful business conduct. (*Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, at pp. 197, 209-210.) "By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable." (*Cel-Tech, Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Jaquez asserts that the termination fee runs afoul of five different statutes: Civil Code, sections 1670.5, 1671, and 1770, Business and Professions Code section

7159(c)(1)-(2), and the Consumer Legal Remedies Act (CLRA). None of these statutes provide a basis for Jaquez to assert a claim under the UCL.

1. Civil Code section 1670.5

Jaquez alleges the termination fee in the merchant agreement is unconscionable under Civil Code section 1670.5. Subdivision a of section 1670.5 allows a court to refuse to enforce any portion or all of a contract if it finds as a matter of law that the contract or clause is unconscionable at the time it was made. The issue whether a contract provision is unconscionable is a question of law. (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.)

Civil Code section 1670.5 does not define unconscionability and the concept applies to a wide variety of conduct. (1 Witkin, Summary of California Law (10th ed. 2005) Contracts § 331, p. 366) In California, two separate approaches have developed for determining whether a contract or term 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 (*Scissor-Tail*). Under *Scissor-Tail*, 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.' " (*Id.* at p. 820.)

A separate test, based upon cases applying the Uniform Commercial Code unconscionability provision views unconscionability as having "procedural" and "substantive" elements. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473 (*A & M Produce*).) "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." (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539.) Applying the procedural/substantive approach, courts have declared a contract unconscionable if it "involves contract terms that are so one-sided as to ‘shock the conscience,’ or that impose harsh or oppressive terms.” (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

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.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-114 (*Armendariz*).)

Our Supreme Court in *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, (*Perdue*), performed its unconscionability analysis exclusively under the *Graham* approach, but noted the two analytical approaches are not incompatible, declaring: “Both pathways should lead to the same result.” (*Id.* at p. 925, fn. 9.) The high court also discussed both approaches in *Armendariz, supra*, 24 Cal.4th at pp. 113-114, but noted that “ ‘[t]he prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.’ ” (*Id.* at p. 114, quoting *Stirlen v. Supercuts, Inc.*, (1997) 51 Cal.App.4th 1519, 1533.) Since then, the court appears to have chosen to employ exclusively the procedural/substantive approach. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 246, and *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1159.) Professor Witkin has also recast the *Scissor-Tail* analysis as one which “embodies the elements of both procedural unconscionability . . . and substantive unconscionability . . .; and the court’s conclusion ties both elements together.” (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 332, p. 368.) We follow the Supreme Court’s lead and apply the procedural/substantive approach to this issue. In doing so, we find the agreement lacking in substantive unconscionability.

Jaquez argues the first amended complaint has adequately alleged substantive unconscionability "[g]iven (1) the size of the ETF (which sits on a sliding scale between the value of the entire Acknowledgment term and $750.00), (2) that all of the risk of termination rests with Plaintiff, and (3) that Plaintiff was purposefully not made aware of the ETF or initial three (3) year term by Defendants . . . ."

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." (*24 Hour Fitness, supra*, 66 Cal.App.4th at pp. 1199, 1213.) "[I]t is clear that the price term, like any other term in a contract may be unconscionable. [Citations.] Allegations that the price exceeds cost or fair value, standing alone, do not state a cause of action. [Citations.] Instead, plaintiff's case will turn upon further allegations and proof setting forth the circumstances of the transaction. [¶] The courts look to the basis and justification for the price [citation], including 'the price actually being paid by . . . other similarly situated consumers in a similar transaction.' [Citation.]" (*Perdue, supra*, 38 Cal.3d at pp. 913, 926-927.)

Applying this analysis, we cannot conclude that a fee equal to the amount remaining under the contract (and capped at $ 750), standing alone, is so harsh or oppressive as to "shock the conscience." (*Morris, supra*, 128 Cal.App.4th at pp. 1305, 1315 [$150 termination fee did not shock the conscience]; *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 105 [loan agreement containing both prepayment penalty and right to demand full payment held neither unconscionable per se nor objectively unreasonable].) We instead must consider the basis or justification for the fee. Jaquez, however, has made no allegation that Protection One's termination fee is grossly out of line with fees charged by other security companies. Nor has Jaquez alleged any facts demonstrating what costs, if any, Protection One incurred in terminating the account. There is no allegation that the fee is out of proportion to the costs of terminating the account, particularly when Protection One must physically remove the security system from the house. As one court noted, "[i]t is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." (*Geldermann & Co., Inc. v. Lane Processing, Inc.* (8th Cir. 1975) 527 F.2d 571, 576.) It is obvious that Jaquez believed he was getting value for the security system at the time he entered into the Protection One agreement. He has failed to allege facts to demonstrate the early termination fee is substantively unconscionable.

Moreover, Jaquez's argument that all of the risk of termination rests with him does not involve the "one-sided" reallocation of risks found by courts to "shock the conscience." An unconscionable reallocation of risks occurs when, for example, a manufacturer disclaims all warranties that the product will perform its intended functions, or precludes a buyer's recovery of consequential damages. (*A&M Produce, supra,* 135 Cal.App.3d at pp. 491-493.) In such situations, the seller shifts the risk connected with matters in its own control to the buyer, in contravention of the basic principle that the "risk of loss is most appropriately borne by the party best able to prevent its occurrence." (*Id*. at p. 491.) Imposition of the termination fee upon the customer here does not improperly reallocate the risk of the bargain because the customer may just as easily terminate the contract, as Jaquez did here. Finally, Jaquez's argument that he was unaware of the early termination fee or the length of the contract addresses procedural unconscionability, not substantive unconscionability. Having determined that the early termination fee is not substantively unconscionable, we need not address whether it is also not procedurally unconscionable.

2. Civil Code section 1671

Jaquez next contends that the early termination fee is an invalid liquidated damages provision under Civil Code section 1671. We disagree. Section 1671, subdivision (b), provides in relevant part: "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." Absent a relationship between the liquidated damages and the damages the parties anticipated would result from a breach, a liquidated damages clause will be construed as an unenforceable penalty. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977 (*Ridgley*).)

We find that the early termination fee contained in Protection One's agreement does not implicate section 1671 because it is not an unenforceable penalty. It is instead an alternative to performance that allows Jaquez to choose whether to fulfill the three year contract or pay an early termination fee. "Where a contract for a specified period of time permits a party to terminate the agreement before its expiration in exchange for a lump-sum monetary payment, the payment is considered merely an alternative to performance, and not a penalty." (*Morris, supra*, 128 Cal.App.4th at p. 1314; *Blank v. Borden* (1974) 11 Cal.3d 963, 970 (*Blank*).) In *Blank,* the Supreme Court reviewed a contract allowing a real property owner to terminate a listing agreement with a broker before its expiration upon the payment of a specified fee. It concluded the provision was not a liquidated damages provision because the fee was not triggered by a breach or default under the agreement. The court noted the contract presented the owner with a true option or alternative: "if, during the term of an exclusive-right-to-sell contract, the owner changes his mind and decides that he does not wish to sell the subject property after all, he retains the power to terminate the agent's otherwise exclusive right through the payment of a sum certain set forth in the contract." (*Id.* at p. 970.)

Jaquez argues that the alternative performance analysis under *Blank* and *Morris* does not apply here because the fee is referred to as "liquidated damages" and fails to use the words "alternative performance" anywhere. Having looked to the substance rather than the form of the provision, we conclude that its true function is that of an alternative to performance. (*Blank, supra*, 11 Cal.3d at p. 970.)

Jaquez further contends the early termination fee is an unlawful penalty because it can be triggered involuntarily by Protection One, citing to *Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298 (*Cellphone*). There, a class of consumers challenged Sprint's early termination fees. The trial court found that Sprint's early termination fee was an unlawful liquidated damages clause and not an alternative means of performance. (*Id.* at p. 321.) On appeal, the court found substantial evidence to support the trial court's findings. (*Cellphone*, *supra*, at p. 329.) The court relied on evidence that 80 percent of the customers who were charged an early termination fee were terminated by Sprint after it declared the contract had been breached. Accordingly, the predominant effect of the early termination fee was not to provide consumers with a choice of whether to keep the contract or terminate it. Instead, consumers were forced to pay the fee after Sprint unilaterally decided to terminate the contract. (*Ibid.*)

Contrary to Jaquez's assertions, *Cellphone* does not stand for the proposition that Protection One's ability to terminate the contract and charge an early termination fee qualifies the fee as an unlawful penalty. Instead, *Cellphone* informs us that the predominant effect of the fee must be to prevent giving consumers a choice. Here, there are no allegations that Protection One terminated Jaquez's contract or anyone else's. Instead, it was Jaquez who decided to terminate the contract, not Protection One. There are also no allegations that any customers, much less a majority, who were charged an early termination fee were terminated by Protection One.

Jaquez also contends that "the amount of the payment to be made was so large that it was, in reality, a penalty and served as a strong incentive to perform[,]" relying on *Ridgley, supra*, 17 Cal.4th at pp. 970, 979. *Ridgley* does not stand for the proposition that any sum, whether $150 or $750, is automatically a penalty. In *Ridgley,* the California Supreme Court found an invalid penalty resulted from a provision that the borrower owed the lender a prepayment fee at the time of sale only if the borrower had been more than 15 days late with any scheduled interest payment. The court looked to the substance of the provision at issue rather than its form and held that the provision was a disguised penalty because the fee was unrelated to the purported function of the charge as compensation for prepayment. (*Id.* at p. 981.) "The charge provision is, instead, plainly intended as an incentive for prompt payment of interest." (*Ibid*.)

In contrast to the prepayment fee in *Ridgley,* the early termination fee here is closer to the alternative to performance clause in *Blank.* As in *Blank*, the Protection One agreement presented Jaquez with the option of terminating the agreement early by paying a sum certain or retaining Protection One's services through the end of the term. The court in *Blank* explained the distinction as follows:

> "We do not see in this arrangement the invidious qualities characteristic of a penalty or forfeiture. As indicated above, what distinguishes the instant case from other situations in which a form of alternative performance is used to mask what is in reality a penalty or forfeiture is the element of rational choice. For an example by way of contrast we need look no further than the *Garrett* [*v. Coast & Southern Fed. Save. & Loan Assn.* (1973) 9 Cal.3d 731] case itself. There the contract, a promissory note secured by a deed of trust on real property, provided for the assessment of certain 'late charges' for failure to make timely installment payments on the note— such charges to be a percentage of the unpaid principal balance for the period during which payment was in default. We held that these charges, which did not qualify as proper liquidated damages pursuant to Civil Code section 1671, constituted illegal penalties. In characterizing the subject provision we observed that its 'only reasonable interpretation . . . is that the parties agreed upon the rate which should govern the contract and then, realizing that the borrowers might fail to make timely payment, they further agreed that such borrowers were to pay an additional sum as damages for their breach[,] which sum was determined by applying the increased rate to the entire unpaid principal balance.' (9 Cal.3d at p. 738.) Clearly this arrangement, viewed from the time of making the contract, realistically contemplates no element of free rational choice on the part of the obligor insofar as his performance is concerned; rather the agreement is founded upon the assumption that the obligor will make the lower payment. In these circumstances, as an eminent commentator has observed, 'the only purpose and effect of the formal alternative is to hold over [the obligor] the larger liability as a threat to induce prompt payment of the lesser sum.' (McCormick, Damages (1935) § 154, p. 618.)
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> "In the instant case, on the other hand, the contract clearly reserves to the owner the power to make a realistic and rational choice in the future with respect

to the subject matter of the contract. Rather than allowing the broker to proceed with his efforts to sell the property, the owner, in the event that at any time during the term of the contract he changes his mind and decides not to sell after all, may withdraw the property from the market upon payment of a sum certain. In these circumstances the contract is truly one which contemplates alternative performance, not one in which the formal alternative conceals a penalty for failure to perform the main promise." (*Blank*, *supra*, at pp. 970-971, fns. omitted.)

This analysis applies equally here. It is clear that the early termination fee provides Protection One's customers with the power to make a rational choice—to continue using Protection One's monitoring and alarm services or to pay an early termination fee. The early termination fee is thus an alternative to performance rather than an unlawful penalty.

3. CLRA

Jaquez also borrows from the CLRA to complain that Protection One violated the UCL. Because we determine that Jaquez's third cause of action for an independent violation of the CLRA fails, as described below, violation of the CLRA by Protection One cannot serve as a basis for a UCL claim.

4. Business and Professions Code section 7159

Jaquez next grounds his UCL claim on a violation of Business and Professions Code, section 7159. That section does not apply here. Section 7159 applies to home improvement contracts and expressly excludes "any costs associated with monitoring a burglar or fire alarm system." (§ 7159, subd. (a)(4).)

B. UCL Claim Based On Unfair Conduct

Jaquez next contends that Protection One's agreement violates the UCL under the unfair prong of section 17200. In support, he relies on *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403 (*Camacho*), which sets out the elements for such a claim: (1) substantial consumer injury; (2) injury that is not outweighed by any countervailing benefits to consumers or competition; and (3) injury that consumers themselves could not reasonably have avoided. (*Camacho, supra*, 142

Cal.App.4th at p. 1403.) In *Camacho*, the plaintiff, who had rear-ended an insured driver, claimed that the collection agency's efforts to collect money owed by him for causing the accident were "unfair" under the UCL. With regard to the third prong of the unfairness test, the *Camacho* court held "the 'injury' in this case is one that [the plaintiff] could have reasonably avoided by complying with the law and obtaining insurance. Thus, even if there is some theory under which [the plaintiff] can claim that he was 'injured,' the fact is that he could have avoided any and all action taken by defendants by obtaining and carrying insurance, as the law requires." (*Camacho, supra*, 142 Cal.App.4th at p. 1406.)

Here, the imposition of the early termination fee reasonably could have been avoided if Jaquez continued to use Protection One's services or chose not to use Protection One's services in the first place. The third prong of the *Camacho* test is not met. Jaquez contends that he was unaware of the early termination fee and thus, could not have avoided it. Those allegations relate to whether fraud occurred in this transaction. We address that issue next.

C. UCL Claim Based on Fraudulent Conduct

Finally, Jaquez alleges Protection One committed a fraudulent business practice in violation of the UCL. Jacquez asserts that the omission of the second page when he initially signed the agreement and Morse's failure to specifically point out the early termination fee provision resulted in a scheme to defraud him and other consumers. This "bait-and-switch" scheme ensured customers did not see the full terms of the agreement during the 3-day cooling off period. As discussed above, we find Jaquez has adequately alleged a claim for fraud and thus, his UCL claim on this limited basis also survives demurrer.

II. Third Cause of Action for Violation of CLRA

Jaquez's third cause of action is for violation of various provisions of the CLRA. The CLRA proscribes specified "unfair methods of competition and unfair or deceptive acts or practices" in transactions for the sale or lease of goods to consumers. (Civ. Code, § 1770.) Unlike the UCL, under the CLRA a consumer may recover actual damages, punitive damages, and attorney fees. (Civ. Code, § 1780, subds. (a)(1), (5), (d).) The first amended complaint specifically alleges that Protection One violated five of the 24 acts prohibited by the CLRA. Specifically, Jaquez alleges that Protection One violated the following subsections of section 1770(a):

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

"[¶] . . . [¶]

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

"[¶] . . .

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

"[¶] . . .

"(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

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

In reviewing the first amended complaint, we find no factual allegations addressed to any violation of subsections (9), (14), (16), and (18). On appeal, Jaquez fails to explain what "rights, remedies, or obligations" were represented to be conferred by the transaction under subsection (14) or what "subject" was not supplied in accordance with a previous representation under subsection (16). Jaquez similarly fails to explain how Protection One's failure to provide him with the second page of the agreement qualifies as an advertisement under subsection (9). Moreover, there are no allegations that Morse or any other Protection One employee, including the technicians, made any representations regarding his or her authority to negotiate with Jaquez under subsection (18). Indeed, Jaquez contends it was a "take-it-or-leave-it" agreement for home monitoring services, which implies no negotiation whatsoever. Finally, Jaquez's claims under subsection (19) fail because we have found no substantive unconscionability in the agreement, as discussed above.

DISPOSITION

The judgment is reversed insofar as the trial court sustained the demurrer as to the first and second causes of action for violation of the UCL based on fraudulent business practices and the fourth cause of action for fraud and deceit. The judgment is otherwise affirmed. The parties shall bear their own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.