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5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**

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8 Janet Cheatham,

9 Plaintiff,

10 v.

11 ADT Corporation, et al.,

12 Defendants.

No. CV-15-02137-PHX-DGC

ORDER

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14 On March 1, 2016, Defendant ADT LLC (“ADT”) filed its answer to Plaintiff’s
15 complaint. Doc. 31. On March 10, before the expiration of the 21-day period for
16 amending the answer as a matter of course, Plaintiff filed a motion to strike all of ADT’s
17 affirmative defenses. Doc. 33. ADT responded, acknowledging that its answer was
18 deficient and stating its intention to file a motion for leave to amend. Doc. 38. Plaintiff
19 replied. Doc. 39. On March 31, 2016, eight days after the deadline for amending as a
20 matter of course, ADT filed a motion for leave to amend, attaching the proposed
21 amendment to its motion. Docs. 40, 50, 53. Oral argument has not been requested on
22 either motion. ADT’s motion for leave to amend will be granted and Plaintiff’s motion to
23 strike will be denied as moot.

24 Because ADT filed its motion after the deadline for amending as a matter of
25 course, it may amend “only with the opposing party’s written consent or the court’s
26 leave.” Fed. R. Civ. P. 15(a)(2). Leave is given freely “when justice so requires.” *Id.*
27 Applying this standard, courts grant leave absent “undue delay, bad faith or dilatory
28 motive on the part of the movant, repeated failure to cure deficiencies by amendments

1 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
2 amendment, [or] futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).
3 The decision whether to grant leave “is within the discretion of the District Court.” *Id.*¹

4 Plaintiff does not contend that ADT’s motion is prejudicial or made in bad faith.
5 Plaintiff instead argues that the proposed amendment is futile. Doc. 50 at 5-9. A
6 proposed affirmative defense is properly pleaded, and thus is not futile, if it “gives
7 plaintiff fair notice of the defense.” *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1023
8 (9th Cir. 2010).

9 The first affirmative defense ADT seeks to add alleges that “[t]he claims asserted
10 by Plaintiff and/or the proposed class are barred or limited in whole or in part by
11 contractual limitations of liability contained in their Alarm Services Contract with ADT,”
12 including the contract’s integration clause. Doc. 40-1, ¶¶ 10-12. The existence of a
13 contractual limitation of liability is not a valid affirmative defense to Plaintiff’s fraud
14 claim. *See Lutfy v. R. D. Roper & Sons Motor Co.*, 115 P.2d 161, 166 (Ariz. 1941) (“any
15 provision in a contract making it possible for a party thereto to free himself from the
16 consequences of his own fraud in procuring its execution is invalid and necessarily
17 constitutes no defense”). But the existence of a fully integrated contract that specifically
18 governs the rights and obligations at issue in this case may be a valid defense to
19 Plaintiff’s unjust enrichment claim. *See USLife Title Co. of Ariz. v. Gutkin*, 732 P.2d 579,
20 585 (Ariz. Ct. App. 1986). Therefore, the amendment is not futile.

21 The second affirmative defense ADT seeks to add alleges that some members of
22 the putative plaintiff class (1) waived their claims by continuing to engage ADT’s
23 monitoring services after discovering the defects alleged in this case, or (2) ratified
24 ADT’s conduct, or (3) are estopped from complaining about it. Doc. 40-1, ¶¶ 13-17. The
25 third affirmative defense ADT seeks to add alleges that the statute of limitations has run

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27 ¹ Because the proposed amendment comes after the deadline for amendments set
28 forth in the Court’s case management order (Doc. 25, ¶ 2), ADT must also show “good
cause” for modifying the order. *Johnson v. Mammoth Recreations*, 975 F.2d 604, 608
(9th Cir. 1992); *see* Fed. R. Civ. P. 16(b)(4). Good cause exists here because ADT is
seeking to cure defects identified in Plaintiff’s motion to strike.

1 against some members of the putative plaintiff class. Doc. 40-1, ¶¶ 19-21. Plaintiff
2 argues that these affirmative defenses are insufficient, and an amendment to add them
3 would be futile, because ADT fails to identify any members of the putative class to whom
4 the defenses apply. Doc. 50 at 7. ADT objects that it cannot be expected to identify
5 specific class members before a class has been certified, but that it is plausible that these
6 defenses may apply to some of the “tens of thousands” of class members who may
7 ultimately participate in this litigation. Doc. 53 at 7-8. The Court agrees. ADT has
8 given Plaintiff fair notice of the defenses it intends to assert if and when a class is
9 certified. That is sufficient to defeat an argument of futility.

10 **IT IS ORDERED** that ADT’s motion for leave to amend (Doc. 40) is **granted**
11 and Plaintiff’s motion to strike (Doc. 33) is **denied** as moot.

12 Dated this 3rd day of May, 2016.

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17 David G. Campbell
18 United States District Judge
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