

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIRCLE CLICK MEDIA LLC, and CTNY	)	Case No. 12-04000 SC
INSURANCE GROUP LLC, on behalf of	)	
themselves and all others	)	ORDER GRANTING IN PART AND
similarly situated,	)	DENYING IN PART MOTION TO
	)	DISMISS SECOND AMENDED
Plaintiffs,	)	<u>COUNTERCLAIM</u>
	)	
v.	)	
	)	
REGUS MANAGEMENT GROUP LLC, REGUS	)	
BUSINESS CENTRE LLC, REGUS PLC, HQ	)	
GLOBAL WORKPLACES LLC, and DOES 1	)	
through 50,	)	
	)	
Defendants.	)	
	)	

**I. INTRODUCTION**

Plaintiffs Circle Click Media LLC ("Circle Click") and CTNY Insurance Group LLC ("CTNY") (collectively, "Plaintiffs") bring this putative class action against Regus Management Group LLC ("RMG"), Regus Business Centre LLC, Regus plc, and HQ Global Workplaces LLC (collectively "Defendants"). RMG has asserted a counterclaim for breach of contract against CTNY, as well as other counterclaims against both Plaintiffs. After the Court dismissed RMG's counterclaims with leave to amend on August 13, 2013, RMG filed a Second Amended Counterclaim. ECF Nos. 90 ("Aug. 13 Order"), 101 ("SACC"). Plaintiffs now move to dismiss the SACC

1 pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 107  
2 ("Mot."). The Motion is fully briefed, ECF Nos. 110 ("Opp'n"), 114  
3 ("Reply"), and appropriate for determination without oral argument  
4 per Civil Local Rule 7-1(b). For the reasons set forth below, the  
5 Motion is GRANTED in part and DENIED in part.

6

7 **II. BACKGROUND**

8 RMG is in the business of leasing commercial office space  
9 throughout California and New York. Through its advertisements,  
10 RMG represents that it provides customers with fully equipped  
11 offices for one low monthly price. RMG has also represented that  
12 its services are "simple, easy, and flexible," and that its one-  
13 page contract -- the Office Service Agreement -- "takes just 10  
14 minutes to complete."

15 Circle Click and CTNY executed an Office Service Agreement  
16 with RMG. The Office Service Agreement is in fact one page, and it  
17 merely identifies the location of the office space, the monthly  
18 office fee, the term of the agreement, and the parties to it. The  
19 Office Service Agreement incorporates by reference another document  
20 called the "Terms and Conditions." The Terms and Conditions is  
21 also only one page, but it is printed in five-point font, which is  
22 almost illegible. The Terms and Conditions reference another  
23 document, the "House Rules," which discloses a number of other  
24 fees. The House Rules reference yet another document, the Service  
25 Price Guide, which lists the prices for a variety of services.

26 In July 2012, Plaintiffs filed this action against Defendants  
27 in California state court. ECF No. 1. The action was subsequently  
28 removed, and several rounds of pleading followed. The gravamen of

1 Plaintiffs' Second Amended Complaint ("2AC"), Plaintiffs' operative  
2 pleading, is that RMG and the other Defendants routinely assessed  
3 Plaintiffs for charges that were not disclosed in the Office  
4 Service Agreement. ECF No. 65 ("2AC"). For example, according to  
5 Plaintiffs' complaint, the monthly fee listed in Circle Click's  
6 Office Service Agreement is \$2,461, but Circle Click received  
7 monthly invoices ranging from \$2,559.67 to \$6,653.79. Id. ¶ 49.  
8 Plaintiffs allege that Circle Click was assessed charges for  
9 kitchen amenities (regardless of whether these amenities were  
10 used), telephone lines, telecom handsets, office restoration, and  
11 business continuity services, among other things. Id. ¶ 52.

12 In their 2AC, Plaintiffs seek to represent a class of all  
13 persons who paid for Defendants' office space in California and New  
14 York and were assessed charges by Defendants over the monthly  
15 payments indicated in the Office Service Agreement or any similar  
16 agreement. Plaintiffs assert the following causes of action:  
17 violation of California's Unfair Competition Law ("UCL"), Cal. Bus.  
18 & Prof. Code § 17200, et seq.; violation of California's False  
19 Advertising Law ("FAL"), id. § 17509; and unjust enrichment.

20 Defendants subsequently filed an Answer, in which RMG asserted  
21 breach of contract counterclaims against Circle Click and CTNY, as  
22 well as a number of other counterclaims against both the Plaintiffs  
23 and the absent class members. Plaintiffs filed a motion to dismiss  
24 the counterclaims, which was granted in part and denied in part on  
25 August 13, 2013. Among other things, the Court dismissed RMG's  
26 breach of contract counterclaim against Circle Click and CTNY with  
27 leave to amend. The Court directed RMG to "set forth the relevant  
28 provisions of the agreements verbatim, specify how Plaintiffs

1 breached those provisions, and allege whether the House Rule and  
2 Service Price Guide were made available to Plaintiffs." Aug. 13  
3 Order at 19-20.

4 RMG filed the SACC on October 3, 2013. RMG has abandoned its  
5 breach of contract counterclaim against Circle Click, but continues  
6 to press a breach of contract counterclaim against CTNY. RMG  
7 alleges that CTNY breached the Office Service Agreement by: (1)  
8 failing to make its full monthly office payments, plus applicable  
9 taxes, in an amount of \$12,209.01; (2) failing to pay the kitchen  
10 amenities fee, plus applicable taxes, in an amount of \$391.92; (3)  
11 failing to pay the office set-up fee, plus applicable taxes, in an  
12 amount of \$81.66; (4) failing to pay the business continuity  
13 service fee in an amount of \$987; (5) failing to pay the office  
14 restoration fee, plus applicable taxes, in an amount of \$239.45;  
15 and (6) failing to pay late payment fees. SACC ¶¶ 33-38. With the  
16 exception of the basic monthly office fee, none of these fees are  
17 described in the Office Service Agreement.<sup>1</sup> In its prayer for  
18 relief, RMG seeks, among other things, damages and attorney's fees.

19 Plaintiffs move to dismiss RMG's breach of contract  
20 counterclaim against CTNY, as well as its prayer for attorney fees.

21

22 **III. LEGAL STANDARD**

23 A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency  
24 of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

25

26 <sup>1</sup> The kitchen amenities fee is allegedly set out in the Service  
27 Price Guide, the office set-up fee in House Rule 36, the business  
28 continuity service fee in paragraph 1.7 of the Terms and Conditions  
and House Rule 38, the office restoration fee in paragraph 1.7 of  
the Terms and Conditions and House Rule 37, and the late payment  
fees in paragraph 8.5 of the Terms and Conditions and House Rule  
39.

1 "Dismissal can be based on the lack of a cognizable legal theory or  
2 the absence of sufficient facts alleged under a cognizable legal  
3 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
4 (9th Cir. 1988). "When there are well-pleaded factual allegations,  
5 a court should assume their veracity and then determine whether  
6 they plausibly give rise to an entitlement to relief." Ashcroft v.  
7 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
8 must accept as true all of the allegations contained in a complaint  
9 is inapplicable to legal conclusions. Threadbare recitals of the  
10 elements of a cause of action, supported by mere conclusory  
11 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.  
12 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
13 complaint must be both "sufficiently detailed to give fair notice  
14 to the opposing party of the nature of the claim so that the party  
15 may effectively defend against it" and "sufficiently plausible"  
16 such that "it is not unfair to require the opposing party to be  
17 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
18 1191, 1204 (9th Cir. 2011).

19

20 **IV. DISCUSSION**

21 **A. Attorney's Fees**

22 Plaintiffs argue that RMG's prayer for attorney's fees must be  
23 dismissed because RMG cannot point to any statute or contractual  
24 provision allowing for the recovery of such fees. Mot. at 5. RMG  
25 concedes that attorney's fees are not recoverable. Opp'n at 1 n.1.  
26 Accordingly, RMG's demand for attorney's fees is DISMISSED.

27 **B. Breach of Contract**

28 Next Plaintiffs argue that RMG has failed to plead sufficient

1 facts to state a claim for breach of contract against CTNY.  
2 Specifically, Plaintiffs attack RMG's claim as it relates to (1)  
3 the kitchen amenities fee, (2) the business continuity service fee,  
4 and (3) the late payment fee. Plaintiffs also generally argue that  
5 RMG has failed to put CTNY on notice of its damages, and that RMG's  
6 counterclaim is implausible due to numerous inconsistencies.

7 **i. The Kitchen Amenities Fee**

8 The kitchen amenities fee is set out in House Rule 13, which  
9 provides: "Kitchen Amenities/Beverage Fee allows clients and  
10 visitors access to self-service coffee and tea. This fee is  
11 mandatory and will be charged per office occupant." SACC ¶ 20.  
12 The Service Price Guide also refers to the fee: "Kitchen Amenities  
13 (required) \$30 per person per month." Id. Neither the Terms and  
14 Conditions nor the Office Service Agreement contain any reference  
15 to a kitchen amenities fee. However, paragraph 8.9 of the Terms  
16 and Conditions indicates that other fees may be assessed: "The  
17 monthly office fee and any recurring services requested by the  
18 Client are payable monthly in advance." Id. ¶ 21.

19 Based on paragraph 8.9 of the Terms and Conditions, Plaintiffs  
20 argue that RMG has failed to plead that CTNY requested kitchen  
21 amenities, and absent such a request, the kitchen amenities fee  
22 should not have been assessed. Mot. at 6. Defendants respond that  
23 a request was unnecessary because both the House Rules and Service  
24 Price Guide, which were allegedly incorporated into the Terms and  
25 Conditions and the Office Service Agreement, indicate that the  
26 kitchen amenities fee was mandatory. Opp'n at 4.

27 There is some tension between the Terms and Conditions, which  
28 suggests that additional fees will be assessed only for services

1 requested by the client, and the House Rules and Service Price  
2 Guide, which indicate that the kitchen amenities fee is mandatory,  
3 regardless of whether kitchen amenities are used or requested by  
4 the client. As it must, the Court attempts to give effect to every  
5 part of the contract, and interprets each part with reference to  
6 the entire agreement. See Westmoreland Coal Co. v. Entech, Inc.,  
7 100 N.Y.2d 352, 358 (NY Ct. App. 2003). Since Plaintiff's reading  
8 of the agreement would force the Court to ignore provisions that  
9 expressly provide that the kitchen amenities fee is mandatory, the  
10 Court declines to adopt it. Accordingly, RMG's allegations  
11 regarding the kitchen amenities fee remain undisturbed.<sup>2</sup>

12 **ii. Business Continuity Fee**

13 The business continuity services fee is set out in paragraph  
14 1.7 of the Terms and Conditions:

15  
16 When a client vacates its accommodation(s)[,]  
17 invariably Regus continues to receive the  
18 Client's mail, faxes, telephone calls and  
19 visitors. In order to professionally manage the  
20 redirection of the Client's calls, mail, faxes[,]  
21 and visitors[,], Regus charges a one-time Business  
22 Continuity Service. This service lasts for three  
23 months after the end of the date of this  
24 agreement. If in the event [sic] that there are  
25 no calls, mail, faxes or visitors[,], this service  
26 will not be applied. This fee is located in the  
27 house rules.

22 SACC ¶ 23. RMG alleges that the fee was \$329 per month and that  
23 CTNY was obligated to pay a total business continuity fee of \$987.

24 Id.

25 Plaintiffs argue that the SACC does not establish that RMG was  
26

27 <sup>2</sup> Nothing in this Order precludes Plaintiffs from asserting that  
28 Defendants' practice of assessing a kitchen amenities fee violates  
the UCL. Indeed, the dispute over Defendants' counterclaims  
further demonstrates how a reasonable consumer might be deceived by  
the fees set out in RMG's agreements.

1 entitled to the business continuity fee, because it does not allege  
2 that CTNY received any calls, mail, faxes, or visitors at the  
3 offices it leased from RMG after the lease expired. MOT. at 6.  
4 RMG does not meaningfully respond to this argument except to assert  
5 that it has alleged sufficient facts by setting out the breached  
6 contractual provisions verbatim. Opp'n at 4. This argument is  
7 plainly wrong. RMG must also allege facts showing that it was  
8 entitled to assess a business continuity fee. Legal conclusions  
9 regarding breach, without more, are not enough.

10 Accordingly, RMG's breach of contract claim is DISMISSED to  
11 the extent it is predicated on the business continuity fee. Since  
12 the Court's August 13 Order placed RMG on notice that it was  
13 required to plead how CTNY breached the agreements, dismissal is  
14 WITH PREJUDICE.

15 **iii. Late Payment Fees**

16 The Terms and Conditions provide that a late payment fee will  
17 be charged on all overdue balance, and the House Rules explain how  
18 that fee is calculated. SACC ¶ 25. Specifically, the House Rules  
19 provide:

20  
21 Late Payment Fee: If you do not pay fees when  
22 due, a service fee of \$25 plus 5% penalty will be  
23 charged on all overdue balances under \$1,000.  
24 For balances equal to or greater than \$1,000[,] a  
25 fee of \$50 plus 5% will apply. . . . We also  
26 reserve the right to withhold services . . .  
27 while there are any outstanding fees and interest  
28 or you are in breach of your agreement.

26 Id. RMG alleges that it is entitled to late fees because CTNY has  
27 only paid a fraction of the fees it owes. Id. ¶ 26.

28 Plaintiffs argue that the late payment fee constitutes



1 unenforceable liquidated damages under New York law. Mot. at 8.  
2 "Liquidated damages clauses will generally be upheld where, at the  
3 time of contracting, it appears that actual damages will be  
4 difficult to estimate and the liquidated damages amount is not  
5 plainly disproportionate to the possible loss." CIT  
6 Grp./Commercial Servs., Inc. v. Holladay-Tyler Printing Corp., 94  
7 CIV. 6642 (HB), 1995 WL 702343, at \*1 (S.D.N.Y. Nov. 29, 1995).  
8 Further, a "liquidated damages clause[] must specify an amount  
9 either in absolute dollars or in some manner that obviates  
10 foreseeable court involvement." Id. For example, the New York  
11 Supreme Court rejected a liquidated damage clause that allowed a  
12 plaintiff to recover liquidated damages in the amount of 25 percent  
13 of the total contract price, but also gave the plaintiff the right  
14 to sue for "such actual damages as it may establish." Jarro Bldg.  
15 Indus. Corp. v. Schwartz, 281 N.Y.S.2d 420, 421 (N.Y. App. Term  
16 1967). The court reasoned that the clause afforded the plaintiff  
17 "the option to disregard the liquidated damages specified if the  
18 actual damages exceed the amount stipulated." Id. at 426.

19 Plaintiffs reason that the late fee provision here is  
20 unenforceable because it entitles RMG to a minimum late payment  
21 amount plus a percentage penalty, and RMG is also asserting actual  
22 damages in the SACC. Opp'n at 8 (citing SACC ¶¶ 25, 40). However,  
23 Plaintiffs do not point to any provision in the relevant agreements  
24 that would entitle RMG to actual damages for late payments. The  
25 fact that RMG is also seeking damages in the amount of other  
26 allegedly unpaid fees does not render the late penalty fee  
27 unenforceable.

28 Plaintiffs also argue that RMG's claim for late payment fees

1 is "hopelessly vague and fails to provide fair notice to CTNY."  
2 Id. at 6. Plaintiffs contend that RMG does not allege when  
3 payments became late or the amount of any late payment penalty  
4 balance that CTNY purportedly owes. Id. This argument is also  
5 unconvincing. RMG has pled that CTNY owes \$13,909.04, has paid  
6 only \$1,773.32, and that CTNY's lease expired on or around July  
7 2013. SACC ¶¶ 17, 26. This is sufficient to put CTNY on notice  
8 and to establish a plausible claim for a late penalty fee.

9 Accordingly, RMG's breach of contract claim remains  
10 undisturbed as it relates to the late penalty fee.

11 **iv. Other Plausibility Issues**

12 Plaintiffs also raise a number of other plausibility issues.  
13 First, Plaintiffs take issue with paragraph 40 of the SACC, which  
14 states: "Damages incurred by RMG include, but are not limited to,  
15 the remaining monthly payments plus all applicable taxes and fees  
16 for services due under the [Office Service Agreement], in an amount  
17 no less than \$12,135.72., plus all applicable late payment fees."  
18 Specifically, Plaintiffs take issue with the phrase "include, but  
19 not limited to," since it implies that RMG will seek fees not  
20 described in the SACC. Opp'n at 6-7. The Court agrees that RMG  
21 may not pursue claims that are not set out in the SACC without  
22 further amendment. However, at this point, there is no indication  
23 that RMG intends to do so.<sup>3</sup>

24 Plaintiffs also claim that the SACC asserts inconsistent  
25 damage figures. Id. at 7-8. Having carefully reviewed the  
26 pleadings, the Court is not convinced that the SACC contains any

27 \_\_\_\_\_  
28 <sup>3</sup> It is not clear from the motion or reply papers, but Plaintiff  
also appears to be arguing that RMG is required to plead its exact  
damages. This is an unreasonably high pleading standard.

1 internal inconsistencies. RMG has merely alleged different sums in  
2 connection with the CTNY's total obligation under the Office  
3 Service Agreement, and the total amount that is currently due and  
4 owing. Compare SACC ¶ 33 with id. ¶ 40. In any event, to the  
5 extent that there are inconsistencies, they amount to only a few  
6 hundred dollars and, thus, are not fatal for the purposes of a Rule  
7 12(b)(6) motion to dismiss.

8

9 **V. CONCLUSION**

10 For the reasons set forth above, Plaintiffs' motion to dismiss  
11 RMG's counterclaim is GRANTED in part and DENIED in part. The  
12 Court DISMISSES WITH PREJUDICE RMG's request for attorney's fees,  
13 as well as RMG's breach of contract counterclaim to the extent that  
14 it is predicated on CTNY's failure to pay a business continuity  
15 fee. The rest of RMG's counterclaims remain undisturbed.

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17 IT IS SO ORDERED.

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19 December 10, 2013



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UNITED STATES DISTRICT JUDGE

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