

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, METRO	)	Case No. 12-04000 SC
TALENT, LLC, CTNY INSURANCE GROUP	)	
LLC, on behalf of themselves and	)	ORDER RE: RULE 12(b)(1),
all others similarly situated,	)	12(b)(6), AND 12(f) MOTIONS
	)	<u>TO DISMISS COUNTERCLAIMS</u>
Plaintiffs,	)	
	)	
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"), Metro Talent, LLC ("Metro Talent"), 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"). Defendants filed an answer, and, as part of that answer, RMG asserts counterclaims against each of the named Plaintiffs, as well as against members of the absent class. ECF No. 78 ("Answer") at 17-26 ("Countercl."). Plaintiffs have filed two motions to dismiss the counterclaims. The first motion, which

1 is brought under Federal Rule of Civil Procedure 12(b)(1), asserts  
2 that the Court lacks subject matter jurisdiction. ECF No. 81  
3 ("12(b)(1) MTD").<sup>1</sup> The second motion, which is brought under Rules  
4 12(b)(6) and 12(f), asserts that the counterclaims should be  
5 dismissed for failure to state a claim and struck because they are  
6 redundant. ECF No. 82 ("12(b)(6)/12(f) Mot."). All motions are  
7 fully briefed. ECF Nos. 84 ("12(b)(1) Opp'n"), 85 ("12(b)(6)/12(f)  
8 Opp'n"), 87 ("12(b)(1) Reply"), 88 ("12(b)(6)/12(f) Reply"). Per  
9 Civil Local Rule 7-1(b), the matters are appropriate for  
10 determination without oral argument. For the reasons set forth  
11 below, the motion to dismiss for lack of subject matter  
12 jurisdiction is GRANTED in part and DENIED in part, the motion to  
13 dismiss for failure to state a claim is GRANTED, and the motion to  
14 strike is DENIED.

15

16 **II. BACKGROUND**

17 RMG is in the business of leasing commercial office space  
18 throughout California and New York. Countercl. ¶ 1. Through its  
19 advertisements, RMG represents that it provides customers with  
20 fully equipped offices for one low monthly price. ECF No. 77  
21 ("Apr. 22 Order") at 3-4. RMG has also represented that its  
22 services are "simple, easy, and flexible," and that its one-page  
23 contract -- the Office Service Agreement -- "takes just 10 minutes  
24 to complete." Id. at 4.

25 Each of the named Plaintiffs in this action executed an Office

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<sup>1</sup> Plaintiffs state that they are moving under Rule 12(b)(2), which  
27 pertains to personal jurisdiction, but they argue that the court  
28 lacks subject matter jurisdiction, a matter governed by Rule  
12(b)(1). The Court disregards the label, and treats Plaintiffs'  
motion as a Rule 12(b)(1) motion for lack of subject matter  
jurisdiction.

1 Service Agreement with RMG. Countercl. ¶ 1. The Office Service  
2 Agreement is in fact one page, and it merely identifies the  
3 location of the office space, the monthly office fee, the term of  
4 the agreement, and the parties to it. Apr. 22 Order at 2. The  
5 Office Service Agreement incorporates by reference another document  
6 called the "Terms and Conditions." Apr. 22 Order at 3. The Terms  
7 and Conditions is also only one page, but it is printed in five-  
8 point font, which is almost illegible. Id. The Terms and  
9 Conditions reference another document, the "House Rules," which  
10 discloses a number of fees, including a mandatory, "Kitchen  
11 Amenities / Beverage Fee"; a "[s]tandard services" fee, including a  
12 fee "billed upon service activation for applicable telecom and  
13 internet services"; an "Office Set Up Fee"; and a "Business  
14 Continuity Fee." Id. The House Rules reference yet another  
15 document, the Service Price Guide, which lists the prices for a  
16 variety of services. Id.

17 In July 2012, Plaintiffs filed this action against Defendants  
18 in California state court. ECF No. 1. The action was subsequently  
19 removed, and several rounds of pleading followed. The gravamen of  
20 Plaintiffs' Second Amended Complaint ("2AC"), Plaintiffs' operative  
21 pleading, is that RMG and the other Defendants routinely assessed  
22 Plaintiffs for charges that were not disclosed in the Office  
23 Service Agreement. ECF No. 65 ("2AC"). For example, the monthly  
24 fee listed in Circle Click's Office Service Agreement is \$2,461,  
25 but Circle Click allegedly received monthly invoices ranging from  
26 \$2,559.67 to \$6,653.79. Id. ¶ 49. Plaintiffs allege that Circle  
27 Click was assessed charges for kitchen amenities (regardless of  
28 whether these amenities were used), telephone lines, telecom

1 handsets, office restoration, and business continuity services,  
2 among other things. Id. ¶ 52.

3 In their 2AC, Plaintiffs seek to represent a class of all  
4 persons who paid for Defendants' office space in California and New  
5 York and were assessed charges by Defendants over the monthly  
6 payments indicated in the Office Service Agreement or any similar  
7 agreement. Plaintiffs assert the following causes of action:  
8 violation of California's Unfair Competition Law ("UCL"), Cal. Bus.  
9 & Prof. Code § 17200, et seq.; violation of California's False  
10 Advertising Law ("FAL"), id. § 17509; intentional  
11 misrepresentation; unjust enrichment; and violations of the  
12 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18  
13 U.S.C. § 1961, et seq.

14 Defendants previously moved to dismiss the 2AC, and that  
15 motion was granted in part and denied in part on April 22, 2013.  
16 The Court dismissed Plaintiffs' claim for intentional  
17 misrepresentation with prejudice, reasoning that Plaintiffs could  
18 not plausibly claim that Defendants had exclusive knowledge of  
19 various fees when those fees were disclosed in the documents  
20 referenced in the parties' agreements. Apr. 22 Order at 11.  
21 Plaintiffs' RICO claim was dismissed because Plaintiffs could not  
22 state a claim for intentional misrepresentation. Id. at 16-17.  
23 Plaintiffs' other causes of action remained largely undisturbed.  
24 Id. at 23-24.

25 Defendants subsequently filed an Answer, in which RMG asserted  
26 several counterclaims. The "Counterclaim-Defendants" identified in  
27 the Answer are Circle Click, Metro Talent, CTNY, and "Unnamed  
28 Counterclaim-Defendants." Countercl. ¶¶ 11-14. The Unnamed

1 Counterclaim-Defendants are essentially the absent members of the  
2 classes proposed by Plaintiffs. See id. ¶ 14.

3 RMG asserts counterclaims for breach of contract against  
4 Circle Click and CTNY. RMG also asserts three "alternative"  
5 counterclaims against "all Counterclaim-Defendants": (1) breach of  
6 contract, (2) quantum meruit, and (3) unjust enrichment.<sup>2</sup>

7 Countercl. ¶¶ 21-49. The facts alleged in Counterclaim are bare  
8 bones. RMG alleges that Circle Click and CTNY failed to make  
9 required payments under the Office Service Agreement. Id. ¶¶ 21-  
10 32. Specifically, RMG alleges that Circle Click failed to pay  
11 \$1,047 in business continuity fees and that CTNY failed to pay  
12 \$13,640.38 in monthly payments and "applicable taxes and fees."  
13 Id. ¶¶ 26, 32. The counterclaim contains no factual allegations  
14 regarding wrongdoing on the part of Metro Talent or the absent  
15 class members.

16  
17 **III. DISCUSSION**

18 **A. Plaintiffs' Rule 12(b)(1) Motion to Dismiss**

19 The thrust of Plaintiffs' Rule 12(b)(1) motion is that RMG  
20 cannot state a claim against the absent class members since they  
21 are not opposing parties for the purposes of Rule 13. Plaintiffs  
22 further argue that the court lacks subject matter jurisdiction over  
23 the counterclaims without the absent class members, since with  
24 respect to the individual Plaintiffs, Defendant has alleged an  
25 amount in controversy of only \$14,687.38, well below the \$75,000  
26 jurisdictional minimum.

27 <sup>2</sup> RMG misnumbered its alternative counterclaims. For the sake of  
28 clarity, the Court refers to RMG's alternative counterclaims for  
breach of contract, quantum meruit, and unjust enrichment as the  
first, second, and third alternative counterclaims, respectively.

1                    1.     RMG's Counterclaims against the Absent Class Members

2                    Rule 13 allows a defendant to assert a compulsory or  
3 permissive counterclaim against an "opposing party." Fed. R. Civ.  
4 P. 13(a)-(b). Plaintiffs argue that the absent class members are  
5 not opposing parties within the meaning of Rule 13 since they are  
6 not named parties. Mot. at 3. RMG disagrees, arguing that class  
7 members who join this action should be prepared to accept the legal  
8 consequences and risks of litigation, and that RMG should be able  
9 to strike back against any party that sues it. Opp'n at 2.

10                   RMG primarily relies on a 1977 decision out of the Southern  
11 District of New York, National Super Spuds, Inc. v. New York  
12 Mercantile Exchange, 75 F.R.D. 40 (S.D.N.Y. 1977). Id. at 2-4.  
13 The plaintiffs in that case sought to represent a class of persons  
14 who held net long positions on potato futures contracts. Nat'l  
15 Super Spuds, 75 F.R.D. at 41. They alleged that short sellers, in  
16 concert with a number of brokers, manipulated the trading price of  
17 the futures contracts. Id. at 42. One of the broker defendants  
18 asserted a counterclaim, alleging that various members of the class  
19 engaged in a counter-conspiracy to squeeze the futures market. Id.  
20 Some of the counter-defendants were identified by name, while  
21 others were not. Id.

22                   The court held that certain absent class members were opposing  
23 parties within the meaning of Rule 13 "within the context of th[e]  
24 case." Id. The court reasoned that Rule 42 authorized the  
25 consolidation of any or all common issues related to the case, as  
26 well as orders to avoid unnecessary cost or delay. Id. at 44. The  
27 court found that "this is a particularly apt case for exercising  
28 . . . discretion under Rule 42 to consolidate . . . the various

1 issues," since, if the counterclaims were dismissed and asserted  
2 again in a related action, the related claims would be reassigned  
3 to the court under the local rules. Id. The court also noted that  
4 some of the issues raised by the counterclaims could be raised as  
5 affirmative defenses. Id.

6 The decision in National Super Spuds is not binding on this  
7 court. In any event, the case is distinguishable. The  
8 counterclaim in National Super Spuds targeted particular  
9 individuals who were allegedly engaged in a common conspiracy to  
10 manipulate prices. The breach of contract, quantum meruit, and  
11 unjust enrichment counterclaims in the instant action target the  
12 entire class, and there is no indication that these counterclaims  
13 raise common issues of fact or law. Further, unlike in National  
14 Super Spuds, taking up RMG's counterclaims against the class makes  
15 little sense from a case management perspective. Defendants would  
16 essentially have the Court assume jurisdiction over any number of  
17 distinct breach of contract claims that would otherwise be resolved  
18 in state court.

19 The other cases cited by RMG -- which were also decided  
20 decades ago by out-of-circuit courts -- are equally unpersuasive.  
21 In Wolfson v. Artisans Savings Bank, plaintiffs asserted antitrust  
22 claims against banks that required escrow accounts for the payment  
23 of taxes and insurance in connection with mortgages, but then  
24 failed to pay interest on the escrowed funds. 83 F.R.D. 552, 554  
25 (D. Del. 1979). The court allowed the defendants to assert a  
26 counterclaim against the absent class members for expenses incurred  
27 in maintaining the escrow accounts, reasoning that the counterclaim  
28 bore a "logical relationship" to the plaintiffs' claim. Id. But

1 the Court dismissed the defendants' counterclaim for unjust  
2 enrichment, reasoning that "it concern[ed] individual and distinct  
3 loan transactions as to which no agreement or parallel conduct is  
4 claimed and would require examination of payments collected and  
5 disbursed in the individual escrow accounts of individual class  
6 members against whom this claim is asserted." Id. at 555. RMG's  
7 counterclaims for breach of contract, quantum meruit, and unjust  
8 enrichment resemble the unjust enrichment counterclaim that was  
9 dismissed in Wolfson, not the counterclaim for expenses incurred.  
10 Herrmann v. Atlantic Richfield Co., 72 F.R.D. 182 (W.D. Pa.  
11 1976) also does not help RMG. In that antitrust action, the  
12 defendant sought leave to assert two types of counterclaims: (1)  
13 debt collection claims that sought affirmative judgment against  
14 certain individual class members, and (2) set-offs against various  
15 class members for "outstanding balances of previously-filed  
16 unsatisfied judgments against individual members of the plaintiff  
17 class." Id. at 185-86. The court dismissed the former but allowed  
18 the latter to proceed. Id. None of RMG's counterclaims resemble  
19 the set-off claims at issue in Herrmann. RMG has made no reference  
20 to previously filed unsatisfied judgments. Rather, RMG appears to  
21 expect the Court to render independent judgments with respect to  
22 each individual class member. Further, RMG represents that its  
23 counterclaims are distinct from its affirmative defense of set-off  
24 because the counterclaims seek damages and other affirmative  
25 relief. See 12(b)(6)/12(f) Opp'n at 11.

26 In sum, the case law cited by RMG does not support the  
27 contention that RMG may assert counterclaims against the absent  
28 class members in this context. Even if it does, Plaintiffs have



1 cited contrary authority that is more persuasive and more recent,  
2 including Allapattah Services., Inc. v. Exxon Corp., 333 F.3d 1248  
3 (11th Cir. 2003). In that case, the Court found that a class  
4 action defendant had a right to assert set-off claims against class  
5 members, even though it had not asserted those set-off claims in  
6 its answer. Id. at 1259. The Court explained that, although Rule  
7 13 normally requires a party to assert a counterclaim in its  
8 pleadings, "Rule 13 . . . is inapplicable in class action suits,  
9 because absent class members are not opposing or litigating  
10 adversaries for purposes of Rule 13." Id. at 1259 n.14 (quotations  
11 omitted). The court further stated: "[I]f absent class members are  
12 not opposing parties within the meaning of the rule, it follows  
13 that any counterclaims that may be permitted in a class action are  
14 not governed by Rule 13 and are purely discretionary with the  
15 court." Id. (quoting 2 Alba Conte & Herbert B. Newberg, Newberg on  
16 Class Actions § 4:34, at 299-300 (4th ed.2002)).

17 This Court reached a similar conclusion in Roberts v. Heim, C  
18 84-8069 TEH, 1994 WL 675261 (N.D. Cal. Sept. 16, 1994). Roberts  
19 involved a class action for securities fraud. Id. at \*1. The  
20 defendant sought to assert breach of contract counterclaims against  
21 the limited partners of various partnerships involved in the case.  
22 Id. The court held that such absent class members could not  
23 qualify as parties to the litigation within the meaning of Rule 13.  
24 Id. The court also found that policy and due process concerns  
25 supported this conclusion, since the absent class members had not  
26 been provided with notice that failure to opt out of the class  
27 would render them vulnerable to counterclaims, waiving any personal  
28 jurisdiction objections they might have. Id. RMG argues that

1 there is still time to provide notice to the absent class members  
2 here. However, the language of the Roberts opinion suggests that  
3 the court's decision was not based solely on concerns about notice  
4 and opt-out opportunities. See id.

5 The Court's conclusion is further supported by the Supreme  
6 Court's decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797  
7 (1985), which post-dates all of RMG's authority. In that case, the  
8 plaintiffs, who owned the rights to natural gas leases, brought a  
9 class action against a natural gas producer seeking to recover  
10 interest on delayed royalty payments. Id. at 799. The plaintiffs  
11 and the class prevailed in Kansas state court. On appeal, the  
12 defendant contended that the state court erred in exerting  
13 jurisdiction over the class claims without first obtaining the  
14 class members' express consent, and that class members' failure to  
15 execute and return a request for exclusion could not constitute  
16 consent. Id. at 806. The defendant essentially argued that due  
17 process concerns prevented Kansas from exerting jurisdiction over  
18 the claims of the out-of-state class members unless those class  
19 members had sufficient minimum contacts with Kansas. Id. at 808.

20 The Supreme Court disagreed, finding that the burdens placed  
21 on an out-of-state defendant are "not of the same order or  
22 magnitude" as those placed on an absent, out-of-state class member:

23  
24 An out-of-state defendant summoned by a plaintiff is  
25 faced with the full powers of the forum State to  
26 render judgment against it. The defendant must  
27 generally hire counsel and travel to the forum to  
28 defend itself from the plaintiff's claim, or suffer a  
default judgment. The defendant may be forced to  
participate in extended and often costly discovery,  
and will be forced to respond in damages or to comply  
with some other form of remedy imposed by the court  
should it lose the suit.

1 Id. On the other hand:

2 Absent plaintiff class members are not subject to  
3 other burdens imposed upon defendants. They need not  
4 hire counsel or appear. They are almost never subject  
5 to counterclaims or cross-claims, or liability for  
6 fees or costs. Absent plaintiff class members are not  
7 subject to coercive or punitive remedies. Nor will an  
8 adverse judgment typically bind an absent plaintiff  
9 for any damages, although a valid adverse judgment may  
10 extinguish any of the plaintiff's claims which were  
11 litigated.

12 Id. at 810. Thus, Shutts suggests that courts should have  
13 reservations about allowing defendants to assert counterclaims  
14 against absent class members, especially counterclaims which may  
15 bind absents plaintiffs for damages.

16 Accordingly, RMG's counterclaims for breach of contract,  
17 quantum meruit, and unjust enrichment are DISMISSED with respect to  
18 the absent class members.

19 **2. RMG's Counterclaims against the Named Plaintiffs**

20 Plaintiffs argue that, without the counterclaims against the  
21 absent class members, the Court lacks subject matter jurisdiction  
22 over RMG's counterclaims against the named plaintiffs. Mot. at 4.  
23 RMG alleges two bases for subject matter jurisdiction: diversity  
24 jurisdiction under 28 U.S.C. § 1332(a), and the Class Action  
25 Fairness Act ("CAFA"), 28 U.S.C. § 1453. Countercl. ¶ 8. As  
26 Plaintiffs point out, under § 1332(a), the Court can only exercise  
27 diversity jurisdiction where the amount in controversy is more than  
28 \$75,000, and RMG has only alleged \$14,687.38 in damages with  
respect to the individual Plaintiffs. Id. ¶¶ 26, 32. Plaintiffs  
also argue that class action counterclaims are not the types of  
claims over which CAFA may confer subject matter jurisdiction.  
Mot. at 4 (citing Progressive W. Ins. Co. v. Preciado, 479 F.3d

1 1014, 1018 (9th Cir. 2007)).

2 In its opposition brief, RMG does not dispute that the Court  
3 may not exercise diversity or CAFA jurisdiction without the  
4 counterclaims against the absent class members. Instead it argues,  
5 for the first time, that the court should exercise supplemental  
6 jurisdiction pursuant to 28 U.S.C. § 1367(a). Opp'n at 6.  
7 Plaintiff responds that the Court should not consider exercising  
8 supplemental jurisdiction because RMG failed to plead it. Reply at  
9 6. Plaintiffs also argue that the exercise of supplemental  
10 jurisdiction is inappropriate since RMG's counterclaims are not  
11 compulsory, and discretionary supplemental jurisdiction should not  
12 be exercised over RMG's permissive counterclaims.

13 Plaintiffs' argument that the Court must refuse to consider a  
14 basis for subject matter jurisdiction that is not expressly alleged  
15 in the complaint is unavailing. It is true that Federal Rule of  
16 Civil Procedure 8(a)(1) requires that a pleading contain "a short  
17 and plain statement of the grounds for the court's jurisdiction,"  
18 and that the party invoking federal jurisdiction bears the burden  
19 of establishing jurisdiction. Lujan v. Defenders of Wildlife, 504  
20 U.S. 555, 561 (1992). However, when considering a motion to  
21 dismiss for lack of jurisdiction, the court is not limited to the  
22 allegations of the complaint. Scolaro v. Dist. of Columbia Bd. of  
23 Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000).  
24 Accordingly, if the facts of the case, as pled, clearly bring this  
25 case within the court's jurisdiction, a failure to expressly allege  
26 a basis for jurisdiction is not necessarily fatal.<sup>3</sup>

27 <sup>3</sup> Moreover, dismissing the counterclaim for failure to expressly  
28 allege a basis for subject matter jurisdiction would merely delay  
determination of an issue that is presently suitable for  
determination. The Court would need to dismiss with leave to

1 Turning to the merits of the parties' jurisdictional  
2 arguments, 28 U.S.C. § 1367(a) provides for supplemental  
3 jurisdiction over state law claims "that are so related to claims  
4 in the action within [the district court's] original jurisdiction  
5 that they form part of the same case or controversy under Article  
6 III of the United States Constitution." Section 1367 applies to  
7 claims brought by a plaintiff, as well as counterclaims brought by  
8 a defendant. As noted above, Federal Rule of Civil Procedure 13  
9 defines two types of counterclaims, compulsory and permissive.

10 Compulsory counterclaims are those that "arise[] out of the  
11 transaction or occurrence that is the subject matter of the  
12 opposing party's claim." Fed. R. Civ. P. 13(a)(1)(A). Federal  
13 courts apply a liberal "logical relationship" test to determine  
14 whether two claims arise out of the same transaction or occurrence.  
15 Pochiro v. Prudential Ins. Co. of Am., 827 F.2d 1246, 1249 (9th  
16 Cir. 1987). "This flexible approach to Rule 13 problems attempts  
17 to analyze whether the essential facts of the various claims are so  
18 logically connected that considerations of judicial economy and  
19 fairness dictate that all the issues be resolved in one lawsuit."  
20 Id. (quotations omitted). "The traditional rule is that federal  
21 courts have supplemental jurisdiction over compulsory  
22 counterclaims, since a plaintiff would otherwise lose his  
23 opportunity to be heard on that claim." Sparrow v. Mazda Am.  
24 Credit, 385 F. Supp. 2d 1063, 1066 (E.D. Cal. 2005).

25 Permissive counterclaims are those that are not compulsory,  
26 i.e., those that do not arise out of the transaction or occurrence  
27

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28 amend. Thus, RMG could amend its counterclaim to expressly allege  
supplemental jurisdiction, and Plaintiffs could file yet another  
motion to dismiss for lack of subject matter jurisdiction.

1 that is the subject matter of the opposing party's claim. Fed. R.  
2 Civ. P. 13(b). Courts may exercise supplemental jurisdiction over  
3 permissive counterclaims so long as they "arise out of facts that  
4 bear some relationship to the facts from which the federal claim  
5 arises so that the state claim and the federal claim are considered  
6 part of the same constitutional 'case.'" Sparrow, 385 F. Supp. 2d  
7 at 1067. However, even if supplemental jurisdiction exists over a  
8 counterclaim, a district court may decline to exercise jurisdiction  
9 where:

- 10 (1) the claim raises a novel or complex issue of State  
11 law,
- 12 (2) the claim substantially predominates over the  
13 claim or claims over which the district court has  
original jurisdiction,
- 14 (3) the district court has dismissed all claims over  
15 which it has original jurisdiction, or
- 16 (4) in exceptional circumstances, there are other  
compelling reasons for declining jurisdiction.

17  
18 28 U.S.C. § 1367(c).

19 Where plaintiffs have brought claims under the Fair Debt  
20 Collection Practices Act ("FDCPA"), other courts in this circuit  
21 have found that counterclaims for underlying consumer debts are  
22 permissive. See Robles v. Ally Bank, 12CV01013 AJB MDD, 2013 WL  
23 28773, at \*4 (S.D. Cal. Jan. 2, 2013); Sparrow, 385 F. Supp. 2d at  
24 1069. Some of these courts have found that the potential for  
25 supplemental jurisdiction exists under § 1367(a), but have  
26 exercised their discretion to decline jurisdiction pursuant to §  
27 1367(c). See Robles, 2013 WL 28773, at \*4-5. For example, in  
28 Robles, the court reasoned that "exercising supplemental

1 jurisdiction over counterclaims brought by debt collector  
2 defendants, based on the underlying debt, might have a chilling  
3 effect on plaintiffs who otherwise might and should bring suits  
4 under the FDCPA." Id. at \*5. The court also found that  
5 Defendants' counterclaims involved questions of "no federal  
6 significance," adjudicating those counterclaims would "increase  
7 both the complexity and length of time necessary to resolve  
8 Plaintiffs' FDCPA claim, and declining jurisdiction did not raise  
9 the risk of inconsistent judgments. Id. at \*5.

10 The Court finds that RMG's counterclaims bear at least some  
11 relationship to the facts from which Plaintiffs' claims arise.  
12 Both Plaintiffs' claims and RMG's counterclaims implicate the  
13 Office Service Agreement. Plaintiffs allege that RMG unlawfully  
14 assessed fees that were not disclosed in the Office Service  
15 Agreement, and RMG alleges that the named Plaintiffs breached the  
16 agreement by failing to pay some of the fees that Plaintiffs claim  
17 were not disclosed. The Court also finds that declining to  
18 exercise jurisdiction pursuant to § 1367(c) would be inappropriate.  
19 RMG's counterclaims do not raise novel or complex issues of state  
20 law. Nor do the counterclaims substantially predominate over  
21 Plaintiffs' claims. Moreover, the exceptional circumstances cited  
22 in Robles are not present here, primarily because both Plaintiffs'  
23 claims and RMG's counterclaims implicate whether RMG can lawfully  
24 assess certain incidental fees. In contrast, the FDCPA claims at  
25 issue in Robles did not implicate the underlying debt.

26 For these reasons, the Court declines to dismiss RMG's  
27 counterclaims against the named Plaintiffs for lack of subject  
28 matter jurisdiction.

1           **B. Plaintiffs' Rule 12(b)(6) Motion to Dismiss and Rule**  
2           **12(f) Motion to Strike**

3           As the Court chooses to exercise jurisdiction over RMG's  
4 counterclaims against the named Plaintiffs, it now turns to  
5 Plaintiffs' Rule 12(b)(6) motion to dismiss and Rule 12(f) motion  
6 to strike. The Court does not address Plaintiffs' arguments with  
7 respect to the absent class members, since it has already dismissed  
8 RMG's counterclaims against the class because they are not opposing  
9 parties for the purposes of Rule 13. See Section III.A.1 supra.

10           **1. Legal Standard**

11           A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency  
12 of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).  
13 "Dismissal can be based on the lack of a cognizable legal theory or  
14 the absence of sufficient facts alleged under a cognizable legal  
15 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
16 (9th Cir. 1988). "When there are well-pleaded factual allegations,  
17 a court should assume their veracity and then determine whether  
18 they plausibly give rise to an entitlement to relief." Ashcroft v.  
19 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court  
20 must accept as true all of the allegations contained in a complaint  
21 is inapplicable to legal conclusions. Threadbare recitals of the  
22 elements of a cause of action, supported by mere conclusory  
23 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.  
24 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a  
25 complaint must be both "sufficiently detailed to give fair notice  
26 to the opposing party of the nature of the claim so that the party  
27 may effectively defend against it" and "sufficiently plausible"  
28 such that "it is not unfair to require the opposing party to be



1 subjected to the expense of discovery." Starr v. Baca, 633 F.3d  
2 1191, 1204 (9th Cir. 2011).

3 Federal Rule of Civil Procedure 12(f) provides that a court  
4 may, on its own or on a motion, "strike from a pleading an  
5 insufficient defense or any redundant, immaterial, impertinent, or  
6 scandalous matter." Motions to strike "are generally disfavored  
7 because they are often used as delaying tactics and because of the  
8 limited importance of pleadings in federal practice." Rosales v.  
9 Citibank, 133 F. Supp.2d 1177, 1180 (N.D. Cal. 2001). In most  
10 cases, a motion to strike should not be granted unless "the matter  
11 to be stricken clearly could have no possible bearing on the  
12 subject of the litigation." Platte Anchor Bolt, Inc. v. IHI, Inc.,  
13 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

14 **2. Breach of Contract Counterclaims against Circle**  
15 **Click and CTNY**

16 RMG asserts breach of contract counterclaims against Circle  
17 Click and CTNY. RMG alleges that Circle Click failed to pay a  
18 \$1,047.00 business continuity services fee pursuant to Paragraph  
19 1.7 of the Terms and Conditions and Paragraph 38 of the House  
20 Rules. Countercl. ¶ 23-24. As to CTNY, RMG alleges the company  
21 breached the terms of its agreement by "by failing to make its  
22 monthly payments plus applicable taxes and fees for services, such  
23 as for kitchen amenities, internet activation and access, and  
24 business continuity," and alleges damages in "an amount no less  
25 than \$13,640.38." Id. ¶¶ 30, 32.

26 Plaintiffs argue that these counterclaims fail as a matter of  
27 law since neither the House Rules nor the Service Price Guide --  
28 which set forth the business continuity and kitchen amenities fees,

1 among other things -- are part of the parties' agreements.  
2 12(b)(6)/12(f) Mot. at 10. Under California law, "[f]or the terms  
3 of another document to be incorporated into the document executed  
4 by the parties the reference must be clear and unequivocal, the  
5 reference must be called to the attention of the other party and he  
6 must consent thereto, and the terms of the incorporated document  
7 must be known or easily available to the contracting parties."  
8 Chan v. Drexel Burnham Lambert, Inc., 178 Cal. App. 3d 632, 641  
9 (Cal. Ct. App. 1986) (quotations omitted). Likewise, New York law  
10 requires that: (1) the agreement "specifically reference and  
11 sufficiently describe the document to be incorporated, such that  
12 the latter may be identified beyond all reasonable doubt"; and (2)  
13 "it must be clear that the parties to the agreement had knowledge  
14 of and assented to the incorporated terms." Ryan, Beck & Co., LLC.  
15 v. Fakhri, 268 F. Supp. 2d 210, 223 (E.D.N.Y. 2003) (internal  
16 quotations omitted). Plaintiffs argue that these factors are not  
17 satisfied here because Defendant has not alleged that the House  
18 Rules and Service Price Guide were provided to Circle Click or  
19 CTNY. 12(b)(6)/12(f) Mot. at 11. Plaintiffs further argue that  
20 because the Terms and Conditions are practically illegible, the  
21 reference to the House Rules contained in the Terms and Conditions  
22 is neither clear nor unequivocal. Id.

23 RMG responds that the Court's April 22 Order already found  
24 that the House Rules and Services Price Guide are expressly  
25 incorporated into the Office Service Agreement. 12(b)(6)/12(f)  
26 Opp'n at 7. The April 22 Order held that Plaintiffs could not  
27 state a plausible claim for intentional misrepresentation based on  
28 a theory of non-disclosure, because RMG's fees were disclosed in

1 the Terms and Conditions, House Rules, and Service Price Guide.  
2 Apr. 22 Order at 10-11. The Court reasoned that Plaintiffs  
3 confirmed that they had "read and understood" the Terms and  
4 Conditions when they signed the Office Service Agreement, the Terms  
5 Conditions expressly referred to the House Rules, and the House  
6 Rules expressly referred to the Service Price Guide. Id. The  
7 Court agrees with the Plaintiffs, that its April 22 holding was  
8 limited to Plaintiffs' fraud claim. See 12(b)(6)/12(f) Reply at 9-  
9 10. However, the reasoning of the April 22 Order applies with  
10 equal force here. Plaintiffs cannot claim ignorance of the Terms  
11 and Conditions or the documents referenced therein if they  
12 expressly confirmed that they had read and understood the Terms and  
13 Conditions. Further, it remains unclear whether the copy of the  
14 Terms and Conditions provided to Plaintiffs at the time of contract  
15 formation was as illegible as the copy before the Court.<sup>4</sup>

16 Plaintiffs also argue that the allegations in RMG's  
17 counterclaim against Circle Click are contradicted by an RMG  
18 invoice. 12(b)(6)/12(f) Mot. at 9. Plaintiffs argue that the  
19 Court may take judicial notice of the invoice because it is  
20 referenced in the Terms and Conditions. Id. (citing Terms and  
21 Conditions § 8.5). The Court disagrees. In relevant part, Section  
22 8.5 of the Terms and Conditions provides: "If the Client disputes  
23 any part of an Invoice, the Client must pay the amount not in  
24 dispute by the due date or be subject to late fees." The Terms and  
25 Conditions do not specifically refer to the particular invoice

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26 <sup>4</sup> The Court has yet to make a determination about whether the  
27 Office Service Agreement and the referenced documents constitute  
28 valid and enforceable agreements. Nothing in this Order precludes  
Plaintiffs from asserting that the agreements are unconscionable  
and therefore unenforceable.

1 proffered by Plaintiffs. As such, that invoice constitutes  
2 extrinsic evidence -- not a written instrument incorporated by  
3 reference into the pleadings -- and is not appropriate for  
4 consideration on a Rule 12(b)(6) motion to dismiss.<sup>5</sup>

5 Nevertheless, RMG's breach of contract counterclaims against  
6 Circle Click and CTNY suffer from a number of significant pleading  
7 defects. First, RMG has not alleged that the House Rules and the  
8 Service Price Agreement were in fact made available to Plaintiffs.  
9 Second, RMG has not alleged what provisions of the relevant  
10 agreements were breached. As to CTNY, RMG's pleading does not  
11 refer to a particular provision of the Office Service Agreement,  
12 the Terms and Conditions, or the House Rules. Further, RMG does  
13 not allege what portion of the allegedly unpaid \$13,640.38 in fees  
14 constitutes monthly payments and what portion is for taxes and  
15 services. RMG's allegations with respect to Circle Click offer  
16 more detail. RMG alleges that Circle Click breached Paragraph 1.7  
17 of the Terms and Conditions and Paragraph 38 of the House Rules.  
18 However, the Counterclaim does not set forth the language of these  
19 provisions, and, due to miniscule font size and poor image quality,  
20 the Court cannot clearly make out certain terms in the copy of the  
21 Terms and Conditions previously filed, even with magnification.

22 Accordingly, RMG's breach of contract counterclaims against  
23 Circle Click and CTNY are DISMISSED with leave to amend. If RMG

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24 <sup>5</sup> The invoice proffered by Plaintiffs suggests that RMG waived the  
25 \$1,047.00 business continuity fee that Circle Click allegedly  
26 failed to pay. ECF No. 83 Ex. A. RMG disputed the authenticity of  
27 the invoice in its opposition brief, 12(b)(6)/12(f) Opp'n at 2, but  
28 subsequently withdrew this contention, ECF No. 86. While the Court  
may not take judicial notice of the invoice, it reminds RMG of its  
Rule 11 obligations. If the factual allegations underlying the  
breach of contract counterclaim against Circle Click have no  
evidentiary support, then that counterclaim should be withdrawn.  
See Fed. R. Civ. P. 11(b)(3).

1 elects to amend these counterclaims, its pleading should set forth  
2 the relevant provisions of the agreements verbatim, specify how  
3 Plaintiffs breached those provisions, and allege whether the House  
4 Rules and Service Price Guide were made available to Plaintiffs.

5 **3. "Alternative" Counterclaim for Breach of Contract**

6 RMG also asserts "alternative" counterclaims against "all  
7 Counterclaim-Defendants," which presumably includes the named  
8 Plaintiffs, Circle Click, CTNY, and Metro Talent. These  
9 alternative counterclaims are entitled: (1) breach of contract, (2)  
10 quantum meruit, and (3) unjust enrichment. As to the first  
11 alternative counterclaim for breach of contract, RMG alleges: "In  
12 the event the Court determines that the late payment penalty  
13 provisions set forth in [the Office Service Agreement] is invalid,  
14 or is otherwise unenforceable, and that the [Office Service  
15 Agreement] did not allow Counterclaim-Defendants to make past-due  
16 payments, then Counterclaim-Defendants damaged RMG by failing to  
17 timely pay all amounts due to RMG." Countercl. ¶ 35. In its  
18 opposition brief, RMG clarifies that it is merely alleging that  
19 Plaintiffs breached their contractual obligations with RMG by  
20 failing to make timely payments. 12(b)(6)/12(f) Opp'n at 9.

21 As to Circle Click and CTNY, the alternative breach of  
22 contract counterclaim fails for the same reasons as RMG's other  
23 counterclaims for breach of contract. See Section III.B.2 supra.  
24 It is entirely unclear from the pleading what payments Circle Click  
25 or CTNY failed to make or what provisions of the agreements they  
26 breached. RMG's counterclaim against Metro Talent is even less  
27 plausible. The only factual allegation specific to Metro Talent in  
28 the Counterclaim states that Metro Talent is a limited liability

1 company organized and existing under the laws of California.  
2 Countercl. ¶ 12. RMG essentially urges the Court to ignore the  
3 pleading defects in the counterclaim and focus on Plaintiffs' 2AC.  
4 12(b)(6)/12(f) Opp'n at 4. However, contrary to RMG's argument,  
5 the 2AC does not establish that Metro Talent failed to timely pay  
6 its bills. The 2AC paragraphs cited by RMG merely allege that  
7 Metro Talent was assessed fees that were not disclosed in the  
8 Office Service Agreement, that Metro Talent questioned these fees,  
9 and that RMG threatened to evict Metro Talent if it failed to pay  
10 the fees within in a certain time period. See 2AC ¶¶ 62(c)-69.  
11 The 2AC does not suggest that Metro Talent failed to pay the  
12 challenged fees or that its payments were late.

13 RMG's alternative counterclaim for breach of contract is  
14 DISMISSED with leave to amend as to the named Plaintiffs. Should  
15 RMG choose to amend this counterclaim, it should allege specific  
16 facts as to each Plaintiff supporting each element of a claim for  
17 breach of contract.

18 **4. RMG's Alternative Counterclaims for Quantum Meruit**  
19 **and Unjust Enrichment**

20 Plaintiffs also move to strike RMG's second and third  
21 alternative counterclaims for quantum meruit and unjust enrichment.  
22 Both claims essentially assert that if the Court finds that RMG  
23 imposed unauthorized charges, then RMG is entitled to recover  
24 damages because Plaintiffs received the benefit of their contracts  
25 with RMG. See Countercl. ¶¶ 39, 46. Plaintiff moves to strike  
26 these counterclaims pursuant to Rule 12(f) on the grounds that (1)  
27 the counterclaims are mirror images of the claims asserted in the  
28 2AC, and (2) the counterclaims are redundant of affirmative

1 defenses already asserted by Defendants in their Answer.<sup>6</sup>  
2 12(b)(6)/12(f) Mot. at 13.

3 Plaintiffs appear to abandon the first argument in their reply  
4 brief. In any event, the argument is unpersuasive. Plaintiffs  
5 rely on Daily v. Fed. Ins. Co., C 04-3791 PJH, 2005 WL 14734, at \*6  
6 (N.D. Cal. Jan. 3, 2005), in which this court struck the  
7 defendant's counterclaim for declaratory relief because it was  
8 redundant of the plaintiff's claim for declaratory relief. Both  
9 the claim and the counterclaim asked the court to determine whether  
10 the plaintiff was entitled to insurance coverage from defendant.  
11 Id. In contrast, none of the parties have sought declaratory  
12 relief in this action, and RMG's counterclaims raise new issues  
13 that are not contemplated in Plaintiffs' 2AC.

14 Plaintiffs' second argument is also unavailing. RMG's  
15 counterclaims for unjust enrichment and quantum meruit are not  
16 merely repackaged affirmative defenses, because they are different  
17 in scope and seek a different remedy. As Plaintiffs point out, RMG  
18 also asserts affirmative defenses for "benefits realized,"  
19 "setoff," and "unjust enrichment." However, these affirmative  
20 defenses merely assert that Plaintiffs' claims are barred. In  
21 contrast, RMG's counterclaims seek to recover damages.

22 Accordingly, Plaintiffs' motion to strike is DENIED and RMG's  
23 counterclaims for unjust enrichment and quantum meruit remain  
24 undisturbed.

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27 <sup>6</sup> Plaintiffs move to strike RMG's first alternative counterclaim  
28 for breach of contract on these same grounds. In light of the  
Court's findings in Sections III.A.1 and III.B.3 supra, it need not  
address this issue.

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**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs' Rule 12(b)(1) motion to dismiss is GRANTED in part and DENIED in part. RMG's counterclaims are DISMISSED with respect to the putative class. Plaintiffs' Rule 12(b)(6) motion to dismiss is GRANTED. RMG's first and second counterclaims for breach of contract against Circle Click and CTNY are DISMISSED with leave to amend, as is RMG's first alternative counterclaim for breach of contract against Circle Click, CTNY, and Metro Talent. Plaintiffs' motion to strike the second and third alternative counterclaims for unjust enrichment and quantum meruit is DENIED.

RMG shall file an amended counterclaim within thirty (30) days of the signature date of this order. Failure to do so will result in dismissal with prejudice of its first and second counterclaims for breach of contract, as well as its first alternative counterclaim for breach of contract.

IT IS SO ORDERED.

Dated: August 13, 2013



UNITED STATES DISTRICT JUDGE