United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, ET AL.,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC,

Defendant.

Case No. 16-cv-06450-MMC

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, ALTERNATIVELY, TO STRIKE CLASS ALLEGATIONS; GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO STRIKE AFFIRMATIVE DEFENSES

Re: Dkt. Nos. 24, 26

Before the Court are two motions: (1) defendant Massage Envy Franchising, LLC's ("MEF") "Motion for Judgment on the Pleadings or, in the Alternative, to Strike Class Allegations," filed January 27, 2017; and (2) plaintiffs Baerbel McKinney-Dropnis ("McKinney-Dropnis"), Joseph B. Piccola ("Piccola") and Camille Berlese's ("Berlese") "Motion to Strike Affirmative Defenses in Defendants' [sic] Answer to Plaintiffs' Class Action Complaint," filed January 27, 2017. The motions have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

BACKGROUND

In their complaint, plaintiffs allege MEF is a "membership based franchise that, by its standard business practices, attracts customers to join its program that, basically, entitles members to receive one fifty minute massage per month in exchange for a monthly fee that ranges between approximately $30.00 to $59.00 (depending on

[1]By order filed March 14, 2017, the Court took the matters under submission.

geographic location)." (See Compl. ¶ 1.) According to plaintiffs, when a person enrolls as a member, the person executes MEF's "form Membership Agreement." (See id.)

Plaintiffs allege the Membership Agreement provides for an "initial term" of months (see Compl. ¶ 2), the length of which can vary (see Compl. ¶¶ 9, 11), during which period the customer may cancel for limited, specified reasons (see Compl. ¶¶ 2, 4).[2] If the customer chooses to pay on a monthly basis during the initial term, the following provision applies: "Your membership dues of $[X dollar amount] (not including any additional applicable taxes) are due on or after the ___ day of each month hereafter until your membership expires or is terminated in accordance with this agreement." (See Compl. ¶ 1 (alteration in original).) Alternatively, if the customer chooses to pay for the initial term "in full," the following provision applies: "Your payment of $[X dollar amount] is due today." (See id. (alteration in original).) Plaintiffs also allege that, upon expiration of the initial term, the "membership is automatically renewed," and the following provision governs the monthly amount due: "Following the initial term, your membership will automatically continue on a month-to-month basis at $[X dollar amount] per month until your membership is cancelled." (See Compl. ¶ 2 (alteration in original).) According to plaintiffs, the above-quoted clauses, read together, provide that "a customer contracts to pay an explicit, locked in fee for the entire membership term" (see Compl. ¶ 1), "both for the original term and renewal term(s)" (see Compl. ¶ 3).

Plaintiffs allege that each of the three plaintiffs is currently a member of MEF. See Compl. ¶¶ 9-14).[3] Plaintiffs allege that although McKinney-Dropnis' Membership Agreement provided for a monthly fee of $59, MEF, during the sixth year of her

[2]Plaintiffs allege a customer may cancel during the initial term if the customer "permanently relocates their residence more than 25 miles from any [MEF location]" or "a physician certifies that the member is physically unable to receive massage services." (See Compl. ¶ 4.)

[3]Although the complaint does not expressly allege plaintiffs are current members, the parties agree that the complaint should be so interpreted. (See Def.'s Mot., filed January 27, 2017, at 7:8; Pls' Opp. to Def.'s Mot., filed February 10, 2017, at 12:5-6.)

membership, "unilaterally increased" the fee to $59.99, which increase she has paid. (See Compl. ¶ 10.) Plaintiffs allege that although Piccola's Membership Agreement provided for a monthly fee of $49, MEF, during the fourth year of his membership, "unilaterally increased" the fee to $49.99, and, during the fifth year, "unilaterally increased" the fee to $59.99, which increases he has paid. (See Compl. ¶ 12.) Plaintiffs allege that although Berlese's Membership Agreement provided for a monthly fee of $39, MEF, during the second year of her membership, "unilaterally increased" the fee to $39.99, which increase she paid, and, during the sixth year, "unilaterally increased" the fee to $55. (See Compl. ¶ 14.) According to plaintiffs, such increases are "part of a concerted plan to extract as much money from its captive membership base as possible" and "millions of individuals have suffered from [MEF's] failure to abide by the proper contractual obligations." (See Compl. ¶ 23.)

Based on the above-referenced allegations, plaintiffs assert six causes of action, two of which are alleged on behalf of the three plaintiffs and a putative nationwide class, specifically, "Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing" ("Count One") and "Declaratory Relief Pursuant to 28 U.S.C. § 2201 - The Declaratory Judgement Act" ("Count Six"). The remaining four causes of action are alleged on behalf of McKinney-Dropnis and a putative sub-class consisting of California residents (see Compl. ¶ 26), specifically, "Violation of Cal. Civ. Code §§ 1750, et seq. - Consumer Legal Remedies Act" ("Count Two") and three claims each titled "Violation of Cal. Bus. & Prof. Code §§ 17200, et seq. - Unlawful Business Acts and Practices" ("Counts Three, Four, and Five").[4]

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[4]The three § 17200 claims differ in that plaintiffs refer to the alleged conduct as, respectively, "unlawful" (see Compl. ¶ 50), "unfair" (see Compl. ¶ 59) and "fraudulent" (see Compl. ¶ 67).

DISCUSSION

A. MEF's Motion

MEF seeks judgment on the pleadings or, in the alternative, an order striking the class action allegations.

1. Judgment on the Pleadings

In contrast to Rule 12(b) of the Federal Rules of Civil Procedure, which provides for the filing of a motion to dismiss prior to the filing of an answer, Rule 12(c) provides that "[a]fter the pleadings are closed . . . a party may move for judgment on the pleadings." See Fed. R. Civ. P. 12(c). "The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing." See Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). As the motions are "functionally identical," federal courts, in considering motions under Rule 12(c) that are based on an asserted failure to state a claim, apply the same analysis as that applicable to motions under Rule 12(b)(6), see id., which rule provides that a dismissal may be based on, inter alia, an affirmative defense, where "the defendant shows some obvious bar to securing relief on the face of the complaint," see ASARCO, LLC v. Union Pacific Railroad Co., 765 F.3d 999, 1004 (9th Cir. 2014), or where the affirmative defense can be established by documents of which a district court can take judicial notice, such as court filings in other actions, see Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038, 1040-41 (9th Cir. 2010).

Here, MEF argues, the claims of the named plaintiffs are barred in light of the resolution of a class action filed in the Southern District of California, titled Zizian v. Massage Envy Franchising, LLC, Civ. No. 16-CV-00783 DMS-BGS, either under the doctrine of claim preclusion or in light of the court-approved settlement agreement.[5]

[5]MEF also argues that the claims alleged on behalf of "the vast majority of the putative class members" are barred in light of the resolution of either Zizian or one of two other actions, titled, respectively, Hahn v. Massage Envy Franchising, LLC and Bandell v. Massage Envy Franchising, LLC. The Court does not further address such argument herein, as, to date, no class has been certified. See Schwarzchild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995) (holding where defendant obtains judgment in putative class action "before the class has been properly certified," judgment "binds only the named plaintiffs").

In Zizian, the plaintiff, a "current" member of MEF who proceeded on behalf of a class of members whose accounts were "active as of June 30, 2016" (see Def.'s Req. for Judicial Notice, filed January 27, 2017, Ex. J ¶¶ 5,16),[6] alleged that MEF "uniformly interprets its Membership Agreement to provide that if a member has not paid all charges when due, misses a monthly payment, and/or cancels their account, all prepaid massages in the member's account will have to be redeemed within a very short 60-day window or be forfeited" (see Def.'s Req. for Judicial Notice, filed January 27, 2017, Ex. J ¶ 14). The plaintiff therein further alleged that said interpretation, when applied to a member whose membership had been terminated, constituted a breach of a clause in the Membership Agreement providing as follows: "If you have Paid in Full for your membership services, you will be refunded the unused portion of your membership dues for any actual services you have not yet received." (See id. Ex. J ¶ 2.) The district court, after certifying a class for purposes of settlement, approved a settlement entered on behalf of the class (see id. Ex. P), and thereafter, on January 13, 2017, entered its "Final Judgment" dismissing the class claims "with prejudice on the merits" (see id. Ex. Q).

a. Claim Preclusion

The "claim-preclusive effect" of a judgment entered by a federal district court sitting in diversity is determined by the law of the forum state. See Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508-09 (2001). Here, as the Southern District of California had diversity jurisdiction over the claims alleged in Zizian (see Def.'s Req. for Judicial Notice, filed January 27, 2017, Ex. J ¶ 3), the preclusive effect of the final judgment entered therein is determined by California law.

Under California law, the doctrine of claim preclusion bars an action where "(1) [a] claim . . . raised in the present action is identical to a claim . . . litigated in a prior

[6]MEF's unopposed request for judicial notice of the First Amended Complaint filed in Zizian, as well as its unopposed request for judicial notice of other filings in Zizian and of filings in other court actions is hereby GRANTED. See Rosales-Martinez v. Palmer, 753 F.3d 890, 894 (9th Cir. 2014) (holding courts "may take judicial notice of judicial proceedings in other courts").

proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding." See Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 797 (2010). Here, the parties agree the Zizian dismissal constitutes a final judgment on the merits and that plaintiffs, as class members, were parties thereto. (See Def.'s Mot. at 11:25 - 12:6; Pls.' Opp. at 8:10-14.) The parties disagree, however, as to whether the claims alleged in the instant complaint are identical to a claim litigated in Zizian.

"To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have consistently applied the primary rights theory." Boeken, 48 Cal. 4th at 797 (internal quotation and citation omitted). Under the primary rights theory, "a cause of action arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests." See id. at 797-98 (internal quotation, alterations and quotation omitted). In the context of successive lawsuits alleging breach of the same contract, the California Supreme Court, applying the primary rights theory, has held that, although a plaintiff may not file a second lawsuit seeking different remedies for the same breach of a contractual provision, see Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 908 (2002), a plaintiff may bring a second lawsuit alleging breach of the same contract on which it relied in the first lawsuit, so long as "[e]ach action is based on a breach of a separate covenant at different times," see id.

MEF argues the claims alleged in the instant action are barred because "the primary right at issue here is the same primary right at issue in the Zizian [a]ction." (See Def.'s Mot. at 14:25.) The Court disagrees.

As set forth above, the Zizian action asserted claims arising from an alleged breach of a provision in the Membership Agreements concerning the rights a member has upon termination of a membership, whereas the claims in the instant action arise from the alleged breach of provisions concerning the amount of the monthly fee MEF may charge its current members. Consequently, the two actions are based on breaches

of separate covenants. Further, MEF has not shown the asserted breaches of the separate covenants occurred at the same time, as the contractual provision at issue in Zizian can only be breached after a membership is terminated, whereas the contractual provisions at issue in the instant case can only be breached while a customer is still a member.

Accordingly, MEF has failed to show plaintiffs' claims are barred by the doctrine of claim preclusion.

b. Release

MEF argues the Zizian settlement agreement unambiguously provides that plaintiffs, as Zizian class members, nonetheless waived the claims alleged in the instant complaint. As discussed below, the Court disagrees.

The Zizian settlement agreement provides that the class members "fully release and forever discharge" MEF from "causes of action, claims, damages, equitable, legal and administrative relief . . ., whether based on federal, state, or local law, statute, ordinance, regulation, the Constitution, contract, common law, or any other source, that relate to the Released Claims." (See Def.'s Req. for Judicial Notice, filed January 27, 2017, Ex. M ¶ 59.) Additionally, the settlement agreement provides that "[i]t is the intention of plaintiffs in executing this release on behalf of themselves and the Settlement Class to fully, finally, and forever settle and release all matters and all claims relating to the Released Claims in every way." (See id. Ex. M ¶ 62.)

The term "Released Claims" is defined in the settlement agreement as follows:

> 'Released Claims' means all claims, demands, rights, and liabilities asserted in the [Zizian action] including, but not limited to, claims under the common laws and statutes of all fifty (50) states concerning (a) the terms and conditions of the Membership Agreements between the Settlement Class and MEF Franchisees concerning the cancellation, renewal, termination, and/or expiration of or ability to use any Unutilized Massage(s); (b) alleged misrepresentations concerning the terms and conditions of the Membership Agreements between the Settlement Class and MEF Franchisees concerning the cancellation, renewal, termination, and/or expiration of or ability to use any Unutilized Massage(s); and/or (c) any fact or circumstance that relates to the cancellation, renewal, termination, and/or expiration of or ability to use any Unutilized Massage(s) or any claim asserted or that could have been asserted in the [Zizian action]. The

> Released Claims include, but are not limited to, claims that any Membership Agreement contained an illegal forfeiture or liquidated damages penalty; constituted a fraudulent, unlawful, unfair, or deceptive business practice; was unconscionable; violated consumer protection statutes; and for breach of contract and breach of the covenant of good faith and fair dealing.

(See id. Ex. M ¶ 1.LL.)

As MEF observes, plaintiffs' complaint asserts the types of legal claims identified in the last sentence of the "Released Claims" definition, specifically, claims alleging "breach of contract and breach of the covenant of good faith and fair dealing," as well as claims that MEF is engaged in "fraudulent," "unlawful" and "unfair" business practices. (See id.) MEF argues such claims fall within the scope of the release, as those claims "could have been asserted" in the Zizian action. (See id.)

"[T]he interpretation of a release or settlement agreement is governed by the same principles applicable to any other contractual agreement." General Motors Corp. v. Superior Court, 12 Cal. App. 4th 435, 439 (1993). The interpretation of a release in a class action settlement agreement, however, is subject to a specific limiting principle. As the Ninth Circuit has explained, "[a] settlement agreement [in a class action] may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action." See Hesse v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010).

Applying this principle, the Ninth Circuit has affirmed the dismissal of a putative antitrust class action complaint filed by merchants against credit card companies, where such action was based on a theory that the defendants engaged in unlawful "price-fixing" when they agreed upon "the interchange rate" and the plaintiffs had been members of a class that previously had settled "tying" and "monopoliz[ation]" claims that were based on a theory that defendants had "collectively fixed the interchange rate." See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 744-45, 748 (9th Cir. 2006). In so ruling, the Ninth Circuit explained: "While [p]laintiffs seek to hold [d]efendants liable by positing a different theory of anti-competitive conduct, the price-fixing predicate (price-fixing

interchange rates) and the underlying injury are identical." See id. at 749.

By contrast, the Ninth Circuit has reversed a judgment in which the district court found a putative class action filed by Sprint customers was barred by a prior class settlement, where the second action "[did] not share an identical factual predicate with the claims resolved in the [first class action]." See Hesse, 598 F.3d at 591-92. As the Ninth Circuit explained, the first class action "dealt exclusively with specific nationwide surcharges" Sprint imposed on customers "to recoup the costs of compliance with federal programs," while "the claims at issue in the [second] case involve[d] Sprint's statewide surcharge to recoup the cost of [a state tax]." See id. at 591. Although noting that the two actions had a "superficial similarity" in that "[b]oth involve[d] claims that Sprint improperly billed government taxes or fees to its customers," the Ninth Circuit concluded the two actions were not based on "an identical factual predicate" as "they deal[t] with different surcharges, imposed to recoup different costs, that were alleged to be improper for different reasons." See id. In so ruling, the Ninth Circuit rejected Sprint's argument, which was based on language in the settlement agreement that "purported to release Sprint from a set of potential claims much broader than the surcharges for federal regulatory fees that were the subject of the [first] action." See id. at 586.

Here, as set forth above, the Zizian action and the instant action are based on breaches of different contractual provisions in the membership agreement, and those breaches, if they occurred, necessarily occurred at different times. Further, the breaches, if they occurred, caused different injuries. Under such circumstances, MEF has not shown the instant action is based on an "identical factual predicate as that underlying the claims in the settled class action." See id.

Accordingly, MEF has failed to show plaintiffs' claims are barred by the language in the Zizian settlement agreement.

2. Striking Class Action Allegations

MEF, relying on Rule 12(f), next argues that plaintiffs' class allegations should be stricken. See Fed. R. Civ. P. 12(f) (providing “court may strike from a pleading . . .

immaterial . . . matter"); see also Fed. R. Civ. P. 23(c)(1)(A) (providing, where plaintiff sues as class representative, "court must determine by order whether to certify the action as a class action").

As noted, plaintiffs seek to proceed on behalf of a putative nationwide class and McKinney-Dropnis seeks to additionally proceed on behalf of a putative sub-class consisting of California residents. Under Rule 23(a), a plaintiff seeking to proceed on behalf of a class must establish, inter alia, that "the representative parties will fairly and adequately protect the interests of the class." See Fed. R. Civ. P. 23(a)(4). Here, MEF contends plaintiffs' class allegations should be stricken for the asserted reason that "their counsel cannot adequately represent the putative class." (See Def.'s Mot. at 19:22-23.)

MEF's argument is based on a ruling made in an earlier case, Hahn v. Massage Envy Franchising, LLC, Case No. 12-cv-00153-DMS-BGS, in which plaintiffs' counsel represented individuals other than the plaintiffs named in the instant action. The claims alleged in Hahn were based on the same theories as those on which the claims in Zizian were based, specifically, claims challenging the loss of a member's "unused" massages once membership was terminated. (See Def.'s Req. for Judicial Notice, filed January 27, 2017, Ex. A ¶¶ 1, 8-9, 17.) Initially, the plaintiffs in Hahn sought to proceed on behalf of a class of MEF members who were former members of MEF (see id. Ex. A ¶ 23; Ex. B ¶¶ 29-30), and successfully moved to certify a class consisting of former members (see id. Ex. E at 4:10-17). The parties to the Hahn action, however, subsequently entered into a settlement agreement on behalf of both former and current MEF members, and the plaintiffs successfully obtained leave to amend to allege their claims on behalf of both current and former members. (See id. Ex. C; Ex. D at 2:11-21.)

Thereafter, although the district court had granted preliminary approval of the settlement (see id. Ex. D at 6:20-23), the district court denied the plaintiffs' motion for final approval of the settlement. In so doing, the district court, after considering objections filed by current members, found the "interests of former and current members [were] not aligned," as those two groups had "competing demands" with respect to being able to

use "accrued massages" after termination of membership (see id. Ex. E at 11:11 - 12:18), and the named plaintiffs, who were former members, had "secured preferential treatment for themselves over current members" (see id. Ex. E at 12:20-22).[7] In light of the "fundamental differences between former and current members," the district court found the "former members [could not] adequately represent the current members" and "counsel representing former members [could not] adequately represent the current members." (See id. Ex. E at 13:8-10.)[8]

MEF, relying on the above-referenced ruling in Hahn, contends plaintiffs in the instant case, who are current members, and their counsel, who was counsel in Hahn, can never adequately represent the interests of former MEF members. The Court is not persuaded. In particular, the Court declines to make such a finding at the pleading stage, as the ruling in Hahn on which MEF relies was based on specific provisions of the settlement agreement presented to that court, rather than on a determination that former and current members of an organization can never represent each other, and MEF points to nothing on the face of the complaint to indicate an inherent conflict exists between former and current members.

Accordingly, MEF has failed to show the class action allegations should be stricken at the pleading stage.

B. Plaintiffs' Motion to Strike Affirmative Defenses

A district court "may strike from a pleading an insufficient defense." See Fed. R. Civ. P. 12(f).

MEF's answer contains twenty-nine "affirmative defenses" (see Def.'s Answer at

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[7]The district court explained that, under the proposed agreement, former members would "receive six times longer (180 days) than current members (60 days) to redeem unused pre-paid monthly massages" (see id. Ex. E at 11:15-16), and that, "in implementing the settlement agreement, [MEF] contemplate[d] an extension of time for former members to use their accrued massages, but no such flexibility [was] contemplated for the current members" (see id. Ex. E at 12:15-17).

[8]Later, the parties in Hahn reached a settlement agreement on behalf of former members only, which agreement the district court approved. (See id. Ex. G.)

15:25-26), each of which, according to plaintiffs, should be stricken. In that regard, plaintiffs argue that some of the "affirmative defenses" are not affirmative in nature, that others are insufficient for failure to provide any notice as to the basis for the defense, and that others are, as a matter of law, insufficient.

1. Defenses Not Affirmative in Nature

"A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002). Rather, such a defense is "merely rebuttal against the evidence [to be] presented by the plaintiff" and, consequently, when pleaded as an affirmative defense, is "redundant" and, as such, subject to being stricken "so as to simplify and streamline the litigation." See Barnes v. AT&T Pension Benefit Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1173-74 (N.D. Cal. 2010) (striking eight "affirmative defenses" that "simply provide[d] a basis to negate an element of [the plaintiff's] prima facie case for relief").

Here, plaintiffs argue, a number of pleaded "affirmative defenses" are not affirmative in nature, and, consequently, should be stricken.

As to the following "affirmative defenses," the Court agrees: (1) the First Affirmative Defense, titled "Failure to State a Claim Upon Which Relief Can Be Granted"; (2) the Twelfth Affirmative Defense, titled "Lack of Standing"; (3) the Fifteenth Affirmative Defense, titled "Express Contractual Terms Govern Conduct"; (4) the Sixteenth Affirmative Defense, titled "Lack of Proximate Cause"; (5) the Seventeenth Affirmative Defense, titled "Unconstitutional as Class Action," and based solely on a theory that "[p]laintiffs cannot satisfy Federal Rule of Civil Procedure 23" (see Answer at 19:25 - 20:1);[9] (6) the Eighteenth Affirmative Defense, titled "Plaintiffs' Counsel Inadequate to Represent Proposed Class"; (7) the Nineteenth Affirmative Defense, titled "Conduct Not

[9]Despite the title of the Seventeenth Affirmative Defense, MEF does not allege therein that Rule 23, or any other rule or statute, is unconstitutional.

'Unlawful,' 'Unfair,' or 'Fraudulent'"; (8) the Twenty-First Affirmative Defense, titled "No Vicarious Liability Under the UCL"; (9) the Twenty-Fourth Affirmative Defense, titled "No Ground for Attorney's Fees"; (10) the Twenty-Fifth Affirmative Defense, titled "Damages Speculative"; (11) the Twenty-Sixth Affirmative Defense, titled "No Prejudgment Interest"; and (12) the Twenty-Eighth Affirmative Defense, titled "No Liability for Acts of Alleged Agents."

Accordingly, the First, Twelfth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-First, Twenty-Fourth, Twenty-Fifth, Twenty-Sixth and Twenty-Eighth Affirmative Defenses will be stricken, without prejudice to MEF's raising such defenses in rebuttal to plaintiffs' case.

2. Lack of Fair Notice

To adequately plead an affirmative defense, a defendant must provide "fair notice" of the defense, and can do so by "describing the defense in general terms." See Kohler v. Flava Enterprises, Inc., 779 F.3d 1016, 1019 (9th Cir. 2015) (internal quotation and citation omitted) (holding, in action in which disabled plaintiff alleged length of bench in defendant's store was not compliant with federal regulation, defendant gave sufficient notice of affirmative defense that noncompliant bench "provide[d] substantially equivalent or greater access to and usability of the facility," by alleging in answer that "store was compliant due to its use of 'alternative methods' of accessibility").

Here, as plaintiffs correctly observe, MEF has included no facts of any kind to support several of the pleaded affirmative defenses, specifically, the following seven affirmative defenses: (1) the Fifth Affirmative Defense, titled "Laches"; (2) the Sixth Affirmative Defense, titled "Estoppel" and further referred to as "the equitable doctrine of estoppel" (see Answer at 17:5-8); (3) the Eighth Affirmative Defense, titled "Unclean Hands"; (4) the Ninth Affirmative Defense, titled "Failure to Mitigate"; (5) the Eleventh Affirmative Defense, titled "Business Justification"; (6) the Fourteenth Affirmative Defense, titled "Good Faith"; and (7) the Twenty-Third Affirmative Defense, titled "Unjust Enrichment." Nor does MEF point to any other portion of the answer or to language

contained in any other document in which it describes the basis for any of these seven defenses. Cf. Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) (finding defendant provided "fair notice" of factual basis for "statute of limitations" as affirmative defense, where answer did no more than plead "plaintiff's claims are barred by the applicable statute of limitations," but defendant identified specific statute in its motion for leave to amend answer to allege such bar as defense). As to the Thirteenth Affirmative Defense, titled "Consent," although MEF alleges plaintiffs "signed contracts expressly evidencing consent to the terms of [sic] thereof" (see Answer at 18:26 - 19:1), such language is, at best, ambiguous, and, consequently, does not provide the requisite fair notice.[10]

Next, the Court finds MEF has not provided, and cannot at this time provide, fair notice of the basis for the Twenty-Ninth Affirmative Defense, titled "Miscellaneous," as the defense concededly is, in essence, a placeholder for defenses MEF may assert against "absent class members." (See Answer at 22:24.)[11] If, upon certification of a class, MEF seeks to assert affirmative defenses that differ from those asserted against the named plaintiffs, MEF may move to amend its answer at that time. See, e.g., DGM Investments, Inc. v. New York Futures Exchange, 2004 WL 635743 (S.D.N.Y. 2004) (striking affirmative defense purporting to reserve right to assert other affirmative defenses that might be revealed during discovery; explaining that if "additional affirmative defenses are warranted," defendant's "remedy" is to move to amend answer).

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[10]Plaintiffs also argue that the Eleventh, Thirteenth and Fourteenth Affirmative Defenses are not affirmative in nature. Plaintiffs, however, do not contend they have the burden to prove MEF acted with a lack of business justification, a lack of consent or a lack of good faith, and, consequently, it would appear such defenses are properly characterized as affirmative. See Zivkovic, 302 F.3d at 1088 (defining affirmative defense). As discussed above, however, they will be stricken for failure to provide fair notice of the basis therefor.

[11]To the extent the defense is intended to assert against members of any certified class the affirmative defenses alleged against the named plaintiffs, the defense is unnecessary, as the Court construes the First through Twenty-Eighth Affirmative Defenses to be asserted not only against the named plaintiffs but also against the members of any class that may be certified.

Accordingly, the Fifth, Sixth, Eighth, Ninth, Eleventh, Thirteenth, Fourteenth, and Twenty-Third Affirmative Defenses will be stricken, with leave to amend to provide, if MEF can do so, fair notice of the basis therefor, and the Twenty-Ninth Affirmative Defense will be stricken without prejudice to MEF's seeking to amend its answer if it later learns of additional affirmative defenses.

In contrast to the above-discussed defenses, the Court finds MEF, by describing "in general terms" the basis thereof, see Kohler, 779 F.3d at 1019, has provided fair notice for the following four affirmative defenses: (1) the Tenth Affirmative Defense, titled "Offset," which is based on the theory that, if judgment is entered against MEF, MEF is entitled to "offset" the judgment by the "value of the services" each plaintiff owes to MEF or MEF's franchisees (see Answer at 18:3-9);[12] (2) the Twentieth Affirmative Defense, titled "Taking," which is based on the theory that an award of restitution would violate the Takings Clause of the Fifth Amendment and Article I, Section 19, of the California Constitution, as "neither the [p]laintiffs nor the putative class and/or subclass members [p]laintiffs seek to represent paid any membership fees or other fees to MEF" (see Answer at 20:21-28); (3) the Twenty-Second Affirmative Defense, titled "Unconstitutional Vagueness," which is based on the theory that the statutory term "unfair," as set forth in § 17200, is unconstitutionally vague (see Answer at 21:12-15); and (4) the Twenty-Seventh Affirmative Defense, titled "Failure to Join Indispensable Parties," which is based on the theory that "the Massage Envy franchisees that entered [into] Membership Agreements with [p]laintiffs" are indispensable parties (see Answer at 22:13-16).

Accordingly, plaintiffs have failed to show the Tenth, Twentieth, Twenty-Second and Twenty-Seventh Affirmative Defenses should be stricken for failure to provide fair notice.

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[12]MEF has not alleged any counterclaims against plaintiffs. Nonetheless, as plaintiffs have not challenged the "offset" defense on the merits, the Court does not further address it herein.

3. Merits

Plaintiffs argue that seven of the affirmative defenses are, as a matter of law, insufficient and, consequently, should be stricken for that reason, irrespective of any other asserted deficiency.

As to four of the affirmative defenses, the Court agrees. The basis for the Second Affirmative Defense, titled "Res Judicata," and the Fourth Affirmative Defense, titled "Impermissible Claims Splitting," is that plaintiffs' claims are barred by the doctrine of claim preclusion in light the judgment of dismissal entered in Zizian. The basis for the Third Affirmative Defense, titled "Claims Released," and for the Seventh Affirmative Defense, titled "Waiver," is that plaintiffs' claims are barred by the Zizian settlement agreement. For the reasons stated above with respect to MEF's motion for judgment on the pleadings, the Court finds said defenses, as a matter of law, lack merit.

Accordingly, the Second, Third, Fourth and Seventh Affirmative Defenses will be stricken without leave to amend.

With respect to the three remaining affirmative defenses to which plaintiffs raise a challenge on the merits, however, the Court, as set forth below, finds a determination at the pleading stage is premature.

As to the Twentieth and Twenty-Second Affirmative Defenses, although plaintiffs assert in conclusory fashion that courts have "repeatedly upheld the constitutionality of the UCL and awards made thereunder" (see Pls.' Mot. at 18:6-7), plaintiffs cite to no authority rejecting either of these two constitutional defenses, which are, respectively, that, even if authorized under § 17200, it is unconstitutional to require a defendant to pay restitution when that defendant has not received any property from the plaintiff, and that the term "unfair" is unconstitutionally vague when applied to the factual allegations in the complaint.

Lastly, as to the Twenty-Seventh Affirmative Defense, in which MEF alleges plaintiffs have failed to join, as "indispensable parties," MEF "franchises that entered Membership Agreements with [p]laintiffs" (see Answer at 22:13-15), plaintiffs argue that

the franchisees are not indispensable parties, relying on "facts" they assert were found by the district court in Hahn, specifically, that MEF franchisees were not necessary parties to the Hahn plaintiffs' challenge to the loss of accrued massages upon termination of membership. (See id. at 19:19-22, 20:7, 13-14.) As plaintiffs acknowledge, however, some of the "facts" on which they rely were set forth in an order resolving a motion for summary judgment, which order was later vacated (see id. at 19:26-27), and the balance were contained in an order resolving a motion to dismiss the plaintiffs' operative complaint filed therein, in which order the district court was required to assume true the factual allegations in said pleading, see Hahn, Case No. 12-153, Doc. No. 52 (S.D. Cal. September 17, 2013). Under such circumstances, the Court finds the issue of whether MEF franchisees are indispensable parties cannot be resolved against MEF at the pleading stage.

Accordingly, plaintiffs have failed to show the Twentieth, Twenty-Second, and Twenty-Seventh Affirmative Defenses should be stricken.

CONCLUSION

For the reasons stated above:

1. MEF's motion for judgment on the pleadings or, alternatively, to strike class allegations is hereby DENIED.

2. Plaintiffs' motion to strike MEF's affirmative defenses is hereby GRANTED in part and DENIED in part, as follows:

a. The Second, Third, Fourth and Seventh Affirmative Defenses are hereby STRICKEN without leave to amend.

b. The First, Twelfth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-First, Twenty-Fourth, Twenty-Fifth, Twenty-Sixth and Twenty-Eighth Affirmative Defense are hereby STRICKEN without prejudice to MEF's raising such defenses in rebuttal to plaintiffs' case.

c. The Twenth-Ninth Affirmative Defense is hereby STRICKEN without prejudice to MEF's seeking to amend if it later learns of additional affirmative defenses.

d. The Fifth, Sixth, Eighth, Ninth, Eleventh, Thirteenth, Fourteenth, and Twenty-Third Affirmative Defenses are hereby STRICKEN with leave to amend.

e. In all other respects, the motion is DENIED.

Should MEF seek to amend its answer, MEF shall file its Amended Answer no later than April 21, 2017.

IT IS SO ORDERED.

Dated: April 5, 2017

MAXINE M. CHESNEY
United States District Judge

United States District Court
Northern District of California