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DONNA ZIZIAN
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DONNA ZIZIAN, Individually and on
behalf of all other similarly situated
11 California Residents,

12 Plaintiff,

13 v.

14 MASSAGE ENVY FRANCHISING,
LLC, a Delaware limited liability
15 company,

16 Defendant.
17
18
19
20

Case No. 16-CV-0783-DMS (BGS)

**FIRST AMENDED CLASS
ACTION COMPLAINT FOR:**

(1) BREACH OF CONTRACT

**(2) VIOLATION OF THE
IMPLIED COVENANT OF
GOOD FAITH AND FAIR
DEALING**

**(3) DECLARATORY RELIEF
UNDER THE
DECLARATORY
JUDGMENT ACT, 28 U.S.C.
§ 2201**

DEMAND FOR JURY TRIAL

1 Plaintiff, Donna Zizian (“Plaintiff”), files this first amended complaint as
2 to herself and all others similarly situated (“Class Members”), against Defendant
3 Massage Envy Franchising, LLC (“Massage Envy”), for breach of contract,
4 breach of the implied covenant of good faith and fair dealing, and for declaratory
5 relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiff, based on
6 her own experience, and as to all other allegations, based on a review of reports,
7 complaints, and investigation about Massage Envy, alleges the following.

8
9 **I. INTRODUCTION**

10 1. Massage Envy is a membership-based franchise specializing in
11 massages. After signing up, members receive one fifty-minute massage per
12 month, in consideration for a monthly fee of approximately \$60.00. All pre-paid
13 massages a member has paid for that month and is unable to use for that month
14 accrue for the member to redeem later at his or her convenience. Massage Envy
15 has however inserted unconscionable provisions into its adhesion contract that
16 requires members to continue purchasing additional monthly massages as a
17 precondition to redeeming the previously purchased unused massages. If a
18 member cancels or ceases payment for the monthly purchases of additional
19 massages when those charges become due, all of the unused pre-paid massages
20 that have not been redeemed are summarily and irreversible forfeited.

21 2. For Plaintiff and Class Members, Massage Envy’s forfeiture of the
22 prepaid massages breaches the uniform provision of Massage Envy’s
23 Membership Agreement that provides: “If you have Paid in Full for your
24 membership services, you will be refunded the unused portion of your
25 membership dues for any actual services you have not yet received.” Massage
26 Envy’s failure to either allow members to redeem the massages or refund the
27 members the cost of the massages constitutes a breach of contract and breach of
28 Massage Envy’s implied covenant of good faith and fair dealing.

1 **II. JURISDICTION AND VENUE**

2 3. This Court has jurisdiction over the subject matter of this action
3 under the Class Action Fairness Act. Plaintiff alleges that the cumulative amount
4 in controversy for Plaintiff and Class Members exceeds \$5 million, exclusive of
5 interest and costs.

6 4. Venue is proper pursuant to 28 U.S.C. § 1391(a) and (c) because
7 substantial parts of the acts and transactions giving rise to the violations of law
8 complained of herein occurred in this District and because Massage Envy:

- 9 (a) conducts business itself or through its agent(s) in this District, by
10 providing services to Plaintiff and Class Members located in this
11 District; and/or
12 (b) is licensed or registered in this District; and/or
13 (c) otherwise has sufficient contacts with this District to justify
14 Massage Envy being fairly brought into court in this District.
15

16 **III. PARTIES**

17 5. Plaintiff is, and at all times relevant hereto was, a resident of the
18 County of San Diego and a citizen of California. Plaintiff has been a member of
19 Massage Envy at all times since 2008. Plaintiff signed a standardized contract
20 with Massage Envy that provided for one \$59.00 massage per month. Plaintiff's
21 contract with Massage Envy had an initial term of 12 months, with an automatic
22 renewal clause that continues month-to-month until cancelled. Plaintiff has at
23 least 40 prepaid, unused massages. Plaintiff has kept her membership account
24 current in the hopes that she would eventually be able to redeem her unused
25 massages.

26 6. Massage Envy is a Delaware limited liability company with its
27 principal place of business at 14350 North 87th Street, Suite 200, Scottsdale,
28 Arizona, 85260. Massage Envy is the franchisor for all Massage Envy clinics.

1 Massage Envy contractually requires all Massage Envy clinics to include certain
2 material terms in its membership agreements including the requirement that
3 Plaintiff and Class Members “agree to pay [Massage Envy] for the membership,
4 goods and services according to the payment schedule,” that Plaintiff and Class
5 Members “may continue to redeem [their] pre-paid massages after the initial
6 term of the membership as long as [their] membership has been renewed and is
7 current,” and that Plaintiff and the Class Members’ membership “must be active
8 in order to redeem any membership services including membership massages.”
9 Massage Envy permits Plaintiff and Class Members to redeem their prepaid
10 massages at any Massage Envy clinic in the nation.

11 7. Massage Envy maintains operational control over most, if not all,
12 aspects of its clinics, including but not limited to, the System Standards applied
13 through Massage Envy’s Operations Manual. The Manual governs the
14 standards, specifications, operating procedures and rules for Massage Envy
15 clinics including, all products and services clinics can (and cannot) sell, pricing
16 of goods and services, location (and relocation) of clinics, hiring of real estate
17 broker(s) and clinic lease or purchase terms, staffing levels, employee
18 qualifications and training protocols, dress and appearance standards for
19 employees, and marketing protocols. Massage Envy owns all accounts and any
20 corresponding information for both Plaintiff and Class Members. In addition, the
21 Massage Envy Franchise Agreement gives Massage Envy the right to cancel
22 clinics’ Franchise Agreements if they do not continually maintain Massage
23 Envy’s prescribed standards.

24 8. Massage Envy is the successor-in-interest to Massage Envy
25 Limited, LLC, founded as an Arizona limited liability company in 2002. In
26 2008, Massage Envy Limited, LLC was sold to Veria Network, a Texas
27 subsidiary of the Essel Group, a multi-billion-dollar consortium based in India.
28 In January 2010, Veria sold Massage Envy Limited, LLC to Sentinal Capital

1 Partners, a private equity firm headquartered in New York City. In October
2 2012, Sentinal Capital Partners sold the Massage Envy franchise to Roark
3 Capital Group.

4 5 **IV. SUBSTANTIVE ALLEGATIONS**

6 7 **A. Allegations Concerning All Class Members**

8 9. Massage Envy markets itself as a “pioneer and national leader of
9 affordable massages and spa services.” Massage Envy has over 1200 clinics
10 nationwide. Massage Envy employs approximately 22,000 massage therapists
11 making it one of the largest employers of licensed/registered massage therapists
12 in the United States. Massage Envy has since acquired over 1 million members
13 at all clinic locations.

14 10. Massage Envy’s business model was created in 2002, mimicking a
15 health club membership model. Under the health club membership model,
16 members pay a monthly fee to gain access to the facilities or services they
17 provide. Massage Envy’s business model is slightly different. Under Massage
18 Envy’s business model, members pay a monthly membership fee ranging from
19 \$49 to \$59 and in return, receive a pre-paid transferable monthly massage/facial.
20 However, members do not gain access to the facilities, they simply receive a
21 service in return.

22 11. Additionally, services rendered at Massage Envy are not exclusive
23 to members but non-members are also able to pay for and receive services, unlike
24 the exclusivity granted to members at health clubs. The “membership” aspect of
25 Massage Envy’s business model simply arises from the recurring nature of
26 Massage Envy’s charges.

27 12. Massage Envy’s approach for recruiting members is two-fold. First,
28 when a prospective customer first visits a Massage Envy clinic, they are offered a

1 message at an introductory price. Then, immediately after the customer receives
2 their message, while in a relaxed (compromised) mental state, Massage Envy’s
3 protocol is to offer the customer a Massage Envy membership. The membership
4 is advertised as a one-time, take it or leave it opportunity. The potential
5 customer must then sign Massage Envy’s standardized adhesion contract with
6 the recurring monthly massages (the “Membership Agreement”), in order to take
7 advantage of this opportunity.

8 13. Plaintiff and each Class Member have signed Massage Envy’s
9 Membership Agreement for personal, family, or household purposes. A true and
10 correct exemplar of Massage Envy’s Membership Agreement is attached as
11 Exhibit A. The Membership Agreement provides in part¹:

- 12 (a) “Your membership dues of [amount] (not including any additional
13 applicable taxes) will be due on the [date] day of each month
14 hereafter until your membership expires or is terminated in
15 accordance with this agreement.”
- 16 (b) “You have the entire term of the membership agreement to use all
17 pre-paid massages. You may continue to redeem your pre-paid
18 massages after the initial term of the membership as long as your
19 membership has been renewed and is current.”
- 20 (c) “Your membership status must be active in order to redeem any
21 membership services including membership massages.”
- 22 (d) “You agree to pay us for the membership, goods and services
23 according to the payment schedule above.”
- 24 (e) “Your Dues Based membership entitles you to (1) one hour massage
25 session in clinic per month during the term of your membership.”
- 26
- 27

28 ¹ Variations in the Membership Agreement are provided in brackets.

1 (f) “You may cancel your membership during the original term in the
2 event that: (a) the member **permanently** relocates his or her
3 residence more than a 25 mile radius away from any Massage Envy
4 clinic; or (b) a physician certifies that a member is permanently
5 disabled or unable to avail himself or herself of massage services
6 All cancellation requests **MUST** be accompanied by written proof
7 of relocation (i.e., Mortgage or Rental agreement, utility bill, car
8 insurance, etc.) or submission of Doctor’s note. Upon approval of
9 your cancellation during the initial membership term, you will be
10 relieved from making any future membership dues payments.”

11 (g) “If you have Paid in Full for your membership services, you will be
12 refunded the unused portion of your membership dues for any actual
13 services you have not yet received.”

14 14. Each Class Member’s Membership Agreement is either identical or
15 functionally identical in its material terms. Even though the Membership
16 Agreement does not expressly provide for forfeiture, Massage Envy uniformly
17 interprets its Membership Agreement to provide that if a member has not paid all
18 charges when due, misses a monthly payment, and/or cancels their account, all
19 prepaid massages in the member’s account will have to be redeemed within a
20 very short 60-day window or be forfeited.

21 15. The Membership Agreement does not expressly provide forfeiture
22 of the unused pre-paid massages when members either cancel and/or do not keep
23 their account current by making timely payments. Instead, the Membership
24 Agreement contains an express refund clause that Massage Envy disregards in
25 favor of ambiguous terms that Massage Envy misleadingly and impermissibly
26 construes to compel forfeiture.

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1 **B. Class Action Allegations**

2 16. Plaintiff brings this action as a class action under Federal Rule of
3 Civil Procedure 23(a) and 23(b)(3) on behalf of (a) all members of a clinic or spa
4 owned and operated by a Massage Envy® franchisee within the United States
5 whose membership was active as of June 30, 2016, including members whose
6 membership was frozen or suspended as of June 30, 2016 (“Class Members”).
7 Excluded are Massage Envy and any person, firm, trust, corporation, or other
8 entity related to or affiliated with Massage Envy, Legacy Members
9 (i.e., members of a clinic or spa independently owned and operated by an
10 Massage Envy® Franchisee within the United States whose Membership
11 Agreements expressly state that accrued monthly massages may be used
12 indefinitely after membership termination, cancellation, or non-renewal), and any
13 member whose membership was terminated for inappropriate or illegal conduct.

14 17. The Class Members are so numerous that joinder is impracticable.
15 While the exact number of Class Members is unknown to Plaintiff at this time,
16 Plaintiff is informed and believes that there are approximately 1.6 million Class
17 Members.

18 18. The exact number of Class Members will be ascertained through
19 appropriate discovery by Massage Envy’s proprietary software called
20 “Millennium 2009” (or the current update). This software is used for member
21 management and accounting, point of sale, cash register, and credit card
22 processing functions. Massage Envy requires each clinic to install this software,
23 which Massage Envy sublicenses to its franchised clinics. Massage Envy has
24 independent unlimited access to the information generated and tracked by the
25 computer systems of its franchised clinics, including information generated from
26 Millennium 2009 (or the current update). Thus, Massage Envy can readily
27 obtain information to identify Class Members, as well as the number of massages
28 each Class Member currently has.

1 19. Each Class Member paid Massage Envy a monthly membership
2 charge, from which the number of redeemed massages can be deducted to
3 determine the class-wide restitution and/or damages and/or reinstated massages
4 as maintained by Massage Envy's records.

5 20. The claims asserted by Plaintiff are typical of all other Class
6 Members. All Class Members have been and/or continue to be similarly affected
7 by Massage Envy's wrongful conduct as complained of herein.

8 21. Plaintiff has no interests adverse to the Class Members. Plaintiff
9 will fairly and adequately protect Class Members' interests and has retained
10 counsel competent and experienced in consumer class action lawsuits and
11 complex litigation.

12 22. Massage Envy has acted with respect to each Class Member in a
13 manner generally applicable to each Class Member. Common questions of law
14 and fact exist as to all Class Members and predominate over any questions
15 wholly affecting individual Class Members. There is a well-defined community
16 of interest in the questions of law and fact involved in the action, which affect all
17 Class Members. Among the questions of law and fact common are, *inter alia*:

- 18 (a) Whether Massage Envy is a party to Membership Agreements with
19 Plaintiff and Class Members and/or are liable for the actions of
20 Massage Envy's franchised clinics;
- 21 (b) Whether Massage Envy's forfeiture of prepaid massages breaches
22 the refund clause in Massage Envy's Membership Agreement;
- 23 (c) Whether Massage Envy's forfeiture of prepaid massages breaches
24 the implied covenant of good faith and fair dealing attendant to
25 Massage Envy's Membership Agreement;
- 26 (d) The nature and extent of damages, restitution, equitable remedies,
27 and injunctive relief to which Plaintiff and Class Members are
28 entitled;

1 (e) Whether Plaintiff and Class Members are entitled to declaratory
2 relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201,
3 declaring that Massage Envy’s Membership Agreement does not
4 entitle Massage Envy to forfeit Plaintiff’s and Class Members’
5 prepaid massages; and

6 (f) Whether Plaintiff and Class Members should be awarded attorneys’
7 fees and the costs of suit.

8 23. A class action is superior to all other available methods for the fair
9 and efficient adjudication of this controversy since joinder of all members is
10 impracticable. Furthermore, as the damages suffered by individual Class
11 Members may be relatively small, the expense and burden of individual litigation
12 makes it virtually impossible for Class Members to individually redress the
13 wrongs done to them. There will be no difficulty in managing this action as a
14 class action.

15 24. Massage Envy has acted on grounds generally applicable to the
16 entire Class with respect to the matters complained of herein, thereby making
17 appropriate the relief sought herein with respect to Class Members as a whole.

18
19 **COUNT ONE**

20 **On Behalf of Plaintiff and All Class Members for Breach of Contract**

21 25. Plaintiff incorporates by reference and re-alleges each and every
22 paragraph above as though fully alleged herein.

23 26. Plaintiff and each Class Member entered into a Membership
24 Agreement with Massage Envy and/or Massage Envy’s franchisee clinics.

25 27. Plaintiff and each Class Member obliged by the Membership
26 Agreement by pre-paying Massage Envy for the massage services that were
27 subject to the refund clause in Massage Envy’s Membership Agreement.

28

1 but not limited to reinstatement of Plaintiff's and Class Members' prepaid
2 massages;

3 C. For an order enjoining Massage Envy from continuing to engage in
4 the unlawful business acts and practices as alleged herein;

5 D. For declaratory relief pursuant to the Declaratory Judgment Act,
6 28 U.S.C. § 2201;

7 E. For an order awarding Plaintiff and Class Members of the class pre-
8 judgment and post-judgment interest;

9 F. For an order awarding attorneys' fees and cost of suit, including
10 experts' witness fees as permitted by law; and

11 G. Such other and further relief as this Court may deem just and
12 proper.

13
14 **VII. JURY TRIAL DEMAND**

15 Plaintiff demands a trial by jury for all of the claims asserted in this
16 Complaint so triable.

17
18 Dated: June 1, 2016

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FRANK J. JOHNSON

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20
21 By: s/ Brett M. Weaver
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PROOF OF SERVICE

I am employed in the County of San Diego. I am over the age of eighteen years and am not a party to the within entitled action. My business address is 600 West Broadway, Suite 1540, San Diego, CA 92101.

On June 1, 2016, I served a copy of the following document:

1) **FIRST AMENDED CLASS ACTION COMPLAINT**

[BY ELECTRONIC ACCESS] I hereby certify that the foregoing documents were filed electronically with the Clerk of Court to be served by operation of the Court’s electronic filing system upon all parties on the electronic service list maintained for this case.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

Executed on June 1, 2016, at San Diego, California.

Bv: s/ Brett M. Weaver
BRETT M. WEAVER