

1 Jeffrey R. Krinsk, Esq. (CA Bar No. 109234)
jrk@classactionlaw.com
2 Trenton R. Kashima, Esq. (CA Bar No. 291405)
trk@classactionlaw.com
3 FINKELSTEIN & KRINSK LLP
550 C Street, Suite 1760
4 San Diego, California 92101
Telephone: (619) 238-1333
5 Facsimile: (619) 238-5425

6 Attorneys for Plaintiffs
and the Class
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 BAERBEL MCKINNEY-DROBNIS, JOSEPH
12 B. PICCOLA, and CAMILLE BERLESE,
individually and on behalf of all others similarly
situated

13 Plaintiffs,
14

15 v.

16 MESSAGE ENVY FRANCHISING, LLC, a
Delaware Limited Liability Company,

17 Defendant.
18
19
20
21
22
23
24
25
26
27
28

Case No.

**AMENDED CLASS ACTION
COMPLAINT FOR:**

- (1) **BREACH OF CONTRACT -
VIOLATION OF THE IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING**
- (2) **INTENTIONAL INTERFERENCE
WITH CONTRACTUAL
RELATIONS;**
- (3) **VIOLATION OF CAL. CIV. CODE
§§ 1750, et seq.;**
- (4) **VIOLATION OF CAL. BUS. &
PROF. CODE § 17200, et seq.;**
- (5) **DECLARATORY RELIEF
PURSUANT TO THE
DECLARATORY JUDGMENT
ACT, 28 U.S.C. § 2201**

JURY TRIAL DEMANDED

1 Plaintiffs Baerbel McKinney-Drobnis, Joseph B. Piccola, and Camille Berlese (“Plaintiffs”)
2 allege as to themselves based on their own experience, and as to all other allegations, based upon
3 the investigation of counsel, which included, *inter alia*, a review of complaints, reports, advisories,
4 press releases, information available on various websites, and media reports about or concerning
5 defendant Massage Envy Franchising, LLC (“Massage Envy” or “Defendant”) as follows:

6 **I. INTRODUCTION**

7 1. Massage Envy is a membership based massage franchise that, by its standard
8 business practices, attracts customers to join its program that, basically, entitles members to receive
9 one fifty minute massage per month in exchange for a monthly fee that ranges between
10 approximately \$39.00 to \$59.00 (depending on geographic region). Upon a consumer enrolling in
11 Massage Envy’s membership program, they must execute Massage Envy’s form Membership
12 Agreement that states in substantially identical language that:

13 For those choosing to pay on a monthly basis: “[y]our membership dues of \$[X dollar
14 amount] (not including any additional applicable taxes) are due on or after the ____ day of
15 each month hereafter until your membership expires or is terminated in accordance with
16 this agreement.”

17 (Emphasis added). Or, for customers choosing to pay in full for a given term, “[y]our payment of
18 \$[dollar amount] is due today.” That is, a customer contracts to pay an explicit, locked in fee for
19 the entire membership term, payable either in one lump sum or in equal monthly installments
20 (based on the length of the term in the Membership Agreement).

21 2. Upon expiration of the initial term of the Membership Agreement, a customer’s
22 membership is automatically renewed pursuant to the form Membership Agreement, stating in
23 substantially identical language that “[f]ollowing the initial term, your membership will
24 automatically continue on a month-to-month basis at \$[X dollar amount] per month until your
25 membership is cancelled.” (Emphasis added). The Membership Agreement thereby represents that
26 a Massage Envy customer will pay a set, agreed upon monthly fee until their Membership
27 Agreement is cancelled. The automatic renewal provision is also one of only two provisions in the
28 Membership Agreement that are required to be initialed by the consumer at the time the contract is
executed.

1 3. Massage Envy, however, has failed to abide by its contract. After execution of the
2 Membership Agreement, thus locking in the monthly membership fee amount (both for the original
3 term and renewal term(s)), Massage Envy unilaterally raises the monthly membership fee amount
4 without consent of the customer. While this fee increase was initially small (only 99 cents),
5 Defendant has continued to increase its membership fees without justification (and at times without
6 notice) in some cases over thirty-five percent. As a result, Defendant has collected millions of
7 dollars' attributable to monthly membership fees without a contractual provision allowing the fee
8 increases to occur. Often, Massage Envy customers do not know that their obligated payments
9 have increased to an amount greater than contractually imposed on them due to the nature of
10 Defendant's automatic billing.

11 4. Defendant's business model makes it very difficult for a member to discontinue the
12 membership in order to avoid the increased fee (if noticed) as Defendant requires customers to
13 prepay for their massages. This results in many customers having a "bank" of accrued massages
14 that must be used before cancellation of their membership and thus a corresponding loss of these
15 earlier prepaid massages when they cancel. Given the limited ability of the customers to
16 immediately terminate the Membership Agreement (assuming the fee increase is noticed),
17 Plaintiffs and the putative Class pay an amount far greater than the contracted obligation. The
18 Membership Agreement restricts a member's ability to cancel the contract during the initial term,
19 allowing cancellation if, and only if: (1) the member permanently relocates their residence more
20 than 25 miles from any Massage Envy or Massage Envy Spa or (2) a physician certifies that the
21 member is physically unable to receive massage services, both circumstances dependent on
22 approval by Massage Envy. Cancellations require 30 days written notice and only become
23 effective 30 days after the date of the member's last payment.

24 5. Accordingly, Plaintiffs bring this class action to remedy Defendant's unlawful
25 practices (often referred to as bait-and-switch marketing). Defendant's unilateral price increases
26 breach the customer's Membership Agreement and violates Massage Envy's implied covenant of
27 good faith and fair dealing given the law of each of the fifty states. Relative to the California Sub-
28 Class, Massage Envy's practice of agreeing to a set monthly membership fee for the duration of a

1 customer's membership followed by a unilateral fee increase is prohibited by California Civil Code
2 § 1770(a)(4), forbidding "[u]sing deceptive representations . . . in connection with goods or
3 services" and California Civil Code § 1770(a)(9), prohibiting "[a]dvertising goods or services with
4 intent not to sell them as advertised." Further, by embedding unconscionably vague language in
5 the terms and conditions to allow Defendant to unilaterally increase the monthly membership fee of
6 the Membership Agreement, Defendants conduct violates California Civil Code § 1770(a)(19),
7 which forbids "[i]nserting an unconscionable provision in the contract." Defendant's contract is
8 thus unenforceable pursuant to California Civil Code § 1670.5. For consumers that are California
9 Sub-Class members, Massage Envy's violations (of law and public policy) are "unlawful" business
10 practices under California's Unfair Competition Law (the "UCL," CAL. BUS. & PROF. CODE §§
11 17200 *et seq.*) as well as the Consumer Legal Remedies Act ("CLRA," CAL. CIV. CODE §§ 1750 *et*
12 *seq.*).

13 6. This class action seeks restitution of all fees paid by Defendant's customers in
14 excess of the contracted amounts set forth in their Membership Agreements, injunctive relief
15 preventing the recurrence and perpetuation of Defendant's improper conduct, declaratory relief
16 pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, and such other relief as allowed by
17 law or equity.

18 **II. JURISDICTION AND VENUE**

19 7. This Court has jurisdiction over the subject matter of this action pursuant to the
20 Class Action Fairness Act. Defendant and members of the Class are residents of different states
21 and Plaintiffs allege that the cumulative amount in controversy for Plaintiffs and the Class exceed
22 \$5 million, exclusive of interest and costs.

23 8. Venue is proper in this District pursuant to 28 U.S.C. §1391(a) and (c) because
24 many of the acts and transactions giving rise to the violations of law complained of herein occurred
25 in this District and because Defendant:

- 26 (a) conducts business itself or through agent(s) in this district, by providing services to
27 Class members located in this District; and/or
28

1 (b) undertakes and/or participates in the marketing of Massage Envy services to
2 consumers;

3 (c) is licensed or registered to conduct business in this District; and/or

4 (d) otherwise maintains sufficient contacts with this District to justify Defendant being
5 fairly brought into the court of this District.

6 **III. PARTIES**

7 **A. PLAINTIFFS' EXPERIENCE WITH DEFENDANT**

8 9. Plaintiff Baerbel McKinney-Drobnis ("Ms. McKinney-Drobnis") is, and at all times
9 relevant hereto was, a resident of the County of Marin, and a citizen of California. Ms. McKinney-
10 Drobnis bought a Massage Envy membership at the Massage Envy "clinic" located at 160 Donahue
11 Street, Sausalito, California, on or about October 12, 2007. Ms. McKinney-Drobnis signed the
12 standardized Membership Agreement, it providing for a monthly membership fee of \$59.00. Ms.
13 McKinney-Drobnis's contract with Massage Envy had an initial term of seven months (from
14 October 12, 2007 until May 12, 2008), with automatic renewal that thereafter continued the
15 contract month-to-month at a stated fee of \$59.00 per month until her membership was cancelled.

16 10. On or about December 2013, Massage Envy unilaterally increased the monthly
17 membership fee amount from \$59.00 to \$59.99. Ms. McKinney-Drobnis received no notice of the
18 price increase and failed to notice the increase because it was a recurring charge and the increase
19 amount was small. Ms. McKinney-Drobnis paid Massage Envy approximately seventy-two (72)
20 monthly membership fee installments of \$59.00 each and approximately thirty-four (34) monthly
21 membership fee installments of \$59.99 each.

22 11. Plaintiff Joseph B. Piccola ("Mr. Piccola") is, and at all times relevant hereto was, a
23 resident of the County of Dallas, and a citizen of Texas. Mr. Piccola bought a Massage Envy
24 membership at the Massage Envy clinic located at 9440 Garland Road, Suite 174, Dallas, Texas,
25 on or about June 28, 2010. Mr. Piccola signed a standardized Membership Agreement that
26 provided for a monthly membership fee of \$49.00 during the initial term. Mr. Piccola's contract
27 with Massage Envy had an initial term of thirteen months (from June 28, 2010 until July 28, 2011),
28

1 with an automatic renewal clause that continued the contract on a month-to-month basis at a stated
2 fee of \$49.00 per month until his membership is cancelled.

3 12. Like other members of the Class, Massage Envy unilaterally increased Mr. Piccola's
4 monthly membership fee (once in April 2014 (\$0.99 increase) and again in February 2016 (\$10.00
5 increase)). Mr. Piccola did not receive notice with respect to the first increase of \$0.99. Mr.
6 Piccola paid Massage Envy approximately forty-five (45) monthly membership fee installments at
7 \$49.00 each, approximately twenty-one (21) monthly membership fee installments at \$49.99 each,
8 and approximately eight (8) monthly membership installments at \$59.99 each.

9 13. Plaintiff Camille Berlese ("Mrs. Berlese") is, and at all times relevant hereto was, a
10 resident of the County of Maricopa, and a citizen of Arizona. Mrs. Berlese purchased her Massage
11 Envy membership at a Massage Envy clinic located at 7000 E. Mayo Blvd, Building 8, Suite 1052,
12 Phoenix, Arizona, on or about June 14, 2011. Mrs. Berlese signed a standardized Membership
13 Agreement that provided for a monthly membership fee of \$39.00. Mrs. Berlese's contract with
14 Massage Envy had an initial term of thirteen months (from June 14, 2011 until July 14, 2012), with
15 the automatic renewal clause continuing the contract on a month-to-month basis for a stated fee of
16 \$39.00 per month until her membership is cancelled.

17 14. Massage Envy unilaterally increased Mrs. Berlese's monthly membership fee (once
18 in March 2014 (\$0.99 increase) and again in September 2016 (\$15.01 increase)). Mrs. Berlese did
19 not receive notice regarding the first \$0.99 increase. Mrs. Berlese paid Massage Envy
20 approximately thirty-three (33) monthly membership fee installments at \$39.00 each and
21 approximately thirty (30) monthly membership fee installments at \$39.99 each.

22 **B. DEFENDANT**

23 15. Defendant Massage Envy is a Delaware Limited Liability Company with its
24 principal place of business in Scottsdale, Arizona. Massage Envy is the franchisor and monitors,
25 regulates, controls and directs the Massage Envy clinics nationally, including California, Texas and
26 Arizona. Massage Envy requires each Massage Envy clinic to (1) use its Membership Agreements,
27 including the requirement that Plaintiff and the Class "agree to pay [Massage Envy] for the
28

1 membership, goods and services according to the payment schedule above,”¹ (2) abide by its rules,
2 and (3) contribute to funding pools intended for advertising and marketing.

3 16. Massage Envy owns Plaintiffs’ (and the putative Class’) membership accounts as
4 well as corresponding information, and permits Plaintiffs and the putative Class to redeem pre-paid
5 massages at Massage Envy clinics throughout the nation. In addition, Massage Envy maintains
6 operational control over most, if not all, aspects of its national clinics, including but not limited to,
7 the “System Standards” applied through Massage Envy’s “Operations Manual.” Massage Envy
8 controls the franchisees, including the pricing of goods and services offered by its franchisees. In
9 addition, the Massage Envy Franchise Agreement gives Massage Envy the right to cancel a clinic’s
10 Franchise Agreement if it does not continually conform to Massage Envy’s prescribed operating
11 standards.

12 **IV. SUBSTANTIVE ALLEGATIONS**

13 17. Massage Envy describes itself as a “pioneer and national leader of affordable
14 massage and spa services.” In fact, Massage Envy is the world’s largest employer of
15 licensed/registered massage therapists, with more than 25,000 therapists providing over 250,000
16 massages every week. Massage Envy claims to have provided over 90 million massages, in over
17 1,000 clinics in the United States, making it the nation’s largest massage chain. Massage Envy has
18 over 1.65 million members.

19 18. In 2002, Massage Envy created a consumer massage business model designed to
20 mimic the “health club” membership paradigm. Unlike a health club, however, Plaintiffs and
21 putative Class members do not purchase the right to *access and use Massage Envy’s facilities*,
22 instead purchasing a pre-paid, transferrable massage treatment in exchange for a monthly fee
23 ranging from \$39.00 to \$59.00. The “membership” dimension of Defendant’s business model
24 arises from the recurring nature of Defendant’s monthly charges, not from the exclusivity members
25

26 ¹ The “payment schedule above” refers to the first section of the Membership Agreement titled
27 “Membership Description & Payment Schedule,” which is where the contracted monthly
28 membership fee amount is stated, both for the original term and renewal term.

1 receive to use Massage Envy's services. In fact, non-members can purchase anything from
2 Defendant that Plaintiff and putative Class members can purchase.

3 19. When a prospective customer initially visits a Massage Envy clinic, the prospect is
4 offered a massage at an "introductory price." Immediately after the prospective customer has
5 received their massage treatment and is in a relaxed mood, Defendant's protocol is to then
6 immediately offer the candidate a Massage Envy membership. The candidate is required to sign
7 Massage Envy's standardized adhesion contract to proceed with membership and must commit to
8 paying the recurring monthly fee that is offered as a one-time, take it or leave it opportunity (the
9 "Membership Agreement").

10 20. Plaintiffs and each putative Class member has signed the Massage Envy
11 Membership Agreement for personal, family, or household purposes. The text of Massage Envy's
12 Membership Agreement provides:²

- 13 • "Your membership dues of \$[amount] (not including any additional applicable taxes) [will
14 be due on ___ and then due on or after the same day of each month / are due on or after the
15 ___ day of each month] hereafter until your membership expires or is terminated in
16 accordance with this agreement."
17 • "Following the initial term, your membership will automatically continue on a month-to-
18 month basis at [\$[dollar amount] per month / the monthly rate] until your membership is
19 cancelled [by you]."
20 • "You agree to pay us for the membership, goods and services according to the payment
21 schedule."
22 • "You may cancel your membership during the initial term only in the event that, (a) you
23 permanently relocate your residence more than a 25 mile radius away from any Massage
24 Envy or Massage Envy Spa; or (b) a physician certifies that you are unable to receive
25 massage or facial services. All cancellation requests MUST be accompanied by written
26 proof of relocation (e.g., Mortgage or Rental agreement, utility bill, car insurance) or
27 submission of Doctor's note. Upon approval of your written request for membership
28 cancellation during the initial membership term, you will be relieved from making any
future membership dues payments."

Each Class member's Massage Envy Membership Agreement is identical, or functionally identical,
as to its material terms.

² Variations in the Membership Agreement are provided in brackets.

1 21. Massage Envy’s Membership Agreement contains an express clause with an
2 explicit, locked in amount that is to be paid each month “until [a member’s] membership expires or
3 is terminated in accordance with this agreement.” The membership fee amount for the initial term
4 as well as the auto-renewed extension term are on the first page of the contract.³ The first page is
5 the only page to the agreement that is required to be signed by the customer. Additionally, the
6 auto-renewal provision of the agreement, including the monthly fee amount, must be initialed by
7 the new member. Through this process, each member of the Class is purportedly assured that the
8 membership fee amount will never increase once a they execute the agreement and begin making
9 timely payments.

10 22. While the Membership Agreement prohibits unilateral increases of the monthly
11 membership dues, Massage Envy unilaterally increases (often without notice or forewarning) the
12 monthly membership fees owed by its members (increases ranging from 1.68% to as high as
13 37.53%). If Defendant increased the monthly fees only ninety-nine cents, it would be a significant
14 (and illegal) windfall. If Defendant does in fact have 1.65 million members, as represented, a
15 ninety-nine cent increase in monthly fees yields an additional 19.6 million dollars of annual
16 revenue.

17 23. Defendant’s fee increases are not innocent or accidental, but part of a concerted plan
18 to extract as much money from its captive membership base as possible. The philosophy of
19 Defendant is inchoate as, for example, Defendant makes it as “painful” as possible for customers
20 to cancel a membership. Massage Envy members lose accrued or “banked” massages after
21 cancellation. Further, cancellation is only effective thirty days after the member’s home clinic
22 receives written notice in an allowable form. As referenced above, Massage Envy members often
23 are unaware that their membership fee is increasing because Massage Envy requires that customers
24 provide a credit card for automatic billing and does not provide a monthly accounting of
25 membership changes.

26 _____
27 ³ The contracts are one page in length, with supplemental terms and conditions sometimes, but
28 not always, being provided. Even when provided, however, the terms and conditions are glossed
over by Massage Envy and are not required to be signed by members.

1 24. Defendant starts its untoward agenda with a small, ninety-nine cent monthly
2 increase, intended to test its customers' price sensitivity and reactions. After the "test run"
3 Defendant increases its monthly membership fees further. Regardless of the size of the increase,
4 Defendant's actions are unconscionable and/or a violation of the Membership Agreement.
5 Defendant thus uses its members as a corporate ATM – withdrawing an additional monthly
6 payment in excess of the amount stated in the Membership Agreement.

7 25. Massage Envy's unlawful practices generate numerous Internet complaints, the
8 below samples indicative of complaints about Massage Envy's fee increases:

9 "I had no idea the rates went up...as told they e-mailed me,,tThey said they sent me a
10 letter...I received neither have been with them 7 year's...I was a valued
11 customer,sometimes went 3 times a month alway's has 2 hours as I went not for
12 relaxing...I went as my disks and muscles needed it...and they are very good at there
work...But to spend almost \$125-\$175 including tip is way way out of my reach...But
was told the increase was to pay for the employee's...they depend on tip's and believe
me this will fall into play...From a Loyal customer that way feels burned!!!..."⁴

13 "I just received notice they have changed the \$39 to \$49 as I go every 3 times month...I
14 now want out of this contract..I was told they had to pay the employees more
15 money...they depend on tip's..I have been going 2006 I no longer believe in them..I
16 received no notice as I walked in last week? Even as they told me they e-mailed me as
well as a home mail...I get notices all the time about??? How did you like your
massage,as well as phone calls...I heard nothing about price increase ...NOT HAPPY."⁵

17 "I signed up for a Massage Envy membership 3 months ago, and got an e-mail a couple
18 of days ago, letting me know that the membership price was increasing by .99 cents. I
contracted for \$59.00 per month, NOT 59.99 per month. WTF? Gonna cancel, if they
increase before the end of my contract."⁶

19 ". . . Now, Massage Envy Mira Mesa has decided to raise all their rates across the board
20 and they are no longer honoring grandfathered rates. The owner, Joe Wang, himself
21 claimed that he has a right to refuse service to anyone, even a person with a valid,
contracted ME membership because their rates are too low and he has to run a business.
22 I don't see how this is acceptable to Massage Envy Corporate, and it is surely a poor
business practice . . ."⁷

23 Accordingly, the subject of this complaint is not an isolated problem. Millions of individuals
24 have suffered from Defendant's failure to abide by the proper contractual obligations and
deserve a remedy.

25 ⁴ <http://massageenvyblows.com/no-go/>

26 ⁵ <http://massageenvyblows.com/change/>

27 ⁶ <http://massageenvyblows.com/can-they-do-this/>

28 ⁷ <https://www.yelp.com/biz/massage-envy-mira-mesa-san-diego>

1 **V. CLASS ACTION ALLEGATIONS**

2 26. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil
3 Procedure 23(a) and 23(b)(3) for the following "CLASS" of persons under breach of contract and
4 breach of the implied covenant of good faith and fair dealing:

5 "National Class"

6 All individuals within the United States, within the applicable statute of limitations, who
7 were or are presently enrolled in a Massage Envy membership and whose monthly
8 membership fee was increased above the amount stated in their Membership Agreement.

9 "California Sub-Class"

10 All California residents, within four (4) years of the filing of this complaint, who
11 were or are presently enrolled in a Massage Envy membership and whose monthly
12 membership fee has been increased by Defendant above the amount stated in their
13 Membership Agreement.

14 Excluded from the Class are all legal entities, Defendant herein and any person, firm, trust,
15 corporation, or other entity related to or affiliated with any defendant, as well as any judge, justice
16 or judicial officer presiding over this matter and members of their immediate families and judicial
17 staff.

18 27. The members of the Class are so numerous that joinder of all Class members is
19 impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and
20 will be ascertained through appropriate discovery, Plaintiffs are informed and believe that there are
21 hundreds of thousands of members in the Class. Defendant requires each of their clinics to install
22 Massage Envy's proprietary software called "Millennium 2009" (or the current update), which
23 Massage Envy sublicenses to its franchised clinics. This software can be used to monitor
24 memberships, for management and accounting, point of sale, cash register, and credit card
25 processing functions. Massage Envy has independent, unlimited access to the information
26 generated and tracked by the computer systems at its franchised clinics, including information
27 generated from Millennium 2009 (or a current update). Thus, Defendant can readily obtain
28 information to identify members of the Class, as well as the amount by which Class members'
monthly fees were increased and the amounts paid by each member in excess of the amount stated

1 in his/her Membership Agreement. Members of the Class can be identified from the records
2 maintained by Defendant.

3 28. Each putative member of the Class contracted with Defendant to pay a set monthly
4 membership fee which can be deducted from the amounts actually paid by each Class member to
5 determine class-wide restitution and/or damages.

6 29. Plaintiffs' claims are typical of the claims of the other members of the putative
7 Class. All Class members have been and/or continue to be similarly affected by Defendant's
8 wrongful conduct as complained of herein, in violation of law. Plaintiffs have no interests adverse
9 to the Class.

10 30. Plaintiffs will fairly and adequately protect the Class members' interests and have
11 retained counsel competent and experienced in consumer class action lawsuits and complex
12 litigation.

13 31. Defendant has acted with respect to the putative Class in a manner generally
14 applicable to each Class member. Common questions of law and fact exist as to all members of the
15 Class and predominate over any questions wholly affecting an individual Class member. There is a
16 well-defined community of interest in the questions of law and fact involved in the action, affecting
17 all members of the Class. The questions of law and fact common to the members of the Class
18 include, *inter alia*:

19 (a) Did Defendant's unilateral increase of the monthly membership fees violate the
20 stated membership fee clause and/or payment schedule of Defendant's Membership Agreement;

21 (b) Did Defendant's unilateral increase to the monthly membership fees violate the
22 implied covenant of good faith and fair dealing attaching to the Membership Agreement;

23 (c) Did Defendant induce its franchisees to breach the Membership Agreement;

24 (d) Whether Plaintiffs and the Class members are entitled to declaratory relief pursuant
25 to the Declaratory Judgment Act, 28 U.S.C. § 2201, declaring that Massage Envy's Membership
26 Agreement does not entitle Defendant to unilaterally increase the monthly membership fees of
27 Plaintiffs' and the Class members;

1 (e) The nature and extent of damages, restitution, equitable remedies, and injunctive
2 relief to which Plaintiff and the Class members are entitled;

3 (f) Whether and the amount Plaintiffs and the Class members should individually be
4 awarded attorneys' fees and the costs of suit;

5 32. In addition to the common questions of law and fact identified above, the Class has
6 additional common questions of law and fact that exist with respect to all California Sub-Class
7 Membership Agreements. The common questions predominate over any questions wholly
8 affecting individual California Sub-Class members. There is a well-defined community of interest
9 in the questions of law and fact involved in the action, which affect all members of the California
10 Sub-Class. Among the questions of law and fact common to the members of the California Sub-
11 Class are, *inter alia*:

12 (a) Whether Massage Envy's vague provisions in its terms and conditions are
13 procedurally and/or substantively unconscionable under California Civil Code § 1670.5;

14 (b) Whether Massage Envy's embedding of unconscionably vague language in its terms
15 and conditions as a condition to increasing the contracted monthly membership fee amount stated
16 in the Membership Agreement violates California Civil Code § 1770(a)(19);

17 (c) Whether Massage Envy's practice of contracting for massage treatments at a fixed
18 monthly fee amount pursuant to a contract of adhesion and then unilaterally increasing such fee is
19 prohibited by California Civil Code §§ 1770(a)(4) and (9);

20 (d) Whether Defendant's practice of unilaterally increasing the monthly membership
21 fee stated in the Membership Agreement is an "unlawful" business act or practice under, *inter alia*,
22 Cal. Bus. & Prof. Code §§ 17200 as a violation of California Civil Code §§ 1770(a)(4), 1770(a)(9),
23 1770(a)(19) and/or 1670.5;

24 (e) Whether Defendant's practice of unilaterally increasing contracted monthly
25 membership fees is an "unfair" business act or practice under, *inter alia*, Cal. Bus. & Prof. Code §§
26 17200.

1 (f) Whether Defendant's practice of unilaterally increasing the contracted monthly
2 membership fee stated in the Membership Agreement is a "fraudulent" business act or practice
3 under, *inter alia*, Cal. Bus. & Prof. Code §§ 17200.

4 33. A class action is superior to all other available methods for the fair and efficient
5 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the
6 damages suffered by individual Class members may be relatively small, the expense and burden of
7 individual litigation make it virtually impossible for Class members to individually redress the
8 wrongs done to them. There will be no difficulty in managing this action as a class action.

9 34. Defendant has acted on grounds generally applicable to the entire Class with respect
10 to the matters complained of herein, thereby making appropriate the relief sought herein with
11 respect to the members of the Class as a whole.

12 **COUNT ONE**
13 **Breach of Contract and the Implied Covenant**
14 **Of Good Faith and Fair Dealing**
15 **(On Behalf of the Class)**

16 35. Plaintiffs incorporate by reference and reallege paragraphs one through thirty-four
17 alleged above as though fully alleged herein.

18 36. Plaintiffs and each member of the Class entered into a Membership Agreement with
19 Massage Envy.

20 37. Plaintiffs and each member of the Class performed under the Membership
21 Agreement by paying Massage Envy the stated monthly fee therein.

22 38. Defendant, its agents and its franchisee clinics, breached the Membership
23 Agreement's Payment Schedule clauses by unilaterally increasing the express, contracted monthly
24 membership fee amount.

25 39. The Membership Agreement also contains an implied covenant of good faith and
26 fair dealing by operation of law.

27 40. Massage Envy instituted its unilateral monthly fee increase practices as a means to
28 unjustly increase revenue while not having to provide additional massage services (i.e., as a means
to generate unfair profits).

1 to unjustly increase revenue while not having to provide additional massage services (i.e., as a
2 means to generate unfair profits).

3 48. As a direct and proximate result of the breaches to the Membership Agreement's
4 Payment Schedule clause, Plaintiffs and each member of the Class have sustained losses, costs,
5 damages and expenses in an amount to be proved at the trial of this matter.

6 **COUNT THREE**
7 **Violation of CAL. CIV. CODE §§ 1750, *et seq.* -**
8 **Consumer Legal Remedies Act**
9 **(On Behalf of the California Sub-Class)**

10 49. Plaintiffs incorporate by reference and reallege each and every paragraph alleged
11 above as though fully alleged herein.

12 50. Defendant's monthly massage memberships are a "service" as defined by California
13 Civil Code § 1761(b).

14 51. Defendant is a "person" as defined by California Civil Code § 1761(c).

15 52. Plaintiff Baerbel McKinney-Drobnis and the members of the California Sub-Class
16 are "consumers" within the meaning of California Civil Code § 1761(d) because they purchased
17 the services for personal, family, or household purposes.

18 53. The sale of the Massage Envy memberships constitutes a "transaction" as defined
19 by California Civil Code § 1761(e).

20 54. By contracting for an explicit, set monthly membership fee amount and then
21 unilaterally increasing such fee amount without the consent of Plaintiff Baerbel McKinney-Drobnis
22 or the members of the California Sub-Class, Defendant violated California Civil Code §§
23 1770(a)(4), (9) and (19), as it (a) contracted for a set membership fee amount with intent not to
24 continue selling such membership for the amount advertised, (b) represented that the transaction
25 involved a set membership fee amount that could not be changed *until the membership is cancelled*
26 *or terminated*, and (c) embedded extremely vague language in its ancillary terms and conditions as
27 a way to justify its deceptive practices pursuant to a contract of adhesion.

28 55. As a result of Defendant's conduct, Plaintiff Baerbel McKinney-Drobnis and the
members of the California Sub-Class were harmed and suffered actual damages as a result of

1 Defendant's unfair competition and deceptive acts and practices. Had Defendant not falsely
2 represented its membership fee policy, Plaintiff Baerbel McKinney-Drobnis and members of the
3 California Sub-Class would not have been misled into purchasing Defendant's membership
4 services.

5 56. Plaintiff Baerbel McKinney-Drobnis, on behalf of herself and all other similarly
6 situated California consumers and as appropriate, on behalf of the general public of the State of
7 California, seeks injunctive relief prohibiting Defendant continuing these unlawful practices.
8 Plaintiffs provided Defendant with notice of its alleged violations of the CLRA pursuant to
9 California Civil Code § 1782(a) *via* certified mail, on November 4, 2016, demanding that
10 Defendant correct such violations. Defendant failed to adequately respond to Plaintiff's notice
11 within 30 days. Accordingly, Plaintiff also seeks all available damages under the CLRA for all
12 violations complained of herein, including, but not limited to, statutory damages, punitive
13 damages, attorneys' fees and costs, and any other relief that the Court deems proper.

14 **COUNT FOUR**
15 **Violation of Cal. Bus. & Prof. Code §§ 17200, et seq. -**
16 **Unlawful Business Acts and Practices**
17 **(On Behalf of the California Sub-Class)**

18 57. Plaintiffs incorporate by reference and realleges each and every paragraph alleged
19 above as though fully alleged herein.

20 58. California Business and Professions Code § 17200, *et seq.* prohibits acts of unfair
21 competition which includes "unlawful . . . business act[s] or practice[s]."

22 59. Defendant's practice of contracting at a set membership fee amount pursuant to a
23 contract of adhesion and then unilaterally increasing such fee is prohibited by California Civil
24 Code §§ 1770(a)(4) and (9), and is therefore an "unlawful" business practice in violation of the
25 UCL.

26 60. Defendant's exceptionally vague language that it embeds in its terms and conditions
27 to serve as a basis for unilaterally increasing the express membership fee amount stated in the
28 Membership Agreement, is prohibited by California Civil Code § 1770(a)(19) and is

1 unconscionable and unenforceable under California Civil Code § 1670.5, and is therefore an
2 “unlawful” business practice in violation of the UCL.

3 61. Defendant’s exceptionally vague language in its terms and conditions in
4 combination with its practice of unilaterally increasing the monthly membership fee amount from
5 the stated amount in Plaintiff Baerbel McKinney-Drobnis’s and each California Sub-Class
6 member’s Membership Agreements, breaches the Membership Agreements’ implied covenant of
7 good faith and fair dealing, and is therefore “unlawful” business practices in violation of the UCL.

8 62. As a direct and proximate result of Defendant’s “unlawful” business practices as
9 alleged herein, Plaintiff Baerbel McKinney-Drobnis and each California Sub-Class member have
10 been wrongfully deprived of money and/or property. Plaintiff Baerbel McKinney-Drobnis and
11 each California Sub-Class member suffered injury-in-fact as a result of Defendant’s unilateral
12 increase to their monthly membership fee amounts.

13 63. Accordingly, Defendant received and is in possession of excessive and unjust
14 revenues and profits, and/or has caused Plaintiff Baerbel McKinney-Drobnis and other California
15 Sub- Class members to lose money or property (by overpaying) directly as a result of Defendant’s
16 wrongful acts and practices.

17 64. As a result of the above unlawful acts and practices of Defendant, Plaintiffs, on
18 behalf of themselves and all others similarly situated, and as appropriate, on behalf of the general
19 public of the state of California, seeks injunctive relief prohibiting Defendant from continuing
20 these wrongful practices, and such other equitable relief, including full restitution of membership
21 fees paid in excess of the originally contracted amount, to the fullest extent permitted by law.

22 **COUNT FIVE**
23 **Violation of Cal. Bus. & Prof. Code §§ 17200, et seq. -**
24 **Unfair Business Acts and Practices**
25 **(On Behalf of the California Sub-Class)**

26 65. Plaintiffs incorporate by reference and realleges each and every paragraph alleged
27 above as though fully alleged herein.

28 66. California Business and Professions Code § 17200, *et seq.* prohibits acts of unfair
competition which includes “unfair . . . business act[s] or practice[s].”

1 74. California Business and Professions Code § 17200, *et seq.* prohibits acts of unfair
2 competition which includes “fraudulent business act[s] or practice[s].”

3 75. As more fully described above, Defendant misrepresented that the monthly
4 membership fee amount would be at the stated amount *until the membership is cancelled or*
5 *terminated.*

6 76. Defendant’s misleading marketing and advertising, as well as its membership
7 agreement itself, are likely to, and do, deceive reasonable consumers. Indeed, Plaintiff Baerbel
8 McKinney-Drobnis and other members of the California Sub-Class relied on Defendant’s explicit
9 payment schedule and were deceived about membership fee amounts during the entirety of their
10 membership, as Defendant’s marketing, advertising, and underlying membership agreement
11 misrepresent that the monthly membership fee amount will be at the expressly stated amount until
12 the membership is cancelled or terminated. Said acts are fraudulent business practices and acts.

13 77. Defendant’s misleading and deceptive practices caused Plaintiff Baerbel McKinney-
14 Drobnis and other California Sub-Class members to purchase Defendant’s massage membership.

15 78. Plaintiff Baerbel McKinney-Drobnis and other California Sub-Class members were
16 harmed and suffered injury as a result of Defendant’s violations of the CAL. BUS. PROF. CODE §§
17 17200, *et seq.* Defendant has been unjustly enriched at the expense of Plaintiff Baerbel McKinney-
18 Drobnis and the members of the California Sub-Class.

19 79. Accordingly, Plaintiff Baerbel McKinney-Drobnis and members of the California
20 Sub-Class seek injunctive relief prohibiting Defendant from continuing these wrongful practices,
21 and such other equitable relief, including full restitution of all improper revenues and ill-gotten
22 profits derived from Defendant’s wrongful conduct to the fullest extent permitted by law.
23 Unilaterally increasing the monthly membership fee amounts above that which was expressly
24 contracted is deceptive and unconscionable, and purchasers of the memberships are entitled to
25 restitution of the moneys paid in excess of their contracted monthly membership fee amount.

26 ///

27 ///

1
2 **COUNT SEVEN**
3 **Declaratory Relief Pursuant to 28 U.S.C. § 2201—**
4 **The Declaratory Judgement Act**
5 **(On Behalf of the Class)**

6 80. Plaintiffs incorporate by reference and reallege each and every paragraph alleged
7 above as though fully alleged herein.

8 81. Pursuant to 28 U.S.C. § 2201, Plaintiffs and the Class are entitled to have this Court
9 establish by declaration their rights and legal relations under Massage Envy's Membership
10 Agreement.

11 82. Accordingly, Plaintiffs on behalf of the Class prays for a declaration that Massage
12 Envy's standardized Membership Agreement does not permit Massage Envy to unilaterally
13 increase the monthly membership fee amounts of Plaintiffs and the members National Class.

14 **VI. PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs and members of the Class pray for relief and judgment as
16 follows:

17 A. For an order declaring that this action is properly maintained as a class action and
18 certifying a class representative(s) in accordance with Rule 23 of the Federal Rules of Civil
19 Procedure, appointing Plaintiffs as representative(s) for the Class, and appointing Plaintiffs'
20 counsel as Class counsel;

21 B. For an order awarding Plaintiffs and the members of the Class restitution and/or an
22 injunction prohibiting Defendant's unilateral increase of monthly membership fees, and/or other
23 equitable relief as the Court deems proper, including but not limited to reimbursement of all
24 amounts paid in excess of Plaintiffs and the National Class members' initial membership costs;

25 C. For an order enjoining Defendant from continuing to engage in the unlawful
26 business acts and practices alleged herein;

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

28 E. For an order awarding Plaintiffs and the members of the Class pre-judgment and
post-judgment interest;

1 F. For an order awarding attorneys' fees and costs of suit, including experts' witness
2 fees as permitted by law; and

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

4 **VII. JURY TRIAL DEMAND**

5 Plaintiffs demand a trial by jury for all of the claims asserted in this Complaint so triable.

6 Dated: April 28, 2017

Respectfully submitted,

8 FINKELSTEIN & KRINSK LLP

9 By: /s/ Trenton R. Kashima
10 Trenton R. Kashima

11 Jeffrey R. Krinsk
12 550 West C Street, Ste. 1760
13 San Diego, CA 92101
14 Telephone: (619) 238-1333
15 Facsimile: (619) 238-5425

16 *Counsel for Plaintiffs and the Class*