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23 **UNITED STATES DISTRICT COURT**
24 **SOUTHERN DISTRICT OF CALIFORNIA**

25 **WALTER HODGES, on Behalf of Himself §**
26 **and on Behalf of All Others Similarly §**
27 **Situated §**

28 **Plaintiff,**

V.

AMERICAN SPECIALTY HEALTH §
INCORPORATED and AMERICAN §
SPECIALTY HEALTH FITNESS, INC., §

Defendants. §

CIVIL ACTION NO. '20CV1158 LAB AHG

CLASS ACTION COMPLAINT FOR §
DAMAGES, RESTITUTION, AND §
INJUNCTIVE RELIEF §

JURY TRIAL DEMANDED

Case No. _____

1 **PLAINTIFF’S CLASS ACTION COMPLAINT**

2 **I. INTRODUCTION**

3 1. Plaintiff Walter Hodges (“Plaintiff”) brings this case as a class action against
4 Defendants American Specialty Health Incorporated and American Specialty Health Fitness, Inc.
5 (“Defendants”) pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of himself
6 and all others similarly situated. Defendants operate a fitness program known as “Active & Fit
7 Direct” which provides customers with membership to thousands of participating fitness centers
8 nationwide. Customers of Defendants’ fitness program pay \$25 per month (plus tax) and a \$25
9 enrollment fee in exchange for access to fitness centers across the country. Unfortunately,
10 Defendants made the unconscionable decision to keep charging their customers monthly
11 membership fees when fitness centers were closed following the COVID-19 Pandemic.

12 2. To sign up for Defendants’ program, customers provide Defendants with their
13 credit card or debit card information. Defendants then automatically charge their customers as
14 payments are due on a monthly basis.

15 3. Beginning in March 2020, gyms across the country closed down indefinitely as
16 “stay at home” and “shelter in place” orders were issued. However, Defendants continued
17 charging their customers the full monthly membership fees. In doing so, Defendants made the
18 deliberate decision to take millions of dollars from their customers who did not have access to the
19 service Defendants promised, agreed, and warranted to them.

20 4. Defendants’ agreement, warranty, and representation to their customers, including
21 Plaintiff was that in exchange for payment, Defendants will provide access to thousands of
22 participating fitness centers nationwide.

23 5. Defendants’ website states as follows:

24 The Active&Fit Direct™ program is designed to help you achieve better health
25 through regular exercise without breaking the bank. The program includes a
26 membership to 9,000+ participating fitness centers nationwide at just a fraction of
27 average market prices (\$25/month plus a \$25 enrollment fee).

28 The Active&Fit Direct program also includes:

- Online directory maps and locator for fitness centers (available on any device)
- A free guest pass to try out a fitness center before enrolling (where available)

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

- The option to switch fitness centers at anytime

(See <https://www.activeandfitdirect.com/About>, last visited June 22, 2020)

6. The terms of service further state:

As a participant in the Program, you will have basic membership access to Active&Fit Direct contracted Fitness Centers. Depending on the specific services available at the Fitness Center, your basic membership will give you access to standard fitness club or exercise center services, which may include (again, depending availability at the Fitness Center): access to cardiovascular equipment; free weights; resistance training equipment; group exercise classes (yoga, dance, Pilates, etc.); and, where available, amenities such as saunas, steam rooms, and whirlpools.

7. This promise to provide access to participating fitness centers formed the basis of the agreement with Plaintiff and the Class Members. Indeed, the reason Defendants' customers pay their monthly membership fees is to have access to participating fitness centers. However, Defendants have continued to charge their customers when the fitness centers closed following the COVID-19 Pandemic.

8. During the pandemic, millions of Americans lost their jobs and the ability to earn a living. Millions of people are struggling to survive. Rather than stop charging their customers during the pandemic, like other business have done, Defendants have continued taking money from their customers. The Plaintiff and Class Members need the money that Defendants have unlawfully taken from them. Defendants have taken this decision to profit from the COVID-19 Pandemic to the detriment of millions of Americans.

9. Through the conduct described in this Complaint, Defendants have violated California, Texas and federal law. Plaintiff brings this case as class action for breach of contract, unjust enrichment, money had and received, breaches of express and implied warranties, under the Magnuson-Moss Warranty Act, under the California Consumer Legal Remedies Act ("CLRA"), Civil Code §§ 1750, *et seq.*, Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200, *et seq.*, False Advertising Law ("FAL"), Bus. & Prof. Code §§ 17500, *et seq.*, pursuant to the Texas Deceptive Trade Practices Act ("DTPA"), and for Declaratory Relief.

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

JURISDICTION AND VENUE

1
2 10. This Court has original jurisdiction over Plaintiff’s claims pursuant to the Class
3 Action Fairness Act found in 28 U.S.C. § 1332(d)(2). The matter in controversy, exclusive of
4 interest and costs, exceeds the sum or value of \$5,000,000 and is a class action in which there are
5 in excess of 100 class members and some of the class members are citizens of a state different than
6 that of Defendants.

7 11. This Court has personal jurisdiction over Defendants because Defendants operate
8 in California and they maintain their headquarters in California located at 10221 Wateridge Circle,
9 San Diego, California 92121.

10 12. Venue is proper in this district under 28 U.S.C. § 1391 because a substantial part
11 of the acts or omissions giving rise to the claims in this Complaint took place in this district. That
12 is, the decision to violate the law as described in this lawsuit was made in this district. In particular,
13 the decision to wrongfully charge their customers the full monthly membership fees while fitness
14 centers were closed nationwide was made from the California headquarters.

PARTIES

15
16 13. Plaintiff Walter Hodges is a resident of San Antonio, Texas. Mr. Hodges is a
17 current member of Defendants’ fitness program, paying \$25.00 (plus tax) per month on a month-
18 to-month basis. Plaintiff has been a member since at least 2019. In March 2020, States within the
19 US began a mandatory closure of all non-essential businesses, which included gyms and fitness
20 facilities. For example, beginning at 12:01 am on Tuesday, March 17, San Francisco, Marin, Santa
21 Clara, Santa Cruz, San Mateo, Contra Costa, and Alameda Counties in California were placed
22 under a mandatory “shelter in place” order.¹ On March 24, 2020, San Antonio, Texas (in Bexar
23 County) was placed under a mandatory “shelter in place” order.² During the “shelter in place”
24 order, Plaintiff and the Class Members did not have access to any fitness center. Despite that fact,
25 Defendants continued to charge Plaintiff the full amount of the membership fee. Plaintiff signed

26
27 ¹ https://en.wikipedia.org/wiki/Timeline_of_the_COVID-19_pandemic_in_the_United_States

28 ² <https://www.sacurrent.com/the-daily/archives/2020/03/23/san-antonio-and-bexar-county-impose-shelter-in-place-order-through-april-9-to-contain-coronavirus-spread>

1 up for Defendants’ month-to-month membership with the belief and on the basis that he would
2 have access to the gyms and fitness facilities that Defendant promised.

3 14. The mandatory closure of all non-essential businesses continued to May 2020,
4 when certain States began easing restrictions. However, Defendants continue to charge their
5 customers the full amount of the membership fee despite the fact that fitness centers remain closed
6 or only operate at a reduced capacity.

7 15. Defendant American Specialty Health Incorporated is a foreign corporation
8 organized under the laws of Delaware. Defendant can be served with process by serving its
9 registered agent Cogency Global, Inc. at 1325 J. St., Suite 1550, Sacramento, CA 95814.

10 16. Defendant American Specialty Health Fitness, Inc. is a foreign corporation
11 organized under the laws of Delaware. Defendant can be served with process by serving its
12 registered agent Cogency Global, Inc. at 1325 J. St., Suite 1550, Sacramento, CA 95814.

13 17. The “National Class” consists of all individuals in the United States who were
14 charged the full membership fee by Defendants at any time when they were under a “stay at home,
15 “shelter in place” or similar order due to the COVID-19 pandemic. Excluded from this Class are
16 Defendants’ officers and directors.

17 18. The “Texas Class” consists of all residents of Texas who were charged the full
18 membership fee by Defendants at any time when they were under a “stay at home, “shelter in
19 place” or similar order to the COVID-19 pandemic. Excluded from this Class are Defendants’
20 officers and directors.

21 **FACTS**

22 19. The novel Coronavirus has infected over 2,000,000 Americans, caused the deaths of
23 over 120,000 Americans, and has caused millions of Americans to lose their jobs. Currently, the
24 nation is facing a troubled economic and health situation. Despite these troubling times,
25 Defendants made the deliberate decision to take millions of dollars from their customers.

26 20. Defendants operate a fitness program known as “Active & Fit Direct” which
27 provides customers with access to thousands of participating fitness centers nationwide.
28

Case No. _____

1 Defendants promote their services on their website <https://www.activeandfitdirect.com/>. On this
2 website, Defendants state that their members can “Explore Our 11,000+ Fitness Centers”

3 21. Defendants website further states:

4 The Active&Fit Direct program partners with top fitness centers across the country—
5 ranging from conventional gyms to studios with yoga, cycling, and more.* With many
6 locations offering free guest passes and the ability to change fitness centers any time at
no additional cost with your Active&Fit Direct membership, you can explore the
possibilities and find your perfect fit.

7 22. Defendants’ website reiterates that their customers will have access to thousands of
8 gyms and fitness facilities:

9 The Active&Fit Direct™ program is designed to help you achieve better health
10 through regular exercise without breaking the bank. The program includes a
11 membership to 9,000+ participating fitness centers nationwide at just a fraction of
average market prices (\$25/month plus a \$25 enrollment fee).

12 The Active&Fit Direct program also includes:

- 13 • Online directory maps and locator for fitness centers (available on any device)
- 14 • A free guest pass to try out a fitness center before enrolling (where available)
- 15 • The option to switch fitness centers at anytime

16 (See <https://www.activeandfitdirect.com/About>, last visited June 22, 2020)

17 23. Customers of Defendants’ fitness program pay \$25 per month (plus tax) and a \$25
18 enrollment fee in exchange for access to fitness centers across the country. This promise to provide
19 access to fitness centers formed the basis of the agreement with Plaintiff and the Class Members.
20 Indeed, the reason Defendants’ customers pay their monthly membership fees is to have access to
the participating fitness centers.

21 24. Defendants further promised, agreed, and warranted as follows:

22 As a participant in the Program, you will have basic membership access to Active&Fit
23 Direct contracted Fitness Centers. Depending on the specific services available at the
24 Fitness Center, your basic membership will give you access to standard fitness club or
25 exercise center services, which may include (again, depending availability at the
26 Fitness Center): access to cardiovascular equipment; free weights; resistance training
equipment; group exercise classes (yoga, dance, Pilates, etc.); and, where available,
amenities such as saunas, steam rooms, and whirlpools.

1 25. Despite the fact that the nation was under a lockdown following the COVID-19
2 Pandemic, Defendants made the unconscionable decision to keep charging their customers the full
3 monthly membership fees when the participating fitness centers were closed

4 26. This caused financial and economic harm to Plaintiff and the Class Members.

5 27. Plaintiff has been a customer of Defendants since 2019. Plaintiff resides in San
6 Antonio, Texas. On March 24, 2020, San Antonio, Texas (in Bexar County) was placed under a
7 mandatory “shelter in place” order.³ This shelter in place order closed all participating fitness
8 centers. A further “stay home” order was extended to June 4, 2020.⁴ During this time, Defendants
9 continued to charge Plaintiff despite the fact that all participating fitness centers were closed.

10 28. On March 9, 2020, Defendants charged Plaintiff \$27.06 in transaction number
11 2596257.

12 29. On April 9, 2020, Defendants charged Plaintiff \$27.06 in transaction number
13 2783573.

14 30. On May 9, 2020, Defendants charged Plaintiff \$27.06 in transaction number
15 2958039.

16 31. Defendants continue to charge Plaintiff monthly membership fees to this day.

17 32. Defendants never provided Plaintiff or any other Class Member a refund (or even
18 offered a reduced/prorated membership fee) during the COVID-19 Pandemic in breach of their
19 agreement, promise, and warranty.

20 33. Defendants’ conduct has caused significant financial and economic harm to
21 Plaintiff and the Class Members as Defendants have willfully taken millions of dollars that
22 rightfully belong to Plaintiff and the Class Members. Defendants’ unconscionable conduct
23 continues to this day. As the second wave of the Coronavirus is on the horizon and more shelter
24

25
26
27 ³ <https://www.sacurrent.com/the-daily/archives/2020/03/23/san-antonio-and-bexar-county-impose-shelter-in-place-order-through-april-9-to-contain-coronavirus-spread>

28 ⁴ <https://www.ksat.com/news/local/2020/05/19/san-antonio-bexar-county-extend-stay-home-work-safe-order-until-june-4/>

1 in place orders are beginning to be issued, this lawsuit is intended to stop the illegal conduct of
2 Defendants.

3 **COUNT I**

4 **Breach of Contract, including Breach of the**
5 **Implied Covenant of Good Faith and Fair Dealing**

6 (On behalf of Plaintiff and the National Class)

7 34. Plaintiff re-alleges and incorporates the allegations stated above as if set forth fully
8 herein.

9 35. At all relevant times, Plaintiff and the Class Members entered valid and enforceable
10 contracts with Defendants whereby Defendants promised to provide access to participating fitness
11 centers in exchange for the payment of membership fees. Plaintiff and the Class Members have
12 otherwise performed all obligations under their agreements with Defendants. Defendants have
13 breached these contracts by charging Plaintiff and the Class Members while the fitness centers
14 were closed.

15 36. In addition, every contract imposes a duty of good faith and fair dealing on the
16 parties with respect to the performance and enforcement of the terms of the contract. Defendants
17 breached the covenant of good faith and fair dealing because, to the extent Defendants had the
18 discretion to bill the monthly membership rate, that discretion was exercised wrongfully under the
19 circumstances when the fitness centers were closed. Thus, Defendants breached the obligation of
20 good faith and fair dealing.

21 37. Indeed, Defendants exercised their discretion in bad faith by charging Plaintiff and
22 the Class Members fees even after the “shelter in place” and other lockdown orders were issued
23 beginning in March 2020. To this day, Defendants have not refunded the amount of the charges.

24 38. Defendants’ contractual breaches, including the breaches of the implied covenant
25 of good faith and fair dealing, caused Plaintiff and the Class to suffer damages in the amount to be
26 determined at trial.

27 39. Plaintiff and the Class Members also seek injunctive relief and equitable relief
28 prohibiting Defendants from continuing to charge customers the full membership fees while the

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

1 participating fitness centers are closed or operate at reduced capacity following the COVID-19
2 Pandemic.

3 **COUNT II**

4 **Conversion**

5 (On behalf of Plaintiff and the National Class)

6 40. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as
7 if fully set forth herein.

8 41. Plaintiff and the Class Members owned and possessed money that Defendants took
9 for membership fees beginning in March 2020. Plaintiff and the Class Members had a right to
10 retain their money and Defendants unilaterally charged the Plaintiff's and Class Members' debit
11 cards and credit cards even when the "shelter in place" and other lockdown orders were issued.

12 42. To this day, Defendants have intentionally refused to give Plaintiff's and the Class
13 Members' money back to them.

14 43. Plaintiff and the Class Members were harmed through Defendants' intentional
15 charging of their credit cards and debit cards.

16 44. Defendants' conduct was a substantial factor in causing Plaintiff's and the Class
17 Members' harm.

18 45. Plaintiff and the Class Members also seek injunctive relief and equitable relief
19 prohibiting Defendants from continuing to charge customers the full membership fees while the
20 participating fitness centers are closed or operate at reduced capacity following the COVID-19
21 Pandemic.

22 **COUNT III**

23 **Unjust Enrichment**

24 (On behalf of Plaintiff and the National Class)

25 46. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as
26 if fully set forth herein.

27
28
Case No. _____

1 charged and retained membership fees while the fitness centers were closed following the COVID-
2 19 Pandemic.

3 56. Plaintiff and the Class Members also seek injunctive relief and equitable relief
4 prohibiting Defendants from continuing to charge customers the full membership fees while the
5 participating fitness centers are closed or operate at reduced capacity following the COVID-19
6 Pandemic.

7 **COUNT V**

8 **Breach of Express Warranty**

9 (On Behalf of Plaintiff and the National Class)

10 57. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as
11 if fully set forth herein.

12 58. This cause of action is brought against Defendants for breaching their express
13 warranty. In connection with the sale of their membership plans, Defendants made an express
14 warranty that Defendants would provide access to participating fitness centers.

15 59. This express warranty was made by Defendants to Plaintiff and the Class Members.

16 60. Defendants’ affirmation of fact and promise became part of the basis of the bargain
17 between Defendant and Plaintiff and the Class Members, thereby creating an express warranty that
18 the services provided by Defendants would conform to that affirmation of fact, representation,
19 promise, and description.

20 61. The representations made by Defendants were the basis and reason why Plaintiff
21 and the Class Members purchased Defendants’ membership plans.

22 62. Here, Defendants have breached this express warranty because the participating
23 fitness centers were closed and not accessible to Plaintiff and the Class Members. Nevertheless,
24 Defendants still charged Plaintiff and the Class Members the full amount of the monthly
25 membership fees.

26 63. Plaintiff and the Class Members have suffered economic harm as a result. As a
27 result of Defendants’ illegal conduct, Plaintiff and the Class Members are entitled to
28 reimbursement of the amounts charged to them for membership fees during the class period.

Case No. _____

COUNT VII

Violation of California’s Consumers Legal Remedies Act

California Civil Code § 1750, et seq.

(On Behalf of Plaintiff and the National Class)

(Injunctive Relief)

73. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

74. Plaintiff and the Class Members are consumers who paid fees for Defendants’ service which was to provide access to thousands of fitness centers for personal use. Plaintiff and the Class are “consumers” as that term is defined by the CLRA in Cal. Civ. Code § 1761(d).

75. Defendants’ membership program that Plaintiff and the Class Members purchased was a “service” within the meaning of Cal. Civ. Code § 1761(b).

76. Defendants’ actions, representations, and conduct have violated, and continue to violate the CLRA, because they extend to transactions that intended to result, or which have resulted in, the sale of services to consumers.

77. Defendants’ advertising that their customers would have access to the fitness centers upon paying a membership fee was false and misleading to a reasonable consumer, including Plaintiff, because such fitness centers were closed and yet Defendants continued to charge them.

78. California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits “Misrepresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” By engaging in the conduct set forth herein, Defendants violated and continue to violate Section 1770(a)(5) of the CLRA because Defendants’ conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that Defendants misrepresented the particular characteristics, benefits and quantities of the services. Defendants have charged Plaintiff and the Class Member membership fees despite not having access to the fitness centers.

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

1 79. Cal. Civ. Code § 1770(a)(7) prohibits representing that goods or services are of a
2 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of
3 another. By engaging in the conduct set forth herein, Defendants violated and continue to violate
4 Section 1770(a)(7) of the CLRA, because Defendants’ conduct constitutes unfair methods of
5 competition and unfair or fraudulent acts or practices, in that Defendants misrepresent the
6 particular standard, quality or grade of the services.

7 80. Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or services with
8 intent not to sell them as advertised.” By engaging in the conduct set forth herein, Defendants
9 violated and continue to violate Section 1770(a)(9), because Defendants’ conduct constitutes
10 unfair methods of competition and unfair or fraudulent acts or practices, in that Defendants
11 advertise services with the intent not to provide those services as advertised. Defendants have
12 advertised and charged for access to the participating fitness centers despite their customers not
13 having access and usage of those fitness centers.

14 81. Plaintiff and the Class Members acted reasonably when they purchased and paid
15 for Defendants’ membership plan in the belief that Defendants’ representations were true and
16 lawful.

17 82. Plaintiff and the Class Members suffered injuries caused by Defendants because (a)
18 they would not have purchased or paid for Defendants’ membership plan absent the representations
19 and omission of a warning that they would be charged even if the participating fitness centers were
20 closed; (b) Plaintiff and the Class Members would not have purchased and paid for the
21 memberships on the same terms absent Defendants’ representations and omissions; (c) Plaintiff
22 and the Class Members paid a price premium for Defendants’ membership plan based on
23 Defendants’ misrepresentations and omissions; and (d) Defendants’ membership plan did not have
24 the characteristics, benefits, or quantities as promised.

25 83. Under California Civil Code § 1780(a), Plaintiff and the Class Members seek
26 injunctive and equitable relief for Defendants’ violations of the CLRA.

27 84. Wherefore, Plaintiff seeks injunctive and equitable relief for these violations of the
28 CPLR.

Case No. _____

COUNT VIII

Violation of California’s Unfair Competition Law

California Business & Professions Code § 17200, et seq.

(On Behalf of Plaintiff and the National Class)

85. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

86. Defendants are subject to California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq. The UCL provides, in pertinent part: “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising”.

87. Defendants’ advertising that the membership plans would include access to thousands of participating fitness centers upon paying a membership fee is false and misleading to a reasonable consumer, including Plaintiff, because such fitness centers were closed following the COVID-19 Pandemic and yet, Defendants still continued to charge their customers, including Plaintiff.

88. Defendants’ business practices, described herein, violate the “unlawful” prong of the UCL by violating the CLRA, the FAL, and California's Health Studio Services Contract Law and other applicable law as described herein.

89. Defendants’ business practices, described herein, violate the “unfair” prong of the UCL in that their conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous, as the gravity of the conduct outweighs any alleged benefits. Defendants’ advertising and the charging of membership fees while the participating fitness centers were closed is of no benefit to consumers.

90. Defendants violated the fraudulent prong of the UCL by misleading Plaintiff and the Class Members to believe that they would only be charged fees when they would have access to the participating fitness centers and by charging membership fees to Plaintiff and the Class Members after the such fitness centers were closed.

Case No. _____

1 97. Defendants' advertising and marketing misrepresented and/or omitted the true
2 content and nature of Defendants' services. Defendants' advertisements and inducements were
3 made in and originated from California and come within the definition of advertising as contained
4 in Bus. & Prof. Code § 17500, *et seq.* in that the promotional materials were intended as
5 inducements to purchase and maintain memberships, and are statements disseminated by
6 Defendants to Plaintiff and the Class Members. Defendant knew that these statements were
7 unauthorized, inaccurate, and misleading and nevertheless, continued to charge Plaintiff and the
8 Class Members after the participating fitness centers had closed following the COVID-19
9 Pandemic.

10 98. Defendants' advertising that their customers would have access to the participating
11 fitness centers upon paying a membership fee is false and misleading to a reasonable consumer,
12 including Plaintiff, because such fitness centers were closed and yet, Defendants continued to
13 charge them.

14 99. Defendants violated § 17500, *et seq.* by misleading Plaintiff and the Class Members
15 to believe that they would be charged membership fees only when they had access to the
16 participating fitness centers that Defendants promised.

17 100. Defendants knew or should have known, through the exercise of reasonable care
18 that their advertising was false and misleading. Further, Defendants knew or should have known
19 that they breached their contracts with their customers by charging the full membership fees when
20 the participating fitness centers were closed.

21 101. Plaintiff and the Class Members lost money or property as a result of Defendants'
22 FAL violation because (a) they would not have purchased or paid for Defendants' membership
23 plan absent the representations and omission of a warning that they would be charged even if the
24 participating fitness centers were closed; (b) Plaintiff and the Class Members would not have
25 purchased and paid for the memberships on the same terms absent Defendants' representations
26 and omissions; (c) Plaintiff and the Class Members paid a price premium for Defendants'
27 membership plan based on Defendants' misrepresentations and omissions; and (d) Defendants'
28 membership plan did not have the characteristics, benefits, or quantities as promised.

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

COUNT X

Violation of California’s Health Studio Services

Contract Law Civil Code § 1812.80, et seq.

(On Behalf of Plaintiff and the National Class)

102. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

103. Under Cal. Civ. Code § 1821.92, any contract for health studio services entered into in reliance upon any willful and false, fraudulent, or misleading information, representation, notice or advertisement of the seller shall be void and unenforceable.

104. Here, Plaintiff and the Class Members signed up and paid for Defendants’ membership plan based on Defendants’ false and misleading representation that Plaintiff and the Class Members would have access to participating fitness centers, when, in fact, they did not have such access.

105. Further, Cal. Civ. Code § 1812.85 requires that “[e]very contract for health studio services shall provide that performance of the agreed-upon services will begin within six months after the date the contract is entered into. The consumer may cancel the contract and receive a pro rata refund if the health studio fails to provide the specific facilities advertised or offered in writing by the time indicated.” Here, Defendants advertise that they provide access to thousands of participating fitness centers, when, in fact, Defendants have charged customers the membership fees even after many or all participating fitness centers had closed. No pro rata refund or any other refund has been paid to Plaintiff and the Class Members.

106. Accordingly, Plaintiff and the Class Members are entitled to economic damages for Defendants charging the full amount of the membership fees during the Class period.

COUNT XI

Violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312

(On Behalf of Plaintiff and the National Class)

107. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above as if fully set forth herein.

Case No. _____

1 117. Plaintiff sought or acquired by purchase memberships, which is a “good” or
2 “service” within the meaning of the DTPA. *See* Tex. Bus. & Com. Code § 17.45(1).

3 118. Plaintiff sought or acquired a membership plan after Defendants made the false,
4 misleading, and deceptive statement that they would provide access to thousands of participating
5 fitness centers.

6 119. Defendants’ conduct violates Sections 17.46(b)(2), 17.46(b)(5), 17.46(b)(7),
7 17.46(b)(9), and 17.46(b)(24) of the Texas Business and Commerce Code.

8 120. Defendants’ illegal actions include, but are not limited to the following:

9 a. Defendants represented that the membership plans were of a particular standard,
10 quality, and grade that they are not. Also, Defendants represented that they would
11 provide access to thousands of participating fitness centers that they did not
12 provide, and yet, still charged their customers the full amount of the membership
13 fees.

14 b. Defendants represented that the membership plans they sold have sponsorship,
15 approval, characteristics, and benefits that they do not have.

16 c. Breaching express and implied warranties, as further stated above.

17 121. Defendants’ false, misleading, and deceptive acts induced Plaintiff and the Texas
18 Class Members to purchase the membership plans.

19 122. But for Defendants engaging in the false, misleading, and deceptive acts, as
20 identified in this Complaint, Plaintiff and the Texas Class Members would not have purchased the
21 membership plans and would not have suffered economic harm. As a result of Defendants’ illegal
22 conduct, Plaintiff and the Texas Class Members are entitled to reimbursement of the amount they
23 spent.

24 123. Plaintiff and the Texas Class Members also seek treble their economic losses
25 because Defendants acted intentionally.

26 124. Plaintiff and the Texas Class Members also seek reasonable attorney’s fees,
27 expenses, and court costs.

28
Case No. _____

TEXAS CLASS

All residents of Texas who were charged a membership fee by Defendants at any time when they were under a “stay at home,” “shelter in place” or similar order due to the COVID-19 pandemic. Excluded from this Class are Defendants’ officers and directors.

131. **Numerosity.** The members of the Classes are so numerous that joinder of all members of the Classes is impracticable. Plaintiff is informed and believes that the proposed Classes contain thousands of members who have been harmed by Defendants’ conduct as alleged herein. The precise number of Class Members is unknown to the Plaintiff but is believed to be well in excess of 1,000.

132. **Typicality.** Plaintiff’s claims are typical of the claims of the members of the Classes because all Class Members were injured through the uniform misconduct described above and were all subject to Defendants’ illegal conduct. Plaintiff is advancing the same claim and legal theories on behalf of the Classes.

133. **Adequacy of Representation.** Plaintiff will fairly and adequately protect the interests of the members of the Classes. Plaintiff has retained counsel experienced in complex class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Classes.

134. **Rule 23(b)(1):** Class action status is warranted under Rule 23(b)(1)(A) because prosecuting separate actions by or against individual members of the Classes would create a risk of inconsistent or varying adjudications with respect to individual members of the Classes, which would establish incompatible standards of conduct for Defendants.

135. Class action status is also warranted under Rule 23(b)(1)(B) because prosecuting separate actions by or against individual members of the Classes would create a risk of adjudications with respect to individual members of the Classes, which would, as practical matter

1 be dispositive of the interests of the other Class Members not parties to the adjudications, or
2 substantially impair or impede their ability to protect their interests.

3 136. **Rule 23(b)(2):** This action is appropriate as a class action pursuant to Rule 23(b)(2)
4 because Plaintiff seeks injunctive relief and corresponding declaratory relief for the Classes.
5 Defendants has acted in a manner generally applicable to each member of the Classes.

6 137. Defendants' unlawful practices, if not enjoined, will subject Plaintiff and the Class
7 Members to continuing harm and will cause irreparable injuries to Plaintiff and the Class Members.
8

9 138. The adverse financial impact of Defendants' unlawful actions is continuing and,
10 unless preliminarily and permanently enjoined, will continue to irreparably injure Plaintiff and the
11 Class Members.

12 139. **Rule 23(b)(3):** This action is also appropriate as a class action pursuant to Rule
13 23(b)(3) because common questions of fact and law predominate over any individualized
14 questions. These common legal and factual questions include, but are not limited to, the following:
15

- 16 (a) whether Defendants' representations discussed above are false, misleading, or
17 objectively reasonably likely to deceive consumers;
18 (b) whether Defendants breached its agreement to provide access to thousands of
19 participating gyms, fitness facilities and exercise centers;
20 (c) whether Defendants intentionally charged money belonging to Plaintiff and the
21 Class Members;
22 (d) whether Defendants breached its warranty to provide access to thousands of
23 participating gyms, fitness facilities and exercise centers; and
24 (e) whether Defendants has been unjustly enriched to the detriment of the Plaintiff and
25 Class Members.
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Case No. _____

1 140. **Superiority.** A class action is superior to all other available means for the fair and
2 efficient adjudication of this controversy. The damages or other financial detriment suffered by
3 individual Class Members is relatively small compared to the burden and expense that would be
4 entailed by individual litigation of their claims against Defendants. It would thus be virtually
5 impossible for members of the Classes, on an individual basis, to obtain effective redress for the
6 wrongs done to them. Furthermore, even if Class Members could afford such individualized
7 litigation, it would place a tremendous strain on judicial economy. Individualized litigation would
8 create the danger of inconsistent or contradictory judgments arising from the same set of facts.
9 Individualized litigation would also increase the delay and expense to all parties and the court
10 system from the issues raised by this action. By contrast, the class action device provides the
11 benefits of adjudication of these issues in a single proceeding, economies of scale, and
12 comprehensive supervision by a single court, and presents no unusual management difficulties
13 under the circumstances here.

14
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16 141. Indeed, by concentrating this litigation in one forum, judicial economy and parity
17 among the claims of individual Class Members are promoted. Additionally, class treatment in this
18 matter will provide for judicial consistency. Notice of the pendency and any resolution of this
19 action can be provided to the Class Members by mail, electronic mail, text message, print,
20 broadcast, internet and/or multimedia publication. The identity of members of the Class Members
21 is readily identifiable from Defendants' records.

22
23 142. This type of case is well-suited for class action treatment because: (1) Defendants'
24 practices, policies, and/or marketing were uniform; (2) Defendants' agreement with the Class
25 Members was uniform; (3) Defendants' promise, warranty, and agreement to provide access to
26 thousands of participating fitness centers was the same for all Class Members; and (4) the
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Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

1 necessary records to prove Defendants’ illegal acts are in the possession of Defendants.
2 Ultimately, a class action is a superior form to resolve the claims detailed herein because of the
3 common nucleus of operative facts centered on Defendants’ illegal conduct.

4 143. Unless a class is certified, Defendants will retain the money they wrongfully
5 received as a result of its illegal conduct. Defendants have acted and refused to act on grounds
6 generally applicable to all Class Members, making a class action a superior means to resolve this
7 case.
8

9 **JURY DEMAND**

10 144. Plaintiff hereby demands trial by jury on all issues.

11 **PRAYER**

12 145. For these reasons, Plaintiff prays for:

- 13 a. An order certifying the Classes under Rule 23 of the Federal Rules of Civil
- 14 Procedure;
- 15 b. A judgment against Defendants awarding Plaintiff and the Class Members their
- 16 economic losses, treble damages, and all statutory penalties;
- 17 c. Exemplary damages within the jurisdictional limits of the Court;
- 18 d. An order awarding attorneys’ fees, costs, and expenses;
- 19 e. Pre- and post-judgment interest at the highest applicable rates; and
- 20 f. Such other and further relief as may be necessary and appropriate.
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Case No. _____

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HODGES & FOTY, L.L.P.

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And

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ATTORNEYS FOR PLAINTIFF AND CLASS MEMBERS

Case No. _____

(Walter Hodges, et al. v. American Specialty Health Incorporated, et al.)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

WALTER HODGES, on Behalf of Himself and Behalf of All Others Similarly Situated

(b) County of Residence of First Listed Plaintiff Bexar County, TX (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Hodges & Foty, LLP, Tej P. Singh 1055 West 7th Street, 33rd Floor #165, Los Angeles, CA, 877-342-2020

DEFENDANTS

AMERICAN SPECIALTY HEALTH INCORPORATED and AMERICAN SPECIALTY HEALTH FITNESS, INC.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'20CV1158 LAB AHG

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

41 U.S.C. § 6503

Brief description of cause:

Class action for breach of contract conversion and other violations.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

06/24/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ Tej P. Singh

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Class Action: Active Fit & Direct Members Charged Monthly Fees During Pandemic While Facilities Were Closed](#)
