UTAH SUPREME COURT

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<td>GOLD'S GYM INTERNATIONAL, INC.,

Appellant,

vs.

CLARK CHAMBERLAIN and BRENT STATHAM VINCE ENGLE,

Appellees.</td>
<td>GOLD'S GYM INTERNATIONAL, INC.'S APPEAL

Appellate Case No. 20170146-SC</td>
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On Appeal from the Third Judicial District Court for Salt Lake County, State of Utah
Civil No. 090919785, Honorable T. M. SHAUGHNESSY

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COMPLETE LIST OF ALL PARTIES TO THIS PROCEEDING

Pursuant to Rule 24(a)(1) U.R.A.P., the following is a complete list of the parties present to this appeal: (1) Gold's Gym International, Inc.; and (2) Clark Statham and Brent Chamberlain. The other entities or individuals that were parties to this action but that are not parties to this appeal are: (1) Vince Engle; (2) Travis Izatt; (3) Health Source, Inc.; (4) Fitcorp, Inc.; (5) Fitness Source, LLC; (6) OPM Holdings, Inc.; and (7) St. George Fitness, LLC.

INTRODUCTION

This appeal seeks attorneys' fees from the Members of a closely-held corporation who unsuccessfully asserted claims on behalf of their company based on rights embodied in a contract that provides for attorneys' fees. Brent Statham and Clark Chamberlain (the "**Members**") were members of Health Source of St. George, LLC ("**HSSG**"). The Members filed a lawsuit against Gold's Gym and other defendants seeking to enforce a franchise License Agreement. The parties to the License Agreements were only HSSG and Gold's Gym. The Members brought five (5) causes of action, all of which were intricately and directly related to the claim for breach of the License Agreement: (1) conversion of the franchise rights embodied in the License Agreement between Gold's Gym International, Inc. ("**Gold's Gym**") and HSSG; (2) tortious interference with the prospective contract rights between HSSG and its clients; (3) civil conspiracy to sell the franchise rights in the Franchise Agreement; (4) negligence arising from failure to fulfill contractual duties under the License Agreements; and (5) breach of the License Agreement.

The negligence and breach of contract claims were dismissed on Gold's Gym's Motion to Dismiss because they were barred by the relevant statutes of limitations. After a three-day bench trial, the trial court found in favor of Gold's Gym on all of the remaining claims. Despite containing a "prevailing party" attorneys' fee provision, the trial court found that Gold's Gym was not entitled to attorneys' fees under the License Agreement because the Members were not parties thereto even though all of the Members' claims directly arose therefrom.

Members should not be allowed to enforce rights under a contract but escape its obligations. Gold's Gym additionally seeks a determination from the Supreme Court of Utah regarding the exception to the derivative action rule regarding closely-held corporations. In particular, Gold's Gym seeks a ruling that members of a closely-held LLC should be held individually liable for attorneys' fees for asserting rights embodied in a contract to which only the corporation is a party and that contains an attorneys' fees provision.

STATEMENT OF THE ISSUES

I. Is the action brought by the Members a derivative action on behalf of HSSG which would require the Members to pay Gold's Gym's attorneys' fees and costs?

(a) "The interpretation of a statute is a question of law that we review for correctness...." *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2010 UT 65, ¶ 11, 245 P.3d 184, 189 (citations omitted).

(b) For support that this issue was preserved in the trial court, refer to (i) Gold's Gym's Motion for Attorneys' Fees and Costs and Reply Memorandum in Support thereof filed with the trial court on 9 January 2017 and 24 March 2017, respectively, (ii)

Gold's Gym's Motion for Summary Judgment and Reply Memorandum in Support thereof filed on 26 February 2013 and 4 June 2013, respectively, and (iii) the transcripts from the three-day bench trial that occurred on 1-3 November 2016.

II. Did the trial court err by failing to award Gold's Gym attorneys' fees and costs under the attorneys' fee provision in the License Agreement?

(a) "Questions of contract interpretation which are confined to the language of the contract itself are questions of law, which we review for correctness." *Mellor v. Wasatch Crest Mut. Ins. Co.*, 2009 UT 5, ¶ 7, 201 P.3d 1004, 1007.

(b) For support that this issue was preserved in the trial court, refer to (i) Gold's Gym's Motion for Attorneys' Fees and Costs and Reply Memorandum in Support thereof filed with the trial court on 9 January 2017 and 24 March 2017, respectively, (ii) Gold's Gym's Motion for Summary Judgment and Reply Memorandum in Support thereof filed on 26 February 2013 and 4 June 2013, respectively, and (iii) the transcripts from the three-day bench trial that occurred on 1-3 November 2016.

STATEMENT OF THE CASE

A. The Facts of the Case. On 22 June 1999, Gold's Gym International, Inc. ("**Gold's Gym**"), a national fitness franchisor, entered into a License Agreement with Health Source of St. George, Inc. ("**HSSG**") to operate a Gold's Gym located in St. George, Utah. (Exhibit A of Addendum; Record on Appeal ("R."), pp. 632-653). HSSG is a closely-held corporation owned 50% by Brent Statham and Clark Chamberlain (the "**Members**" of the corporation that brought this lawsuit), with the remaining 50% owned by Vince Engle ("**Mr. Engle**") through his personal company known as Health Source, Inc. ("**HSI**"). (R., pp.669-687).

On 10 April 2001, Defendant Engle represented to Gold's Gym that Statham and Chamberlain were no longer involved with HSSG. In reliance on this representation, Gold's Gym entered into a franchise agreement with HSI. Subsequently, on 8 May 2003, Gold's Gym received a Consent to Assignment authorizing the transfer of the Gym, which was signed by Mr. Engle. (R., pp.2423-2432). Later in 2005, the Plaintiffs contacted Gold's Gym after they learned of the transfer. They claimed Gold's Gym had improperly transferred the license interest.

B. The Procedural History. On 11 July 2005, the Members of HSSG filed suit against Mr. Engle, Gold's Gym, and other defendants.[1] Despite HSSG never being named a party to this action, the Members filed suit on behalf of the corporation against Gold's Gym for: (1) breach of the License Agreement; (2) negligence; (3) tortious interference with prospective contract rights; (4) conversion of contractual rights; and (5) conspiracy to convert contractual rights.[2]

On 27 October 2011, Judge Toomey granted Gold's Gym's Motion to Dismiss with respect to the Members' negligence and breach of contract claims. (R., pp.275-280). The court concluded that the negligence and breach of contract claims were new causes of action that "did not relate back to the earlier Complaint as provided by Rule 15(c), and the statute of limitations has run." (*Id.*).

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[1] The original case was dismissed without prejudice on 19 November 2008 for failure to prosecute. The instant case was filed on 18 November 2009.

[2] Mr. Engle was also a named Defendant in this action, against whom the court entered a Default Judgment. On 7 February 2017, the trial court entered a Default Judgment against Mr. Engle and his personally-owned companies Fitcorp and HSSG. The amount of the Default Judgment was for $7,165,032.21 in consequential damages, $3,762,632.21 in prejudgment interest, $20,000,000 in punitive damages, and post-judgment interest at the statutory rate of 2.87%. (R., pp.430-431).

During the discovery of this matter, Gold's Gym prevailed on all but one of the discovery-related motions filed either by the Members or Gold's Gym. Subsequently, Gold's Gym filed two motions for summary judgment, both of which were denied. However, after a three-day bench trial, the trial court agreed with Gold's Gym's arguments – the same arguments presented in its motions for summary judgment – and entered a judgment dismissing all claims against Gold's Gym on all of the Members' claims against Gold's Gym.

C. Disposition in the Trial Court.

Motion for Summary Judgment Ruling: Gold's Gym filed a Summary Judgment Motion to dismiss the Members' claims because Gold's Gym argued their claims were derivative on behalf of HSSG. In her ruling, *inter alia*, the Honorable Kate A. Toomey held that Plaintiffs could proceed due to the closely held corporation exception to the derivative action rules. (R., pp.1427-1449).

Bench Trial Results: After the three-day bench trial, the trial court found for Gold's Gym on all claims. (R., pp.3631-3665). On 9 January 2017, Gold's Gym filed a Motion for Attorneys' Fees and Costs. (R., pp.3817-3869). On 29 March 2017, the Honorable Todd Shaughnessy in the Third Judicial District denied Gold's Gym's respective motion in the form of a minute entry and without conducting any oral arguments on the motion. (R., pp.4340-4341). On 4 April 2017, Gold's Gym, filed this Notice of Cross-Appeal. (R., pp.4344-4346).[3]

SUMMARY OF ARGUMENTS

[3] On 21 February 2017, the Members filed a Notice of Appeal but then subsequently withdrew their appeal on 30 October 2017. (R., pp.4038-4039).

The Members of HSSG brought a derivative action on behalf of the closely-held LLC against Gold's Gym. HSSG is a party to the License Agreement; the Members were not in privity of contract with Gold's Gym. The Members have no direct injury. Thus, the Members' claims against Gold's Gym could only be derivative claims. The trial court allowed the claims to proceed despite the fact that the Members had no contractual privity or individual interest – citing the closely-held corporation exception to the derivative action rules that would otherwise bar the Members from asserting such claims. The Members should be required to assume the obligations under the License Agreement where they have asserted rights thereunder, including the obligation to pay attorneys' fees.

ARGUMENTS

A. Gold's Gym is Entitled to An Award of Attorneys' Fees Pursuant to the Broadly-Worded Attorneys' Fee Provision In the License Agreement. The Members did ***not*** contest at trial that the License Agreement contains a broadly-worded attorneys' fee provision. In *Giles v. Mineral Res. Int'l, Inc.*, 2014 UT App 259, ¶ 17, 338 P.3d 825, 829-30, the Utah Court of Appeals held that "[certain] attorney fees provisions at issue are not limited to litigation arising from the contract claims." "Rather, they are ***broadly worded*** and allow an award of such fees to the "prevailing party" in "***any legal action aris[ing] under ... or relating to***" the … agreement." *Id.* at 830-831 (citations omitted) (emphasis added). "Under this ***broad contractual language***, attorney fee awards are not limited to the specific claims a party prevails upon but instead may be awarded to the party who prevails in ***an action that arises out of or relates to the agreements***." *Id.* at 831 (emphasis added); *see e.g., Energy Claims Ltd. v. Catalyst Inv. Group Ltd.,* 2014 UT

13, ¶¶ 11, 45, 325 P.3d 70 (holding that a breach of fiduciary duty claim fell within the scope of a contract's forum selection clause).

In this case, the relevant section of the License Agreement provides:

> ***4. <u>Costs and Attorneys' Fees</u>: The prevailing party in any dispute relating to or arising out of this Agreement, shall be entitled to recover its costs and expenses including, without limitation, accounting', attorneys', arbitrators', and related fees, costs, and other expenses, in addition to any other relief to which such party may be entitled.*** (Ex. A to Addendum, § 4, p.16) (emphasis added).

This attorneys' fee provision awards attorneys' fees to the prevailing party for "***any dispute***" that is "***relating to or arising out of***" the License Agreement. Therefore, the Court should grant Gold's Gym an award of attorneys' fees pursuant to the broad, mandatory contractual language contained in the License Agreement, and particularly because this was ***not*** contested below.

B. Gold's Gym Is the Prevailing Party On All of the Members' Claims. The Members did ***not*** contest in the trial court that Gold's Gym was the prevailing party on all claims. "Generally, only the prevailing or successful party is entitled to an award of attorney fees." *Olsen v. Lund*, 2010 UT App 353, ¶¶ 6-7, 246 P.3d 521, 522–23 (citations omitted). From the very outset of the case, Gold's Gym successfully dismissed with prejudice the Members' claims for: (1) breach of contract; and (2) negligence. Then, Gold's Gym prevailed on each of the Members' three causes of action tried to the bench: (1) intentional interference; (2) conversion; and (3) conspiracy. Gold's Gym provided a successful defense to all of the Members' claims asserted against it.

C. Gold's Gym Is Entitled to Attorney's Fees and Costs On the Members' Breach of Contract Claim. The trial court granted Gold's Gym's Motion to Dismiss the

Members' breach of contract claim. (R., pp.275-280; 27 October 2011 Memorandum Decision and Order, p.5). The breach of contract claim was a new cause of action that "did not relate back to the earlier Complaint as provided by Rule 15(c), and the statute of limitations has run." (*Id.*) The Members' contract claim arose out of and related to the License Agreement because the Members alleged that Gold's Gym breached that Agreement. Gold's Gym was the "prevailing party" on the Members' contract claim.

After analyzing the Members' Complaint, Gold's Gym determined to file a Motion to Dismiss. (R., pp.174-183). Gold's Gym's Motion to Dismiss and the Reply Memorandum in Support thereof consisted of approximately 10 pages. The Members filed a Memorandum in Opposition thereto and a Sur-reply Memorandum that contained roughly 15 pages. Preparation and attendance was required for the respective hearing held before the trial court. In total, Gold's Gym incurred **$13,676.42** in attorneys' fees and costs with respect to the Motion to Dismiss. (R., 3870-3960; Declaration ("Decl.") of Blake T. Ostler, ¶ 21). Therefore, Gold's Gym seeks the above-stated amount as part of its award for reasonable attorneys' fees in prevailing in the Members' contract claim.

D. The Members' Intentional Interference, Conversion, and Conspiracy Claims "Arise Out Of" and "Relate To" the License Agreement. The Members did ***not*** dispute at the trial court that their intentional interference, conversion, and conspiracy claims arose out of and related to the License Agreement.

1. Intentional Interference With Contract. The Members based their tortious interference claim in part, on intentional breach of contract. The trial court made the following findings:

> ***Insofar as the Members are asserting that Gold's Gym interfered with the License Agreement**, **or with a prospective Franchise Agreement, that claim fails because Gold's Gym was (or would have been) a party to those contracts and the Members cannot sue Gold's Gym for interfering with a contract to which it is a party***. (R., pp.3631-3665; Findings of Fact and Conclusions of Law, p.29) (emphasis added).
>
> …
>
> Although the Members could potentially rely on their conversion claim as the improper means to support a claim against St. George Fitness (a claim that fails for the reasons identified above), they cannot show improper means by Gold's Gym. ***At most, Gold's Gym breached a contract with the Members (or the entity they now claim to control). A breach of contract cannot serve as improper means, unless, perhaps, there is proof that it was done intentionally and for the purpose of inflicting economic harm, which the Members have not shown in this case.*** "A deliberate breach of contract, even where employed to secure economic advantage, is not, by itself, an 'improper means.'" (*Id.*, pp.30-31) (citations omitted) (emphasis added).

A breach of the License Agreement was integral to the "improper means" element of the Members' intentional interference claim. Gold's Gym was forced to defend a breach of contract claim all the way through trial (even though the breach of contract claim was dismissed with prejudice on Gold's Gym's Motion to Dismiss) because an intentional breach of the License Agreement with the purpose to inflict economic harm can serve as a basis for "improper means" to support an intentional interference claim.[4] However, the Members proved no such improper intent to breach the License Agreement. Thus, the tort claim of intentional interference was dismissed with prejudice.

[4] At trial, the Members' counsel argued at length that Gold's Gym's knowing breach of contract constituted improper means for purposes of tortious interference. Mr. Nadesan argued that "***[t]he improper means in terms of Gold's [Gym] would be doing it contrary to their contract, contrary to any obligation to make sure they're dealing with an authorized party***." (R., pp.5111-5216; Trial Transcript, 3 November 2016, 15:21-24) (emphasis added). The court even specifically asked whether the improper means to support an intentional interference claim was "***either conversion or breach of contract?***" (*Id.* at 18:19-25) (emphasis added). The Members' counsel responded, "***Correct***." (*Id.*) (emphasis added).

In *Giles v. Mineral Res. Int'l, Inc.*, 2014 UT App 259, ¶ 18, 338 P.3d 825, 830, the Utah Court of Appeals analyzed a similar fee provision in a non-compete agreement, which provided: "If *any legal action arises under* this agreement or *relating thereto, ...* [t]he prevailing party shall be entitled to costs and reasonable attorney's fees...." The *Giles* court determined whether defendants' tort counterclaim, *i.e.* breach of fiduciary duty, arose out of or related to the non-compete agreement, and if so, to award attorneys' fees to the prevailing party. *Giles*, 2014 UT App 259, ¶ 19, 338 P.3d at 830. The trial court rejected the argument that the tort claim was unrelated or did not arise out of the contract claim, and awarded attorneys' fees to the prevailing party on the tort claim. *Id.* Affirming on appeal, and because the same facts that supported the contract claim were incorporated for the tort claim, the court concluded that "the ***Contract Claim and the Fiduciary Duty Claim were filed together as a "legal action aris[ing] under" the agreements "or relating thereto***" and that, as the prevailing party in the action, Giles was entitled to an award of attorney fees." *Giles*, 2014 UT App 259, ¶ 22, 338 P.3d at 831 (emphasis added); *see also Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶ 21, 993 P.2d 222, 227 (affirming a trial court's award of attorneys' fees on the basis that the "contract and torts claims were based on related legal theories involving a common core of facts."); *Sprouse v. Jager*, 806 P.2d 219, 226 (Utah Ct.App.1991) ("Because these complex issues were so intertwined, we find the court acted within its discretion in its award of attorney fees"); *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560, 566 (10th Cir. 1993) (stating because plaintiff's "claims arose out of a common core of facts and involved related legal theories, the district court may ... conclude her prevailing party status on ... [one] claim subsumes her failure to succeed [on the other.]"); *Dejavue, Inc.*,

1999 UT App 355, ¶ 20, 993 P.2d at 227 ("when a plaintiff brings multiple claims involving a common core of facts and related legal theories, and [the defendant] prevails on at least some of its claims, [the defendant] is entitled to compensation for all attorney fees reasonably incurred in the litigation.").

As in *Giles* to support Members' relied on a breach of contract claim into their intentional interference claim. Therefore, Gold's Gym is entitled to an award of attorneys' fees because Gold's Gym is the prevailing party with respect to the Members' intentional interference claim that arises out of and relates to the License Agreement.

2. Conversion of Contractual Franchise Rights. The Members' conversion claim is inherently "related to" and "arises from" the License Agreement. The Members have asserted that Gold's Gym converted their franchise rights under the License Agreement, and that Gold's Gym converted the property and equipment located at the St. George gym that were allegedly the Members' property pursuant to the License Agreement. In their opposition memorandum to a summary judgment motion filed by Gold's Gym, the Members stated:

> Gold's clearly exercised control over the ***License Agreement*** and subsequently over the ***Franchise Agreement***. Engle had to seek the permission of Gold's to enter into a ***Franchise Agreement*** on behalf of Fitcorp, and Gold's not only granted such permission … but it also unilaterally and on its own accord terminated the ***License Agreement*** and replaced it with Fitcorp's ***Franchise Agreement***. Gold's also exercised control inconsistent with the Members' rights when it not only consented to the transfer of the ***Franchise Agreement*** from Fitcorp to Fitness Source, but refused to relinquish its control and return the ***license/franchise*** rights to the Members when they notified Gold's of their rightful ownership... Gold's further exercised control over the franchise inconsistent with the Members' rights when it terminated Fitness Source, LLC's ***Franchise Agreement*** … and, rather than returning the franchise to the Members, awarded the ***franchise*** rights to St. George Fitness, LLC…. (R., pp.2543-2651; 5 August 2015 Members' Corrected Motion to Strike, or In the

> Alternative, Memorandum in Opposition to Gold's Gym's Motion for Summary Judgment, p.31-32) (emphasis added).

The Members' arguments below in effort to establish a conversion claim relate to and arise directly from the License Agreement.[5] The trial court additionally held:

> Also, the ***[franchise/license]*** rights ceased to exist when the ***License Agreement*** was changed to a ***Franchise Agreement***. Lastly, even if these rights were somehow capable of being converted, their value at the time of the alleged conversion would be something less than the $8,500 HSSG paid for them when it entered the ***License Agreement***. (R., pp.3631-3665; Findings of Fact and Conclusions of Law, p.27) (emphasis added).

In *Brown v. David K. Richards & Co.*, 1999 UT App 109, ¶ 22, 978 P.2d 470, 475, although a conversion claim was not at issue, the case entailed a "common factual basis with his breach of warranty and his negligent and fraudulent misrepresentation claims." "Richards's defense to Brown's contract claim was that Brown had misrepresented the value of the company and had breached warranties under the contract and thus had failed to substantially perform." *Id.* at ¶ 22, 978 P.2d at 475. The court held that the "fees were recoverable" when the defendants' attorneys' efforts "went to prove facts common to both [claims]." *Id.* (alteration in original).

In this case, as in *Brown*, the Members' tort claim for conversion is essentially a breach of contract claim. The Members' assert that Gold's Gym breached the License Agreement by not obtaining the Members' written consent for an assignment of the franchise rights thereunder, which is the same basis for their conversion claim. Significantly, the franchise rights the Members claim were converted were created by the

[5] During closing arguments, the Members' counsel argued that their conversion claim was dependent upon the License Agreement: "***Instead what it did was it entered into an agreement where it replaced the old license agreement with a new franchise agreement. That is where the conversion happened***." (R., pp.5111-5216; Trial Transcript, 3 November 2016, 8:2-4 (emphasis added).

License Agreement. The Members provide no additional evidence to support their conversion claim besides what was presented to establish their tortious interference or breach of contract claims. The Members present a common core of facts and legal theories to support multiple causes of actions, including the claim for conversion, all of which arise from and relate to the License Agreement. Therefore, Gold's Gym is entitled to an award of attorneys' fees because Gold's Gym is the prevailing party with respect to the Members' conversion claim.

3. Conspiracy to Convert or Intentionally Interfere With Contractual Franchise Rights. A conspiracy can only be proven based upon an underlying tort, *see Estrada v. Mendoza*, 2012 UT App 82, ¶ 13 (Utah Ct.App. 2012) (citation omitted), and thus, it logically follows that the Members' conspiracy claim arises out of and relates to the License Agreement because the Members' other tort claims do so as well. The trial court held the following with respect to the Members' conspiracy claim:

> For there to be a meeting of the minds on an unlawful objective, the Members would have to show, by clear and convincing evidence, that Gold's Gym was aware of Engle's plan to surreptitiously eliminate the Members' ownership in the St. George gym through the device of ***converting the License Agreement to a Franchise Agreement***, and in so doing change the franchise from HSSG, an entity in which the Members had a membership interest, to Fitcorp, an entity in which they do not have an interest…Showing that Gold's Gym failed to follow its usual procedures, was careless in not investigating the matter further, or even that it ***breached the License Agreement*** by not verifying the accuracy of the statement – even if that were true, and the court does not find it is – would not be sufficient. (R., pp.3631-3665; Findings of Fact and Conclusions of Law, pp.23-24) (emphasis added).

The trial court not only addressed conspiracy as it relates to the License Agreement but again stated that the Members' theory of conversion arises out of breach of the License Agreement.

In *Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 2001 UT App 128, ¶ 25, 26 P.3d 872, 879, the Utah Court of Appeals addressed a conspiracy claim and an award of attorneys' fees to the prevailing party pursuant to a fee provision that required reimbursement of fees and costs for "*any action or proceeding against the other relating to the provisions of this Lease*…." On appeal, the plaintiff argued that "the trial court improperly awarded attorney fees to Mall Defendants for successfully defending against his *conspiracy to defraud* claims because, as tort claims, they do not relate to the leases." *Id.* at ¶ 27, 26 P.3d at 879 (emphasis added). Upholding the trial court's award of attorneys' fees, the *Keith* court held:

> ***[T]he conspiracy to defraud and breach of lease claims significantly overlapped. Jorgensen's Third Amended Complaint incorporated the same seventy-six background facts to support the breach of lease and conspiracy to defraud claims. The claims also relied on similar theories. Additionally, Mall Defendants used the same facts and discovery, depositions in particular, to defend against these claims. Accordingly, we conclude the trial court did not err in awarding attorney fees to Mall Defendants for successfully defending against the conspiracy to defraud claims.*** *Id.* at ¶ 28, 26 P.3d at 879 (emphasis added).

In the present matter, the Members' conspiracy claim arises out of and relates to their claims for breach of contract, tortious interference, and conversion. Each of the Members' claims entails a common core of facts and legal theories arising out of alleged breach of the License Agreement. Gold's Gym was compelled to assert the same facts and legal theories to defend against these claims. Therefore, Gold's Gym is entitled to an award of attorneys' fees because Gold's Gym is the prevailing party with respect to the Members' conspiracy claim that arises out of and relates to the License Agreement.

E. Gold's Gym Prevailed On the Discovery-Related Motions. The Members did ***not*** contest before the trial court that Gold's Gym prevailed on all but one discovery-

related motions.[6] First, on 14 February 2013, Judge Toomey *denied* both the Members' Statement of Discovery Issues and Motion for Enlargement of Time because, among other things, the Members did not exhaust their standard discovery for a Tier III case. (R., p.579-582; 14 February 2013 Memorandum Decision, p.2). Subsequently, on 6 September 2013, the court *denied* the Members' Motion for Reconsideration of the court's prior 14 February 2013 Order. (R., pp.1427-1449; 6 September 2013 Memorandum Decision, pp.4-9).

Next, on 19 June 2015, the court *denied* the Members' third attempt to extend fact discovery. (R., pp.2204-2207). In this 19 June 2015 Order, the court also *denied* the Members' request to compel Gold's Gym to provide any additional documents besides the re-constituted financial statements for 2006 and 2010, which the Members did not even use or present at trial because they were irrelevant – the ground upon which Gold's Gym objected to the production of these documents in the first place. (*Id*.). The court *denied* the Members' remaining discovery issues at that time. (*Id*.). In addition, the Order from the court on 20 July 2015 again *denied* the Members' discovery motion to clarify the court's prior 19 June 2015 Order. (R., pp.2467-2469).

On 9 November 2015, the court *granted* Gold's Gym Motion to Strike the Members' Expert Witness Designation as being grossly untimely since expert discovery had expired years earlier. (R., pp.2805-2807). The Members then filed a Motion for Jury Trial, which the court *denied* on 10 December 2015 because it found that the Members

[6] Gold's did not prevail on one (1) discovery-related motion and has not included fees for that motion herein.

had waived their right to a jury trial by failing to pay the requisite filing fee even after the court reminded the Members of their failure to do so. (R., pp.2848-2850).

Due to the Members' dilatory conduct throughout this entire action to properly prosecute its case-in-chief, Gold's Gym was forced to respond to discovery motions that were filed even after the fact and expert discovery deadlines had expired by several years. The Members' discovery motions were not even close calls due to the egregious failure of the Members to abide by the discovery deadlines or to exhaust the discovery guidelines before requesting judicial intervention. Gold's Gym prevailed on practically all of the discovery motions during this action.

In total, Gold's Gym incurred **$82,792.74** in attorneys' fees and costs with respect to the identified discovery motions in this case. (R., 3870-3960; Decl. of Blake T. Ostler, ¶ 23). This amount includes analyzing the Members' discovery motions and researching and drafting responses thereto, drafting Gold's Gym's discovery motion, and analyzing the documents and data disclosed therefrom. This figure also includes drafting discovery requests to the Members and writing responses to the Members' discovery requests, which all relate to and arise out of the License Agreement. Gold's Gym has also calculated the time and expense incurred in phone conferences with opposing counsel to meet and confer concerning the discovery disputes and other consultations with clients. This amount also encompasses the time and expense to prepare for and attend the conferences held by the court. This figure includes the time and expense incurred in drafting the respective discovery orders per the court's rulings and requests. Finally, this amount includes mediation efforts that occurred throughout discovery and prior to trial in this case. Therefore, Gold's Gym seeks an Order from this Court in the above-stated

amount as part of its award for reasonable attorneys' fees for prevailing in the discovery issues.

F. Gold's Gym is Entitled to Attorneys' Fees for its Summary Judgment Motions. The attorneys' fees related to Gold's Gym's summary judgment motions ***was*** contested at trial court. The Members specifically cited to *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 52, 246 P.3d 131 (explaining that parties cannot recover attorney fees incurred in prosecuting unsuccessful motions for summary judgment), and stated that Gold's Gym incurred $146,795.50 in fees on unsuccessful motions for summary judgment, and that at most, it could be awarded only **$220,525.03** in attorneys' fees of the total **$367,320.50** it sought at the time (not including attorneys' incurred in the Motion for Attorneys' Fees on with respect to this appeal). (R., pp.4054-4067; Members' Memo. in Opp. to Gold's Gym's Motion for Attorneys' Fees, p.2).

However, in *Deer Crest Assocs. I, L.C. v. Deer Crest Resort Grp.*, No. 2:04-CV-220 TS, 2007 WL 3143691, at *2 (D. Utah Oct. 24, 2007) (emphasis added), the Utah federal court held the following when awarding $279,726.00 of attorneys' fees to the prevailing party:

> ***Plaintiff's unsuccessful motion was related to the claims on which it eventually prevailed. Particularly in the context of a failed motion for summary judgment, in which fact development is critical, a subsequent success is possible after material issues of fact are resolved. Plaintiff ultimately achieved the goals of this lawsuit and, therefore, attorneys' fees for the partial summary judgment motion are appropriately included in the total fee.***

In this case, as in *Deer Crest*, Gold's Gym's motions for summary judgment were essential to prepare for trial and resolve outstanding issues related to the Members' claims. Although Gold's Gym did not prevail on all of its summary judgment motions the

work done to prepare for summary judgment would have had to be done to prepare for trial and thus saved additional fees that otherwise would have been incurred in preparing for trial. For example, at trial Gold's Gym relied on the previously filed motions to demonstrate the Members' lack of disclosure of a damages calculation as required by Rule 26 of the Utah Rules of Civil Procedure in addition to the lack of evidence to support the Members' damages for lost profits, as was the case in *Stevens-Henager Coll. v. Eagle Gate Coll., Provo Coll., Jana Miller*, 2011 UT App 37, ¶ 35, 248 P.3d 1025, 1035, and in *Sleepy Holdings LLC v. Mountain W. Title*, 2016 UT App 62, ¶ 17, 370 P.3d 963, 968, both of which were cited in the court's Findings of Fact and Conclusions of Law. (R., pp.3631-3665; Findings of Fact and Conclusions of Law, pp.31-32).

Similarly, Gold's Gym argued at the summary judgment stage that it was entitled to judgment because it had no intent to conspire with Defendant Engle to deprive the Members of anything, nor could this be proven with clear and convincing evidence, with which the court ultimately held after hearing all of the trial evidence. (*Id*. at pp.23-24). Gold's Gym also argued at summary judgment that it was never in control or possession of the franchise property. The court agreed with Gold's Gym again on this point. (*Id*. at pp.26-27). Gold's Gym previously argued that a mere approval of an assignment or transfer of a franchise cannot constitute conversion, and the court found that such action does not amount to exercising control over membership contracts owned by the franchisee. (*Id*. at p.28). In addition, Gold's Gym argued that the Members' intentional interference claim fails as a matter of law because Gold's Gym cannot interfere with its own License Agreement, that Gold's Gym did not have the requisite intent to interfere with the Members, and nor did Gold's Gym intentionally breach the contract, which

would support the improper means prong of an intentional interference claim. All of these same arguments would have had to be briefed and prepared and the same costs required to prepare for summary judgment would have been uncured preparing for trial in this matter regarding the arguments that the court relied on for its rulings. (*Id*. at pp.29-30).

Gold's Gym's summary judgment motions were advantageous because it produced important evidence, tested the parties' theories, and revealed facts and issues that were previously unnoticed. Further, the court's 6 September 2013 findings set forth strong connections between Gold's Gym's motions for summary judgment and Gold's Gym's ultimate success in this case. For example, the court noted that "The Members should have designated an expert within the specified discovery deadlines, and the Members have been dilatory in providing even a ballpark figure for its damages estimate." (R., pp.1427-1449; 6 September 2013 Memorandum Decision, p.17). Finally, after all of the evidence was presented at trial, the court accepted Gold's Gym's arguments that were raised in its summary judgment motions and dismissed the Members' claims altogether.

In total, Gold's Gym incurred **$146,857.76** in attorneys' fees and costs with respect to the summary judgment motions in this case. (R., 3870-3960; Decl. of Blake T. Ostler, ¶ 25). This amount includes time and expenses for drafting the motions, analyzing the Members' responses thereto, preparing the reply memoranda in support thereof, conferring with clients, arguing the motions before the court, and submitting the respective orders per the court's ruling and request.

G. Gold's Gym is Entitled to an Award of Attorneys' For All Claims Successfully Defended At Trial, Including Pre-Trial and Post-Trial Motions. The

Members did ***not*** contest Gold's Gym entire fees for pre- trial and post-trial motions in the lower court. "Where a contract provides the right to attorney fees, Utah courts have allowed the party who successfully prosecuted or defended against a claim to recover the fees attributable to those claims on which the party was successful." *Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217, 221 (Utah Ct.App.1990). Because Gold's Gym successfully defended each and every claim the Members brought against it, Gold's Gym is entitled to recover the attorneys' fees attributable to the claims that were tried to the bench and upon which Gold's Gym prevailed, including pre-trial and post-trial motions.

In total, Gold's Gym incurred **$123,993.61** in attorneys' fees and costs with respect to trial. (R., pp. 3870-3960; Decl. of Blake T. Ostler, ¶ 27). This amount includes time and expenses for pre-trial motions, pre-trial disclosures and respective objections thereto, preparing the exhibits and witnesses, analyzing case strategy and Utah law relevant to the Members' claims, and spending three (3) days in trial before the court. This amount includes the legal work involved with the Members' pre-trial motions dated 9 November 2015 – Gold's Gym's Motion to Strike the Members' Expert Witness Designation, which was *granted* in favor of Gold's Gym; and 22 December 2015 – the Members' Motion For Jury Trial, which was *denied* in favor of Gold's Gym. This amount also includes the time spent preparing the court-requested post-trial brief relating to intentional breach of contract as a basis to support the improper means element of a tortious interference claim, which was filed by both parties on 14 December 2016. This figure also includes legal expenses concerning the Members' post-trial motions dated 19 December 2016 – the Members' Motion to Re-Open Evidence and Motion for Sanctions, both of which were summarily *denied* as moot upon the court's entry of its Findings of

Fact and Conclusions of Law in favor of Gold's Gym. (R., p.3764). Therefore, Gold's Gym is entitled to the above-stated amount as part of its award for reasonable attorneys' fees for prevailing in the pre- and post-trial motions and at trial.

H. Gold's Gym is Entitled to an Award for the Time Spent Preparing the Motion for Attorneys' Fees and Costs. The Members did ***not*** contest this issue in the lower court. In Utah, "[a]ttorneys' fees are generally awarded for the reasonable time spent preparing the subject motion seeking such fees." *Parker v. CitiMortgage, Inc.*, 987 F. Supp. 2d 1224, 1237 (D. Utah 2013), *aff'd*, 572 F. App'x 602 (10th Cir. 2014) (citations omitted). In this case, Gold's Gym has spent a total of **$13,721.50** preparing this Motion for Attorneys' Fees and Costs as of 6 January 2017. (R., 3870-3960; Decl. of Blake T. Ostler, ¶ 29). Additional time will be spent analyzing the Members' response hereto, if any, drafting a reply memorandum, as needed, and preparing and attending oral arguments should the Court so require. Therefore, Gold's Gym requests this Court to permit Gold's Gym to supplement its request for attorneys' fees for the time spent preparing and arguing this Motion before this Court.

I. Gold's Gym's Fee Allocation is Reasonable. The Members did ***not*** contest this issue in the lower court. The Supreme Court of the United States has stated the following: "Where a [defendant] has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). "[T]he most critical factor is the degree of success obtained." *Id.* at 436.

In *Brown v. David K. Richards & Co.*, 1999 UT App 109, ¶ 16, 978 P.2d 470, 474, the Utah Court of Appeals reversed a trial court's capricious reduction of the requested fee amount of ***$540,000 to $218,986.42***. The *Brown* court stated that "the court erroneously eliminated fees where the factual development, although necessary to defeat Brown's ***contract*** claim, also bore on Richards's ***fraud*** claims." *Id.* at ¶ 18, 978 P.2d at 475 (emphasis added). The trial court also arbitrarily made a "thirty-five percent" reduction "of the total time expended through trial [i.e., the approximate time spent on the breach of warranty claim]...would be more reasonable." *Id*. The trial court was reversed because "Richards's defense under the Asset Sale Agreement (*i.e.*, Richards's defense that Brown failed to substantially perform) had ***a common factual basis*** with his ***breach of warranty*** and his ***negligent*** and ***fraudulent misrepresentation claims***. Where Richards's attorneys' efforts went to prove facts common to both recoverable contract and non-recoverable fraud claims, the fees were recoverable." *Id*. (emphasis added). "There was an overlapping of the warranty evidence and fraud evidence such that one could not allocate the time expended to one claim or the other with any degree of precision." *Id*. In the end, the Brown court awarded "reverse[d] and remande[d] for the entry of an award to Richards for his trial fees of $540,000." *Id*. at ¶ 24, 978 P.2d at 475.

Similarly, the Utah Court of Appeals in *Kraatz v. Heritage Imports*, 2003 UT App 201, ¶ 2, 71 P.3d 188, 192, upheld an award of $432,941.36 in attorney fees. The *Kraatz* court concluded that "Kraatz's counsel's fee affidavit and very detailed accompanying materials convince us that Kraatz thoroughly accounted for all time spent pursuing his respective claims...." *Kraatz*, 2003 UT App 201, ¶ 58, 71 P.3d at 202. In addition, the *Kraatz* court rejected the arguments raised to reduce the fee amount, viz.: "(1) Kraatz's

counsel spent time researching the trial judge's reversal rate on appeal in deciding whether to appeal in this case; (2) 'Time spent on travel is not fully compensable'; (3) Kraatz's counsel billed for two or more attorneys' time spent on the same task; and (4) Kraatz's counsel billed for time spent in attorney conferences." *Id.* at ¶ 60, 71 P.3d at 202. The court responded that "Heritage has not cited any Utah authority suggesting that any one of these things should not be recoverable within the trial court's discretion." *Id.*

The court in *Kraatz* also emphasized that the fee was appropriate due to the duration, difficulty and complexity of the litigation, the overlapping nature of the claims, the amount in controversy and the financial analysis accordingly, the discovery taken, the experience and expertise of legal counsel, the necessity of involving multiple attorneys in the representation, and the overall reasonableness of the fee award. *Id.* at 202-03. Applying the factors discussed in *Kraatz* establishes that Gold's Gym's fee calculation is reasonable.

First, this litigation has been ongoing for over 11 years. Second, this case has proven to be complex due to the multiple claims asserted by the Members, the relation of the present case to the previously filed case, the lack of witnesses due to death or other causes, the unavailability or lack of participation of named parties in this action, the difficulty in proving damages in this case, and because of the Members' repeated failures to abide by the Utah Rules of Civil Procedure, particularly with respect to discovery. Third, the Members' claims overlap significantly, all stemming from a common core of facts. Fourth, settlement was almost impossible given the Members' outrageous settlement offers despite their speculative evidence supporting their claims and particularly damages. The Members' asserted at trial that they were entitled to roughly

$2,000,000 (*i.e.* $450,000 plus $100,000 annually from 2002 to the present) (R., pp.5111-5216; Trial Transcript, 3 November 2016, pp.11, 13), and in their Complaint, they sought an additional $1,000,000 in punitive damages. (R., pp.1-151, Complaint, p.50; *see also* R., pp.430-431, Default Judgments Against Defendants Vince Engle, Health Source, Inc., and Fitcorp, Inc. wherein Members seek $7,165,032.21 in damages, $3,762,632.21 in prejudgment interest, and $20,000,000 in punitive damages to be entered against the other Defendants). Although the Members sought astronomical amounts in damages, Gold's Gym prudently rejected the Members' unreasonable settlement offers given the financial analysis and weaknesses of the Members' case.

Fifth, difficulty arose in this case because the Members repeatedly attempted to re-open fact and expert discovery after cut-off dates, which the lower court rejected on several occasions. Sixth, Gold's Gym lead attorney has over 30 years of litigation and trial experience, and this case required an experienced litigator to address the complexities and nuances raised by the Members' Complaint against the several Defendants. Seventh, due to the longevity and complexity of this case, Gold's Gym took advantage of involving junior associates to engage in researching, drafting, and analyzing this case in addition to having a more experienced attorney for more complex issues, strategy, and trial preparation. Finally, as in *Kraatz* and *Brown*, Gold's Gym's requested fee amount is reasonable given the duration, complexity, and overall outcome of this case.

J. Gold's Gym Seeks Reimbursement of its Attorneys' Fees Incurred On Appeal Pursuant to the License Agreement. For the foregoing reasons, Gold's Gym respectfully requests this Court to grant this appeal by awarding Gold's Gym its

attorneys' fees incurred in successfully defending this action, consisting of the following: (1) $13,676.42 for prevailing on the Members' breach of contract claim; (2) $82,792.74 for prevailing on the discovery motions throughout the entire case; (3) $146,857.76 for ultimately prevailing on the summary judgment motions; (4) $123,993.61 for prevailing on the pre- and post-trial motions and at trial on the Members' intentional interference, conversion, and conspiracy claims, which (1) through (4), *supra*, totals $367,320.53 of attorneys' fees and costs as of the filing of the Motion for Attorneys' Fees and Costs, not including the fees incurred preparing the entirety of that Motion or this appeal, and (5) the right to provide supplemental information based on a fee affidavit from Gold's Gym's legal counsel with the additional attorneys' fees incurred for preparing and arguing this appeal before this Court.

K. The Members Asserted a Derivative Action On Behalf Of the Corporation Against Gold's Gym. The claims asserted by the Members are derivative claims because they sought to enforce rights belonging to HSSG. The Court must first determine whether the Members' claims against Gold's Gym are derivative or direct. "The characterization of an action as derivative or direct is a question of state law." *Rice v. Deer Crest Janna, LLC*, No. 2:09-CV-00560, 2010 WL 1329704, at *9 (D. Utah Mar. 30, 2010); *see Combs v. Price Waterhouse Coopers LLP*, 382 F.3d 1196, 1200 (10th Cir.2004).

"Utah law defines derivative suits as, those which seek to enforce any right which belongs to the corporation. Actions alleging mismanagement, breach of fiduciary duties...generally belong to the corporation, and therefore, a shareholder must bring such actions on its behalf. Moreover, even though wrongdoing or fraud of corporate officers may indirectly injure shareholders, shareholders generally cannot sue directly for those

injuries." *Rice*, No. 2:09-CV-00560, 2010 WL 1329704, at *9 (citing *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.,* 970 P.2d 1273, 1280 (Utah 1998) (internal quotation marks and citation omitted). "In contrast, a direct claim is one where "the injury is one to the plaintiff as a stockholder…, and not to the corporation, as where the action is based on [a] contract to which he is a party, or on a right belonging severally to him." *Rice*, No. 2:09-CV-00560, 2010 WL 1329704, at *9 (citing *GLFP, Ltd. v. CL Management, Ltd.*, 163 P.3d 636, 640 (Utah Ct.App.2007) (internal quotation marks and citation omitted). "A shareholder may sue in his individual capacity in a direct action when he can show that he was injured in a manner distinct from the corporation…Claims brought by members of non-profit corporations will be analyzed under the same parameters." *Id.* (citations omitted). "If a member attempts to bring such a claim individually and not as a derivative action, the claim will be dropped." *Id.* However, the "shareholder must examine his injury in relation to the corporation and demonstrate that the injury was visited upon him and not the corporation." *Barnes v. Harris*, 783 F.3d 1185, 1193 (10th Cir. 2015) (citing *Dansie v. City of Herriman*, 134 P.3d 1139, 1144 (Utah 2006)). "If the "[p]laintiffs were injured because the [c]ompany was injured," the claim is derivative." *Id.* (citing *Dansie,* 134 P.3d at 1144).

In *Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1281 (Utah 1998), the Utah Supreme Court adopted a "closely-held" exception to the necessity of derivative actions. However, in *Dansie v. City of Herriman*, 2006 UT 23, ¶ 16, 134 P.3d 1139, 1145, the Supreme Court of Utah stated the following: "[f]rom our vantage point eight years after *Aurora,* we can see that our proclamation of a 'growing trend' in recognizing an exception to the derivative action rule for closely-held corporations may

have overstated matters. Some jurisdictions have rejected the closely-held corporation exception or severely limited it…Since *Aurora*, we have not had the opportunity to fully delineate the bounds of the exception in Utah."

Critically, the *Aurora* court did not address the issue presented here. The *Aurora* decision merely held that members of a closely-held corporation can proceed directly against corporate officers. *See Aurora Credit Servs., Inc.*, 970 P.2d at 1281. It more specifically stated that this exception "would exempt the minority shareholder from many of the procedural requirements of a derivative action, such as the requirement to make demand on the corporation and to obtain court approval before voluntarily dismissing or settling an action." *Id.* Thus, the *Aurora* court created an exception to the derivative action procedural rules. It did not alter the nature of the action, namely that a derivative action is one that the members bring on behalf of the corporation. Whether the derivative action procedure rules are exempted or waived based on a closely-held status of an entity, the nature of the action, if derivative, will nonetheless remain derivative. Put simply, *Aurora* did not shift the entire legal framework for analyzing whether a claim is direct or derivative, it only created procedural exemptions for members of closely-held corporations.

Accordingly, Gold's Gym seeks a ruling from this Court that the Members' claim in this case are derivative regardless of whether they satisfy the *Aurora* closely-held exception or whether the Court desires to now depart from the *Aurora* decision based on its later comments in *Dansie*, 2006 UT 23, ¶ 16, 134 P.3d at 1145, when it stated: "Since *Aurora*, we have not had the opportunity to fully delineate the bounds of the exception in Utah." The Members of HSSG brought a derivative action on behalf of the closely-held

LLC against Gold's Gym. The Members have no direct injury. The Members are not parties to the License Agreement. Rather, HSSG is the only party to the License Agreement. The contract rights belong to HSSG, not to the individual Members. *See Rice*, No. 2:09-CV-00560, 2010 WL 1329704, at *10 ("The court notes that Ms. Rice is not a party to the Master Declaration. Ms Rice's rights and non-exclusive easements under the Master Declaration stem from her status as a property owner. These same rights and easements belong to all Deer Crest property owners. Accordingly, the court finds that Ms. Rice's claims are derivative."); *see also Barnes*, 783 F.3d at 1195 ("At bottom, most of plaintiffs' claims rest on injuries to the Holding Company that are derivative of injuries to the Bank. We affirm the district court's conclusion that those claims belong to the FDIC."). Therefore, the Members' claims against Gold's Gym can only be derivative claims.

The Utah authority allowing shareholders of close corporations to bring direct actions is limited and originates from *Aurora*. The holding in *Aurora* is narrow, subsequently distinguished, and inapplicable to the case at hand. The holding states: "[w]e therefore hold that a court may allow a minority shareholder in a closely held corporation to proceed directly *against corporate officers*." *Aurora Credit Servs., Inc.*, 970 P.2d at 1281 (emphasis added); *see also Banyan Inv. Co., LLC v. Evans*, 2012 UT App 333, ¶ 19, 292 P.3d 698, 705, *writ of certiorari granted in Banyon Inv. v. Evans*, 300 P.3d 312 (Utah 2013) (applying the *Aurora* exception for a member to bring suit against the managers of an LLC). As explained, the Members are pursuing claims against Gold's Gym as a third party, not against managers. The Utah Supreme Court has never subsequently sanctioned the exception. The *Aurora* court reasoned that " [t]here is a

growing trend to allow minority shareholders of a closely held corporation to proceed directly against *majority shareholders*." *Aurora Credit Servs., Inc.*, 970 P.2d at 1280 (emphasis added). While *Aurora* remains the law, the Utah Supreme Court has backtracked from the limited holding From our vantage point eight years after *Aurora*, we can see that our proclamation of a 'growing trend' in recognizing an exception to the derivative action rule for closely held corporations may have overstated matters." *Dansie*, 2006 UT 23 at ¶ 16, 134 P.3d at 1139. The Utah Court of Appeals observed "since its decision in *Aurora Credit*, the Utah Supreme Court has not sanctioned this exception, and has recently suggested that the trend to invoke it may have "stopp[ed] in its tracks" or "retreated," and that it has been "severely limited or rejected" in some jurisdictions." *GLFP, Ltd.*, 2007 UT App 131, 163 P.3d at 643 (citing *Dansie*, 2006 UT 23 at ¶ 16, 134 P.3d at 1139).

"Mississippi, Nebraska, South Dakota, Alaska, and Arkansas each refuse to apply the close corporation exception, recognizing instead that an individual shareholder can bring a direct action only when a stockholder "shows a violation of duty owed directly to him" or when an injury is "peculiar" to him. *See, e.g.*, *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347, 349 & n. 3 (5th Cir.1987) (applying Mississippi law and noting that a stockholder may sue directly "'in a case where the stockholder shows a violation of duty owed directly to him'" (quoting *Bruno v. Southeastern Servs.*, 385 So.2d 620, 622 (Miss. 1980))); *Landstrom v. Shaver*, 561 N.W.2d 1 (S.D.1997)("[F]or a shareholder to maintain an individual action, the shareholder must establish a 'special injury' which is separate and distinct from that of other shareholders."); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129, 134 (1989) (requiring shareholders

to allege a "separate and distinct injury" if bringing an individual action); Donaldson, Breathing Life Into *Aurora Services,* 2002 Utah L. Rev at 531 (discussing states that have adopted special injury requirement); *cf., e.g., Hikita v. Nichiro Gyogyo Kaisha, Ltd.*, 713 P.2d 1197, 1200 (Alaska 1986) (finding that shareholders may assert direct claims for breach of contract to which he is a party); *Hames v. Cravens*, 332 Ark. 437, 966 S.W.2d 244, 247 (1998) (same)." *GLFP, Ltd. v. CL Mgmt., Ltd.*, 2007 UT App 131, 163 P.3d 636, 643.

In *Dansie*, 2006 UT 23, ¶ 31, 134 P.3d at 1148 the Utah Supreme Court held that a claim by shareholders against third party City of Herriman was a derivative action. Herriman was neither an officer nor director of the company. The *Dansie* court held that the claim was therefore a third-party derivative claim. The *Dansie* court dismissed the plaintiffs' claims because they had failed to comply with the requirements of Rule 23A URCP regarding derivative actions. The *Dansie* court stated: "[w]e are unable to uncover any behavior by Defendants that was animated by a desire to injure Plaintiffs in their individual capacities...[t]o think otherwise is to misunderstand the distinction between individual and corporate injury. A shareholder does not sustain an individual injury because a corporate act results in disparate treatment among shareholders. ***Rather, the shareholder must examine his injury in relation to the corporation and demonstrate that the injury was visited upon him and not the corporation***." *Dansie*, at ¶¶ 12-13, 134 P.3d at 1144 (citations omitted) (emphasis added).

L. Because the Members Asserted Derivative Claims, the Members Must Assume Both the Rights and Obligations Under the License Agreement, Including the Obligation to Pay Attorneys' Fees. "As a general rule, attorney fees are recoverable

only if authorized by contract or statute." *Giles*, 2014 UT App 259, ¶ 17, 338 P.3d at 829-30 (citations omitted). A court may also award costs and attorneys' fees based upon a written contract when the provisions of the contract "allow at least one party to recover attorney fees." Utah Code Ann. § 78B-5-826.

In this case, the License Agreement contemplates the payment of attorneys' fees in several provisions as follows:

> The prevailing party in any dispute relating to or arising out of this Agreement, shall be entitled to recover its costs and expenses including, without limitation, accounting', attorneys', arbitrators', and related fees, costs, and other expenses, in addition to any other relief to which such party may be entitled. (Ex. A to Addendum, § 4, p.16).

Notwithstanding the contractual language requiring the payment of costs and attorneys' fees in this case, the Members argue that they are not liable to pay such costs and attorneys' fees because they are not "signatories" to the License Agreement. This argument holds no water. They initiated this lawsuit. The Members specifically sued Gold's Gym for breach of the License Agreement. All of the Members' other claims (*i.e.* conversion, tortious interference, and conspiracy) relate to and arise out of the License Agreement because they stem from the franchise rights embedded in the License Agreement. Moreover, the Personal Guaranty expressly references that the Members can be held liable for costs and attorneys' fees.

In *Brusso v. Running Springs Country Club, Inc.*, 228 Cal. App. 3d 92, 110, 278 Cal. Rptr. 758, 768 (Ct. App. 1991), the California Court of Appeals dealt with the precise issue at hand, and held that "[i]t would be "extraordinarily inequitable" to deny them attorney's fees because plaintiffs who are not signatories chose to sue on the contracts in an action on behalf of the corporation when the corporation would not bring

suit itself." In addition to principles of equity, the *Brusso* court found that "liabilities for fees here are predicated on breach of three contracts." *Id*. at 108, 278 Cal. Rptr. at 767.

First, "[t]he individual warranties on the purchase agreement signed by the plaintiffs, individually and not on behalf of the corporation, specifically apply to section 11, the attorney's fees section." ." *Id*. at 109, 278 Cal. Rptr. at 767. Second, "Section 16 of the purchase agreement states, "The parties hereto agree that *any* breach of *any* term or condition of this Agreement shall constitute a material breach of this Agreement." (Emphasis added). Thus, the parties contemplated that a breach of the management agreement would be a material breach of the purchase agreement, and also subject to the section 11 attorney's fees provision." *Id.* As for third contract at issue, the court noted that "the lease also contains its own attorney's fees provision. The only signatories there are the corporation and defendant William E. Clark. However, as we discuss below, the Trial court was correct in directing the individual plaintiffs, not the corporation, to pay the defendants' fees." *Id.*

In the present matter, the Members must be liable for Gold's Gym's costs and attorneys' fees. Pursuant to the "substantial benefit" doctrine recognized by Utah the Members must pay attorney fees. *See LeVanger v. Highland Estates Properties Owners Ass'n, Inc.*, 2003 UT App 377, ¶ 7, 80 P.3d 569, 572 ("The trial court also determined that the LeVangers' derivative action conferred a substantial benefit upon Highland Estates and, therefore, that the LeVangers were entitled to $41,327.15 in attorney fees and costs to be paid by Highland Estates.").

However, the Members cannot use litigation as a sword when it is advantageous but then utilize it as a shield to avoid fees. Because the Members elected to sue Gold's

Gym on behalf of HSSG, despite the Members not being signatories to the License Agreement, the Members assumed all of the risks and obligations thereunder, including the obligation to reimburse Gold's Gym its reasonable attorneys' fees.

CLAIM FOR ATTORNEYS' FEES - Rule 24(a) (9) U.R.A.P.

As argued herein at length, Gold's Gym is entitled to attorneys' fees under the License Agreement for being the prevailing party to this action.

CONCLUSION – Rule 24(a) (10) U.R.A.P.

For the a reasons set forth above, Gold's Gym respectfully requests this Court to reverse the trial court's order denying Gold's Gym the right to attorneys' fees, and to award Gold's Gym its attorneys' fees and costs incurred throughout the duration of this lawsuit.

CERTIFICATE OF COMPLIANCE – Rule 24(a) (11) U.R.A.P.

I certify that in compliance with U.R.A.P. 24(a) (11), this brief contains 9,982 words, excluding the Table of Contents, Table of Authorities, and addenda. I relied on my word processor to obtain the count, which is Microsoft Word. I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word in compliance with Utah R. App. P. 27(b). I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

ADDENDUM– Rule 24(a) (12) U.R.A.P.

Exhibit A, License Agreement………………………………………..……..8,12,36

RESPECTFULLY SUBMITTED this 12th day of February, 2018.

OSTLER MOSS & THOMPSON

/s/ Blake T. Ostler
By: Blake T. Ostler
Attorney for Gold's Gym International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of February, 2018, I caused to be served by the method indicated below a true and correct copy of the foregoing **GOLD'S GYM INTERNATIONAL, INC.'S APPEAL** on the following:

_x_ VIA EMAIL ____ VIA HAND DELIVERY ____ VIA U.S. MAIL ____ VIA ELECTRONIC FILING	Holly S. Chamberlain CHAMBERLAIN LAW, PLLC 2235 South 2200 East Salt Lake City, Utah 84109 Email: chamberlainlaw@gmail.com
_x_ VIA EMAIL ____ VIA HAND DELIVERY ____ VIA U.S. MAIL ____ VIA ELECTRONIC FILING	Karthik Nadesan NADESANBECK P.C. 8 East Broadway, Suite 625 Salt Lake City, Utah 84111 Email: karthik@nadesanbeck.com
_x_ VIA EMAIL ____ VIA HAND DELIVERY ____ VIA U.S. MAIL ____ VIA ELECTRONIC FILING	Utah Supreme Court 450 South State P.O. Box 140210 Salt Lake City, Utah 84114-0210 Email: supremecourt@utcourts.gov

/s/ Rebecca Zinie
Legal Assistant to Blake T. Ostler

EXHIBIT A

LICENSE AGREEMENT

THIS LICENSE AGREEMENT ("Agreement") is made of June 22, 1999, between Gold's Gym Franchising, Inc., a California corporation, located at 358 Hampton Drive, Venice, California 90291 (referred to in this Agreement as "we," "us" or "our"), and Health Source-St. George, LLC which will conduct business pursuant to this Agreement under the fictitious business name of: Gold's Gym St. George, UT located at 1028 East Tabernacle St. George, UT 84770 (referred to in this Agreement as "you" or "your") with reference to the following:

We have developed valuable and proprietary business formats and systems ("Systems"), that are used in the development and operation of health and fitness centers (called "Facilities") and are identified by the service mark Gold's Gym, and related commercial symbols (the "Marks"). We use and sublicense the Marks with the permission of our Affiliate, Gold's Gym Enterprises, Inc., a California corporation ("GGE").

We license and franchise others to operate one or more Facilities. You have applied for a license to own and operate one Facility, and we wish to grant you such a license on the terms and conditions contained in this Agreement.

THEREFORE, you and we agree as follows:

A. GRANT OF LICENSE.

1. Grant. On the terms and conditions of this Agreement, we grant you a license ("License") to operate one Facility and to use the System in the operation thereof at the site selected and developed in accordance with Section B, located within the geographic area ("Territory") described in Exhibit A, attached hereto and incorporated herein.

2. Term. The term of the License (the "Term") shall be for a period of five (5) years commencing on the date specified in Exhibit A (the "Effective Date").

3. Location. You may not operate the Facility from any location other than the Site, as defined below, without our prior written consent. If you request our consent to the relocation of the Facility, you will reimburse us for our out-of-pocket inspection costs promptly upon receipt of our invoice.

4. Territorial Rights. Subject to our reservation of rights described in Subsection A.5, below, and your compliance with this Agreement, during the Term we will not ourselves operate or authorize others to operate a Facility identified by the Marks which is located within your Territory.

5. Reservation of Rights. All rights not expressly granted to you are reserved by us. Without limitation and without regard to proximity to the Facility, we and our Affiliates reserve the right, in our sole discretion, on such terms and conditions as we deem appropriate, ourselves, or through authorized third parties (including our Affiliates) to:

(a) manufacture, distribute, market, and sell products and services identified by the Marks or other marks, in any type of channel of distribution within or outside of the Territory; and

(b) own, establish and operate Facilities outside of the Territory (and license or franchise others to do so).

6. Guaranty. If you are a corporation, partnership, limited liability company, or other legal entity, each of your shareholders, members or general partners (each such person is referred to in this Agreement as an "Owner") will fully guarantee all of your obligations to us under this Agreement or otherwise arising out of the relationship established by this Agreement by executing the form of Guaranty attached as Exhibit B hereto. The name of each Owner and his or her percentage of ownership in you is set forth in Exhibit A. You will promptly notify us of any change in the information in Exhibit A.

B. YOUR OBLIGATIONS TO DEVELOP THE FACILITY.

You have the following obligations with respect to location selection, lease, development, and opening of your Facility (collectively "Development Obligations"):

1. Site Selection. You have the primary responsibility to select the location of your Facility (the "Site") and to independently investigate its suitability. The Site must be situated within the Territory. Before you acquire or lease the Site you must obtain our approval. To enable us to evaluate your proposed Site, you must supply us with detailed information about the proposed Site and your acquisition and development plans as we request. Our approval of the Site is not an implied guaranty that it will be successful.

2. Lease. Within ninety (90) days after the Effective Date, you must purchase or lease the approved Site for the Facility and (if applicable) provide us with a fully signed copy of your lease.

3. Development. Within one hundred eighty (180) days from the Effective Date, you must secure all financing required to develop and operate the Facility; obtain all permits and licenses required to construct and operate the Facility; construct all required improvements to the Site and decorate the Facility in compliance with plans and specifications we have approved; purchase or lease and install all required equipment, fixtures, furnishings and signs for the Facility; and purchase an opening inventory of authorized and approved products, materials, and supplies.

4. Opening. Within two hundred seventy (270) days after the Effective Date, you must open the Facility for business utilizing the System; provided, however, you may not open the Facility for business or sell memberships in the Facility until:

(a) We have inspected and approved the Facility as developed in accordance with our specifications and standards. As an alternative to our physical inspection of the Facility, we may require you to provide us with such video tapes and/or photographs of the Facility as we deem necessary;

(b) Pre-opening training described in Section D, has been completed to our satisfaction;

(c) You have satisfied all bonding, licensing, and all other legal requirements applicable to the lawful operation of your Facility, and furnished us with evidence satisfactory to us of compliance;

(d) All amounts due to us have been paid; and

(e) We have been furnished with evidence satisfactory to us that you maintain the insurance required by this Agreement.

5. Products. Prior to the opening of your Facility, you will purchase, prominently display, and offer for sale (at prices you determine in your sole discretion) a representative line of all branded "Gold's" clothing and other consumer products approved for sale at Facilities ("Products") in sufficient quantities to meet reasonably expected consumer demand, and thereafter, throughout the Term, reorder and stock such Products as are necessary to meet such consumer demand at the Facility. Neither of us will have any obligation to the other on account of the temporary unavailability of any Products from authorized licensees.

6. Termination Prior to Completion of Development Obligations.

(a) If you fail to timely accomplish your Development Obligations, we may, in our sole discretion, terminate this Agreement. In the case of your failure to timely select an approved Site, we may terminate this Agreement at any time before we approve a Site for your Facility. If you have selected an approved Site, but have failed to timely complete any other Development Obligations, we may terminate this Agreement if you do not complete the applicable Development Obligations within thirty (30) days from the date we notify you of our intention to terminate this Agreement on account of such failure.

(b) You have the right to elect to terminate this Agreement for any reason within thirty (30) days from the date of this Agreement by delivering notice to us of your election.

(c) If either you or we terminate this Agreement pursuant to this Subsection 6, we will refund to you the Annual Fee which you paid upon execution of this Agreement, prorated for the period from the date of this Agreement to the date of termination, plus any unused Security Deposit (defined below), less an administrative fee of Six Hundred Dollars ($600) and our documented out-of-pocket expenses incurred in connection with performing our obligations and exercising our rights under this Agreement prior to the date of termination. Upon termination of this Agreement pursuant to this Subsection, neither party shall have any further rights or obligations derived from or relating to this Agreement.

C. FEES.

1. Annual Fee. You will pay us a fee for each year of the Term of this Agreement at the rate set forth in Exhibit A (the "Annual Fee"). The Annual Fee is payable in advance upon the execution of this Agreement and on each anniversary of the Effective Date of this Agreement during the Term.

2. Security Deposit. If this is your first Facility, we have the right in our sole discretion to require that you give us a security deposit ("Security Deposit") equal to fifty percent (50%) of the Annual Fee for the second year of the Term, to be retained by us as security for your financial obligations to us under this Agreement. If we request, you will pay the Security Deposit via electronic funds transfer, in twenty-four (24) equal monthly installments on or before the fifteenth (15th) day of each month during the first two (2) years of the Term. The Security Deposit may be applied by us, in our sole discretion, to any delinquent Annual Fee, interest, late charge, Promotion Contribution, inspection cost, or any other amounts due us. Within ten (10) days after receipt of our request, you will restore any amounts we have withdrawn from the Security Deposit. We may commingle the Security Deposit with our general funds, and retain as our property any interest on the Security Deposit. Within forty-five (45) days after expiration of this Agreement, we will

return any unused portion of the Security Deposit. Our rights under this provision are in addition to any other remedy we have, including the right to terminate this Agreement pursuant to the provisions of Section M hereof.

3. Late Charges; Interest on Delinquent Payments. In addition to all other remedies we have, including without limitation, the right to terminate this Agreement pursuant to Section M hereof, you will pay us, on demand, the following charges: (a) a one time late charge of Five Hundred Dollars ($500) if any Annual Fee is not paid on the day due; and (b) if the Annual Fee is more than thirty (30) days past due, or if any other amount payable to us or any Affiliate under this or any other agreement is delinquent for any period, interest at the rate of one percent (1%) per month, calculated from the date such payment was due until it is received by us, not to exceed the highest contract rate of interest permitted by law.

D. TRAINING AND GUIDANCE.

1. Training. Prior to opening, we will furnish a management training program on the operation of a Facility at our designated training facility for up to ten (10) people, without additional charge. Before you sell any memberships, advertise, or open the Facility to the public, you and each of your managers must complete training to our sole satisfaction. You will be responsible for the compensation, travel and living expenses of your employees during training. If you request training for more than ten (10) people in any year, you must pay us our then current fee, in advance, for each additional person. Our current daily training fee is Five Hundred Dollars ($500) per person.

2. Manager. You will replace any person who does not satisfactorily complete our management training program. Upon our request, you will allow us to conduct training at your Facility for persons employed at other Facilities. We will reimburse you for your reasonable, pre-approved, out-of-pocket expenses in providing such assistance.

3. Your Training. You will implement a training program for all your employees using training standards and procedures prescribed by us and will staff the Facility at all times with a sufficient number of trained employees including at least one (1) manager who has completed our management training school to our sole satisfaction.

4. Manuals and System Standards. We will loan you during the Term hereof one (1) copy of our manuals and forms, consisting of such materials that we generally furnish to our licensees from time to time for use in operating a Facility (collectively "Manuals"). The Manuals as well as the bulletins and other written materials provided to you contain mandatory and suggested specifications, standards, operating procedures and rules ("System Standards") that we prescribe from time to time for the development and operation of the Facility and information relating to your other obligations under this Agreement. The Manuals may be modified from time to time to reflect changes in System Standards. You agree to keep your copy of the Manuals current and in a secure location at the Facility. We are the sole owner of the copyright and all other rights to the Manuals, and you may not reproduce or use them for any purpose other than in connection with your performance under this Agreement. If the Manuals have not been completed at the time of execution of this Agreement, our written directives to you shall temporarily serve as the Manuals.

5. Conventions. You, or if you are a legal entity, one of your Owners or the manager of the Facility must attend an annual regional or national Gold's Gym convention. You will be responsible for the registration fees and traveling and living expenses for such conventions.

E. MARKS.

1. License. We hereby grant you a License during the Term to use and display the Marks at the Facility and in marketing and advertising of the Facility, in accordance with and subject to the restrictions contained in this Agreement.

2. Ownership and Goodwill of Marks. You acknowledge and agree that GGE and we own all rights in and to the Marks and all goodwill associated therewith. You will never (during or after the Term) challenge our and GGE's exclusive rights to the Marks. Your unauthorized use of the Marks will be a material breach of this Agreement and an intentional infringement of our trademark rights. Your usage of the Marks and any goodwill established by such use will be exclusively for our and GGE's benefit. All provisions of this Agreement applicable to the Marks apply to any additional proprietary trademarks, service marks and commercial symbols we authorize you to use during the Term. You have no other rights to the Marks except for the License granted under this Agreement.

3. Rules For the Use of Marks. You must use the Marks as the sole identification of the Facility at the Site and in the manner we prescribe in the Manuals and in bulletins and other notices to you, and give such notice of registration or other claim of trademark rights as we prescribe. You may not use the Marks: (a) as part of the name of any entity or for any purpose not expressly authorized by this Agreement; (b) on or to identify any services, merchandise, products or equipment, whether or not sold at the Facility, excepting only those services authorized to be provided at Gold's Gyms and items that are furnished or sold to you by us, or our authorized suppliers or distributors ("Authorized Products"); or (c) at any location other than the Facility at the Site other than approved advertising and marketing. Any Authorized Products may be sold by you only at retail to customers of the Facility and shall not be sold through mail order or sold at a location other than the Site (except for limited, short term, off-site, promotional purposes we approve in advance).

4. Notification of Claims. You will notify us promptly of any claim by others that you are infringing their trademark rights in connection with your use of the Marks, or of any claim by others to any rights in the Marks which are inconsistent with this Agreement or our and GGE's exclusive rights to the Marks. You will fully cooperate with us with respect to our prosecution of any infringement claim or our defense of a claim that you are infringing the trademark rights of any third party.

5. Indemnification By Us. Provided you comply with the provisions of Subsection 3, above, we will defend you with counsel of our selection and indemnify you against all damages for which you are held liable arising from your use of the Marks in the manner authorized by us in this Agreement.

6. Discontinuance of Use of Marks. If, in our reasonable opinion, it is desirable to modify or discontinue the use of any of the Marks and/or use one or more additional or substitute Marks, you will comply with our directions within a reasonable time after receiving notice thereof. We will reimburse you, not to exceed one thousand dollars ($1,000), for your reasonable direct expenses to change the Facility's exterior signs. However, we will not be obligated to reimburse you for any loss of revenues, profits, start-up or other such expenses, or any other incidental or consequential damages attributable thereto.

7. Trade Secrets. You may become aware of confidential information which is commercially valuable, and is not generally known by the public or other persons who can obtain economic value from its disclosure and use ("Trade Secrets"). Such Trade Secrets may be specifically identified as being confidential or the confidential nature of such information will be reasonably apparent to you. The Manuals contain Trade Secrets. You agree to hold all Trade Secrets in confidence and to use such information only for the purposes authorized by this Agreement. You

will not disclose Trade Secrets except to your employees requiring such information to perform their duties.

8. Exclusive Relationship. We would be unable to protect Trade Secrets against unauthorized use or disclosure or be able to encourage a free exchange of ideas and information among our franchisees and licensees if you were permitted to hold interests in or perform services for a Related Business (defined below). Therefore, we have granted the License to you in consideration of and reliance upon your agreement to deal exclusively with us. You agree that, during the Term, neither you nor any of your Owners, directors, or officers (nor any of your or your Owners', directors', or officers' spouses or children) will, directly or indirectly perform services, have any financial interest in any Related Business, or hire any of our or our licensees' or franchisees' employees (or aid others to do so). The term "Related Business" means any business that derives more than 3% of its revenues from the muscle or body building business, a gymnasium, an athletic or fitness center, a health club, an exercise or aerobics facility, or one or more similar facilities or businesses, or the granting of franchises or licenses or entering into other similar arrangements with others concerning such businesses.

F. SYSTEM STANDARDS.

1. Compliance with System Standards. The Manuals contain mandatory and recommended System Standards. You will observe those System Standards which are noted as being mandatory, as if they were part of this Agreement. Without limitation of the foregoing, you will not offer, sell or provide at or from the Facility goods or services not authorized in the Manuals and will offer, sell and furnish those goods and services we prescribe from time to time. We will have the right to periodically modify and supplement the System Standards and, in the case of mandatory System Standards, when communicated to you, they shall constitute legally binding obligations upon you. You will not be required to incur any capital expense in connection with any modified or new mandatory System Standards, except those which we reasonably believe are necessary for the protection of public health or safety or to enable the Facility to comply with applicable laws, or when it would be reasonable to project the amortization of such expense over the remaining Term or we agree to extend the Term to enable you to do so. We will never modify or issue a new mandatory System Standard which will alter your fundamental status and rights under this Agreement.

2. Management of the Facility. The Facility must be under full-time, on premises management by a person who devotes his or her full working time and best efforts to the day-to-day operations of the Facility and has satisfactorily completed our management training program, and who is not engaged in any other business endeavor except passive investments which do not interfere with the performance of his or her duties as manager. No manager of a Facility may have any direct or indirect financial interest in a Related Business. The use of an independent consultant or management company to manage the Facility is prohibited, unless previously approved in writing by us.

3. Membership Agreements. Every membership agreement shall comply with all mandatory System Standards and all applicable laws, rules and regulations of any governmental authority with jurisdiction over the Facility.

4. Presale of Memberships. No memberships may be sold prior to opening the Facility to the general public unless your plan for pre-selling memberships is approved in writing by us. Once approved, you may pre-sell memberships only in compliance with such approved plan and applicable laws and ordinances.

5. Reciprocity. During the Term, you must allow any yearly member of

another Gold's Gym located more than fifty (50) miles from the Facility to use the Facility without charge (except for services and goods which would normally be charged to a member of your Facility) for up to a total of fourteen (14) days per calendar year upon proof of a valid and current Gold's Gym membership. Members of your Facility will have similar reciprocal rights with all other licensed or franchised Gold's Gyms. In addition, if you notify us you elect to participate in our full membership reciprocity program, applicable to members who have permanently relocated, you will honor your obligations to do so.

6. Notices. You will prominently display in the Facility such statements which we prescribe from time to time identifying you as our authorized licensee. All checks, invoices and stationery which you use in connection with the operation of your Facility will also have a statement in the form we prescribe identifying you as the owner of the Facility and indicating you are our authorized licensee.

7. Equipment; Products. You will purchase and use in your Facility, from suppliers we approve, only those items of product, equipment and attachments which meet our specifications and we have approved for such use. If you wish to use any item of product, equipment or attachments which have not been approved by us, you must establish to our satisfaction that it is of equivalent quality and functionality to the item it replaces, and that the supplier is reputable, financially responsible and adequately insured for product liability claims. Upon request, you must pay our actual expenses in reviewing your request, performing credit and other relevant investigations, and conducting equipment tests. We will use our best efforts to notify you of our approval or disapproval of your request within ninety (90) days after you have furnished us with the information necessary for us to act upon it. You will not provide any service or offer or sell any products at or from the Facility which are unrelated to the fitness industry.

G. ADVERTISING, PROMOTION, AND MARKETING.

1. Approval. All advertising, promotion, and marketing conducted by you ("Marketing Materials") must be legal and not misleading and conform to the policies set forth in the Manuals and as we prescribe from time to time. All Marketing Materials must be approved by us before use, and for such purpose, submitted to us at least fifteen (15) days before your date of intended use.

2. Promotion Fund. We have established a fund ("Promotion Fund") for advertising, marketing, and public relations programs and materials. On the fifteenth (15th) day of each month during the Term, you will pay to us or our designated Affiliate, via electronic funds transfer, a contribution to the Promotion Fund ("Promotion Contribution") in the amount set forth in Exhibit A. We may, from time to time, increase your Promotion Contribution, but any increase shall not exceed your original Promotion Contribution by more than twenty-five percent (25%) over any twelve (12) month period, or one hundred percent (100%) over the Term. If you become delinquent in payment of your Promotion Contribution, we may require you to pay your Promotion Contributions annually, in advance, in addition to any remedy we have by reason of such failure. We will administer the Promotion Fund in accordance with the following provisions:

(a) We will direct all programs financed by the Promotion Fund, with sole discretion over all creative and business aspects. The Promotion Fund may be used to pay the fees and expenses of advertising agencies for preparing and producing advertising materials and for media costs. Subject to your payment of the Promotion Contributions, we will furnish you with samples of advertising, marketing, and promotional formats and materials at no extra cost. Additional such materials may be purchased at our cost, plus a reasonable charge for shipping, handling and storage.

(b) The Promotion Fund will not be used to pay for salaries of our employees, our overhead, or our other general operating expenses. We may spend, on behalf of the Promotion Fund, in any fiscal year an amount greater or less than the aggregate Promotion Contributions of all Facilities in that year, and the Promotion Fund may borrow from us or others to cover deficits or invest any surplus for future use. We will prepare and furnish to you upon request an annual unaudited financial statement of the Promotion Fund. We may at any time delegate our rights and responsibilities with respect to the Promotion Fund to an Affiliate or other responsible third party.

(c) The Promotion Fund is intended to develop goodwill in connection with the Marks, and products and services associated with the Marks, and the patronage of all Facilities. We have no obligation to ensure that expenditures by the Promotion Fund proportionately benefit any particular geographic area or Facility.

(d) Upon thirty (30) days' advance notice, we may terminate entirely, reduce or temporarily suspend Promotion Contributions and operation of the Promotion Fund (and, if terminated, suspended, deferred, or reduced, reinstate such Promotion Contributions). If the Promotion Fund is terminated, all unspent monies on the date of termination will be distributed to our franchisees and licensees making Promotion Contributions in proportion to their respective Promotion Contributions during the preceding twelve (12) month period.

H. INSPECTIONS

We and our designated representatives have the right prior to opening the Facility for business and thereafter from time to time, during your regular business hours, and without prior notice to you, to inspect the Facility, observe, and record operations, interview personnel and members, and inspect your books and records relating solely to business conducted at the Facility. You will cooperate in connection therewith. You agree to and will upon our request, ask your members to, participate in surveys. Within ten (10) days after your receipt of our invoice, you will pay to us in advance our estimated round trip coach air fare for our representative to conduct inspections. You will reimburse us for all inspection and other costs incurred by us in excess of such advance payment within ten (10) days after your receipt of our invoice. Except for the initial inspection or a relocation inspection and any re-inspection to determine whether noted deficiencies have been corrected, you will not be obligated to pay for more than one inspection per calendar year. You will promptly correct all deficiencies noted by our inspectors, at your expense, but not later than thirty (30) days following your receipt of our notice thereof. Failure to timely correct noted deficiencies constitutes a material breach of this Agreement.

I. TRANSFER.

1. By Us. We may assign this Agreement and delegate all or any part of our obligations to any person or entity who or which we reasonably believe is capable of performing our obligations under this Agreement.

2. By You. Your rights and duties under this Agreement are personal to you. This License has been granted to you in reliance upon our perceptions of your character, skill, aptitude, attitude, business ability, and financial capacity. Accordingly, neither this Agreement (or any right granted herein) nor any ownership or other interest in you or the Facility (including the equipment and other assets thereof) may be transferred without our prior approval in accordance with the provisions of Subsection 3, below. Any violation of this restriction shall be a material breach of this Agreement and any unauthorized assignment or transfer will be without effect. The term "transfer" includes, without limitation, your (or your Owners') voluntary, involuntary, direct, or indirect assignment, sale, gift, encumbering, delegation, or other disposition. A transfer of more than a forty-nine

percent (49%) financial interest or voting control of any entity owning the Facility, or a series of transfers which, in the aggregate, total more than forty-nine percent (49%), shall also be deemed a transfer hereunder.

3. Conditions for Approval of Transfer. Provided you are then in compliance with this Agreement, and subject to the other provisions of this Section, we will approve a transfer that satisfies the following conditions:

(a) The proposed transferee and each of its Owners must be individuals who meet our then applicable standards for new licensees;

(b) The proposed transferee (or its managing Owner) and all managers must have agreed in writing to complete our management training school (unless the transferee is an existing licensee or an Owner);

(c) The proposed transferee must have agreed in writing to be bound by all of the terms and conditions of this Agreement;

(d) We must have received a transfer fee of Five Hundred Dollars ($500);

(e) You (and your transferring Owners) must have signed general releases, in form satisfactory to us, of any and all claims against us and our Affiliates, shareholders, officers, directors, employees, and agents;

(f) If you or your Owners finance any part of the sale price of the transferred interest, you and your Owners must have agreed that all of the transferee's obligations pursuant to any promissory notes, agreements, or security interests that you or your Owners have reserved in the Facility are subordinate to the transferee's obligation to pay annual fees and other amounts due to us and otherwise comply with this Agreement; and

(g) You and your transferring Owners (and your transferring Owners' spouses and children) must agree in writing for our benefit to continue to observe the restrictions contained in Subsection E.7 for a period of at least one (1) year following the transfer.

4. Transfer to an Entity. If you are then in compliance with this Agreement, you may transfer this Agreement to a legal entity formed solely to operate the Facility and, if applicable, other Facilities, in which you maintain management control and of which you own at least a fifty-one percent (51%) financial and voting interest, and provided that all assets of the Facility are owned, and the entire business of the Facility is conducted, by such entity. Transfers of ownership interests in such entity will be subject to the provisions of Subsections 2 and 3 hereof. You will remain liable for performance of this Agreement by any entity to which you transfer this Agreement. You will notify us of any transfer under this Subsection and, upon our request, the Owners of the entity to which you transfer this Agreement will execute and deliver to us the Guaranty which is Exhibit B to this Agreement.

J. DEATH OR DISABILITY.

1. Transfer Upon Death or Disability. Upon your death or disability (hereinafter defined), or if you are a legal entity, upon the death or disability of an Owner with a twenty-five percent (25%) financial or voting interest or greater, you or the Owner's executor, administrator, conservator, guardian, or other personal representative, must, within a reasonable time (not to exceed six (6) months after such death) transfer your or the Owner's interest to a third party in compliance with the terms and conditions applicable to transfers contained in this Agreement. Failure

to comply with this Subsection is a material breach of this Agreement. As used in this Agreement, "disability" means the inability of such person to perform his or her normal responsibilities at the Facility for a consecutive period of at least ninety (90) days, or one hundred eighty (180) days during any twelve (12) month period.

2. Operation Upon Death or Disability. If you or one of your Owners was the manager of the Facility at the time of your or such Owner's death or disability, within thirty (30) days, your executor or other personal representative must appoint a qualified manager to operate the Facility. Such manager will be required to complete our management training school.

3. Our Right of First Refusal. If you or any of your Owners wish to transfer an interest in this Agreement or the Facility (including the equipment and other assets thereof), and you have reached agreement with a proposed transferee on the terms and conditions of the proposed transfer, and such transfer would result in a change (together with all prior and contemporaneous transfers) of more than forty-nine percent (49%) in either the financial or voting interest in you, this Agreement, or the Facility (including the equipment and other assets thereof), before you or your Owners become legally bound to consummate such transfer, you (or such Owner) shall give us a right of first refusal to accept the transfer ourself or in favor of our nominee on the same terms and conditions as your proposed transfer to a third party (except that we may substitute cash for any non-cash consideration). To enable us to exercise our right of first refusal, you or the Owner will provide us with a copy of the agreement you have reached and such other information that we may reasonably request. We will have thirty (30) days to notify you of our exercise of a right of first refusal and fifteen (15) days thereafter to consummate the purchase. If we do not exercise our right of first refusal, you or the selling Owner may consummate such transfer (subject to the other provisions of this Agreement applicable to transfers) on terms that are no more favorable to the transferor than those contained in the notice to us; provided, however, that if such transfer is not completed within ninety (90) days after the expiration of our right of first refusal, we shall again have a new right of first refusal on any such transfer.

K. EXPIRATION OF THIS AGREEMENT.

1. Your Right to Acquire a Renewal License. Upon expiration of the Term, if you (and each of your Owners) are then in compliance with this Agreement and:

(a) you maintain possession of and agree to remodel, and/or expand the Facility, add or replace improvements, equipment, fixtures, furnishings, signs, and otherwise modify the Facility as we require to bring it into compliance with specifications and standards then applicable for new Facilities; or,

(b) if you are unable to maintain possession of the Site, or if in our judgment the Facility should be relocated, you: (i) secure a substitute Site we approve; (ii) develop the substitute Site in compliance with specifications and standards then applicable for new Facilities; and (iii) continue to operate the Facility at the original Site until operations are transferred to the substitute Site; then, subject to the terms and conditions set forth in this Section, you will have the right to acquire a License (the "Renewal License") to operate the Facility on the terms and conditions of the License Agreement we are then using in granting Renewal Licenses. Your territorial rights may be modified in the Renewal License, in accordance with our policies then in effect.

2. Grant of a Renewal License. You agree to give us notice of your election to acquire a Renewal License at least six (6) months prior to the expiration of the Term. We will advise you within ninety (90) days after we receive your notice of

any deficiencies which must be corrected by you before we will grant you a Renewal License or the reason why we will not grant you a Renewal License.

3. Agreements/Releases. If you satisfy all of the other conditions to the grant of a Renewal License, you and your Owners must execute the form of License Agreement and any ancillary agreements we are then using in connection with the grant of Renewal Licenses for Facilities except the Term of such new agreement will be for five (5) years, without any further renewal or extension rights. As a further condition to the grant of a Renewal License, you and each of the Owners must also execute and deliver to us within thirty (30) days after their delivery to you, general releases, in form satisfactory to us, of any and all claim against us, our Affiliates, and our Affiliate's subsidiaries, shareholders, officers, directors, employees, agents, successors and assigns.

L. TERMINATION OF AGREEMENT.

1. By Either Party. Either party may terminate this Agreement if the other commits a material breach of their respective obligations under this Agreement and fails to correct such breach within thirty (30) days after notice thereof.

2. Termination Prior to the Completion of Development of the Facility. You and we will have the rights of termination described in Section B of this Agreement.

3. Material Breach. The occurrence of any one of the following events shall each constitute non-curable, material breaches of this Agreement. Therefore, in addition to the rights of termination described in Subsections 1 and 2, above, we may, at our option, terminate this Agreement, upon notice to you, for any of the following breaches of this Agreement, without affording you a further opportunity to correct such breaches:

(a) you (or any of your Owners) have made any material misrepresentation or omission in connection with your application for and purchase of the License;

(b) you abandon or fail actively to operate the Facility for two (2) or more consecutive business days;

(c) you or any of your Owners make a purported transfer in violation of Section I hereof;

(d) you (or any of your Owners with a twenty-five percent (25%) or greater financial or voting interest in you) are or have been convicted of, or plead or have pleaded no contest to, a felony;

(e) you (or any of your Owners with a twenty-five percent (25%) or greater financial or voting interest in you) engage in any dishonest or unethical conduct which, in our reasonable opinion, adversely affects the reputation of the Facility or the goodwill associated with the Marks;

(f) you lose the right to possession of the Site;

(g) you (or any of your Owners) misappropriate any Trade Secrets;

(h) you violate any material law, ordinance, or regulation applicable to the Facility, or your operation thereof, and do not begin to correct such noncompliance or violation immediately, or do not completely correct such noncompliance or violation within seventy-two (72) hours after you have notice thereof;

(i) you fail to make any payment due to us and do not correct such failure within five (5) days after you have notice thereof;

(j) you fail to maintain the insurance required by this Agreement or to furnish us with satisfactory evidence of such insurance within the time required hereunder and do not correct such failure within five (5) days after you have notice thereof;

(k) you fail to pay when due any federal or state income, service, sales, employment, or other taxes due from the operations of the Facility, unless you are in good faith contesting your liability for such taxes through appropriate proceedings;

(l) you (or any of your Owners) commit any breach of this Agreement on three (3) or more separate occasions within any period of twelve (12) consecutive months, whether or not such breaches are individually material breaches or corrected after notice;

(m) you fail to pay your creditors within thirty (30) days following the due date or any default by you under any material note, lease or agreement pertaining to the operation or ownership of the Facility;

(n) the termination by us on account of default of any other contract with you or any of your Owners (or any Affiliate of yours or your Owners); or

(o) you make an assignment for the benefit of creditors or admit in writing your insolvency or inability to pay your debts generally as they become due; you consent to the appointment of a receiver, trustee or liquidator of all or a substantial part of your property; the Facility is attached, seized, or levied upon, unless such attachment, seizure, or levy is vacated within thirty (30) days; or any order appointing a receiver, trustee, or liquidator of you or the Facility is not vacated within thirty (30) days following the entry of such order.

M. EFFECT OF TERMINATION OR EXPIRATION OF THIS AGREEMENT.

1. Payment of Amounts Owed to Us. Upon termination or expiration of this Agreement for any reason, within ten (10) days after such termination or expiration, you will pay us all amounts due under this Agreement, including the aggregate of the unpaid Annual Fees for the remainder of the unexpired Term.

2. Marks. Upon the termination or expiration of this Agreement:

(a) you may not directly or indirectly at any time or in any manner (except with respect to other Facilities you own and operate) identify yourself or any business as a current or former Facility, or as one of our current or former licensees, or use any of the Marks, the System, System Standards, or any colorable imitation thereof;

(b) you will take such action as may be required to cancel all fictitious or assumed name or equivalent registrations relating to your use of any of the Marks;

(c) you will deliver to us within fifteen (15) days all signs, marketing materials, forms and other materials containing any of the Marks or otherwise identifying or relating to a Facility;

(d) you will promptly and at your own expense make such alterations as we specify to distinguish the Facility clearly from its former appearance and from other Facilities so as to prevent a likelihood of confusion by the public;

(e) you will notify the telephone company and all telephone directory publishers of the termination or expiration of your right to use any telephone, telecopy, or other numbers and any regular, classified, or other telephone directory listings associated with any of the Marks or the Facility, authorize the transfer of such numbers and directory listings to us or our nominee or instruct the telephone company to forward all calls made to your telephone numbers to numbers we specify; and

(f) you will notify all of your members of the termination or expiration of this License and offer to such members the option to terminate their membership and a pro rata refund of all membership fees and other charges which were prepaid by such members for any period after the effective date of termination or expiration of this License.

3. Trade Secrets. Upon termination or expiration of this Agreement you will immediately cease to use any of our Trade Secrets in any business or otherwise and return to us all copies of the Manuals and any other confidential materials that we have loaned to you.

4. Continuing Obligations. All of our and your (and your Owners' and Affiliates') obligations which expressly or by their nature survive the termination or expiration of this Agreement will continue in full force and effect subsequent to and notwithstanding its termination or expiration until such obligations are satisfied in full or by their nature expire.

N. RELATIONSHIP OF THE PARTIES; INDEMNIFICATION.

1. Independent Contractors. This Agreement does not create a fiduciary relationship between you and us. We and you are and will be independent contractors and nothing in this Agreement is intended to create an agency, joint venture, partnership, or employment relationship. Neither party has any right to create any obligation on behalf of the other except as expressly provided in this Agreement.

2. Taxes. You and your Owners are solely responsible for all taxes, however denominated or levied upon you or the Facility, in connection with the business you will conduct hereunder (except any taxes we are required by law to collect from you with respect to purchases from us).

3. Indemnification. You will indemnify, defend, and hold us, our Affiliates, and our and their respective shareholders, directors, officers, employees, agents, successors and assignees (collectively "Indemnified Parties") harmless against and reimburse any one or more of the Indemnified Parties for all third party claims, any and all taxes, and any and all claims and liabilities directly or indirectly arising out of the operation of the Facility or your breach of this Agreement ("Claims"). For purposes of this indemnification, "Claims" include all obligations, damages (actual, consequential, exemplary, or other), and costs reasonably incurred in the defense of any claim against any of the Indemnified Parties, including, without limitation, accountants', arbitrators', attorneys', and expert witness fees, costs of investigation and proof of facts, court costs, other expenses of litigation, arbitration, or alternative dispute resolution, and travel and living expenses. Each Indemnified Party has the right to defend any Claim. This indemnity will continue in full force and effect notwithstanding the termination or expiration of this Agreement. Neither we nor any other Indemnified Party are required to seek recovery from any insurer or other third party in order to maintain and recover fully a Claim against you. You agree that our failure to pursue such recovery will in no way reduce or alter the amounts we or another Indemnified Party may recover from you.

4. Insurance. At least thirty (30) days prior to the earlier of: (a) opening the Facility, or (b) your first use, in any manner, of the Marks, you must obtain and thereafter maintain in full force and effect, throughout the Term public liability and property damage insurance in the minimum amount of $1,000,000 per occurrence and in the aggregate, for the risks specified in the Manuals. Said coverage shall be on an "occurrence" basis and must provide that it cannot be canceled, terminated, reduced, or amended without the insurer first giving at least thirty (30) days advance notice thereof. The insurer under any policy required hereunder shall at all times maintain at least an "A-V" rating or better as rated by Best's Insurance Reports. You must cause us and GGE to be named as additional insured on any such policies and deliver evidence thereof to us. Upon issuance of any insurance policy required hereunder and at least thirty (30) days prior to any renewal or replacement thereof, you must deliver to us a certificate of insurance evidencing that you have obtained such policy. You must promptly notify us of any claims paid or reserves made by the insurer under any policy required hereunder.

O. STANDARD CLAUSES.

1. Severability. Except as expressly provided to the contrary herein, each provision of this Agreement, and any portion thereof, is severable, and if, for any reason, any such provision is held to be invalid or in conflict with any applicable present or future law or regulation in a final, unappealable ruling issued by any court, agency, or tribunal with competent jurisdiction in a proceeding to which we are a party, that ruling will not impair the operation of, or have any other effect upon, such other portions of this Agreement as may remain otherwise intelligible, which will continue to be given full force and effect and bind the parties hereto. If any covenant herein which restricts competitive activity is deemed unenforceable by virtue of its scope in terms of area, business activity prohibited, and/or length of time, but would be enforceable by reducing any part or all thereof, you and we agree that such covenant will be enforced to the fullest extent permissible under the laws and public policies applied in the jurisdiction whose law is applicable to the validity of such covenant. If any applicable and binding law or rule of any jurisdiction requires a greater prior notice than is required hereunder of the termination of this Agreement or of our refusal to enter into a Renewal License Agreement, or the taking of some other action not required hereunder, or if, under any applicable and binding law or rule of any jurisdiction, any provision of this Agreement or any System Standard is invalid or unenforceable, the prior notice and/or other action required by such law or rule will be substituted for the comparable provisions hereof, and we will have the right to modify such invalid or unenforceable provision or System Standard to the extent required to be valid and enforceable. You agree to be bound by any promise or covenant imposing the maximum duty permitted by law which is subsumed within the terms of any provision hereof, as though it were separately articulated in and made a part of this Agreement, that may result from striking from any of the provisions hereof, or any System Standard, any portion or portions which a court or arbitrator may hold to be unenforceable in a final decision to which we are a party, or from reducing the scope of any promise or covenant to the extent required to comply with such a court order or arbitration award. Such modifications to this Agreement will be effective only in such jurisdiction, unless we elect to give them greater applicability, and will be enforced as originally made and entered into in all other jurisdictions.

2. Amendment. The provisions of this Agreement may be modified at any time only by written agreement between you and us.

3. Waiver of Obligations. We and you may by written instrument unilaterally waive or reduce any obligation of or restriction upon the other under this Agreement, effective upon delivery of notice thereof to the other or such other effective date stated in the notice of waiver. Any waiver we or you grant will be without prejudice to any other rights we or you may have, will be subject to our or

your continuing review and may be revoked, in our or your sole discretion, at any time and for any reason. Any waiver must be in writing to be enforceable. Our failure to complain or declare that you are in breach of the terms hereof or our failure to give or withhold our approval as provided herein shall not constitute a waiver of such breach or of such right to withhold our approval.

4. Costs and Attorneys' Fees. The prevailing party in any dispute relating to or arising out of this Agreement, shall be entitled to recover its costs and expenses including, without limitation, accounting, attorneys', arbitrators', and related fees, costs, and other expenses, in addition to any other relief to which such party may be entitled.

5. No Off-Sets. You may not take any off-sets from any amounts due us under this Agreement or pursuant to any other agreements.

6. Arbitration. Except for controversies, disputes, or claims related to or based on your use of the Marks after the expiration or termination of this Agreement, all disputes between us and our Affiliates, shareholders, officers, directors, agents, and employees and you (your Owners, guarantors, Affiliates, officers, directors, agents, and employees, if applicable) arising out of or related to this Agreement or any other agreement between us, including the arbitrability of the dispute or the validity of any provision of this Agreement, including this Subsection, will be exclusively determined by binding arbitration under the then current commercial arbitration rules of the American Arbitration Association. All matters relating to arbitration will be governed by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by any state arbitration law. Judgment upon the award may be entered in any court of competent jurisdiction. Arbitration must be conducted on an individual, not a class-wide, basis, and an arbitration proceeding between us and our Affiliates, shareholders, officers, directors, agents, and employees and you (and/or your Owners, guarantors, affiliates, officers, directors, agents, and employees, if applicable) may not be consolidated with any other arbitration proceeding between us and any other person, corporation, limited liability company, or partnership. Notwithstanding anything to the contrary contained in this Subsection, we and you each have the right in a proper case to obtain temporary restraining orders and temporary or preliminary injunctive relief from a court of competent jurisdiction. The provisions of this Subsection will continue in full force and effect notwithstanding the termination or expiration of this Agreement.

7. Governing Law. All matters relating to arbitration will be governed by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.). Except to the extent governed by the Federal Arbitration Act as required hereby, the United States Trademark Act of 1946 (15 U.S.C. sections 1051 et seq.), or other federal law, this Agreement, the License, and all claims arising from the relationship between us and you will be governed by the laws of the State of California, without regard to its conflict of laws principles, except that any California law regulating the sale of franchises, licenses or business opportunities or governing the relationship of a franchisor and its franchisee or the relationship of a licensor and its licensee will not apply unless its jurisdictional requirements are met independently without reference to this Section.

8. Consent to Jurisdiction. You and your Owners agree that all judicial actions and arbitrations brought by us against you or your Owners or by you or your Owners against us or our Affiliates, or our or their shareholders, officers, directors, agents or employees must be brought exclusively in Los Angeles County, California, and you (and each Owner) irrevocably submit to the jurisdiction of such court or arbitrator sitting in such County and waive any objection you, he, or she may have to either the jurisdiction or venue thereof. Notwithstanding the foregoing, we may bring an action for a temporary restraining order, temporary or preliminary injunctive relief, or to enforce an arbitration award, in any federal or state court of general jurisdiction in the state in which you reside or in which the Facility is located.

9. Waiver of Punitive Damages. Except with respect to your obligation to indemnify us pursuant to Subsection N.3 for Claims of others seeking to recover punitive or exemplary damages from us, and claims we bring against you for your unauthorized use of the Marks or misappropriation of any Trade Secrets for which you are responsible, we and you and your Owners waive to the fullest extent permitted by law any right to or claim for any punitive or exemplary damages against the other and agree that, in the event of a dispute between you and us, the party making a claim will be limited to equitable relief and to recovery of any actual damages he, she or it sustains.

10. Limitations of Claims. Except for claims arising from your non-payment of amounts due us under this Agreement, any and all claims arising out of or relating to this Agreement or our relationship with you will be barred unless an arbitration proceeding is commenced within one (1) year from the date on which the party asserting such claim knew or should have known of the facts giving rise to such claims.

11. Construction. The recitals and exhibits to this Agreement and your application for the License are a part of this Agreement which, together with the Manuals, System Standards, and our other written policies, constitute our and your entire agreement, and there are no oral or other written understandings or agreements between us and you relating to the subject matter of this Agreement. Nothing in this Agreement is intended, nor will be deemed, to confer any rights or remedies upon any person or legal entity not a party hereto. Except where this Agreement expressly obligates us reasonably to approve any of your actions or requests, we have the absolute right to refuse any request you make or to withhold our approval of any of your proposed or effected actions that require our approval. The headings of the several sections and subsections hereof are for convenience only and do not define, limit, or construe the contents of such sections or subsections. The term "Affiliate," as used herein with respect to you or us, means any person directly or indirectly owned or controlled by, under common control with or owning or controlling you or us. For purposes of this definition, "control" of a person means ownership or control of a majority of the voting ownership of the person or combination of voting ownership or one or more agreements that together afford control of the management and policies of such person. If two or more persons are at any time the Owner, their obligations and liabilities to us will be joint and several. References to "Owner" means any person holding a direct or indirect, legal or beneficial ownership interest or voting rights in you (or a transferee). The term "Facility" as used herein includes all of the assets of the Facility you operate pursuant to this Agreement, including its revenue and income. This Agreement may be executed in multiple copies, each of which will be deemed an original.

12. Notices and Payments. All approvals, requests, notices and reports required or permitted hereunder will not be effective unless in writing and delivered to the party entitled to receive the same in accordance with this Subsection. All such approvals, requests, notices, reports, and all payments will be deemed delivered at the time delivered by hand; or one (1) business day after being placed in the hands of a nationally recognized commercial courier service for next business day delivery; or three (3) business days after placement in the United States Mail by Registered or Certified Mail, Return Receipt Requested, postage prepaid; and must be addressed to the party to be notified at its most current principal business address of which the notifying party has been notified.

13. Time. Time is of the essence of this Agreement and each and every provision hereof.

14. Binding Effect. The delivery of this Agreement to you is not an offer. Therefore, this Agreement will not be binding upon us until it is first signed by you, tendered to us for our acceptance, and accepted by us through the signature of our duly authorized officer in Los Angeles, California.

INTENDING TO BE LEGALLY BOUND, the parties hereto have executed and delivered this Agreement on the date stated on the first page hereof.

GOLD'S GYM FRANCHISING, INC.

By:____________________

Title: President and International Director

By:____________________

Title: Chief Financial Officer

Address: 358 Hampton Drive
Venice, California 90291

IF LICENSEE IS A CORPORATION, LIMITED LIABILITY COMPANY OR LIMITED PARTNERSHIP:

Health Source-St. George, LLC
Name of Licensee

Signed: [signature]

Title: Co-manager

Address: 3952 West 3500 South
Salt Lake City, UT 84120

The facility in St. George, UT is to be expanded or relocated to a minimum of 12,000 square feet no later than January 1, 2000.

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IF LICENSEE IS A SOLE PROPIETORSHIP OR GENERAL PARTNERSHIP:

Signature	Signature
n/a Printed Name	n/a Printed Name
Signature	Signature
n/a Printed Name	n/a Printed Name

EXHIBIT A

This Exhibit is in reference to that certain License Agreement between Gold's Gym Franchising, Inc., a California corporation, and Health Source-St. George, LLC dated June 22, 1999, (the "License Agreement").

TERRITORY
(License Agreement Section A.1)

The Territory referred to in the License Agreement shall be as follows:

Five (5) mile radius from gym location in St. George, UT excluding any overlap into an existing territory.

SITE
(License Agreement Section B.1)

1028 East Tabernacle

St. George, UT 84770

EFFECTIVE DATE
(License Agreement Section A.2)

The Effective Date referred to in the License Agreement shall be June 22, 1999.

FORM OF LICENSEE
(License Agreement Section A.6)

Sole Proprietorship or General Partnership: If you are a general partnership owned by more than one Owner, your Owner(s) and their percentage ownership are as follows:

Owner's Name and Address	Percentage of Ownership Interest
Name: n/a	
Address:	
Name: n/a	
Address:	
Name: n/a	
Address:	
Name: n/a	
Address:	

INITIAL HERE

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EXHIBIT A
(continued)

Corporation, Limited Liability Company, or Limited Partnership: If you are a legal entity other than a general partnership (i.e., a corporation, limited liability company or limited partnership), please provide the following information:

You are a limited liability company and were formed on June 1999, under the laws of the State of Utah. You have not conducted business under any name other than your corporate, limited liability company, or limited partnership name and n/a.

The following is a list of your directors and officers, if applicable, as of the Effective Date shown above:

Name of Each Director/Officer	Position(s) Held
Vince Engle	Co-manager
Doug L. Chamberlain	Co-manager

The following list includes the full name and mailing address of each person who is one of your Owners (as defined in the License Agreement) and fully describes the nature and percentage of each Owner's interest:

Owner's Name and Address	Description and Percentage of Ownership Interest
Name: Vince Engle Address: 4190 S. Bountiful Blvd. Bountiful, UT 84010	50%
Name: Brent Statham Address: P. O. Box 1061 St. George, UT 84771	16.7%
Name: Doug L. Chamberlain Address: 3318 E. Daserat Dr., South St. George, UT 84790	16.665%
Name: Clark D. Chamberlain Address: 3318 E. Daserat Dr., South St. George, UT 84790	16.665%

FEES
(License Agreement Sections C.1 and C.2)

First Year Annual Fee	$ 8,500.00
Second through Fifth Year Annual Fee	$ 6,000.00
Security Deposit	$ waived

CURRENT PROMOTION CONTRIBUTION
(License Agreement Section G.2)

$195.00 per month.

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EXHIBIT B

CONTINUING GUARANTY
("Guaranty")

The undersigned (referred to herein as "Guarantors"), whose addresses are set forth below, in consideration of the rights and obligations of the parties set forth in the "License Agreement" dated June 22, 1999 , between GOLD'S GYM FRANCHISING, INC. ("Company") and Health Source-St. George, LLC ("Licensee"), and all amendments thereto (the "Agreement"), covering the following Facility:

Gold's Gym St. George, UT
1028 East Tabernacle
St. George, UT 84770

do hereby agree as follows:

1. Guarantors do hereby guarantee the full, faithful and timely payment and performance by Licensee of all of the payments, covenants and other obligations of Licensee under or pursuant to the Agreement, including, without limitation, all payment obligations relating to inventory, goods and equipment delivered by Company or its approved suppliers to Licensee. If Licensee shall default at any time in the payment of any sums, costs or charges whatsoever, or in the performance of any of the other covenants and obligations of Licensee, under or pursuant to the Agreement, then Guarantors, at their expense, shall on demand of Company fully and promptly, and well and truly, pay all sums, costs and charges to be paid by Licensee, and perform all the other covenants and obligations to be performed by Licensee, under or pursuant to the Agreement, and in addition shall, on Company's demand, pay to Company any and all sums due to Company, including (without limitation) all interest on past-due obligations of Licensee, costs advanced by Company, and damages and all expenses (including attorneys' fees and litigation costs), that may arise in consequence of Licensee's default. Guarantors hereby waive all requirements of notice of the acceptance of this Guaranty.

2. A separate action or actions may, at Company's option, be brought and prosecuted against Guarantors, whether or not any action is first or subsequently brought against Licensee, or whether or not Licensee is joined in any such action, and Guarantors may be joined in any action or proceeding commenced by Company against Licensee arising out of, in connection with or based upon the Agreement. Guarantors waive any right to require Company to pursue any other remedy in Company's power whatsoever, any right to complaint of delay in the enforcement of Company's rights under the Agreement, and any demand by Company and/or prior action by Company of any nature whatsoever against Licensee, or otherwise.

3. This Guaranty shall remain and continue in full force and effect and shall not be discharged in whole or in part notwithstanding (whether prior or subsequent to the execution hereof) any alteration, renewal, extension, modification, amendment or assignment of, or subletting, franchising, or licensing under the Agreement. For the purpose of this Guaranty and the obligations and liabilities of Guarantors hereunder, "Licensee" shall be deemed to include any and all licensees, franchisees, assignees, sublicensees, permittees or others directly or indirectly operating or conducting a GOLD'S GYM Facility (as defined in the Agreement) as fully as if any of the same were the named Licensee under the Agreement.

4. This Guaranty shall apply to: (a) any amendment to the Agreement, (b) any other agreements between the parties in furtherance of the Agreement or in connection with the Facility, and (c) any license or franchise agreement between the parties replacing the Agreement.

5. Guarantors' obligations hereunder shall remain fully binding although Company may have waived one (1) or more defaults by Licensee, extended the time of performance by Licensee, released, returned or misapplied other collateral at any time given as security for Licensee's obligations (including other

guaranties) and/or released Licensee from the performance of its obligations under the Agreement.

6. This Guaranty shall remain in full force and effect notwithstanding the institution by or against Licensee, of bankruptcy, reorganization, readjustment, receivership or insolvency proceedings of any nature, or the disaffirmance or rejection of the Agreement in any such proceedings or otherwise.

7. If this Guaranty is signed by more than one (1) party, their obligations shall be joint and several.

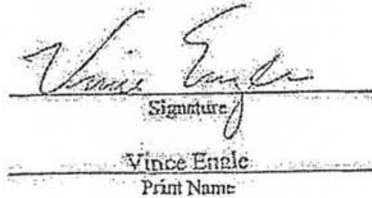
8. Company may, without notice, assign this Guaranty in whole or in part.

9. In the event that Company should institute any suit against Guarantors for violation of or to enforce any of the covenants or conditions of this Guaranty or to enforce any right of Company hereunder, or should Guarantors institute any suit against Company arising out of or in connection with this Guaranty, or should either party institute a suit against the other for a declaration of rights hereunder, or should either party intervene in any suit in which the other is a party, to enforce or protect its interest or rights hereunder, the prevailing party in any such suit shall be entitled to the fees of its attorney(s) in the reasonable amount thereof, to be determined by the court and taxed as a part of the costs therein.

10. The execution of this Guaranty prior to execution of the Agreement or any of them shall not invalidate this Guaranty or lessen the obligations of Guarantors hereunder.

IN WITNESS WHEREOF, the undersigned have executed this Guaranty this 7th day of July, 1998.

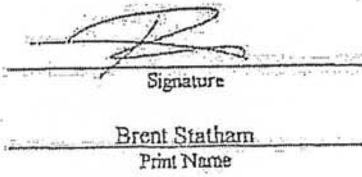
"GUARANTORS":



Signature

Vince Engle
Print Name

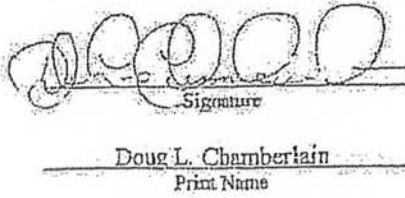
Address: 4190 S. Bountiful Blvd.
Bountiful, UT 84010



Signature

Brent Statham
Print Name

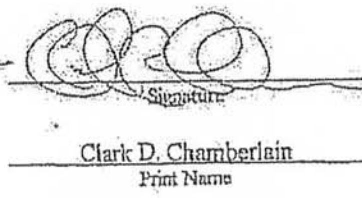
Address: P. O. Box 1061
St. George, UT 84771



Signature

Doug L. Chamberlain
Print Name

Address: 3318 E. Daserat Dr., South
St. George, UT 84790



Signature

Clark D. Chamberlain
Print Name

Address: 3318 E. Daserat Dr., South
St. George, UT 84790