

**IN THE UTAH SUPREME COURT**

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GOLD'S GYM INTERNATIONAL,  
INC.,

Appellant,

v.

CLARK CHAMBERLAIN and BRENT  
STATHAM,

Appellees.

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Case No. 20170146-SC

**BRIEF OF APPELLEE CLARK CHAMBERLAIN**

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Brent Statham, *Appellee*, not currently represented

St. George Fitness, LLC, *defendant in underlying proceeding*

Vince Engle, *defendant in underlying proceeding*

Health Source, Inc., *defendant in underlying proceeding*

Fitcorp, Inc., *defendant in underlying proceeding*

Travis Izatt, *defendant in underlying proceeding*

Fitness Source, LLC, *defendant in underlying proceeding*

O.P.M. Holdings, Inc., *defendant in underlying proceeding*

Gold's Gym International, Inc., *defendant in underlying proceeding*

St. George Fitness, LLC, *defendant in underlying proceeding*

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## **INTRODUCTION**

Appellant Gold's Gym International, Inc. ("Gold's") challenges the district court's denial of its motion for attorney fees, claiming that it is entitled to fees pursuant a contractual attorney fees provision. However, this Court should affirm the district court's ruling because Appellee Clark Chamberlain was not a party to the contract. Furthermore, Gold's argument on appeal, that Chamberlain is liable under the contract because he brought a derivative action, was never preserved in the district court. In addition, Gold's is estopped from arguing that Chamberlain's conspiracy, conversion, and interference cause of action arise from the or relate to the contract when Gold's successfully obtained dismissal of Chamberlain's breach of contract claim by arguing the opposite – that the claims did not arise from or relate to the contract. Gold's also raises several arguments regarding the reasonableness and amount of its fees. However, these issues are not properly before the Court because they were never ruled on by the district court.

## **STATEMENT OF THE ISSUES**

Chamberlain was a member, along with Vince Engle, in Health Source of St. George, LLC ("HSSG"). In 1999, HSSG entered into a license agreement (the "License Agreement") with Gold's. The License Agreement contained an attorney fees provision granting attorney fees in any legal action arising under or relating to the License Agreement. Chamberlain was not a party to the License Agreement. Subsequently, in 2001, Engle falsely represented to Gold's that he was the only member of HSSG and requested that the License Agreement with HSSG be replaced with a franchise agreement with Fitcorp, Inc., a corporation solely owned by Engle. Engle also converted all of HSSG's remaining assets. Chamberlain discovered Engle's conversion of HSSG's assets in 2003.

In 2005, based on his belief that Gold's had been aware of and consented to Engle's wrongful conduct, Chamberlain filed a lawsuit against Gold's (along with other

defendants) alleging cause of action for conversion, civil conspiracy and tortious interference (the “First Action”). The First Action was subsequently dismissed without prejudice in 2008 for failure to prosecute. Chamberlain then filed this case in 2009, less than a year later (the “Second Action”). However, in the Second Action, Chamberlain alleged additional causes of action against Gold’s for breach of contract and negligence. Gold’s moved to dismiss the Second Action, arguing that it had been filed after the expiration of the applicable statutes of limitations. Chamberlain opposed dismissal, arguing that the Second Action was timely under Utah’s savings statute. In response, Gold’s argued that the breach of contract and negligence claims alleged in the Second Action did not relate back to the First Action because they did not arise out of or relate to the same conduct transaction, or occurrence alleged in the First Action. The district court ruled that the conversion, civil conspiracy, and tortious interference causes of action were timely because they had been raised in the First Action. However, the district court agreed with Gold’s that the breach of contract and negligence causes of action had not arisen from and did not relate to the conduct, transaction, or occurrence alleged as part of the conversion, civil conspiracy, and interference claims in the First Action and dismissed those causes of action as barred by the statute of limitations.

In the course of the district court proceedings, Gold’s filed several motions claiming that Chamberlain’s claims against it were derivative and should be dismissed because Chamberlain had not followed the procedures for bringing a derivative action. However, the district court ruled that Chamberlain’s claims were not, in fact, derivative. Gold’s has not appealed these rulings.

Ultimately, after a bench trial, the district court found in Gold’s favor and dismissed Chamberlain’s claims with prejudice. Gold’s then filed a motion seeking its attorney fees as the prevailing party. The basis for Gold’s motion was the attorney fees provision in the License Agreement. Gold’s argued that, under this provision, it was entitled to its attorney fees because Chamberlain’s breach of contract, conversion, civil conspiracy, and



interference causes of action arose out of or related to the License Agreement. When Chamberlain pointed out that he was not a party to the License Agreement, Gold's argued for the first time, in its reply, that Chamberlain was bound by the terms of the License Agreement because he had sought to enforce its benefits. Gold's did not, however, argue that Chamberlain was liable because his claims were derivative. The district court denied the motion for attorney fees, holding that Chamberlain was not a party to the License Agreement and that, with the exception of the breach of contract cause of action, the claims in the case had not arisen out of or related to the License Agreement.

### **ISSUE ONE**

Whether the district court's correctly denied Gold's motion for attorney fees when Chamberlain was not a party to the License Agreement, Gold's initial motion for attorney fees never explained why Chamberlain was liable under the License Agreement, Gold's first argued that Chamberlain was liable despite not being a party to the License Agreement in its reply memorandum, Gold's never argued to the district court that Chamberlain was liable because his claims were derivative, and Gold's did not appeal the district court's rulings that Chamberlain's claims were not derivative.

#### Standard of Review

Whether attorney fees should be awarded is a legal issue that is reviewed for correctness. See Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

#### Preservation

“When a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue, and an appellate court will not typically reach that issue absent a valid exception to preservation.” State v. Johnson, 2017 UT 76, ¶ 15. Gold's Statement of the Issues fails to cite with specificity to the pages of the record on appeal where Gold's

arguments were preserved. See Appellant Br. at 7-8.

## ISSUE TWO

Whether the district's court correctly denied Gold's motion for attorney fees when Gold's had obtained dismissal of Chamberlain's breach of contract cause of action by arguing that the breach of contract claim did not relate to or arise from the same conduct, transaction, or occurrence alleged in Chamberlain's conversion, conspiracy, and interference causes of actions.

### Standard of Review

Whether attorney fees should be awarded is a legal issue that is reviewed for correctness. See Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

### Preservation

While this issue was not raised in the district court, "an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory ... was not raised in the lower court, and was not considered or passed on by the lower court." Dipoma v. McPhie, 2001 UT 61, ¶ 18, 29 P.3d 1225 (quotation omitted).

## STATEMENT OF THE CASE

### **A. FACTUAL BACKGROUND**

The complex factual background of this case is, for the most part, irrelevant to the issues on appeal. Clark Chamberlain was a member, along with Vince Engle, in Health Source of St. George, LLC (“HSSG”). See Findings of Fact and Conclusions of Law (the “FFCL”) at Fact No. 17 (R. 3634).<sup>1</sup> In 1999, HSSG entered into a license agreement (the “License Agreement”) with Gold’s Gym International, Inc. (“Gold’s”). Id. at Fact No. 21 (R. 3635); License Agreement (R. 54-74).<sup>2</sup> The License Agreement contained a provision granting attorney fees in any legal action arising under or relating the License Agreement. See License Agreement at §O(4) (R. 68). Chamberlain was not a party to the License Agreement. See License Agreement at R. 54; FFCL at Fact No. 21 (R. 3635).

In 2001, Engle falsely represented to Gold’s that he was the only member of HSSG. See FFCL at Fact Nos. 44-46 (R. 3640-41). In 2003, Engle had Gold’s replace the License Agreement with a franchise agreement with Fitcorp, Inc., a corporation solely owned by Engle. Id. at Fact Nos. 48-50 (R. 3642). Engle also converted all of HSSG’s other assets. Id. at Fact Nos. 51-53 (R. 3642-43). Chamberlain discovered Engle’s conversion of HSSG’s assets in 2003. Id. at Fact No. 57 (R. 3644)

### **B. PROCEDURAL BACKGROUND**

On July 11, 2005, Chamberlain filed a complaint against Gold’s, among other parties, in Case No. 050912077 before the Third District Court (the “First Action”). See October 27, 2011 Memorandum Decision and Order (R. 276).<sup>3</sup> The complaint in the First

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<sup>1</sup> A copy of the FFCL is attached to the Appendix at Exhibit A.

<sup>2</sup> A copy of the License Agreement is attached to the Appendix at Exhibit B.

<sup>3</sup> A copy of the 2011 Memorandum Decision and Order is attached to the Appendix at Exhibit C.

Action alleged causes of action for conversion, conspiracy and interference against Gold's. Id. (R. 277); (R. 261-62).<sup>4</sup> The case was dismissed without prejudice on November 19, 2008 for failure to prosecute. Id. (R. 276).

On November 18, 2009, Chamberlain filed his complaint in this case (the "Second Action"). (R. 1-151). The complaint in the Second Action alleged causes of action against Gold's for civil conspiracy, conversion, breach of contract, negligence, and tortious interference. (R. 26-29, 35-38, 42-43). On December 9, 2010, Gold's filed a motion to dismiss Chamberlain's conspiracy, breach of contract, negligence, and interference claims as, among other things, barred by the statute of limitations. (R. 174-83). In response, Chamberlain argued that his causes of action were timely under Utah's savings statute because they had been filed within one year of dismissal of the First Action. (R. 184-92).

In its reply, Gold's conceded that Chamberlain's "argument appears to be well taken with respect to those claims which were previously asserted in the [First Action.]" See Reply in Support of Motion to Dismiss (R. 218).<sup>5</sup> However, Gold's argued that Chamberlain's "contract and negligence claims do not arise out of the conduct, transactions, or occurrences set forth or attempted to be set forth in the pleadings" in the First Action. Id. (R. 220). "There is no way that Gold's Gym could divine from the prior asserted claims ... that these Plaintiffs, who are not parties to the License Agreement, would assert a breach of contract claim." Id. (R. 218). Similarly, Gold's argued that the "negligence claim also appears to arise out of the License Agreement, or breach thereof ... [t]here is no way that Gold's Gym could have known that it would be subject to a negligence claim based upon the claims asserted in the" First Action. Id. (R. 219). Gold's concluded that "[t]o the extent the claims arise out of or are related to the License Agreement, they are barred by the relevant statutes of limitation and the savings clause has

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<sup>4</sup> Chamberlain has not been to locate a copy of the complaint in the First Action in the record on appeal.

<sup>5</sup> A copy of the Reply in Support of Motion to Dismiss is attached to the Appendix at Exhibit D.

no application ... The savings clause extends only to claims which were asserted ... in the prior action.” Id. (R. 219). And, at oral argument, Gold’s “contend[ed] that what they placed in [the complaint in the First Action] is not, does not arise out of the conduct, transaction, or current set forth in the – attempted to be set forth in the original pleading ... [t]he issues arising out of breach of contract of the Franchise Agreement simply aren’t relevant to the types of claims that were asserted.” (R. 4367).

In its ruling on the Motion to Dismiss, the district court held that “[t]he claims for conspiracy and interference are properly raised now because they were also raised in Plaintiff’s previous lawsuit, and they met the statute of limitations at the time the 2005 suit was filed.” See 2011 Memorandum Decision and Order (R. 277). However, the district court went on to state that:

The Court determines that the breach of contract and negligence claims are not substantially similar to the previous claims ... The Plaintiffs claim they had put Gold’s Gym on notice because the earlier claims regarding the License Agreement between Health Source and Gold’s Gym, and the facts arose from the same dealings. Gold’s counters that the 2005 Complaint had no claims asserted upon the transaction of entering into the License Agreement. These two additional claims are not substantially similar to those in the previous suit.

Id. (R. 278). As a result, the district court dismissed the breach of contract and negligence claims. Id.

On February 26, 2013, Gold’s filed a motion for summary judgment on Chamberlain’s remaining claims. (R. 591-631). As one of its basis for dismissal, Gold’s argued that, because Chamberlain was not a party to the License Agreement, Chamberlain had no standing to bring any claims on behalf of HSSG. (R. 627). Gold’s further argued that Chamberlain’s claims were all derivative and therefore had to be dismissed because Chamberlain had not satisfied the procedural requirements for bringing a derivative action. (R. 627-28). On September 6, 2013, the district court issued a memorandum decision on Gold’s motion for summary judgment. See September 2013 Memorandum Decision (R.

1427-1449).<sup>6</sup> In denying summary judgment, the district court concluded that “Plaintiffs Clark Chamberlain and Brent Statham are not improper parties, and Gold’s has not shown that this is a derivative action that would require [HSSG] to be named as a Plaintiff.” Id. [R. 1440]. On October 1, 2013, Gold’s filed a motion for clarification, revision and reconsideration of the 2013 Memorandum Decision. (R. 1502-1515). As part of the Motion, Gold’s again argued that Chamberlain’s remaining claims should be dismissed as derivative. (R. 1507-1509). On April 1, 2014, the district court denied the motion for reconsideration. (R. 1724).

Beginning on November 1, 2016, the district court held a three-day bench trial on Chamberlain’s claims. (R. 3354, 3369-70, 3408). At the conclusion of the trial, Gold’s filed a Motion for Directed Verdict. (R. 3374-3394). Yet again, Gold’s argued that Chamberlain lacked standing and his claims were derivative. (R. 3380-3381). On December 19, 2016, the district court entered its FFCL ordering judgment in favor of Gold’s and dismissing all of Chamberlain’s claims with prejudice. See FFCL (R. 3631-3665). In the FFCL, the district court reaffirmed its prior ruling that “Plaintiffs have standing to bring their claims and those claims are not derivative.” See FFCL (R. 3652).

On January 9, 2017, Gold’s filed its Motion for Attorney Fees. See Motion for Attorney Fees (R. 3817-3869).<sup>7</sup> In the Motion for Attorney Fees, Gold’s argued that, as the prevailing party, it was entitled to attorney fees under the License Agreement’s attorney fee provision. Id. (R. 3818-21). Not only did Gold’s argue that Chamberlain’s breach of contract claim was subject to the License Agreement’s attorney fee provision, it also argued that Chamberlain’s interference, conversion, and conspiracy claims arose from and related to the License Agreement. Id. (R. 3822-3830). Significantly, the Motion for Attorney Fees did not claim that Chamberlain was a party to the License Agreement and failed to argue

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<sup>6</sup> A copy of the September 2013 Memorandum Decision is attached to the Appendix at Exhibit E.

<sup>7</sup> A copy of the Motion for Attorney Fees is attached to the Appendix as Exhibit F.

why the License Agreement’s attorney fee provision applied to Chamberlain’s claims if Chamberlain was not a party. Id. (R. 3817-3840).

In his opposition to the Motion for Attorney Fees, Chamberlain argued, among other things, that Golds was not entitled to fees because Chamberlain had never been a party to the Agreement. (R. 4055-57). On March 24, 2017, Gold’s filed its Reply in support of the Motion for Attorney Fees. See Reply in Support of Attorney Fees (R. 4321-4330).<sup>8</sup> In the Reply, Gold’s did not argue that Chamberlain was liable under the License Agreement because his claims were derivative. Id. Nor did Gold’s argue any theory of liability predicated on the “closely-held” exception adopted by this Court in Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc., 970 P.2d 1273, 1280-81 (Utah 1998). Id. Instead, and for the first time, Gold’s argued that Chamberlain was liable under the License Agreement because he had allegedly “claimed the benefits of its protections” and was thus estopped from claiming that he was not bound by the provisions of the License Agreement. (R. 4322-4326). Gold’s did not seek leave of the district court to raise this new argument in the reply memorandum.

On March 29, 2017, without holding oral argument, the district court entered its Ruling and Order denying the Motion for Attorney Fees. See March 2017 Ruling (R. 4340-4341).<sup>9</sup> The district court provided two reasons for the denial. First, it held that Chamberlain was not a party to the License Agreement. Id. Second, it held that, with the exception of the breach of contract claim, none of Chamberlain’s claims arose out of or related to the License Agreement. Id. The district court did not address Gold’s newly raised argument that Chamberlain had claimed the benefits of the License Agreement and was therefore liable under it. Id.

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<sup>8</sup> A copy of the Reply in Support of Attorney Fees is attached to the Appendix as Exhibit G.

<sup>9</sup> A copy of the March 2017 Ruling is attached to the Appendix at Exhibit H.

On April 4, 2017, Gold’s filed its Notice of Cross-Appeal. See Cross-Appeal (R. 4344-46).<sup>10</sup> The Cross-Appeal stated that Gold’s was appealing from “the Judgment entered on 29 March 2017 ... denying attorneys’ fees to Gold’s Gym.” Id. Similarly, in its conclusion section, Gold’s Appeal Brief only sought reversal of the district court’s “order denying Gold’s Gym the right to attorneys’ fees.” See Appellant Br. at 38.

### **C. DISPOSITION IN DISTRICT COURT**

Judgment in favor of Gold’s and dismissing all of Chamberlain’s claims with prejudice was entered on January 19, 2017. (R. 3998-399). Chamberlain filed a Notice of Appeal on February 21, 2017. (R. 4038). Chamberlain subsequently voluntarily withdrew his appeal. Gold’s filed its Notice of Cross-Appeal on April 4, 2017. (R. 4344-46).

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<sup>10</sup> A copy of the Cross-Appeal is attached to the Appendix as Exhibit I.



## **SUMMARY OF THE ARGUMENT**

The district court's denial of attorney fees should be sustained. On appeal, Gold's argues that, even though Chamberlain was not a party to the License Agreement, he is liable under its attorney fee provision because his claims were derivative. Gold's has also argued that, in addition to his breach of contract cause of action, Chamberlain's conversion, conspiracy, and interference claims arose from or related to the License Agreement. Both of these arguments must be rejected.

First, Gold's argument that Chamberlain is liable because his claims are derivative fails because Gold's failed to preserve this argument in the district court and has failed to challenge the district court's numerous rulings holding that Chamberlain's claims were not derivative. In its initial motion for attorney fees, Gold's cited to the License Agreement as its sole basis for attorney fees. Gold's did not argue the reciprocal attorney fee statute, the derivative nature of the claims, or any other basis for imposing liability on Chamberlain. Gold's provided an alternate basis of liability – that Chamberlain was liable because he had claimed the “benefits” of the License Agreement's “protections” – for the first time in its reply memorandum, after Chamberlain pointed out that he was not a party to the License Agreement. However, it was already too late to raise this argument. Gold's never asked for and never received leave to make a new argument in its reply memorandum and the district court never addressed the new argument in its March 2017 Ruling. Most significantly, Gold's never raised the argument it urges on appeal – that Chamberlain is liable under the License Agreement because his claims are derivative – in the district court. And, even if this argument had been preserved and could be considered on appeal, it would still fail because Gold's has not challenged the district court's previous rulings holding that Chamberlain's claims were not derivative.

Second, Gold's is estopped from arguing that Chamberlain's conversion, conspiracy, and interference claims arose from or related to the License Agreement. At the inception of the Second Action, Gold's argued that Utah's savings statute did not apply to

Chamberlain's breach of contract claim because the breach of contract claim did not "relate back" to Chamberlain's claims in the First Action. In fact, Gold's expressly claimed that the Chamberlains' causes of action in the First Action, which included the conversion, conspiracy, and interference claims, did not arise from and were not related to the License Agreement. Based on Gold's argument, the district court dismissed Chamberlain's breach of contract claim with prejudice. It would therefore be inequitable and unjust for Gold's to now seek attorney fees by claiming the opposite – that the conversion, conspiracy, and interference claims arise from and relate to the License Agreement. As a result, Gold's is estopped from making such an argument.

Finally, Gold's has made numerous arguments regarding the amount and reasonableness of its fees. However, these issues are not before the Court. Because it ruled that Gold's was not entitled to fees, the district court never addressed the amount and reasonableness of Gold's fee request. Therefore, in the unlikely event this Court holds that Gold's is entitled to its fees, these issues should be remanded back to the district court.

## ARGUMENT

### **I. GOLD’S FAILED TO PRESERVE ITS ARGUMENT FOR WHY CHAMBERLAIN WAS SUBJECT TO THE ATTORNEY FEES PROVISION OF THE LICENSE AGREEMENT.**

The March 2017 Ruling must be affirmed because Gold’s did not preserve its arguments for why Chamberlain was liable under the License Agreement. “When a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue, and an appellate court will not typically reach that issue absent a valid exception to preservation.” State v. Johnson, 2017 UT 76, ¶ 15. “An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it.” Id. (quotations, ellipses, and citations omitted). “To provide the court with this opportunity, the issue must be specifically raised by the party asserting error, in a timely manner, and must be supported by evidence and relevant legal authority.” Id. (quotations, ellipses, and citations omitted).

#### **A. GOLD’S DID NOT PRESERVE ANY ARGUMENT FOR WHY CHAMBERLAIN WAS LIABLE UNDER THE LICENSE AGREEMENT.**

Gold’s failed to preserve any argument for why Chamberlain was liable for attorney fees under the License Agreement. In the Motion for Attorney Fees Gold’s sole basis for seeking fees was the attorney fee provision of the License Agreement. See Motion for Attorney Fees at 2-4 (R. 3818-20). However, Gold’s has conceded in its Appeal Brief that Chamberlain was not a party to the License Agreement. See Appellant Br. at 11 (stating that “HSSF is a party to the License Agreement; [Chamberlain was] not in privity of contract with Gold’s Gym.”) And, significantly, Gold’s initial Motion for Attorney Fees never explained why Chamberlain would be subject to the License Agreement’s attorney fee provision if he was not a party. See Motion for Attorney Fees *generally* (R. 3817-3869). Gold’s did not argue the Chamberlain, a non-party to the License Agreement, was liable for fees under Utah’s reciprocal attorney fee provision or any other legal theory. Id.

Instead, Gold’s first argument explaining why liability should be imposed, despite Chamberlain not being a party to the License Agreement, was raised in its Reply in Support of Attorney Fees. See Reply in Support of Attorney Fees at 2-6 (R. 4322-4326). However, because the argument was first raised in Gold’s reply, it was not preserved. “Where a party first raises an issue in his reply memorandum, it is not properly before the trial court unless the party has received leave of the court to raise a new issue.” Winegar v. Springville City, 2014 UT App 9, ¶ 21, 319 P.3d 1 (quotations omitted). Here, Gold’s did not seek leave of the district court to raise this new argument and the district court did not address it in its March 2017 Ruling. See March 2017 Ruling (R. 4340-4341). As a result, Gold’s failed to preserve its arguments and they may not be considered on appeal.

**B. THE ARGUMENT IN THE REPLY WAS NOT SUPPORTED BY ANY LEGAL AUTHORITY.**

Alternatively, Gold’s argument for why Chamberlain was liable under the License Agreement was not preserved because Gold’s failed to support it with any legal authority. In its Reply in Support of Attorney Fees, Gold’s argued that “Plaintiffs asserted claims directly under the License Agreement and must bear the burden of attorneys’ fees because they claimed the benefits of its protections.” See Reply in Support of Attorney Fees at 4 (R. 4324). However, Gold’s did not cite to any legal authority establishing that a non-party to a contract could be subject to liability under the contract simply by claiming “the benefits of its protections.” Instead, the parties in the legal cases cited by Gold’s in its reply memorandum were also parties to the contract. Id. at 4 n.9 (citing Richardson v. Rupper, 2014 UT App 11, ¶ 11, 318 P.3d 128; Francisconi v. Hall, 2008 UT App 166; Prudential Fed. Sav. & Loan Ass’n v. Hartford Acc. Indem. Co., 325 P.2d 899, 903 (Utah 1958)). As a result, Gold’s also failed to preserve the argument raised in the reply memorandum because it cited no relevant legal authority in support of its position.

**C. GOLD’S ARGUMENT ON APPEAL WAS NOT RAISED IN THE REPLY IN SUPPORT OF ATTORNEY FEES.**

The argument that Gold’s set forth in the Reply in Support of Attorney Fees is not the same argument that it now makes on appeal. In its Reply in Support of Attorney Fees, Gold’s argued that “Plaintiffs asserted claims directly under the License Agreement and must bear the burden of attorneys’ fees because they claimed the benefits of its protections” and Plaintiffs were equitably estopped from arguing that they were not bound by the attorney fee provision. See Reply in Support of Attorney Fees at 4-5 (R. 4324-25). However, on appeal, Gold’s argues, for the first time, that Chamberlain is liable under the License Agreement because his claims were derivative.<sup>11</sup> See Appellant Br. at 35-38. As a result, Gold’s argument on appeal was not preserved in the district court.

**D. GOLD’S HAS NOT CHALLENGED THE DISTRICT COURT’S PRIOR RULINGS THAT CHAMBERLAIN’S CLAIMS WERE NOT DERIVATIVE.**

Gold’s argument on appeal that Chamberlain’s claims are derivative is barred by Gold’s failure to challenge the district court’s prior rulings on that issue. Rulings of the district court that are not challenged on appeal will not be disturbed by the appellate court. See Allen v. Friel, 2008 UT 56, ¶ 7, 194 P. 3d 903 (holding that “[i]f an appellant does not challenge a final order of the lower court on appeal, that decision will be placed beyond the reach of further review” and “[i]f an appellant fails to allege specific errors of the lower court, the appellate court will not seek out errors in the lower court’s decision”); Velasquez v. Harman-Mont & Theda, 2014 UT App 6, ¶ 12, 318 P.3d 1188 (affirming district court’s

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<sup>11</sup> In its Appeal Brief, Gold’s argues at length about the “closely-held corporation exception” to the procedural requirements for filing a derivative action adopted by this Court in Aurora, 970 P.2d at 1280-8. See Appeal Br. at 31-35. However, as Gold’s concedes in its briefing, “the holding in Aurora is narrow, subsequently distinguished, **and inapplicable to the case at hand.**” Id. at 33 (emphasis added). This is because Gold’s argues that Chamberlain’s claims should be considered derivative “regardless of whether they satisfy the Aurora closely-held exception or whether the Court desires to now depart from the Aurora decision.” Id. at 32.

ruling when it has not been properly challenged on appeal); DeGrazio v. Legal Title Co., 2006 UT App 183 (citing Greenwood v. City of N. Salt Lake, 817 P.2d 816, 818 (Utah 1991), Williamson v. Williamson, 1999 UT App 219, ¶ 8 n.3, 983 P.2d 1103); Tracy v. University of Utah Hosp., 619 P.2d 340, 342 n.4 (Utah Ct. App. 1980) (holding that trial court rulings from which no appeal is taken become law of the case). In this case, the district court ruled that Chamberlain’s claims were not derivative on at least two separate occasions. See September 2013 Memorandum Decision (R 1427-1449); FFCL (R. 3652). And Gold’s has expressly limited its appeal to challenging the district court’s ruling on the Motion for Attorney Fees. See Cross-Appeal (R. 4344-46); Appellant Br. at 38. As a result, Gold’s has not challenged the district court’s ruling that Chamberlain’s claims were not derivative and its argument on appeal must necessarily fail.

**E. GOLD’S CANNOT REMEDY ITS LACK OF PRESERVATION OR ITS FAILURE TO CHALLENGE THE DISTRICT COURT’S PRIOR RULINGS IN ITS REPLY BRIEF.**

Lastly, Gold’s cannot argue preservation or challenge the district court’s other rulings in its reply brief. “When a party fails to raise and argue an issue on appeal, or raises it for the first time in a reply brief, that issue is waived and will typically not be addressed by the appellate court.” State v. Johnson, 2017 UT 76, ¶ 15. See also Coleman v. Stevens, 2000 UT 98, ¶ 9, 17 P.3d 1122 (holding that “we will not consider matters raised for the first time in the reply brief”). As a result, Gold’s cannot raise any new arguments or challenge new rulings in its reply brief. Furthermore, Gold’s bore the burden of establishing, **in its opening brief**, where each issue was preserved for appeal and, if an issue was not preserved, why it should be considered anyway. UTAH R. APP. P. 24(a)(5)(B) (“Principal briefs must contain ... citation to the record showing that the issue was preserved for review; or a statement of grounds for seeking review of an issue not preserved”). Gold’s wholly failed to meet this burden. Instead, Gold’s generally referred to its Motion for Attorney Fees, its Reply in Support of Attorney Fees, its 2013 motion and

reply memorandum in support of summary judgment, and the transcript of the three-day bench trial. See Appellant Br. at 7-8. These general references were not supported by citations to the record. See UTAH R. APP. P. 24(e)(1). Similarly, Gold's was required to designate "the judgment or order, or part thereof, appealed from" in its notice of appeal and "summarize the party's position and ... state the specific relief sought on appeal" in its opening brief. See UTAH R. APP. P. 3(d), 24(a)(10). But in its Notice of Cross-Appeal and Appeal Brief, Gold's only claimed to be appealing the district court's March 2017 Ruling. Therefore, because Gold's failed to establish that its issues on appeal were preserved (or excepted from the preservation requirement), limited its appeal to the March 2017 Ruling, and only argued one (unpreserved) basis for liability in its opening brief, it is barred from making new arguments, claiming an exception to preservation, or extending its appeal to additional rulings in its reply.

## **II. GOLD'S IS ESTOPPED FROM ARGUING THAT CHAMBERLAIN'S CONVERSION, INTERFERENCE, AND CONSPIRACY CLAIMS AROSE FROM OR WERE RELATED TO THE LICENSE AGREEMENT.**

Gold's is estopped from claiming that Chamberlain's conversion, interference, and conspiracy claims arouse from or were related to the License Agreement because, earlier in the proceedings in the district court, Gold's successfully argued that Chamberlain's breach of contract claim did not arise from and was not related to the same transaction or occurrence as the conversion, interference, and conspiracy claims. "[A] person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained." Tracy Loan & Trust Co. v. Openshaw Inv. Co., 132 P.2d 388, 390 (1942). See also Occidental/Nebraska Fed. Sav. v. Mehr, 791 P.2d 217, 220 (Utah Ct. App. 1990) (holding that "[g]enerally in legal proceedings a party with knowledge of all the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change in circumstances, return to attack the validity

of the prior position or the outcome flowing from it” (citing 28 AM. JUR. 2D *Estoppel and Waiver* §§ 68-70 (1966)).

Here, Gold’s successfully moved for dismissal of Chamberlain’s breach of contract and negligence causes of action by arguing that they did not arise or relate to Chamberlain’s conspiracy, conversion, and interference claims, which had been asserted in the First Action. In its Reply in Support of Motion to Dismiss, Gold’s expressly argued that Chamberlain’s “contract and negligence claims do not arise out of the conduct, transactions, or occurrences set forth or attempted to be set forth in the pleadings” in the First Action. (R. 220). “There is no way that Gold’s Gym could divine from the prior asserted claims ... that these Plaintiffs, who are not parties to the License Agreement, would assert a breach of contract claim.” *Id.* (R. 218). Similarly, Gold’s argued that the “negligence claim also appears to arise out of the License Agreement, or breach thereof ... [t]here is no way that Gold’s Gym could have known that it would be subject to a negligence claim based upon the claims asserted in the” First Action. *Id.* (R. 219). Gold’s concluded that “[t]o the extent the claims **arise out of or are related to the License Agreement**, they are barred by the relevant statutes of limitation and the savings clause has no application ... The savings clause extends only to claims which were asserted ... in the prior action.” *Id.* (R. 219) (emphasis added). And, during oral argument, Gold’s “contend[ed] that what they placed in [the complaint in the First Action] is not, does not arise out of the conduct, transaction, or current set forth in the – attempted to be set forth in the original pleading ... [t]he issues arising out of breach of contract of the Franchise Agreement simply aren’t relevant to the types of claims that were asserted.” (R. 4367). In summary, Gold’s argued that Chamberlain’s breach of contract and negligence claims did not relate back to the First Action and were therefore barred by the statute of limitations because the conversion, conspiracy, and interference claims, which were pled in the First Action, did not arise from or relate to the License Agreement. Gold’s argument was successful. The district court held that the breach of contract and negligence claims were



not substantially similar to the conversion, conspiracy, and interference claims because they did not arise from or relate to the License Agreement. See 2011 Memorandum Decision and Order (R. 278). It therefore dismissed those claims with prejudice. Id.

However, in seeking its attorney fees, Gold's argues just the opposite. In its Motion for Attorney Fees, Gold's claimed that the License Agreement's attorney fee provision was applicable because Chamberlain's conversion, conspiracy, and interference claims arose from or related to the License Agreement. See Motion for Attorney Fees (R. 3822-3830). In denying the Motion for Attorney Fees, held that, with the exception of the breach of contract claim, none of Chamberlain's claims arose out of or related to the License Agreement. See March 2017 Ruling (R. 4340-4341). This was consistent with the district court's ruling in 2011.

While this Court has not previously addressed the circumstances presented by Gold's appeal – where a party successfully prevails on a cause of action by asserting one position in the case and then seeks attorney fees by asserting the opposition position – the policy reasons favoring estoppel apply to Gold's conduct here with equal force. It would clearly be inequitable and unjust for Gold's to prevail on Chamberlain's breach of contract claim by arguing that his other claim's did not arise out of or relate to the License Agreement, but then allow Gold's to recover its attorney fees by arguing the exact opposite. As a result, this Court should hold that Gold's is now estopped from arguing that the conversion, conspiracy, and interference claims arose from or are related to the License Agreement as a result of its previous conduct and, on this basis, affirm the district court's March 2017 Ruling.

### **III. GOLD'S ARGUMENTS REGARDING THE AMOUNT AND REASONABLENESS OF ITS FEES ARE NOT PROPERLY BEFORE THE COURT.**

This Court should decline to address Gold's arguments regarding the amount and reasonableness of its fees because they were never addressed by the district court.

“Calculation of reasonable attorney fees is in the sound discretion of the trial court and will not be overturned in the absence of a showing of a clear abuse of discretion.” Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). However, the district court never reached the amount or reasonableness of Gold’s claimed fees because it found no basis for awarding fees. See March 2017 Ruling (R. 4340-4341). Accordingly, if this Court reverses the decision of the district court, it should decline to reach these issues and instead remand so that the district court may make such a determination. See e.g. Sunridge Dev. Corp. v. RB&G Engineering, Inc., 2010 UT 6, ¶ 25 n. 6, 230 P.3d 1000 (2010) (declining to consider issue not addressed by lower court).

### **CONCLUSION**

For the foregoing reasons, Appellee Clark Chamberlain respectfully requests that the district court’s March 29, 2017 Ruling and Order be affirmed and Gold’s appeal denied.

RESPECTFULLY SUBMITTED this 20th day of May, 2018.

NADESAN BECK P.C.

/s/ Karthik Nadesan

Karthik Nadesan  
*Attorney for Appellant*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the 30-page limit set forth in Utah Rule of Appellate Procedure Rule 24(g) and complies with Utah Rule of Appellate Procedure 21(g) because it does not contain any non-public information.

/s/ Karthik Nadesan

Karthik Nadesan  
*Attorney for Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 20, 2018, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was emailed to the following:

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## **APPENDIX**

Exhibit A: Findings of Fact and Conclusions of Law (R. 3631-3665)

Exhibit B: License Agreement (R. 54-74)

Exhibit C: 2011 Memorandum Decision and Order (R. 275-280)

Exhibit D: Reply in support of Motion to Dismiss (R. 217-224)

Exhibit E: 2013 Memorandum Decision (R. 1427-1449)

Exhibit F: Motion for Attorney Fees (R. 3817-3840)

Exhibit G: Reply in Support of Motion for Attorney Fees (R. 4321-4330)

Exhibit H: March 2017 Ruling and Order (R. 4340-4343)

Exhibit I: Notice of Cross-Appeal (R. 4344-46)

# **EXHIBIT A**

**FILED DISTRICT COURT**  
**Third Judicial District**

**DEC 19 2016**

By: \_\_\_\_\_  
Salt Lake County

Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

<p>CLARK CHAMBERLAIN, ET AL.</p> <p>Plaintiffs,</p> <p>vs.</p> <p>VINCE ENGLE, ET AL.</p> <p>Defendants.</p>	<p><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p>Case No. 090919785</p> <p>Judge Todd Shaughnessy</p>
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This matter came before the court for a bench trial on November 1 through 3, 2016. Plaintiffs Clark Chamberlain and Brent Statham were represented by Karthik Nadesan and Holly Chamberlain, Defendant Gold's Gym International Inc. was represented by Blake Ostler, and Defendant St. George Fitness, LLC was represented by Brian Harrison. The Court having heard the testimony and arguments, and having considered the evidence and good cause appearing now therefore enters its Findings of Fact and Conclusions of Law as follows:

**FINDINGS OF FACT**

1. Plaintiff Clark Chamberlain ("Chamberlain") is a resident of Salt Lake County, Utah, but at some of the relevant times was a resident of Washington County, Utah.
2. Plaintiff Brent Statham ("Statham") is resident of California. However, for some time beginning in 2003, Statham was a resident of St. George, Utah and of Utah County, Utah.

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3. Defendant Vince Engle ("Engle") was a resident of Davis County, Utah. Plaintiffs served Engle on April 25, 2010, but he never filed a responsive pleading. Plaintiffs obtained a Default Certificate on September 27, 2012, but did not obtain a default judgment against him. Engle failed to appear at trial.

4. Defendant Health Source, Inc. ("Health Source") is a Utah corporation whose principal office was located in Salt Lake County, Utah, doing business in Washington County, Utah. Engle accepted service on behalf of Health Source, Inc. on April 25, 2010. Plaintiffs obtained a Certificate of Default against Health Source (a "Default Judgment" was entered, but in it damages were reserved).

5. Defendant Fitcorp, Inc. ("Fitcorp") is or was a Utah corporation. Engle accepted service on behalf of Fitcorp. Plaintiffs obtained a Certificate of Default against Fitcorp (a "Default Judgment" was entered, but in it damages were reserved).

6. Defendant Travis Izatt ("Izatt") is or was a resident of Davis County, Utah. Travis Izatt was never served with a Summons and Complaint in this matter.

7. Defendant Fitness Source, LLC ("Fitness Source") is or was a Utah limited liability. Fitness Source, LLC was never served with a Summons and Complaint in this matter.

8. Defendant O.P.M. Holdings, Inc. ("OPM") is or was a Utah corporation. OPM was never served with a Summons and Complaint in this matter.

9. Defendant Gold's Gym International, Inc. is a Delaware corporation ("Gold's Gym").



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10. Defendant St. George Fitness, LLC, doing business as Gold's Gym-Utah Group, ("St. George Fitness") is a Utah limited liability company whose principal office is located in Utah County, Utah, doing business in Washington County, Utah.

11. In 1998, Defendant Engle owned an exercise facility in St. George, Utah, operating under the name "Cardiax."

12. Beginning in or around 1998, The Bluffs, LC ("The Bluffs") was building a commercial development located at 384 North Bluff Street in St. George, Utah. Statham, Chamberlain, and Chamberlain's father were members of The Bluffs. As part of this development, The Bluffs decided to pursue a gym or workout facility as its anchor or central tenant.

13. Plaintiffs, as members of The Bluffs, were involved in the development and marketing of the project and efforts to secure an anchor tenant.

14. Plaintiffs desired to open a Gold's Gym in The Bluffs, and to that end made a preliminary arrangement with Gold's Gym to acquire an exclusive right to the St. George area upon payment of a deposit. The Bluffs did not pay that deposit but instead sought to enter a joint venture with the "Provo Group" to open the gym. The persons Plaintiffs refer to as the "Provo Group" are various individuals who are or were at one time associated with defendant St. George Fitness. Plaintiffs had preliminary discussions with the "Provo Group" but no agreement was reached at that time. According to St. George Fitness, the "Provo Group" was not interested in the arrangement because The Bluffs' site was, in their view, inadequate for various reasons.

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15. No written agreement was ever signed between these parties and no enforceable agreement was ever reached.

16. The "Provo Group" did not pay to Gold's Gym a deposit that was necessary to reserve the territory, and therefore Plaintiffs did not secure the exclusive rights to the St. George area.

17. In May 1999, Engle obtained the first option to secure the Gold's Gym license in the St. George area by paying a deposit of \$8,500.00 to Gold's Gym. When Plaintiffs learned that Engle had secured the option for a Gold's Gym in St. George, they agreed to partner with him on the gym. Together they formed an entity that was to be known as Health Source of St. George, LLC ("HSSG").

18. Plaintiffs and Engle agreed that Engle would have primary responsibility for managing the gym and be the acting managing member of HSSG. Engle agreed to contribute the exercise and other equipment from Cardiax for installation at The Bluffs and used as part of the operation of the gym.

19. Plaintiffs maintain that both Engle and Gold's Gym told them that Gold's Gym operators could expect to make a profit of \$200,000 to \$400,000 by their third full year of operation. Even if such statements were made – and Gold's Gym at least denies making such statements – they are so vague and so conditional that no reasonable business person would rely on them as accurately reflecting the profits of the gym at issue.

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20. The gym was a startup business. There was no evidence of an operating history or track record, there were few customers, and the gym was opening in a new and untested location. At that time, it would have been very difficult to accurately predict whether or when the gym reasonably could be expected to make a profit, what that profit would be, what investments would be required to achieve that profit, and for how long any such profits could continue. Other than what is identified in the preceding paragraph, Plaintiffs did not present evidence of the profitability of similar gyms opening in similar circumstances, or even similarly situated businesses. Plaintiffs also did not call an expert witness to testify on the subject of lost profits.

21. On or about June 22, 1999, HSSG entered into a license agreement (“License Agreement”) with Gold’s Gym. The address identified for the gym was the Cardiax gym location on Tabernacle Drive, with a note that it would be expanded or relocated no later than January 1, 2000. The License Agreement was signed by Engle as “co-manager” for HSSG, which had not been formed yet. Engle, Plaintiffs, and Chamberlain’s father all signed personal guarantees, which were included as part of the License Agreement.

22. The Articles of Organization for HSSG were filed several months later on October 14, 1999.

23. The License Agreement had a term of 5 years with a right to seek renewal for an additional 5-year term, subject to satisfying certain contingencies, including, if necessary, relocating the site and building it out to Gold’s Gym’s specifications, remodeling the existing site,

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expanding the facility, and/or adding improvements, equipment, fixtures, furnishings, signs, etc, to Gold's Gym's satisfaction. There was no requirement that it be renewed.

24. On or about July 18, 1999, HSSG, as a tenant, entered into a lease agreement (the "Lease Agreement") with The Bluffs, as a landlord. The Lease Agreement was signed by Engle on behalf of HSSG.

25. The Bluffs agreed to purchase the equipment, furniture, etc. that Engle had been using in his Cardiax facility for \$150,000, financed via a promissory note, and make it available for use by the new Gold's Gym facility as part of the tenant improvements.

26. On or about August 6, 1999, HSSG and The Bluffs added an addendum (the "Addendum") to their Lease Agreement. (PI Ex. 6).

27. The Addendum stated, among other things:

- a) that The Bluffs agreed to purchase furniture, equipment, etc. from Cardiax Inc. for \$150,000 on a promissory note;
- b) that The Bluffs would provide HSSG with \$40,000 for startup and marketing costs for the opening;
- c) that Engle, or his entity Health Source, Inc., was to be the Manager of HSSG and would operate the new gym. Health Source, Inc. (a.k.a. Engle) would receive 6% of the gross revenue as a management fee for operating the facility;
- d) that insofar as Engle had signed any documents or made any commitments, it was intended to be on behalf of his entity, Health Source, Inc.;

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e) that as a Manager, Health Source, Inc. was responsible for providing management supervision, accounting, marketing materials, advertising, sales management, staffing, and insuring state regulations and permits were established.

28. The HSSG Operating Agreement stated that Clark Chamberlain and Brent Statham each owned 12.5% of HSSG, Doug Chamberlain, through his entity Chamberlain Enterprises, owned 25%, and Engle, through Health Source, Inc., owned 50% of HSSG.

29. The Operating Agreement also provided that Health Source, Inc. and Chamberlain Enterprises would be co-managing members of HSSG.

30. Paragraph 6.01 states:

(a) Except as set forth in Paragraph 6.01(b), the Managers shall have full and exclusive power to manage and control the business and affairs of the Company, and the Members shall have no right to act on behalf of or bind the Company. The Managers shall have all the rights, powers and obligations of a manager as provided in the Act, and as otherwise provided by law, and any action taken by the Managers shall constitute the act of and serve to bind the Company in dealing with the Managers, no persons shall be required to inquire into and all persons are entitled to rely conclusively on, the authority of the Managers to bind the Company.

(b) Notwithstanding the provisions of Paragraph 6.01(a), the Managers shall not (i) confess a judgment against the Company or execute or deliver any assignment for the benefit of creditors of the Company or (ii) sell or assign substantially all the Property in bulk, without the written consent of the Members holding a majority of the Membership Interests.

31. There is a dispute between the parties about whether Gold's Gym was ever sent a copy of the signed Operating Agreement.

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32. In or around October 1999, Carolyn Shepard, the Gold's Gym Licensing Coordinator, sent a "fully executed 5-year License Agreement for the St. George territory" having a commencement date of June 22, 1999.

33. Engle managed and ran the daily operations of the St. George Gold's Gym. Construction of the facilities at The Bluffs was completed in February or March 2000, and the gym opened at this location sometime around June 2000.

34. By late 2000, Plaintiffs no longer lived in the St. George area and were not personally aware of the daily operations of the St. George Gold's Gym. Plaintiffs relied on Engle to provide information to Doug Chamberlain/Chamberlain Enterprises regarding the management of HSSG.

35. Sometime in December 2000, Engle provided a Profit and Loss Statement to Doug Chamberlain who in turn provided it to Plaintiffs. However, Plaintiffs did not know who prepared it, what underlying information was relied on to create the numbers, and could not vouch for its accuracy. The sheet shows net income for the period of January through December 2000 of \$6,249.62.

36. Plaintiffs received no further Profit and Loss Statements or any other financial information from Engle, including for years 2001, 2002, 2003, 2004, or 2005. Plaintiffs likewise never received any K-1's for HSSG or other tax documents that would have been necessary during that time period. Plaintiffs never inquired as to why such documents were not provided. Plaintiffs never received any distributions or other payments from HSSG. Plaintiffs' Ex. 5 is a one-page profit

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and loss statement for the period from January through October 2002; it shows net income of \$102,837.48. Plaintiffs were unable to provide any further information about this P&L statement, including information from which the court could determine its accuracy.

37. From and after December 2000, Engle failed to:
- a) keep proper operating reports and records for the LLC, and provide such documentation to Plaintiffs and to Brent Chamberlain;
  - b) provide Plaintiffs with any financial profit and loss statements;
  - c) ever distribute any net operating profits to Plaintiffs;
  - d) provide Plaintiffs with K-1 tax forms for year-end tax filing for the years 2000, 2001, and 2002; and
  - e) hold any corporate meetings with Plaintiffs regarding the LLC.

38. As became clear later, Engle failed to do these things because he had converted for his own use and benefit all of the assets of HSSG, without any disclosure to his business partners.

39. On or about July 9, 2001, the Department of Commerce issued a Certificate of Involuntary Dissolution for HSSG based upon its failure to renew. Statham received a copy of the certificate.

40. Upon receiving it, Statham testified that he contacted Engle regarding his failure to renew HSSG. Ultimately, Statham had to contact his own attorney to file the appropriate paperwork to renew HSSG. During this time Plaintiffs did not receive any communication verbal or

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written or in any other form from Engle and/or Health Source, Inc. either directly or indirectly through Doug Chamberlain, the other managing member.

41. Doug Chamberlain passed away in 2011 and therefore the court received no testimony from him. The court finds it unlikely that Doug Chamberlain became aware of Engle's misconduct at any time prior to Plaintiffs becoming aware of it, given that neither he nor Plaintiffs took any meaningful action at the time in question.

42. During late 2000 and early 2001, for reasons unrelated to the issues in this case, Gold's Gym was rolling out a franchising program for its various locations and was attempting to move from licensing agreements, such as the one it signed with HSSG, to franchise agreements. Gold's Gym was giving its existing licensees various incentives for doing so

43. On January 2, 2001, Michele Bauzon, an employee of Gold's Gym, sent a Franchise Agreement Worksheet and a copy of the Gold's Gym Franchiser offering circular to Engle and HSSG. (Pl. Ex. 38)

44. A few months later, on April 10, 2001, Engle spoke with a Gold's Gym employee, Rebecca Shroyer about entering a Franchise Agreement for the St. George location. On that date, Ms. Shroyer faxed to Engle another copy of the blank Franchise Agreement Worksheets, told him to "fill [them] out completely" and "fax back to me by the due date, today." (Pl. Ex. 7).

45. Engle wrote a letter to Ms. Shroyer in which he stated:

Thanks for the fax. I have started correspondence with Jay Gardner in regards to some changes in ownership percentages. As you are aware we had 3 shareholders of HealthSource Inc. We have chosen to divide our partnership and each



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shareholder has agreed to purchase certain assets or locations. As you know Gary Nielsen owned 4% of HEALTHSOURCE and he recently purchased Ogden and Layton. Mer Rasmussen and I have been 48% owners each. We have not completed and I know we have to get final approval from Gold's Gym Corporate, but the plan is for Mer Rasmussen to own 100% of West Valley *and I will own 100% of St. George. St. George was done in a joint partnership with Brent Statham and partners who are no longer involved.* So I am filling out these worksheets assuming all this is approved by Jay Gardner or other Gold's Gym Corporate representative.

Please feel free to call me at 801-971-8785 if you have any questions. I will be traveling to St. George tomorrow and this is my cell number.

Thanks for your help.

Sincerely

Vince Engle /s/

Vince Engle, President

HealthSource, Inc.

(Gold's Gym Ex. 113 (emphasis added)).

46. The representations made by Engle that "Brent Statham and partners...are no longer involved [in the St. George Gold's Gym/HSSG]" and that "I will own 100% of St. George" were false, were known by Engle to be false, and were made with the intent of depriving Plaintiffs of their interest in the business. No other members of HSSG had resigned or transferred their interests in HSSG to either Engle or Health Source, Inc.

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47. Plaintiffs have not presented evidence sufficient to show that Gold's Gym knew Engle's statements were false or that Gold's Gym knew Engle's reasons for making these false statements.

48. On April 10, 2001, Engle also filled out and returned the Gold's Gym Franchising, Inc. Franchise Agreement Worksheet. Engle filled out the worksheet in the name of "Fitcorp, Inc." for the purpose of establishing a Gold's Gym franchise at The Bluffs location. (Pl. Ex. 8). The application contains a reference to "June 22, 1999 (old/effective)" – a clear reference to the HSSG License Agreement. In it, Engle represented that he was the President, "only shareholder," and owned "100% of [sic] stock" of Fitcorp.

49. Gold's Gym did not obtain from Plaintiffs any signed consent to this transaction, or any other document that would confirm Engle's representation that Plaintiffs were no longer involved. Gold's Gym appears not to have followed many of its standard procedures in the process of consenting to and ultimately converting the License Agreement to a Franchise Agreement, and changing the identity of the licensee/franchisee.

50. Gold's Gym and Fitcorp entered a Gold's Gym Franchising, Inc. Charter Franchise Agreement. It was dated April 17, 2003, but backdated to June 22, 2001, 2 years after the effective date of the original HSSG License Agreement. (Pl Ex. 12).

51. Engle, now acting through Fitcorp, continued to operate the St. George Gold's Gym until early 2003. On or about January 1, 2003, Fitcorp, through Engle, sold the St. George Gold's

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Gym to OPM Holdings, Inc. ("OPM") and Travis Izatt. Fitcorp and OPM entered into an Agreement for Sale of Assets.

52. The purchase price was \$350,000.00, which included inventory, furniture, fixtures, goodwill, membership rights, and Gold's Gym franchise rights. (Pl Ex. 28). The buyers also assumed The Bluffs' real estate lease and the underlying note for equipment and leasehold improvements. Fitcorp retained a security interest in all goods and equipment to secure buyer's payment of the \$150,000 balance of the purchase price (Pl Ex. 31). The Fitcorp to OPM agreement does not allocate what value the parties gave to the various assets of Fitcorp.

53. Gold's Gym did not obtain signed releases from Plaintiffs upon Fitcorp's sale of the St. George Gold's Gym to OPM, nor did it notify Plaintiffs of the sale. No notice of the transfer from Fitcorp to OPM was given to the other members of HSSG and they did not consent to the transfer.

54. In late April 2003, Gold's Gym drafted documents to approve a transfer of the franchise from Fitcorp to OPM. On May 8, 2003, Gold's Gym acknowledged and consented to the transfer from Fitcorp to OPM by signing a Consent to Assignment of Franchise Documents. Gold's Gym signed the document as franchisor; Engle, on behalf of Fitcorp, signed the form as the transferor; and Izatt, signed on behalf of "Fitness Source, LLC" as the transferee. Gold's Gym did not obtain, or require, a similar consent when the HSSG / Gold's Gym License Agreement was converted to a Fitcorp / Gold's Gym Franchise Agreement.

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55. Gold's Gym maintains that it had no knowledge of the machinations by which Engle had converted the HSSG / Gold's Gym License Agreement into a Fitcorp / Gold's Gym Franchise Agreement – and in the process eliminated Plaintiffs' interests in the gym. On the contrary, Gold's Gym maintains that it did not know about any of this until it was contacted by Plaintiffs after the Fitcorp to OPM transaction.

56. The date on which Plaintiffs spoke to Gold's Gym is therefore critical to understand whether, as Gold's Gym claims, it didn't know about Engle's activities until it was too late; or whether Gold's Gym knew what Engle was up to and aided and assisting him by approving the transfer of the franchise to OPM. As noted above, Gold's Gym approved that transfer in an agreement dated May 8, 2003.

57. Plaintiffs discovered the transfer from Fitcorp to OPM shortly after it occurred in January 2003. Plaintiffs retained an attorney to send a demand letter to Izatt. On February 10, 2003, Jay Bell, acting as attorney for Chamberlain Enterprises, Clark Chamberlain, and Brent Statham, wrote a letter to Izatt stating: "My clients have been informed that Vince Ingle [sic], also one of the two managers of Health Source [HSSG], may have licensed, leased or sold the Gold's Gym facility to you or one of your entities."

58. So, it is clear Plaintiffs learned about the transfer to OPM sometime prior to February 10, 2003. Statham testified that he visited the gym in January 2003 after moving back to St. George and, when he asked for Engle, was told that Izatt owned the gym. Because Plaintiffs were aware by this time that Engle had purported to sell the gym and its assets to Izatt, that Izatt

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was purporting to operate the Gold's Gym, and that they had not received anything from Engle regarding their interest in the gym, Plaintiffs must have known about at least some of Engle's misdeeds including, most important, that he had sold property in which Plaintiffs had a 50% interest without Plaintiffs knowledge or consent.

59. Satham testified that he contacted Gold's Gym to discuss the transfer to Izatt and to ask how a transfer could have taken place without Plaintiffs' knowledge or consent. At trial, Satham testified that he spoke with Dawn Knight at Gold's Gym and that this conversation took place in March 2003. As noted above, establishing that this conversation took place in March 2003 – or some time prior to May 8, 2003 – is critical to Plaintiffs' claims.

60. In earlier proceedings, however, Satham testified that the conversation took place in May 2003, potentially *after* Gold's Gym had consented to the transfer, and on another occasion, Satham testified that the conversation took place in May 2005, two *years* later. Neither Satham nor Chamberlain, nor anyone else, memorialized this conversation in writing. Apparently no one other than Satham, including Chamberlain, Chamberlain's father, or their attorney at the time, communicated with Gold's Gym about these issues; and no one on Plaintiffs' side communicated with Gold's Gym in writing.

61. According to Satham, Ms. Knight advised him that the transfer to OPM had already taken place, she hoped Gold's Gym had not made a mistake, and Satham should speak with Eduardo Afonso if he wished to discuss the matter further. That version of events is consistent with the conversation having taken place sometime after May 8, 2003.

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62. Statham testified that shortly after his conversation with Ms. Knight, he received a call from Mr. Afonso. Statham testified that, in response to a question about how HSSG's contract with Gold's Gym could have been transferred without the other members' consent, Afonso stated that: "we just took Vince [Engle]'s word on it, and we've both been victimized." Like Ms. Knight, Afonso stated that Gold's Gym could not do anything about it because the transfer had already occurred and Statham that he would have to resolve the matter with Engle.

63. Afonso confirmed that he spoke with Statham on the phone, and Afonso's testimony concerning the substance of that call largely agreed with Statham's – Afonso testified that he told Statham: (a) Gold's Gym had relied on Engle's representation as president of Health Source and managing member of HSSG that the other members were no longer involved; (b) both of them had been defrauded by Engle; (c) the transfer of the interest had already occurred; and (d) Statham would have to resolve the matter with Engle.

64. Afonso testified that the call took place sometime between September 2004 and July 2005. According to Afonso, this had to be the case because it occurred shortly before Ms. Knight left employment with Gold's Gym as his assistant and while Gold's Gym's corporate offices were in the process of moving from California to Texas. That move, according to Afonso, took place between September 2004 and July 2005.

65. Afonso likewise was unable to find anything in writing documenting the date of the call. Given Statham's relationship and direct interest in the dispute, he – or someone on his side – would be expected to have a clearer recollection of the event than Afonso or others at Gold's

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Gym, who were handling a variety of matters for hundreds of franchisees across the country. But Statham's testimony is inconsistent and no one bothered to document the conversation in writing. Also, Afonso attaches the timing of the call not to a specific memory of the date, but to events that were going on in his office at the time and to Ms. Knight's employment, making it more credible. Finally, due to substantial delays in this litigation, it has become exceedingly difficult for anyone to accurately identify the date of the call inasmuch as it occurred 12 to 13 years prior to trial. On balance, Plaintiffs bear the burden of proof on this issue and they failed to meet their burden of showing, by a preponderance of evidence, that the conversation took place prior to the May 8, 2003, consent.

66. Thus, Gold's Gym was not on notice of the falsity of Engle's representations regarding Plaintiffs contained in his April 10, 2001, letter at the time Gold's Gym signed the consent to the transfer of the franchise from Fitcorp to OPM.

67. Whether Gold's Gym complied with its contractual obligations under the License Agreement with HSSG is not an issue because the claims asserted by Plaintiffs for breach of contract and for negligence have previously been dismissed with prejudice.

68. On June 27, 2005, Gold's Gym sent to Izatt a Preliminary Agreement, the purpose of which was to begin the process of renewing the Franchise Agreement with OPM. (PI Ex. 41). However, on December 27, 2005, Gold's Gym terminated the Preliminary Agreement because Izatt had failed to return a signed copy of the Agreement. (PI Ex. 25).

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69. Plaintiffs claim that, in early 2005, Statham, Chamberlain and Doug Chamberlain voted to expel HealthSource, Inc. as a member of HSSG based on Engle's misfeasance, and that after the vote, Doug Chamberlain's entity, Chamberlain Enterprises, owned 50% of the membership interests of HSSG and Chamberlain and Statham each owned 25%. Plaintiffs further claim that, at some point, Chamberlain Enterprises conveyed and HSSG distributed to Chamberlain and Statham whatever rights they may have had in the claims being pursued in this case.

70. Plaintiffs filed a lawsuit against at least some of the defendants in this case in July 2005 (Case No. 050912077). That case was dismissed by the court without prejudice due to inactivity on or about November 19, 2008. This case was filed on November 18, 2009 – one day short of one year.

71. Also in 2005, St. George Fitness agreed to purchase the franchise rights for the St. George Gold's Gym from Izatt/OPM. Troy Peterson, who testified as a representative of St. George Fitness, testified that Statham never contacted him to tell him about the existence of the original lawsuit filed by Plaintiffs in July 2005.

72. The transaction closed on or about February 1, 2006. St. George Fitness purchased equipment, which was unencumbered by a UCC-1 Financing Statement, member obligations, and other debts and liabilities. Thereafter, St. George Fitness \$1,500,000 in leasehold improvements for the new "Mall" location.

73. St. George Fitness relocated the gym to a different facility that was approximately 52,000 square feet (about 2½ times larger than The Bluffs facility). It included amenities not



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available at The Bluffs facility such as a swimming pool, basketball courts, saunas, locker rooms, and more parking. The St. George Fitness facility, lease, business operations, etc are not comparable to the facility, lease, and business operations at The Bluffs.

74. St. George Fitness paid for the franchise rights, together with equipment, furnishings, and membership rights by agreeing to assume debt of approximately \$300,000.00 and to service outstanding membership contracts for which it received no membership fees.

75. On or about March 1, 2006, Gold's Gym entered a Franchise Agreement with St. George Fitness for the gym. St. George Fitness was served with a copy of the complaint filed in the original case in or around April 2006. St. George Fitness did not have knowledge or notice of the dispute between Plaintiffs and the various other defendants at the time it closed on the purchase.

76. St. George Fitness was willing to pay for the Gold's Gym franchise territory rights and other assets, despite the fact that the parties to the transaction attributed no value to them in the sale, because St. George Fitness had access to a favorable lease at the new facility that made it worth paying the amount of money. There is no evidence that Plaintiffs ever had a similar opportunity for such a favorable lease.

77. The purchase by St. George Fitness of the Gold's Gym territory franchise rights occurred after the time that the License Agreement between HSSG and Gold's Gym would have expired by its own terms.

78. The original License Agreement would have terminated under its own terms on June 22, 2004 unless renewed by the parties. Plaintiffs maintain that Gold's Gym would have

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renewed the agreement on substantially the same terms. Plaintiffs have not provided sufficient, credible evidence to support this. The evidence they rely on is essentially their own word. They presented little to no evidence regarding Gold's Gym's practices or standards regarding renewal at the time. They also have not addressed the likelihood that Gold's Gym would have required changes to the space or to the business operations as a condition of renewal, and what impact those changes would have had on HSSG's operation of the gym. In short, Plaintiffs' evidence regarding renewal of the License Agreement is speculative.

79. The License Agreement did not include the rights to any other assets other than the use of the Gold's Gym name.

80. Gold's Gym was never in possession of the equipment, furnishings, and/or membership agreements for the St. George Gold's Gym.

81. There is no evidence of the value of the equipment, furnishings, gym, memberships, etc. as of the date of the alleged transfer of the License Agreement.

82. Plaintiffs have not presented sufficient evidence to permit the court to conclude that the revenue, expenses, or profits of the gym operated by St. George Fitness are reasonably comparable to or representative of the actual or reasonably expected revenue, expenses, or profits of a gym operated at The Bluffs location. The two gyms varied significantly in size, location, operations, management, marketing, and amenities.

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83. According to Peterson, St. George Fitness realized profits from the gym in 2006, 2007, and 2008. From 2009 through 2014, St. George Fitness suffered substantial losses. On November 30, 2014, St. George Fitness was acquired by Vasa Fitness, LLC.

### CONCLUSIONS OF LAW

Based on the evidence presented, the court adopts the following conclusions of law and disposition of the remaining claims in this case. The following claims by Plaintiffs against Gold's Gym or St. George Fitness, the only defendants who appeared at trial to defend against them, are the following:<sup>1</sup> Count 4, for civil conspiracy, asserted against Gold's Gym; Count 5, for conversion, asserted against Gold's Gym and St. George Fitness; and Counts 12 and 13, for intentional interference with contracts and/or other economic relations, asserted against Gold's Gym and St. George Fitness. Plaintiffs obtained a default certificate against all other defendants, on all claims asserted by Plaintiffs against those defendants, and liability on those claims is therefore established as a matter of law and procedure. The only question that remains with respect to those claims is the amount of damages. *See* Utah R. Civ. P. 55(b)(2).

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<sup>1</sup> To the extent any other claims against Gold's Gym or St. George Fitness may technically remain in the case, Plaintiffs have waived those claims by not identifying them for the court at the time of trial. During trial, the court asked counsel to identify the claims for which Plaintiffs sought relief, and the court addresses those claims here. To the extent any claim or issue raised during trial by the parties is not explicitly addressed in these findings or conclusions, the claim or issue is rejected by the court and further discussion is unnecessary.

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In a Memorandum Decision dated September 6, 2013, Judge Toomey made a series of rulings on various defenses to the claims. This court addressed many of those same issues in orders dated April 9, 2014, and November 9, 2015. Having now heard the evidence, the court reaffirms the following rulings:

(i) Plaintiffs' remaining claims are not barred by the doctrine of laches. *See DOIT Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 845 (Utah 1996).

(ii) Plaintiffs' remaining claims are not barred by the statute of limitations because they accrued in 2003 when Plaintiffs discovered that Engle had sold the gym to Izatt.

(iii) Plaintiffs have standing to bring their claims and those claims are not derivative.

Also, although the copy of the License Agreement received in evidence, Exhibit 49, does not contain a signature by Gold's Gym, Gold's Gym acted at all relevant times as though the License Agreement was binding and enforceable. The court therefore finds that the License Agreement was a contract binding on the parties to it.

#### **I. CIVIL CONSPIRACY**

The elements for a claim of civil conspiracy are as follows: (1) a combination of two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result thereof. *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah App. 1987). In addition, the "claim of civil conspiracy requires, as one of its essential elements, an underlying tort." *Estrada v. Mendoza*, 2012 UT App 82, p.13 (Utah Ct. App. 2012) (citation omitted). The burden of proof for a

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civil conspiracy claim is clear and convincing evidence. *Crane Co. v. Dahl*, 576 P.2d 870,872 (Utah 1978), *Israel v. Pagan*, 746 P.2d 785 (Utah App. 1981).

Plaintiffs only possible conspiracy claim would involve Gold's Gym conspiring with Engle to deprive Plaintiffs of their ownership interest in the St. George gym. Plaintiffs have shown, by clear and convincing evidence, that Engle committed any one of a number of torts against them, including fraud, breach of fiduciary duty, etc. And Engle, in the course of committing those torts, engaged in one or more unlawful, overt acts. But to find Gold's Gym liable for conspiring with Engle, Plaintiffs also must show that there was an object to be accomplished and a meeting of the minds between Gold's Gym and Engle on that object or on a course of conduct to achieve that object. Plaintiffs must make this showing by clear and convincing evidence. Gold's Gym has failed to do so. For there to be a meeting of the minds on an unlawful objective, Plaintiffs would have to show, by clear and convincing evidence, that Gold's Gym was aware of Engle's plan to surreptitiously eliminate Plaintiffs' ownership in the St. George gym through the device of converting the License Agreement to a Franchise Agreement, and in so doing change the franchisee from HSSG, an entity in which Plaintiffs had a membership interest, to Fitcorp, an entity in which they do not have an interest. Stated somewhat differently, Plaintiffs would have to show, clearly and convincingly, that Gold's Gym knew the falsity of Engle's statement in his April 10, 2001, letter that "Brent Statham and his partners ... are no longer involved." 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 –

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even if that were true, and the court does not find it is – would not be sufficient. For conspiracy liability to attach, Plaintiffs would have to show that Gold's Gym knew the statement was false, Engle's objective in making it, and a meeting of the minds on the objective to be accomplished. Plaintiffs have not made this showing.

The termination of Izatt/OPM's Franchise Agreement, and subsequent award of a franchise to St. George Fitness, is even further removed. Plaintiffs have not shown that Gold's Gym took these actions as part of a conspiracy to deprive Plaintiffs of their interest in the gym, as opposed to pursuing Gold's Gym's legitimate business objectives and/or the requirements of its contracts with its franchisees. And although motive is not an element of these claims, Plaintiffs were never able to identify any non-speculative reason why Gold's Gym would participate in such a conspiracy; or, stated differently, what was in it for Gold's Gym. The lack of any plausible, non-speculative motive undercuts the credibility of Plaintiffs' claims. Additionally, Plaintiffs cannot show recoverable damages, for the reasons discussed below.

Accordingly, the claim for civil conspiracy must be dismissed with prejudice.

## II. CONVERSION

"A conversion is an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Allred v. Hinkley*, 8 Utah 2d 73, 76, 328 P.2d 726, 728 (Utah 1958). "[A] party alleging conversion must show that he or she is entitled to immediate possession of the property at the time of the alleged conversion." *Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 20, 974 P.2d 288, 296. "In short,

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a conversion does not occur until the defendant exercises control over property that is inconsistent with the plaintiff's right of possession to that property." *Id.* (emphasis added). Under the traditional, common law rule, which appears to be the rule in Utah, "one who purchases converted goods from one who has no title is himself a converter by the very act of purchase. The purchaser may be wholly innocent, he may pay value for the goods and he may act in good faith. He is nevertheless a converter." 1 Dobbs, et al., *The Law of Torts* (2d ed. 2011) § 72; *see also* Restatement (Second) of Torts § 229 cmt e ("[O]ne receiving a chattel from a third person with intent to acquire a proprietary interest in it is liable without a demand for its return by the person entitled to possession, although he takes possession of the chattel without knowledge or reason to know that the third person has no power to transfer the proprietary interest. The mere receipt of the possession of the goods under such circumstances is a conversion."). "[A] bona fide purchaser of goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods." *Allred v. Hinkley*, 328 P.2d 726, 727 (Utah 1958).

Plaintiffs claim that defendants converted for their own use the gym equipment, furniture, and fixtures that were installed in The Bluffs location, subsequently sold to Izatt/OPM, and then sold to St. George Fitness. Because Gold's Gym never had ownership, custody, or control of any of that equipment, Plaintiffs appear to concede that a claim for conversion of the equipment, furniture, and fixtures cannot be asserted against Gold's Gym; to the extent Plaintiffs do not concede this point, the court finds that a conversion claim against Gold's Gym for this property fails on this basis. Plaintiffs do assert this claim against St. George Fitness. However, the gym

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equipment, furniture and fixtures were, at all material times, owned by The Bluffs, not HSSG or the Plaintiffs. The handwritten changes made to the lease agreement between The Bluffs and HSSG (Pl. Ex. 48) recite that the "lessee [HSSG] agrees to bring fixtures required for the completion of the Bluffs St Gym from two Cardiax gyms lessee is currently operating...." It further states that the "lessor [The Bluffs] agrees to pay lessee an agreed to value for these items from lessees tenant improvement budget All improvements paid for from the TI Budget will remain the property of the lessor until the termination of the lease."<sup>2</sup> The typewritten addendum to the lease (Pl. Ex. 6) states:

The Bluffs, LLC has agreed to purchase specific furniture, equipment, cabinetry, flooring, computers and other general equipment from HealthSource Inc or Cardiax Inc from the St. George and Highland Drive locations of Cardiax. This equipment purchase will be for \$150,000 dollars [sic] and will be paid in full no later than February 15, 2000. The Bluffs will execute a promissory note for such equipment upon receipt thereof. The payment of such note will be paid direct to K.E.B. Financial for reduction of a liability owed by Cardiax or HealthSource Inc.

Thus, during the period from 2000 through 2006 – the period during which the equipment necessarily must have been converted – it was not owned by HSSG or by the Plaintiffs. It was owned by The Bluffs. Plaintiffs testified that, despite the foregoing written agreements, HSSG and not The Bluffs purchased and owned the equipment, and that The Bluffs effectively financed

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<sup>2</sup> Under the lease, the tenant (HSSG) was given a \$400,000 tenant improvement budget to build out the space. The lease recites that HSSG could use part of that TI budget to purchase the equipment, and that the equipment would then be owned by the landlord.



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HSSG's purchase, with HSSG paying back The Bluffs through increased rent payments. Plaintiffs, however, did not present any documents that would show a transfer of the equipment to them or to HSSG. As a result, to the extent any party has a claim for conversion of that property, it would be The Bluffs, and not HSSG or Plaintiffs. Additionally, Plaintiffs failed to present sufficient evidence of the value of the equipment at the time it was allegedly converted. In 1999, the parties placed a value on the equipment of \$150,000 but it is not clear whether that truly represents its value at that time as opposed to, for example, the amounts owing to financing companies for its original purchase.<sup>3</sup> No evidence was presented concerning what specifically the equipment consisted of in 2001 or in 2005, let alone its value at either of those times. Plaintiffs' claim for conversion of the furniture, fixtures, and equipment therefore fails and must be dismissed.

Next, Plaintiffs claim that Gold's Gym and St. George Fitness converted for their own use and benefit contract rights; specifically, the contracts with members of the gym and the corresponding benefits that flow from those contracts.<sup>4</sup> To begin, it is not clear to the court that

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<sup>3</sup> The documents reflect that The Bluffs was to make payments directly to a finance company to whom Engle and/or Cardiax must have owed money, which could have been for the original purchase of the equipment.

<sup>4</sup> Plaintiffs disclaimed any claim that their conversion claim is directed to other contract rights, such as rights under the License Agreement between Gold's Gym and HSSG. Those rights were never held or asserted to be held by Gold's Gym – Gold's Gym was the licensor of those rights. Also, the 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.

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these types of intangible property constitute a “chattel” or personal property capable of being converted. But even they are, Gold’s Gym never took possession, custody, or control of, and never claimed any rights to, any gym membership contracts. Nor did Gold’s Gym ever accept any benefits from the membership contracts. Those contracts passed to the various purchasers of the gym; Gold’s Gym’s only role in connection with those transactions was consenting to or approving the transfer of the franchise. Approving the transfer of the franchise does not amount to exercising control over membership contracts owned by the franchisee. Gold’s Gym therefore did not, and could not have, converted those membership contracts.

With respect to St. George Fitness, Plaintiffs failed to produce evidence sufficient to permit the court to identify any membership contracts that were in existence at the time Engle converted them; any membership contracts that were in existence at the time Engle transferred them to Izatt/OPM; and finally any membership contracts that were in existence when St. George Fitness took over in 2006. Beyond this, Plaintiffs did not introduce evidence sufficient to permit the court to determine the value of any of those membership contracts. So, even if membership contracts existed, and ultimately came into possession of St. George Fitness through its purchase agreement with Izatt/OPM, the court has no way to accurately determine what those contracts were or how much those contracts were worth. The conversion claim against St. George Fitness fails to this reasons.

Plaintiffs’ conversion claim against Gold’s Gym and St. George Fitness must be dismissed with prejudice.

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**III. INTENTIONAL INTERFERENCE**

To prevail on a claim for tortious interference under Utah law, “a plaintiff must prove by a preponderance of the evidence (1) that the defendant intentionally interfered with the plaintiff’s existing or potential economic relations, (2) ... by improper means, (3) causing injury to the plaintiff.” *Eldridge v. Johndrow*, 2015 UT 21, ¶ 70, 345 P.3d 553, 565 (citations omitted).

Plaintiffs’ claims for intentional interference fail for many of the same reasons its conspiracy and conversion claims fail. Here, Plaintiffs claim that the contracts and/or economic relations with which Gold’s Gym and St. George Fitness interfered were either HSSG’s license agreement or the contracts with gym members. Insofar as Plaintiffs 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 Plaintiffs cannot sue Gold’s Gym for interfering with a contract to which it is a party. And St. George Fitness did not interfere with the License Agreement because it ceased to exist years before St. George Fitness purchased the gym from Izatt/OPM, was terminated long before St. George Fitness came on the scene, and this was done for reasons wholly unrelated to St. George Fitness. And because all these agreements predated St. George Fitness’s involvement, St. George Fitness cannot be said to have taken any intentional actions to interfere with them. There is no factual basis for a claim of interfering with Plaintiffs’ existing or prospective economic relationship with Gold’s Gym.

Plaintiffs instead seem to be claiming that Gold’s Gym and St. George Fitness interfered with Plaintiffs’ existing or potential economic relationships with members of the gym, or the

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membership contracts these members entered with the gym owners. But this claim suffers the same problems as the conversion claim, as identified above.

In addition, and unlike a conversion claim, Gold's Gym and St. George Fitness would have to be aware of the economic relationship, and intentionally interfere with it. As noted, at the time St. George Fitness purchased the gym it had no reason to believe anyone other than the seller of the gym claimed an interest in it. St. George Fitness was not served with the original complaint until after the transaction had closed, and was not contacted by Plaintiffs prior to that time. It therefore could not have intentionally interfered. And as also noted above, the court finds that Plaintiffs did not meet their burden of showing that Gold's Gym was aware of Plaintiffs' competing claim prior to signing the May 8, 2003, consent to transfer of the franchise. Gold's Gym therefore did not intentionally interfere.

Although Plaintiffs 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 Plaintiffs (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 Plaintiffs 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.'" *Leigh Furniture & Carpet Co.*, 657 P.2d at 309 *overruled in part on other grounds by Eldridge*, 2015 UT 21, 345 P.3d 553; *see also, Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 800 (Utah

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1985) ("Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort."); *Canyon Country Store v. Bracey*, 781 P.2d 414, 423 (Utah 1989) (same).

Plaintiffs' intentional interference claims against Gold's Gym and St. George Fitness must be dismissed with prejudice.

#### IV. DAMAGES

In addition to the foregoing, Plaintiffs' damages claims against Gold's Gym and St. George Fitness are deficient. To begin, Plaintiffs did not disclose a calculation or summary of their claimed damages to these defendants during discovery in this case that was sufficient to permit them to understand and ultimately rebut those claims. The damage claim that Plaintiffs advance appears to have been first disclosed during trial. These defendants requested the disclosure of damages, in interrogatories and deposition, and no adequate disclosure was provided in advance of trial. These defendants submit that no damages may be awarded against them for this reason alone. *Sleepy Holdings LLC v. Mountain W. Title*, 2016 UT App 62, ¶¶ 17-18; *Stevens-Henager College v. Eagle Gate College*, 2011 UT App 37.

Second, Plaintiffs seek recovery of lost profits but have not provided evidence from which this court could make a reasoned or reliable calculation of such profits. The gym from which these profits allegedly were lost was a startup enterprise with no operating history and no track record of past performance that could be used to assist in measuring future performance. Additionally, no evidence was provided concerning the economic performance of other, similar gyms or other

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businesses generally. No evidence was provided concerning the cost of operations, advertising, or other expenses; nor did Plaintiffs provide actual or projected membership information or other sources of revenue. Plaintiffs did not offer expert testimony (nor could they, since no expert or expert calculation was disclosed), and they were not able to present evidence of the actual performance of the gym over the years in question. Instead, their lost profit calculation relies largely on a profit and loss statement for a single year of operation. In short, the evidence presented is woefully insufficient to accurately measure lost profits. The price paid by St. George Fitness to Izatt/OPM also cannot be used to measure damages in this case because the assets, rights, equipment, and so forth being acquired by them differed, a significant component of the transaction involved the assumption of debt, there was no testimony to establish values or how they may have been determined, and the transaction by which St. George Fitness acquired the gym involved a dramatically different deal than simply purchasing it as a going concern and operating it at its existing location. Peterson, after all, testified that St. George Fitness attributed no value to the existing franchise and acquired it solely so it could operate a different Gold's Gym in a different location. *See Stevens–Henager College v. Eagle Gate College*, 2011 UT App 37, ¶¶ 25, 28, 30.

Plaintiffs must produce “evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages.” *Sunridge Dev. Corp. v. RB & G Engr., Inc.*, 305 P.3d 171, 176 (Utah App. 2013), *cert. denied*, *Sunridge v. RB & G*, 312 P.3d 619 (Utah 2013) (citing *TruGreen Cos. v. Mower Bros., Inc.*, 2008 UT 81, ¶ 15, 199 P.3d 929 (citation and

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internal quotation marks omitted). “[M]ere conclusions and conjecture’ will not suffice.” *Id.* “[P]laintiff must provide ‘supporting evidence’ from which the factfinder may derive a reasonable estimate of the amount of damages.” *Id.* at 176-77; see *Sawyers v. FMA Leasing Co.*, 722 P.2d 773, 774 (Utah 1986) (per curiam). Here, Plaintiffs failed to meet that standard.

Plaintiffs’ claims against Gold’s Gym and St. George Fitness must be dismissed for this additional reason.

#### **V. REMAINING DEFENDANTS**

As noted above, all of the remaining defendants are in default, default certificates have been entered against them, and their liability to Plaintiffs has been established. This includes liability for claims that are materially different than the claims asserted against Gold’s Gym and St. George Fitness, such as fraud and breach of fiduciary duty. Because these defendants chose not to participate in the case, they were not entitled to any disclosure of Plaintiffs’ claimed damages. They also did not appear at trial to object to or otherwise challenge Plaintiffs’ damage evidence or theories, to argue against the admission of that evidence, or to rebut that evidence with contrary evidence. By failing to appear and object, they waived any objection to the damages information that was received. So, although the court finds this damages evidence insufficient as it relates to Gold’s Gym and St. George Fitness, for the reasons identified above, it is un-contradicted and not objected to as it relates to any of the defaulted defendants.

Plaintiffs are therefore entitled to judgment by default against the defaulting defendants for the amounts Plaintiffs requested at trial.

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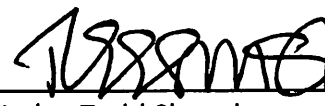
**ORDER**

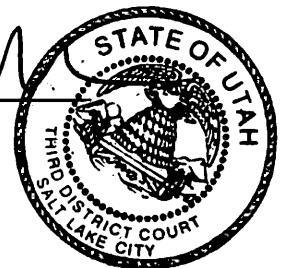
Based on the foregoing, and for good cause appearing, IT IS HEREBY ORDERED as follows:

1. That judgment enter in favor of Gold's Gym and St. George Fitness and that all claims against them be dismissed with prejudice.
2. That default judgment enter against the defaulting defendants in the amounts requested by Plaintiffs at the time of trial.
3. That within 14 days of this order, counsel for Gold's Gym and St. George Fitness prepare a Final Judgment, meeting the requirements of Rule 58A of the Utah Rules of Civil Procedure, and submit it to counsel for Plaintiffs for approval as to form.
4. That within 14 days of this order, counsel for Plaintiffs prepare a Final Default Judgment, meeting the requirements of Rule 58A of the Utah Rules of Civil Procedure, and submit it to counsel for the appearing defendants for approval as to form.

DATED: December 19, 2016.

THIRD JUDICIAL DISTRICT COURT

  
\_\_\_\_\_  
Judge Todd Shaughnessy



03664



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090919785 by the method and on the date specified.

MANUAL EMAIL: HOLLY S CHAMBERLAIN chamberlainlaw@gmail.com  
MANUAL EMAIL: BRIAN C HARRISON brianharrisonpc@gmail.com  
MANUAL EMAIL: TYLER J MOSS tylermoss22@gmail.com  
MANUAL EMAIL: KARTHIK NADESAN karthik@nadesanbeck.com  
MANUAL EMAIL: BLAKE T OSTLER supes00@gmail.com

12/19/2016

/s/ MANDY ACEVEDO

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

# **EXHIBIT B**

## LICENSE AGREEMENT

THIS LICENSE AGREEMENT ("Agreement") is made on 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 voting control of any entity owning the Facility, 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 yourself 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 of 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:**

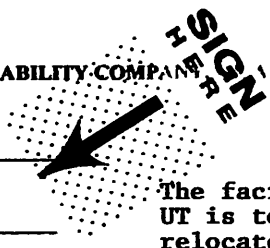
Health Source-St. George, LLC  
Name of Licensee

Signed: *Thomas Engler*

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 PROPRIETORSHIP OR GENERAL PARTNERSHIP:**

\_\_\_\_\_  
Signature

n/a  
Printed Name

\_\_\_\_\_  
Signature

n/a  
Printed Name

\_\_\_\_\_  
Signature

n/a  
Printed Name

\_\_\_\_\_  
Signature

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:

<u>Owner's Name and Address</u>	<u>Percentage of Ownership Interest</u>
Name: <u>n/a</u> Address: _____ _____	_____
Name: <u>n/a</u> Address: _____ _____	_____
Name: <u>n/a</u> Address: _____ _____	_____
Name: <u>n/a</u> Address: _____ _____	_____

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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:

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

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:

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

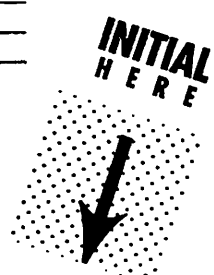
**FEES**

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

First Year Annual Fee	\$ <u>8,500.00</u>
Second through Fifth Year Annual Fee	\$ <u>6,000.00</u>
Security Deposit	\$ <u>waived</u>

**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.

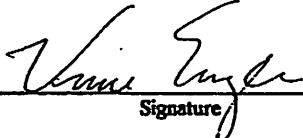
8. Company may, without notice, assign this Guaranty in whole or in part.

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 7<sup>th</sup> day of July, 19 99.


"GUARANTORS":


  
\_\_\_\_\_  
Signature  
  
\_\_\_\_\_  
Vince Engle  
Print Name

  
\_\_\_\_\_  
Signature  
  
\_\_\_\_\_  
Brent Statham  
Print Name

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

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

  
\_\_\_\_\_  
Signature  
  
\_\_\_\_\_  
Doug L. Chamberlain  
Print Name

  
\_\_\_\_\_  
Signature  
  
\_\_\_\_\_  
Clark D. Chamberlain  
Print Name

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

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

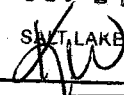
# **EXHIBIT C**



OCT 27 2011

SALT LAKE COUNTY

By



Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY  
STATE OF UTAH

<p>CLARK CHAMBERLAIN and BRENT STATHAM,  Plaintiffs,  vs.  VINCE ENGLE, et al.,  Defendants.</p>	<p><b>MEMORANDUM DECISION AND ORDER</b></p> <p>Case No. 090919785</p> <p>Judge Kate A. Toomey</p>
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This matter is before the Court on Defendant Gold's Gym International Inc.'s Motion to Dismiss, filed December 19, 2010. Oral argument was held on August 31. The motion is now ready for decision.<sup>1</sup>

**BACKGROUND**

In 1999, Plaintiffs Clark Chamberlain and Brent Statham and Defendant Vince Engle formed Health Source of St. George, LLC for the purpose of opening a Gold's Gym. Mr. Engle held a 50% interest in Health Source, and the Plaintiffs divided the remaining 50%.

On June 22, 1999, the Plaintiffs and Mr. Engle executed a License Agreement with

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<sup>1</sup> Gold's Gym's reply memorandum in support of its Motion to Dismiss raised new issues to which the Plaintiffs had no opportunity to respond. The Plaintiffs moved the Court to strike the memorandum or, in the alternative, to allow the Plaintiffs to file an additional memorandum addressing the new issues. The Court issued a Memorandum Decision on May 13, 2011, allowing the Plaintiffs to file an additional memorandum.

Gold's Gym. The Agreement listed the Plaintiffs and Mr. Engle as members of Health Source, each holding an interest in the Gold's Gym franchise. The agreement required that all owners sign a release prior to the sale or transfer of the gym to a new owner.

On April 10, 2001, Mr. Engle notified Gold's Gym that he had taken over operations of the gym and he now owned 100% of the franchise. Although Mr. Engle's representation was not true, Gold's Gym took Mr. Engle at his word and did not seek the Plaintiffs' release.

On June 7, 2001, Mr. Engle sold the Gym from Health Source to Fitcorp, Inc., his own company. The Plaintiffs were not notified, nor was their consent requested. On January 1, 2003, Mr. Engle sold the Gym from Fitcorp to Travis Izatt and O.P.M. Holdings, Inc. On May 8, Gold's Gym authorized the sale. Again, Mr. Engle and Gold's Gym did not notify or obtain releases from the Plaintiffs.

On July 11, 2005, the Plaintiffs filed their original Complaint, case number 050912077. The case was dismissed without prejudice on November 19, 2008 for failure to prosecute, and the instant case was filed November 18, 2009. The causes of action are similar but not identical to those in the previous suit.

### **DISCUSSION**

Gold's Gym moves the Court to dismiss the four causes of action against it: civil conspiracy, breach of contract, negligence, and tortious interference. A motion to dismiss for failure to state a claim, Rule 12(b)(6), Utah Rules of Civil Procedure, is appropriate where the Court concludes that the Complaint fails to state a claim upon which relief can be granted, that is, where it appears beyond a doubt that the claimant can prove no facts to support its claim that would entitle it to relief. *See Tuttle v. Olds*, 2007 UT App 10, ¶ 14,

155 P.3d 893. The Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in a light most favorable to the complainant. *Munteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991) (citation omitted).

Gold's Gym argues that the statute of limitations has passed on all claims, precluding the causes of action. However, Utah's savings statute provides that a subsequent suit may be filed within one year of dismissal of the original suit and still maintain the original filing date when considering the statutes of limitations.<sup>2</sup> The Plaintiffs filed the instant lawsuit within one year of dismissal of the previous suit. The claims for conspiracy and interference are properly raised now because they were also raised in the Plaintiffs' previous lawsuit, and they met the statute of limitations at the time the 2005 suit was filed.

In comparison, the Plaintiffs did not raise the claims for breach of contract or negligence in the 2005 suit. Therefore, in order to take advantage of 2005 as the filing date (and thus to be within the statute of limitations), these two claims must "relate-back" to the original complaint. In order to relate-back to the date of the original complaint, the new claims must be "substantially the same" as the previous action. *Herbertson v. Bank One, Utah, N.A.*, 1999 UT App 342, ¶ 18, 955 P.2d 7. Rule 15(c), Utah Rules of Civil Procedure, describes the relation-back doctrine: "[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or

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<sup>2</sup> The savings statute provides: "If any action is timely filed and . . . if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff . . . may commence a new action within one year after the reversal or failure." Utah Code Ann. § 78B-2-111(1).

attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

The Court determines that the breach of contract and negligence claims are not substantially similar to the previous claims. Gold’s Gym was not put on notice by the 2005 suit of the claims to come in the 2009 suit. The Plaintiffs claim they had put Gold’s Gym on notice because the earlier claims regarded the License Agreement between Health Source and Gold’s Gym, and the facts arose from the same basic dealings. Gold’s counters that the 2005 Complaint had no claims asserted upon the transaction of entering into the License Agreement. These two additional claims are not substantially similar to those in the previous suit.

The Plaintiffs argue that the discovery rule buys them more time under the statute of limitations for breach of contract (six years) and negligence (four years).

Generally, a cause of action accrues upon the happening of the last event necessary to complete the cause of action. . . . In certain instances, however, the discovery rule tolls the limitations period until facts forming the basis for the cause of action are discovered. The discovery rule applies: . . . (2) in situations where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct[.]

*Spears v. Warr*, 2002 UT 24, ¶ 33, 44 P.3d 742, (internal citations and quotations omitted).


The Plaintiffs allege that Gold’s Gym concealed the transfers of the gym from the Plaintiffs and the Plaintiffs did not become aware of the transfer until May 2003. However, even if the discovery rule tolls the running of the statute of limitations to begin in May 2003, the breach of contract claim was filed six months after the period ran (November 2009). Similarly, the Plaintiff’s negligence claim was not asserted in the first action, so its filing date does not relate back to the original complaint. Because negligence has a four-year

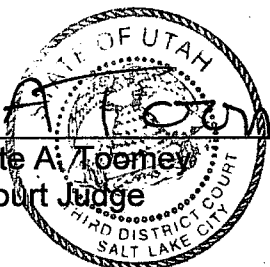
statute of limitations, the Plaintiffs would have had to assert that the cause of action accrued no earlier than November 2005, but they maintain the 2003 discovery date.

### CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part Gold's Gym's Motion to Dismiss. Under the savings statute, the Plaintiffs' claims for conspiracy and interference relate back to the 2005 Complaint and are within the statute of limitations for those claims. The breach of contract and negligence claims are new causes of action that do not relate back to the earlier Complaint as provided by Rule 15(c), and the statute of limitations has run. The Court grants the motion to dismiss for breach of contract and negligence and denies the motion as to conspiracy and interference.

DATED this 26 day of October, 2011.

  
Judge Kate A. Toomey  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090919785 by the method and on the date specified.

MAIL: HOLLY S CHAMBERLAIN 2235 SOUTH 2200 EAST SALT LAKE CITY, UT 84109

MAIL: BRIAN C HARRISON 3651 N 100 E STE 300 PROVO UT 84604

MAIL: BLAKE T OSTLER 57 W 200 S STE 350 SALT LAKE CITY UT 84101

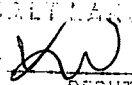
Date: 27 Oct 2011

KW

Deputy Court Clerk

# **EXHIBIT D**

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FILED  
THIRD DISTRICT COURT  
11 FEB 23 AM 10:25  
SALT LAKE COUNTY  
BY  DEPUTY CLERK

Attorneys for Defendant Gold's Gym International, Inc.

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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CLARK CHAMBERLAIN and BRENT  
STATHAM,

Plaintiffs,

vs.

VINCE ENGLE, an individual; HEALTH  
SOURCE, INC., a Utah corporation;  
FITCORP, INC., a Utah corporation; TRAVIS  
IZATT, an individual, d/b/a Gold's Gym of St.  
George; FITNESS SOURCE, LLC, a Utah  
limited liability company; O.P.M.  
HOLDINGS, INC., a Utah corporation;  
GOLD'S GYM INTERNATIONAL, INC., a  
Texas corporation; ST. GEORGE FITNESS,  
LLC, a Utah limited liability company, d/b/a  
Gold's Gym - Utah Group; and DOES I  
through X

Defendants.

**DEFENDANT GOLD'S GYM  
INTERNATIONAL, INC.'S REPLY IN  
FURTHER SUPPORT OF ITS MOTION  
TO DISMISS AND IN OPPOSITION TO  
PLAINTIFFS' MEMORANDUM IN  
OPPOSITION**

Civil No. 090919785

Judge Kate A. Toomey

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The Defendant, Gold's Gym International, Inc. ("Gold's Gym"), by and through counsel of record, hereby respectfully this Reply in Further Support of its Motion to Dismiss and in Opposition to Plaintiffs' Memorandum in Opposition.

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## I. NATURE OF THIS CASE

Gold's Gym seeks dismissal of Plaintiff's causes of action in which Gold's Gym is named because they are barred by the relevant statutes of limitations. In its Memorandum in Opposition, the Plaintiffs claim that they are saved by Utah's Saving Statute because the new Complaint was filed within one (1) year from the date of dismissal of the prior Complaint, which was dismissed without prejudice.

The Plaintiffs' argument appears to be well taken with respect to those claims which were previously asserted in the prior Second Amended Complaint (the last operative pleading filed by the Plaintiff in the prior matter). However, the Plaintiffs' argument is not well taken with respect to new claims which are asserted for the first time in the new Complaint: the Eighth Claim for Breach of a Written Contract (breach of the License Agreement) between Gold's Gym's predecessor in interest ("Gold's Gym Franchising, Inc.") and Health Source - St. George, LLC. That License Agreement provides the following at ¶10:

"Except for claims arising from your non-payment of amounts due to 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."

Thus, the Plaintiffs' breach of contract claim (the Eighth Claim) is subject to arbitration. Further, the Plaintiffs in this matter are not in privity with Gold's Gym. There is no way that Gold's Gym could divine from the prior claims asserted in the prior Second Amended Complaint that these Plaintiffs, who are not parties to the License Agreement, would assert a breach of contract claim. All claims against Gold's Gym under the License Agreement are subject to arbitration and if Gold's Gym is required to respond to the Complaint, will seek to stay these proceedings pending outcome of arbitration proceedings.

In addition, the Ninth Claim of the Complaint (negligence) in this matter was not asserted in the prior Second Amended Complaint. The negligence claim also appears to arise out of the License Agreement, or breach thereof. There is no way that Gold's Gym could have known that it would be subject to a negligence claim based upon the claims asserted in the Second Amended Complaint in the prior action. To the extent such claims arise out of or are related to the License Agreement, Gold's Gym will seek to stay these proceedings pending outcome of arbitration proceedings.

To the extent the claims arise out of or are related to the License Agreement, they are barred by the relevant statutes of limitation and the savings clause has no application. The savings clause extends only to claims which were asserted in the Second Amended Complaint in the prior action.

## II. ARGUMENT

**A. The Savings Statute Does Not Apply to Either the Eighth for Breach of a Written Contract (the Franchise Agreement) or the Ninth Claim of Negligence.** Utah's Saving Statute, §78B-2-111 U.C.A. provides as follows:

“If any action is timely filed and the judgment for the plaintiff is reversed, or if the plaintiff fails in the action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff ... may commence a new action within one year after the reversal or failure.”

Although the Plaintiffs filed their new Complaint within one (1) year after the Saving Statute, they have asserted new claims which were not included in the prior action. The Plaintiffs have asserted a claim for breach of a written contract arising from under the “License Agreement.” However, these Plaintiffs are not in privity with any party to the License Agreement. Thus, they cannot maintain an action under the License Agreement. Further, the License Agreement contains an arbitration provision which would require arbitration of any claims for breach of such License Agreement or related thereto. This claim was not asserted in the Second Amended Complaint

previously filed by the plaintiffs' in the prior action. It is well settled under Utah law that any newly filed claim must be "substantially the same as the previous action" to relate back to the prior action under the saving statute. See *Hebertson v. Bank One, Utah, N.A.*, 1999 UT App 342, P18 ("however, the prevailing view is that the prior and re-filed actions need only be substantially the same"). A newly filed action may not take advantage of Utah's Savings Clause if it is not "substantially the same" with respect to the prior asserted claims. It is well established that: "To benefit from the one-year extension of the statute of limitation, the second action must be 'substantially the same involving the same parties, the same causes of action, and the same right ...'" *Cherokee Ins. Co. v. R/I, Inc.*, 97 N.C.App. 295, 297-98 (N.C. Ct. App. 1990). See also, *Taylor v. Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers (IUE)*, 25 Kan. App. 2d 671, 676-77 (Kan. Ct. App. 1998) ("The saving statute applies only if the original action and the subsequent action are substantially the same"). New claims are not "substantially the same" if they were not asserted in the prior dismissed action. See, e.g., *Taylor v. Int'l Union of Elec.*, 968 P.2d 685 (Kan. 1998).

To determine whether claims are substantially the same, the Utah Court's have looked to the relation back standard established in Rule 15(c) of the U.R.C.P. which provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

In this matter, the contract and negligence claims do not arise out of the conduct, transaction or occurrences set forth or attempted to be set forth in the pleadings (the Second Amended Complaint) in the prior action. There is no claim that was asserted based upon the transaction of entering the License Agreement in the prior filed Second Amended Complaint. The second claim for breach of contract in the prior matter is based upon a claim against Defendant Vince Engle for

breach of an Operating Agreement, to which Gold's Gym is not a party. In contrast, in this action the breach of contract claim is based upon the License Agreement between Gold's Gym and Health Source of St. George, LLC. These Plaintiffs are not parties to that agreement and they are not in privity of contract with Gold's Gym. Further, any such claim would have been subjected to the arbitration clauses in the contract.

The negligence claim also arises out of the License Agreement to which the Plaintiffs' are not parties. The alleged negligence arises out of failure to abide by the provisions of the License Agreement.

Because the new claims for breach of a written agreement (the Eighth Claim) and negligence (the Ninth Claim) of the new Complaint do not arise out of the conduct, transaction, or occurrence alleged in the prior Second Amended Complaint, they do not relate back to the prior filed action.

**B. The Eighth and Ninth Claims Are Barred by the Statutes of Limitations.** This matter must be dismissed because it was not filed within the one (1) year statute of limitations provided in the License Agreement itself, the four (4) year statute of limitations applicable to negligence claims, or the six (6) year statute of limitations that applies to written contracts (assuming that the one-year provision in the License Agreement does not govern).

In addition, the Court must apply the one-year statute of limitations provided in the License Agreement itself to the breach of contract claim. *Deer Crest Ass. I, LC v. Silver Creek Der. Group, LLC*, 2009 UT App 356, P11 ("Utah follows the general principle that parties may contractually limit the time in which to bring an action in contract to a period shorter than that of the applicable statute of limitations, so long as the limitation is reasonable"). The savings clause does not apply because the breach of express contract would have been barred by the agreed one-year limitation of actions. Therefore, the claim based upon the written license agreement fails regardless because the saving statute does not apply because the claim for breach of a written contract would have been

too late even if it had been included in the prior filed matter, which was filed on 11 July 2005. The Plaintiffs do not dispute that the claims for breach of contract arose between 2001 and 2003, at the very latest. Thus, the complaint filed in 2005 is late and barred by the statute of limitations based upon the one-year statute of limitations provided in the License Agreement.

Finally, it would be futile to allow the Plaintiffs to move forward with the claim based upon the written agreement because they are not in privity of contract or a party to the License Agreement. The Plaintiffs were simply not parties to the License Agreement and cannot take advantage of its provisions. Utah law is clear that “relation back” provision of Rule 15(c) U.R.C.P. is subject to the doctrine that relation back will not be allowed when it would be futile to allow an amendment. As the court stated in *Gary Porter Construction*: “However, where one of the reasons the nonmoving party provides for denying the motion to amend is that the statute of limitations bars the claim, the analysis is not the weighing of equitable factors under Rule 15(c), but rather a legal determination regarding whether the amendment would be futile.” *Gary Porter Construction*, 2004 UT App 354, P30. *See also, Sulzen v. Williams*, 1999 UT App 76, P7, 977 P.2d 497 (characterizing the appeal from denial of a motion to amend as “challenging the trial court’s apparent conclusion that the statute of limitations had run and that their effort to amend their complaint was thus futile”). *See also, Jensen v. IHC Hosps., Inc.*, 2003 UT 51, P139, 82 P.3d 1076 (recognizing “that a court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss”).

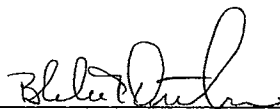
### III. CONCLUSION

For the forgoing reasons, this Court should hold that the Eighth Claim for Breach of a Written Contract and the Ninth Claim for Negligence are barred by the relevent statutes of limitation. In addition, the contract claim is barred because of the one (1) year statute of limitations

provided in the License Agreement itself and the original complaint in the prior action was not timely filed.

DATED this 22<sup>nd</sup> day of February, 2011.

THOMPSON OSTLER & OLSEN



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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of February, 2011, I caused to be served by the method indicated below a true and correct copy of the foregoing DEFENDANT GOLD'S GYM INTERNATIONAL, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MEMORANDUM IN OPPOSITION on the following:

- VIA FACSIMILE
- VIA HAND DELIVERY
- VIA U.S. MAIL
- VIA FEDERAL EXPRESS

Holly S. Chamberlain  
2235 South 2200 East  
Salt Lake City, Utah 84109

- VIA FACSIMILE
- VIA HAND DELIVERY
- VIA U.S. MAIL
- VIA FEDERAL EXPRESS

Brian C. Harrison  
Brian C. Harrison P.C.  
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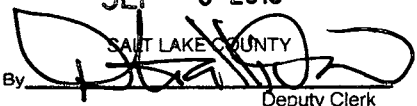


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# **EXHIBIT E**





SEP - 6 2013  
SALT LAKE COUNTY  
By  Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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<b>CLARK CHAMBERLAIN and BRENT STATHAM,</b>	:	<b>MEMORANDUM DECISION</b>
<b>Plaintiffs,</b>	:	
<b>vs.</b>	:	<b>CASE NO. 090919785</b>
<b>VINCE ENGLE, et al.,</b>	:	
<b>Defendants.</b>	:	

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The Court heard a Motion for Summary Judgment filed by Defendant Gold's Gym on July 9, 2013, and that motion is ready for decision. In the meantime, the Court has received a Request to Submit for Decision on a Motion for Reconsideration, for Clarification, and for Enlargement of Time, filed by the Plaintiffs, Clark Chamberlain and Brent Statham. This motion is also ready for decision, and the Court will address both motions in this Memorandum Decision.

**BACKGROUND**

In 1999, the Plaintiffs and Defendant Vince Engle formed Health Source of St. George, LLC ("Health Source") for the purpose of opening a Gold's Gym. Mr. Engle, *dba* Health Source, Inc. ("HSI"), held a 50% interest in Health Source, and the Plaintiffs divided the remaining 50%.

On June 22, 1999, Health Source executed a License Agreement with Gold's

Gym. The Agreement listed the members of Health Source as Clark Chamberlain, Doug Chamberlain, Brent Statham and Vince Engle.<sup>1</sup> The agreement required that all owners sign a release prior to the sale or transfer of the gym to a new owner. It also provides that “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 written approval,” “any unauthorized assignment or transfer will be without effect,” and “approvals . . . required hereunder will not be effective unless in writing[.]” “Transfer” is defined as more than 49% interest under the License Agreement.

The Plaintiffs note that although Mr. Engle was the only member of Health Source to sign Gold’s License Agreement, this is because there was only one signature line on the form, and Gold’s assured the Plaintiffs that any member’s signature was sufficient.

Thereafter, Health Source executed an Operating Agreement and Articles of Incorporation. These documents listed Mr. Engle (*dba* HSI) as a 50% managing member; the other members are listed as non-managing members. Copies of both documents were sent to Gold’s. The Operating Agreement provides:

[A]ny action taken by the Managers shall constitute the act of and serve to bind the Company in dealing with the Managers, no persons shall be

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<sup>1</sup> Doug Chamberlain died in 2011 and has since been removed as a Plaintiff. Clark Chamberlain, Doug’s son, claims ownership of his father’s interest in Health Source. Gold’s challenges this transfer, citing a lack of evidentiary proof. The Court considers as well taken Doug Chamberlain’s December 19, 2009 Revocable Trust Agreement naming Clark as his beneficiary in all business dealings. Regardless, the status of Doug’s share of Health Source ownership is largely irrelevant. Neither Vince Engle nor the remaining parties (together) owned a majority of the shares.

required to inquire into and all persons are entitled to reply conclusively on, the authority of the Managers to bind the Company.

...  
The Managers shall not . . . (ii) sell or assign substantially all the Property in bulk, without the written consent of the Members holding a majority of the Membership Interests.

Mr. Engle ran the day-to-day operations of the gym franchise in St. George. On April 10, 2001, Mr. Engle notified Gold's Gym that, as president of HSI (50% interest holder in Health Source), he had taken over operations of the gym and he now owned 100% of the franchise. Gold's Gym took Mr. Engle at his word and did not seek the Plaintiffs' release. In July 2001, Health Source was dissolved by the Utah Department of Commerce for failure to renew.

On June 7, 2001, Mr. Engle purported to sell the gym from Health Source to Fitcorp, Inc., Mr. Engle's own company. The Plaintiffs were not notified and their consent was not requested. In 2003, Mr. Engle sold the Gym from Fitcorp to Travis Izatt *dba* O.P.M. Holdings, Inc. On May 8, Gold's Gym authorized the sale and entered into a Franchise Agreement with Mr. Engle. Again, Mr. Engle and Gold's Gym did not notify or obtain releases from the Plaintiffs.

On July 11, 2005, the Plaintiffs filed their original Complaint, case number 050912077. The case was dismissed without prejudice on November 19, 2008 for failure to prosecute, and the instant case was filed November 18, 2009. Default judgment has been entered against Mr. Engle and HSI.

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## **THE PLAINTIFFS' MOTION FOR RECONSIDERATION, FOR CLARIFICATION, AND FOR ENLARGEMENT OF TIME**

Pursuant to Rules 6, 16, and 60(b) of the Utah Rules of Civil Procedure, the Plaintiffs ask the Court<sup>2</sup> to reconsider and clarify its Memorandum Decision of February 14, 2013 in which it addressed some discovery issues pursuant to the procedures for addressing discovery disputes on an expedited basis, as well as a Motion for Enlargement of Time filed by the Plaintiffs. The Memorandum Decision provided a procedural summary of the case as background for the Court's ruling:

- this was the second case filed by the Plaintiffs to prosecute their claims based on the facts alleged in the Complaint
- this action was filed in 2009 and was nearly dismissed for failure to prosecute
- instead, the Court ordered discovery under the new discovery rules, anticipating that the parties would pursue it without further significant delay
- the Plaintiffs did not seek discovery until late October 2012, but it was enough time to allow for limited discovery before the mid-January discovery cut-off deadline
- the Plaintiffs did not seek the follow-up discovery until just before the discovery deadline

Because the Plaintiffs did not exhaust their standard discovery for a Tier III case, the Court denied the Motion for Enlargement of Time, albeit inartfully: "The enlargement of time is not well-taken under the discovery rules, however, because the Plaintiffs did

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<sup>2</sup>The Motion for Reconsideration, for Clarification, and for Enlargement of Time was filed without a supporting memorandum on May 29, 2013; an Opposition was filed June 17; no reply memorandum was filed.

not exhaust their standard discovery for a Tier III case. Accordingly, [the motion] is denied.” The Court also denied each side’s request for an award of attorneys’ fees.

The Plaintiff’s Motion for Reconsideration alleges that although the action was filed in 2009, Gold’s Gym did not file an answer in this case until January 2012, and thereafter was uncooperative in setting reasonable discovery deadlines. They further allege that written discovery requests were served on Gold’s in October 2012, but the responses were inadequate and Gold’s objected to producing information, and although there was still time to complete further discovery based on Gold’s responses, it provided scant and still-insufficient supplemental responses. The Plaintiffs have sent a second request to supplement to Gold’s counsel, and state that they “have not yet submitted expert disclosures because they required Gold’s supplemental responses and/or a decision from the Court regarding Plaintiff’s Statement of Discovery Issues in order to obtain all necessary information for expert damage calculations.”

The Plaintiffs point out that the Court is mistaken in thinking that this case came close to being dismissed last May for failure to prosecute. After reviewing the docket, the Court agrees that no order had been issued to show cause why the case should not be dismissed for failure to prosecute. Rather, it appears that the progress of the case was slowed for other reasons, including by the Plaintiffs’ delay in serving the Complaint,<sup>3</sup> and by Gold’s Motion to Dismiss which required resolution before an Answer was due.<sup>4</sup> The Court regrets the error.

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<sup>3</sup>The Complaint was filed in November 2009, Gold’s was not served until November 2010.

<sup>4</sup>Gold’s first Motion to Dismiss was filed December 9, 2010, and decided October 27, 2011. In January 2011, Gold’s filed a second Application to Dismiss Complaint, for

The Plaintiffs also argue that although not served until October 26, 2012, their first set of discovery requests were served on Gold's with sufficient time for response, as well as sufficient time for any necessary follow-up and supplemental discovery.

1 But the responses, which were received "at the end of November/first of December 2012,"<sup>5</sup> were inadequate, and "Plaintiffs should not now be punished because Gold's did not comply with its obligations under Rule 26[.]" The Plaintiffs brought their motion for an enlargement of time on January 14, 2013. In their Statement of Discovery Issues filed at the same time, they indicated that they "sent Gold's a letter on January 8, 2013, detailing the various deficiencies in the Responses," and asking for its stipulation to an extension of time to resolve discovery issues and to allow time for a 30(b)(6) deposition after receiving supplemental discovery.

They further argue that the Court's denial of their motion for an enlargement of time for failure to exhaust their standard discovery, is based on an erroneous interpretation of Rule 26, because the exhaustion requirement is only applicable to motions for extraordinary discovery, and does not apply to extensions of time.

The Court agrees that its analysis was off the mark. Subsection (c)(5) establishes limits for standard discovery, and this includes the number of days to

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failure to serve the Complaint, but withdrew it. Gold's filed a third Motion to Dismiss, this time for improper venue, on January 6, 2012, and withdrew it on January 19, 2012, the same day it filed its Answer. Because two of the three Motions to Dismiss were withdrawn shortly after they were filed and before they were submitted for decision, the Court does not agree with the Plaintiffs' suggestion that all three delayed the progress of this case.

<sup>5</sup> The Plaintiffs' Statement of Discovery Issues stated that "Gold's served its Responses on or about November 26, 2012," but states the date more vaguely in the present motion.

complete standard fact discovery. But while subsection (c)(6) begins with the sentence “To obtain discovery beyond the limits established in paragraph (c)(5),” and this at first blush appears to refer to all of the limits provided in subsection (c)(5), including the time limits, the Court sees that this cannot be the case because it would be impossible to bring a motion for extraordinary discovery both before the close of the standard discovery and after reaching the limits of standard discovery if this were to include the time limits.

Nevertheless, the Court remains unpersuaded that the motion is well-taken with respect to conducting new discovery. The discovery cut-off deadline was January 14, 2013, the day the motion was filed. The Plaintiffs had months in which to conduct discovery but did not make use of those months, and according to Gold’s, a request for a 30(b)(6) deposition was first made on January 8, without the reasonable notice required in Rule 30(b)(1).

The Plaintiffs’ challenge to the sufficiency of the Plaintiffs’ discovery responses is a different matter. These are to be brought at least initially in the context of a Statement of Discovery Issues. The Plaintiffs raised sufficiency challenges both in the Motion for Enlargement of Time and in their Statement of Discovery Issues, but they are the same challenges, and in that regard, the Court stated “it appears that the Memorandum in Opposition to Motion for Enlargement of Time addresses the substance of many of the Plaintiffs’ concerns, but in any event, the items addressed in the Plaintiffs’ Statement should have been addressed promptly through a supplemental discovery request. This was not done, and the Court is not inclined to de facto enlarge the discovery period by granting the relief requested in the Statement of Discovery

Issues.” The Plaintiffs now ask for “a decision relating to each issue addressed in their Statement, regardless of whether the Court decides to enlarge the time for discovery,” and correctly note that an insufficient response must be remedied, even after a discovery deadline passes.

The Plaintiffs identify “the most significant deficiency,” even after receiving supplemental information from Gold’s: “[I]t failed to provide any financial information relating to the Gold’s Gym franchises that have operated within the Plaintiffs’ franchise territory through the present date.” According to the Plaintiffs, Gold’s initially objected on the ground of relevance, but in its supplemental responses of January 31, 2013, it stated it “is not aware of any additional financial records for Health Source of St. George franchise from 1999 to the present.” The Plaintiffs note a perceived ambiguity in this statement, and ask the Court to require Gold’s to clarify, and compel it to produce “any and all financial information in Gold’s possession for franchisees in St. George through the present.”

Gold’s opposition memorandum does not appear to specifically address this question, and therefore the Court directs it to respond. Further, if a document request was made but not responded to,<sup>6</sup> Gold’s is directed to supplement its response. The Court notes, however, that it appears that Gold’s has responded to, and then supplemented its discovery responses, and the Court determined as much in its Memorandum Decision addressing the Statement of Discovery Issues.

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<sup>6</sup>The Court is unable to determine whether this is the case.



Finally, the Plaintiffs request an enlargement of the deadline for designating an expert witness. Such a designation was due seven days after the close of fact discovery, but the Plaintiffs contend that they lack the financial information necessary to finalize a damages calculation and therefore cannot designate an expert. Gold's responds that this would be unfairly prejudicial inasmuch as they relied upon the Court's Memorandum Decision denying the request for enlargement and addressing the Statement of Discovery Issues. They add that designating an expert would be futile, in any event.

The Court agrees that allowing the Plaintiffs to designate an expert at this late date is unfairly prejudicial to Gold's, and while it did not specifically address this subject in the Memorandum Decision addressing the Statement of Discovery Issues, it denied the Plaintiffs' request for relief, which encompassed this request. An expert should have been designated within the specified time frame.

In summary, the Court denies the Plaintiffs' Motion for Reconsideration, for Clarification, and for Enlargement of Time except with respect to directing Gold's to clarify what it means by the statement that it "is not aware of any additional financial records for Health Source of St. George franchise from 1999 to the present," and if there is a related document request that has not been fully responded to, to supplement its production.

## **GOLD'S MOTION FOR SUMMARY JUDGMENT**

Gold's moves the Court for summary judgment on the Plaintiffs' claims for civil conspiracy, conversion, and intentional interference with economic relations.<sup>7</sup>

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c).

Gold's argues that the claims should be dismissed under the doctrine of laches, the statutes of limitations, and lack of standing, and that the Plaintiffs cannot meet the elements of the three claims against it.

### **Claims not Barred by Laches**

Gold's cites the Plaintiffs' slow movement of propelling this case forward and the loss of documents, memories, and witnesses as grounds for its request that the Court dismiss the matter under the doctrine of laches. Laches is "based upon [the] maxim that equity aids the vigilant and not those who slumber on their rights." *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, ¶ 29, 289 P.3d 502 (citation omitted). Laches has two elements: (1) lack of diligence on the part of plaintiff and (2) injury to the defendant owing to the lack of diligence. *Id.* Laches may bar a claim that is still within the statute of limitations.<sup>8</sup> *Ellis v. Swensen*, 2000 UT 101, ¶ 23,

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<sup>7</sup> The Court dismissed as untimely the Plaintiffs' claims for breach of contract and negligence in its Oct. 22, 2011 Memo. Decision and Order.

<sup>8</sup> Whether the claims were timely under their statutes of limitations is addressed in the next section.

16 P.3d 1233.

Gold's notes that the allegedly wrongful acts began to occur in 2001, and the Plaintiffs were aware of them in 2003 at the latest, but that the current action was not filed until 2009. In the intervening time, witnesses have died or are unable to be located; documents have been lost and memories have faded; Plaintiff Doug Chamberlain died in 2011 and has been identified as the one best acquainted with Health Source's financial documents and status; and fact discovery has expired, the Plaintiffs did not take any depositions or identify any experts, and the Court has denied the Plaintiffs' attempt to re-open discovery deadlines. The Plaintiffs counter that their delay is attributable to a failed attempt to settle their claims without resorting to a lawsuit. They blame their lack of discovery progress on Gold's refusal to provide requested discovery.

Laches is an equitable defense against causes of action based in equity. Where the claims are based in law, the relevant statute of limitations is determinative. *DOIT Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 845 (Utah 1996). The three causes of action against Gold's are all based in law, so laches does not apply. Gold's points to a cryptic sentence in a Utah Supreme Court decision stating, "[T]here may be factual scenarios where equitable defenses, such as laches, would be available in addition to the applicable statutes of limitations[.]" *General Constr. & Dev., Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 11, 248 P.3d 972. Gold's argument is not well fleshed out, nor is it clear that the Supreme Court's statement is anything other than dicta. Because the

causes of action lie in law, laches is inappropriate.<sup>9</sup>

*Claims not Barred by the Statutes of Limitations*

The statutes of limitations on conversion, conspiracy and intentional interference are three, four and four years, respectively. See Utah Code Ann. §§ 78B-2-305 and -307. The original Complaint was filed on July 13, 2005, meaning the causes of action, to be timely, must have accrued after July 13, 2001 and 2002, respectively.

The parties disagree as to when the claims arose. Gold's claims the causes of action accrued either in April 2001, when Mr. Engle told Gold's that the Plaintiffs no longer had an interest in the franchise, or upon the involuntary dissolution of Health Source on July 2011. The Plaintiffs counter that their claims arose on either July 14, 2001, the effective date of dissolution being five days after the July 9 notice was mailed (see Utah Code Ann. § 48-2c-1207), or in 2003 when the Plaintiffs became aware that Mr. Engle had convinced Gold's the Plaintiffs no longer held an ownership interest in the gym franchise. The Plaintiffs also argue that the wrongful acts continued until at least 2006, when Gold's and Mr. Engle continued to reassign the franchise agreement to entities other than that of the Plaintiffs.

The Court agrees with the Plaintiffs. Their claims are not untimely. The action was filed within four years of dissolution, within the four-year conspiracy and intentional interference statutes of limitations, and within three years of May 2003, when the

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<sup>9</sup> The Complaint also contains a cause of action for injunctive relief. The Plaintiffs have not moved for an injunction since they filed the current action almost four years ago, and they are unlikely to do so, given the lengthy delay without one. If the claim for injunction were still viable, it would be subject to dismissal by laches. To the extent that the claim remains, it is dismissed.

Plaintiffs first learned of the alleged acts of Mr. Engle and Gold's, the basis for the conversion claim. Therefore, the claims are not barred by the statutes of limitations.

Plaintiffs have Standing

Gold's argues that the Complaint should be dismissed because the claims belong to the now-defunct Health Source, but Health Source was never a named party.<sup>10</sup>

Gold's claims that the Complaint is a derivative action on behalf of Health Source, and the individual Plaintiffs lack standing.

The Court must first determine whether this is a derivative action. Derivative suits seek to enforce rights belonging to the corporation. *Aurora Credit Serv. Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1276 (Utah 1998). In contrast, direct actions by members are appropriate where "the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action." <sup>\_\_\_\_\_</sup> *Id.* The Court is not convinced that this is a derivative suit. First, the Utah Supreme Court has noted that derivative actions may not be required where the corporation is closely held with a limited number of

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<sup>10</sup> That Health Source was dissolved in 2001 does not preclude its inclusion as a plaintiff. "Dissolution of a company does not . . . prevent commencement of a proceeding by or against the company in its company name." Utah Code Ann. § 48-2c-1203(2)(3). A dissolved corporation may continue for the purpose of winding up its affairs, including to sue or be sued. *Id.* § 16-10-101.

principals.<sup>11</sup> Here, the claims are brought by two of the three remaining members of Health Source; clearly, Health Source was closely held with a very limited number of principals. Second, derivative actions are alleged against the corporation itself. Here, Gold's is challenging the claims against Gold's, not Health Source or Mr. Engle. Gold's does not cite to authority requiring a derivative suit for claims against a party who is not the primary corporation.

Plaintiffs Clark Chamberlain and Brent Statham are not improper parties, and Gold's has not shown that this is a derivative action of the sort that would require Health Source to be named a Plaintiff.

Claim for Civil Conspiracy

The Complaint alleges: "The object to be accomplished by the civil conspiracy of the Defendants was to sell the Gym and the franchise rights without the knowledge, approval, or consent of Plaintiffs and to convert the proceeds and/or benefits therefrom for their own use, gain and benefit." A claim for civil conspiracy requires: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result. *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 12, 42 P.3d 1253.

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<sup>11</sup> "[T]he rationale for requiring an action to proceed derivatively is often absent in a closely held corporation, where it is unlikely that there is a disinterested board because the majority shareholders are often the corporation's managers. As well, the concept of a corporate injury that is distinct from any injury to the shareholder approaches the fictional in the case of a firm with only a handful of shareholders." *Aurora*, 970 P.2d 1273, 1280-81.

Gold's argues that the Plaintiffs cannot point to any "unlawful, overt act" on its part. See *Estrada v. Mendoza*, 2012 UT App 82, ¶ 13, 42 P.3d 1253 (conspiracy requires an underlying tort). Gold's insists that Mr. Engle, as 50% owner of Health Source and its managing partner, had the authority to bind Health Source when it related to Gold's that Mr. Engle was now its sole shareholder.

Gold's insists that the Court should apply the Utah Code provisions for LLCs that were in place in 2001 when Health Source was dissolved. This version provided that an instrument disposing of an LLC's property is binding if executed by "one or more managers." Utah Code Ann. § 48-2b-127 (emphasis added).<sup>12</sup>

The Plaintiffs counter that the proper statutes should be those in effect in 2003 when Mr. Engle convinced Gold's that he was 100% owner of the St. George gym franchise and Gold's executed a franchise agreement with a party other than Health Source. Specifically, code section 48-2c-802 in place in 2003 provided that an act of a member not in carrying out the ordinary course of business binds the LLC "only if the act was authorized by the other members in accordance with Section 48-2c-803,"

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<sup>12</sup> Section 127 of the prior version of the LLC code conflicted with section 125, which limited a manager's authority to bind the LLC "unless otherwise provided in the LLC's articles of organization or operating agreement." Gold's acknowledges that Health Source's operating agreement specifically states that the managers may not "sell or assign substantially all the Property in bulk, without the written consent of the Members holding a majority of the Membership Interests." But Gold's notes that the Utah Supreme Court addressed the conflicting statutes in *Taghipour v. Jerez*, 2002 UT 74, 52 P.3d 1252, where it held that section 127 is more specific than section 125 and thus takes precedence. In response, the Plaintiffs note that the *Taghipour* decision was premised on an otherwise valid document conveying the property; here, Mr. Engle -- for HSI -- sold the franchise to Fitcorp, but since HSI was not the owner of the franchise, the sales agreement was not a document conveying title. The Plaintiffs' argument is well taken, and *Taghipour* is inapplicable.

which, in turn, requires approval of 2/3 interest holders for “any sale, lease, exchange, or other disposition of all or substantially all of the company’s property other than in the usual and regular course of the company’s business.”<sup>13</sup> It also provided that a manager may not act in contravention of an LLC’s articles of organization or operating agreement. *Id.* at § 48-2c-804(4).

The causes of action arose not when Mr. Engle represented a falsity to Gold’s, but when property was divested of Health Source. This occurred sometime after July 1, 2001 (it appears to be in 2003), so the later version of LLC code applies.<sup>14</sup> Under the applicable code, disposal of the majority of an LLC’s property requires approval of 2/3 of the interest holders. That clearly was not met when Gold’s facilitated the transfer of assets from Health Source to HSI, then to other entities.<sup>15</sup>

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<sup>13</sup> The Plaintiffs argue that Mr. Engle disposed of “substantially all” of Health Source’s property when he made a misrepresentation to Gold’s and when Gold’s entered into a license agreement divesting Health Source of the franchise. Gold’s counters that its acts, along with Mr. Engle’s, did not dispose of most of the LLC’s assets because the gym equipment valued at around \$150,000 was not covered under the License Agreement. The Court determines that for all practical purposes, Mr. Engle disposed of all or nearly all of the LLC’s property. The purpose of forming the LLC was to purchase and run the gym franchise, and gym equipment by its nature is entwined in the franchise ownership.

<sup>14</sup> It should be noted that at least as early as April 12, 2001 (when the prior LLC code was in effect), Gold’s agreed to let Mr. Engle enter into new franchise agreement under Fitcorp, Inc. Gold’s sent a new Franchise Agreement to Mr. Engle. It could be argued that the causes of action arose then, given Gold’s overt act demonstrating reliance on Mr. Engle’s wrongful assertion. But until documentation was executed, the claim cannot be said to have manifested.

<sup>15</sup> The post-July 2001 code also provides that a manager, acting in the ordinary course of business, binds the LLC unless the act is prohibited in the articles of incorporation or if the party dealing with the manager had notice that the manager lacked authority. Utah Code Ann. § 48-2c-802. Plaintiffs meet both conditions.



A claim for civil conspiracy also requires an underlying unlawful act; the Plaintiffs posit that the tort is either (or both) of its additional claims for conversion or intentional interference. Conspiracy also requires a meeting of the minds, here, between Mr. Engle and Gold's. Whether there is a meeting of the minds depends on whether the parties actually intended to contract, "and the question of intent generally is one to be determined by the trier of fact." *Terry v. Bacon*, 2011 UT App 432, ¶ 21, 269 P.3d 188. Therefore, whether the Plaintiffs can meet that prong of conspiracy is yet to be determined.

Lastly, the Plaintiffs must demonstrate damage from the alleged conspiracy. Gold's argues that the Plaintiffs have completely failed to present any evidence of damage, despite discovery requests for the same. In an earlier section of this Memorandum Decision, the Court denied the Plaintiffs' motion for enlargement of time to appoint an expert to calculate damages. The Court noted that the Plaintiffs should have designated an expert within the specified discovery deadlines, and the Plaintiffs have been dilatory in providing even a ballpark figure for its damage estimate.

Gold's cites *Stevens-Henager College v. Eagle Gate College*, 2011 UT App 37, 248 P.3d 1025, which held that summary judgment is appropriate when a plaintiff fails to present expert testimony regarding damages. The problem with that argument is that in *Stevens-Henager*, an expert was required to assess damages when the issue of causation was beyond the grasp of ordinary people. *Id.* at ¶ 15. Here, damages should not be difficult to calculate, as they are likely the value of the gym franchise at the time that Mr. Engle and Gold's transferred it from Health Source's possession. Therefore,

the Plaintiffs' failure to procure an expert on damages is not necessarily fatal to their claims. Nevertheless, "there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of damages." *Id.* at ¶ 16. The Court notes that the Plaintiffs' apparent lack of any estimate of damages is disconcerting, especially given that the discovery period is long past. Nevertheless, the Court declines to grant summary judgment for Gold's on the issue of damages because (a) a calculation should not be too difficult to assess, and (b) unlike in *Stevens-Henager*, the Plaintiffs here have a stronger showing of proximate cause. Where the fact of damages is clear, even though the amount is not, summary judgment is not appropriate. It shall be up to the trier of fact to assess whether there was a meeting of the minds and the amount of damages.

#### Claim for Conversion

A claim for conversion must include "an act of willful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *Lawrence v. Intermountain, Inc.*, 2010 UT App 313, ¶ 15, 243 P.3d 508 (citation omitted).

Gold's primary defense is that it never committed an unlawful act because it reasonably relied on Mr. Engle's *actual and apparent* authority vested by Health Source.<sup>16</sup> Gold's argues that Mr. Engle had authority to bind Health Source because:

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<sup>16</sup> Actual authority arises when the principle identifies its authority to perform an act on the principal's behalf. *Grazer v. Jones*, 2012 UT 58, ¶ 10, 289 P.3d 437. Apparent authority is considered from third party's perspective of the principal's acts. *Posner v. Equity Title Ins. Agency*, 2009 UT App 347, ¶ 18, 222 P.3d 775.

the other members of Health Source allowed Mr. Engle to sign the License Agreement on behalf of Health Source; Mr. Engle was the managing partner of Health Source; Mr. Engle (as HSI) owned 50% of the shares of Health Source; and the other members of Health Source had little to do with its operation. This argument is not well taken: Health Source's operating agreement prohibited Mr. Engle's unilateral disposal of its assets, Gold's was given a copy of Health Source's operating agreement, and Utah code also prohibited such action. Any reliance on Mr. Engle's representation by Gold's was not reasonable and not under authority of the members of Health Source.

Gold's next argues that Health Source cannot maintain a conversion claim because it had no immediate right to possession of its interest in the gym franchise. *See Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13 ¶ 20, 974 P.2d 288 (holding that a party alleging conversion must show it is entitled to immediate possession of the property at the time of conversion). Gold's argues that a franchise right is an intangible property right not subject to conversion. The Court finds this argument unavailing. Although the Utah Supreme Court has noted that a franchise is generally intangible property not subject to conversion, *see T-Mobile USA, Inc. v. Utah State Tax Comm'n*, 2011 UT 28, ¶ 39, 254 P.3d 752, the United States District Court for Utah clarifies that intangible property may be converted when it is "customarily merged in a document." *Margae, Inc. v. Clear Link Technologies, LLC*, 620 F. Supp. 2d 1284, 1287 (D. Utah 2009). Here, Health Source's franchise right was solidified when Health Source and Gold's executed the License Agreement. The Agreement is tangible property for a conversion claim. Summary judgment for Gold's is not warranted for conversion.

*Claim for Intentional Interference with Prospective Economic Relations*

The last claim against Gold's is for intentional interference. This requires: "(1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 65, 201 P.3d 966. Gold's challenges the Plaintiffs' ability to meet the second and third prongs.

The Court is unconcerned that the Plaintiffs can show the transfer was done using improper means. See *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 308 (Utah 1982) ("Means may also be improper or wrongful because they violate "an established standard of a trade or profession"). Improper means is "satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law-rules." *Id.* If proven, the Plaintiffs' other causes of action would constitute improper means.<sup>17</sup>

The Court is likewise comfortable with the Plaintiffs' ability to show damages. Gold's makes much of the fact that the Plaintiffs have not identified specific harm to Health Source's economic interests.<sup>18</sup> Gold's cites to a case in which the court properly granted summary judgment on an intentional interference claim because the plaintiff could not show any damages. See *Anderson Dev. Co. v. Tobias*, 2005 UT 36, 116 P.3d 323. In that case, however, the Plaintiff was estopped from executing a

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<sup>17</sup> The Plaintiffs are not necessarily limited to reliance on their others causes of action as the underlying wrongs. The Court has not been presented with authority limiting a plaintiff's interference claim to additional claims pled.

<sup>18</sup> The one failed business deal identified by the Plaintiffs involved the "Provo group," but that relationship ended in 1999 and is barred by the statute of limitations.

specific contract because of the action of the city council, not of the defendants. Gold's does not cite to authority that a plaintiff must prove a loss of *prospective* economic interest, which by definition is vague. A claim for intentional interference with economic relations "protects both existing contractual relationships *and prospective relationships of economic advantage not yet reduced to a formal contract.*" *Id.*, at ¶ 20 (emphasis added). If the gym franchise had not been taken from Health Source, Health Source surely could have benefitted from the sale of the franchise, regardless of whether a specific purchaser can be identified.

The Court is less convinced of the Plaintiffs' ability to prove the first element for intentional interference: that Gold's *intentionally* interfered. However, that will be an issue of fact appropriate for the trier of fact and is not appropriate for summary judgment.

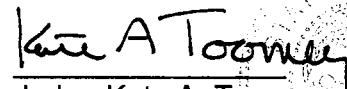
Gold's lastly argues that any actions it may have taken come within the scope of a business privilege in that it was acting in its own business interest to secure a license agreement with a franchisee when it executed the transfers. The Court rejects this argument and the argument that Gold's cannot interfere in its own contracts. The Plaintiffs' claim for interference is for potentially lost contracts with third parties interested in buying the franchise, not interference with the License Agreement that Health Source executed with Gold's.

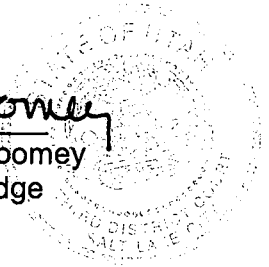
Gold's has not demonstrated that the Plaintiffs will be unable to show the elements of a claim for intentional interference, and summary judgment is denied.

## **CONCLUSION**

In summary, the Court denies the Plaintiffs' Motion for Reconsideration, for Clarification, and for Enlargement of Time, with the limitations contained herein, and the Court denies Gold's Motion for Summary Judgment.

DATED this 6 day of September, 2013.

  
\_\_\_\_\_  
Judge Kate A. Toomey  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090919785 by the method and on the date specified.

MAIL: HOLLY S CHAMBERLAIN 2235 SOUTH 2200 EAST SALT LAKE CITY, UT 84109

MAIL: BRIAN C HARRISON 3651 NORTH 100 EAST STE 300 PROVO UT 84604

MAIL: BLAKE T OSTLER 57 WEST 200 SOUTH STE 350 SALT LAKE CITY UT 84101

MAIL: CLARK W SESSIONS ONE UTAH CTR 13TH FLR 201 SOUTH MAIN STREET SALT LAKE CITY UT 84111-2216

Date: 09/06/2013 \_\_\_\_\_

/s/ DEVONYA B GALLIVAN \_\_\_\_\_

Deputy Court Clerk

# **EXHIBIT F**



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**THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH**

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CLARK CHAMBERLAIN and BRENT  
STATHAM,

Plaintiffs,

vs.

VINCE ENGLE, an individual; HEALTH  
SOURCE, INC., a Utah corporation;  
FITCORP, INC., a Utah corporation; TRAVIS  
IZATT, an individual, d/b/a Gold's Gym of St.  
George; FITNESS SOURCE, LLC, a Utah  
limited liability company; O.P.M.  
HOLDINGS, INC., a Utah corporation;  
GOLD'S GYM INTERNATIONAL, INC., a  
Texas corporation; ST. GEORGE FITNESS,  
LLC, a Utah limited liability company, d/b/a  
Gold's Gym - Utah Group; and DOES I  
through X,

Defendants.

**DEFENDANT GOLD'S GYM  
INTERNATIONAL, INC.'S MOTION  
FOR ATTORNEYS' FEES AND COSTS**

Civil No. 090919785

Judge Todd Shaughnessy

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Defendant, Gold's Gym International, Inc. ("Gold's Gym"), pursuant to Rules 7, 73, and 54 of the Utah Rules of Civil Procedure, respectfully submits this *Motion for Attorneys' Fees and Costs*, and in support hereof, states the following:

## I. REQUESTED RELIEF AND GROUNDS THEREFOR

On 19 December 2016, this Court entered its Findings of Fact and Conclusions of Law based on the evidence presented throughout a three-day bench trial, and awarded Gold’s Gym a complete defense verdict on all of the claims brought by Plaintiffs. Thus, Gold’s Gym is the “prevailing party” on all of Plaintiffs’ claims in this action. The parties’ License Agreement executed on 22 June 1999 contains a broadly-worded attorneys’ fees provision, which contractually entitles Gold’s Gym to an award of attorneys’ fees on all claims in this case. The Declaration from Gold’s Gym’s legal counsel, Mr. Blake T. Ostler, details the allocation of the attorneys’ fees, costs, and expenses incurred in this action. Therefore, Gold’s Gym seeks an award from this Court of its reasonable attorneys’ fees, costs, and expenses incurred in this case, as more fully described herein.

## II. ARGUMENT AND AUTHORITY

**A. Gold’s Gym is Entitled to An Award of Attorneys’ Fees Under Utah Law and Pursuant to the Broadly-Worded Attorneys’ Fee Provision In the License Agreement.** “As a general rule, attorney fees are recoverable only if authorized by contract or statute.”<sup>1</sup> “If the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so strictly in accordance with the contract’s terms.”<sup>2</sup> “We first look to the writing alone to determine its meaning and the intent of the contracting parties.”<sup>3</sup> 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

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<sup>1</sup> *Giles v. Mineral Res. Int’l, Inc.*, 2014 UT App 259, ¶ 17, 338 P.3d 825, 829–30 (citing *Hahnel v. Duchesne Land, LC*, 2013 UT App 150, ¶ 16, 305 P.3d 208).

<sup>2</sup> *Id.* at 830.

<sup>3</sup> *Id.* (citation and internal quotation marks omitted).

litigation arising from the contract claims.”<sup>4</sup> “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.”<sup>5</sup> “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*.”<sup>6</sup>

In this case, as in *Giles*, the parties’ License Agreement contains broad contractual language relating to the award of attorneys’ fees, providing as follows:

***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.***<sup>7</sup>

This attorneys’ fee provision is broadly worded because it awards attorneys’ fees to the prevailing party for “*any dispute*” that is “*relating to or arising out of*” the License Agreement. Thus, this clause does not limit fees to claims for breach of contract but instead awards attorneys’ fees to the prevailing party in any dispute or action arising out of or relating to the License Agreement. The parties’ attorneys’ fee clause in this action is vastly different from narrowly-crafted contractual provisions that only award attorneys’ fees to the prevailing party who succeeds in “enforcing the agreement”,<sup>8</sup> or to the “non-defaulting party.”<sup>9</sup> Juxtaposing the various attorneys’ fee provisions makes it apparent that the parties bargained for an expansive and broadly-sweeping attorneys’ fee clause to be placed in the parties’ License Agreement. The

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<sup>4</sup> *Id.* (alteration in original).

<sup>5</sup> *Id.* at 830-831 (citations omitted) (emphasis added).

<sup>6</sup> *Id.* at 831 (emphasis added); *cf. 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, which provided that “ ‘[a]ny dispute, controversy or claim arising out of or related to the agreement shall be brought exclusively before the courts of England [and] Wales,’ ” because the clause's language did not “support a distinction between contract claims and tort claims” (alterations in original)).

<sup>7</sup> Exhibit 1, § 4, p.16 (emphasis added).

<sup>8</sup> *B. Inv. LC v. Anderson*, 2012 UT App 24, ¶ 33, 270 P.3d 548, 555

<sup>9</sup> *Jones v. Riche*, 2009 UT App 196, ¶ 3, 216 P.3d 357, 359.

contractual clause further includes granting “costs and expenses” even for “accounting’, attorneys’, arbitrators’, and related fees, costs, and other expenses....” Many contrasting fee provisions are not as broad or inclusive. It should also be noted this fee provision is also mandatory, *i.e.* “shall be entitled to recover its costs and expenses....”

Therefore, the Court should grant Gold’s Gym an award of attorneys’ fees pursuant to the broad, mandatory contractual language contained in the parties’ License Agreement.

**B. Gold’s Gym Is the Prevailing Party On All of Plaintiffs’ Claims.** “Generally, only the prevailing or successful party is entitled to an award of attorney fees.”<sup>10</sup> “Determining the prevailing party is often an imprecise process.”<sup>11</sup> “Our courts have developed a ‘flexible and reasoned approach’ for determining which party has emerged the ‘comparative winner.’”<sup>12</sup> “It begins by identifying ‘the party in whose favor the ‘net’ judgment is entered.’”<sup>13</sup> “The ‘net judgment rule’ will usually be ‘at least a good starting point,’ but it should not be ‘mechanically applied.’”<sup>14</sup> “This approach requires not only consideration of the significance of the net judgment in the case, but also looking at the amounts actually sought and then balancing them proportionally with what was recovered.”<sup>15</sup> “Consequently, ‘a party that makes an outrageous claim and then receives only a fraction of what it demanded’ – though the net judgment winner – ‘will not likely be deemed the successful party.’”<sup>16</sup> “Thus, we focus on ‘which party had attained a ‘comparative victory,’ considering what a total victory would have meant for each party and

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<sup>10</sup> *Olsen v. Lund*, 2010 UT App 353, ¶¶ 6-7, 246 P.3d 521, 522–23 (citations omitted).

<sup>11</sup> *Id.* at ¶ 7, 246 P.3d at 523.

<sup>12</sup> *Id.* (citations omitted).

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> *Id.* at ¶ 12, 246 P.3d at 524 (citing *J. Pochynok Co. v. Smedsrud*, 2005 UT 39, ¶ 20, 116 P.3d 353).

what a true draw would look like.”<sup>17</sup> “Comparative victory – not necessarily a shutout – is all that is required.”<sup>18</sup>

In this case, all claims asserted by the Plaintiffs against Gold’s Gym were dismissed with prejudice. From the very outset of the case, Gold’s Gym successfully dismissed with prejudice Plaintiffs’ claims for: (1) breach of contract; and (2) negligence. Then, Gold’s Gym prevailed on each of Plaintiffs’ three (3) 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 Plaintiffs’ claims asserted against it.<sup>19</sup> Gold’s Gym was found not liable on each of Plaintiffs’ claims asserted against Gold’s Gym despite the fact that Plaintiffs sought \$7,165,032.21 in damages, \$3,762,632.21 in prejudgment interest, and \$20,000,000 in punitive damages, as stated in the proposed Default Judgments to be entered against the other Defendants.<sup>20</sup>

Therefore, this Court should find that Gold’s Gym is the prevailing party on all of Plaintiffs’ claims asserted against Gold’s Gym.

**C. Gold’s Gym Is Entitled to Attorney’s Fees and Costs On Plaintiffs’ Breach of Contract Claim.** On 26 October 2011, Judge Toomey granted Gold’s Gym’s Motion to Dismiss

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<sup>17</sup> *Id.* (citing *J. Pochynok Co.*, 2005 UT 39, ¶ 20, 116 P.3d 353).

<sup>18</sup> *Id.* See *Occidental/Nebraska Fed. Sav. Bank*, 791 P.2d 217 at 222 (holding that defendants prevailed in context of plaintiffs’ \$600,000 claim notwithstanding a \$7,339.44 judgment against them).

<sup>19</sup> Gold’s Gym reiterates what the Court stated in its Findings of Fact and Conclusions of Law: “To the extent any other claims against Gold’s Gym or St. George Fitness may technically remain in the case, Plaintiffs have waived those claims by not identifying them for the court at the time of trial. During trial, the court asked counsel to identify the claims for which Plaintiffs sought relief, and the court addresses those claims here. To the extent any claim or issue raised during trial by the parties is not explicitly addressed in these findings or conclusion, the claim or issue is rejected by the court and further discussion is unnecessary.” See Findings of Fact and Conclusions of Law, p.21. In addition, in the 6 September 2013 Memorandum Decision regarding Gold’s Gym’s Motion for Summary Judgment, the Court ruled that “[t]he Complaint also contains a cause of action for injunctive relief. The Plaintiffs have not moved for an injunction since they filed the current action almost four years ago, and they are unlikely to do so, given the lengthy delay without one. If the claim for injunction were still viable, it would be subject to dismissal by laches. To the extent that the claim remains, it is dismissed.” See 6 September 2013 Memorandum Decision, p.12 n.9.

<sup>20</sup> Exhibit 2, email dated 30 December 2016 from Plaintiffs’ counsel re: Proposed Default Judgments Against Defendants Vince Engle, Health Source, Inc., and Fitcorp, Inc.

with respect to Plaintiffs' breach of contract claim.<sup>21</sup> The Court concluded that 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."<sup>22</sup> Plaintiffs' contract claim arose out of and related to the License Agreement because the Plaintiffs alleged that Gold's Gym breached that Agreement. Gold's Gym was the "prevailing party" on Plaintiffs' contract claim given Judge Toomey's 26 October 2011 Order of dismissal of Plaintiffs' contract claim.

Plaintiffs filed this action on 18 November 2009.<sup>23</sup> After analyzing Plaintiffs' Complaint, Gold's Gym determined to file a Motion to Dismiss on 9 December 2009.<sup>24</sup> Gold's Gym's Memorandum in Support of the Motion to Dismiss and the Reply Memorandum in Support were concise and straightforward, consisting of approximately 10 pages of facts and legal analysis. In response thereto, Plaintiffs filed a Memorandum in Opposition and additionally a Surreply Memorandum, which contained roughly 15 pages total of counterarguments and other facts. Preparation and attendance was required for the respective hearing held before the Court on 31 August 2011. In total, Gold's Gym incurred \$13,676.42 in attorneys' fees and costs with respect to the Motion to Dismiss.<sup>25</sup> Therefore, Gold's Gym seeks the above-stated amount as part of its award for reasonable attorneys' fees in prevailing in Plaintiffs' contract claim.

**D. Plaintiffs' Intentional Interference, Conversion, and Conspiracy Claims "Arise Out Of" and "Relate To" the License Agreement.** Plaintiffs' intentional interference, conversion, and conspiracy claims each "arise out of" and "relate to" the License Agreement. Thus, Gold's Gym is entitled to an award of reasonable attorneys' fees for being the prevailing party with respect to Plaintiffs' claims for intentional interference, conversion, and conspiracy.

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<sup>21</sup> Docket, 26 October 2011 Memorandum Decision and Order, p.5.

<sup>22</sup> *Id.*

<sup>23</sup> Docket, Complaint.

<sup>24</sup> *Id.*

<sup>25</sup> *See* Declaration ("Decl.") of Blake T. Ostler, ¶ 21.

**1. Intentional Interference With Contract.** With respect to Plaintiffs’ intentional interference with the License Agreement claim, this Court made the following statement in its Findings of Fact and Conclusions of Law:

***Insofar as Plaintiffs 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 Plaintiffs cannot sue Gold’s Gym for interfering with a contract to which it is a party.***<sup>26</sup>

This Court went on to further provide:

Although Plaintiffs 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 Plaintiffs (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 Plaintiffs 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.’” *Leigh Furniture & Carpet Co.*, 657 P.2d at 309 *overruled in part on other grounds by Eldridge*, 2015 UT 21, 345 P.3d 553; *see also, Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 900 (Utah 1985) (“Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort.”); *Canyon Country Store v. Bracey*, 781 P.2d 414, 423 (Utah 1989) (same).<sup>27</sup>

Based on the Court’s Findings and Conclusions, noted *supra*, a breach of the License Agreement was integral to the “improper means” element of Plaintiffs’ intentional interference claim. Plaintiffs’ intentional interference claim directly arose out of and related to the License Agreement because Plaintiffs relied on the argument that Gold’s Gym’s breach of contract constituted improper means for purposes of tortious interference. At trial, Plaintiffs’ 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***

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<sup>26</sup> Docket, Findings of Fact and Conclusions of Law, p.29 (emphasis added).

<sup>27</sup> *Id.* at pp.30-31 (emphasis added).

*sure they're dealing with an authorized party.*"<sup>28</sup> This Court even specifically asked whether the improper means to support an intentional interference claim was "*either conversion or breach of contract?*"<sup>29</sup> Plaintiffs' counsel responded, "*Correct.*"<sup>30</sup> The Court asked the parties to specifically brief whether breach of contract could constitute improper means to support tortious interference, which the parties then submitted respective post-trial memoranda on this issue.

In addition, Gold's Gym's counsel at trial vehemently defended the breach of contract issue with respect to the improper means for an intentional interference claim.<sup>31</sup> Particularly, the case was made that there was no evidence to establish that Gold's Gym knowingly breached a contract with the intent to harm Plaintiffs. As a result, 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. However, Plaintiffs proved no such improper intent to breach the License Agreement. Thus, the tort claim of intentional interference was dismissed with prejudice.

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 strikingly 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 then determined whether defendants' tort counterclaim, *i.e.* breach of fiduciary duty, arose out of or related to the

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<sup>28</sup> Trial Transcript, 3 November 2016, 15:21-24 (emphasis added).

<sup>29</sup> *Id.* at 18:19-25 (emphasis added).

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> *Id.* at 39-41.



non-compete agreement, and if so, to award attorneys' fees to the prevailing party accordingly.<sup>32</sup> The trial court rejected the argument that the tort claim was unrelated or did not arise out of the contract claim, and thus, awarded attorneys' fees to the prevailing party on the tort claim.<sup>33</sup>

Affirming the trial court's award of attorneys' fees, the appellate court in *Giles* first held that the fee provision, which is practically identical with the fee provision in the License Agreement, contains "*broad contractual language*" and that it is "*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.*"<sup>34</sup> 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."<sup>35</sup>

As in *Giles*, the facts that support Plaintiffs' contract claim are incorporated to their intentional interference claim, the respective legal theories overlap significantly, and the claims are intricately intertwined. In *Dejavue, Inc. v. U.S. Energy Corp.*, 1999 UT App 355, ¶ 21, 993 P.2d 222, 227, the Utah Court of Appeals similarly affirmed 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.*"<sup>36</sup> "Furthermore, when a plaintiff brings multiple claims

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<sup>32</sup> *Giles*, 2014 UT App 259, ¶ 19, 338 P.3d at 830.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at ¶ 21, 338 P.3d at 830-31 (emphasis added); *cf. 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, which provided that "[a]ny dispute, controversy or claim arising out of or related to the agreement shall be brought exclusively before the courts of England [and] Wales," because the clause's language did not "support a distinction between contract claims and tort claims" (alterations in original)).

<sup>35</sup> *Giles*, 2014 UT App 259, ¶ 22, 338 P.3d at 831 (emphasis added).

<sup>36</sup> *See also 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") (emphasis added); *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560, 566 (10th Cir.1993) (stating because plaintiffs "*claims arose out of a*

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.*”<sup>37</sup>

Therefore, Gold’s Gym is entitled to an award of attorneys’ fees because Gold’s Gym is the prevailing party with respect to Plaintiffs’ intentional interference claim that arises out of and relates to the License Agreement.

**2. Conversion of Contractual Franchise Rights.** Plaintiffs’ conversion claim is inherently and directly “related to” and “arises from” the License Agreement. Throughout this entire case, Plaintiffs 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 Plaintiffs’ property pursuant to the License Agreement. As recently as 5 August 2015, Plaintiffs stated the following in their opposition memorandum to a summary judgment motion filed by Gold’s Gym:

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 Plaintiffs’ 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 Plaintiffs when they notified Gold’s of their rightful ownership... Gold’s further exercised control over the franchise inconsistent with

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*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.]”) (emphasis added); *Caufield v. Cantele*, 837 So. 2d 371, 379 (Fla. 2002) (stating “the fraudulent misrepresentation complained of in this case could be correctly characterized as a tort stemming from or arising out of the failure of one party to carry out its contractual duty to reveal defects in the property. Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the tort complained of necessarily arose out of the underlying contract. As a result, the contractual provisions, including the prevailing party clause, should be given effect.”).

<sup>37</sup> *Dejavue, Inc.*, 1999 UT App 355, ¶ 20, 993 P.2d at 227 (emphasis added); see *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

Plaintiffs' rights when it terminated Fitness Source, LLC's *Franchise Agreement* ... and, rather than returning the franchise to Plaintiffs, awarded the *franchise* rights to St. George Fitness, LLC....<sup>38</sup>

Plaintiffs' own arguments to the Court in effort to establish a conversion claim relate to and arise directly from the License Agreement. During closing arguments, Plaintiffs' 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.*"<sup>39</sup>

In addition, This Court made the following statement in its Findings of Fact and Conclusions of Law:

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*.<sup>40</sup>

Even during trial, the Court considered evidence concerning Plaintiffs' assertion that Gold's Gym converted their franchise rights granted to them under the License Agreement.

Significantly, the franchise rights they claim were converted and created by the License Agreement. In addition, Plaintiffs provide no additional evidence to support their conversion claim besides what is already presented to establish their tortious interference or breach of contract claim for that matter. Plaintiffs 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.

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<sup>38</sup> Docket, 5 August 2015, Plaintiffs' 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).

<sup>39</sup> Trial Transcript, 3 November 2016, 8:2-4 (emphasis added).

<sup>40</sup> Docket, 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.”<sup>41</sup> The court held that the “fees were recoverable” when the defendants’ attorneys’ efforts “went to prove facts common to both [claims].”<sup>42</sup>

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

Therefore, Gold’s Gym is entitled to an award of attorneys’ fees because Gold’s Gym is the prevailing party with respect to Plaintiffs’ conversion claim that arises out of and relates to the License Agreement.

**3. Conspiracy to Convert or Intentionally Interfere With Contractual Franchise Rights.** A conspiracy can only be proven based upon an underlying tort,<sup>43</sup> and thus, it logically follows that Plaintiffs’ conspiracy claim arises out of and relates to the License Agreement because Plaintiffs’ other tort claims do so as well. In fact, this Court held the following with respect to Plaintiffs’ conspiracy claim as it relates to and arises out of the License Agreement:

For there to be a meeting of the minds on an unlawful objective, Plaintiffs would have to show, by clear and convincing evidence, that Gold’s Gym was aware of Engle’s plan to surreptitiously eliminate Plaintiffs’ 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

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<sup>41</sup> *Brown*, 1999 UT App 109, ¶ 22, 978 P.2d at 475.

<sup>42</sup> *Id.* (alteration in original).

<sup>43</sup> *Estrada v. Mendoza*, 2012 UT App 82, p.13 (Utah Ct. App. 2012) (citation omitted).

Plaintiffs 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.<sup>44</sup>

Here, the Court not only addresses conspiracy as it relates to the License Agreement but again states that Plaintiffs' theory of conversion arises out of breach of the License Agreement. All of Plaintiffs' claim arise out of and relate to 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....” The court in *Keith* stated that “we conclude this lease language is broad....”<sup>45</sup> 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.”<sup>46</sup> Upholding the trial court's award of attorneys' fees, the *Keith* court held that:

***[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.***<sup>47</sup>

In the present matter, Plaintiffs' conspiracy claim arise out of and relate to their claims for breach of contract, tortious interference, and conversion. Each of Plaintiffs' claims entails a common core of facts and legal theories arising out of alleged breach of the License Agreement

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<sup>44</sup> Docket, Findings of Fact and Conclusions of Law, pp.23-24 (emphasis added).

<sup>45</sup> *Keith Jorgensen's, Inc.*, 2001 UT App 128, ¶ 26, 26 P.3d at 879 (emphasis added).

<sup>46</sup> *Id.* at ¶ 27, 26 P.3d at 879 (emphasis added).

<sup>47</sup> *Id.* at ¶ 28, 26 P.3d at 879 (emphasis added).

and 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 Plaintiffs' conspiracy claim that arises out of and relates to the License Agreement.

**E. The Time Spent Defending One Claim Was Spent Defending All Claims.** Because the same set of common facts and related legal theories were alleged by Plaintiffs to establish each of their claims, the time spent by Gold's Gym on defending one claim, such as intentional interference, was also spent on defending Plaintiffs' conversion and conspiracy claims. It is nearly impossible to divide what time went to defending each of the claims because each of the claims were so closely related. Nevertheless, Gold's Gym prevailed on each of Plaintiffs' claims asserted against it, and thus, is entitled to an award of reasonable attorneys' fees.

**F. Gold's Gym Prevailed On the Discovery-Related Motions.** Gold's Gym prevailed on the discovery-related motions because practically all of Plaintiffs' respective motions were denied and Gold's Gym's respective motions were granted.<sup>48</sup> First, on 14 February 2013, Judge Toomey *denied* both Plaintiffs' Statement of Discovery Issues and Motion for Enlargement of Time because, among other things, Plaintiffs did not exhaust their standard discovery for a Tier III case.<sup>49</sup> Subsequently, on 6 September 2013, the Court *denied* Plaintiffs' Motion for Reconsideration of the Court's prior 14 February 2013 Order.<sup>50</sup>

Next, on 19 June 2015, the Court *denied* Plaintiffs' third attempt to extend fact discovery.<sup>51</sup> In this 19 June 2015 Order, the Court also *denied* Plaintiffs' request to compel

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<sup>48</sup> Gold's did not prevail on one (1) discovery-related motion and has not included fees for that motion herein.

<sup>49</sup> Docket, 14 February 2013 Memorandum Decision, p.2.

<sup>50</sup> Docket, 6 September 2013 Memorandum Decision, pp.4-9.

<sup>51</sup> Docket, 19 June 2015 Order.

Gold's Gym to provide any additional documents besides the re-constituted financial statements for 2006 and 2010, which Plaintiffs 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.<sup>52</sup> The Court *denied* Plaintiffs' remaining discovery issues at that time.<sup>53</sup> In addition, the Order from this Court on 20 July 2015 again *denied* Plaintiffs' discovery motion to clarify the Court's prior 19 June 2015 Order.<sup>54</sup>

On 9 November 2015, the Court *granted* Gold's Gym Motion to Strike Plaintiffs' Expert Witness Designation as being grossly untimely since expert discovery had expired years earlier.<sup>55</sup> Plaintiffs then filed a Motion for Jury Trial, which the Court *denied* on 10 December 2015 because it found that Plaintiffs had waived their right to a jury trial by failing to pay the requisite filing fee even after the Court reminded Plaintiffs of their failure to do so.<sup>56</sup>

Due to Plaintiffs' 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. Plaintiffs' discovery motions were not even close calls due to the egregious failure of Plaintiffs 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.

The fees for which Gold's Gym is seeking are the following discovery motions upon which Gold's Gym prevailed: (1) 14 February 2013 – Plaintiffs' Statement of Discovery Issues – *denied*; (2) 14 February 2013 – Plaintiffs' Motion for Enlargement of Time – *denied*; (3) 6 September 2013 – Plaintiffs' Motion for Reconsideration of the 14 February 2013 Order, for

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Docket, 20 July 2015 Order.

<sup>55</sup> Docket, 9 November 2015 Order.

<sup>56</sup> Docket, 10 December 2015 Minute Entry; *see also* 22 December 2016 Order.

Clarification, and for Enlargement of Time – *denied*; (4) 19 June 2015 – Plaintiffs’ Motion to Compel – *largely denied*; and (5) 20 July 2015 – Plaintiffs’ Objection to Form of 19 June 2015 Order – *denied*. This amount further includes mediation efforts.

In total, Gold’s Gym incurred \$82,792.74 in attorneys’ fees and costs with respect to the identified discovery motions in this case, which includes analyzing Plaintiffs’ discovery motions and researching and drafting responses thereto, drafting Gold’s Gym’s discovery motion, and analyzing the documents and data disclosed therefrom.<sup>57</sup> This figure also includes drafting discovery requests to Plaintiffs and writing responses to Plaintiffs’ 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 related issues.

**G. Gold’s Gym is Entitled to Attorneys’ Fees for its Summary Judgment Motions.**

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***

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<sup>57</sup> Decl. of Blake T. Ostler, ¶ 23.



***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 Plaintiffs' 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 Plaintiffs' 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 Plaintiffs' 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 this Court's Findings of Fact and Conclusions of Law.<sup>58</sup>

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 Plaintiffs of anything, nor could this be proven with clear and convincing evidence, with which this Court ultimately held after hearing all of the trial evidence.<sup>59</sup> 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.<sup>60</sup> 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

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<sup>58</sup> Docket, Findings of Fact and Conclusions of Law, pp.31-32.

<sup>59</sup> *Id.* at pp.23-24.

<sup>60</sup> *Id.* at pp.26-27.

franchisee.<sup>61</sup> In addition, Gold's Gym argued that Plaintiffs' 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 Plaintiffs, 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 this Court relied on for its rulings.<sup>62</sup>

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, this 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 "Plaintiffs should have designated an expert within the specified discovery deadlines, and the Plaintiffs have been dilatory in providing even a ballpark figure for its damages estimate."<sup>63</sup> Finally, after all of the evidence was presented at trial, this Court accepted Gold's Gym's arguments that were raised in its summary judgment motions and dismissed Plaintiffs' 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.<sup>64</sup> This amount includes time and expenses for drafting the motions, analyzing Plaintiffs' 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.

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<sup>61</sup> *Id.* at p.28.

<sup>62</sup> *Id.* at p.29-30.

<sup>63</sup> Docket, 6 September 2013 Memorandum Decision, p.17.

<sup>64</sup> Decl. of Blake T. Ostler, ¶ 25.

**H. Gold’s Gym is Entitled to an Award of Attorneys’ For All Claims Successfully Defended At Trial, Including Pre-Trial and Post-Trial Motions.** “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.”<sup>65</sup> Because Gold’s Gym successfully defended each and every claim Plaintiffs 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.<sup>66</sup> 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 Plaintiffs’ claims, and spending three (3) days in trial before this Court. This amount includes the legal work involved with Plaintiffs’ pre-trial motions dated 9 November 2015 – Gold’s Gym’s Motion to Strike Plaintiffs’ Expert Witness Designation, which was *granted* in favor of Gold’s Gym; and 22 December 2015 – Plaintiffs’ 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 Plaintiffs’ post-trial motions dated 19 December 2016 – Plaintiffs’ Motion to Re-Open Evidence and Motion for

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<sup>65</sup> *Occidental/Nebraska Fed. Sav. v. Mehr*, 791 P.2d 217, 221 (Utah Ct.App.1990).

<sup>66</sup> Decl. of Blake T. Ostler, ¶ 27.

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.<sup>67</sup>

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.

**I. Gold's Gym is Entitled to an Award for the Time Spent Preparing the Motion for Attorneys' Fees and Costs.** In Utah, "[a]ttorneys' fees are generally awarded for the reasonable time spent preparing the subject motion seeking such fees."<sup>68</sup> 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.<sup>69</sup> Additional time will be spent analyzing Plaintiffs' 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.

**J. Gold's Gym's Fee Allocation is Reasonable.** 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."<sup>70</sup> "[T]he most critical factor is the degree of success obtained."<sup>71</sup>

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<sup>67</sup> Docket, 19 December 2016 Minute Entry.

<sup>68</sup> *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); *see also Tinch v. City of Dayton*, 199 F. Supp. 2d 758, 763 (S.D. Ohio 2002) (awarding attorneys' fees "to compensate them for the time incurred to request such fees."); *Barnes v. Astrue*, No. 3:11CV01780 HBF, 2013 WL 1296498, at \*3 (D. Conn. Mar. 28, 2013), *aff'd sub nom. Barnes v. Colvin*, No. 3:11-CV-1780 JCH, 2013 WL 3853446 (D. Conn. July 23, 2013) (same); *Jadwin v. Cty. of Kern*, 767 F. Supp. 2d 1069, 1140 (E.D. Cal. 2011) (same); *Emmenegger v. Bull Moose Tube Co.*, 33 F. Supp. 2d 1127, 1140-41 (E.D. Mo. 1998) (same); *Faust v. Menard, Inc.*, No. 2:11 CV 425 JM, 2014 WL 1259963, at \*1 (N.D. Ind. Mar. 26, 2014) (same).

<sup>69</sup> Decl. of Blake T. Ostler, ¶ 29.

<sup>70</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

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.”<sup>72</sup> 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.”<sup>73</sup> 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.”<sup>74</sup> “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.”<sup>75</sup> 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.”<sup>76</sup>

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....”<sup>77</sup> In addition, the *Kraatz* court rejected the arguments raised to reduce the fee amount,

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<sup>71</sup> *Id.* at 436.

<sup>72</sup> *Brown*, 1999 UT App 109, ¶ 18, 978 P.2d at 475 (emphasis added).

<sup>73</sup> *Id.* at 475.

<sup>74</sup> *Id.* at ¶ 18, 978 P.2d at 475 (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at ¶ 24, 978 P.2d at 475 (alteration in original).

<sup>77</sup> *Kraatz*, 2003 UT App 201, ¶ 58, 71 P.3d at 202.

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.”<sup>78</sup> The Court simply 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.”<sup>79</sup>

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.<sup>80</sup> 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 Plaintiffs, 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 Plaintiffs’ repeated failures to abide by the Utah Rules of Civil Procedure, particularly with respect to discovery. Third, as addressed herein, Plaintiffs’ claims overlap significantly, all stemming from a common core of facts. Fourth, settlement was almost impossible given Plaintiffs’ outrageous settlement offers despite their speculative evidence supporting their claims and particularly damages. Plaintiffs’ asserted at trial that they were

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<sup>78</sup> *Id.* at ¶ 60, 71 P.3d at 202.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 202–03.

entitled to roughly \$2,000,000 (*i.e.* \$450,000 plus \$100,000 annually from 2002 to the present),<sup>81</sup> and in their Complaint, they sought an additional \$1,000,000 in punitive damages.<sup>82</sup> Although Plaintiffs sought astronomical amounts in damages, Gold's Gym prudently rejected Plaintiffs' unreasonable settlement offers given the financial analysis and weaknesses of Plaintiffs' case.

Fifth, difficulty that arose in this case because Plaintiffs repeatedly attempted to re-open fact and expert discovery after cut-off dates, to which this Court flatly rejected on several occasions. Sixth, Gold's Gym lead attorney has over 30 years of litigation and trial experience. This case required an experienced litigator to address the complexities and nuances raised by Plaintiffs' 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.

### III. CONCLUSION

For the foregoing reasons, the Defendant, Gold's Gym International, Inc., respectfully requests this Court to grant Plaintiffs' Motion for Attorneys' Fees in its entirety, consisting of attorneys' fees and costs as follows: (1) \$13,676.42 for prevailing on Plaintiffs' 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 Plaintiffs' intentional

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<sup>81</sup> Trial Transcript, 3 November 2016, pp.11, 13.

<sup>82</sup> Complaint, p.50; *see also* Ex. 2, email dated 30 December 2016 from Plaintiffs' counsel re: Proposed Default Judgments Against Defendants Vince Engle, Health Source, Inc., and Fitcorp, Inc. wherein Plaintiffs 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.

interference, conversion, and conspiracy claims, which (1) through (4), *supra*, totals \$367,320.53 of attorneys' fees and costs thus far (not including the fees incurred preparing this Motion), and (5) the right to supplement this Motion with the additional attorneys' fees incurred for preparing and arguing this Motion before this Court.

DATED this 9<sup>th</sup> day of January, 2017.

**OSTLER MOSS & THOMPSON**

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



**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of January, 2017, I caused to be served by the method indicated below a true and correct copy of the foregoing **DEFENDANT GOLD’S GYM INTERNATIONAL, INC.’S MOTION FOR ATTORNEYS’ FEES AND COSTS** on the following:

<input type="checkbox"/> VIA EMAIL	Holly S. Chamberlain
<input type="checkbox"/> VIA HAND DELIVERY	CHAMBERLAIN LAW, PLLC
<input type="checkbox"/> VIA U.S. MAIL	2235 South 2200 East
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Salt Lake City, Utah 84109
	Email: <a href="mailto:chamberlainlaw@gmail.com">chamberlainlaw@gmail.com</a>

<input type="checkbox"/> VIA EMAIL	Karthik Nadesan
<input type="checkbox"/> VIA HAND DELIVERY	NADESANBECK P.C.
<input type="checkbox"/> VIA U.S. MAIL	8 East Broadway, Suite 625
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Salt Lake City, Utah 84111
	Email: <a href="mailto:karthik@nadesanbeck.com">karthik@nadesanbeck.com</a>
	<i>Attorneys for Plaintiffs</i>

<input type="checkbox"/> VIA EMAIL	Brian C. Harrison
<input type="checkbox"/> VIA HAND DELIVERY	BRIAN C. HARRISON P.C.
<input type="checkbox"/> VIA U.S. MAIL	3651 North 100 East, Suite 300
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Provo, Utah 84604
	Email: <a href="mailto:attorney@brianharrisonpc.com">attorney@brianharrisonpc.com</a>
	<i>Attorney for Defendant St. George Fitness, LLC</i>

/s/ Kiersten Slade  
Legal Assistant to Blake T. Ostler

# EXHIBIT G

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*Attorneys for Defendant Gold's Gym International, Inc.*

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**THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH**

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CLARK CHAMBERLAIN and BRENT  
STATHAM,

Plaintiffs,

vs.

VINCE ENGLE, an individual; HEALTH  
SOURCE, INC., a Utah Company; FITCORP,  
INC., a Utah Company; TRAVIS IZATT, an  
individual, d/b/a Gold's Gym of St. George;  
FITNESS SOURCE, LLC, a Utah limited  
liability company; O.P.M. HOLDINGS, INC.,  
a Utah Company; GOLD'S GYM  
INTERNATIONAL, INC., a Texas Company;  
ST. GEORGE FITNESS, LLC, a Utah limited  
liability company, d/b/a Gold's Gym - Utah  
Group; and DOES I through X,

Defendants.

**REPLY MEMORANDUM IN SUPPORT  
OF DEFENDANT GOLD'S GYM  
INTERNATIONAL, INC.'S MOTION  
FOR ATTORNEYS' FEES AND COSTS**

Civil No. 090919785

Judge Todd Shaughnessy

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Defendant, Gold's Gym International, Inc. ("Gold's Gym"), pursuant to Rules 7, 73, and 54 of the Utah Rules of Civil Procedure, respectfully submits this *Reply Memorandum in Support of Motion for Attorneys' Fees and Costs*, and in support hereof, states the following:

## I. ARGUMENT AND AUTHORITY

**A. Plaintiffs Directly Asserted Claims as a Party to the License Agreement.** This Court has consistently ruled that Plaintiffs asserted claims that arose only because they were parties to the License Agreement on behalf of Health Source of St. George, LLC (“Company”). Plaintiffs claimed that the rights embodied in the License Agreement were converted by Gold’s Gym in conspiracy with Engel. The Court ruled that they had standing to maintain such claims as parties to the License Agreement.<sup>1</sup> Further, in their 26 April 2013 Memorandum in Opposition to Gold’s Gym’s Motion for Summary Judgment, Plaintiffs admitted several times that they brought this action on behalf of the Company as a party to the License Agreement. Plaintiffs have sought to enforce the rights of the License Agreement for over a decade, even throughout a three-day bench trial before this Court. Now, however, Plaintiffs inconsistently argue that they are not responsible for the Company’s obligations under the License Agreement, including the liability for the attorneys’ fees under the explicit attorneys’ fees provision of that License Agreement. In other words, Plaintiffs wish to “have their cake and eat it too.”

For example, Plaintiffs’ opposition memorandum provides that “*Plaintiffs’ claims* belong to them personally (for example, Gold’s interfered with their individual relations with the other members of the LLC, as alleged in the previous section, and with their individual relations with the Provo Group) but *also belong to Health Source LLC. Under controlling law, however, Plaintiffs are entitled to bring the claims personally on behalf of the LLC.*”<sup>2</sup>

Plaintiffs further cited Utah Code Ann. § 48-2c-1701, providing that “[a] member may bring an action in the right of a company to recover a judgment in its favor: (1) if the managers

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<sup>1</sup> See 9-16-2013 Memo Decision re: Summary Judgment Motion, pp.13-14; see also 12-19-2016 Findings of Fact and Conclusions of Law, p.22.

<sup>2</sup> Plaintiffs’ 4-26-2017 Memorandum in Opposition to Gold’s Gym’s Motion for Summary Judgment, p.85 (emphasis added).

or, if no managers, the members with authority to do so have refused to bring the action and the decision of the managers or members not to sue constitutes an abuse of discretion or involves a conflict of interest that prevents an unbiased exercise of judgment; (2) if an effort to cause those managers or members to bring the action is not likely to succeed.”<sup>3</sup> Plaintiffs posited that “an effort to cause [the Company] to bring this action would certainly not have succeeded, as [the Company] and Engle were complicit in the actions causing damage herein. ***Plaintiffs therefore properly brought the action in the right of the company*** and are the proper plaintiffs under Utah Code Annotated Section 48-2c-1702, because they were members at the time of the transactions of which they complain.”<sup>4</sup>

Plaintiffs’ also cited Rule 17(a) of the Utah Rules of Civil Procedure, which states that “***a party authorized by statute may sue in that person’s name without joining the party for whose benefit the action is brought.***”<sup>5</sup> Plaintiffs additionally argued that “Health Source’s absence as a plaintiff does not impede its ability to protect its interest because ***Plaintiffs have asserted Health Source’s claims on its behalf***, and no parties are at risk of incurring multiple obligations due to Plaintiffs, rather than Health Source itself, asserting Health Source’s claims.”<sup>6</sup>

Finally, Plaintiffs previously argued that Health Source should be joined in this litigation pursuant to Utah Code Ann. § 48-2c-801(2), which provides: “a manager-managed company shall become a member-managed company upon the death, withdrawal, or removal of the sole remaining manager, or if one of the events described in Subsection 48-2c-708(1)(d), (e), or (f) occurs with regard to the sole remaining manager, unless another manager is appointed by the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 85-86 (emphasis added).

<sup>5</sup> *Id.* at 86 (emphasis added).

<sup>6</sup> *Id.* at 87 (emphasis added).

members within 90 days after the occurrence of any such event.”<sup>7</sup> “If the Court thus makes a determination that the LLC should now be joined as a party and that such joinder would now be proper, it would not be proper to dismiss the case, but rather *it would be proper for the Court to add the LLC as a party pursuant to the aforementioned rules.*”<sup>8</sup> It follows that Plaintiffs asserted claims directly under the License Agreement and must bear the burden of attorneys’ fees because they claimed the benefits of its protections.

**B. Having Asserted a Right to Receive the Benefits, the Plaintiffs Must Also Accept the Burdens of the License Agreement.** Under Utah law, “[a] party cannot accept the benefits of a contract and reject its burdens.”<sup>9</sup> In this case, Plaintiffs cannot seek to enforce the License Agreement against Gold’s Gym, *i.e.* the benefits of a contract, and then reject the liability that comes thereunder, *i.e.* the burdens of the contract such as the duty to pay attorneys’ fees if the party does not prevail. From the commencement of this lawsuit, Plaintiffs have brought this action on behalf of and in the right of the Company in order to enforce the License Agreement against Gold’s Gym. However, now that each of their claims have been dismissed with prejudice, Plaintiffs attempt to reject the burdens of the License Agreement, namely the liability of attorneys’ fees incurred on behalf of the prevailing party in this action, which is Gold’s Gym. Therefore, Plaintiffs must accept both the benefits and burdens of the License Agreement and should not be allowed to circumvent their contractual obligations.

**C. Plaintiffs Are Estopped From Arguing That They Are Not Bound by the Attorneys Fees Provision of the License Agreement.** “Generally in legal proceedings a party

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<sup>7</sup> *Id.* at 88.

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Richardson v. Rupper*, 2014 UT App 11, ¶ 11, 318 P.3d 1218, 1221; *see Francisoni v. Hall*, 2008 UT App 166 (“A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions.”) (citing *Southern Energy Homes, Inc. v. Gregor*, 777 So.2d 79, 82 (Ala.2000)); *see also Prudential Fed. Sav. & Loan Ass’n v. Hartford Acc. & Indem. Co.*, 7 Utah 2d 366, 372, 325 P.2d 899, 903 (1958) (finding that a party “cannot accept the benefits of the contract and reject the burdens.”).

with knowledge of all the facts will not be allowed to take a position, pursue that position to fruition, and later, with no substantial change in circumstances, return to attack the validity of the prior position or the outcome flowing from it.”<sup>10</sup> “Equitable estoppel reflects circumstances where it is not fair for a party to represent facts to be one way...and then change positions later to the other’s detriment.”<sup>11</sup> “[E]stoppel precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position [it has] previously taken.”<sup>12</sup> The elements for equitable estoppel are: (1) an affirmative admission, statement or act inconsistent with the position afterwards asserted; (2) action by the other party in reliance on the admission, statement or act; and (3) injury to the relying party resulting from allowing the first party to make the inconsistent admission, statement or act.<sup>13</sup>

Throughout the entirety of this action, Plaintiffs pressed claims of, *inter alia*, breach of the License Agreement. Plaintiffs insisted that their claims were on behalf of and in the right of Health Source-St. George, LLC, the Company that is a party to the License Agreement. For the past decade and more, Plaintiffs have used the License Agreement against Gold’s Gym as a sword.<sup>14</sup> Gold’s has spent literally hundreds of thousands of dollars in attorneys’ fees in reliance on the Court’s finding that the Plaintiffs have standing to assert claims on behalf of the entity under the License Agreement. Now, however, they wish to use the License Agreement as a shield, asking this Court to find that they are not parties to that agreement and therefore its terms do not provide privity of contract and deny that Health Source of St. George is a party to this

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<sup>10</sup> *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 220 (Utah Ct. App. 1990).

<sup>11</sup> *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 15, 158 P.3d 1088, 1092.

<sup>12</sup> *Wohnoutka v. Kelley*, 2014 UT App 154, ¶ 2, 330 P.3d 762, 764 (citations omitted); *see also Zeese v. Siegel’s Estate*, 534 P.2d 85, 89 (Utah 1975) (“For a period of four years plaintiffs dealt with defendant as the lessee, they are estopped by this conduct to take the inconsistent position that defendant did not have a leasehold interest.”).

<sup>13</sup> *Bahr v. Imus*, 2011 UT 19, ¶ 23, 250 P.3d 56, 63.

<sup>14</sup> *See generally Terry v. Bacon*, 2011 UT App 432, ¶ 17, 269 P.3d 188, 193 (“We agree with the jurisdictions holding that fairness dictates that ‘[contracts may] not be used both as a sword and a shield.’”) (alteration in original) (citations omitted).

action.<sup>15</sup> However, Plaintiffs are estopped from raising an inconsistent position from a previous one that they have argued for over a decade throughout this litigation.

**D. Plaintiffs Fail to Rebut That the Attorneys' Fee Provision In the License Agreement Provides Fees to Gold's Gym.** In their opposition memorandum, Plaintiffs do not refute or even attempt to present a counterargument that the attorneys' fee provision found in Section 4 of the License Agreement is broadly-worded and provides for attorneys' fees to be recovered by Gold's Gym. Therefore, the Court should make a finding that the attorneys' fee provision is broadly-worded and mandatory, and enforce it accordingly.

**E. Plaintiffs Fail to Rebut That Gold's Gym is the "Prevailing Party" In this Action.** In their opposition memorandum, Plaintiffs do not refute or even attempt to present a counterargument that Gold's Gym is the prevailing party in this matter. Therefore, the Court should make a finding that Gold's Gym is the prevailing party according to the attorneys' fee provision in Section 4 of the License Agreement.

**F. Plaintiffs Fail to Rebut That the Claims for Intentional Interference With Economic Relations, Conversion, and Conspiracy "Relate to or Arise Out of" the License Agreement.** In their opposition memorandum, Plaintiffs do not refute or even attempt to present a counterargument that the claims for intentional interference, conversion, and conspiracy relate to or arise out of the License Agreement. Therefore, the Court should make a finding that Plaintiffs' claims for intentional interference, conversion, and conspiracy relate to or arise out of the License Agreement.

**G. Plaintiffs Do Not Argue That Gold's Gym's Attorneys' Fees Are Unreasonable.** With respect to defending the breach of contract claim, pursuing discovery-related items throughout fact and expert discovery, preparing for and trying this case in a three-day bench trial,

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<sup>15</sup> *Id.*



and filing post-trial motions, including this Motion for Attorneys' Fees, Plaintiffs do not complain that Gold's Gym's attorneys' fees are unreasonable. Therefore, this Court should award Gold's Gym the following in attorneys' fees: (1) \$13,676.42 relating to the Motion to Dismiss the breach of contract claim; (2) \$82,792.74 relating to discovery motions; (3) \$123,993.61 relating to pre- and post-trial motions (excluding the expenses incurred in bringing this Motion for Attorneys' Fees); and (4) the amount to be determined in bringing and arguing this Motion for Attorneys' Fees, which will be provided to the Court in a respective affidavit upon the Court's ruling on this Motion.

**H. Plaintiffs' Case Law Cited In Relation to Refusing to Award Attorneys' Fees is Distinguishable From the Present Matter.** In *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 52, 246 P.3d 131, 148–49, the court denied awarding attorneys' fees on an unsuccessful summary judgment motion because the “motion did not actually lead to a vindication of Defendants' rights under the Listing Agreement; nor did the trial court's findings set forth any connection between the motion and Defendants' ultimate success in the case.” In addition, “the trial court expressly rejected the proximate cause argument raised as a significant part of the motion, both in its ruling denying summary judgment and when the issue was raised again in Defendants' motion for a directed verdict made after the close of evidence.”<sup>16</sup> Thus, in *Gilbert*, the bases for the summary judgment were eventually rejected both at the motion stage and again at trial.<sup>17</sup> In contrast, the arguments made in Gold's Gym's summary judgment motion were ultimately adopted by the Court after a three-day bench trial. *Gilbert* is, therefore, distinguishable. In addition, not only did Gold's Gym prevail on all of Plaintiffs' claims, but the

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<sup>16</sup> *Gilbert Dev. Corp. v. Wardley Corp.*, 2010 UT App 361, ¶ 52, 246 P.3d 131, 148–49.

<sup>17</sup> *Id.*

Court adopted the arguments made by Gold's Gym in its summary judgment motions as the bases for ultimately prevailing at trial.<sup>18</sup>

Plaintiffs next rely upon *ProMax Dev. Corp. v. Raile*, 2000 UT 4, ¶ 32, 998 P.2d 254, 261, which is problematic because it provides no analysis or reasoning relating to awarding attorneys' fees with respect to summary judgment motions. The court in *ProMax* actually awarded attorneys' fees to the defendants "in defending their judgment on this appeal", but then – without explanation or reason – simply denied defendants' request for attorneys' fees relating to the motion to dismiss the appeal. Thus, *ProMax* does not address the issue before this Court and is distinguishable regarding summary judgment motions.

Plaintiffs' third cited case is *Valcarce v. Fitzgerald*, 961 P.2d 305, 317 (Utah 1998), which is irrelevant because it deals with a claim for attorneys' fees for bad-faith litigation pursuant to Utah Code Ann. § 78-27-56. Moreover, the court in *Valcarce* refused to award attorneys' fees because the counterclaim was unsuccessful. Accordingly, *Valcarce* is distinguishable from the present case because Gold's Gym successfully prevailed on all of Plaintiffs' claims.

Plaintiffs' final, unreliable cited case is *Paul Mueller Co. v. Cache Valley Dairy Ass'n*, 657 P.2d 1279, 1288 (Utah 1982), which refused to award attorneys' fees with respect to a counterclaim that was unsuccessful. As in *Valcarce*, *Paul Mueller* is also distinguishable from the present case because Gold's Gym successfully prevailed on all of Plaintiffs' claims.

In contrast to Plaintiffs' distinguishable case law cited in its opposition memorandum, *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), is directly on point with this action. The *Deer Crest* court awarded \$279,726.00 in attorneys' fees to the prevailing party and stated as follows:

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<sup>18</sup> See Gold's Gym's Motion for Attorneys' Fees and Costs, pp.16-18.

*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.* (emphasis added).

Therefore, Gold's Gym is entitled to attorneys' fees incurred in bringing the motions for summary judgment because Gold's Gym ultimately prevailed upon the arguments that were the bases for filing such motions.

## II. CONCLUSION

For the foregoing reasons, the Defendant, Gold's Gym International, Inc., respectfully requests this Court to grant Defendants' Motion for Attorneys' Fees in its entirety, consisting of attorneys' fees and costs as follows: (1) \$13,676.42 for prevailing on Plaintiffs' 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 Plaintiffs' intentional interference, conversion, and conspiracy claims, which (1) through (4), *supra*, totals \$367,320.53 of attorneys' fees and costs thus far (not including the fees incurred preparing this Motion), and (5) the right to supplement this Motion with the additional attorneys' fees incurred for preparing and arguing this Motion before this Court.

DATED this 24<sup>th</sup> day of March, 2017.

**OSTLER MOSS & THOMPSON**

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of March, 2017, I caused to be served by the method indicated below a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT GOLD’S GYM INTERNATIONAL, INC.’S MOTION FOR ATTORNEYS’ FEES AND COSTS** on the following:

<input type="checkbox"/> VIA EMAIL	Holly S. Chamberlain
<input type="checkbox"/> VIA HAND DELIVERY	CHAMBERLAIN LAW, PLLC
<input type="checkbox"/> VIA U.S. MAIL	2235 South 2200 East
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Salt Lake City, Utah 84109
	Email: <a href="mailto:chamberlainlaw@gmail.com">chamberlainlaw@gmail.com</a>

<input type="checkbox"/> VIA EMAIL	Karthik Nadesan
<input type="checkbox"/> VIA HAND DELIVERY	NADESANBECK P.C.
<input type="checkbox"/> VIA U.S. MAIL	8 East Broadway, Suite 625
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Salt Lake City, Utah 84111
	Email: <a href="mailto:karthik@nadesanbeck.com">karthik@nadesanbeck.com</a>

<input type="checkbox"/> VIA EMAIL	Troy L. Booher
<input type="checkbox"/> VIA HAND DELIVERY	Julie J. Nelson
<input type="checkbox"/> VIA U.S. MAIL	ZIMMERMAN JONES BOOHER
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	341 South Main Street, Fourth Floor
	Salt Lake City, Utah 84111
	Email: <a href="mailto:tbooher@zjbappeals.com">tbooher@zjbappeals.com</a>
	Email: <a href="mailto:jnelson@zjbappeals.com">jnelson@zjbappeals.com</a>
	<i>Attorneys for Plaintiffs</i>

<input type="checkbox"/> VIA EMAIL	Brian C. Harrison
<input type="checkbox"/> VIA HAND DELIVERY	BRIAN C. HARRISON P.C.
<input type="checkbox"/> VIA U.S. MAIL	3651 North 100 East, Suite 300
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Provo, Utah 84604
	Email: <a href="mailto:attorney@brianharrisonpc.com">attorney@brianharrisonpc.com</a>
	<i>Attorney for Defendant St. George Fitness, LLC</i>

/s/ Kiersten Slade  
Legal Assistant to Blake T. Ostler

# EXHIBIT H

3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

CLARK CHAMBERLAIN, : RULING  
Plaintiff, : RULING AND ORDER  
: vs. : Case No: 090919785  
VINCE ENGLE, : Judge: TODD M SHAUGHNESSY  
Defendant. : Date: March 29, 2017

---

Before the court is defendant Golds Gym's motion for attorneys' fees. The motion is fully briefed, Oral argument is unnecessary. The court denies the motion and declines to award attorneys' fees for the following reasons, along with the reasons set forth in the opposition papers:

Plaintiffs Clark Chamberlain and Brent Statham are not parties, in their individual capacities, to the agreement that contains the fee provision Golds Gym seeks to enforce. The licensee under that agreement is Health Source of St. George, LLC. Messrs. Chamberlain and Statham signed personal guarantees, but Golds Gym has not shown that it is entitled to an award of its fees under the terms of the guarantee.

The court disagrees with Golds Gym's claim that all claims in this case arise out of or relate to the License Agreement. If Golds Gym was entitled to attorneys' fees, and the court concludes it is not, it would only be entitled to fees incurred in connection with its motion to dismiss the claim for breach of contract, which was granted in 2009 and appears to involve about \$10-15,000 of the \$370,000 sought.

This is the court's order on the attorneys' fee motion and no further order is necessary.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090919785 by the method and on the date specified.

04340

Case No: 090919785 Date: Mar 29, 2017

---

EMAIL: TROY L BOOHER tbooper@zjbappeals.com  
EMAIL: HOLLY S CHAMBERLAIN chamberlainlaw@gmail.com  
EMAIL: BRIAN C HARRISON brianharrisonpc@gmail.com  
EMAIL: TYLER J MOSS tylermoss22@gmail.com  
EMAIL: KARTHIK NADESAN karthik@nadesanbeck.com  
EMAIL: JULIE J NELSON jnelson@zjbappeals.com  
EMAIL: BLAKE T OSTLER supes00@gmail.com

03/29/2017

/s/ TODD M SHAUGHNESSY

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

04341

The Order of the Court is stated below:

Dated: March 29, 2017  
01:39:39 PM

/s/ TODD M SHAUGHNESSY  
District Court Judge



3RD DISTRICT COURT - SALT LAKE  
SALT LAKE COUNTY, STATE OF UTAH

---

CLARK CHAMBERLAIN,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 090919785
VINCE ENGLE,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: March 29, 2017

---

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The court disagrees with Golds Gym's claim that all claims in this case arise out of or relate to the License Agreement. If Golds Gym was entitled to attorneys' fees, and the court concludes it is not, it would only be entitled to fees incurred in connection with its motion to dismiss the claim for breach of contract, which was granted in 2009 and appears to involve about \$10-15,000 of the \$370,000 sought.

This is the court's order on the attorneys' fee motion and no further order is necessary.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 090919785 by the method and on the date specified.

04342



Case No: 090919785 Date: Mar 29, 2017

---

EMAIL: TROY L BOOHER tboher@zjbappeals.com  
EMAIL: HOLLY S CHAMBERLAIN chamberlainlaw@gmail.com  
EMAIL: BRIAN C HARRISON brianharrisonpc@gmail.com  
EMAIL: TYLER J MOSS tylermoss22@gmail.com  
EMAIL: KARTHIK NADESAN karthik@nadesanbeck.com  
EMAIL: JULIE J NELSON jnelson@zjbappeals.com  
EMAIL: BLAKE T OSTLER supes00@gmail.com

03/29/2017

/s/ TODD M SHAUGHNESSY

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

04343

# **EXHIBIT I**

Blake T. Ostler (Bar No. 4642)  
[supes00@gmail.com](mailto:supes00@gmail.com)  
Tyler J. Moss (Bar No. 15685)  
[tylermoss22@gmail.com](mailto:tylermoss22@gmail.com)

**OSTLER MOSS & THOMPSON**  
57 West 200 South, Suite 350  
Salt Lake City, Utah 84101  
T: (801) 575-5000  
F: (801) 880-7640

*Attorneys for Defendant Gold's Gym International, Inc.*

---

**THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH**

---

CLARK CHAMBERLAIN and BRENT  
STATHAM,

Plaintiffs,

vs.

VINCE ENGLE, an individual; HEALTH  
SOURCE, INC., a Utah corporation;  
FITCORP, INC., a Utah corporation; TRAVIS  
IZATT, an individual, d/b/a Gold's Gym of St.  
George; FITNESS SOURCE, LLC, a Utah  
limited liability company; O.P.M.  
HOLDINGS, INC., a Utah corporation;  
GOLD'S GYM INTERNATIONAL, INC., a  
Texas corporation; ST. GEORGE FITNESS,  
LLC, a Utah limited liability company, d/b/a  
Gold's Gym - Utah Group; and DOES I  
through X,

Defendants.

**NOTICE OF CROSS-APPEAL**

Civil No. 090919785

Judge Todd Shaughnessy

---

The Defendant, Gold's Gym International, Inc. ("Gold's Gym"), pursuant to Rule 4(d) of the Utah Appellate Rules of Civil Procedure, hereby submit this *Notice of Cross-Appeal* from the

Judgment entered on 29 March 2017 by the Honorable Todd M. Shaughnessy of the Third Judicial District Court, Salt Lake County, Utah denying attorneys' fees to Gold's Gym.

DATED this 4<sup>th</sup> day of April, 2017.

**OSTLER MOSS & THOMPSON**

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of April, 2017, I caused to be served by the method indicated below a true and correct copy of the foregoing **NOTICE OF CROSS-APPEAL** on the following:

<input type="checkbox"/> VIA EMAIL	Holly S. Chamberlain
<input type="checkbox"/> VIA HAND DELIVERY	CHAMBERLAIN LAW, PLLC
<input type="checkbox"/> VIA U.S. MAIL	2235 South 2200 East
<input checked="" type="checkbox"/> VIA ELECTRONIC FILING	Salt Lake City, Utah 84109
	Email: <a href="mailto:chamberlainlaw@gmail.com">chamberlainlaw@gmail.com</a>

<input type="checkbox"/> VIA EMAIL	Karthik Nadesan
<input type="checkbox"/> VIA HAND DELIVERY	NADESANBECK P.C.
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	Email: <a href="mailto:karthik@nadesanbeck.com">karthik@nadesanbeck.com</a>

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<input type="checkbox"/> VIA HAND DELIVERY	Julie J. Nelson
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	Email: <a href="mailto:jnelson@zjbappeals.com">jnelson@zjbappeals.com</a>
	<i>Attorneys for Plaintiffs</i>

<input type="checkbox"/> VIA EMAIL	Brian C. Harrison
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	<i>Attorney for Defendant St. George Fitness, LLC</i>

/s/                     Kiersten Slade                      
Legal Assistant to Blake T. Ostler