No. 101832-1

No. 84242-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

FITNESS INTERNATIONAL, LLC, a California limited liability company,

Petitioner,

v.

NATIONAL RETAIL PROPERTIES, LP, a Delaware limited liability company,

Respondent.

PETITION FOR REVIEW

Christopher M. Huck, WSBA No. 34104
R. Omar Riojas, WSBA No. 35400
GOLDFARB & HUCK ROTH RIOJAS, PLLC
925 Fourth Avenue, Ste. 3950
Seattle, Washington 98104
Telephone: (206) 452-0260
Facsimile: (206) 397-3062
E-mail: huck@goldfarb-huck.com
riojas@goldfarb-huck.com

Attorneys for Petitioner

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I. IDENTITY OF PETITIONER

Fitness International, LLC ("Tenant") respectfully asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Tenant seeks review of the February 21, 2023 published decision of the Court of Appeals, Division I, ("Decision") that affirmed the trial court's order granting summary judgment and dismissing Tenant's claims against respondent National Retail Properties, LP ("Landlord"). A copy of the Decision is in the Appendix at Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should accept review of the Decision under RAP 13.4(b)(4), because review provides an opportunity for this Court to modernize application of equitable doctrines, including adoption of Restatement (Second) of Contracts §§ 269, 270, and 272 (1981), which concern temporary frustration of purpose, the adoption of which will properly equip

Washington courts with a full set of tools to answer continued questions due to the COVID-19 global pandemic and likely future challenges based on any new global pandemic or, for example, inevitable disruptions as a result of climate change.

2. Whether this Court should accept review of the Decision pursuant to RAP 13.4(b)(1), because it conflicts with decisions of this Court regarding contract interpretation and summary judgment procedure.

IV. STATEMENT OF THE CASE

A. The Lease Concerns Operation of a Health Club.

"This case involves … a health club in a shopping complex at 15707 Pacific Avenue South in Tacoma" (the "Premises"). CP 33. Tenant and Landlord are parties to a Land and Building Lease Agreement dated July 2, 2015, as amended (the "Lease"), under which Tenant leases the Premises from Landlord. CP 98-195.

At the most basic level, the purpose of the Lease is for Tenant to pay rent to Landlord for the right to use the Premises

for the operation of Tenant's health club. *See* Lease § 9.1 (CP 111) ("Tenant may use the Premises ('Initial Uses') for the operation of a health club and fitness facility….").

The Lease is anything but a garden-variety lease that happens to concern use of space for fitness center purposes. Rather, the Lease was merely one component of a larger transaction, covering the acquisition, development, and use of the subject facility, which, from its inception, was conducted towards one and only one purpose: construction and operation of a health club and fitness facility. CP 164-195; 238-261.

Specifically, before the parties' agreements, the subject property was a vacant 3.77-acre parcel of land owned by a third-party developer. CP 106. Tenant brought in Landlord as a development partner, and the parties ultimately entered into what is known as a "reverse build-to-suit" transaction. CP 230. In brief:

Tenant assigned its rights under the Purchase and Sale agreement to Landlord, who acquired the property under its own name. CP 233.

Tenant, with Landlord's consent, then oversaw development of the property into a health center and fitness facility. CP 241-61. Such development was governed by a Development Procedure Agreement (entered into the same day as the Lease, July 2, 2015 (the "Development Agreement") (CP 241)), which was also incorporated into the subject Lease. CP 106.

Under the Development Agreement, the "Improvements" to the Premises were constructed, under Tenant's management, as an "LA Fitness" health club and fitness facility. CP 241; CP-256-257. For example, the architectural plans appended into the Development Agreement depict what is obviously a health club and fitness facility, including a swimming pool, basketball/sports court, locker rooms, and areas for fitness equipment. CP 255.

Accordingly, as understood and acknowledged by the

parties from the outset, the sole purpose of the Lease was Tenant's use of the Premises for the operation of a health club and fitness facility, and Tenant would not have executed the Lease or the Development Agreement, or constructed the improvements if it did not have the right to use the Premises for the operation of a health club and fitness facility throughout the entire term of the Lease. CP 230.

B. The COVID-19 Pandemic Made It Illegal for Tenant to Use the Premises.

On March 13, 2020, President Trump issued a proclamation declaring a national emergency concerning the COVID-19 outbreak. CP 203-04.

On March 16, 2020, Governor Inslee ordered all non-essential businesses, including gyms and fitness centers, to immediately cease operating to prevent the perceived spread of COVID-19. *Id*.

On March 23, 2020, Governor Inslee issued the "Stay Home, Stay Healthy" order. *Id*.

On May 1, 2020, Governor Inslee's "Stay Home, Stay

Healthy" order was extended until May 31, 2020. The governor also announced a plan to resume Washington's economic and social life over four phases. *Id.*

Thus, for two separate periods, from (i) March 17, 2020 to August 9, 2020 and (ii) November 16, 2020 to January 10, 2021 (the "Closure Periods") it was illegal for Tenant to use the entirety of the Premises for the Lease's sole stated purpose as a health club and fitness facility. CP 229-30.

During the Closure Periods, Tenant did not generate any revenue as it did not collect any dues, fees, or monetary payments from its members. CP 230. In addition, Tenant suffered a substantial loss of its memberships since it was illegal to operate its business. *Id*.

Despite it being illegal to use the Premises during the Closure Periods and Tenant being unable to operate a health club at the Premises, and in the face of the COVID-19 global pandemic, Landlord demanded that Tenant pay full rent. CP 230.

Accordingly, under protest, Tenant paid alleged rent for the months of March 2020 through November 2020. *Id*.[1]

When Tenant has been allowed to legally use the Premises, it has timely paid rent, starting in February 2021 through the present. CP 230. Thus, it is ***not*** the case that Tenant occupies the Premises rent-free. Rather, this action concerns whether, under the circumstances here and pursuant to Washington law, rent is due for the seven months in which it was illegal for Tenant to use the entire Premises due to government orders in connection with the unprecedented COVID-19 global pandemic.

C. Procedural History.

On November 17, 2020, Tenant filed a complaint against Landlord. CP 1.

Tenant asserted four causes of action against Landlord: (1) breach of Lease based on Landlord's breach of representations,

[1] However, Tenant did not pay rent in December 2020 and January 2021, when the Premises was subject to the second Closure Period.

warranties and covenants; (2) breach of Lease due to Landlord's failure to provide credits under the Lease; (3) breach of Lease related to Landlord's failure to abate rent; and (4) a declaratory judgment that Tenant was not obligated to pay alleged rent during the Closure Periods because (a) Tenant was excused; (b) the purpose of the Lease was frustrated; and (c) Tenant's performance under the Lease was impracticable and/or impossible. CP 8-12.

On January 1, 2021, Landlord filed its Answer and Counterclaims. CP 15. Landlord asserted Counterclaims for "Breach of Lease" and "Unjust Enrichment," seeking alleged rent owed for December 2020 and January 2021. CP 22-24.

On July 16, 2021, Landlord filed a motion for summary judgment ("SJ Motion"). CP 31. The SJ Motion requested "(i) dismissal of Fitness International's first three causes of action; (ii) summary declaratory judgment against Fitness International as to its fourth cause of action; and (iii) summary judgment for

unpaid rent and prejudgment interest on National Retail's counterclaim." CP 33.

At the time of the SJ Motion, discovery was incomplete. Landlord's responses to Tenant's first set of discovery requests were due on August 16, 2021. CP 205; 230. No depositions had been conducted. CP 205.

On August 13, 2021, the trial court held oral argument on the SJ Motion. RP (August 13, 2021). During the hearing, the trial court requested supplemental briefing on two issues: the distinctions between a covenant and a warranty, and the summary judgment standard. *Id.* at 51-55.

On September 22, 2021, the trial court entered its Order Granting Defendant's Motion for Summary Judgment ("SJ Order"). CP 326-28.

In a published opinion, Division I affirmed.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court Should Grant Review to Update Application of Equitable Doctrines, Including Consideration of Whether Washington Should Adopt the Equitable Doctrine of Temporary Frustration of Purpose.

Three years ago, the world changed. Forever. The COVID-19 global pandemic and its disruption of everyday life was unanticipated and unprecedented in modern history. But Washington courts have not been fully equipped to properly adjudicate contractual disputes related to the COVID-19 pandemic, relying on antiquated law concerning application of equitable doctrines. For example, with respect to frustration of purpose, the Decision relies on a ***1911*** decision from this Court.

This petition, therefore, concerns issues of substantial public interest, because it provides an opportunity for the Court to modernize precedent and equip Washington courts with a full and updated toolset of equitable doctrines to tackle ongoing disputes related to COVID-19 and likely future pandemics, and inevitable disruption caused by other factors such as climate

change. As discussed below, Tenant respectfully requests the Court to accept review of the Decision for several reasons.

1. Whether this Court Should Consider Adoption of Restatement (Second) of Contracts §§ 269, 270, and 272 Is an Issue of Substantial Public Interest.

Review provides an opportunity for the Court to consider adoption of Restatement (Second) of Contracts §§ 269, 270, and 272 (1981), which concern temporary frustration of purpose. Under the doctrine of temporary frustration of purpose, frustration of purpose "that is only temporary ***suspends*** the obligor's duty to perform" but the duty to perform ***resumes*** once the frustration ends. Restatement (Second) of Contracts § 269 (1981) (emphasis added).

Tenant requested the Court of Appeals to adopt Restatement (Second) of Contracts §§ 269, 270, and 272, including at oral argument. In fact, Landlord admitted that the doctrine of temporary frustration of purpose applies here: "The most one could say here is that the government's public health orders temporarily frustrated Fitness International's purpose.

The doctrine of temporary frustration of purpose suspends performance." CP 262. Yet the Court of Appeals, in the Decision, wholly ignored Tenant's request and Landlord's admission, and failed to discuss whatsoever *why* the doctrine of temporary frustration of purpose does or does not apply here. Decision at pp. 11-15.

Whether this Court adopts Restatement (Second) of Contracts §§ 269, 270, and 272 has implications not only for larger companies like Tenant, but also for small businesses, many of which are family-owned, who fell behind on rent during the closure periods, and are still in dispute with landlords. "Pandemic pivots" during the closure periods were often not realistic, as many consumer-facing businesses—large and small—focus on a single type of service, product, or market, and often have fewer financial resources.[2] Tenant, while a larger

[2] *See* Paul Roberts, "The deepening economic divide: How the pandemic has hurt small businesses," *The Seattle Times* (March 28, 2021), https://www.seattletimes.com/business/economy/the-deepening-economic-divide-how-the-pandemic-has-hurt-small-businesses/ (last visited March 23, 2023) (discussing challenges

company with more resources, was similarly not poised to do a quick pivot during the closure periods. Nor should it have been. As the record shows, the premises were built out specifically for the purpose of operating a full-service fitness facility, equipped with a pool, locker rooms, and other specialized amenities. CP 255.

But the Court of Appeals erroneously concluded that Tenant "could for example, use the premises to create online classes, sell take-away food, beverages, and goods." Decision at p. 14. Respectfully, the Decision is unreasonable, because no reasonable businessperson would dispute that converting a property built-out for a *specific* purpose to provide *different* services and/or goods, obtaining necessary equipment and licenses (to prepare and "sell take-away food", for example), and

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faced by small businesses during closure periods and the subsequent impact on the vitality of those businesses; noting that "when COVID-19 struck, Black and Latino-owned businesses were even less likely to have the reserves to weather losses or to pivot to new products").

embarking on a new marketing campaign takes substantial time and resources.

Indeed, Tenant submitted *unrebutted* evidence that, during the Closure Periods, Tenant was unable to earn *any* revenue from the Premises. CP 230. It was also undisputed that Tenant suffered substantial loss of its membership since it was illegal to operate its business during the Closure Periods. CP 230.

Accordingly, adoption and application of the doctrine of temporary frustration of purpose would allow Washington courts to fashion an appropriate equitable remedy not only for Tenant but also for *current* and *future* similarly situated litigants. *See*, *e.g*., *Proctor v. Huntington*, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010) ("[T]the essence of the court's equity power … is inherently flexible and fact-specific."); *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107, 33 P.3d 735 (2001) ("When equitable claims are brought, the focus remains on the equities involved between the parties."); Restatement (Second) of Contracts § 272(2) (1981) ("In any case governed by the rules stated in this

Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice***, the court may grant relief on such terms as justice requires*** including protection of the parties' reliance interests.") (emphasis added).

2. Adopting Sections 269, 270, and 272 Is Consistent with This Court's Long-Standing Practice of Relying on the Restatement (Second) of Contracts to "Regularize" Washington Contract Law for the Public's Benefit.

The Restatement (Second) of Contracts underlies and informs modern contract law in Washington. On several occasions, this Court has adopted sections of the Restatement in recognition that "[t]he [S]econd Restatement [of Contracts] provides a convenient and effective means of clarifying and regularizing Washington" contract law. *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 32, 46, 686 P.2d 465 (1984) (adopting Restatement (Second) of Contracts § 348, "Alternatives to Loss in Value of Performance" as "the appropriate formulation of damages" in a case involving "breach of a construction contract resulting in both remediable and

irremediable defects"); *see also Storti v. Univ. of Wash.*, 181 Wn.2d 28, 38, 330 P.3d 159 (2014) (adopting Restatement (Second) of Contracts § 45 regarding option contracts and substantial performance; "because contract law in this state generally tracks national common law, we now adopt the Restatement approach"); *Berg v. Hudesman*, 115 Wn.2d 657, 666-67, 801 P.2d 222 (1990) (adopting Restatement (Second) of Contracts §§ 212, 214(c) regarding admissibility of extrinsic evidence "as an aid in ascertaining the parties' intent" regarding "the entire circumstances under which the contract was made"; noting that other courts have adopted the "context rule" and citing cases); *Washington State Hop Producers, Inc., Liquidation Tr. v. Goschie Farms, Inc.*, 112 Wn.2d 694, 701, 773 P.2d 70 (1989) ("Washington has not before now adopted the doctrine of supervening frustration as recited in Restatement (Second) of Contracts § 265 (1979).").[3]

[3] *Accord Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 899, 425 P.2d 623 (1967) (adopting "most significant relationship" choice of law rule for contract cases,

As far as Tenant is aware, no state appellate court has affirmatively adopted Restatement (Second) of Contracts §§ 269, 270, and 272 in response to the COVID-19 global pandemic. The Court should accept review so that Washington may lead the way. In any event, Washington should join other non-Washington appellate courts that have adopted Restatement (Second) of Contracts § 269. *See*, *e.g.*, *Maudlin v. Pac. Decision Scis. Corp.*, 137 Cal. App. 4th 1001, 1017, 40 Cal. Rptr. 3d 724 (2006) ("The obligation to perform is not excused or discharged by a temporary impossibility—it is merely suspended—unless the delayed performance becomes materially more burdensome or the temporary impossibility becomes permanent. … California law on temporary impossibility mirrors the Restatement Second of Contracts, section 269."); *Nash v. Bd. of*

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relying on (then-draft) Restatement (Second) Conflict of Laws § 332; rejecting "lex loci contractus" rule and explaining that "lex loci contractus is an unfortunately outstanding example of a rule ***which, in our modern multistate commercialism, has outlasted any usefulness it may ever have had, if it ever had any***") (emphasis added).

Ed., Union Free Sch. Dist. No. 13, Town of Islip, 38 N.Y.2d 686, 689, 345 N.E.2d 575 (1976) (citing Section 289 of Tentative Draft 9 which is now Section 269; holding "[t]his is because the giving of notice by that date, although not literally impossible, would have been frustrative of the notice provisions of the collective agreement and of the statutory purpose in extending petitioner's probation, and thus contrary to his benefit.").

3. Accepting Review Would Allow the Court to Update Precedent Concerning Equitable Doctrines.

Application of equitable doctrines currently requires Washington courts to rely on antiquated law. For example, with respect to frustration of purpose, the Decision relies on law from this Court in *1911* and *1917* ***related to prohibition***. *See* Decision at p. 13 (citing *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 119 P. 739 (1911); *Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co.*, 98 Wash. 12, 167 P. 58 (1917)).

Similarly, *Felt v. McCarthy*, 130 Wn.2d 203, 922 P.2d 90 (1996), is the most recent case from this Court concerning the

frustration of purpose doctrine—*i.e.*, Restatement (Second) of Contracts § 265 (1981). *Felt* was issued nearly ***30*** years ago.

The frustration of purpose doctrine has also been addressed by this Court in *Washington State Hop Producers, Inc., Liquidation Tr. v. Goschie Farms, Inc.*, 112 Wn.2d 694, 773 P.2d 70 (1989) and *Weyerhaeuser v. Stoneway Concrete, Inc.*, 96 Wn.2d 558, 637 P.2d 647 (1981). That is to say, in opinions that are over ***30*** and ***40*** years old.

Thus, regardless of whether the Court ultimately recognizes temporary frustration of purpose, accepting review here will provide the Court with a rare opportunity to consider and clarify application of the frustration of purpose doctrine under contemporary circumstances, to guide Washington courts and litigants in the coming years. *See Baffin*, 70 Wn.2d at 898 ("Too often courts justify decisions simply by stating in effect, as Justice Holmes observed, '(s)o it was in the time of Henry IV.' Holmes made the further observation that: * * * (J)ust as the clavicle in the cat only tells of the existence of some earlier

creature to which a collarbone was useful, ***precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten***. The result of following them must often be failure and confusion from the merely logical point of view. HOLMES, THE COMMON LAW 35 (1881)." (emphasis added).

Notably, other courts, under similar circumstances as here, have granted Tenant relief, including applying equitable doctrines to fashion equitable relief. *See Egate-95 LLC v. Fitness Int'l, LLC*, 208 A.D.3d 1638, 174 N.Y.S.3d 625 (N.Y. App. Div. 2022) (dismissing landlord's appeal of trial court order granting Tenant relief based on frustration of purpose of the applicable lease); *SVAP II Pasadena Crossroads, LLC v. Fitness Int'l, LLC*, Case. No. C02-CV-20001258 (Cir. Ct. Anne Arundel Cnty., Md. Jan. 4, 2023) (ordering judgment on Tenant's counterclaim, including (*inter alia*) based on frustration of purpose and temporary frustration of purpose of the applicable lease); *VEREIT Real Estate, L.P. et al. v. Fitness Int'l, LLC*, Cause No.

DC-20-18444 (Dallas Cnty. 14th Dist. Ct. Aug. 8, 2022) (judgment in favor of Tenant; finding that the purpose of applicable leases was frustrated, and performance was temporarily impossible and impracticable, so Tenant's obligation to pay rent was excused); *Fitness Int'l, LLC v. Brandsmart USA of South Dade Inc.*, Case No. 2021-012878-CA-01 at p. 14 (Cir. Ct. 11th Jud. Cir. Miami-Dade Cnty., Fl. Sept. 19, 2022) ("the equitable doctrines excuse [Tenant's] obligation to pay Rent for the Closure Period"); *Fitness Int'l, LLC v. Vereit Real Estate, L.P.*, Case No. 2020-027207-CA-01 at p. 8 (Cir. Ct. 11th Jud. Cir. Miami-Dade Cnty., Fl. June 8, 2022) ("Insofar as the Force Majeure provision is inapplicable, however, the equitable doctrines yield the same result."); *Nat'l Retail Props., LP v. Fitness Int'l, LLC*, Case. No. 20-01449-CB at pp. 16-17 (Mich. Super. Ct. Cnty. of Wayne Feb. 3, 2022) (finding frustration of purpose excused Tenant's payment of rent).[4]

[4] Copies of the trial court orders are included at Appendix B-F.

B. The Court Should Grant Review Because the Decision Is Inconsistent with Well-Established Washington Law Concerning Contract Interpretation and Summary Judgment Procedure.

The Court should grant review because the Decision is inconsistent with this Court's long line of decisions regarding the proper method of interpreting contracts and when a breach of contract dispute can be adjudicated at summary judgment.

First, the Decision ignores the plain language of the Lease, which is contrary to well-established precedent. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) ("we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement"). Here, in Section 27.2 of the Lease, Landlord made the following *express* unqualified covenant and warranty:

> Landlord ***covenants and warrants*** that Tenant ***shall*** have and enjoy ***full, quiet, and peaceful possession of the Premises***, its appurtenances and ***all rights and privileges incidental thereto during the term***, subject to the provisions of this Lease.

CP 132 (emphasis added).

But rather than focus on express covenants and warranties Landlord made in the Lease, the Court of Appeals instead fixated on the "subject to the provisions of this Lease" clause of Section 27.2, holding that an "agreed covenant cannot now constitute a breach of quiet enjoyment" because (supposedly) "section 9.2 [] requires [Tenant] to comply with all use regulation and orders in effect during the tenancy." Decision at pp. 7-8. However, the provisions of Section 9.2, when read in their entirety, plainly apply to Tenant's compliance with rules and regulations relating to *physical* conditions, improvements, and alterations to the Premises. CP 112.

Thus, the Decision is predicated on "add[ing] to, subtract[ing] from, vary[ing], or contradict[ing]" the Lease (*i.e.*, adding an exemption that is not currently there), which is precluded under Washington law. *Berg*, 115 Wn.2d at 670 (holding that court may not "add to, subtract from, vary, or contradict" a written contract).

Second, the Decision renders certain express language in the Lease superfluous, which is contrary to Washington law. *See Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc*., 173 Wn.2d 829, 840, 271 P.3d 850 (2012) ("[A] court should not disregard language that the parties have used.").

Specifically, the Decision is based on the inapplicable ***implied*** covenant of quiet enjoyment ***provided by common law***. For instance, the Court of Appeals' citations to *Thompson* and *American Jurisprudence* both concern the ***implied*** covenant of quiet enjoyment. *See* Decision at p. 9 ("The ***implied*** covenant of quiet enjoyment….") (emphasis added); *id*. at p. 9 ("Pursuant to the ***implied*** covenant of quiet enjoyment….") (emphasis added). Indeed, the *Thompson* section cited by the Court of Appeals references "implied" nearly *50* times.

In fact, the Court of Appeals' alleged authority concludes that a "covenant of quiet enjoyment will ***not*** be implied when the lease contains an ***express*** covenant of quiet enjoyment. ***The parties may provide for an express covenant that is more*** or less

extensive ***than the implied covenant of quiet enjoyment.***" 5 *Thompson on Real Property* (Thomas Editions) § 41.03(c)(1) (emphasis added). Here, the parties contracted ***out*** of *default* common law and provided for a more extensive covenant, as Section 27.2 of the Lease contains unambiguous, unqualified, *express* covenants and warranties, that are not limited to Landlord's actions.

Third, the Decision is contrary to Washington precedent, because whether Landlord breached the Lease is a mixed question of law and fact that cannot be ascertained at summary judgment under the current, limited record. *See Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425 n.9, 191 P.3d 866 (2008) ("The meaning of contract provisions is a ***mixed question of law and fact*** because we ascertain the intent of the contracting parties 'by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of

respective interpretations advocated by the parties.'") (emphasis added).

At the time of the SJ Motion, discovery was incomplete. Landlord's responses to Tenant's first set of discovery requests were due on August 16, 2021. CP 205; 230. No depositions had been conducted. CP 205.

Tenant proffered reasonable, alternative interpretations of the Lease to the Court of Appeals and the trial court. But rather than construe Tenant's interpretation and reasonable inferences in the light most favorable to Tenant (as the nonmoving party) as the courts were obligated to do,[5] the Court of Appeals instead "disagreed" with Tenant's interpretation and adopted Landlord's interpretation.

[5] *See Strauss v. Premera Blue Cros*s, 194 Wn.2d 296, 300, 449 P.3d 640 (2019) ("When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party.")

Accordingly, because "the meaning of contract provisions is a ***mixed question of law and fact***" (*Mut. of Enumclaw.*, 164 Wn.2d at 432), the Decision is inconsistent with Washington's summary judgment standard, under which contract interpretation and construction often presents a question of material fact, including adjudication at trial. *See id*. (affirming/reversing summary judgment rulings); *Hearst*, 154 Wn.2d at 504 ("Both Hearst and the Times offered extrinsic evidence ***at trial***….") (emphasis added); *Berg*, 115 Wn.2d at 679 (reversing summary judgment).

In sum, Division I's published decision conflicts with decisions from this Court. Thus, review under RAP 13(b)(1) is warranted.

VI. CONCLUSION

For the above reasons, Tenant respectfully requests that this Court accept review of the Court of Appeals decision, on any or all of the issues raised in this Petition.

RESPECTFULLY SUBMITTED this 23rd day of March, 2023.

I certify that this memorandum contains 4259 words, in compliance with Rules of Appellate Procedure.

GOLDFARB & HUCK ROTH RIOJAS, PLLC

/s/ R. Omar Riojas
Christopher M. Huck, WSBA No. 34104
R. Omar Riojas, WSBA No. 35400
925 Fourth Avenue, Suite 3950
Seattle, Washington 98104
Telephone: (206) 452-0260
Facsimile: (206) 397-3062
E-mail: huck@goldfarb-huck.com
riojas@goldfarb-huck.com

Attorneys for Petitioner Fitness International, LLC

CERTIFICATE OF SERVICE

I certify that on this 23rd day of March, 2023, a copy of this document was sent as stated below.

Amit D. Ranade Snell & Wilmer LLP 506 2nd Ave, Ste. 1400 Seattle, WA 98104 aranade@swlaw.com	☒ via efiling/email ☐ via personal service ☐ via US Mail ☐ via fax

DATED this 23rd day of March, 2023 at Seattle, Washington.

/s/ Angela A. Trinh
Angela A. Trinh

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Christopher M. Huck, WSBA No. 34104
R. Omar Riojas, WSBA No. 35400
GOLDFARB & HUCK ROTH RIOJAS, PLLC
925 Fourth Avenue, Ste. 3950
Seattle, Washington 98104
Telephone: (206) 452-0260
Facsimile: (206) 397-3062
E-mail: huck@goldfarb-huck.com
riojas@goldfarb-huck.com

Attorneys for Petitioner

APPENDIX A

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2/21/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FITNESS INTERNATIONAL, LLC, a California limited liability company, Appellant, v. NATIONAL RETAIL PROPERTIES, LP, a Delaware limited liability company, Respondent.	No. 84242-1-I DIVISION ONE PUBLISHED OPINION

MANN, J. — On March 16, 2020, Governor Jay Inslee issued the first of several public health orders directing all nonessential businesses, including gyms and fitness centers, to immediately cease operating to prevent the spread of the 2019 novel coronavirus (COVID-19). While the initial closure was lifted in August 2020, a second closure occurred between November 2020 and January 2021. Fitness International, LLC, operates an "LA Fitness" health and fitness club in Spanaway at a facility it leases from National Retail Properties, LP (National Retail). As a result of the closures, Fitness International sued National Retail for breach of lease and sought declaratory judgment based on the equitable doctrines of frustration of purpose and impossibility or

impracticability. Fitness International appeals the trial court's order granting summary judgment and dismissing its claims. We affirm.

I.

As of March 2020, Fitness International owned and operated over 700 large health clubs in 27 states and the District of Columbia, including 28 in Washington. Most of the health clubs operated under the trade name "LA Fitness." Fitness International has approximately five million active members. National Retail is a real estate investment trust that owns commercial properties nationwide.

In July 2015, Fitness International brought in National Retail as a development partner, and they entered into a series of agreements relating to the acquisition, development, and leasing of a vacant 3.77 acre parcel in Spanaway, Washington (premises). Together the contracts formed a "reverse build-to-suit" transaction. [1] Relevant here, under the development agreement, Fitness International agreed to develop the premises for a health and fitness facility that Fitness International would then lease from National Retail. Under a separate lease agreement, Fitness International agreed to lease the premises from National Retail for an initial term of 19 years with 4 options to extend the term of the lease up to 40 years.

The lease describes the uses allowed on the premises. "Initial uses" are for the "operation of a health club and fitness facility" which includes, "without limitation," a long list of activities such as personal training, lessons, group classes, weight and aerobic training, youth instruction, and saunas. The lease also allows a long, nonexclusive list

[1] The premises was initially owned by a third-party developer, Spanaway Village, L.P. Fitness International purchased the property from the developer, and then, under the "assignment and assumption of contract" agreement assigned all of its rights and obligations to the purchase to National Retail.

of "ancillary uses" that Fitness International can use the premises for, including uses such as tanning services, cosmetic treatments, child care facilities, food and beverage services, spa services, dry cleaning drop-off and pickup, car washing/detailing, shoe repair, and nutritional supplement sales. The lease leaves it to Fitness International's business judgment to decide ancillary uses for the premises:

> for such other use as Tenant may determine in Tenant's reasonable business judgment, provided that such use: (i) is lawful; (ii) is in compliance with applicable environmental, zoning and land use laws and requirements; (iii) does not violate matters of record or restrictions affecting the Premises; (iv) does not conflict with any other agreement to which Landlord is bound, of which agreement Tenant has received written notice, where such conflict would materially adversely affect Landlord; (v) would not have a material adverse effect on the value of the Premises; and (vi) would not result in or give rise to any material environmental deterioration or degradation of the Premises.

The development agreement allocated some risk and excused some performance for "Force Majeure Events." The force majeure clause stated:

> If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, retraction by any governmental authority of the building permit, failure of power, restrictive laws, riots, insurrection, war, fire, inclement weather or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (each, a "Force Majeure Event"), the performance of such act shall be excused for the period of delay caused by Force Majeure Events.

The lease does not contain a similar force majeure clause.

On March 16, 2020, Governor Inslee issued the first of several public health orders directing all nonessential businesses, including gyms and fitness centers, to immediately cease operating to prevent the spread of the COVID-19 virus. On August 10, 2020, the state permitted indoor clubs and gyms in Pierce County to operate under

restricted guidelines. Another COVID-19 closure period occurred from November 17, 2020 to January 10, 2021. During these closure periods it was illegal for Fitness International to use the premises to operate a health club and fitness facility. In January 2021, the public health orders abated and Fitness International resumed operations.

National Retail requested full rental payments under the lease during the closure periods. Fitness International paid its rent obligations from March 2020 through November 2020. On November 17, 2020, Fitness International sued National Retail in Pierce County Superior Court. It raised three causes of action for breach of lease: (1) breach of the representations, warranties, and covenants, (2) failure to provide credits under the lease, and (3) failure to abate rent. In its fourth cause of action, Fitness International sought a declaratory judgment that it was not obligated to pay rent during the closure periods based on equitable grounds of frustration of purpose, or impracticability and/or impossibility. National Retail answered and counterclaimed for breach of lease and unjust enrichment seeking rent owed for December 2020 and January 2021.

National Retail moved for summary judgment requesting (1) dismissal of Fitness International's first three causes of action for breach of lease, (2) summary declaratory judgment against Fitness International as to its fourth cause of action, and (3) summary judgment for unpaid rent and prejudgment interest on National Retail's counterclaim.

After oral argument and supplemental briefing, the trial court granted summary judgment for National Retail. The court dismissed Fitness International's three causes of action for breach of lease. The court also dismissed Fitness International's fourth cause of action for declaratory judgment but declared that its duty to pay rent was not

excused due to the public health orders. The court granted judgment for National Retail for unpaid rents.

Fitness International appeals.

II.

This is an appeal from an order granting summary judgment. Our review is de novo and we engage in the same inquiry as the trial court. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Young, 112 Wn.2d at 225. We construe the evidence and reasonable inferences in the light most favorable to the nonmoving party. Strauss v. Premera Blue Cross, 194 Wn.2d 296, 300, 449 P.3d 640 (2019).

A.

Fitness International argues that the trial court erred in dismissing its claims that National Retail breached the covenant of quiet enjoyment, and the duty to credit or abate rent paid during the pandemic. We disagree.

"The interpretation of a lease is a question of law that this court reviews de novo." Bellevue Square, LLC v. Whole Foods Mkt. Pac. Nw., Inc., 6 Wn. App. 2d 709, 716-17, 432 P.3d 426 (2018). Our primary goal is to determine the parties' intent. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). We determine the parties' intent by "focusing on the objective manifestation of the parties in the written contract." Bellevue Square, LLC, 6 Wn. App. 2d at 716 (citing Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005)." "Accordingly, a court considers only what the parties wrote, giving words in a contract their ordinary, usual, and popular

meaning unless the agreement as a whole clearly demonstrates a contrary intent." 4105 1st Ave. S. Invs., LLC v Green Depot WA Pac. Coast, LLC, 179 Wn. App. 777, 784, 321 P.3d 254 (2014); Hearst, 154 Wn.2d at 503-04. "A contract 'should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions.'" Bellevue Square, LLC, 6 Wn. App. 2d at 717 (quoting Colo. Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 588, 167 P.3d 1125 (2007)).

1.

We first address Fitness International's claim that National Retail breached the lease's express covenant and warranty of quiet enjoyment. Fitness International's claim fails as a matter of law for two reason: (1) the government, not National Retail, affected Fitness International's possession and use of the premises; and (2) the lease excludes interference by government orders.

The covenant of quiet enjoyment protects "the tenant from any wrongful act by the lessor which . . . interferes with the tenant's quiet and peaceable use and enjoyment thereof." Cherberg v. Peoples Nat'l Bank of Wash., 15 Wn. App. 336, 343, 549 P.2d 46 (1976), rev'd on other grounds, 88 Wn.2d 595, 564 P.2d 1137 (1977); Hockersmith v. Sullivan, 71 Wash. 244, 247, 128 P. 222 (1912). The covenant is not breached when a third party, who is stranger to title, disturbs possession. 5 THOMPSON ON REAL PROPERTY § 41.03(c)(5)(3d Thomas ed. 2019); see also 15 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 48:10 (4th ed. 2014).

While perhaps old, the Supreme Court's decision in Hockersmith is instructive. There, the City of Seattle regraded a street and in doing so "render[ed] the [leased] premises inaccessible and of no value." Hockersmith, 71 Wash. at 245. The tenants

sued the landlord for breach of the covenant of quiet enjoyment. Hockersmith, 71 Wash. at 245. The trial court dismissed the claim and the Supreme Court affirmed, holding that the covenant "does not insure against third parties who are wrongdoers." Hockersmith, 71 Wash. at 247. Because the landlord had nothing to do with the street work, the court held that if the City's regrading was wrongful, the tenant's remedy was against the City, not the landlord. Hockersmith, 71 Wn. at 247.

The same is true here. National Retail was not responsible for the public health orders and was powerless to prevent the government's closure of nonessential businesses like fitness clubs. Fitness International's claim is more appropriate against the government rather than its landlord.

Furthermore, the lease explicitly excludes interferences caused by government orders. Section 27.2 of the lease specifically states that the covenant and warranty of quiet enjoyment is expressly subject to other provisions of the lease:

> Landlord covenants and warrants that Tenant shall have and enjoy full, quiet, and peaceful possession of the Premises, its appurtenances and all rights and privileges incidental thereto during the term, subject to the provisions of this Lease.

One of the other provisions, section 9.2, requires Fitness International to comply with all use regulations and orders in effect during the tenancy:

> Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record, and requirements in effect during the term or any part of the term hereof, regulating the use by Tenant of the Premises.

Fitness International asks this court to ignore this interpretation because section 9.2 does not reference the covenant of quiet enjoyment. But, we "view the contract as a whole, interpreting particular language in the context of other contract provisions."

Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 713, 334 P.3d 116 (2014). Read together, section 27.2's "subject to the provisions of this Lease" language effectually incorporates section 9.2, limiting the scope of the covenant to exclude the effects of government regulations. Here, the government ordered the COVID-19 shutdown that infringed on Fitness International's enjoyment of its leased property. Fitness International agreed to abide by all government orders in section 9.2. Section 27.2 incorporates section 9.2. An agreed upon covenant cannot now constitute a breach of quiet enjoyment.

Fitness International argues that this interpretation contradicts Washington law because the court is required to "harmonize clauses" in the lease; interpreting section 9.2 as an exemption to National Retail's covenant conflicts with the broad, unqualified and sweeping covenant of section 27.2. But Fitness International reads out "subject to the provisions of this Lease." Interpreting section 9.2 as an express covenant to abide by orders and agree it is not a breach of quiet enjoyment is a more harmonious interpretation than stating that Fitness International's compliance with section 9.2 creates a breach by National Retail.

Alternatively, Fitness International argues that the inclusion of both the terms covenant and warranty in section 27.2 refer to different promises. We disagree.

First, any distinction is immaterial because both terms are subject to other provisions of the lease:

> Landlord covenants and warrants that Tenant shall have and enjoy full, quiet, and peaceful possession of the Premises, its appurtenances and all rights and privileges incidental thereto during the term, subject to the provisions of this Lease.

(Emphasis added). Thus, even if the terms meant different things, they are both still subject to other provisions of the lease, including section 9.2.

Further, the context of conveyances, "[the] covenant of warranty and covenant of quiet enjoyment are identical." Rowe v. Klein, 2 Wn. App. 2d 326, 335, 409 P.3d 1152 (2018) (citing W. Coast Mfg. & Inv. Co. v. W. Coast Imp. Co., 25 Wash. 627, 643, 66 P. 97 (1901)). The assurance has taken the form of a covenant and warranty based on the nature of the persons against whom it applies:

> The implied covenant of quiet enjoyment concerns the tenant's possession of the leased premises. It is a covenant and warranty that the landlord, and individuals claiming under or through the landlord, will not wrongfully disturb the possession of the tenant, and that the tenant's possession will not be disturbed by individuals with paramount title to the property.

5 THOMPSON, supra, § 41.03(c)(1). The "covenant" is a promise that the lessor will not disturb the tenant's possession while the "warranty" is a promise that no one with paramount title will disturb possession:

> Pursuant to the implied covenant of quiet enjoyment, the landlord warrants that the tenant will not be disturbed in the possession by another other person with superior legal right to possession and protects the tenant from actual or constructive eviction by someone with superior title. Moreover, the landlord covenants not to evict the tenant himself, actually or constructively.

49 AM. JUR. 2D Landlord and Tenant § 469 (2018) (footnotes omitted). In other words, the warranty protects the tenant from eviction by someone else with a superior title to the property while the covenant protects the tenant from eviction by the lessor. Neither protect against actions by third-party strangers, such as government regulation.

National Retail did not breach the covenant of quiet enjoyment because it was not responsible for and powerless to stop the intervening event.

2.

We next address Fitness International's claim that National Retail breached contractual duties to credit or abate rent. "A breach of contract is actionable only if the contract imposes a duty." NW. Indep. Forest Mfrs. V. Dep't of Lab. & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The lease does not impose a duty for National Retail to credit or abate rent.

To the contrary, the only discussion of a credit or abatement is in section 15 of the lease. Section 15 states: "Tenant is not entitled to any rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises." Moreover, section 5.2 requires Fitness International to pay rent "without prior notice, invoice, demand, deduction, or offset whatsoever." Section 29.11 requires payment even in breach:

> This Lease shall be construed as though the covenants herein between Landlord and Tenant are independent and not dependent and Tenant . . . agrees that if Landlord fails to perform its obligations set forth herein, Tenant shall not be entitled to make any repairs or perform any acts hereunder at Landlord's expense or to any offset of the rent or other amounts owing hereunder against Landlord.

Looking at the terms of the lease, there is no requirement for National Retail to abate or credit rent without a separate action and finding that National Retail breached the lease agreement. The lease requires Fitness International to pay rent and does not include a provision that entitles Fitness International to rent abatement or credit.

III.

Fitness International argues in the alternative that the trial court erred in granting summary judgment because it was entitled to declaratory judgment that it did not have

to pay rent during the closure periods based on equitable grounds of frustration of purpose, or impracticability and/or or impossibility. We disagree.

At the outset, Fitness International argues that our review of the trial court's dismissing its claim for declaratory judgment is subject to an abuse of discretion standard of review. In contrast, National Retail argues our review is de novo. Our Supreme Court recently resolved this conflict in Borton & Sons, Inc. v. Burbank Props, LLC, 196 Wn.2d 199, 205-07, 471 P.3d 871 (2020). The threshold question of "whether equitable relief is appropriate is a question of law that we review de novo." Borton & Sons, 196 Wn.2d at 207. If equitable relief is available, whether the trial court properly fashioned the remedy is reviewed for abuse of discretion. Borton & Sons, 196 Wn.2d at 206. Because the trial court concluded that equitable relief was unavailable, our review here is de novo.[2]

A.

The doctrine of "discharge by supervening frustration" is recited in Restatement (Second) of Contracts § 265 (Am. L. Inst. 1981):

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."

[2] National Retail argues that equitable remedies are unavailable as a matter of law because Fitness International has an adequate remedy at law—its challenge that National Retail breached the lease. National Retail cites Kucera v. State Dep't of Transp., 140 Wn.2d 200, 210, 995 P.2d 63 (2000) for the three-part test to determine whether there are adequate remedies at law: "(1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature." Fitness International responds that money damages were insufficient because it sought a declaration that rent was not owed during the closure periods (as well as potentially future closure periods). We agree with Fitness International.

Washington State Hop Producers, Inc., Liquidation Tr. V. Goschie Farms, Inc., 112 Wn.2d 694, 700, 773 P.2d 70 (1989). Under the Restatement, "the purpose that is frustrated must have been a principal purpose of that party in making the contract . . . without [which] the transaction would make little sense." RESTATEMENT (SECOND) OF CONTRACTS § 265, cmt. a. See also Wash. State Hop Producers, 112 Wn.2d at 700. Performance is not excused unless the purpose is "substantially frustrated." Felt v. McCarthy, 130 Wn.2d 203, 207, 922 P.2d 90 (1996). "It is not enough that the transaction has become less profitable for the affected party or even that [it] will sustain a loss." Felt, 130 Wn.2d at 208.

While we agree that Fitness International could not fully operate a traditional fitness facility during the limited months of the public health orders, the purpose of the lease was not substantially frustrated. Section 9.1 of the lease describes the initial and ancillary authorized uses of the premises. Initial uses include a lengthy list of traditional health and fitness facility uses:

> Tenant may use the Premises ("Initial Use") for the operation of a health club and fitness facility which may include, without limitation, weight and aerobic training, group exercise classes, exercise dancing such as Zumba, yoga, Pilates, racquetball/squash, personal training, aerobics, health and fitness related programs, free weights, spinning/cycling, circuit training, boxing, basketball, swimming pool, instruction in sports or other physical activities (e.g., swim lessons, racquetball/squash/tennis lessons, martial arts, dance, and youth sports instruction) and sauna and whirlpool facilities.

Section 9.1 also lists more than a dozen possible ancillary uses that Fitness International can conduct, including selling apparel, wellbeing services, vitamins, and food and beverages. Use of the premises for ancillary purposes is left broadly to Fitness International's business judgment:

> Tenant may determine in Tenant's reasonable business judgment, provided that such use: (i) is lawful; (ii) is in compliance with applicable environmental, zoning, and land use laws ad requirements; (iii) does not violate matters of record or restrictions affecting the Premises; (iv) does not conflict with any other agreement to which Landlord is bound, of which agreement Tenant has received written notice, where such conflict would materially adversely affect Landlord; (v) would not have a material adverse effect on the value of the Premises; and (vi) would not result in or give rise to any material environmental deterioration or degradation of the Premises.

In Felt, a contract case, the purchaser stopped making payments on a real property purchase because zoning changes reduced the property's value by more than 80 percent. 130 Wn.2d at 205, 207. The Supreme Court held that a "decline in market value is not sufficient in and of itself" to excuse performance. Felt, 130 Wn.2d at 210; see also RESTATEMENT (SECOND) CONTRACTS §265 cmt. a (operating at a substantial loss does not constitute a substantial frustration excusing performance).

In leasing, the frustration defense is unavailable if a lease allows the tenant to put the premises to another use. Hayton v. Seattle Brewing & Malting Co., 66 Wn. 248, 248-49, 119 P. 739 (1911). In Hayton, the tenants entered into a lease stating they "may . . . conduct a retail saloon business in the building." Hayton, 66 Wash. at 249 (emphasis added). When prohibition laws went into effect, the tenant vacated, stopped paying rent, and argued that their performance was excused because the prohibition laws frustrated the purpose of their lease. Hayton, 66 Wash. at 249. The Supreme Court disagreed, holding that the saloon use "is only permissive in that respect, and clearly does not prevent [tenant] from using the premises for any lawful purpose." Hayton, 66 Wash. at 249. Simply, while their primary purpose was to conduct a saloon

business, because the negotiated lease agreement allowed for additional uses, the purpose of the lease was not frustrated.

As in Hayton, Fitness International's lease uses the same permissive term, the "Tenant may use the Premises." Moreover, the lease specifically enumerates more than a dozen other ancillary uses subject only to Fitness International's business judgment. Fitness International could for example, use the premise to create online classes, sell take-away food, beverages, and goods.

Fitness International relies on Weyerhaeuser v. Stoneway Concrete, Inc., 96 Wn.2d 558, 637 P.2d 647 (1981), and Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co., 98 Wash. 12, 14-15, 167 P. 58 (1917). In Weyerhaeuser, a commercial mineral lease was frustrated when an unanticipated and unprecedented shift in environmental laws prevented the tenant from obtaining regulatory approvals. In applying the Restatement, the Supreme Court explained:

> There can be no doubt of the desired object or purpose of [the lease].
>
> . . . .
>
> [The] purpose of obtaining sand, gravel and other aggregates by strip mining the leased premises was frustrated by its inability to obtain the necessary permits is unchallenged. Stoneway was without fault in the occurrence of the supervening event causing the frustration of its purpose.

Weyerhaeuser, 96 Wn.2d at 561-62. After finding equitable relief appropriate, the court limited the scope of the equitable remedy. The court found that frustration did not excuse the tenant's rent obligations for the period between 1972 and 1975 when the tenant knew its project was a lost cause but remained in possession of the premises. Weyerhaeuser, 96 Wn.2d at 561-62.

Weyerhaeuser, is distinguishable. First, Fitness International remained in possession of the premises during the closure periods. In Weyerhaeuser, the court specifically excluded the periods the tenant remained in possession of the premises from the frustration doctrine. Weyerhaeuser, 96 Wn.2d at 561-62. There the court excluded a three-year period; we are considering a period of seven months. Second, a mineral land lease is a specific purpose—the mining of resources. There was no other available use for the land that met the limited purpose and project scope. Alternatively, here, Fitness International could alter its business practices to occupy the premises for other purposes.

In Brunswick, another Prohibition era case, the lease was materially narrower than the lease in Hayton. The Brunswick lease stated that "[t]he premises are hereby leased to the lessee for the purpose of conducting a saloon and selling liquors at retail therein." Brunswick, 98 Wn. at 14-15. Unlike the Hayton lease, the Brunswick lease left out the term "may." The Supreme Court concluded that the nonpermissive lease language made it apparent that the parties had "one and one purpose only in mind, that the premises were let for saloon purposes and were to be occupied as a saloon." Brunswick, 98 Wn. at 14-15. Because of Prohibition, the purpose was completely frustrated.

In contrast, the lease in this case is much more expansive and allows Fitness International flexibility in its use of the premises. Fitness International's lease was not substantially frustrated.

B.

"The doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical, provided the party seeking relief does not bear the risk of the unexpected occurrence." Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 81, 96 P.3d 454 (2004). These defenses are "not the legal equivalent of subjective inability to perform." Liner v. Armstrong Homes of Bremerton, Inc., 19 Wn. App. 921, 926, 579 P.2d 367 (1978).

Fitness International relies on Smugglers Cove, LLC v. Aspen Power Catamarans, LLC, 2020 WL 758107, at *3 (W.D. Wash. Feb. 14, 2020) (court order). There, the doctrine of impossibility discharged the contractual obligation to deliver a boat because a drunk driver struck and destroyed the boat in delivery. Smugglers Cove, 2020 WL 758107, at *3. The boat was destroyed, and so performance became impossible. Smugglers Cove, 2020 WL 758107, at *3.

In contrast, the lease provides Fitness International with exclusive possession and use of the premises in exchange for monthly rent and other charges. Fitness International still occupied the premises, could conduct ancillary uses including, but not limited to, conducting online classes, sell take-away food, or otherwise alter its business, and continue operations. The premises was not destroyed nor was Fitness International's exclusive possession and use disturbed. The temporary public health closure orders limited Fitness International's use of the premises, but that is not sufficient to discharge Fitness International of performance based on impossibility. "The

mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside." Liner, 19 Wn. App. at 926.

IV.

National Retail argues that it is entitled to an award of reasonable attorney fees and costs on appeal. We agree.

"A contractual provision supporting award of attorney fees at trial supports an award of attorney fees on appeal." Draper Mach. Works, Inc. v. Hagberg, 34 Wn. App. 483, 490, 663 P.2d 141 (1983). The lease contains such a provision:

> if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered, a reasonable sum as attorneys' fees and costs. Such attorneys' fees and costs shall be paid by the losing party in such action.

The trial court awarded National Retail reasonable attorney fees and costs at trial. Subject to compliance with RAP 18.1, we award National Retail its reasonable attorney fees incurred in this appeal.

Affirmed.

Mann, J.

WE CONCUR:

Coburn, J.

APPENDIX B

E-FILED; Anne Arundel Circuit Court
Docket: 1/4/2023 10:46 AM; Submission: 1/4/2023 10:46 AM

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

SVAP II PASADENA CROSSROADS, LLC	*	
Plaintiff/ Counter-Defendant	*	
vs.	*	
	*	CASE NO. C02-CV-20001258
FITNESS INTERNATIONAL, LLC	*	
Defendant/Counter-Plaintiff		

****

ORDER

This matter was heard by this Court, a bench trial having been held on August 3, 2022. Both sides thereafter submitted their Memorandum in support of their respective claims and defenses. This Court has now had an opportunity to review the evidence presented at trial including the testimony and extensive exhibits as well as the argument of counsel and the supporting Memorandum submitted by each side, as well as the applicable law. For the reasons set forth in the Memorandum filed by Defendant/Counter Plaintiff, this Court concludes that Plaintiff has failed to meet its' burden of proof as to the claim for breach of contract. Defendant/Counter Plaintiff has met its' burden as to the counterclaim. It is therefore, this day of December, 2022, by the Circuit Court for Anne Arundel County hereby,

01/04/2023 HM

12/30/2022 9:15:46 AM

ORDERED that judgment is hereby entered in favor of Defendant and against Plaintiff in Count 1 of the Complaint alleging breach of contract; and it is further

ORDERED that as to the Counterclaim filed by Defendant/Counter Plaintiff, judgment is hereby entered in favor of Defendant/Counter Plaintiff against Plaintiff/Counter Defendant in the amount of $34,529.98 plus the costs of these proceedings.

Judge Ronald A. Silkworth

Judge Ronald A. Silkworth
Circuit Court for Anne Arundel County

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

SVAP II PASADENA CROSSROADS, LLC,

Plaintiff,

vs.

FITNESS INTERNATIONAL, LLC,
d/b/a L.A. FITNESS,

Defendant.
_____/ CASE NO. C02-CV-20001258

FITNESS INTERNATIONAL, LLC,

Defendant/Counter-Plaintiff,

vs.

SVAP II PASADENA CROSSROADS, LLC

Plaintiff/Counter-Defendant.
_____/

POST-TRIAL MEMORANDUM OF DEFENDANT/COUNTER-PLAINTIFF FITNESS INTERNATIONAL, LLC

The bench trial in this matter was held on August 3, 2022 before the Honorable Ronald A. Silkworth. At the Court's direction, Defendant/Counter-Plaintiff Fitness International, LLC ("Defendant" or "Fitness"), by and through its undersigned counsel, hereby submits the following Post-Trial Memorandum.

I. Introduction

Plaintiff/Counter-Defendant SVAP II Pasadena Crossroads, LLC, as landlord ("Plaintiff" or "SVAP") and Defendant, as tenant ("Tenant"), were parties to a retail lease dated May 26, 2009, as amended (the "Lease") for the premises located at 8120 Jumpers Road, Pasadena, Maryland (the "Premises"). (Exhibits 3 and 4).[1] SVAP sold the Premises in October 2021 and assigned all

[1] Exhibit 3 is the Retail Lease, Exhibit 4 is the First Amendment to Lease. All exhibits referred to in this Post-Trial Memorandum were admitted into evidence at trial following testimony or through the Court's judicial notice of them at trial.

its rights, title and interest in and to any of the obligations under the Lease to the new landlord, Paramount Crossroads at Pasadena, LLC ("New Landlord" or "Paramount"). (Exhibit A). As such, and as discussed further below, Plaintiff is not the real party in interest and has no standing to pursue its claims against Tenant at trial, requiring that they be dismissed and judgment entered in favor of Defendant. At trial, SVAP not only lacked standing to pursue its claims, but it did not produce any witness to properly authenticate the unredacted Purchase and Sale Agreement and/or establish any damages. (Exhibit 2). Judgment should be entered in favor of Defendant.

This dispute involves a discrete period of time, from March 16, 2020 to June 19, 2020 (the "Closure Period"), when as a result of the casualty of the 2019 novel coronavirus disease ("COVID-19") and the closure orders of the Governor of the State of Maryland in response to the COVID-19 pandemic (the "COVID-19 Pandemic"), it was illegal for Tenant to use the Premises to operate its full service indoor health club and fitness facility, the express purpose of the Lease. As SVAP admitted during the trial, Tenant paid all rent and other charges under the Lease through March 2020 and paid all rent and other charges from July 2020 to present. At trial, SVAP's sole witness testified that SVAP seeks "approximately" $206,000 for rent allegedly owed by Tenant for April 2020, May 2020 and June 2020. As discussed further below, even if Plaintiff had standing, which it does not, Plaintiff failed to establish its damages with competent evidence at trial.

Fitness asserted affirmative defenses and counterclaims against SVAP because Tenant's obligation to pay rent during the Closure Period is excused and/or abated under the Lease, including due to SVAP's breach of the representations, warranties and covenants to Tenant in the Lease, under the casualty and taking provisions in the Lease, and pursuant to the doctrines of temporary frustration of purpose, temporary impossibility and/or impracticability. Fitness

presented evidence at trial in support of its affirmative defenses and that establish its right to have judgment entered in its favor and against SVAP on its counterclaims. For all these reasons, judgment should be entered in favor of Defendant.

II. Analysis

A. Plaintiff Failed To Meet Its Burden Of Proof At Trial

1. Plaintiff lacks standing to bring its claims.

Plaintiff has the burden of proving that it has standing to assert its claim for breach of the Lease at trial. *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 Fed. Appx. 838, 839 (4th Cir. 2012)(the burden of establishing standing lies squarely on the party claiming subject-matter jurisdiction) (citation omitted). Plaintiff bore this burden not only as of the date it filed suit, but at the time of trial. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (party asserting subject matter jurisdiction bears the burden of establishing it has standing to invoke the authority of the court, "a burden which tracks the manner and degree of evidence required at each successive stage of litigation."); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) (plaintiffs "have the burden of proof and persuasion as to the existence of standing.") (citations omitted)).

Standing depends on whether the plaintiff is the proper party to bring the action. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 (4th Cir. 2007). A party must be able to demonstrate "a real and justiciable interest ... capable of being resolved through litigation." *Norman v. Borison*, 192 Md. App. 405, 420 (2010). This necessarily requires a showing of some kind of "injury-in-fact, or "an actual legal stake" in the outcome of the case. *Id.* SVAP failed to meet this burden at trial. The only evidence introduced at trial was that SVAP had given up and assigned all rights and interests in any obligations of Fitness under the Lease to New Landlord and that SVAP did not have a landlord/tenant relationship with Fitness.

At trial, SVAP presented one witness, Craig A. Mueller. Mr. Mueller testified he is not now, nor was he ever, an employee of SVAP but is the Senior Managing Director of Sterling Retail Services, a third-party entity which manages leases, primarily for shopping centers, for affiliates of Sterling. Mr. Mueller testified that SVAP is an "affiliate" of Sterling but did not provide any evidence of what an "affiliate" is. Mr. Mueller testified that SVAP was the fee owner of the "big box retail" shopping center property located in Pasadena, Maryland and that SVAP sold the property, which includes the Premises, to Paramount in October 2021.[2] Mr. Mueller testified that upon the sale of the Pasadena, Maryland property to Paramount, SVAP had no business operations and no assets (other than cash in bank accounts).

In its motion for summary judgment, SVAP asserted that it reserved all rights to its claim against Fitness in the sale to New Landlord. (Affidavit of Craig A. Mueller ("Mueller Aff."), Ex. 1 to Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support at ¶14).[3] The alleged proof for this assertion was a copy of select sections of the heavily redacted Purchase and Sale Agreement dated August 23, 2021 attached to the Mueller Aff. as Exhibit 5.[4] Defendant had no way of determining if this assertion were correct prior to trial as SVAP never produced the unredacted document during discovery. In fact, it was not until Defendant's objection to Plaintiff's attempt to introduce a portion of the redacted Purchase and Sale Agreement at trial that Plaintiff

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[2] Mr. Mueller testified that SVAP purchased the property on or about November 2, 2015 for Thirty One Million Six Hundred Thirty-Five Thousand Dollars ($31,635,00) and sold it to Paramount on or about October 22, 2021 for over double that amount, Sixty-Nine Million Dollars ($69,000,000). (*See* Exhibit 10, Special Warranty Deed dated November 2, 2015, and Exhibit 11, Special Warranty Deed dated October 22, 2021).

[3] Paragraph 14 of the Mueller Aff. provides: "On or about August 23, 2021, Landlord sold the Building. Pursuant to the Purchase and Sale Agreement, Landlord retained all rights regarding the collection of the Arrears." (Ex. 5 at §7.3.1(c))." As shown at trial, this statement is not accurate.

[4] The Purchase and Sale Agreement was, by Plaintiff's account, at least fifty (50) pages. The heavily redacted document produced by Plaintiff, was five (5) pages.

suddenly produced what it now classifies as the unredacted Purchase and Sale Agreement dated August 23, 2021 (the "PSA."). (Exhibit 2).[5] Contrary to Plaintiff's pre-trial claims, the unredacted PSA contains no reservation of rights by SVAP to collect any alleged unpaid rent from Fitness in this action. Rather, as discussed below, the PSA states the exact opposite. The unrefuted evidence establishes that SVAP assigned all its rights and interests to any obligation under the Lease to Paramount. As such, since October 22, 2021, SVAP has been divested of all right and interest in the April, May and June 2020 rent for the Premises and has no legal stake in it and no standing in this action.

Section 7.3.1((f) of the PSA provides:

> (f) Collection. After Closing, Purchaser shall (i) bill each tenant under the Leases for all rentals and other tenant charges and Additional Rents, (ii) include all delinquent amounts in its normal billings, (iii) pursue the collection of all amounts using reasonable and customary measures, and (iv) reasonably cooperate with Seller in collecting any amounts due Seller (but shall not be required to litigate or declare a default under the applicable Lease). Delinquent payments, if and when collected by Purchaser, shall be paid to Seller to the extent of Seller's interest therein, and if not collected despite Purchaser's efforts as set forth in the preceding sentence, Seller may not collect those payments, nor pursue an action against any tenant owing delinquent rents or any other amounts to Seller attributable to the period before the Proration Date.

[5] There is no evidence, competent or otherwise, that the PSA produced was the actual sales agreement. Mr. Mueller is not a party to the PSA. He did not negotiate the PSA. He did not draft the PSA. He did not sign the PSA. He did not know the person who signed the PSA for the purchaser or whether that person was authorized by the purchaser to sign the PSA. Mr. Mueller testified that he did not witness the signing of the PSA and he does not recognize the signature of the purchaser. Fitness objected to the authenticity of the PSA and to its admissibility, including for the above reasons. Further, there was no testimony that the PSA offered as Exhibit 2 was the final document and no witness for either the seller or the purchaser testified at trial. *See* Md. Rule 5-602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). The Court initially took the admissibility of the PSA under advisement and then subsequently admitted it over Fitness's objection.

(Ex.2, §7.3.1(f)) (emphasis added). It is undisputed that the months for which SVAP is attempting to collect rent, *i.e.*, April, May and June 2020, are "attributable to the period before the Proration Date." Mr. Mueller testified that he has no knowledge whether Paramount ever collected from Fitness the rent allegedly owed for the months of April, May and June 2020, and never spoke to Paramount about any rent it has received from Fitness for any time period or about anything else. Pursuant to the plain language of Section 7.3.1(f) of the PSA, as of August 23, 2021, the Effective Date of the PSA, SVAP had given up its right to collect any amounts allegedly owed by Fitness as well as the right to pursue any action against Fitness for rent or other amounts allegedly owed to SVAP by Fitness. (Ex.2, p. 1 and §7.3.1(f)).

Section 7.3.1(f) of the PSA is consistent with the Assignment and Assumption of Leases, dated October 21, 2021, introduced at trial. (*See* Ex. A at pp. 7-13).[6] (Mr. Mueller testified that he would expect this type of document to be associated with the sale). Mr. Mueller testified on cross-examination that he recognized the signature of Gregory S. Moross, who signed the Assignment and Assumption of Leases on behalf of SVAP. (Ex. A at p. 8). Mr. Mueller testified that he has no reason to believe that the person signing the Assignment and Assumption of Leases on behalf of Paramount was not authorized to do so. The Assignment and Assumption of Leases provides, in pertinent part:

> This ASSIGNMENT AND ASSUMPTION OF LEASES (this "*Assignment*") is made and entered into as of October 21, 2021 (the "*Effective Date*"). For valuable consideration, the receipt and sufficiency of which are hereby acknowledged, SVAP II PASADENA CROSSROADS, LLC, a Delaware limited liability company (the "*Assignor*"), hereby assigns and delegates to PARAMOUNT CROSSROADS AT PASADENA, LLC, a Maryland limited liability company the ("*Assignee*"), and Assignee

[6] SVAP did not produce the Assignment and Assumption of Leases in discovery or identify it as a trial exhibit. Fitness introduced it in rebuttal through Mr. Mueller's testimony. (*See* Exhibit A).

> hereby **assumes and accept the assignment and delegation of all of Assignor's right, title and interest in and to any obligations under the leases** (the "*Leases*") and the security deposits held by Assignor relating to the property known as Pasadena Crossing located at 8070 Governor Ritchie Highway, Pasadena, MD 21122 and more particularly describe on Exhibit A attached hereto. The Leases and security deposits (collectively, the "*Assigned Property*") are listed on Exhibit B attached hereto.

(Ex. A, at p. 7) (emphasis added). Mr. Mueller acknowledged that the Lease with Fitness is included in the list of Leases in Exhibit B to the Assignment and Assumption of Leases and that the Assignment and Assumption of Leases provides that SVAP is assigning all rights concerning any obligations under the Leases to Paramount. (Ex. A at pp. 10-11).

The suggestion by SVAP that Section 7.3(c) of the PSA gives SVAP the right to pursue its suit against Fitness to collect the three months' rent at issue in this action is not supported by the actual language of the PSA. Section 7.3.1(c) provides:

> (c) After the Proration Date. All rentals and other tenant charges and Additional Rents (except as set forth below regarding operating pass-throughs and taxes) under the Leases received by Purchaser or Seller from any Tenant after the Proration Date shall not be prorated on the Closing Date and shall be applied as follows: (i) first, to the Current Month as prorated between Seller and Purchaser; (ii) second, on account of Purchaser for any amounts then currently due Purchaser from such tenant for any periods on or after the Proration Date; and (ii) third, on account of Seller for any amount then currently due Seller from such tenant for any periods before the Proration Date, and the balance to be retained by Purchaser. After application as set forth above, Purchaser shall remit to Seller within ten (10) Business Days after Purchaser's receipt of that portion of rentals and other tenant charges and Additional Rents received after the Proration Date attributable to periods before the Proration Date. Any payments received by Seller from any tenant after the Closing that relate to the Current Month, or any period of time preceding the Current Month, shall be retained by Seller based on Seller's period of ownership of the Property during the Current Month, or any period of time preceding the Current Month, as applicable, and Seller shall pay to Purchaser any portion due to Purchaser within ten (10) Business Days after Seller's receipt of such payment. Any other payments received by Seller from any tenant after the Closing shall be endorsed by Seller (without recourse) and delivered to Purchaser

> within ten (10) Business Days after Seller's receipt of such payment. Purchaser shall use its commercially reasonable efforts following Closing to collect and promptly remit to Seller rents or other amounts due Seller for the period prior to Closing.

(Ex. 2, §7.3.1(c)) (emphasis added). This section simply deals with the distribution of monies between SVAP and Purchaser after the Proration Date.[7] There is no reservation of rights in Section 7.3.1(c), and thus Section 7.3.1.(c) is not a basis for standing for SVAP to assert its claims at trial. In fact, the last sentence of this section, consistent with the other sections of the PSA and the Assignment and Assumption of Leases, contemplate the exact opposite: Specifically, that New Landlord shall collect any and all monies.

SVAP's claim that the "waterfall" provisions in Section 7.3.1(c) and SVAP's disclosure of litigation in the PSA somehow constitute a reservation of rights for SVAP to collect the alleged rent owed from Fitness in this action is also not supported by the language in the PSA. A careful review of the PSA shows that the "waterfall" provision provides that Paramount is collecting these monies. (Ex. 2, §7.3.1(c)). The "waterfall" provision, together with the "Collection" provision in Section 7.3.1(f) of the PSA – that SVAP "may not collect those payments, nor pursue an action against any tenant owing delinquent rents or any other amounts to Seller attributable to the period before the Proration Date" – demonstrate that there is no reservation of rights regarding the collection of the three months' rent at issue in this action in the PSA.[8] And, as discussed above, the Assignment and Assumption of Leases states the exact opposite – that SVAP has no right and

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[7] Proration Date is defined in the PSA as "12:01 a.m. on the Closing Date. (Ex 2, §1.3 at p. 6).

[8] At trial, during redirect of Mr. Mueller, Plaintiff made a half-hearted attempt to suggest Exhibit H, a disclosure statement attached to the PSA, provides the required standing. It does not. Further, reading the disclosure statement in conjunction with Section 5.9 of the PSA, in which SVAP agrees to "indemnify and defend and hold harmless" New Landlord (including for attorneys' fees and expenses) in connection with the disclosed "LA Fitness Litigation" only supports what the Assignment and Assumption of Leases states in clear and concise language -- all right, title and interest was assigned to New Landlord. (Ex. 2, §5.9).

interest in the three months rent at issue in the action because it delegated and assigned that interest and that right to Paramount.

Accordingly, the unrefuted evidence presented at trial establishes that as of October 21, 2021, SVAP assigned and delegated to Paramount all of SVAP's right, title and interest in and to any obligations under the Lease. SVAP has no "actual legal stake" in the outcome of the case and therefore no standing to pursue its claims. *Covenant Media*, 493 F.3d at 429; *see also Baltimore Steam Co. v. Baltimore Gas & Elec. Co.*, 123 Md. App. 1, 15 (1998) (vacated and remanded on other grounds, 353 Md. App. 142, 725 A.2d 549 (1999) (Mem) ("[T]he core inquiry of standing is whether a particular party has an interest that is sufficient as a matter of judicial policy to entitle that party to be heard in court."). The issue of standing "does go to the very heart of whether the controversy before the court is justiciable. If the controversy is nonjusticiable, it should not be before the court, and therefore must be dismissed." *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 150 Md. App. 479, 496 (2003) (quoting *Sipes v. Board of Municipal Zoning Appeals*, 99 Md. App. 78, 87-88 (1994)). Because SVAP has no standing to pursue its claim for breach of the Lease at trial, the claim must be dismissed and judgment entered in favor of Fitness.

2. Plaintiff failed to produce competent evidence that any monies were owed under the Lease and therefore failed to prove any breach of the Lease.

Not only did SVAP fail to establish it has standing to pursue its claims, but it failed to prove at trial that Fitness breached the Lease. Simply put, SVAP did not and could not prove Fitness breached the Lease because it did not prove that Fitness owed any money under the Lease.

SVAP's sole claim is that Fitness failed to pay rent allegedly due for the months of April, May and June 2020 and that failure is a breach of the Lease. (*See* Complaint, ¶¶13-15, 18-23). SVAP chose to have one witness at trial and that witness could not provide competent evidence of a breach of the Lease by Fitness. Pursuant to the plain language of the PSA, if Paramount collected

the rent allegedly owed to SVAP for the months of April, May and June 2020, after application of the amounts received to other priorities, SVAP may be entitled to receive from Paramount (not from Fitness) "any amount then currently due Seller from such tenant for any periods before the Proration Date, and the balance to be retained by Purchaser." (Ex. 2 at §7.3.1(c)(iii)). Mr. Mueller, SVAP's sole witness, testified that SVAP has no information as to whether since SVAP's sale of the property to Paramount Fitness has paid the rent allegedly owed for the months of April, May and June 2020 to Paramount. Mr. Mueller testified that he had no conversations with Paramount as to whether Fitness paid the rent to Paramount. Mr. Mueller testified he had no conversations with anyone at Paramount about anything. No witness for Paramount testified at trial.

Further, the only information produced by Plaintiff as the basis for the amount it seeks in damages was an Aging Detail printed January 19, 2022. (Exhibit 8). The Aging Detail was created by undisclosed individuals for January 2022, seven months ago. (*Id.*). Mr. Mueller, who is not an employee of SVAP, testified that he was not responsible for creating the information on the Aging Detail. The Aging Detail only provided information as to what was allegedly owed as of January 31, 2022, seven months before trial. Mr. Mueller testified that the information on the Aging Detail can change "at any second on any day in the last seven months." Mr. Mueller never asked for an updated Aging Detail and made no effort to determine what amount, if any, was owed as of the day of trial. The Aging Detail is not probative of what may or may not be owed under the Lease as of the day of trial and Plaintiff introduced no evidence of what, if anything, was owed as of the date of trial. At best, Plaintiff showed what may have been owed seven months ago. This is a fatal flaw.

SVAP presented no competent evidence that Fitness owed any money under the Lease. At best, SVAP tried to establish what Fitness allegedly owed seven months ago. The evidence that

was produced was deficient by its own admission. Without any competent evidence as to whether any amount was owed by Fitness on the day of trial, SVAP failed to prove any breach of the Lease by Fitness.

SVAP has the burden of proving that Fitness breached the Lease. *The Fischer Organization, Inc. v. Landry's Seafood Restaurants, Inc.*, 143 Md. App. 65, 75, 792 A.2d 349, 355 (2002) ("In an action for breach of contract, it is the party alleging the breach that bears the burden."). SVAP failed to meet that burden at trial, requiring that judgment be entered in favor of Defendant and against Plaintiff on Plaintiff's claim for breach of the Lease.

3. Plaintiff failed to provide any competent evidence concerning its alleged damages.

Even if it had standing, which it does not, and even if it had proved a breach of the Lease, which it did not, Plaintiff failed to prove its damages. The testimony of Mr. Mueller concerning Plaintiff's alleged damages was not based on his personal knowledge and was uncertain. Mr. Mueller stated he did not create the Aging Detail and did not work in or for the department where those records were kept or maintained. (*See* Exhibit 8). While testimony by a witness might be acceptable for purposes of a discovery deposition, Mr. Mueller's testimony about SVAP's alleged damages was incompetent for purposes of trial, where personal knowledge is required of a testifying witness. *See* Md. Rule 5-602 ("a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). No evidence was introduced suggesting Mr. Mueller had personal knowledge of the alleged damages. Mr. Mueller acknowledged that Fitness sought to have the attendance at trial of Gregory S. Moross by serving a trial subpoena on SVAP's counsel, but that SVAP refused the request.

Further, Mr. Mueller was unable to state with any certainty the amount of SVAP's alleged damages. Mr. Mueller testified that SVAP's damages are "approximately $206,000," and that he

did not create the Aging Detail nor did he discuss it with anyone after it was prepared in January 2022. Mr. Mueller testified that the information on the Aging Detail "can change at any second on any day in the last seven months." However, as discussed above, Mr. Mueller did not ask anyone to update the information on the Aging Detail prior to trial. Mr. Mueller testified that he has no knowledge whether Paramount ever collected from Fitness the rent allegedly owed for the months of April, May and June 2020, and never spoke to anyone at Paramount. Mr. Mueller admitted that he made no effort prior to trial to determine whether the information on the Aging Detail was true and accurate as of the date of the trial. SVAP's proffered evidence of damages is thus "devoid of reasonable certainty" and without any competent evidence of damages, SVAP failed to meet its burden of proof. *Roebuck v. Steuart*, 76 Md. App. 298, 314 (1988) ("One may recover only those damages that are affirmatively proved with reasonable certainty, and said damages may not be based on speculation or conjecture." (citations omitted)). Further, as discussed below, SVAP also failed to prove that it performed all its material obligations to Tenant under the Lease. *See Collins/Snoops Associates, Inc. v. CJF, LLC*, 190 Md. App. 146, 161, 988 A.2d 49, 57 (2010) ("On a claim for breach of contract, the plaintiff. . .asserting the claim for damages bears the burden of proving all elements of the cause of action, including plaintiff's own performance of all material contractual obligations.").

B. At Trial, Defendant Demonstrated Plaintiff's Breach Of The Lease

1. SVAP breached the representations, warranties and covenants to Fitness in the Lease, excusing Tenant's obligations under the Lease.

Pursuant to the Lease SVAP leased the Premises to Tenant for Tenant's right to use the Premises for the operation of a full service indoor health club and fitness facility ("health club"), and the Lease gives Fitness the unqualified, express, and absolute right to use the Premises for such purpose, encapsulated in its plain language: "Tenant shall have the right throughout the Term

to operate the Premises, or any portion thereof, for uses permitted under this Lease." (Ex. 3 at §1.9). The "uses permitted" "shall be for the operation of a health club and fitness facility," defined as the "Primary Uses," and "for uses ancillary to a health club and fitness facility," defined as the "Ancillary Uses." (Ex. 3 at §1.9). Mr. Mueller testified that Fitness's business is the operation of fitness centers and that it is a "fair statement in my experience with Fitness" that Fitness would require §1.9 be in the Lease. Section 1.9 of the Lease further provides: "Landlord hereby represents, warrants and covenants to Tenant that Tenant's operation of business from the Premises for Tenant's Primary Uses and/or Ancillary Uses does not and will not violate any agreements respecting exclusive use rights **or restrictions on use** within the Project or any portion thereof." (Ex. 3 at §1.9) (emphasis added). Mr. Mueller testified that there are representations, covenants, and warranties by SVAP to Tenant in both Section 1.9 of the Lease and in Section 2.2 of the Lease.

In Section 2.2 of the Lease, as acknowledged by Mr. Mueller in his testimony, SVAP made representations, warranties and covenants to Tenant in consideration for Tenant in entering into the Lease and as an inducement to Tenant for Tenant to lease the Premises. (Ex. 3 at §2.2). In Section 2.2 of the Lease, as acknowledged by Mr. Mueller in his testimony, SVAP acknowledged and agreed that each of the representations, warranties and covenants made by Landlord to Tenant in the Lease is material to Tenant, is being relied upon by Tenant, and shall survive the execution and delivery of the Lease by Tenant and Landlord. (Ex. 3 at §2.2). In the Section 2.2 of the Lease, as acknowledged by Mr. Mueller in his testimony, SVAP represented, warranted and covenanted to Tenant that SVAP shall indemnify and hold Tenant harmless from and against any and all losses, demands, claims, liabilities, damages, costs and expenses (including without limitation, reasonable attorneys' fees and expenses) arising as a result of any inaccuracy or breach of any representation, warranty or covenant of SVAP set forth in Lease. (Ex. 3 at §2.2). Mr. Mueller testified that the

representations, covenants, and warranties made by SVAP to Tenant in Section 2.2 of the Lease are in addition to what SVAP represented, covenanted and warranted to Tenant in Section 1.9 of the Lease. Mr. Mueller testified that it is "pretty normal" for a tenant to rely on representations, covenants and warranties made by a landlord in a lease.

In Section 2.2 of the Lease, among other things, Landlord represented, warranted and covenanted to Tenant that Landlord owns and will own the property "free and clear of all...covenants, conditions, restrictions...which might in any manner or to any extent prevent or adversely affect the use of the Premises by Tenant for Tenant's intended purposes, or disturb Tenant's peaceful and quiet possession and enjoyment thereof...". (Ex. 3 at §2.2).

At trial, through Mr. Mueller's testimony, SVAP admitted and there is no dispute, that pursuant to Maryland Governor Larry Hogan's Executive Order dated March 16, 2020, all gyms and fitness centers in Maryland, including Fitness's at the Premises, were ordered to close, effective 5 p.m. on March 16, 2020. (*See* Exhibit D – Order of the Governor of the State of Maryland Amending and Restating the Order of March 12, 2020 Prohibiting Large Gatherings and Events and Closing Senior Centers, and Additionally Closing Bars, Restaurants, Fitness Centers, and Theatres, at §VI, p. 3). [9] Similarly, through Mr. Mueller's testimony at trial, SVAP admitted, and there is no dispute, that pursuant to Maryland Governor Larry Hogan's Executive Order dated June 10, 2020, all gyms and fitness centers in Maryland, including Fitness's at the Premises, were permitted to reopen, effective 5 p.m. on June 19, 2020, "*provided, however*, that the total number

[9] The Order Number 20-04-03-01, dated April 3, 2020, of Maryland Governor Larry Hogan (Exhibit 9) that SVAP cites in its Pretrial Statement for its argument that "Governor Hogan made explicit that commercial tenants remain responsible for all rent payment obligations," is not relevant to the claims and defenses in this action and has no evidentiary value. (SVAP's Pretrial Statement at pp. 3, 7) (emphasis supplied). Order Number 20-04-03-01 (Exhibit 9) related to a moratorium on commercial evictions. This is not a commercial eviction action.

of persons permitted in a Fitness Center at any one time shall not exceed 50% of that Fitness Center's Maximum Occupancy. . .". (*See* Exhibit K - Order of the Governor of the State of Maryland Amending and Restating the Order of June 3, 2020, Allowing the Reopening of Certain Businesses and Facilities, Subject to Local Regulations, at §III. g., p. 7 (emphasis supplied)).

The Lease provides that "**[i]n consideration** of the rents agreed to be paid and of the covenants and agreements made by the respective parties hereto, Landlord hereby demises and leases to Tenant and Tenant hereby leases from Landlord the Premises, upon and subject to the terms, conditions and provisions set forth in this Lease . . . ." (Ex. 3 at §2.1) (emphasis added). Tenant's obligation to pay rent is conditioned upon Landlord's representations, warranties, and covenants, including, but not limited to, the affirmative obligation to own the property free and clear of all conditions and restrictions which might in any manner or to any extent prevent or adversely affect Tenant's use of the Premises for its health club or in any manner or to any extent disturb Tenant's peaceful use and enjoyment.

Tenant's obligations under the Lease were excused when Landlord's representations, warranties, and covenants to Tenant in the Lease were not accurate and not fulfilled due to COVID-19 and the government mandated closures, when it was illegal for Tenant to use the Premises to operate its health club. Once the closure orders went into effect, SVAP was in breach of its representation, warranty, and covenant to Tenant that Tenant would have the right to operate the Premises for a health club and fitness facility throughout the Term of the Lease. (Ex. 3 at §1.9). Once the closure orders went into effect, SVAP was in breach of its representation, covenant and warranty to Tenant that there would be no restrictions on Tenant's use of the Premises for a health club and fitness facility. (*Id.*). Once the closure orders went into effect, SVAP was in breach of its representation, covenant and warranty to Tenant that it would continue to own the Premises

free of all restrictions and conditions which might in any manner or to any extent prevent or adversely affect the use of the Premises by Tenant for its health club or disturb Tenant's peaceful and quiet enjoyment. (Ex. 3 at §2.2(b)).[10] Such breaches provide a basis for excusing rent.

Under Maryland law, a material breach or nonperformance of a promise discharges the non-breaching party from performing its own contractual obligations. *See Jay Dee/Mole Joint Venture v. Mayor and City Council of Baltimore*, 725 F. Supp. 2d 513, 526 (D. Md. 2010) (applying Maryland law) (citing 23 Williston on Contracts §63:3 (4th Ed.) (discussing that a material breach of a contract discharges the non-breaching party of its duty to perform). A breach is material if it goes to the very substance of the contract and defeats the object of the parties in entering into the contract. "A breach is material [under Maryland law] 'if it affects the purpose of the contract in an important or vital way.'" *Gresham v. Lumbermen's Mut. Cas. Co.*, 404 F.3d 253, 260 (4th Cir. 2005) (quoting *Sachs v. Regal Sav. Bank, FSB*, 119 Md.App. 276, 705 A.2d 1, 4 (Md. Ct. Spec. App. 1999); *see also Miller v. Strudwick*, 2018 WL 4679730, at *3 (D. Md. Sept. 28, 2018) (applying Maryland law). Additionally, when a party materially breaches a contract, it "is not entitled to recover damages for the other party's subsequent nonperformance ... since the latter party's performance is excused." *Gresham v. Lumbermen's Mut. Cas. Co.*, 404 F.3d at 528 (quoting 23 Williston on Contracts § 63:3 (4th ed.)). In similar situations, where a landlord has made an express promise that the tenant would be able to use the leased property for a specific purpose but the tenant was not able to do so, it has been held that the landlord cannot enforce the

[10] Such promises concerning quiet enjoyment are not mere codifications of existing law; rather, they indicate the parties' intention that Tenant have the right to operate the Premises for a health club and fitness facility throughout the term of the Lease. Tenant's right to operate the Premises as a health club through the duration of the Lease term is a right essential for Tenant's quiet use and enjoyment. During the Closure Period, Tenant had neither the right to use nor enjoyment of the Premises in breach of these promises.

lease against the tenant. *See Benderson Dev. Co. v. Commenco Corp.*, 355 N.Y.S.2d 859, 860 (4th Dept 1974). In *Benderson*, the lease contained landlord's express warranty that the property could be used for tenant's intended use as a fast-food restaurant. When tenant was not able to use the property for the intended purpose for a period of time because it could not obtain a required permit until certain public sewer work was completed, the court refused to enforce the lease against the tenant because of the failure of the landlord's warranty. As the court noted, the landlord's warranty was not voided, even though it was tenant's responsibility to obtain the required permits and tenant was aware of potential difficulties in doing so. *Id*

In a recent case involving Fitness, COVID-19 and government-mandated closures and restrictions in connection with the COVID-19 Pandemic, after a bench trial the Texas court entered judgment in favor of Fitness and against landlords in a matter involving six leases, some of which had a similar force majeure provision as in the Lease, and issued Findings of Fact and Conclusions of Law. A copy of the Findings of Fact and Conclusions of Law dated August 8, 2022 in *VEREIT Real Estate, L.P., Cole LA Dallas TX, LLC, Cole LA Denton TX, LLC, Cole LA Duncanville TX, LLC v. Fitness International, LLC*, Cause No. DC-20-18444 (District Court of the Fourteenth Judicial District, Dallas County, Texas), is attached as Exhibit 1-A. Among the Conclusions of Law made by the court are the following:

- The purpose of the operation of fitness facilities was extinguished by unforeseen, supervening events—the government closure orders in response to the COVID-19 Pandemic—for each month throughout the entire Closure Period. It would have been a violation of the State of Texas and Dallas County's executive orders for Fitness to use the Properties throughout the Closure Period.

- Landlord has breached the Leases in several ways: (1) failing to uphold the representations, warranties, and covenants in the Leases when Fitness was denied, among other things, the right to use the Properties to operate its business, the right of exclusive use and

control of the Properties, the right to peaceful and quiet possession and enjoyment of the Properties, and the right to use the Properties free and clear of any conditions or restrictions which would prevent or adversely affect use of the Properties by Fitness (see Lease, §2.2); and (2) failing to provide Fitness a credit for Rent paid during the Closure Period.

- As a result of Landlord's breach, Fitness has been damaged. Counter-Defendants are liable to Fitness for the breach of the Leases.
- During the ongoing State and County Restrictions, Fitness was prevented from fully using the Properties as guaranteed by the Leases.
- Because Fitness was substantially prevented from operating the Properties due to the capacity limits imposed by the On-Going Restrictions, Fitness is entitled to an abatement of Rent for that period.
- Plaintiffs' claim for breach of contract is barred due to failure of consideration.
- Plaintiffs' claims are barred by the doctrine of impracticability.
- Plaintiffs' claims are barred by Landlord's primary material breach.
- Plaintiffs' claims are barred as a result of casualty.

(Conclusions of Law nos. 4-6, 12-13, 15, 27-28, 33-34, 43-46; *see also* Final Judgment dated June 27, 2022 entered in the same case, a copy of which is attached as Exhibit 1-B).

SVAP's breaches of the representations, covenants and warranties to Fitness in the Lease not only excused Tenant's obligations under the Lease, but as discussed below, support Tenant's claim for damages for the portion of the month of March 2020 in which Tenant made a rent payment but it could not operate its business from the Premises.

Moreover, the indemnification provisions of §2.2 of the Lease applies here. (Ex. 3 at §2.2). Section 2.2 specifically requires the Landlord to indemnify and defend Tenant and hold it harmless "against any and all losses, demands, claims, liabilities, damages, costs and expenses. . . arising as

a result of any inaccuracy or breach" of a representation, warranty or covenant by Landlord. That the Premises could not be used as a health club during the period of the government-mandated closures in connection with the COVID-19 Pandemic rendered Landlord's representations, warranties and covenants, at a minimum, "inaccurate." SVAP is required to indemnify, defend, and hold Tenant harmless for any "losses, demands, claims, liabilities, damages, costs and expenses" Tenant incurred as a result of this "inaccuracy." Thus, even if Tenant's obligation to pay rent, despite the failure of the representations, warranties and covenants, continued, SVAP is required to indemnify, defend, and hold Tenant harmless from any claim for such rent. Accordingly, even if SVAP proved Tenant has liability to it, which SVAP did not, SVAP is required by the express terms of the Lease to indemnify Tenant. This is another reason precluding judgment for SVAP and warranting judgment for Tenant.

While SVAP would like to argue that the Court need look no further than the force majeure provision, that is inaccurate. The plain language of the force majeure provision makes it "subject to any limitations expressly set forth elsewhere in this Lease," including Sections 1.9 and 2.2 containing representations, covenants and warranties. (Ex. 3 at §§22.3, 1.9, 2.2). Section 15.4 requires abatement in the event of a casualty like the COVID-19 Pandemic and Section 16.1 requires abatement in the event of government action. (Ex. 3 at §§15.4, 16.1). SVAP would have the Court ignore these other provisions in the Lease. This is not permitted under Maryland law. *See Walker v. Dept. of Human Resources*, 379 Md. 407, 421, 842 A.2d 53, 61 (2004) (under Maryland law, "[w]e also attempt to construe contracts as a whole, to interpret their separate provisions harmoniously, so that, if possible, all of them may be given effect" (citations omitted).

C. At Trial, Defendant Established Its Right To Relief Under Its Affirmative Defenses And Counterclaims

1. Fitness demonstrated that the casualty of COVID-19 requires SVAP to abate rent during the Closure Period.

Among other things, the Lease allocates the risk of non-use to the Landlord, as indicated by the casualty and condemnation provisions in the Lease which provide that Rent is abated when Tenant is unable to use the Premises for the operation of its business. (Ex. 3 at §§15.4, 16.1). On March 17, 2020, the day after it was forced to cease operations, Tenant sent correspondence to SVAP regarding its position that its obligation to pay rent was excused. (Exhibit 5). Notwithstanding Tenant's notice and SVAP's breaches of the Lease, including its obligation to indemnify Tenant for losses, SVAP demanded that Tenant pay rent in full. (Exhibit 7).

Fitness alleged in its Counterclaims that COVID-19 is a hazardous substance and that SVAP represented to Tenant that it would not knowingly or unknowingly allow any hazardous substances into the Premises "that would materially and adversely affect Tenant's use or occupancy of the Premises or the operation of Tenant's business from the Premises," and that SVAP "will indemnify, defend and hold Tenant harmless from any liability, damages or losses whatsoever (including attorneys' fees and costs) by reason of any hazardous substances in, on or at the Premises, the Building or the Shopping Center." Specifically, in its Counterclaims, Fitness asserted:

> In the Lease, among other things, Landlord represented to Tenant that (a) Landlord shall not, knowingly or unknowingly, allow any materials containing any hazardous substances into the Building or the Shopping Center that would be required to be remediated under any environmental laws or that would materially and adversely affect Tenant's use or occupancy of the Premises or the operation of Tenant's business from the Premises, (b) Landlord will indemnify, defend and hold Tenant harmless from any liability, damages or losses whatsoever (including attorneys' fees and costs) by reason of any hazardous substances in, on or at the Premises, the Building or the Shopping Center, and (c) in the event hazardous substances are or become located in, upon, under or about any portion of the Building or the Shopping Center that Landlord is legally required to remediate under any applicable environmental laws, Landlord shall remediate such contamination in compliance with such environmental law, at no cost to Tenant.

(Counterclaims at ¶ 20).

> COVID-19 is an uncured environmental condition that physically infects and exists on surfaces, objects, and materials for days.

(Counterclaims at ¶ 24).

> The Centers for Disease Control ("CDC") and various health departments, including in the State of Maryland, have implemented guidelines and instructions for the cleaning, sanitizing and fumigating of public areas prior to allowing them to re-open publicly due to the possible presence of hazardous substances such as COVID-19.

(Counterclaims at ¶ 25; *see also* Exhibit 3 at §8.6; Eighteenth Affirmative Defense: "Plaintiff's claims are barred because Plaintiff failed to maintain the Premises."). COVID-19 is clearly a substance which is deemed to be hazardous and dangerous. The State of Maryland proclamations and orders that were admitted into evidence support this. The State of Maryland Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19 dated March 5, 2020 provides, among other things, that "the novel coronavirus, as a viral agent capable of causing extensive loss of life or serious disability, is a deadly agent;" "the transmission of the novel coronavirus in the state is a threat to human health in all of Maryland;" "the person-to-person spread modeled by the CDC and WHO indicates that extensive loss of life or serious disability is threatened imminently in all of Maryland because of the transmission in the state of novel coronavirus;" and COVID-19 poses an immediate danger to public safety." (Exhibit B). The Order of the Governor of the State of Maryland Amending and Restating the Order of March 12, 2020, Prohibiting Large Gatherings and Events and Closing Senior Centers, and Additionally Closing Bars, Restaurants, Fitness Centers and Theatres dated March 16, 2020, provides, among other things, that "COVID-19, a respiratory disease that spreads easily from person to person and may result in serious injury or death, is a public health catastrophe and has been confirmed in several Maryland counties;" "[t]o reduce the threat to human health caused by transmission of the

novel coronavirus in Maryland, and to protect and save lives, it is necessary and reasonable that individuals in the state refrain from congregating;" "[t]o protect the public health, welfare, and safety, prevent the transmission of the novel coronavirus, control the spread of COVID-19, and save lives, it is necessary to control and direct the movement of individuals in Maryland, including those on the public streets;" and "[i]t is further necessary to control and direct in Maryland the occupancy and use of buildings and premises, as well as places of amusement and assembly." (Exhibit D; *see also* Exhibits C and E through N).

The Lease provides for abatement of rent in the event of a casualty. Section 15.4 of the Lease provides, in pertinent part:

> **ABATEMENT OF RENT.** If neither party terminates this Lease pursuant to the foregoing provisions, and if the operation of Tenant's business from the Premises or parking therefor or access thereto is materially and adversely interfered with as a result of any damage or destructions, Tenant's obligation for the payment of Minimum Rent and any other amounts owing from Tenant to Landlord pursuant to this Lease during the period the Premises are so rendered unfit shall be equitably abated from the date of the casualty based upon the extent of the interference resulting from such casualty (or shall be fully abated for such period if the operation of Tenant's business from the remaining portion of the Premises is not reasonable practicable). . .

(Ex. 3 at §15.4 (emphasis added)).[11]

[11] Section 16.1 also provides a basis for abating rent under the Lease. It provides, in pertinent part: "In the event of a Taking which does not result in the termination of this Lease, Tenant's obligations for Minimum Rent and Additional Rent shall be equitably abated following such Taking based upon the extent of the interference with the operation of Tenant's business from the Premises." (Ex. 3 at §16.1). *See also* Twenty-Seventh Affirmative Defense: "Plaintiff's claims are barred because there was a temporary taking of the Premises under the Lease and applicable law;" Counterclaims, ¶38: "The closures amounted to a temporary condemnation of the Premises under the Lease;" ¶39: "Tenant's obligations under the Lease, including payment of Rent, are equitably abated during the period following the temporary condemnation/taking through the date Tenant was legally permitted to resume operations at the Premises."

From the onset of the COVID-19 Pandemic, Fitness has maintained COVID-19 is a casualty. This was set forth in the Counterclaims (*see, e.g.*, Counterclaim, ¶¶20, 24, 25), as well as Fitness's testimony during discovery. The following deposition testimony of Fitness's corporate designee, Diann D. Alexander, Fitness's Director of Leasing, Vice President, Senior Real Estate Counsel concerning Fitness's position concerning a casualty:

> Q. Are you claiming a casualty occurred [in] this instance?
>
> A. The presence of Coronavirus very likely was on the premises, so there is an argument to be made that there was a casualty.

(Tr. at 67:15-16,18-21).

The casualty of COVID-19 provides Tenant with the right to abate rent during the Closure Period. It is undisputed that Tenant paid rent in March 2020 prior to being ordered to close due to COVID-19. Mr. Mueller testified that rent is approximately $68,000 a month. Accordingly, Fitness demonstrated at trial its right to damages in the amount of $34,529.98, representing the principal amount due to Defendant for rent it paid during the periods March 17, 2020 through March 30, 2020 when it was unable to use the Premises. [Counterclaim, ¶45; *see also* Twenty-Third Affirmative Defense: "Plaintiff's claims are barred and/or reduced in light of the doctrines of offset and/or payment;" Thirty-Second Affirmative Defense: "Plaintiff's claims are barred because Defendant is entitled to abate Rent during the period that Defendant is not permitted and/or able to use the Premises for the operation of its business.")

2. The doctrine of temporary frustration of purpose requires entry of judgment in favor of Fitness.

Fitness demonstrated its right to be excused from payment of rent due to the doctrine of temporary frustration of purpose. Maryland law recognizes the doctrines of frustration of contractual purpose, which examines the parties' purpose in entering into their agreement. "The principle underlying the frustration of purpose doctrine is that where the purpose of a contract is

completely frustrated and rendered impossible of performance by a supervening event or circumstance, the contract will be discharged." *Montauk Corp. v. Seeds*, 215 Md. 491, 499, 138 A.2d 907 (1958)). Under this doctrine, "if a contract is legal when made, and no fault on the part of the promisor exists, the promisor has no liability for failing to perform the promised act, after the law itself subsequently forbids or prevents the performance of the promise." *Wischhusen v. Spirits Co.*, 163 Md. 565, 572–573, 163 A. 685 (1933). In *Montauk*, the Court of Appeals outlined three factors that courts should examine when determining whether the frustration doctrine applies: "(1) whether the intervening act was reasonably foreseeable; (2) whether the act was an exercise of sovereign power; and (3) whether the parties were instrumental in bringing about the intervening event." *Montauk*, 215 Md. at 499, 138 A.2d 907.

To analyze equitable defenses to breach of contract, Maryland courts look to the Restatement (Second) of Contracts for guidance. *See, e.g.*, *Montauk Corp.*, 215 Md. at 498, 138 A.2d at 910-911.

> Restatement (Second) of Contracts § 265 provides:
>
> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 265 (1981).

Thus, to succeed on a theory of frustration of purpose, a party must show that notwithstanding its ability to perform, the "principal purpose" of the contract is "substantially frustrated." *Id.* That is precisely what happened here. The express "purpose" of the Lease was to give Tenant the right to operate the Premises for a health club throughout the term of the Lease. (Ex. 3 at §1.9). SVAP does not dispute that the closures in response to the once-in-a-lifetime global pandemic were unforeseeable and beyond Tenant's control; nor does it dispute that, during

the Closure Period, it was illegal for Tenant to use the Premises for the operation of its business. Mr. Mueller testified that during the Closure Period, Fitness could not operate for the Primary Uses, *i.e.*, for the operation of a health club and fitness facility. Thus, the essential purpose of the Lease, and in turn, the totality of the bargain that Tenant was to receive, was completely frustrated.

Courts addressing the COVID-19 Pandemic and related government closure orders have held that the circumstances present here —the destruction of the essential purpose of the Lease— are separate and distinct from circumstances from which a party may invoke a lease's force majeure provision. *See, e.g., UMNV 205-207 Newbury LLC v. Caffe Nero Americas Inc.*, 2021 WL 956069, at *6 (Mass. Super. Ct. Feb. 8, 2021 ("[T]he force majeure provision addresses the risk that performance may become impossible but does **not** address the distinct risk that the performance could still be possible even while the main purpose of the Lease is frustrated by events not in the parties' control.") (emphasis supplied); *Rembrandt Enterprises, Inc. v. Dahmes Stainless, Inc.*, No. C15-4248-LTS, 2017 WL 3929308, at *14 (N.D. Iowa Sept. 7, 2017) (applying Minnesota law) ("While the contract contains a force majeure clause, no authority suggests that the existence of such a clause precludes the doctrine of frustration of purpose."); *1800 Baxter County Road LLC*, 2021 WL 1588745, at *3 (Minn. Dist. Ct. Mar. 30, 2021) (finding that the "force majeure clause does not allocate the risk of frustration of purpose to either party").

The Restatement (Second) of Contracts also recognizes that the frustration of purpose (or impracticability) may be *temporary* and will suspend any duty to perform while the frustration exists. The well-established doctrine of temporary frustration of purpose was included in both Restatement (First) of Contracts § 462 and Restatement (Second) of Contracts § 269. Restatement (Second) of Contracts §269 provides:

> Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration

> exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement (Second) of Contracts § 269. Here, as undisputed by SVAP, once Tenant was legally permitted to use the Premises to operate a health club, it paid rent in full.

In *Bay City Realty, LLC v. Mattress Firm, Inc.*, 2021 WL 1295261, at *7, 9 (E.D. Mich. April 7, 2021), the court held tenant's purpose in leasing the space for the retail sale of bedding products was frustrated by the COVID-19 shutdown orders in Michigan, excusing tenant from paying rent. In doing so, the court rejected the landlord's argument that the premises could be used for other purposes, such as storage and office uses. *Bay City Realty*, 2021 WL 1295261, at *7. "Here, the primary and secondary retail purposes were frustrated by the Governor's Order. In addition, everyone who could work from home was required to do so, and, therefore, the offices were essentially storage units for business equipment during the shutdown. The purpose of the lease, the retail sale of bedding products, was substantially frustrated during the shutdown." *Id.* In coming to this decision, the court relied in part on two cases—*20th Century Lites, Inc. v. Goodman*, 149 P.2d 88, 92 (Cal. App. Dep't Super. Ct. 1944) (holding that both parties are excused from performance by commercial frustration where a governmental proclamation frustrates the "desired object or effect to be obtained" by the parties to a lease) and *Indus. Dev. & Land Co. v. Goldschmidt*, 206 P. 134, 136 (Cal. App. 1922) ("[A] contract which contemplates the doing of a thing, at first lawful, but which afterwards and during the running of the contract term becomes unlawful, ceases to be operative upon the taking effect of the prohibitory law").

Here, as in *Caffe Nero* and *Mattress Firm*, the frustration of purpose defense applies and provides relief to Tenant. It is undisputed that the purpose of the Lease was for Tenant to use the Premises to operate a health club and that COVID-19 and the government closure orders made such use illegal, frustrating the purpose of the Lease.

SVAP's assertion that the Lease requires payment of rent even when it has become illegal for the Premises to be used for their only intended purpose makes little sense. Rent is paid under a lease *in exchange for* the right to use a property and, if use of the property is made illegal, the purpose of the lease is frustrated and the obligation to pay rent for the property is excused.

Another court addressing the COVID-19 Pandemic, government closure orders and a lease in which Fitness is the tenant adopted the same equitable arguments Fitness makes in this case that Fitness is entitled to be excused from payment of rent and/or to abate rent based on the doctrines of temporary frustration of purpose, temporary impossibility, and impracticability.[12] *See* February 3, 2022 *Opinion and Order in National Retail Properties, LP v. Fitness International, LLC*, in the Circuit Court for the County of Wayne, Michigan, Case No. 20-014449-CB, a copy of which is attached as Exhibit 2.

In granting Fitness' Cross-Motion for Summary Disposition based on the equitable doctrine of frustration of purpose, the Michigan court ruled that:

> [T]he primary purpose of operation of fitness facilities had been frustrated by 'an event not reasonably foreseeable' at the time the contract was made and has not been the fault of Fitness. The extraordinary circumstances of a pandemic causing a complete shutdown of nonessential services were not reasonably foreseeable.
>
> The temporary, but complete, shutdown by the government frustrated Fitness' purpose of using the premises for the operation of a health club and fitness facilities. Fitness, the tenant, did not receive the benefit of its original and continued bargain to use the property as intended in exchange for the payment of rent.
>
> During the time of the total shutdown, the change of circumstance, made the contracts 'virtually worthless' to Fitness.
>
> Therefore, the Court holds that Fitness may avail itself of the doctrine of frustration of purpose for the period of total shutdown.

---

[12] *See* Twenty-Eighth and Twenty-Ninth Affirmative Defenses (impossibility of performance); Thirtieth Affirmative Defense (doctrine of impracticability); Thirty-First Affirmative Defense (frustration of purpose); Counterclaims at ¶31 (impossibility), ¶33 (impracticability), ¶35 (frustration of purpose).

Id. at 17 (citations omitted).

For the same reasons, the Michigan court also granted summary disposition in favor of Fitness based on the equitable doctrines of impossibility and impracticability because the "operation of fitness facilities was impossible during the time of the total shutdown" and "it was impossible for Fitness to uses [sic] the properties as intended during the shutdown period the government deemed the use illegal." *Id.* at 18-19. In this case, Fitness also asserts that the purpose of the Lease (*i.e.*, for Fitness to operate an indoor health club and fitness facility) was frustrated and that during the Closure Period it became impossible and impracticable for Fitness to operate its health club. The government-mandated closures were unanticipated and beyond Fitness's control. During the Closure Period, it was illegal for Fitness to use the Premises as set forth in the Lease.

In *VEREIT Real Estate, L.P., et al. v. Fitness International, LLC*, Cause No. DC-20-18444 (District Court of the Fourteenth Judicial District, Dallas County, Texas Aug. 8, 2022) discussed above, among the Findings of Fact made by the court following a bench trial concerning the six leases (the "Leases") at issue in the action are the following:

- Fitness entered into the Leases for the express purpose of operating an indoor health club and fitness center on each of the Properties.

- The Leases provide that Tenant would be able to operate the Properties as a health club throughout the term of each Lease, with Landlord warranting that Fitness "shall have the right to use the Premises" for a health club throughout the entire Term.

- The essential purpose of the Leases and, in turn, the totality of the bargain that Tenant was to receive under and through the Leases, was to give Tenant the right to use each of the Properties to operate a full service indoor health club and fitness center for Tenant's members and invitees.

- As Fitness was prohibited from using each of the Properties by the government mandates, the purpose of the Leases was frustrated.

- {F}rom March 17, 2020 to May 31, 2020 (the "Closure Period"), government mandated closure orders made it illegal for Fitness to use the entirety of the Properties for the operation of its business (the "Closure Orders").

- Fitness also froze membership dues/monetary payments during the Closure Period as required by its contracts with its members and as a result, did not generate any revenue from the Properties during the Closure Period.

- Tenant paid Rent in March 2020 for the Properties. As a result of the closures, Tenant is entitled to a credit. . .for Rent it paid for the period of March 17 through March 31, 2020 when it was not permitted to use any of the Properties.

(Ex. 1-A, Findings of Fact nos. 9-13, 21-22, 26).

Among the Conclusions of Law, the court found the following:

- The purpose of the operation of fitness facilities was extinguished by unforeseen, supervening events—the government closure orders in response to the COVID-19 Pandemic—for each month throughout the entire Closure Period. It would have been a violation of the State of Texas and Dallas County's executive orders for Fitness to use the Properties throughout the Closure Period.

- The undisputed facts also establish the defense of impossibility.

(Ex. 1-A).

In *Fitness International, LLC v. VEREIT Real Estate, L.P.*, Case No. 2020-027207-CA-01 (In the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, June 8, 2022), a copy of which is attached as Exhibit 3, the court entered summary judgment for Fitness, finding that "the essential purpose of the Lease, and in turn, the totality of the bargain that Fitness was to receive, was completely frustrated." As a result, "[i]sofar as the Force Majeure provision is inapplicable. . .the equitable doctrines yield the same result" and even had there been a different or inapplicable force majeure provision, "Fitness would have been excused from the payment of Rent during the Closure Period based on the doctrine of frustration of

purpose…Fitness also would have been excused from the payment of Rent during the Closure Period under the equitable doctrine of impossibility…[and] impracticability." *Id.*, p. 8.

3. The doctrine of temporary impossibility and/or impracticability requires entry of judgment in favor of Fitness.

Fitness demonstrated its right to be excused from payment of rent due to the doctrines of temporary impossibility and/or impracticability. During the Closure Period and as acknowledged by SVAP's witness, who testified he was not surprised by this, Fitness did not charge its members any fees. Under the doctrine of legal impossibility, "[i]f a contract is legal when made, and no fault on the part of the promisor exists, the promisor has no liability for failing to perform the promised act, after the law itself subsequently forbids or prevents the performance of the promise." *Wischhusen v. American Medicinal Spirits Co.*, 163 Md. 565, 572–573, 163 A. 685, 687–688 (1933); (where the entire business was the manufacture of whisky, which required a permit from the federal government, without the permit "the performance of the contract would be criminal, and so legally impossible, by reason of the refusal of constituted authority to grant the requested permit to manufacture.")[13]; *see also 267 Development, LLC v Brooklyn Babies and Toddlers LLC*, 2021 WL 963955, at *2 (Sup Ct Kings County, March 15, 2021) (finding that the shutdown of the

[13] In reaching its decision, the *Wischhusen* court relied on the Restatement of Contracts §458, "Supervening Prohibition or Prevention by Law":

> A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States.

Wischhusen, 163 A. at 688.

defendant/tenant's business during the Covid-19 pandemic **precluded the tenant from performing its contractual obligation to pay rent**). Maryland also recognizes that the impossibility may be temporary, temporarily suspending performance under a contract. *See Taylor v. Weller*, 213 Md. 578, 583, 132 A.2d 578 (1957).

Similarly, under Maryland law, "a party is excused from performing on a contract when performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts §261 (1981); *see also Opera Co. of Boston, Inc. v. Wolf Trap Foundation for Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987) (performance excused when party's performance is made impracticable). Courts recognize temporary impracticability as excusing performance. "'Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists....'" *enXco Dev. Corp. v. N. States Power Co.*, 758 F.3d 940, 945 (8th Cir. 2014) (quoting Restatement (Second) of Contracts § 269). Once the impracticability of performance or frustration of purpose no longer exists, the obligor then has a duty to perform, which is exactly what happened here - Tenant resumed paying rent once it was legal to use the Premises again for the operation of its health club.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the claim of Plaintiff/Counter-Defendant SVAP II Pasadena Crossroads LLC for lack of standing. In the alternative, the Court should enter judgment in favor of Defendant/Counter-Plaintiff Fitness International, LLC and against Plaintiff on Plaintiff's claim for breach of the Lease. In addition, the Court should grant judgment in favor of Defendant and against Plaintiff in the principal amount $34,529.98,

representing the principal amount due to Defendant for rent it paid during the periods March 17, 2020 through March 30, 2020, plus interest, attorneys' fees and costs.

Respectfully submitted,

/s / Matthew J. Youssef

Craig D. Roswell, Esq.
Matthew Youssef, Esq.
Niles, Barton & Wilmer, LLP
111 South Calvert Street, Suite 1400
Baltimore, Maryland 21202
Direct: (410) 783-6341
Fax: (410) 783-6486
cdroswell@nilesbarton.com
mjyoussef@nilesbarton.com

and

A. Grant Phelan, Esquire (admitted *pro hac vice*)
Mary Ellen O'Laughlin (admitted *pro hac vice*)
Klehr Harrison Harvey Branzburg LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103
Telephone: 215-569-2096
Facsimile: 215-568-6603
gphelan@klehr.com
molaughlin@klehr.com

Attorneys for Defendant/Counter-Plaintiff, Fitness International, LLC

Dated: August 17, 2022

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Trial Memorandum was electronically filed and delivered to all counsel of record using the Maryland Court's File & Serve MDEC System:

GKG LAW, P.C.
Brendan Collins
CPF No. 8612010100
1055 Thomas Jefferson Street NW, Suite 500
Washington, D.C. 20007
Telephone: (202) 342-5200
Facsimile: (202) 342-5219
bcollins@gkglaw.com

and

Rachel E. Shaw (*admitted pro hac vice)*
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036
Telephone: (212) 421-4100
Facsimile: (212) 798-6352
rshaw@pryorcashman.com

A Word copy of the foregoing also was served upon the Honorable Ronald A. Silkworth via electronic mail at ronald.a.silkworth@mdcourts.gov

/s / Matthew J. Youssef
Craig D. Roswell, Esq.
Matthew Youssef, Esq.
Niles, Barton & Wilmer, LLP
111 South Calvert Street, Suite 1400
Baltimore, Maryland 21202
Direct: (410) 783-6341
Fax: (410) 783-6486
cdroswell@nilesbarton.com
mjyoussef@nilesbarton.com

Dated August 17, 2022

APPENDIX C

CAUSE NO. DC-20-18444

VEREIT REAL ESTATE, L.P., COLE LA DALLAS TX, LLC, COLE LA DENTON TX LLC, COLE LA DUNCANVILLE TX, LLC,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
	§	14TH JUDICIAL DISTRICT
vs.	§	
FITNESS INTERNATIONAL, LLC,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came for trial on March 29, 2022. Plaintiffs Vereit Real Estate, L.P., COLA LA Dallas TX, LLC, Cole LA Denton TX LLC, and Cole LA Duncanville TX, LLC (collectively "Landlord") and Defendant Fitness International L.L.C. (sometimes "Fitness" or "Tenant") appeared and announced ready. The case was tried without a jury. This Court entered a judgment on June 27, 2022 (the "Judgment"). Based on the evidence presented, the Court issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On March 29, 2022 the Court heard testimony in the above cause and makes the following findings:

1. The following findings were based, in part, on observing the witnesses and evidence presented at trial. To the extent that findings of fact included herein were denied by witnesses, the Court does not find their testimony credible and rather finds it not to be persuasive, given the totality of the evidence.

2. Fitness operates indoor health clubs throughout the United States, including in Texas.

3. Landlord and Plaintiffs Vereit Real Estate, L.P., COLA LA Dallas TX, LLC, Cole LA Denton TX LLC, and Cole LA Duncanville TX, LLC (collectively "Landlord") entered into multiple Retail Leases for multiple properties across Texas.

4. The Leases are dated August 29, 2007 for the Denton Property; March 8, 2008 for the Dallas Property; October 27, 2006 for the Duncanville Property; November 22, 2016 for the McKinney Property; December 20, 2005 for the Rowlett Property; and July 20, 2005 for the Spring Property (collectively "the Properties").

5. The leases for Dallas, Denton, and Duncanville Properties have virtually identical force majeure provisions which provide, in pertinent part:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, retraction by the governing authorities of the Building Permit or any of the Required Project Entitlements (through no fault of such party), failure of power, restrictive laws, riots, insurrection, war, fire, inclement weather or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (each, a "Force Majeure Event"), subject to any limitations expressly set forth elsewhere in this Lease, performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event). Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.

6. The lease for the McKinney Property has the following force majeure provision:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, restrictive laws, riots, insurrection, war, fire, severe inclement weather such as snow or ice or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability

excepted (any "Force Majeure Event"), performance of such act shall be excused for the delay caused by the Force Majeure Event. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.

7. The lease for the Spring Property has a similar force majeure provisions with critical differences, as follows:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, restrictive Laws, riots, insurrection, war, fire or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), performance of such act (**other than the payment of Rent**, except to the extent the Commencement Date or Rent Commencement Date may be delayed due to Force Majeure as set forth in Section 1.5) shall be excused for the period of the Force Majeure Event, and the period for the performance of such act shall be extended for an equivalent period. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events. **Payment of sums owing under this Lease by either party, including without limitation Rent** and Landlord's Construction Cost Contribution (defined in the Work Letter), **shall not be excused by Force Majeure Events**, except to the extent that dates which govern the timing of payments, including without limitation the Commencement Date and Base Rent Commencement Date, may be delayed by Force Majeure Events pursuant to the provisions of this Lease. (emphasis added)

8. The lease for the Rowlett Property also has a similar force majeure provision, but with critical differences:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any **non-monetary obligation** hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, restrictive laws, riots, insurrection, war, fire, inclement weather or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), performance of such **non-monetary obligation** shall be excused for the period of the Force Majeure Event, and the period for the performance of such act shall be extended for an equivalent period, so long as the party requesting the extension provides written notice of such events and the anticipated delay caused thereby within the later of (i) ten (10) business days after the event; and ten (10) business days after the date the party knew or should have known about such event. Delays or failures to perform resulting from lack of funds or

which can be cured by the payment of money shall not be Force Majeure Events. (emphasis added)

9. Fitness entered into the Leases for the express purpose of operating an indoor health club and fitness center on each of the Properties.

10. The Leases provide that Tenant would be able to operate the Properties as a health club throughout the term of each Lease, with Landlord warranting that Fitness "shall have the right to use the Premises" for a health club throughout the entire Term.

11. The essential purpose of the Leases and, in turn, the totality of the bargain that Tenant was to receive under and through the Leases, was to give Tenant the right to use each of the Properties to operate a full service indoor health club and fitness center for Tenant's members and invitees.

12. In the Lease, Landlord represented, agreed, and covenanted to Tenant that the Premises which it pledged to demise and deliver to Tenant were free and clear of conditions and restrictions which might in any manner or to any extent prevent or adversely affect the use of the Premises.

13. As Fitness was prohibited from using each of the Properties by the government mandates, the purpose of the Leases was frustrated.

14. On March 11, 2020, the World Health Organization declared the 2019 Novel Coronavirus Disease ("COVID-19") to be a global pandemic (the "COVID-19 Pandemic").

15. On March 13, 2020, Texas Governor Greg Abbott proclaimed a State of Disaster because of the threat of COVID-19.

16. On March 13, 2020, President Trump issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.

17. Effective March 20, 2020, Governor Greg Abbott issued "Executive Orders to Mitigate Spread of COVID-19 in Texas," prohibiting people from eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors.

18. On March 17, 2020, having already been ordered to close locations in various states, Fitness anticipated that the rest of the states would quickly follow, so it closed all of its health clubs nationwide, just three days before it was ultimately required to do so in Texas.

19. Pursuant to government phased re-opening orders, Tenant was permitted to re-open its business at the Properties with restrictions on June 1, 2020.

20. These "On-Going Restrictions" included an initial cap on occupancy of only twenty-five percent (25%), which was eventually increased to fifty percent (50%), then to seventy-five percent (75%) which On-Going Restrictions continued until March 10, 2021, nearly one year to the day the closure orders when into effect.

21. Thus, from March 17, 2020 to May 31, 2020 (the "Closure Period"), government-mandated closure orders made it illegal for Fitness to use the entirety of the Properties for the operation of its business (the "Closure Orders").

22. Fitness also froze membership dues/monetary payments during the Closure Period as required by its contracts with its members and as a result, did not generate any revenue from the Properties during the Closure Period.

23. Fitness clubs memberships provided: "A member may cancel a contract and receive a refund of unearned payments made under the contract by sending written notice of cancellation, accompanied by proof of payment made under the contract, by certified mail to the certificate holder's home office if the certificate holder: (1) closes the health spa and fails to provide alternative facilities not more than 10 miles from the location of the health spa, relocates the health spa more than 10 miles from its location preceding the relocation; or (3) fails to provide advertised services." Tex. Occ. Code § 702.308(a) (emphasis added).

24. On December 1, 2020, Landlord demanded that Fitness pay rent allegedly due during the Closure Period (the "Demand").

25. On March 17, 2020, Fitness sent Landlord notices regarding its position that it did not owe rent during the Closure Period, and asserted its right to abate rent due to a *force majeure*, the doctrines of impossibility, impracticability, and/or frustration of purpose.

26. Tenant paid Rent in March 2020 for the Properties. As a result of the closures, Tenant is entitled to a credit, in the amount of $201,805.34, for Rent it paid for the period of March 17 through March 31, 2020 when it was not permitted to use any of the Properties.

27. Tenant paid 100% of Rent for each of July and August 2020 in the total amount of $841,628.74 for the Dallas, Denton, Duncanville, McKinney, Rowlett, and Spring Properties. As Tenant was permitted only to operate at 50% capacity during July and August, the Rent owed is 50% of the monthly amount of $420,814.37 (i.e., $210,407.19). Tenant should have only been obligated to pay the 50%-reduced amount of $210,407.19/month. As Tenant paid $420,814.37 for each of July and August 2020, Tenant is due the amount of $420,814.37 (i.e., the $841,628.74 paid by Tenant, less the $420,814.37 Tenant should have paid).

28. Tenant paid 100% of Rent for each of September, October, November, and December 2020 in the total amount of $1,683,257.48 for the Dallas, Denton, Duncanville, McKinney, Rowlett, and Spring Properties. As Tenant was permitted only to operate at 75% capacity during this time period, the Rent owed is 75% of the monthly amount of $420,814.37 (i.e., $315,610.78). As Tenant paid $420,814.37 for each of September, October, November, and December 2020, Tenant is of $420,814.37 (i.e., the $1,683,257.48 paid by Tenant, less the $1,262,443.11 Tenant should have paid).

29. Tenant paid 100% of Rent for each of January and February 2021 for a total of $841,628.74. As tenant was permitted to only operate at 50% capacity during this time period, the

Rent owed is 50% of the total amount of $420,814.37 (i.e., $210,407.19). Tenant is therefore due $420,814.37.

30. Fitness is entitled to recover attorneys' fees in the amount of $100,000.00, and courts costs and expenses of $1,3449.91 from Landlord. Fitness is entitled to recover it's attorneys' fees.

31. Any Conclusion of Law more properly identified as Finding of Fact.

CONCLUSIONS OF LAW

1. "A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

2. "Construing an unambiguous lease is a question of law for the Court." *Andarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002).

3. Under the Uniform Declaratory Judgment Act, a court has the power to "declare rights, status, and other legal relations" as requested by the party seeking declaratory relief. Tex. Civ. Prac. & Rem. Code § 37.003.

4. The undisputed facts demonstrate that the closure orders have "delayed," "hindered," and/or "prevented" Fitness "from the performance of" an "act required" under the Dallas, Denton, and Duncanville Leases and the McKinney Lease: the right to use the Properties to operate a health club and fitness facility, and the concomitant payment of Rent, was unquestionably delayed, hindered or prevented.

5. The government closure orders due to the COVID-19 Pandemic constituted a "Force Majeure Event" under the Dallas, Duncanville, Denton, and McKinney Leases for the entire Closure Period.

6. The circumstances do not fall within the provisions' exceptions for (i) financial inability or (ii) "[d]elays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events." *See ROIC Four Corner Square, LLC v. Fitness International, LLC*, No. 21-2-04531-8 (Wash. Super. Ct. Oct. 8, 2021).

7. The *force majeure* language is similar in the Dallas, Denton, Duncanville, and McKinney Leases' force majeure provisions, entitles Fitness to a rent credit for rent paid for the period of March 17, 2020 to March 31, 2020.

8. Fitness is entitled to a declaration under Chapter 37 of the Texas Civil Practice & Remedies Code that the force majeure provision in the Dallas, Denton, Duncanville, and McKinney Leases excuses Fitness from owing any Rent from March 17, 2020 through May 31, 2020. The Leases in question in this matter are all valid contracts.

9. The Rowlett and Spring Leases contain similar Force Majeure provisions as in the other Leases, but with critical differences, as the provisions in the Rowlett and Spring Leases expressly state that a force majeure event shall not excuse Tenant's obligation to pay Rent (in the case of the Spring Lease) and monetary obligations (in the case of the Rowlett Lease). Notably, the Dallas, Denton, Duncanville and McKinney Leases, while containing very similar provisions, do not contain the same exclusions. When comparing and contrasting the language of the Force Majeure clauses in all the Leases, it is clear the parties did ***not*** intend for Fitness to pay Rent in the event of a Force Majeure Event under the Dallas, Denton, Duncanville and McKinney Leases; however, additional defenses still apply to all Leases, including the Spring and Rowlett Leases.

10. Under Texas law, "'[f]rustration of purpose' is an excuse to performance that is sometimes described as 'impossibility of performance' or 'commercial impracticability.'" *Philips v. McNease*, 467 S.W.3d 688, 695-96 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing

Ramirez Co. v. Hous. Auth. of City of Houston, 777 S.W.2d 167, 173 n. 11 (Tex. App.—Houston [14th Dist.] 1989, no writ)).

11. "Under this theory, an obligor may be excused from performing a contract if an event occurs and the contract was made on the basic assumption that the event would not occur." *Id.* at 696. (citing Restatement (Second) of Contracts § 261; *Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 52 (Tex. App.–Houston [14th Dist.] 2011, pet. denied)).

12. The primary purpose of operation of fitness facilities had been frustrated by an event not reasonably foreseeable at the time the contract was made and has not been the fault of Fitness. The extraordinary circumstances of a pandemic causing a complete shutdown of nonessential services were not reasonably foreseeable. Here, the *express* purpose of the Leases, which are monthly installment contracts, was to enable Fitness to have the right to operate an indoor health club and fitness facility on the Properties—but for the ability to operate a health club and fitness facility, Fitness would not have entered into the Leases with Landlord.

13. The purpose of the operation of fitness facilities was extinguished by unforeseen, supervening events—the government closure orders in response to the COVID-19 Pandemic—for each month throughout the entire Closure Period. It would have been a violation of the State of Texas and Dallas County's executive orders for Fitness to use the Properties throughout the Closure Period.

14. Fitness is entitled to a declaration under Chapter 37 of the Texas Civil Practice & Remedies Code that because the supervening event of the government closures frustrated the stated purpose of the Lease for each month of the Closure Period, Fitness' obligation to pay rent during

the Closure Period was excused for the Dallas, Denton, Duncanville, McKinney, Rowlett, and Spring Properties.

15. The undisputed facts also establish the defense of impossibility.

16. Fitness is entitled to a declaration under Chapter 37 of the Texas Civil Practice & Remedies Code that Fitness is also entitled to be excused from paying rent during the Closure Period s under the equitable doctrine of impossibility.

17. Where the impossibility is temporary, performance is excused only throughout the duration of the situations rendering performance impossible. *Bergin v. Van Der Steen*, 107 Cal. App. 2d 8, 16 (1951) *see also* Restatement (First) of Contracts § 462 (1932).

18. The impossibility of performance was temporary, but it nevertheless excused Fitness's obligation to pay Rent while it lasted. *See Bergin*, 107 Cal. App. 3d at 16.

19. Once the restrictions were lifted, Fitness was obligated to carry out the terms of the contract (i.e., pay rent for the right to use), which it did and has continued to do by paying full Rent since being permitted to legally use the Properties again, even at limited operational capacity.

20. Similar to the doctrine of impossibility, Texas law recognizes a lessee's performance, including payment of rent, is discharged where there is a supervening impracticability. The Restatement (Second) of Contracts Section 261, which has been adopted by the Texas Supreme Court provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

See also Centex Corp. v. Dalton, 840 S.W.2d 952 (Tex. 1992); *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 52 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

21. Additionally, if a party's performance "is made impracticable by having to comply with a domestic or foreign regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." *See Centex Corp.* 840 S.W.2d at 954 (citing Restatement (Second) of Contracts Section 264).

22. The complete cessation of operations due to the government orders making it illegal for Fitness to use some or all of the Properties (and, therefore, the inability of Fitness to generate revenue from the Properties) make any payment of Rent during the Closure Period an excessive and unwarranted financial burden on Fitness.

23. At the time the Leases were entered into, neither party expected nor anticipated that government orders due to a global health crisis would impede either's performance.

24. Fitness is entitled to a declaration under Chapter 37 of the Texas Civil Practice & Remedies Code that its performance under the Lease was excused by the doctrine of Impracticability during the Closure Period.

25. Under the Texas Civil Practice and Remedies Code, Fitness is entitled to recover its reasonable and necessary attorneys' fees, expenses, and costs incurred in the prosecution of its declaratory judgment claim. Tex. Civ. Prac. & Rem. Code § 37.009.

26. At all relevant times, Fitness performed its obligations under the Leases (i.e., payment of rent) except for those times it was excused from doing so during the Closure Period.

27. Landlord has breached the Leases in several ways: (1) failing to uphold the representations, warranties, and covenants in the Leases when Fitness was denied, among other things, the right to use the Properties to operate its business, the right of exclusive use and control of the Properties, the right to peaceful and quiet possession and enjoyment of the Properties, and the right to use the Properties free and clear of any conditions or restrictions which would prevent

or adversely affect use of the Properties by Fitness (*see Lease, §2.2*); and (2) failing to provide Fitness a credit for Rent paid during the Closure Period.

28. As a result of Landlord's breach, Fitness has been damaged. Counter-Defendants are liable to Fitness for the breach of the Leases.

29. Fitness is entitled to the money it paid Landlord in the amount of $201,805.34.

30. Similarly, Landlord owes Fitness its reasonable attorneys' fees pursuant to the Lease and Texas law. Tex. Civ. Prac. & Rem. Code § 38.001; *Lease, §22.7.*

31. To prevail on a claim for money had and received, Fitness must demonstrate that Landlord holds money which, in equity and good conscience, belongs to Fitness. *See MGA Ins. Co. v. Charles R. Chesnutt, P.C.*, 358 S.W.3d 808, 814 (Tex. App.—Dallas 2012, no pet.).

32. While a party generally cannot recover under this theory when an express contract covers the subject matter of the parties' dispute, a party can recover for overpayments. *J & A Coating, LLC v. PPG Indus., Inc.*, 05-20-00382-CV, 2021 WL 972899, at *2 (Tex. App.—Dallas Mar. 16, 2021, no pet.) (citing *Sw. Elec. Power Co. v. Burlington N. R.R. Co.*, 966 S.W.2d 467, 469–70 (Tex. 1998)).

33. When Fitness paid in full for the months it was prohibited by law from operating the Properties entirely, it overpaid for rent. *See, e.g., In Re Hitz Restaurant Group*, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020).

34. During the ongoing State and County Restrictions, Fitness was prevented from fully using the Properties as guaranteed by the Leases.

35. Tenant paid 100% of Rent for each of September, October, November, and December 2020 in the total amount of $1, 683,257.48 for the Dallas, Denton, Duncanville, Mckinney, Rowlett, and Spring Properties. As Tenant was permitted only to operate at 75%

capacity during this time period, the Rent owed is 75% of the monthly amount of $420,814.37 (i.e., $315,610.78). As Tenant paid $420,814.37 for each of September, October, November, and December 2020, Tenant is of $420,814.37 (i.e., the $1,683,257.48 paid by Tenant, less the $1,262,443.11 Tenant should have paid).

36. Tenant paid 100% of Rent for each of January and February 2021 for a total of $841,628.74. As tenant was permitted to only operate at 50% capacity during this time period, the Rent owed is 50% of the total amount of $420,814.37 (i.e., $210,407.19). Tenant is therefore due $420,814.37.

37. Because Fitness was substantially prevented from operating the Properties due to the capacity limits imposed by the On-Going Restrictions, Fitness is entitled to an abatement of Rent for that period.

38. Furthermore, it is undisputed that Fitness made these payments under threat of eviction, after notifying Landlord of the Closure Orders.

39. As there is no evidence contradicting the fact that Fitness overpaid for rent during March of the Closure Period, and that Landlord received and is now holding Rent payments that in equity and good conscience belong to Fitness, Tenant is entitled to recovery of its overpayment.

40. Because Fitness has established that Landlord did not perform its obligations during the Closure Period, Tenant never breached the contract. Tenant is entitled to judgment on Plaintiffs' claim for breach of contract.

41. To the extent Landlord is entitled to any damages, Tenant is entitled to an offset.

42. To establish a claim for unjust enrichment, Landlord must establish that Fitness (1) "wrongfully secured or passively received a benefit from [Landlord] that would be unconscionable to retain" or that (2) it obtained said benefit from Landlord by "fraud, duress, or the taking of an

undue advantage." *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 720 (Tex. App.—Dallas 2015, no pet.). Landlord has failed to establish a claim for unjust enrichment. Therefore, Tenant is entitled to judgment on Landlord's claim for unjust enrichment.

43. Plaintiffs' claim for breach of contract is barred due to failure of consideration.

44. Plaintiffs' claims are barred by the doctrine of impracticability.

45. Plaintiffs' claims are barred by Landlord's primary material breach.

46. Plaintiffs' claims are barred as a result of casualty.

47. Any Finding of Fact more properly identified as a Conclusion of Law.

Signed this 8 of August 2022

ERIC V. MOYÉ
JUDGE 14TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-012878-CA-01
SECTION: CA23
JUDGE: Barbara Areces

FITNESS INTERNATIONAL LLC a foreign California lim

Plaintiff(s)

vs.

BRANDSMART USA OF SOUTH DADE INC. a Florida corpor

Defendant(s)

_____/

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on July 11, 2022 on Plaintiff Fitness International, LLC's ("Fitness" or "Tenant") *Motion for Summary Judgment* ("Fitness MSJ") and Defendant Brandsmart USA of South Dade, Inc. ("Brandsmart" or "Landlord") *Motion for Summary Judgment* ("Landlord MSJ"). The Court, having reviewed the motions and the file, having heard argument of counsel, and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES that for the reasons explained below, Plaintiff Fitness International, LLC's *Motion for Summary Judgment* is GRANTED and Defendant Brandsmart USA of South Dade, Inc.'s *Motion for Summary Judgment* is DENIED.

BACKGROUND

The Parties and Lawsuit

Fitness is the tenant under a lease with Landlord (the "Lease"). Fitness MSJ at 2. This lawsuit concerns whether Fitness was obligated to pay rent, including sales tax (collectively, "Rent"), to Landlord for the approximate three-month period in 2020 during which state and local

orders required all gyms and health clubs to be closed to stop the spread of COVID-19.

Landlord argues that Fitness was required to pay Rent during that period. Landlord MSJ at 4-9. Fitness argues that it should be excused from paying Rent during that period under the Force Majeure provision of the Lease. Fitness MSJ at 8-14. In the alternative, Fitness argues that the Court should apply the equitable doctrines of frustration of purpose, impossibility, and impracticability to excuse its obligation to pay Rent during the relevant period. Fitness MSJ at 14-18.

The Lease

Landlord and Fitness are parties to a Retail Lease dated October 5, 1999 (previously defined as the "Lease"). Fitness MSJ at 2. Pursuant to the Lease, Fitness leases from Landlord certain premises in Miami, Florida (the "Premises"). *Id.*

Fitness entered into the Lease for the express purpose of operating a health club and fitness center on the Premises. Lease at ¶ 1.9. Pursuant to section 1.9 of the Lease, the parties agreed that Fitness would pay Rent to Landlord *in exchange* for the right to operate a health club on the Premises, and Landlord agreed that Tenant shall have the right throughout the Term to operate such use.

The Lease has a force majeure provision (the "Force Majeure Provision"), which states:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, restrictive Laws, riots, insurrection, war, fire, or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), except where performance of such act is expressly stated to not be subject to this Section, such performance shall be excused for the period of the Force Majeure Event, and the period for the performance

> of such act shall be extended for an equivalent period. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.

Lease at § 22.3.

COVID-19 Closure Orders

On March 1, 2020, Governor DeSantis issued Executive Order No. 20-51, declaring a public health emergency in Florida because of the threat of COVID-19. Fitness MSJ at 3. On March 9, 2020, Governor DeSantis issued Executive Order No. 20-52, declaring a state of emergency in Florida as a result of COVID-19. *Id*.

On March 20, 2020, Governor DeSantis issued Executive Order No. 20-71, requiring all gyms and fitness centers in Florida to close to prevent the spread of COVID-19. *Id*. at 4. On April 1, 2020, Governor DeSantis issued Executive Order No. 20-91, directing that, effective April 3, 2020, all individuals in Florida stay at home, with certain exceptions, and all non-essential businesses close in order to prevent further spread of COVID-19. *Id*. On April 29, 2020, Governor DeSantis issued Executive Order No. 20-112, directing that all gyms and fitness centers closed by Executive Order 20-71 remain closed. *Id*. On May 15, 2020, Governor DeSantis issued Executive Order No. 20-123, which became effective on May 18, 2020, allowing gyms and fitness centers to re-open and operate at up to 50% of building occupancy. On June 3, 2020, Governor DeSantis issued Executive Order No. 20-139, which became effective on June 5, 2020 (except in certain counties, including Miami-Dade County, where the Premises is located), which allowed most of Florida to enter "Phase 2" of Florida's COVID-19 reopening plan. *Id.* at 4-5. In Phase 2, gyms and fitness centers could reopen at full capacity, though as relevant in this action, not in Miami-Dade County. On September 11, 2020, Governor DeSantis issued Executive Order No. 20-223, which became effective on September 14, 2020 and allowed Miami-Dade County to enter Phase 2 of Florida's COVID-19 reopening plan. *Id*. at 5.

County and municipal governments in Florida also issued orders that prohibited or limited certain businesses, such as fitness centers and health clubs, from operating, in order to prevent the further spread of COVID-19. In particular, Miami-Dade County entered Emergency Order 23-20 and Amendment 2 to Emergency Order 23-20, which directed that all gyms and fitness centers be closed until June 8, 2020. *Id*.

On March 17, 2020, having already been ordered to close locations in various states, Fitness anticipated that the rest of the states would quickly follow, so it closed all of its health clubs nationwide, just three days before it was ultimately required to do so in Florida. Affidavit of Diann Alexander, dated January 18, 2022 ("Alexander Affidavit"), at ¶ 9. The period during which Fitness's clubs were closed in Miami-Dade County is referred to in this Order as the "Closure Period" or "Closures." Fitness froze membership dues/monetary obligations for its members nationwide, and therefore generated no revenue from the Premises during the Closure Period. *Id.* at ¶ 10. Fitness reopened at the Premises on June 8, 2020. *Id.* At ¶ 9.

STANDARD

The Court applies the summary judgment standard set forth under Fla. R. Civ. P. 1.510(a). Under the rule, a party may obtain summary judgment if it can show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fla. R. Civ. P. 1.510(a). The test for the existence of a genuine factual dispute is "whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *See In re: Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 194 (Fla. 2020) (quoting *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986)).

The parties agree that there are no genuine factual disputes precluding entry of summary judgment.

ANALYSIS

I. Force Majeure

A force majeure clause is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled. *See ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019). The Court finds that the plain language of the Lease's Force Majeure Provision controls.

Fitness asserts, and the Court agrees, that the government orders making it illegal for Fitness to operate its fitness centers and health clubs were "restrictive Laws," as listed in the Force Majeure Provision. Fitness MSJ at 10-11. Those "restrictive Laws" were events "beyond the reasonable control of the party delayed" and thus were a Force Majeure Event under the Lease.

Fitness' obligation to pay Rent was consideration for its right to operate a health club on the Premises. This was the purpose of the Lease – Fitness would have the right to operate a health club and would pay for that right in the form of Rent. The Force Majeure Provision excuses and extends the time for performance for specified unforeseen events, including the "restrictive laws" that took away Fitness' right to operate a health club on the Premises. Once Fitness' right to operate a health club in the Premises – the very thing for which Fitness bargained in entering into the Lease – was taken away, the Rent obligation necessarily must be excused for the period of delay caused by the restrictive laws and extended. *See* Lease at § 22.3 ("performance of such act shall be excused for the period of delay caused by Force Majeure Events and the period for the performance of such act shall be extended for an equivalent period."). Those obligations go hand in hand – payment of rent for the right to operate a health club in the Premises.

While the Court is simply applying the unambiguous, plain language of the Force Majeure Provision and Lease as a whole, the Court notes that other courts in this state and other states have come to the same conclusion in reviewing similar Fitness lease force majeure provisions.

In a nearly identical case involving Fitness and a nearly identical Force Majeure lease provision, styled *Fitness International, LLC v. VEREIT Real Estate, L.P.* (Case No. 2020-027207-

CA-01) (the "Miami-Dade VEREIT Case") pending in the Eleventh Judicial Circuit, Judge William Thomas considered the same issues between Fitness and another landlord, VEREIT Real Estate, L.P. ("VEREIT"), when ruling on motions for summary judgment filed by those parties. In the Miami-Dade VEREIT case, Judge Thomas rejected VEREIT's arguments and adopted the same force majeure and equitable arguments that Fitness makes in this case.[1] Judge Thomas granted Fitness' *Motion for Summary Judgment* in the Miami-Dade VEREIT Case and ruled that:

> Fitness' obligation to pay Rent was consideration for its right to operate a health club on the Premises. This was the purpose of the Lease – Fitness would have the right to operate a health club and would pay for that right in the form of Rent. The Force Majeure Provision excuses performance for specified unforeseen events, including the "restrictive laws" that took away Fitness' right to operate a health club on the Premises. Once Fitness' right to operate a health club in the Premises – the very thing for which Fitness bargained in entering into the Lease – was taken away, the Rent obligation necessarily must be excused. Those obligations go hand in hand….
>
> Therefore, the Court finds that Fitness' obligation to pay Rent is indeed excused during the Force Majeure Event of the government-mandated closures.

See Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment for Damages entered in the Miami-Dade VEREIT Case, a copy of which is attached to Fitness' *Response in Opposition to Brandsmart' s Motion for Summary Judgment* dated June 20, 2022 at Exhibit A.[2] This Court likewise adopts Fitness' same force majeure arguments made in this case and rejects Landlord's arguments.

In granting Fitness' *Motion for Partial Summary Judgment* in *ROIC Four Corner Square, LLC v. Fitness International, LLC* (WA Superior Ct. 2021), a Washington court considered a substantially similar force majeure provision. *See Order Granting Defendant's Motion for Partial Summary Judgment* in *ROIC Four Corner Square, LLC v. Fitness International, LLC*, a copy of which is attached to Fitness' Notice of Filing dated January 19, 2022 at Exhibit B. That court ruled that government-mandated closures were a force majeure event and that "[t]here is no amount of money that could have been paid to 'cure' the Force Majeure Event of the government

closures." *Id.* The court extended the lease by the length of the closures, with the rent due during the closure period becoming due during the extension period, as the force majeure provision in that lease provided that "performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for performance of such act shall be extended for an equivalent period…." *Id.*

Similarly, in denying the landlord's motion to dismiss Fitness' counterclaim in *BAI Century LLC v. Fitness Int'l* (IL Cir. Ct. 2021), the Circuit Court for Cook County, Illinois ruled that based on "the plain language of the Lease":

> The Lease's force majeure provision expressly provides that Defendant's rent obligations are excused due to the "restrictive laws," which are beyond the reasonable control of the parties. The restrictive laws due to the Pandemic may rise to a force majeure event under the Lease, and Defendant alleges that it placed Plaintiff on notice of the event.

See September 30, 2021 *Opinion* in *BAI Century LLC v. Fitness International, LLC*, a copy of which is attached to Fitness' Notice of Filing dated January 19, 2022 at Exhibit C. That court further ruled that the force majeure provision required the landlord to extend the lease by the amount of the closure period and Fitness would be obligated to pay rent for that extended period, as the force majeure provision in that lease provided that "performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period …." *Id.* 2-3. Finally, the court noted that "the very purpose of the force majeure provision in the Lease is to excuse performance for events such as the restrictive laws that caused Defendant to stop use of the Premises for its business operations." *Id.* At 3-4. In the same case, the Cook County court granted summary judgment in favor of Fitness and adopted its interpretation of the force majeure provision. *See Opinion* in *BAI Century LLC v. Fitness International, LLC*, a copy of which is attached to Fitness' Second Notice of Filing Supplemental Authority dated May 18, 2022 at Exhibit A. Just as Landlord argues here, the *BAI* landlord maintained that "the COVID orders did not relieve Tenant of its obligation to pay rent because Tenant's failure to perform its obligations can be cured by the payment of money." *Id*.; Landlord MSJ at 5. The Cook County Court disagreed, ruling:

> Yet here, Fitness is not invoking the *force majeure* clause because of "financial inability" or lack of funds, but is arguing that the restrictive laws which prohibited the use of the Premises is the *force majeure* event and this event cannot be cured by the payment of money. The court finds this interpretation prevails under Illinois contract law. The cause of delay, hindrance or prevention at issue here could not be cured by the payment of money, as there is no amount of money that could have been paid to eliminate the *force majeure* event. Even if Fitness had paid Rent during the government-mandated closures, the underlying problem would not have been solved. The government mandated closures would still have prohibited Fitness from operating its fitness center at the Premises.

See Opinion in *BAI Century LLC v. Fitness International, LLC*, a copy of which is attached to Fitness' Second Notice of Filing Supplemental Authority dated May 18, 2022 at Exhibit A (italics in original). That court further ruled that it was Fitness' lease-granted right to operate in the premises, not the ability to pay rent, that the government-mandated closures (which were the force majeure event) prevented. *Id*. at 5.

Moreover, in another case between Fitness and VEREIT, after a bench trial, a Texas court entered judgment on April 29, 2022 in favor of Fitness in *VEREIT Real Estate, LP v. Fitness Int'l* (TX Dist. Ct. 2022) based on the same arguments Fitness makes in this case. *See* Judgment entered by District Court of the Fourteenth Judicial District in Dallas County, Texas, and the related Motion for Summary Judgment Fitness filed in that case, copies of which are attached as Exhibits B and C to Fitness' Second Notice of Filing Supplemental Authority dated May 18, 2022.

Other Florida courts have made similar rulings. In *In re Cinemex USA Real Estate Holdings, Inc.*, the United States Bankruptcy Court of the Southern District of Florida considered whether a movie theater was excused under a force majeure provision from paying rent for COVID-19 closure periods. Finding that "clearly the events that caused the shutdown were not foreseeable," because the parties' lease also "contemplated that parties might not be able to perform their obligations under the Lease due to acts of God or governmental action," the tenant's performance "is excused due to the government shut down orders." *In re Cinemex*, 627 B.R. 693,

699 (S.D Bk. 2021 (Isicoff, J.). The court rejected the landlord's interpretation of the force majeure provision as not excusing payment of rent because the provision referred to the delay in performance of "any obligations" due to a force majeure event. *Id.* at 701.

The Court is not persuaded by Landlord's arguments. Landlord argues that the Force Majeure Provision does not apply because Fitness has not been "delayed or hindered in or prevented from" paying rent. Landlord MSJ at 4-5. But that argument misconstrues the purpose of the Force Majeure Provision and the purpose of the Lease. The Lease makes it clear that Fitness pays Rent *in exchange* for the right to use the Leased Premises; Landlord made the express promise to Fitness that it "shall have the right throughout the Term [of the Lease] to operate for uses permitted under this Lease …." The government orders making it illegal for Fitness to operate its fitness centers and health clubs were "restrictive Laws," as listed in the Force Majeure Provision. Those "restrictive Laws" were events "beyond the reasonable control of the party delayed" and thus were a Force Majeure Event under the Lease. That Force Majeure Event prevented Fitness from performing under the Lease during the Closure Period (*i.e.*, being able to exercise its right to operate a health club on the Premises), which necessarily also included the payment of rent.

Landlord also argues that pursuant to Section 8.3 of the Lease, "'Tenant is not required to operate in the Premises' and is nonetheless required to pay full rent." Landlord MSJ at 5-6. That argument similarly fails, as it divorces Fitness's rent obligation from what Fitness bargained for in exchange for that obligation – the right to operate a health club on the Premises. Lease at § 1.9. The purpose of the Lease was for Fitness to operate a health club. *Id*. The parties knew of this intended purpose when the Lease was executed. The Force Majeure Provision excuses performance for specified unforeseen events, including the "restrictive laws" that took away Fitness' right to operate a health club on the Premises. Once Fitness' right to operate a health club on the Premises – the very thing for which Fitness bargained in entering into the Lease – was taken away, Fitness was excused from paying Rent while that right was taken away (*i.e.*, during the Closure Period) and the

Lease term is extended by the length of time of the Closure Period, including extending the corresponding rent obligation until that period. If the Court adopted Landlord's interpretation, the Force Majeure Provision could never apply because, under Landlord's view, Fitness could always morph into another business in the face of a Force Majeure Event. Landlord argues that Section 8.3 shows otherwise, in that it prohibits Landlord from terminating the Lease after a period of 90 consecutive calendar days in which Fitness does not operate in the Premises if the lack of operation was due to a Force Majeure Event. That provision is inapplicable here, as Landlord did not attempt to terminate the Lease based on Fitness' closure of operations.

Landlord further argues that the Force Majeure Provision does not apply because the provision states that "[d]elays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events." Landlord MSJ at 5. But the Court agrees with Fitness that there is no amount of money that could have been paid to "cure" the deprivation of Fitness' right to operate a health club that resulted from the Force Majeure Event. Even if Fitness had paid rent during the government-mandated closures, the underlying problem would not have been solved; the government-mandated closures would still have prohibited Fitness from operating its fitness center at the Premises.

In its *Response* to the Fitness MSJ, Landlord states that Section 1.5 of the Lease "required Tenant to pay rent regardless of any closure." *Response* at 3. However, Section 1.5 of the Lease pertains only to the Lease's Commencement Date and Rent Commencement Date (*i.e.*, when the payment of rent first begins). *See* Lease at § 1.5. It has no bearing on the payment of rent after the Rent Commencement Date. Moreover, Section 1.5 of the Lease does not, as Landlord suggests, "explicitly contemplate[] Tenant paying rent even during nonnatural Force Majeure Events ('including without limitation strikes and shortages of labor and material' and government shut-down orders)" throughout the term of the Lease. Response at 3. Rather, Section 1.5 narrowly states that "the ***Commencement Date*** shall not be extended on account of Force Majeure Events or

otherwise as provided in Section 22.3…." (emphasis added). Lease at § 1.5. Had the parties wanted to specifically carve out the payment of rent from the Force Majeure Provision of the Lease, they could have done that, but the Lease has no such language that requires Fitness to pay rent "no matter what."

Therefore, the Court finds that Fitness is excused under the Force Majeure Provision from paying Rent *during* the Closure Period and the Lease term is extended by the length of time of the Closure Period, including extending the corresponding rent obligation until that period. The plain language of the Force Majeure Provision in the Lease dictates this outcome: "[P]erformance shall be excused for the period of the Force Majeure Event, and the period for the performance of such act shall be extended for an equivalent period…." Lease at § 22.3 (emphasis added). In *Cinemex*, the United States Bankruptcy Court of the Southern District of Florida came to the same conclusion when evaluating a force majeure provision that provided: "[i]f the performance by Landlord or Tenant of any of its obligations under this Lease is delayed by reason of 'Force Majeure,' the period for the commencement or completion thereof shall be extended for a period equal to such delay." The court ruled that the provision meant:

> [T]hat the time of non-performance (not being able to operate a movie theater and pay rent) will be added to the end of the lease term, and along with that extension, the obligation to pay the rent. Consequently there is no rent due for the period of closure, but the term of the [ ] Lease (unless that lease is rejected) is extended by the amount of time the movie theater was closed.

See Cinemex, 627 B.R. at 701. Similarly, here, the Force Majeure Provision requires that "the period of performance of such act shall be extended for an equivalent period."

Prior to being ordered to close the Premises during the Closure Period, Fitness prepaid Rent for the month of March 2020, and thereafter pursuant to the June 30, 2020 Letter Agreement entered into between Fitness and Landlord (the "Letter Agreement"), Fitness paid Rent for the months of April through June 2020 under protest and with an express reservation of rights. *See*

Letter Agreement at § 3 ("Neither Tenant nor Landlord is waiving any of its rights or remedies under the Lease, at law or in equity, all of which are hereby expressly reserved."). Therefore, in accordance with the above findings, the Court finds that Fitness is excused from paying Rent *during* the Closure Period and the Lease term is extended by the length of time of the Closure Period between March 17, 2020 and June 7, 2020 (*i.e.*, 83 days), including extending the corresponding rent obligation until that period. As such, the Rent that Fitness paid under protest and a reservation of rights for the period between March 17, 2020 and June 7, 2020 should be reimbursed to Fitness in the total amount of $233,020.06 as set forth below:

Closure Period	**Days Closed**	**Rent Paid to Be Reimbursed to Fitness** (including sales tax)
March 17-31, 2020	15 days	$39,078.16
April 1-30, 2020	30 days	$86,839.66
May 1-31, 2020	31 days	$86,839.66
June 1-7, 2020	7 days	$20,262.58
TOTAL		**$233,020.06**

II. Equitable Doctrines of Frustration of Purpose, Impossibility, and Impracticability

In the alternative to the Force Majeure Provision, Fitness argues that the Court can apply the equitable doctrines of frustration of purpose, impossibility, and impracticability to excuse Fitness' obligation to pay Rent during the Closure Period, as the pandemic and its related shutdown orders

were not foreseeable. *See Cinemex*, 627 B.R. at 700 ("There is no question that the COVID-19 pandemic was completely unforeseeable" and "Clearly the events that caused the shutdown were not foreseeable."); *National Retail Properties, LP v. Fitness Int'l* (MI Cir. Ct. 2022); *VEREIT Real Estate, LP v. Fitness Int'l* (TX Dist. Ct. 2022); *Fitness International, LLC v. VEREIT Real Estate, L.P.* (Miami-Dade County Cir. Ct. 2022). Because the Court has ruled that the Force Majeure Provision extends the Rent obligation as set forth above and requires Landlord to reimburse the Rent paid as set forth above, it is unnecessary to determine whether the equitable provisions apply. Insofar as the Force Majeure Provision is inapplicable, however, the equitable doctrines excuse Fitness obligation to pay Rent for the Closure Period and also require Landlord to reimburse Fitness for Rent paid for the Closure Period in the total amount of $233,020.06.

A. Frustration of Purpose

The purpose of the Lease was for Fitness to operate a health club. Alexander Affidavit at ¶ 8; Lease at ¶ 1.9. The government-mandated closures were unanticipated and beyond Fitness' control. Alexander Affidavit at ¶ 11. Fitness' performance was not made only more difficult; it was illegal for Fitness to operate a health club in the Premises during the Closures. *See Cinemex*, 627 B.R. at 700. Therefore, the essential purpose of the Lease, and in turn, the totality of the bargain that Fitness was to receive, was completely frustrated. As a result, Fitness would have been excused from the payment of Rent during the Closure Period based on the doctrine of frustration of purpose.

A lease's force majeure provision does not displace a party's right to obtain relief under the equitable doctrines of frustration of purpose, impossibility, and/or impracticability. Indeed, while the *Cinemex* court did not reach these equitable doctrines because it ruled on the force majeure provision, it did not foreclose their applicability: "Because there is a contractual provision that excuses CB Theater's performance while the theater was shut down by government order, it is unnecessary for the Court to apply the doctrine of impossibility of performance." *See Cinemex,* 627 B.R. at 699. The court explained that it was "left with the resolutions that parties have bargained for

in their contracts, or, where appropriate, the equitable remedies that common law has fashioned." *Id.* at 701.

B. Impossibility

Fitness also would have been excused from the payment of Rent during the Closure Period under the equitable doctrine of impossibility.

The *Cinemex* court explained the doctrine of impossibility in Florida:

> Impossibility of performance refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform." *Home Design Ctr.--Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. 2d DCA 1990) (internal quotations omitted); *See also* 11 Fla. Jur. 2d *Contracts* § 261 ("A party that contracts absolutely and unqualifiedly to do something that is possible to be accomplished must make the promise good unless performance is rendered actually impossible by an 'Act of God,' the law, or another party. Under Florida contract law, the defense of impossibility may be asserted in situations where the purposes for which the contract was made have, on one side, become impossible to perform."); *Cook v. Deltona Corp.,* 753 F.2d 1552, 1558 (11th Cir. 1985) (In determining whether, under the doctrine of impossibility of performance, a supervening event excuses the performance of a contract party, the court should not "pass on the relative difficulty caused by a supervening event, but [ ] ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain.").

See Cinemex, 627 B.R. at 697; *see also Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008), *aff'd*, 306 Fed. Appx. 471 (11th Cir. 2009) (stating that acts of God and governmental action are among several types of business risks which implicate impossibility defense); *VEREIT Real Estate, LP v. Fitness Int'l* (TX Dist. Ct. 2022).

The "restrictive laws" making it illegal to use the Premises were a governmental action that made it impossible for Fitness to operate a health club at the Premises. Therefore, Fitness'

obligation to pay Rent under the Lease was excused during the Closure Period. *See id*.; *267 Development, LLC v. Brooklyn Babies and Toddlers, LLC*, 2021 N.Y. Slip Op. 30796(U), 4, 2021 WL 963955, at *2-4 (N.Y.Sup.) (granting summary judgment to tenant because government shutdown of tenant's business in response to COVID-19 precluded tenant from performing its contractual obligations: "The government shutdown was unforeseeable and could not have been built into the contract. Under the circumstances presented, this Court finds that performance under the subject lease was made impossible.").

C. Impracticability

Fitness also would have been excused from the payment of Rent during the Closure Period under the equitable doctrine of impracticability. "Florida law has embraced" the defense of impracticability, "calling it a 'cousin' of the defense of impossibility." *Florida Laundry Services, Inc. v. Sage Condominium Ass'n, Inc.*, 193 So.3d 68 (Fla. 3d DCA 2016) (citations omitted). In *Florida Laundry*, the Third DCA quoted the Second Restatement of Contracts to explain the application of the doctrine of impracticability: "[w]here after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Id.* (quoting Restatement (Second) of Contracts § 261 (Am. Law Inst.1981)).

Impracticability applies here, as the pandemic and resulting Closures were unanticipated, outside of the control of Fitness, and significant to its business. Alexander Affidavit at ¶ 9-11. The cessation of Fitness' operations (including the related freezing of its members' dues), made the payment of Rent for the Closure Period an excessive, unwarranted, and impracticable financial burden on Fitness. Because Fitness did not receive its benefit of the bargain under the Lease, it would be inequitable to place the entire burden of Fitness' compliance with the government closure orders solely upon Fitness.

D. The Court rejects Landlord's equitable doctrine arguments.

The Court is not persuaded by Landlord's arguments as it pertains to the equitable doctrines. Landlord argues that "[t]he doctrines of frustration of purpose, impossibility, and impracticability serve **only** to cancel the contract, thereby excusing the parties form further performance." Landlord MSJ at 7 (emphasis in original). The cases Landlord cites, however, do not stand for that broad proposition. To the contrary, the equitable doctrines of impossibility and impracticability **can** warrant the relief of partial performance or reformation of a contract, as opposed to rescission or cancellation of a contract. *See Barnacle Bill's Seafood Galley, Inc. v. Ford*, 453 So. 2d 165, 167 (Fla. 1st DCA 1984) ("The trial court … may reform the lease and under a theory of partial impossibility or partial impracticability resulting from the abolition of the Island Authority, may order payment to Ford of the percentage assessment formerly payable by Barnacle Bill's to the Island Authority or such other relief as may be appropriate."); *see also Monticello v. Beach on Duval, LLC*, 16-10082-CV, 2017 WL 7796165, at *2 (S.D. Fla. Dec. 8, 2017) ("Here, we have no doubt that Hurricane Irma should be considered an Act of God that excused non-performance under the agreement. We also have no issue excusing Defendant's ten-day delay in making the second payment, as the storm made timely performance virtually impossible."). When considering the same equitable arguments that Fitness makes in this case, other courts across the country have agreed that frustration of purpose, impossibility, and impracticability can apply to excuse the payment of rent during the Pandemic. *See Fitness International, LLC v. VEREIT Real Estate, L.P.*, Case No. 2020-027207-CA-01 (Fla. Cir. Ct., Miami-Dade County 2022); *National Retail Properties, LP v. Fitness International, LLC* (Mich. Cir. Court); *VEREIT Real Estate, L.P., et al. v. Fitness International, LLC* (Tex. Dist. Ct. 2022); *Bay City Realty, LLC v. Mattress Firm, Inc.,* 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021); *Simon Property Group, L.P. v. Pacific Sunwear Stores LLC.*, 2020 WL 5984297 (Ind. Super. June 26, 2020); *UMNV 205-207 Newbury, LLC v. Caffe Nero Americas Inc.*, 2021 WL 956069 (Mass. Super. Feb. 8, 2021); *267 Development, LLC v. Brooklyn Babies & Toddlers, LLC*, 2021 N.Y. Slip Op. 30796(U), 4, 2021 WL 963955 (Sup. Ct.

NY, Kings County, March 15, 2021).

Applying Florida law, the U.S. Bankruptcy Court in *Cinemex* noted that the equitable doctrines could apply if the force majeure provision did not. *See In re Cinemex USA Real Estate Holdings, Inc.*, 627 B.R. 693, 699-701 (Bankr. S.D. Fla. 2021) (stating that "[b]ecause there is a contractual provision that excuses CB Theater's performance while the theater was shut down by government order, it is unnecessary for the Court to apply the doctrine of impossibility of performance" but "in the absence of agreed upon resolution, we are left with the resolutions that parties have bargained for in their contracts, or, where appropriate, the equitable remedies that common law has fashioned.").

The Court also rejects Landlord's argument that it was not impossible or impracticable for Fitness to pay rent, and that the Lease's purpose was therefore also not frustrated. Landlord MSJ at 8. Fitness did not argue that it was impossible or impracticable to pay rent, that not paying rent would frustrate the Lease's purpose, or that it was inconvenient or unprofitable to operate. *See* Fitness MSJ at 14-18. Rather, the Court recognizes that it was *illegal* for Fitness to exercise its right to operate a health club, thus the equitable doctrines of frustration of purpose, impossibility, and impracticability could be invoked, excusing Fitness' obligation to pay rent during such time period.

* * *

In the Miami-Dade VEREIT Case, Judge Thomas also adopted the same equitable arguments that Fitness makes in this case. He ruled that insofar as the Force Majeure provision is inapplicable, then the equitable doctrines yield the same result. This Court agrees with that analysis and finds that Fitness would have been excused from the payment of Rent during the Closure Period under the equitable doctrines of frustration of purpose, impossibility, and impracticability. *See Fitness International, LLC v. VEREIT Real Estate, L.P.* (Miami-Dade County Cir. Ct. 2022).

In another case involving Fitness, a Michigan court recently adopted Fitness' same

arguments here on the equitable doctrines and entered summary judgment for Fitness. In *National Retail Properties, LP v. Fitness Int'l* (MI Cir. Ct. 2022), the Circuit Court for Wayne County, Michigan, granted partial summary disposition for Fitness and ruled that Fitness was entitled to abate rent during Michigan's COVID-19 gym closure period based on frustration of purpose, impossibility, and impracticability. *See* Fitness' Notice of Filing dated March 11, 2022 at Exhibit D.[3] The Michigan court ruled that:

> [T]he primary purpose of operation of fitness facilities had been frustrated by "an event not reasonably foreseeable" at the time the contract was made and has not been the fault of Fitness. The extraordinary circumstances of a pandemic causing a complete shutdown of nonessential services were not reasonably foreseeable.
>
> The temporary, but complete, shutdown by the government frustrated Fitness' purpose of using the premises for the operation of a health club and fitness facilities. Fitness, the tenant, did not receive the benefit of its original and continued bargain to use the property as intended in exchange for the payment of rent.
>
> During the time of the total shutdown, the change of circumstance, made the contracts "virtually worthless" to Fitness…
>
> Therefore, the Court holds that Fitness may avail itself of the doctrine of frustration of purpose for the period of total shutdown.

Id. at 17 (citations omitted).

For the same reasons Fitness argues here, the Michigan court also granted summary judgment in favor of Fitness based on impossibility and impracticability. This Court agrees with the Michigan court that the "operation of fitness facilities was impossible during the time of the total shutdown" and "it was impossible for Fitness to uses [*sic*] the properties as intended during the shutdown period the government deemed the use illegal." *Id.* at 18-19.

Because Fitness' obligation under the Lease to pay Rent during the Closure Period was excused by the equitable doctrines of frustration of purpose, impossibility, and/or impracticability,

it should be reimbursed for the Rent that it did pay for the period of the Closures.

III. Count IV of Fitness' Complaint for Unjust Enrichment

For the reasons stated on the record, the Court denies Fitness' Motion for Summary Judgment as to Count IV (Unjust Enrichment).

IV. Count III and IV of Fitness' Complaint Relating to the On-Going Restrictions

As part of the relief Fitness seeks in Counts III and IV of its Complaint, Fitness requests reimbursement of 50% of the Rent it paid while it was allowed to operate its business, but government mandates placed a restriction of 50% capacity at which Fitness could operate (the "On-Going Restrictions"). Fitness did not seek summary judgment as to its claims relating to the On-Going Restrictions, so therefore, the Court does not rule on the claims relating to the On-Going Restrictions in Count III at this time and those portions of Count III remain pending.

V. The Parties' Affirmative Defenses

A. Landlord's Affirmative Defenses to Fitness' Complaint

The Court finds that Landlord's affirmative defenses do not preclude summary judgment in Fitness' favor on Counts I, II, and III.

As to Landlord's First Affirmative Defense, Landlord argues that Section 22.3 of the Lease (the Force Majeure Provision) does not apply to the facts alleged in the Complaint. The Court rejects that argument because, as set forth in detail above, the Force Majeure Provision excuses Fitness from paying Rent *during* the Closure Period and the Lease term is extended by the length of time of the Closure Period, including extending the corresponding rent obligation until that period. The Court does not address the portion of Landlord's First Affirmative Defense as it pertains to Section 15.4 of the Lease (the Abatement clause), as Fitness did not raise Section 15.4 of the Lease

in its Motion for Summary Judgment.

Landlord's Second Affirmative Defense pertains to Count IV of Fitness' Complaint only. As the Court has denied Fitness' Motion for Summary Judgment as to Count IV, it need not address Landlord's Second Affirmative Defense.

As to Landlord's Third, Fourth, and Fifth Affirmative Defenses, the Court rejects Landlord's arguments of accord and satisfaction, estoppel, and waiver relating to the Letter Agreement. Landlord argues Fitness cannot "claw back the rent paid for the months of April 2020 and June 2020" because it entered into the Letter Agreement. Fitness, however, paid such rent under protest and expressly reserved its rights and remedies under the Lease in the Letter Agreement. *See* Fitness MSJ at 6-7; Alexander Affidavit at ¶¶ 15-20. By entering into the Letter Agreement with Fitness that concerned the payment of Rent for the Closure Period, Landlord agreed that Fitness did not waive its rights or remedies under the Lease and that all rights and remedies were expressly reserved as it pertained:

> No Default. Despite any notice or other communication that may have been delivered by Landlord to Tenant to the contrary, no event of default or other breach shall have occurred or remain in effect with respect to Tenant's failure to pay any of the Rent due under the Lease prior to the date of this Letter Agreement. **Neither Tenant nor Landlord is waiving any of its rights or remedies under the Lease, at law or in equity, all of which are hereby expressly reserved.**

Letter Agreement at § 3 (emphasis added). Therefore, because Fitness reserved its rights and remedies under the Lease when paying rent for the months of April 2020 and June 2020, Fitness reserved the right to pursue the claims it brought in this lawsuit and recover the rent paid during the Closure Period. Landlord signed the Letter Agreement and is bound by it.

VI. Damages

As set forth above, the Court finds that Fitness has prevailed on its claims and is excused

from paying Rent during the Closure Period. Therefore, Fitness is entitled to damages from Landlord in the form of Rent paid to Landlord for the Premises between March 17, 2020 and June 7, 2020 in the total amount of $233,020.06. In addition, the Lease term is extended by the length of time of the Closures (i.e., 83 days), and the corresponding rent obligation is extended until that time.

* * *

As set forth above, the Court finds and it is **ORDERED AND ADJUDGED** that:

1. The Court finds in favor of Fitness and against Landlord as to Counts I, II, and III Fitness' Complaint, except that the portion of Count III of Fitness' Complaint relating to the On-Going Restrictions has not been adjudicated and remains pending.

2. The Court finds in favor of Landlord as to Count IV (Unjust Enrichment).

3. Fitness is entitled to damages from Landlord in the amount of Rent Fitness paid for the dates of March 17, 2020 through June 7, 2020 in the total amount of $233,020.06.

4. Fitness is excused from paying Rent during the period of the Closures (*i.e.*, March 17, 2020 through June 7, 2020), and that the Lease term is extended by the length of time of the Closures (*i.e.*, 83 days), and the corresponding rent obligation is extended until that time.

5. The Court finds that, pursuant to Section 22.7 of the Lease, Fitness is entitled to an award of its attorneys' fees and costs as "the successful party" in the lawsuit. The Court reserves jurisdiction to rule on the specific amount of such attorneys' fees and costs and to grant such other further relief as necessary and just.

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[1] The only material difference between the Miami-Dade VEREIT Case and this case is that the force majeure provision in the lease in the Miami-Dade VEREIT Case excuses performance, rather than delays it. Here, Fitness is excused under the Force Majeure provision from

paying Rent *during* the Closure Period, with the Lease term being extended by the length of time of the Closure Period, and the corresponding rent obligation is extended until that period. The plain language of the Force Majeure provision in this Lease dictates this outcome. *See* Lease at § 22.3 ("performance shall be excused for the period of the Force Majeure Event, and the period for the performance of such act shall be extended for an equivalent period.").

[2] On June 30, Judge Thomas entered a Final Judgment in favor of Fitness that incorporated the findings in the *Order on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment for Damages*. A copy of that Final Judgment is attached to Fitness' *Reply to Landlord's Response to Fitness' Motion for Summary Judgment* dated June 30, 2022 at Exhibit A.

[3] In the lease between National Retail Properties, LP and Fitness, there was no force majeure provision.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 19th day of September, 2022.

2021-012878-CA-01 09-19-2022 3:58 PM

2021-012878-CA-01 09-19-2022 3:58 PM
Hon. Barbara Areces

CIRCUIT COURT JUDGE
Electronically Signed

Final Order as to All Parties SRS #: **12** (Other)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Electronically Served:
Howard A Tescher, htescher@teschermediation.com
Matthew Chait, mchait@shutts.com
Matthew Chait, lodum@shutts.com
Sean Michael Smith, ssmith@shutts.com
Sean Michael Smith, lodum@shutts.com
Sean Michael Smith, ssmith@shutts.com
Sean Michael Smith, lodum@shutts.com
Sean Michael Smith, kmeyer@shutts.com
Victor M Velarde, vvelarde@fowler-white.com
Victor M Velarde, mrodriguez@fowler-white.com

Victor M Velarde, jzorrilla@fowler-white.com

Physically Served:

APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-027207-CA-01
SECTION: CA02
JUDGE: William Thomas

Fitness International, LLC

Plaintiff(s)

vs.

Vereit Real Estate, L.P.

Defendant(s)

_____/

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FOR DAMAGES

THIS MATTER came before the Court on May 20, 2022 on Plaintiff/Counter-Defendant Fitness International, LLC's ("Fitness" or "Tenant") *Motion for Summary Judgment* ("Fitness MSJ") and Defendant/Counter-Plaintiff VEREIT Real Estate, L.P. ("VEREIT" or "Landlord") *Motion for Summary Judgment for Damages* ("Landlord MSJ"). The Court, having reviewed the motions and the file, having heard argument of counsel, and being otherwise fully advised in the premises, HEREBY ORDERS AND ADJUDGES THAT:

For the reasons explained below, Plaintiff/Counter-Defendant Fitness International, LLC's *Motion for Summary Judgment* is GRANTED and Defendant/Counter-Plaintiff VEREIT Real Estate, L.P.'s *Motion for Summary Judgment for Damages* is DENIED.

BACKGROUND

The Parties and Lawsuit

Fitness is the tenant under a lease with Landlord (the "Lease"). Fitness MSJ at 2. This lawsuit concerns whether Fitness was obligated to pay rent, including sales tax (collectively,

"Rent"), to Landlord for the approximately three-month period in 2020 during which state and local orders required all gyms and health clubs to be closed to stop the spread of COVID-19.

Landlord argues that Fitness was required to pay Rent during that period. Landlord MSJ at 5-15. Fitness argues that it should be excused from paying Rent during that period under the Force Majeure provision of the Lease. Fitness MSJ at 9-13. In the alternative, Fitness argues that the Court should apply the equitable doctrines of frustration of purpose, impossibility, and impracticability to excuse its obligation to pay Rent during the relevant period. Fitness MSJ at 13-18.

The Lease

Landlord and Fitness are parties to a Retail Lease dated November 22, 2016 (previously defined as the "Lease"). Fitness MSJ at 2. Pursuant to the Lease, Fitness leases from Landlord certain premises in Miami, Florida (the "Premises"). *Id.*

Fitness entered into the Lease for the express purpose of operating a health club and fitness center on the Premises. Lease at ¶ 1.9. Pursuant to section 1.9 of the Lease, the parties agreed that Fitness would pay Rent to Landlord *in exchange* for the right to operate a health club on the Premises.

The Lease has a force majeure provision (the "Force Majeure Provision"), which states:

> Section 22.3 – Force Majeure: If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, restrictive laws, riots, insurrection, war, acts of terrorism, fire, severe inclement weather such as snow or ice or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), performance of such act shall be excused for the delay caused by the Force

> Majeure Event. Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.

Lease at § 22.3.

COVID-19 Closure Orders

On March 1, 2020, Governor DeSantis issued Executive Order No. 20-51, declaring a public health emergency in Florida because of the threat of COVID-19. Fitness MSJ at 3. On March 9, 2020, Governor DeSantis issued Executive Order No. 20-52, declaring a state of emergency in Florida as a result of COVID-19. *Id*.

On March 20, 2020, Governor DeSantis issued Executive Order No. 20-71, requiring all gyms and fitness centers in Florida to close to prevent the spread of COVID-19. *Id*. at 4. On April 1, 2020, Governor DeSantis issued Executive Order No. 20-91, directing that, effective April 3, 2020, all individuals in Florida stay at home, with certain exceptions, and all non-essential businesses close in order to prevent further spread of COVID-19. *Id*. On April 29, 2020, Governor DeSantis issued Executive Order No. 20-112, directing that all gyms and fitness centers closed by Executive Order 20-71 remain closed. *Id*. On May 15, 2020, Governor DeSantis issued Executive Order No. 20-123, which became effective on May 18, 2020, allowing gyms and fitness centers to re-open and operate at up to 50% of building occupancy. On June 3, 2020, Governor DeSantis issued Executive Order No. 20-139, which became effective on June 5, 2020 (except in certain counties, including Miami-Dade County, where the Premises is located), which allowed most of Florida to enter "Phase 2" of Florida's COVID-19 reopening plan. *Id.* at 4-5. In Phase 2, gyms and fitness centers could reopen at full capacity, though as relevant in this action, not in Miami-Dade County. On September 11, 2020, Governor DeSantis issued Executive Order No. 20-223, which became effective on September 14, 2020 and allowed Miami-Dade County to enter Phase 2 of Florida's COVID-19 reopening plan. *Id*. at 5.

County and municipal governments in Florida also issued orders that prohibited or limited certain businesses, such as fitness centers and health clubs, from operating, in order to prevent the further spread of COVID-19. In particular, Miami-Dade County entered Emergency Order 23-20 and Amendment 2 to Emergency Order 23-20, which directed that all gyms and fitness centers be closed until June 8, 2020. *Id*.

On March 17, 2020, having already been ordered to close locations in various states, Fitness anticipated that the rest of the states would quickly follow, so it closed all of its health clubs nationwide, just three days before it was ultimately required to do so in Florida. Affidavit of Diann Alexander, dated March 11, 2022 ("Alexander Affidavit"), at ¶ 9. The period during which Fitness's clubs were closed in Miami-Dade County is referred to in this Order as the "Closure Period" or "Closures." Fitness froze membership dues/monetary obligations for its members nationwide, and therefore generated no revenue from the Premises during the Closure Period. *Id.* at ¶ 10. Fitness reopened at the Premises on June 8, 2020. *Id.* At ¶ 9.

Summary Judgment Standard

Pursuant to rule 1.150, summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.150(1). Rule 1.150 was amended effective on May 1, 2021 "adopting the text of federal rule 56 almost verbatim." *See In re: Amendments to Florida Rule of Civil Procedure 1.150*, SC20-1490, 2021 WL 1684095 at *3 (Fla. Apr. 29, 2021). As such, rule 1.150 "shall be construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 150(a).

The initial burden is on the movant to demonstrate the absence of a "genuine, triable issue of material fact." *See* Fla. R. Civ. P. 1.150(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The substantive law applicable to the dispute will identify which facts are material. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). As such, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Once the moving party has met its initial burden, Rule [1.150] requires the nonmoving party to go beyond the pleadings and identify facts which show a genuine issue for trial." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). In other words, the nonmoving party must come forward with sufficient evidence supporting the existence of a genuine triable issue of material fact. *See Anderson*, 477 U.S. at 248-249; *Celotex*, 477 U.S. at 327. If a dispute about a material fact is genuine, meaning, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party or the court could find in favor of the nonmoving party, summary judgment is not proper. *Anderson*, 477 U.S. at 248-49. The Court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but it is limited to determine whether there is a genuine issue for trial." *Id.* at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" or for the court to render a judgment Sin favor of the non-movant. *See id.* When the evidence is merely colorable or is not significantly probative and "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment may be granted. *See id.* at 249-250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Inferences to be drawn from the underlying facts and the record must be viewed in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. 574, 587 (1986).

The parties agree that there are no genuine factual disputes precluding entry of summary judgment.

ANALYSIS

I. Force Majeure

A force majeure clause is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled. *See ARHC NVWELFL01, LLC v. Chatsworth at Wellington Green, LLC*, 2019 WL 4694146, at *3 (S.D. Fla. Feb. 5, 2019). The Court finds that the plain language of the Lease's Force Majeure provision controls.

Fitness asserts, and the Court agrees, that the government orders making it illegal for Fitness to operate its fitness centers and health clubs were "restrictive Laws," as listed in the Force Majeure Provision. Fitness MSJ at 10. Those "restrictive Laws" were events "beyond the reasonable control of the party delayed" and thus were a Force Majeure Event under the Lease.

Fitness' obligation to pay Rent was consideration for its right to operate a health club on the Premises. This was the purpose of the Lease – Fitness would have the right to operate a heath club and would pay for that right in the form of Rent. The Force Majeure Provision excuses performance for specified unforeseen events, including the "restrictive laws" that took away Fitness' right to operate a health club on the Premises. Once Fitness' right to operate a health club in the Premises – the very thing for which Fitness bargained in entering into the Lease – was taken away, the Rent obligation necessarily must be excused. Those obligations go hand in hand.

The Landlord argues that the Closures affected Fitness' "ability to open operations," but "not the payment of rent," and therefore the Force Majeure Provision does not apply. Landlord MSJ at 19. Similarly, Landlord argues that the Lease does not require "that the property be open to the public," so the Closures caused no delay to Fitness' performance. *Id.* Landlord takes a strained view of the Force Majeure Provision, in that it ignores that bargain at the heart of the Lease: the payment of Rent in exchange for the right to operate a health club. By Landlord's logic, if government orders kept health clubs closed from the first day of the lease term through the last, Fitness would still be obligated to pay rent for the entire multi-year term despite never having the right to operate a health club in the Premises. The Court cannot adopt this unreasonable

interpretation. *See City of Pompano Beach v. Beatty*, 222 So. 3d 598, 601 (Fla. 4th DCA 2017) ("Although the clarity of the provision in dispute ends the analysis, we also point out that Appellees' tortured 'interpretation' amounts to a rewrite of the lease on terms significantly more favorable to the lessor only."); *Am. Employers' Ins. Co. v. Taylor,* 476 So.2d 281 (Fla. 1st DCA 1985); *see also James v. Gulf Life Ins. Co.,* 66 So.2d 62, 63 (Fla.1953) ("[A] construction leading to an absurd result should be avoided.").

Landlord also states that "[i]nstead of innovating and changing, as many businesses were forced to do, Fitness chose to retain the same business model it always had." Landlord *Objection to Fitness International, LLC's Motion for Summary Judgment* at 1. The Court rejects that argument, as it would render the Force Majeure provision of the Lease meaningless if Fitness were obligated to change its entire business type in the face of a Force Majeure event (*e.g.*, from a health club to a grocery store). It is also an absurd interpretation of the Lease to suggest that Fitness, which has one line of business – health clubs – should have morphed into another business, particularly when no one knew in the early days of the pandemic how long it would last.

Landlord also argues that "any delay or failure to perform that can be cured by the payment of money is expressly excluded from the definition of a Force Majeure Event." Landlord MSJ at ¶ 19. That is correct but not relevant here. The Force Majeure Event here – the government-mandated closures – could not be cured with the payment of money, nor does Landlord explain how paying Rent would have lifted the government restrictions. The parties could have included language in the Force Majeure Provision that requires the payment of Rent despite the occurrence of a Force Majeure Event, but they chose not to do so. Indeed, the Court notes that the parties did exactly that in two other leases that were the subject of similar litigation. *See VEREIT Real Estate LP v. Fitness International, LLC*, Superior Court of Arizona, Maricopa County, Case No. CV 2020-016464 (noting that the force majeure provision in two of the three leases at issue state: "Nothing in this Section shall excuse Tenant from the prompt payment of any rental or other charges required of

Tenant hereunder…"). As the Lease at issue here does not contain such a provision, it would be improper to obligate Fitness to pay "rent" despite the occurrence of a Force Majeure event. Therefore, the Court finds that Fitness' obligation to pay Rent is indeed excused during the Force Majeure Event of the government-mandated closures.

II. Equitable Doctrines of Frustration of Purpose, Impossibility, and Impracticability

In the alternative to the Force Majeure provision, Fitness argues that the Court can apply the equitable doctrines of frustration of purpose, impossibility, and impracticability to excuse Fitness' obligation to pay Rent during the Closure Period, as the pandemic and its related shutdown orders were not foreseeable. *See In re Cinemex*, 2021 WL 564486, at *5 ("There is no question that the COVID-19 pandemic was completely unforeseeable" and "Clearly the events that caused the shutdown were not foreseeable."); *National Retail Properties, LP v. Fitness Int'l* (MI Cir. Ct. 2022); *VEREIT Real Estate, LP v. Fitness Int'l* (TX Dist. Ct. 2022). Because the Court has ruled that the Force Majeure Provision excuses the Rent obligation in question, it is unnecessary to determine whether the equitable provisions apply. Insofar as the Force Majeure provision is inapplicable, however, the equitable doctrines yield the same result.

A. Frustration of Purpose

The purpose of the Lease was for Fitness to operate a health club. Alexander Affidavit at ¶ 8; Lease at ¶ 1.9. The government-mandated closures were unanticipated and beyond Fitness' control. Alexander Affidavit at ¶ 11. Fitness' performance was not made only more difficult; it was illegal for Fitness to operate a health club in the Premises during the Closures. *See Cinemex*, 2021 WL 564486, at *5. Therefore, the essential purpose of the Lease, and in turn, the totality of the bargain that Fitness was to receive, was completely frustrated. As a result, Fitness would have been excused from the payment of Rent during the Closure Period based on the doctrine of frustration of purpose.

Landlord's argument that the COVID-19 pandemic-related government closure orders were foreseeable at the time the Lease was entered into, and therefore, the equitable doctrines of frustration of purpose or impracticability cannot apply, is not persuasive. *See Cinemex*, 2021 WL 564486, at *5 ("There is no question that the COVID-19 pandemic was completely unforeseeable" and "Clearly the events that caused the shutdown were not foreseeable."); *accord UMNV 205-207 Newbury, LLC v. Caffe Nero Americas Inc.*, 2021 WL 956069, at *8 (Mass. Super. Feb. 8, 2021) ("[T]he *force majeure* provision addresses the risk that performance may become impossible but does not address the distinct risk that the performance could still be possible even while the main purpose of the Lease is frustrated by events not in the parties' control.") (italics in original); *Bay City Realty, LLC v. Mattress Firm, Inc.,* 2021 WL 1295261, at *8 (E.D. Mich. Apr. 7, 2021) ("the pandemic and Shutdown Order were not reasonably foreseeable at the time the contract was signed").

Furthermore, a lease's force majeure provision does not displace a party's right to obtain relief under the equitable doctrines of frustration of purpose, impossibility, and/or impracticability. Indeed, while the *Cinemex* court did not reach these equitable doctrines because it ruled on the force majeure provision, it did not foreclose their applicability: "Because there is a contractual provision that excuses CB Theater's performance while the theater was shut down by government order, it is unnecessary for the Court to apply the doctrine of impossibility of performance." *See Cinemex,* 2021 WL 564486, at 627 B.R. at 699. The court explained that it was "left with the resolutions that parties have bargained for in their contracts, or, where appropriate, the equitable remedies that common law has fashioned." *Id.* at 701.

B. Impossibility

Fitness also would have been excused from the payment of Rent during the Closure Period under the equitable doctrine of impossibility.

The *Cinemex* court explained the doctrine of impossibility in Florida:

> Impossibility of performance refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform." *Home Design Ctr.--Joint Venture v. Cty. Appliances of Naples, Inc.*, 563 So. 2d 767, 770 (Fla. 2d DCA 1990) (internal quotations omitted); *See also* 11 Fla. Jur. 2d *Contracts* § 261 ("A party that contracts absolutely and unqualifiedly to do something that is possible to be accomplished must make the promise good unless performance is rendered actually impossible by an 'Act of God,' the law, or another party. Under Florida contract law, the defense of impossibility may be asserted in situations where the purposes for which the contract was made have, on one side, become impossible to perform."); *Cook v. Deltona Corp.,* 753 F.2d 1552, 1558 (11th Cir. 1985) (In determining whether, under the doctrine of impossibility of performance, a supervening event excuses the performance of a contract party, the court should not "pass on the relative difficulty caused by a supervening event, but [ ] ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain.").

Cinemex, 2021 WL 564486, at *2; *see also Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008), *aff'd*, 306 Fed. Appx. 471 (11th Cir. 2009) (stating that acts of God and governmental action are among several types of business risks which implicate impossibility defense); *VEREIT Real Estate, LP v. Fitness Int'l* (TX Dist. Ct. 2022).

The "restrictive laws" making it illegal to use the Premises were a governmental action that made it impossible for Fitness to operate a health club at the Premises. Therefore, Fitness' obligation to pay Rent under the Lease was excused during the Closure Period. *See id*.; *267 Development, LLC v. Brooklyn Babies and Toddlers, LLC*, 2021 N.Y. Slip Op. 30796(U), 4, 2021 WL 963955, at *2-4 (N.Y.Sup.) (granting summary judgment to tenant because government shutdown of tenant's business in response to COVID-19 precluded tenant from performing its contractual obligations: "The government shutdown was unforeseeable and could not have been built into the contract. Under the circumstances presented, this Court finds that performance under

the subject lease was made impossible.").

C. Impracticability

Fitness also would have been excused from the payment of Rent during the Closure Period under the equitable doctrine of impracticability. "Florida law has embraced" the defense of impracticability, "calling it a 'cousin' of the defense of impossibility." *Florida Laundry Services, Inc. v. Sage Condominium Ass'n, Inc.*, 193 So.3d 68 (Fla. 3d DCA 2016) (citations omitted). In *Florida Laundry*, the Third DCA quoted the Second Restatement of Contracts to explain the application of the doctrine of impracticability: "[w]here after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Id.* (quoting Restatement (Second) of Contracts § 261 (Am. Law Inst.1981)).

Impracticability applies here, as the pandemic and resulting Closures were unanticipated, outside of the control of Fitness, and significant to its business. Alexander Affidavit at ¶ 9-11. The cessation of Fitness' operations (including the related freezing of its members' dues), made the payment of Rent for the Closure Period an excessive, unwarranted, and impracticable financial burden on Fitness. Because Fitness did not receive its benefit of the bargain under the Lease, it would be inequitable to place the entire burden of Fitness' compliance with the government closure orders solely upon Fitness.

III. <u>The Parties' Affirmative Defenses</u>

A. Landlord's Affirmative Defenses to Fitness' First Amended Complaint

The Court finds that Landlord's affirmative defenses do not preclude summary judgment in Fitness' favor. First, all of Landlord's affirmative defenses are insufficient because they are denials and not affirmative defenses. *See BPS Guard Servs., Inc. v. Gulf Power Co.*, 488 So. 2d 638, 641

(Fla. 1st DCA 1986) ("affirmative defenses" not in the form of a confession and avoidance are improper). Second, each of Landlord's defenses that rely on an argument that Fitness breached the Lease (*i.e.*, Landlord's First and Third through Eleventh Affirmative Defenses), or that Fitness was required to pay Rent during the Closure Period, fail, because the Court finds that Fitness was not obligated to pay Rent during the Closure Period. Third, the Court finds that Landlord's First through Tenth Affirmative Defenses fail to allege sufficient and specific facts. *See Reflex, N.V. v. Umet Trust*, 336 So. 2d 473, 475 (Fla. 3d DCA 1976); *Cady v. Chevy Case Sav. and Loan Inc*., 528 So. 2d 136, 138 (Fla. 4th DCA 1988); *Zito v. Wash. Fed. Sav. & Loan Ass'n,* 318 So. 2d 175, 176 (Fla. 3d DCA 1975) (holding affirmative defenses fail when improperly pled in a conclusory fashion, without the requisite degree of specificity). Furthermore, Landlord's Twelfth Affirmative Defense is not an affirmative defense, but is just a reservation of rights to assert other defenses at a later time, which fails to preclude entry of summary judgment in favor of Fitness.

IV. Damages

As set forth above, the Court finds that Fitness has prevailed on its claims and is excused from paying Rent during the Closure Period. Therefore, Fitness is entitled to damages from Landlord in the form of Rent paid to Landlord for the Premises for the dates of March 17-31, 2020 in the total amount of $34,310.82. In addition, Fitness is excused from paying Rent to Landlord for the Premises for the dates of April 1, 2020 - June 8, 2020.

As set forth above, the Court finds and it is

ORDERED AND ADJUDGED that Plaintiff, Fitness International's Motion for Summary Judgment is **GRANTED** and Vereit Real Estate's corresponding Motion for Summary Judgment is **DENIED**.

1. The Court finds in favor of Fitness and against Landlord as to each count of Fitness' Complaint.

2. The Court finds in favor of Fitness and against Landlord as to each count of Vereit's Counterclaim.

3. Fitness is entitled to damages from Landlord in the amount of Rent Fitness paid for the dates of March 17-31, 2020 in the total amount of $34,310.82.

4. Fitness is excused from paying Rent to Landlord for the dates of April 1 - June 8, 2020.

5. The Court finds that, pursuant to Section 22.7 of the Lease, Fitness is entitled to an award of its attorneys' fees and costs as the prevailing party on all pending claims between the parties (including Fitness' claims and Landlord's counterclaims). The Court reserves jurisdiction to rule on the specific amount of such attorneys' fees and costs and to grant such other further relief as necessary and just.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 8th day of June, 2022.

2020-027207-CA-01 06-08-2022 12:22 P

2020-027207-CA-01 06-08-2022 12:22 PM
Hon. William Thomas

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

Electronically Served:
A. Grant Phelan, gphelan@klehr.com
Craig Solomon Ganz, ganzc@ballardspahr.com
Eric Page Hockman, ehockman@wsh-law.com
Eric Page Hockman, mgaines@wsh-law.com
Eric Page Hockman, faubi@wsh-law.com

Katherin E Anderson Sanchez, andersonsanchezk@ballardspahr.com
Katherine E. Anderson Sanchez, andersonanchezk@ballardspahr.com
Katherine E. Anderson Sanchez, andersonsanchezk@ballardspahr.com
Katherine E. Anderson Sanchez, morganv@ballardspahr.com
Katherine E. Anderson Sanchez, hartt@ballardspahr.com
Lee Loving, lloving@burr.com
Mary Ellen O'Laughlin, molaughlin@klehr.com
Matthew Chait, mchait@shutts.com
Matthew Chait, lodum@shutts.com
Ronald B Cohn, rcohn@burr.com
Ronald B Cohn, dmorse@burr.com
Ronald B Cohn, lloving@burr.com
Sean Michael Smith, ssmith@shutts.com
Sean Michael Smith, lodum@shutts.com
Sean Michael Smith, ssmith@shutts.com
Sean Michael Smith, lodum@shutts.com
Sean Michael Smith, kmeyer@shutts.com

Physically Served:

APPENDIX F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

NATIONAL RETAIL PROPERTIES, LP,
a foreign limited partnership,

Plaintiff / Counter-Defendant,

-v-

FITNESS INTERNATIONAL, LLC,
a foreign limited liability company,

Defendant / Counter-Plaintiff.

Case No. 20-014449-CB

Hon. Muriel D. Hughes

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 2/3/2022

PRESENT: Muriel D. Hughes
Circuit Judge

This civil matter is before the Court on a motion for summary disposition filed by Plaintiff / Counter-Defendant National Retail Properties LP ("NRP"). Also before the Court is a counter-motion filed by Defendant / Counter-Plaintiff Fitness International, LLC ("Fitness"). For the reasons stated below, the Court grants in part and denies in part National's motion. The Court also grants in part and denies in part Fitness' counter-motion.

I. BACKGROUND

Plaintiff NRP is a Delaware limited partnership which is engaged in the business of leasing commercial properties. Defendant Fitness is a limited liability company that operates fitness facilities in Michigan, which are known as LA Fitness.

On June 30, 2015, the parties entered into a lease agreement. Under this agreement Fitness agreed to lease from the landlord, NRP, a property located at 41 128 Ann Arbor Rd., Plymouth, Michigan, 48170 (the "Plymouth Lease"). The parties entered into another lease on August 25, 2017 for a property located at 29659 Seven Mile Road, Livonia Michigan, 48152 (the "Livonia Lease"). According to NRP, Fitness failed to pay rent on the Livonia lease and is in default through December 8, 2020 in the amount of $183,102.02. This amount includes interest and late charges under the lease. NRP claims it had sent a notice of default providing an opportunity to cure the default on October 28, 2020. It further claims that Fitness failed to cure the default.

Although the dates differ in each lease, both the Livonia and Plymouth leases are essentially the identical. Under the leases, Fitness is responsible for payment of property taxes and all utilities. The relevant provisions in each lease are as follows:

> **5.2. Base Monthly Rent**
>
> Tenant shall pay to Landlord as monthly rent an amount equal to one-twelfth (1/12th) of the sum of Owner's Total Investment (as such term is defined in the Development Procedure Agreement) multiplied by the rate of SIX AND 75/100 PERCENT (6.75%) ("Base Monthly Rent"). Base Monthly Rent shall be payable by Tenant to Landlord in advance in equal monthly installments on the first day of each calendar month, without prior notice, invoice, demand, deduction, or offset whatsoever. The payment of Base Monthly Rent shall commence on the date (the "Rent Commencement Date") that is chosen by Tenant at any time after Tenant opens its health club and fitness facility for work outs to the general public on the Premises, but in no event later than 365 days following the Commencement Date. … Base Monthly Rent payable in the Primary Term shall be adjusted on the fifth (5th), tenth (10th), and fifteenth (15th) anniversary of the Commencement Date ("Adjustment Dates" or singly an "Adjustment Date"). …
>
> **9.1. Use of the Premises**
>
> Tenant may use the Premises (**"Initial Use"**) for the operation of a health club and fitness facility which may include, without

limitation, weight and aerobic training, group exercise_classes, exercise dancing such as Zumba, yoga, Pilates, racquetball/squash, personal training, aerobics, health and fitness related programs, free weights, spinning/cycling, circuit training, boxing, basketball, swimming pool, instruction in sports or other physical activities (e.g., swim lessons, racquetball/squash/tennis lessons, martial arts, dance, and youth sports instruction), and sauna and whirlpool facilities. As part of the health club and fitness facility operated within the Building, Tenant may use portions of the Building for use ancillary to a health club and fitness facility (hereinafter, the **"Ancillary Uses"**) for members and non-members except as specifically set forth below, including, but not limited to, a health club and fitness facility related pro shop selling apparel and other fitness related items, services designed to improve personal wellbeing … or for such other use as Tenant may determine in Tenant's reasonable business judgment, provided that such use: (i) is lawful; (ii) is in compliance with applicable environmental, zoning and land use laws and requirements; (iii) does not violate matters of record or restrictions affecting the Premises; (iv) does not conflict with any other agreement to which Landlord is bound, of which agreement Tenant has received written notice, where such conflict would materially adversely affect Landlord; (v) would not have a material adverse effect on the value of the Premises; and (vi) would not result in or give rise to any material environmental deterioration or degradation of the Premises. …

[Bold type in original; internal underlining added].

9.2. Compliance[1]

Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record including, without limitation, the Permitted Encumbrances, and requirements in effect during the term or any part of the term hereof, regulating the use by Tenant of the Premises, including, without limitation, the obligation at Tenant's cost, to alter, maintain, or restore the Premises in compliance and conformity with all laws relating to the condition, use or occupancy of the Premises during the term (including,

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[1] Because the Plymouth property is part of a condominium development, this subsection in the Plymouth lease differs somewhat from the Livonia lease. The Plymouth lease provides in relevant part:

> Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and' restrictions of record (including, but not limited to the Master Deed, Consent Judgment, Declaration of Restrictions and Development Agreement), and requirements in effect during the term or any part of the term hereof, regulating the use by Tenant of the Premises, …

without limitation, any and all requirements as set forth in the Americans with Disabilities Act) and regardless of (i) whether such laws require structural or non-structural improvements, (ii) whether the improvements were foreseen or unforeseen, and (iii) the period of time remaining in the term. Tenant shall be named as Landlord's representative with respect to all matters of governance under the Permitted Encumbrances. …

14.4. Minimum Acceptable Insurance Coverage Requirements

…

(e) Tenant shall also obtain and keep in force during the term of this Lease a policy of Business Interruption insurance covering a period of one (1) year. This insurance shall cover all Taxes and insurance costs for the same period in addition to one (1) year's lease rent amount.

14.5. Additional Insureds

Tenant shall name as additional insureds (by way of a CG 20 26 endorsement or similar endorsement) and loss payees on all insurance, Landlord, Landlord's successor(s), assignee(s), nominee(s), nominator(s), and agents with an insurable interest as follows:

> National Retail Properties, LP, a Delaware limited partnership, its officers, directors, and all successor(s), assigneds), subsidiaries, corporations, partnerships, proprietorships, joint ventures, firms, and individuals as heretofore, now, or hereafter constituted on which the named insured has the responsibility for placing insurance and for which similar coverage is not otherwise more specifically provided.

15. PARTIAL AND TOTAL DESTRUCTION OF THE PREMISES

In the event any part or all of the Premises shall at any time during the term of this Lease be damaged or destroyed, regardless of cause, Tenant shall give prompt notice to Landlord. Tenant shall repair and restore the Premises to their original condition, including buildings and all other improvements, as soon as circumstances permit. Tenant shall hold Landlord free and harmless from any and all liability resulting from such repairs and restoration; provided, however, that in the event the damage or destruction to the Premises results in the payment of insurance proceeds to Landlord, Landlord will make such insurance proceeds

immediately available for Tenant's use for Tenant's repair and restoration of the Premises. Tenant shall pay for any cost of repair or restoration in excess of available insurance proceeds. Tenant is not entitled to any rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises.

18.1. Event of Default

The occurrence of any of the following events (each an "Event of Default") shall constitute a default by Tenant:

(a) Failure by Tenant to pay rent within five (5) days after Tenant's receipt of written notice from Landlord that rent is past due, provided that Landlord shall not be required to send notice more than two (2) times in any period of twelve (12) consecutive months, and when Landlord is not required to send a notice, Tenant shall have no cure or grace period.

18.2. Landlord's Remedies

...

(e) In all events, Tenant is liable for all damages of whatever kind of nature, direct or indirect, suffered by Landlord as a result of the occurrence of an Event of Default. If Tenant fails to pay Landlord in a prompt manner for the damages suffered, Landlord may pursue a monetary recovery from Tenant. Included among these damages arc all expenses incurred by Landlord in repossessing the Premises (including, but not limited to, increased insurance premiums resulting from Tenant's vacancy), all expenses incurred by Landlord in reletting the Premises (including, but not limited to, those incurred for advertisements, brokerage fees, repairs, remodeling to the Premises raw shell, and replacements), all concessions granted to a new tenant on a reletting, "all losses incurred by Landlord as a result of Tenant's default (including, but not limited to, any unamortized commissions paid in connection with this Lease), a reasonable allowance for Landlord's administrative costs attributable to Tenant's default, and all attorneys' fees incurred by Landlord in enforcing any of Landlord's rights or remedies against Tenant.

25.1. Recovery of Attorneys' Fees and Costs of Suit

Tenant shall reimburse Landlord, upon demand, for any costs or expenses incurred by Landlord in connection with any breach or default under this Lease, whether or not suit is commenced or judgment entered. Such costs shall include legal fees and costs incurred for the negotiation of a settlement, enforcement of rights,

or otherwise. Furthermore, if any action for breach of or to enforce the provisions of this Lease is commenced, the court in such action shall award to the party in whose favor a judgment is entered, a reasonable sum as attorneys' fees and costs. Such attorneys' fees and costs shall be paid by the losing party in such action.

27.2. Quiet Enjoyment

Landlord covenants and warrants that Tenant shall have and enjoy full, quiet, and peaceful possession of the Premises, its appurtenances and all lights and privileges incidental thereto during the term, subject to the provisions of this Lease and any title exceptions or defects in existence at the time of the conveyance of the Premises to Landlord by Tenant.

29.15. Waiver of Jury Trial

TENANT AND LANDLORD HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT EITHER OF THEM OR THEIR HEIRS, PERSONAL REPRESENTATIVES, SUCCESSORS OR ASSIGNS MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS LEASE OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONJUNCTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT TO LANDLORD AND TENANT ACCEPTING THIS LEASE.

[Bold type in original][Internal underlining added].

Hence, pursuant to the lease, the initial use of the premises is "for the operation of a health club and fitness facility… and for "use ancillary to a health club and fitness facility …including, but not limited to, a health club and fitness facility related pro shop selling apparel and other fitness related items, services designed to improve personal wellbeing." [Lease, Subsection 9.1].

The leases also included site plans in Exhibit A of the leases for development of the properties. In addition to the leases, the parties entered into Development Procedure Agreements, which is attached to the leases as Exhibit H. In these agreements, NRP is the "Owner" and

Fitness is the "Developer." These agreements allocated the costs of development of the properties and include site signage plans depicting development of the properties for use as "LA Fitness" facilities. Under the agreements, the parties express their desires for the use of the properties. The agreements state in relevant part:

> **1.1 The Premises**
>
> Owner desires to have Developer cause the general development of a health and fitness facility, including the construction of certain site and building improvements (the "Improvements"), on that certain real property (the "Premises")…
>
> [Emphasis added].

The two properties operated as LA Fitness facilities without any problem until Michigan was affected by the COVID-19 virus, which quickly became a pandemic. Due to the pandemic, Governor Whitmer issued an executive order ("EO") declaring a state of emergency. EO 2020-04. As a result, Fitness was unable to conduct its business at either the Livonia or Plymouth location and to use the premises as a fitness and health facilities between March 17, 2020 and September 8, 2020. The Governor issued numerous executive orders in connection with the COVID-19 pandemic. The Michigan Department of Health and Human Services also issued orders.

With respect to fitness facilities, EO 2020-09 closed fitness facilities to the public. EO 2020-09 was rescinded by EO 2020-20 on March 22, 2020. EO 2020-20 continued the closure of fitness facilities until April 13, 2020. Thereafter, EO 2020-43 extended the closure until April 30, 2020. The closure of fitness facilities was again extended to May 28, 2020 by EO 2020-69. EO 2020-69 was extended to June 12, 2020 by EO 2020-100. EO 2020-110 continued the restriction. On September 9, 2020, EO 2020-175 opened fitness centers, but limited capacity to 25% of state or local fire marshals' limited occupancies. The MDHHS issued an order on March 19, 2021 whereby capacity was increased to 30% and which took effect on March 22, 2021. On June 1,

2021, capacity was increased to 50%. The 50% restriction continued until June 22, 2021 when the Governor opened the state to full capacity.

In an affidavit, Diann D. Alexander, Esquire, Director of Lease Administration, Vice President, and Senior Real Estate Counsel to Fitness, stated that Fitness sent a letter to NRP on March 17, 2020 notifying NRP that the government mandated restrictions "frustrated the purpose of the Leases and rendered performance impossible and impracticable." The notice informed NRP that, due to the government restrictions, Fitness was excused from its rent obligations. Ms. Alexander also explained that "National Retail is the landlord in approximately thirty (30) leases in which Fitness is the tenant." In each of the premises, "Fitness only uses the premises for the operation of full service indoor health clubs and fitness centers." She also stated:

> 26. Fitness paid rent timely for March 2020 under the Livonia Lease prior to the government-mandated closures. As a result of the government-mandated closures, Fitness is entitled to a credit, in the amount of $29,889.66, for rent it paid for the period March 17 through March 31, 2020, when it was illegal for it to use the Livonia Premises.
>
> 27. Fitness also timely paid 100% rent under the Livonia Lease for the months following the Closure Period, from October 2020 to the present.
> ...
>
> 33. The sole basis for Landlord's filing suit under the Plymouth Lease is a $2,356.68 late charge, purportedly incurred by Fitness in October 2020. Fitness was not late in paying Landlord any amount due and owing under the Plymouth Lease.

NRP also provides an affidavit executed by Kristin Furniss, Senior Vice President of Asset Management for NRP. Ms. Furniss stated:

> 6. These commercial Leases are both triple net leases and therefore, in addition to rent, Defendant is obligated to pay utilities, taxes and insurance. In exchange, and <u>at all relevant times, Plaintiff has always provided Defendant with unobstructed and peaceful possession of both the Plymouth Property and the Livonia Property</u>.

> 7. Nowhere in either Lease is Defendant entitled to any abatement, credit or reduction of rent for any reason, let alone for a government shutdown affecting these commercial properties.
>
> 8. For the months of August 2020 through September, 2020, Defendant failed to pay rent to Plaintiff as required under the Livonia Lease. A total of $137,032.21 in rent was outstanding.
> ...
>
> 12. Despite the Notice of Default under the Livonia Lease, Defendant failed to pay the outstanding rent due.
>
> 13. Following the Notice of Default under the Plymouth Lease, Defendant paid all the rent then due except for $2,356.68 representing a portion of the late fees and interest still due and owing.
>
> 14. Currently, under the Livonia Lease, Defendant owes the amount of $188,737.26, plus accruing interest (Exhibit C).
>
> 15. Currently, under the Plymouth Lease, Defendant owes the amount of $2,356.68, plus accruing interest (Exhibit D).
>
> [Emphasis added].

Thus, Ms. Furniss' affidavit states NRP's intent to provide "unobstructed and peaceful possession" to Fitness during the duration of the leases. Her affidavit reiterates NRP's claim that Fitness is not entitled to any abatement of rent. The remainder of the affidavit is a reflection of NRP's money damage claims in its amended complaint. These competing affidavits are confirmations and expressions of the parties' positions as stated in NRP's amended complaint and Fitness' counterclaim.

NRP filed its original complaint on November 3, 2020, which included a claim of breach of contract on the Livonia lease and a claim of breach of contract on the Plymouth lease. Since the date of the filing of the original complaint, Fitness almost completely cured its default on the Plymouth lease, but paid rent under protest. On December 18, 2020, NRP filed an amended complaint. The amended complaint includes two claims, breach of contract for the Livonia lease and breach of contract for the Plymouth lease. The amended complaint reflects the fact that

Fitness essentially cured its default on the Plymouth lease, but still currently owes late fees and interest. Hence, NRP now claims that Fitness currently owes late fees and interest in the amount of $2,356.68 on the Plymouth lease.

Fitness filed its answer and affirmative defenses of frustration of purpose, impossibility or impracticability, and NRP's breach of the covenant of quiet enjoyment. Fitness then filed a counter-claim on January 18, 2021, which includes five counts: (1) breach of the Livonia lease; (2) return / reimbursement of money paid under mistake of fact for the Livonia lease; (3) breach of the Plymouth lease; (4) reimbursement of money paid under mistake of fact for the Plymouth lease; and (5) declaratory judgment requesting that the Court find that Fitness is excused from paying under the lease and rent should be abated in a proportional amount corresponding to the Michigan Governor's closure orders and restrictions on fitness facilities.

On August 17, 2021, NRP filed a motion for summary disposition. Fitness' counter-motion was filed on December 1, 2021. Both motions are now before the Court.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

National bases its motion on MCR 2.116(C)(10) and Fitness bases its counter-motion on MCR 2.116(I)(2). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "'Courts are liberal in finding a factual dispute sufficient to withstand summary disposition.'" *Patrick v Turkelson*, 322

Mich App 595, 605; 913 NW2d 369 (2018), quoting *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party ". . . may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. Id; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

"MCR 2.116(I)(2) specifically authorizes the court to render summary disposition in favor of the party opposing the motion if it appears that such party is entitled to judgment. MCR 2.116(I)(2) is subject to MCR 2.116(G)(5) and 2.119(E)(2) concerning the materials that the court may consider in granting summary disposition. Thus, although a motion is not necessary for summary disposition in favor of the party opposing an opponent's motion for summary disposition, all those matters that would have been necessary to support a motion, if it had been made, are required to grant relief to the non-moving party under MCR 2.116(I)(2). § 2116.15 Procedure on Motions for Summary Disposition - Summary Disposition for the Party Opposing the Motion, 1 Mich Ct Rules Prac, Text § 2116.15 (7th ed) "If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly

granted under MCR 2.116(I)(2)." *Lockwood v Ellington Twp*, 323 Mich App 392, 401; 917 NW2d 413 (2018)[Citations omitted].

III. DISCUSSION

In support of its motion, NRP essentially makes three arguments: (1) under the leases or pursuant to law, Fitness is not entitled to an abatement of rent, reimbursement for rent, or credit for rent paid; (2) the leases clearly show that the parties intended that Fitness' rent obligations would continue despite unanticipated events; and (3) the damages suffered by Fitness, were not the result of NRP's action, but were the result of the actions of government agencies and the government agencies did not excuse commercial tenants from their obligations.

In its response and counter-motion, Fitness makes four arguments: (1) NRP has breached the leases by failing to abate rent during the shutdown period because Fitness was denied use and enjoyment of the premises as promised by NRP; (2) NRP's breaches excuse Fitness from performing under the leases; (3) "frustration of purpose" precludes summary disposition in favor of NRP and warrants judgment in favor of Fitness; and (4) Fitness' obligations to pay rent is excused under the doctrines of "temporary impossibility" or "impracticability."

A. Breach of the Contracts

Initially, the parties' arguments involve contract interpretation. "The primary goal of contract interpretation is to honor the parties' intent. When the contract is unambiguous, the parties' intent is gleaned from the actual language used." *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 57; 698 NW2d 900 (2005) [Citations omitted]. "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory v Continental Ins Co,* 473 Mich 457, 468; 703 NW2d 23 (2005) [Emphasis in original]. "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a

reader of the instrument." *Id* at 464. "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id* at 461.

A contract will be susceptible to only one interpretation if it is clear and unambiguous, however inartfully worded or clumsily arranged. *Farm Bureau Mut Ins Co,* 460 Mich 558, 566; 596 NW2d 915 (2003).On the other hand, a contract is ambiguous if its words may reasonably be understood in different ways. "When contractual language is unambiguous reasonable people cannot differ concerning the application of disputed terms to certain material facts, and summary disposition should be awarded to the proper party." *Island Lake Arbors Condo Ass'n v Meisner & Assoc, PC*, 301 Mich App 384, 393; 837 NW2d 439 (2013) [Citations and quotation marks omitted]. However, "[i]f the language of a contract is ambiguous, testimony may be taken to explain the ambiguity." *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 32; 966 NW2d 393 (2020).

In support of its contract arguments, NRP cites subsection 9.2 of the leases. As indicated above, this subsection provides:

> Tenant, at Tenant's sole expense, promptly shall comply with all applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record including, without limitation…

Under subsection 9.2, Fitness must both comply with orders and restrictions and assume the costs of such orders and restrictions.

NRP also cites section 15 of the leases, which provide that, if the premises are partially or totally destroyed, Fitness must repair and restore the premises to their original condition. The section also provides that Fitness holds NRP free and harmless from any liability for repairs and restoration of the premises. It also argues that, under this section, Fitness "is not entitled to any

rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises."

In the Court's view, this section is inapplicable to the circumstances at issue in this case because the premises were not damaged, disturbed, or destroyed such that repairs were required. Rather, the premises were closed by government order.

Although subsection 9.2 provides that Fitness bears the cost associated with orders or restrictions, Fitness argues that its affirmative defenses of frustration of purpose and impossibility and/or impracticability override this assumption of risk. This subsection and these defenses will be discussed in further detail below.

Fitness also argues that, rather than its own breach, NRP breached its own obligation to provide Fitness with its use and quiet enjoyment of the premises. "[T]he covenant for quiet enjoyment protects lessees from dispossession by lessors…" *Elia Companies, LLC v Univ of Michigan Regents*, 335 Mich App 439, 453; 966 NW2d 755, 764 (2021). The covenant of quiet enjoyment is breached only "when the landlord obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold." *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003)[Footnote omitted].

In the instant case, the landlord, NRP, has done nothing to obstruct, interfere with, or to take away from Fitness the "beneficial use of the leasehold." *Id.* Rather, it was the Governor and the MDHHS that obstructed or interfered with the use of the premises. Thus, Fitness has failed to establish that NRP breached the covenant of quiet enjoyment. Therefore, there is no genuine issue of material fact that NRP breached the Livonia lease (Count I of counter-claim) and breached the Plymouth lease (Count III of the counter-claim) and both claims fail as a matter of law. MCR 2.116(C)(10); *West, supra; Maiden, supra.* Accordingly, the Court grants NRP's motion as to Count I and Count III of Fitness' counter-claim.

B. Doctrines of Frustration of Purpose and Impossibility and/or Impracticability

1. Frustration of Purpose

NRP next argues that Fitness' assertion of frustration of purpose as an affirmative defense fails as a matter of law. It avers that, during the 20-year leases, it was unaware that the purpose of the lease was solely for use of the premises as health and fitness centers. In response, Fitness maintains that the leases clearly demonstrate that the principle use of the properties was for the operation of health and fitness centers.

To support its response, Fitness cites *Bay City Realty, LLC v. Mattress Firm, Inc.*, (U.S. Dist Ct, ED Mich); 2021 WL 1295261. In *Bay City Realty*, the court held that, during the pandemic shutdown, "[t]he purpose of the lease, the retail sale of bedding products, was substantially frustrated during the shutdown." *Id* at 7. NRP maintains that Fitness' reliance on the *Bay City Realty* case is misplaced because the disputed lease language in that case, which referred to "hazardous materials," was not the same as in the case before this Court. Although NRP's characterization of the *Bay City Realty* case is imprecise, the Court need not resolve this dispute because the case is not binding on this Court. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

"Under Michigan law, the doctrines of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. Generally, the frustration of purpose doctrine is asserted where a change in circumstances makes one party's performance virtually worthless to the other, frustrating his or her purpose in making the contract…" 5A Mich Civ Jur Contracts § 193 [Footnote omitted].

Before a party may avail itself of the doctrine of frustration of purpose, the following conditions must be present: (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and of which was not assumed by him. *Liggett Restaurant Group, Inc v City of Pontiac,* 260 Mich App 127, 134 -135; 676 NW2d 633 (2003). "'The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.'" *Id* at 135, quoting Second Restatement of Contracts, § 265, comment a, p. 335 [Footnote omitted].

If the parties have not "expressly accounted for the instant situation in their contract," a party may make a claim for relief under the doctrine of frustration of purpose. *Id* at 136. This is not to say that the party will always prevail. See also *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494; 770 NW2d 888 (2009)(The City's delayed issuance of a building permit by more than a year after the Board of Appeals determined that the buildings were actually in compliance, which prevented the defendant from proceeding in a timely fashion to meet the contract's time requirements frustrated the purpose of the contract.).

Under the *Liggett* factors above, the parties do not dispute that the contracts were at least partially executory. However, NRP avers that Fitness meets the above factors (2) and (3) which are challenged by Fitness. The Court finds that Fitness' purpose in making the contract was known to both parties when the contract was made. Although the property could have been used for some other purpose during the state shutdown, the primary purpose of the contracts, as expressed in subsection 9.1 and in the subsection 1.1 of the Development Procedure Agreements, was, in fact, known by NRP.

In addition, the Court finds that the primary purpose of operation of fitness facilities had been frustrated by "an event not reasonably foreseeable" at the time the contract was made and has not been the fault of Fitness. The extraordinary circumstances of a pandemic causing a complete shutdown of nonessential services were not reasonably foreseeable.

The temporary, but complete, shutdown by the government frustrated Fitness' purpose of using the premises for the operation of health club and fitness facilities. Fitness, the tenant, did not receive the benefit of its original and continued bargain to use the property as intended in exchange for the payment of rent.

During the time of the total shutdown, the change of circumstance, made the contracts "virtually worthless" to Fitness. *Liggett, supra* at 133-134; *City of Flint, supra* at 499. However, once the state allowed reopening of fitness centers at 25% capacity, the purpose of the parties' leases was no longer frustrated and was no longer "virtually worthless." *Id.* Hence, the only the time period during which the shutdown of fitness centers was total is applicable to the doctrine of frustration of purpose as it relates to the instant case.

Therefore, the Court holds that Fitness may avail itself of the doctrine of frustration of purpose for the period of total shutdown. Accordingly, the Court denies NRP's motion as it relates to the complete closure period, but grants the motion as to the reopening periods. In addition, the Court grants Fitness' motion as it relates to the complete closure period, but denies the motion for the reopening periods. This determination relates to return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

2. <u>Impossibility and/or Impracticability</u>

NRP also contends that the defense of impossibility and/or impracticability fails as a matter of law. NRP argues that, under Michigan law, economic unprofitableness is not

equivalent to impossibility of performance, citing *Karl Wendi Farm Equip Co v Int'l Harvester Co*, 931 F2d 1112, 1116 (6th Cir 1991) (applying Michigan law).

Fitness argues that it should be excused from paying rent or is entitled to an abatement of rent because, during the government mandated closure periods, it was impossible to operate its health clubs and fitness centers in the premises when such operations were illegal. Fitness also maintains that the defense of impracticability applies because "a part, but not all, of the contract cannot be performed due to an unforeseeable intervening event or set of circumstances," citing *Bissell v L W Edison Co*, 9 Mich App 276, 283; 56 NW2d 623 (1967).

"A promisor's liability may be extinguished in the event his or her contractual promise becomes objectively impossible to perform. There are two kinds of impossibility: original and supervening; supervening impossibility develops after the contract in question is formed. Although absolute impossibility is not required, there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73–74; 737 NW2d 332 (2007)[Citations and internal quotation marks omitted]. The question of whether a promisor's liability is extinguished in the event that his or her contractual promise becomes objectively impossible to perform depends upon whether the supervening event producing impossibility was or was not reasonably foreseeable when he or she entered into the contract. *Id* at 74. "Where there is conflicting evidence on the question of impossibility, it is a question of fact for the trier of fact to resolve. *Roberts, supra* at 74. Here, there is no evidence to contradict the fact that operation of fitness facilities was impossible during the time of the total shutdown.

As indicated above, the complete shutdown of nonessential services due to a pandemic was not a reasonably foreseeable supervening event at the time the contract was made. Indeed, it was impossible for Fitness to uses the properties as intended during the shutdown period because

the government deemed the use illegal. Neither of the parties is at fault for the supervening event and the event was due to forces outside of the parties. Neither party disputes the fact that the premises were unusable for use as fitness facilities during the complete shutdown period. The Court finds there has been a "showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Id.* The Court also finds that "a part, but not all, of the contract [could not] be performed due to an unforeseeable intervening event." *Bissell, supra.* Like the excuse from performance due to a frustration of purpose, during the complete closure, operation as fitness facilities was objectively impossible and/or impracticable. However, once open to 25% capacity, the leases were not impossible or impracticable to perform. Thus, the Court denies NRP's motion only as to the complete closure period. This determination relates to the return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and the return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

IV. CONCLUSION

There is no genuine issue of material fact that NRP breached the Livonia lease (Count I of counter-claim) and breached the Plymouth lease (Count III of the counter-claim) and both claims fail as a matter of law. MCR 2.116(C)(10); *West, supra; Maiden, supra.* Accordingly, the Court grants NRP's motion as to Count I and Count III of Fitness' counter-claim and denies Fitness' counter-motion as to these claims.

Only the time period during which the shutdown of fitness centers was total is applicable to the doctrine of frustration of purpose. The Court denies NRP's motion as it relates to the complete closure period, but grants the motion as to the reopening periods. In addition, the Court grants Fitness' motion as it relates to the complete closure period, but denies the motion for the reopening periods. This determination relates to return / reimbursement of money paid under

mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

During the complete closure, operation as fitness facilities was objectively impossible and/or impracticable. However, once open to 25% capacity, the leases were not impossible to perform. Thus, the Court denies NRP's motion and grants Fitness' motion only as to the complete closure period. This determination relates to the return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and the return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim.

Finally, as to Fitness' declaratory judgment claim (Count V), the Court has determined that Fitness is entitled to an abatement of rent for the period of total government closure, from March 17, 2020 to September 9, 2020, of its Livonia and Plymouth facilities. Thereafter, Fitness must pay the rent owed or due on each of those leases. For the reasons stated in the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by National Retail Properties is **DENIED IN PART** as to the complete closure time period of March 17, 2020 to September 9. 2020 for Fitness International LLC's claims for return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim;

IT IS FURTHER ORDERED that National Retail Properties LP's motion is GRANTED as to the time period after September 9, 2020 for Fitness' International LLC's claims for return / reimbursement of money paid under mistake of fact for the Livonia lease (Count II) and return / reimbursement of money paid under mistake of fact for the Plymouth lease (Count IV) of Fitness' counter-claim;

IT IS FURTHER ORDERED that National Retail Properties LP's motion is **GRANTED** as to the time period after September 9, 202 on its breach of contract claims in its amended complaint (Count I and Count II);

IT IS FURTHER ORDERED that Fitness International LLC's motion as to its declaratory judgment claim (Count V) is hereby **GRANTED IN PART** as the Court has determined that Fitness International LLC is entitled to an abatement of rent for the period of total government closure, from March 17, 2020 to September 9, 2020 and **DENIED IN PART** as the Court has determined that Fitness International LLC must pay the rent owed or due on the Livonia and Plymouth lease after September 9, 2020;

IT IS FURTHER ORDERED that this **DOES NOT** resolve the last pending claim and **DOES NOT CLOSE** the case.

SO ORDERED.

DATED: /s/ Muriel D. Hughes 2/3/2022
Circuit Judge

GOLDFARB & HUCK ROTH RIOJAS, PLLC

March 23, 2023 - 2:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
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Appellate Court Case Title:	Fitness International, LLC, Appellant v. National Retail Properties, LP, Respondent
Superior Court Case Number:	20-2-08426-9

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