No. _____

No. 843338

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

FITNESS INTERNATIONAL, LLC, a California limited liability company,

Petitioner,

v.

135th AND AURORA, LLC, a Washington limited liability company,

Respondent.

FITNESS INTERNATIONAL, LLC, a California limited liability company,

Petitioner,

v.

3922 SW ALASKA, LLC, a Washington limited liability company,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Fitness International, LLC ("Fitness" or "Tenant") respectfully asks this Court to accept review of a narrow but important issue concerning the Court of Appeals' decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Tenant seeks review of a discreet but key question concerning the March 25, 2024 unpublished decision of the Court of Appeals, Division I, ("Decision"), which affirmed the trial court's order denying Tenant's motion for partial summary judgment and granting summary judgment in favor of respondents 135th and Aurora, LLC ("Aurora Landlord") and 3922 SW Alaska, LLC ("Alaska Landlord") (collectively, "Landlords"). A copy of the Decision is in the Appendix at Appendix A.

III. ISSUE 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 ("COVID-19 Pandemic") and likely future challenges based on any new global pandemic or, for example, inevitable disruptions as a result of climate change.

IV. STATEMENT OF THE CASE

A. The Leases Concern Operation of Health Clubs.

Tenant is a nationwide operator of indoor health clubs and fitness centers. CP 255 ¶3.

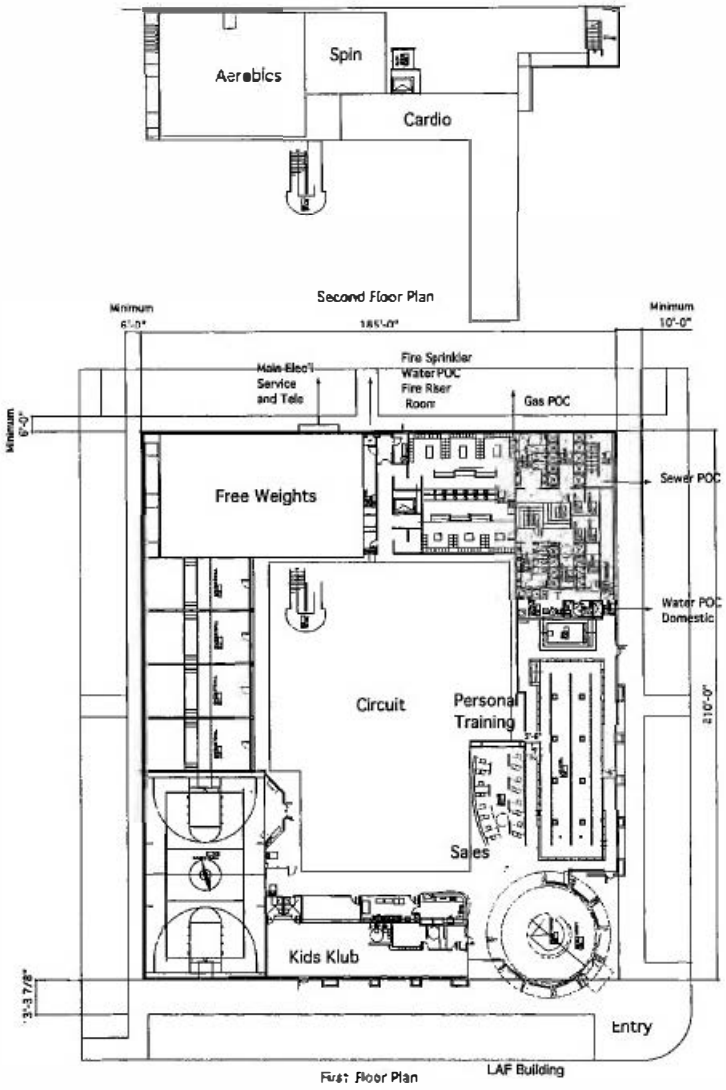
This case, which was consolidated from two separate lawsuits below, arises from two distinct, but (in relevant part) substantively identical lease agreements.

Specifically, Tenant and Aurora Landlord are parties to a Retail Lease ("Aurora Lease") concerning property located at

13244 Aurora Avenue North in Seattle ("Aurora Premises"). CP 413. Likewise, Tenant and Alaska Landlord are parties to a Retail Lease ("Alaska Lease") concerning property located at 3900 SW Alaska Street in Seattle ("Alaska Premises"). CP 602. The Aurora and Alaska Leases and Aurora and Alaska Premises are collectively referred to herein as the "Leases" and "Premises."

The Leases are anything but garden-variety leases that happen to concern use of space for fitness center purposes. Rather, from their inception, the Leases were directed towards one and only one purpose: construction and operation of indoor health clubs and fitness facilities on each Premises.

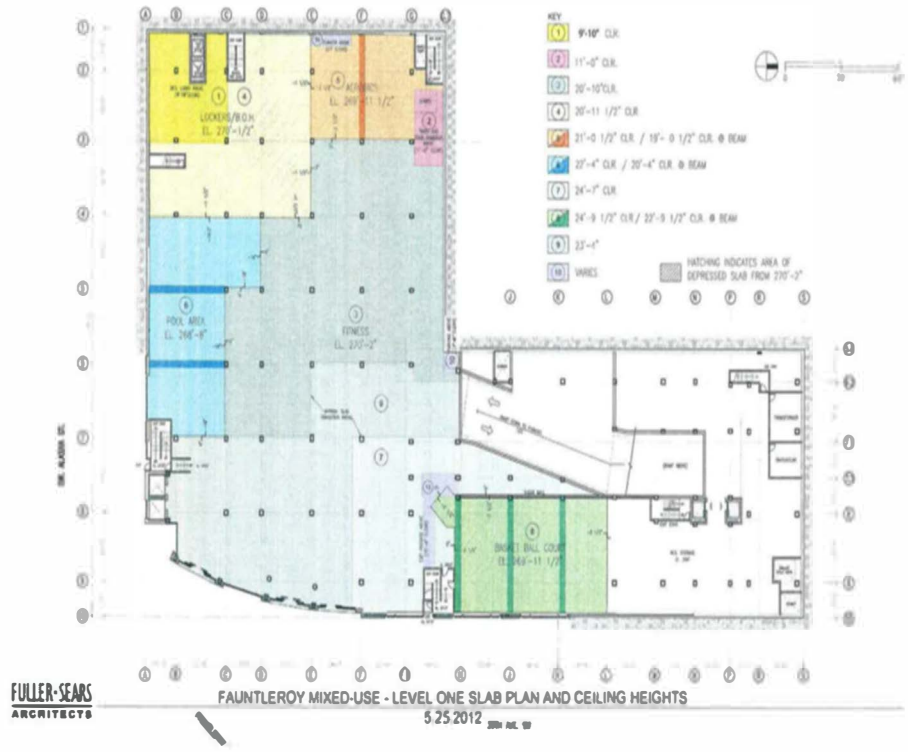
For example, the architectural plans for the Aurora Premises appended into the Aurora Lease depict what is obviously a health club and fitness facility, including a basketball/sports court and areas for fitness equipment:



CP 483.

Similarly, the architectural plans for the Alaska Premises appended into the Alaska Lease depict what is clearly a health club and fitness facility, including a swimming pool,

basketball/sports court, locker rooms, and areas for fitness equipment:



CP 702.

Landlords do not dispute that the mutual intent of the Leases is the construction and operation of a health club and fitness facility. For example, Landlords admit that the Aurora Lease was executed "[i]n May ***2005***" and that "[a]fter entering into the lease, [Tenant] occupied and commenced operating *a*

fitness center at the leased premises on December 31, ***2007***." CP 409 ¶3 (emphasis added). In other words, it took over ***two*** years for the construction of a health club at the Aurora Premises.

Similarly, Landlords admit that the Alaska Lease was executed "[i]n June ***2012***" and that "[a]fter entering into the lease, [Tenant] occupied and commenced operating a fitness center at the leased premises on May 15, ***2015***." CP 409 ¶4 (emphasis added). That is to say, it took nearly ***three*** years for the construction of a health club at the Alaska Premises.

Thus, at the most basic level, the purpose of the Leases is for Tenant to pay rent to Landlords for the right to use the Premises for the operation of Tenant's health clubs. *See* CP 415 (Aurora Lease) §1.9 ("The 'Initial Uses' of the Premises shall be for the operation of a health club and fitness facility…"); CP 613 (Alaska Lease) §1.9 ("The 'Primary Uses' of the Premises shall be for the operation of a health club and fitness facility…").

Landlords demised each Premises to Tenant for such right to use and in exchange Tenant pays rent. *See* CP 417 (Aurora

Lease) §2.1 ("In consideration of the rents agreed to be paid and of the covenants and agreements made by the respective parties hereto, Landlord demises and leases to Tenant and Tenant hereby leases from Landlord the Premises…"); CP 616 (Alaska Lease) §2.1 (same). As Tenant only receives the benefit of its bargain if it can use the Premises (as it must have access and use of the Premises in order to provide the health club services to its members), Tenant negotiates for such right to operate—if no right to operate, then there is no consideration for the rent paid to Landlords. CP 255 ¶4.

In consideration and exchange for Landlords' delivery of the Premises to Tenant and Tenants' use of the Premise and peaceful and quiet possession and enjoyment of the Premises (among other things), Tenant is to pay base monthly rent. CP 421 (Aurora Lease) §5; CP 623 (Alaska Lease) §5.

Therefore, as understood and acknowledged by the parties from the outset, the sole purpose of the Leases was Tenant's use of each Premises for the operation of a health club, and Tenant

would not have executed the Leases or constructed the improvements if it did not have the right to use each respective Premises for the operation of a health club throughout the term of the Leases. CP 255 ¶4; CP 862 ¶5.

In short, Tenant simply did not agree to pay millions of dollars to build out the health clubs and then millions more in rent in the mere hope that it would continue to have the right to use the Premises for their intended purpose as health clubs.

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

The parties' dispute has its roots in the COVID-19 Pandemic. In their Answers, Landlords admitted the following facts:

> - [A national emergency declaration] was followed on March 16, 2020, by Governor Inslee's order directing all non-essential businesses, including gyms and fitness centers, to immediately cease operating to prevent the perceived spread of COVID-19.
>
> - On March 23, 2020, Governor Inslee issued the Stay Home, Stay Healthy proclamation.…

- On May 1, 2020, Governor Inslee's Stay at Home, Stay Healthy Proclamation was extended until May 31, 2020….

- On August 10, 2020, indoor clubs and gyms in certain parts of Washington, including King County, were finally permitted to operate….

- Governor Inslee ordered gyms and fitness centers in Washington to once again cease operating their business on November 17, 2020 to prevent the perceived spread of COVID-19.

- On January 5, 2021, Governor Inslee … allowed gyms in certain parts of Washington, including King County, to operate on January 11, 2021….

CP 178 (Alaska Landlord's Answer); CP 188 (Aurora Landlord's Answer).[1]

Hence, for two separate periods, from (i) March 17, 2020 to August 9, 2020 ("First Closure Period") and (ii) November 16, 2020 to January 10, 2021 ("Second Closure

[1] Landlords admit "that state and/or local restrictions enacted in connection with, or response to the COVID-19 pandemic were out of the control of all parties to this action." CP 179 ¶35 (Alaska Landlord's Answer); CP 189 ¶35 (Aurora Landlord's Answer).

Period") it was illegal for Tenant to use the entirety of the Premises for the Leases' stated purpose as health clubs. *Id.*

C. The Parties Executed Lease Amendments During the First Closure Period.

On March 17, 2020, Tenant gave Landlords notice that Tenant was excused from paying rent because of (*inter alia*) the "Force Majeure Event" of the govermnent mandated closures under the Leases. CP 261; CP 263. Consistent with the applicable Leases, Tenant proposed to Landlords to temporarily excuse the payment of rent but offered an extension of the Lease terms in proportion to the length of govermnent mandated closures. *Id.*

Landlords, however, responded by demanding that Tenant pay rent in full, and filed eviction actions against Tenant. CP 409-10 ¶5.

The parties ultimately resolved the eviction actions by executing (1) a "CR 2A Settlement Agreement" ("CR 2A Agreement") and (2) the "First Amendment to [Aurora] Retail

Lease," and the "Second Amendment to [Alaska] Retail Lease" (collectively, the "Amendments"). CP 981-84; 590-92; 594-96.

The parties agreed in the CR 2A Agreement, which was related to the Amendments,[2] that the Amendments would ***not*** "constitute any admission … as to the scope of liability":

> **No Admission of Liability:** ***Nothing herein shall constitute any admission*** as to any assertion, claim, or allegation made by any party, ***or as to the scope of liability***. ***Tenant specifically denies*** any wrongdoing or ***liability***, and this CR 2A Settlement Agreement is entered to resolve all claims amicably and does not imply or suggest in any way fault or wrongdoing. ***Landlord and Tenant agree that this CR 2A Settlement Agreement***, and any and ***all associated*** negotiations, ***documents***, discussions, ***shall not*** be deemed or construed by anyone to be an admission or evidence of any violation of any statute or law, ***or of any liability*** or wrongdoing by any party, ***or of the proper scope of liability*** under any statute or law, or of the truth of any of the claims or allegations in the Complaint.

CP 982 (emphasis added).

In short, Tenant did not waive any rights in the CR 2A Agreement or the Amendments; rather, those agreements were

[2] *See* CP 965 ¶7.

entered to resolve only the then-current unlawful detainer actions and address rent during the First Closure Period.

D. This Petition Relates to the Enforcement of the Leases and Recovery of Rent Concerning the Second Closure Period.

This petition only concerns the Second Closure Period.

As discussed above, it is undisputed that the government's "restrictions" barred Tenant from operating at the Premises during the Second Closure Period. CP 179 ¶35; CP 189 ¶35. Nonetheless, Landlords demanded Tenant pay full rent allegedly due during the Second Closure Period (CP 231-32; CP 234-35) and commenced eviction proceedings. *See* CP 267-67; 270-71.

To prevent eviction, Tenant was forced to pay Aurora Landlord $133,206.24 and Alaska Landlord $129,287.17, under protest, reserving all rights and remedies waiving none. *Id.*

On January 15, 2021, Tenant filed complaints against Landlords. CP 1-24. In both actions, Tenant alleged, *inter alia*, declaratory judgment claims based on "whether Tenant's performance under the Lease was excused during the [Second]

Closure Period due to the Force Majeure Event of the government-mandated closures" (CP 10 ¶55; CP 22 ¶55) and "whether the intent and purpose of the Lease has been frustrated during the Closure Periods" (CP 10, ¶56; CP ¶56).

On May 20, 2022, Tenant and Landlords filed cross-motions for summary judgment. CP 195-220; CP 272-300.[3] Landlords' motions sought summary judgment as to all of Tenant's claims. CP 277.

On July 1, 2022, the trial court denied Tenant's motion for partial summary judgment and granted Landlords' motion for summary judgment. CP 922.

In an unpublished opinion, Division I affirmed.

[3] Tenant's partial summary judgment motion sought narrow relief: that the trial court find that the FM Clause excused rent *during the Second Closure Period*, and award Tenant a return of the rent it paid under protest. CP 199. Tenant's petition does not concern relief sought by Tenant in its partial summary judgment motion.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court Should Grant Review to Decide Whether Washington Should Adopt the Equitable Doctrine of Temporary Frustration of Purpose.

This Court has adopted the equitable doctrine of frustration of purpose—specifically, Restatement (Second) of Contracts Section 265. *See Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.,* 112 Wn.2d 694, 696, 773 P.2d 70 (1989) (adopting Restatement (Second) of Contracts §§ 261 and 265); *see also*, *e.g.*, *Felt v. McCarthy*, 130 Wn.2d 203, 210, 922 P.2d 90 (1996) ("[Defendant's] frustration was not 'substantial' as required by section 265, comment *a.*").

Applying this Court's jurisprudence under Section Restatement (Second) of Contracts Section 265, the Court of Appeals held that the doctrine of frustration did not apply because the Second Closure Period did not frustrate the purpose of 15 to 20 year leases and Tenant remained in possession of the Premises:

> While we agree that Fitness could not operate a traditional health and fitness center during the second COVID-19 closure, the 2-month closure did not substantially frustrate the primary purpose of the 15 to 20-year leases. Moreover, as we explained in our review of an almost identical lease in Fitness I, Fitness remained in possession of the leased premises and use of the premises for ancillary purposes was left broadly to Fitness's business judgment.

Decision at p. 12.

But the Court of Appeals application of Restatement (Second) of Contracts Section 265 puts commercial tenants who assert that the purpose of their leases was *temporarily* frustrated in an impossible bind: they cannot withhold their rent and raise frustration as a defense against an eviction action; if they pay rent to preserve their interests and then seek to recover it in a separate action, their claims are barred because they remained in possession of leased premises.

This petition, therefore, concerns issues of substantial public interest, because it provides an opportunity for the Court to consider whether to adopt the doctrine of *temporary*

frustration of purpose. 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 expressly requested the Court of Appeals to adopt Restatement (Second) of Contracts §§ 269, 270, and 272. In fact, Landlords admit that the COVID-19 Pandemic *temporarily* frustrated the purposes of the Leases: "[T]he State's COVID restrictions amounted to a *temporary* restriction on [Tenant's]

ability to run a fitness facility, not a 'total' destruction of the leases." Respondents' Brief, p. 34 (emphasis added).

Yet the Court of Appeals, in the Decision, wholly ignored Tenant's request and Landlords' admission, and failed to discuss whatsoever ***why*** the doctrine of *temporary* frustration of purpose does or does not apply here. Instead, in a cursory footnote, the Court of Appeals simply declined to consider the temporary frustration of purpose doctrine: "Fitness asks us to adopt the doctrine of temporary frustration under Restatement (Second of Contracts § 269. ***We decline to do so***." Decision at p. 13 n. 6 (bold/italics/underline added).

The implication of the Decision is that a Washington appellate court has decided *sub silentio* ***not*** to adopt the temporary frustration of purpose doctrine. Although the Decision is unpublished, under the realities of modern litigation, there is risk that trial courts will interpret the Decision as barring *any* consideration of the temporary frustration of purpose doctrine, to the detriment of future litigants and trial courts'

broad equitable powers and discretion to fashion equitable remedies. *See M.G. by Priscilla G. v. Yakima Sch. Dist. No. 7*, __ Wn.2d __, 544 P.3d 460, 469 (2024) ("Trial courts have 'broad discretionary power to fashion equitable remedies.' ") (quoting *Borton & Sons, Inc. v. Burbank Props., LLC*, 196 Wn.2d 199, 206, 471 P.3d 871 (2020); *Jespersen v. Clark Cty.*, 199 Wn. App. 568, 582, 399 P.3d 1209 (2017) ("The court's equitable powers include the power to prevent the enforcement of a legal right that would otherwise result in an inequity under the circumstances.").

Whether this Court adopts Restatement (Second) of Contracts §§ 269, 270, and 272 has implications not only for commercial tenants like Fitness who faced temporary restrictions on their leases, but also future litigants who may confront temporary unforeseen disruptions due to future force majeure events such as pandemics, fires, earthquakes, wars, and/or climate change threats.

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 *future* similarly situated litigants. For example, with respect to Tenant, the trial court could have required Tenant to pay rent in proportion to space it would legally use and suspend rent for space that was illegal for Tenant to use. *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.

Washington courts regularly rely on the Restatement (Second) of Contracts. As a leading treatise on Washington law explains, "[p]erhaps more than any other source within recent years, Washington courts have looked to the Restatement of Contracts for guidance in formulating and applying basic law of contracts." David K. DeWolf, et. al., 25 Wash. Prac., Contract Law and Practice § 1.18 (3d ed. 2014); *see also Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 46, 686 P.2d 465 (1984) (adopting §§ 347 and 348); *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 38, 330 P.3d 159 (2014) (adopting § 45); *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 711-12, 893 P.2d 1127 (1995) (adopting § 374); *Young v. Young*, 164 Wn.2d 477, 487-88, 191 P.3d 1258 (2008) (adopting § 371); *Greaves v. Medical Imaging Sys., Inc.*, 124 Wn.2d 389, 398, 879 P.2d 276 (1994) (adopting § 90); *Seafirst Ctr. Ltd. P'ship v. Kargianis,*

Austin & Erickson, 73 Wn. App. 471, 477, 866 P.2d 60 (1994) (adopting § 295), *aff'd sub nom. Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 898 P.2d 299 (1995); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 346, 103 P.3d 773 (2004) (adopting § 208).[4]

As far as Tenant is aware, no Washington appellate court has affirmatively adopted Restatement (Second) of Contracts §§ 269, 270, and 272. The Court should accept review so that it may determine whether to adopt or decline equitable doctrines that are likely to be needed to address future disputes.

Moreover, Washington should join other non-Washington appellate courts that have adopted Restatement (Second) of Contracts § 269. *See*, *e.g.*, *Le Fort Enters., Inc. v. Lantern 18,*

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[4] *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, 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).

LLC, 199 N.E.3d 1257, 1272 (Mass. 2023) (recognizing temporary frustration of purpose); *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 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.").

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

Accepting review would allow the Court to update precedent concerning equitable doctrines. For example, *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.

The Court of Appeals' mechanical application of *Washington Hop Producers* and *Felt* demonstrates why this Court should accept review. For example, the Court of Appeals' holding that the frustration of purpose doctrine was inapplicable was partly predicated on the fact that Tenant "remained in

possession of the leased premises...." Decision at p. 12. However, if Tenant had not paid rent, it would have been evicted and lost its substantial investment made at the Premises—*i.e.*, millions of dollars it paid to build out the health clubs. Staying in possession also benefitted Landlord, as once the restrictions were lifted and Tenant was legally able to operate again, it immediately began paying rent. Had Tenant vacated, Landlord would have been left with a vacant 40,000 square foot building and no rental stream. Yet, paying rent and remaining in possession of Premises penalized Tenant under the Decision's analysis of application of the frustration of purpose doctrine. In other words, because of gaps in the frustration of purpose framework, Fitness was unfairly subject to a Catch-22. Accepting review would allow the Court to fill gaps by revisiting the decades-old case law addressing the frustration of purpose doctrine.

In addition, the Court of Appeals refused to consider whether to adopt the temporary frustration of purpose doctrine

and instead held that the Leases were "not substantially frustrated" because Tenant could supposedly sell "healthy and/or natural foods [] as well as the sale of exercise and/or health related *videos* and/or *DVDs*…" Decision at pp. 12-13 (emphasis added). But, as the record shows, the Premises were built out specifically for the purpose of operating full-service fitness facilities, equipped with pools, locker rooms, and other specialized amenities, and the selling of food or videos was only permitted as ***an ancillary use*** to a health club—it was illegal to operate a health club during the COVID-19 Pandemic. CP 483; CP 702.

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).

VI. CONCLUSION

For the above reasons, Tenant respectfully requests that this Court accept review of the narrow question on whether the temporary frustration of purpose doctrine should be adopted or not.

RESPECTFULLY SUBMITTED this 24th day of April, 2024.

I certify that this memorandum contains 4017 words, in compliance with Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on this 24th day of April, 2024, a copy of this document was sent as stated below.

Bradley P. Thoreson Robert M. Dato Artin Betpera Buchalter 1420 Fifth Ave, Ste. 3100 Seattle, WA 98101-1337 bthoreson@buchalter.com rdato@buchalter.com abetpera@buchalter.com	☒ via efiling/email ☐ via personal service ☐ via US Mail ☐ via fax

DATED this 24th day of April, 2024.

/s/ Marry Marze
Marry Marze

APPENDIX A

FILED
3/25/2024
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. 135th AND AURORA LLC, a Washington limited liability company, Respondent.	No. 84333-8-I DIVISION ONE UNPUBLISHED OPINION
FITNESS INTERNATIONAL, LLC, a California limited liability company, Appellant, v. 3922 SW ALASKA, LLC, a Washington limited liability company, Respondent.	

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.

As a result of the closure, Fitness International LLC (Fitness), sued two of its Seattle landlords for breach of lease. Fitness appeals the trial court's summary judgment dismissal of its claims. We affirm.

I

A

Fitness owns and operates LA Fitness health and fitness clubs across the nation. In 2005, Fitness entered into a 15-year lease of property located at 135th and Aurora Avenue North in Seattle owned by 135th and Aurora LLC (Aurora LLC, Aurora lease).[1] Fitness occupied and began operating a fitness center at the Aurora property on December 31, 2007.

In 2012, Fitness entered into a 20-year lease of property on 39th Avenue SW in Seattle, owned by 3922 Alaska LLC (Alaska LLC, Alaska lease) (collectively, the leases).[2] Fitness occupied and began operating a fitness center at the Alaska property on May 15, 2015.

Paragraph 1.9 of the Aurora lease provides that Fitness's "initial uses" of the premises "shall be for the operation of a health club and fitness facility," together with "ancillary" uses such as a pro shop selling apparel and fitness related items, vitamin and nutritional supplement sales, and food and beverage service for members. Under paragraph 8.1, Fitness was required to put the premises to this "initial uses" for one day.

[1] The Aurora lease also allowed for three separate options to extend the term of the lease for three consecutive five-year terms.
[2] The Alaska lease also allowed for three separate options to extend the term of the lease for three consecutive five-year terms.

After the required one-day initial use, Fitness was free, subject to some restrictions, to put the premises to any other lawful use.

Paragraph 1.9 of the Alaska lease similarly provides that Fitness's "primary uses" of the premises "shall be for the operation of a health club and fitness facility," together with "ancillary" uses such as a pro shop selling apparel and fitness related items, vitamin and nutritional supplement sales, and food and beverage service (including the sale of healthy and/or natural foods). Under the Alaska lease, Fitness was required to operate the premises for the "primary uses" for a period of 60 consecutive months. After the initial period Fitness was free, subject to some restrictions, to put the premises to any other lawful use.

Under both leases, Fitness is required to pay monthly rent "without demand, deductions, set-offs or counterclaims."

Both leases contain almost identical "force majeure" clauses. The Aurora lease provides:

> 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 and abnormal 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 act 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.[3]

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[3] The Alaska LLC Lease provides:

> 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 once it has already been

B

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 (COVID-19 closure). On August 10, 2020, the State permitted indoor clubs and gyms to operate under restricted guidelines. Another COVID-19 closure occurred from November 17, 2020 to January 10, 2021. It is undisputed that during these closure periods, it was illegal for Fitness to operate an in-person fitness club. See Fitness Int'l, LLC v. Nat'l Retail Props., LP, 25 Wn. App. 2d 606, 611, 524 P.3d 1057 (Fitness I), review denied, 1 Wn.3d 1020 (2023).

Following the first closure, the parties amended both leases to address rent abatement and deferral (the amendments). Aurora LLC and Alaska LLC (collectively landlords) agreed to defer rent or portions of rent for April, May, and June 2020, and to abate 50 percent of the rent for August and September 2020. The amendments also provided the following, "[e]xcept as set forth in Sections 2 and 3 above, Tenant shall continue to pay all obligations under the Lease as and when due."

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issued, 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. Force Majeure Events shall also include, as applied to performance of Tenant's acts, hindrance and/or delays in the performance of Tenant's Work or Tenant obtaining certificates of occupancy or compliance for the Premises by reason of any of the following: (i) any work performed by Landlord in or about the Premises from and after Delivery (including, but not limited to, the completion of any items of Landlord's Work remaining to be completed); and/or (ii) the existence of Hazardous Substances in the Premises not introduced by Tenant.

In January 2021, Fitness sued the landlords asserting breach of contract for (1) breached representations, warranties, and covenants of use and quiet enjoyment, (2) failing to credit Fitness for rent paid during the closures, and (3) not proportionately abating rent during the closures. Fitness also sought a declaratory judgment that, among other things, it has no obligation to pay rent during the government mandated closures. The trial court granted the landlords' motion to consolidate the cases.

In cross motions for summary judgment, Fitness argued that the force majeure clause in the leases excused payment of rent for the second closure period. The landlords argued that the obligation to pay rent was not excused by the force majeure clause nor by frustration of purpose or impossibility. The landlords also asserted that by executing the amendments, Fitness waived its right to claim that its obligation to pay rent was excused. The trial court entered summary judgment in favor of the landlords and dismissed Fitness's claims.

Fitness appeals, challenging only its requirement to pay rent during the second COVID-19 closure.

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, 226, 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).

"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)). "Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used." Hearst, 154 Wn.2d at 503-04, 115 P.3d 262. "A contract should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions." Bellevue Square, 6 Wn. App. 2d at 717, 432 P.3d 426 (internal quotation marks omitted).

A

Fitness argues first that the trial court erred in dismissing its claims because under the leases' force majeure clauses, rent was excused during government-mandated closure periods. Fitness contends that the COVID-19 closures were "restrictive laws" that "hindered" or "prevented" it from performing a required act: operate a health and fitness facility. While we agree that the COVID-19 closures were "restrictive laws," Fitness's argument that the closure excused its duty to pay rent fails.

Again, the force majeure clauses provide, in relevant part

> If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of . . . restrictive Laws . . . or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "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 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.

Under its plain terms, the force majeure clause sets for three requirements for its invocation: (1) a party failed to perform an "act"; (2) performance of the act was "required" under the lease; and (3) the failure to perform the required act was caused by a "restrictive law" or other event listed in the force majeure clause.

Fitness focuses its argument on the leases' required act of operating a health club and fitness facility. But in addition to the required act of operating a health and club and fitness facility, the lease also separately required Fitness to pay monthly rent "without demand, deductions, set-offs or counterclaims." While the COVID-19 closures prohibited the operation of an in-person health club and fitness facility, nothing in the COVID-19 closures prohibited Fitness from paying the rent required under the lease. To the contrary, paragraph 5.3 of the leases expressly states:

> Throughout the Term of this Lease, except as specifically provided in this Lease or any exhibit attached hereto and subject to Tenant's Minimum Rent obligations commencing on the Rent Commencement Date as set forth in Section 5.1 above, Tenant shall pay to Landlord, without demand, deductions, set-offs or counterclaims, the "Rent", which is hereby defined as the sum of the Minimum Rent and all Additional Rent . . . when and as the same shall be due and payable hereunder.

(Emphasis added.) Nowhere in the lease does it specifically provide that rent is excused in the event of a force majeure event. Indeed, the force majeure clause excepts "financial inability" from the list of force majeure events and then expressly states that "Delays or failures to perform resulting from [a] lack of funds or which can be cured by the payment of money shall not be a Force Majeure Event[]."

In contrast with the force majeure clause, other clauses in the leases do specifically provide for nonpayment of rent. For example, in the Alaska lease, Fitness's requirement to pay rent is abated or reduced if the landlord causes a reduction or elimination of utility services:

> Notwithstanding anything to the contrary contained in this Lease, in the event of any failure, interruption or reduction in any utility service due to the negligence or willful misconduct of Landlord, its agents, employees or contractors, which failure, interruption or reduction renders the Premises wholly or partially untenable for the reasonable operation of Tenant's business therein for a period of twenty-four (24) consecutive hours after notice thereof to Landlord, Rent shall thereafter abate during such period of untenability in proportion to the degree to which Tenant's use of the Premises is impaired.

Because the leases do not specifically excuse the duty to pay rent during a force majeure event, the obligation to pay rent under paragraph 5.3 controls.

Fitness argues that the fundamental purpose of the lease is for Fitness to pay rent in exchange for operating a health club and fitness center. Fitness fails, however, to point to plain language in the leases stating that payment of rent is contingent on operating an in-person health club and fitness facility. But even if Fitness is correct, the force majeure clause does not protect Fitness's choice to operate in-person fitness facilities. Instead, the force majeure clause only protects Fitness from the "performance of any act required" under the lease. (Emphasis added.) Under the plain language of the leases, Fitness was not required to operate a health club and fitness facility during the second COVID-19 closure.

Under paragraph 8.1 of the Alaska lease, Fitness was required to conduct the "primary uses" for a period of 60 consecutive months. Fitness occupied and began operating a fitness center at the Alaska property on May 15, 2015. Thus, by May 2020,

Fitness's required "act" of operating the "primary uses" had expired. Similarly, under paragraph 8.1 of the Aurora lease, Fitness was only required to operate the identified "initial uses" of the premises for one day. Fitness's requirement to operate the Aurora lease's initial uses also had expired prior to the second COVID-19 closure.

Because Fitness was not required to operate a health club and fitness center during the second COVID-19 closure, and because the force majeure event did not make it illegal or impossible to pay rent, the force majeure provision does not excuse Fitness from the payment of rent during second COVID-19 closure.

B

Fitness also argues that the trial court erred in concluding that the landlords had not breached the leases' express covenants of quiet enjoyment. We disagree.

Fitness first points to the following nearly identical language in paragraph 1.9 of the leases. Paragraph 1.9 of the Alaska lease provides, in relevant part:

> Landlord hereby represents, warrants and covenants to Tenant that Tenant's operation of business from the Premises for Tenant's Primary Uses does not and will not violate any agreements respecting exclusive use rights or restrictions on use within the Project or any portion thereof.[4]

We agree with the trial court that the State's enactment of COVID-19 closures does not constitute a breach of the quoted portion of paragraph 1.9. The COVID-19 closures were not "an agreement" or "existing lease" "respecting exclusive use rights or restrictions within the Project." The COVID-19 closures were instead acts of the

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[4] The Aurora lease provides:

> Landlord hereby represents and warrants to Tenant that the operation of business from the Premises for Tenant's Initial Uses will not violate any existing leases respecting exclusive use rights or restrictions on use within the Project or any portion thereof.

executive branch of the State of Washington. Moreover, the COVID-19 closures did not concern "the Project," but all health clubs across the State of Washington.

Fitness points also to the following sentence in paragraph 1.9 of the Alaska lease (but not included in the Aurora lease):

> Tenant shall have the right throughout the Term to operate the Premises or any portion thereof, for uses permitted under the Lease.

But this portion of paragraph 1.9 cannot be read to impose an obligation on the landlord relating to any government orders, or guarantee that the government will never prohibit or restrict the type of business Fitness operates. Moreover, even if this portion of paragraph 1.9 was read as some sort of warranty, the warranty would only cover "uses permitted under the Lease." But under paragraph 8.3(3)(e) of the Alaska lease, Fitness covenanted that it would "not use or allow the Premises to be used for any illegal purposes." Because operating a health and fitness center was illegal during the COVID-19 closures, the use was not "permitted under the Lease."

Fitness next argues that the landlords breached the representation, warranty, and covenant in paragraph 2.2(b) of the leases to peaceful and quiet enjoyment. Paragraph 2.2(b) provides:

> Landlord, hereby represents, warrants, and covenants to Tenant that:
>
> Landlord has good and insurable title to the Premises in fee simple, free and clear of all tenancies, covenants, conditions, restrictions, encumbrances and easements which might prevent or adversely affect the use of the Premises by Tenant for the Initial Uses, or disturb Tenant's peaceful and quiet possession and enjoyment thereof, and that there are, and will be at the Commencement Date no unrecorded or inchoate liens affecting the Premises. Landlord agrees to defend said title and represents and warrants that, so long as Tenant fulfills the material covenants and conditions of this Lease required by Tenant to be kept and performed, Tenant shall have, throughout the entire Term and any

> extensions and renewals hereof, peaceful and quiet possession and enjoyment of the Premises without any ejection by Landlord or by any other person by, through or under Landlord.

Again, we agree with the trial court that paragraph 2.2(b) concerns the validity of the landlord's title to the premises, and guarantees that Fitness has a right to peaceful and quiet possession "without any ejection by Landlord or by any other person by, through or under Landlord." But Fitness does not allege that either landlord lacked good title, or that there were restrictions in place, when the leases were signed. The State's temporary COVID-19 closure was not a restriction on title, and was not an action by, through, or under the landlords—it was an action by state government.

The trial court did not err in dismissing Fitness's claims that the landlords were in breach of paragraphs 1.9 or 2.2 of the leases.

III

Fitness argues that the trial court erred by granting summary judgment and dismissing its claims for equitable relief under the doctrines of frustration of purpose, impossibility, and/or impracticability. We disagree.

"'[W]hether equitable relief is appropriate is a question of law that we review de novo.'" Fitness I, 25 Wn. App. 2d at 618 (quoting Borton & Sons, Inc. v. Burbank Props, LLC, 196 Wn.2d 199, 207, 471 P.3d 871 (2020)).

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."

Wash. 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 could not operate a traditional health and fitness center during the second COVID-19 closure, the 2-month closure did not substantially frustrate the primary purpose of the 15 to 20-year leases. Moreover, as we explained in our review of an almost identical lease in Fitness I, Fitness remained in possession of the leased premises and use of the premises for ancillary purposes was left broadly to Fitness's business judgment.

> 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.

Fitness I, 25 Wn. App. 2d at 620. Here, like Fitness I, paragraph 1.9 of the Alaska lease authorized use of the leased premises for a long list of ancillary uses, "including, but not limited to, . . . food and beverage service (including the sale of healthy and/or natural

foods), as well as the sale of exercise and/or health related videos and/or DVDs and other related electronic media items."[5]

A lease is not substantially frustrated if the lease allows the tenant flexibility in its use of the premises. Fitness I, 25 Wn. App. 2d at 622. The trial court did not err in dismissing Fitness's frustration of purpose claim.[6]

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). "The mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside." Liner v. Armstrong Homes of Bremerton, Inc., 19 Wn. App. 921, 926, 579 P.2d 367 (1978).

In Fitness I, impossibility did not discharge performance because:

> Fitness International still occupied the premises, could conduct ancillary uses including, but not limited to, conducting online classes, and selling take-away food, or otherwise alter its business, and continue operations. The premises was not destroyed nor was Fitness International's exclusive

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[5] Similarly, paragraph 1.9 of the Aurora lease provides:

> Tenant may use portions of the Premises for uses ancillary to a health club and fitness facility, including, but not limited to, a pro shop (selling apparel and fitness related items), physical therapy center, sports medicine, weight loss advising and nutritional counseling and related programs, therapeutic massage, swim lessons, racquetball lessons, tanning salon, juice bar, vitamin and nutritional supplement sales, ATM machines, vending machines, child care facility for members and food and beverage service for members.

[6] Fitness asks us to adopt the doctrine of temporary frustration under Restatement (Second) of Contracts § 269. We decline to do so.

> possession and use disturbed. The temporary public health closure orders limited Fitness International's use of the premises, but that is not sufficient.

25 Wn. App. 2d at 623.

Similarly, here, Fitness occupied the properties, could conduct ancillary uses, or otherwise alter its business. The properties were not destroyed nor was Fitness's exclusive possession and use disturbed. Because Fitness's performance was only limited and not made impossible or impracticable, Fitness is not discharged from its contractual obligation to pay rent.[7] The trial court did not err in dismissing Fitness's impossibility claim.

We affirm.

Mann, J.

WE CONCUR:

Birk, J.

Dwyer, J.

[7] Because we affirm the trial court's dismissal of Fitness's claims, we do not reach the issue of whether, by executing the amendments, Fitness waived its right to dispute rent during the second closure period.

GOLDFARB & HUCK ROTH RIOJAS, PLLC

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