Supreme Court Case No. 1018321

(COA No. 84242-1-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

FITNESS INTERNATIONAL, LLC,
a California limited liability company,

Appellant,

v.

NATIONAL RETAIL PROPERTIES, LP,
a Delaware limited partnership,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is easy to conclude the Supreme Court should accept review because this case has roots in the COVID-19 pandemic. Fitness International LLC, appellant, wants the Court to use this case to adopt the common law doctrine of temporary frustration and "update" Washington law on frustration, impracticability, and impossibility. A deeper inspection of the facts reveals that this is not the right case for either purpose.

This case involves a commercial lease and a pair of public health orders temporarily restricting indoor activity in 2020. Despite its claims of frustration, Fitness International, the tenant, in fact paid rent while the first public health order was in effect and, promptly after judgment, paid rent—with interest—for the period covered by the second order. Moreover, Fitness International's tenancy runs up to 40 years whereas the public health orders lasted a total of about seven months. If this Court is inclined to adopt the common law doctrine of temporary

frustration or update existing doctrines (though they need no updating), the Court should wait for better facts.

Moreover, the Court of Appeals decided this case based on specific terms in the specific lease at issue. In doing so, it correctly applied rules of contract interpretation taught in the first year of law school. The Court of Appeals read the lease as a whole, giving words their ordinary meaning and giving effect to every term in the lease. The Court of Appeals also correctly applied the standards for summary judgment. It is undisputed that the sole cause of Fitness International's purported harm is the pair of public health orders issued by the government. Fitness International has never even alleged that National Retail Properties, LP, lessor and respondent, interfered with its possession or use of the subject property. Nothing about this case calls for revising these elementary rules or otherwise disturbing the analysis and decision below.

This Court should decline review.

II. STATEMENT OF THE CASE

This appeal arises from a lease for commercial property at 15707 Pacific Avenue South in Tacoma ("**Property**"). CP 3. National Retail Properties, LP is the owner and lessor, and Fitness International is the tenant. CP 102-95.

A. Both Parties Are Sophisticated Businesses Experienced in Commercial Retail and Leasing.

Both parties in this lawsuit are experienced commercial actors. National Retail is a real estate investment trust that owns commercial properties nationwide. CP 33. Fitness International does business as *L.A. Fitness*, with more than five million active members—242,830 in Washington alone. CP 67-68. Fitness International operates more than 700 locations that "span the continent." CP 31, 57. When it comes to commercial leasing, no one here was a novice.

B. The Parties Negotiated a Lease Allocating to Fitness International the Risk of Performance Regardless of Temporary Public Health Orders.

On July 2, 2015, the parties executed a commercial lease for the Property ("**Lease**"). CP 102-95. Fitness International

characterizes the Lease as "anything but a garden-variety lease." (Petition at 3.) National Retail agrees. This Lease is unique, and as such it does not present a set of facts that serve as useful precedent for other leases. In this particular Lease, the parties specifically allocated to Fitness International the risk of performance in the face of government-issued use restrictions. This allocation of risk is evident throughout the Lease.

1. The Lease repeatedly requires full and timely rent regardless of circumstance.

The Lease explicitly requires Fitness International to pay rent on time, without deduction or offset for any reason:

> …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**.

CP 108-09 § 5.2 (emphasis added). The Lease repeatedly states that rent is due "without offset or deduction." *See*, *e.g.*, CP 129 § 21.2. The Lease requires Fitness International to pay the full measure of rent even if National Retail breaches its duties:

> This Lease shall be construed as though the covenants herein between Landlord and Tenant are independent and not dependent, and Tenant hereby expressly waives the benefit of any statute to the contrary and agrees that **if Landlord fails to perform its obligations set forth herein, Tenant shall not be entitled** … **to any offset of the rent or other amounts owing hereunder against Landlord**; …

CP 134-35 § 29.11 (emphasis added). The full measure of rent is due even if Fitness International incurs expenses to cure a breach by National Retail:

> If Landlord shall at any time default beyond the applicable notice and cure period, Tenant shall have the right to cure such default on Landlord's behalf. … **Tenant shall not be entitled to any deduction or offset against any rent otherwise payable to Landlord under this Lease.**

CP 127 § 18.8 (emphasis added). The duty to pay rent continues unabated even if Fitness International's use is disturbed or the facilities are destroyed:

> 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 is not entitled to any rent abatement during or resulting from any disturbance on or partial or total destruction of the Premises.**

CP 120 § 15 (emphasis added). Through these clauses, Fitness International agreed to bear the risk of performance whether or not it could use the Property as it wished. This may well make the Lease "anything but a garden-variety lease," which is why it is not a good set of facts on which to set precedent.

2. The Lease's covenant of quiet enjoyment does not assure against government restrictions on use of the Property.

The parties' specific and perhaps uncommon allocation of risk is also in the Lease's covenant of quiet enjoyment. In this Lease, the covenant does not assure against government orders restricting use of the Property. Two clauses establish this exemption from the covenant. First, the covenant itself is explicitly subject to other provisions in 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** …

CP 132 § 27.2 (emphasis added). Second, the other provisions in the Lease include an explicit requirement to comply with government orders regulating use of the Property:

> **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, …

CP 112 § 9.2 (emphasis added). The Lease's covenant of quiet enjoyment shifts the risk of performance away from National Retail to Fitness International.

3. The Lease allowed Fitness International to pivot to virtually any lawful use.

Finally, the Lease allowed Fitness International to pivot to other uses while the public health orders were in effect. The Lease permissively allows a broad range of activities:

> The 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.

CP 111 § 9.1 (emphasis added). The Lease also lists more than a dozen "ancillary uses." *Id*. If that is not permissive enough, the Lease ultimately allows almost any lawful use that Fitness International can conceive in its reasonable business judgment:

> … **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; ….

Id. (emphasis added).[1] Fitness International had near boundless flexibility to adapt during the pandemic. An obvious and simple business-compatible solution would have been to use the space for online classes. *Id*. The record contains no evidence Fitness International even considered that option.

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[1] The Lease prohibits only eight specific uses: "factory, processing or rendering plant, massage parlor, peep show store, head shop store, topless or strip club, adult book or video store…, or flea market." CP 111 § 9.1.

C. Fitness International's claims arise solely from public health orders issued by state and local governments—and not from any act or omission by National Retail.

The government issued its first public health order on March 16, 2020. CP 203-04. This order restricted public indoor activities for non-essential businesses to prevent the spread of COVID-19. *Id*. Rather than adapt, Fitness International simply closed its doors. CP 229-30. The government lifted the order effective August 9, 2020. *Id*. Despite its self-imposed closure, Fitness International paid rent during this period. CP 230.

The government issued a second public health order effective November 16, 2020. CP 229-30. This time, in addition to closing its doors again, Fitness International sued National Retail. CP 1. To be clear, Fitness International never alleged that any act or omission by National Retail impeded its ability to use the Property as it wished. *See* CP 1-14.

Even so, on November 17, 2020, Fitness International filed a complaint alleging four claims against National Retail: (i) breach of the Lease's covenant of quiet enjoyment;

(ii) breach of an alleged contractual duty to credit rent paid while the public health orders were in effect; (iii) breach of an alleged contractual duty to abate rent while public health orders were in effect; and (iv) declaratory judgment that Fitness International's duty to pay rent was excused by frustration doctrines. CP 1-14. Fitness International also stopped paying rent. CP 15-25.

On January 1, 2021, National Retail answered and counterclaimed for unpaid rent, plus late charges and fees due under the Lease. *Id*.

The government lifted the second public health order on January 10, 2021. CP 229-30. Fitness International resumed paying rent the next month. CP 230.

D. The Trial Court Entered Summary Judgment Based on Settled Law and the Undisputed Material Facts.

On July 16, 2021, National Retail moved for summary judgment on all claims and counterclaims. CP 31-52. The trial court granted the motion. CP 326-28.

On February 14, 2022, after additional motions practice, the trial court entered a final Amended Judgment for unpaid rent, attorney fees, and pre-judgment interest. CP 443.

About a month later, Fitness International paid the judgment in full, CP 449, and appealed. On February 21, 2023, the Court of Appeals, Division I, affirmed in a published opinion. *See Fitness Int'l, LLC v. Nat'l Retail Properties*, LP, __ Wn. App. 2d __, 524 P.3d 1057 (2023).

III. ARGUMENT

Fitness International's argument begins with a dramatic statement that COVID-19 changed the world forever. But the nexus of this case to the pandemic is not, however, sufficient grounds for Supreme Court Review. Fitness International must demonstrate that this case presents at least one of the four grounds for review listed in RAP 13.4. Fitness International cites two of those grounds, but neither supports further review.

A. This Case Does Not Present an Issue of Substantial Public Interest that Merits Review by this Court.

Fitness International first relies on RAP 13.4(b)(4), which supports review only if a case "involves an issue of substantial public interest that should be determined by the Supreme Court." Fitness International characterizes two issues as matters of sufficient public interest. Not so.

1. The doctrine of temporary frustration would not lead to a different result on these facts.

First, Fitness International says this case presents an opportunity to adopt Restatement (Second) of Contracts § 269 (1981) on temporary frustration of purpose.[2] This doctrine suspends performance during a frustration event, but it does not discharge the duty perform or prevent the duty from arising after the frustration has ended, unless performance has become

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[2] Fitness International also refers to Restatements (Second) of Contracts §§ 270 and 272, but it offers no discussion on those two restatements. In briefing to the Court of Appeals, Fitness International cited them only because they are mentioned in the comments to Restatements (Second) of Contracts § 269. They do not provide an independent reason for further review.

materially more burdensome than it would have been absent the frustration. Restatement (Second) of Contracts § 269 (1981).

Whether or not adoption of the doctrine is a good idea, the Court should decline to do so here because its adoption would not lead to a different result. The performance that was frustrated in this case is Fitness International's payment of rent. The purported temporary frustration was the inability to use the Property as Fitness International wished.

The facts material to an application of the temporary frustration doctrine are undisputed. Fitness International paid rent while the first public health order was in effect, so that order did not in fact frustrate its performance. The second order lifted about ten days after National Retail answered this lawsuit, and Fitness International resumed paying rent. The frustration event was completely over just as this litigation got underway. National Retail later obtained a judgment for the rent Fitness International withheld while the second order was in effect. About a month later, Fitness International paid the judgment in

full with interest, so it cannot be said that performance was materially more burdensome after the government lifted the orders. This fact pattern does not make good precedent for the adoption of Restatement (Second) of Contracts § 269.

A better fact pattern would involve frustration of a time-sensitive service or delivery of perishable goods or a change in circumstance that made performance after the frustrate ended materially more burdensome. A better case would be one in which the trial court entered judgment while the frustration was still in effect. The restatement illustrates an appropriate case:

> A contracts with B to build an electric power plant, completion to be within two years, for $10,000,000. Before the commencement of performance, a shortage of materials due to a sudden outbreak of war makes it temporarily impracticable for A to perform. A's duty is suspended until it is no longer impracticable for him to obtain materials, and he is then under a duty to perform with an appropriate extension of time, …

Restatement (Second) of Contracts § 269 (1981) (Illustration 1, citing *Village of Minn. v. Fairbanks, Morse & Co*., 31 N.W.2d

920 (Minn. 1948)). If the Court wants to adopt this restatement, it should wait for a case presenting better facts.

2. The general common law on the doctrines of frustration, impossibility, and impracticability has not changed in ways that require updating Washington law.

Second, Fitness International argues that this case is an opportunity to "update" Washington's law on the doctrines of frustration, impracticability, and impossibility. But it never asserts that the general common law on these doctrines has changed in ways that require an update to Washington law. Fitness International's argument is based solely on the age of some cases cited by the Court of Appeals and the parties—including Fitness International. This Court should not treat the mere passage of time as a reason to treat good law as bad.

Moreover, the cases cited below are not all that old. In analyzing Fitness International's frustration defense, the Court of Appeals primarily relied on cases from 1981, 1989, and 1996 to explain that performance "is not excused unless the purpose is 'substantially frustrated.'" *Fitness Int'l*, 524 P.3d at 1064-65

(2023) (internal citations omitted). In analyzing impracticability and impossibility, the Court of Appeals cited cases from 1978, 2004, and 2020. *Id*. at 1065-66 (internal citations omitted). Also, despite its castigation of Prohibition Era cases, Fitness International itself relied on a case from that era. *Id*. at 1065 ("Fitness International relies on…*Brunswick-Balke-Collender Co. v. Seattle Brewing & Malting Co*., 98 Wash. 12, 14-15, 167 P. 58 (1917)").

Finally, to the extent this Court feels it important for trial courts to have recent binding precedent on these issues, trial courts have it. "Trial courts are bound by published decisions of the Court of Appeals." *Hor v. City of Seattle*, 18 Wn. App. 2d 900, 911, 493 P.3d 151 (2021), *rev. denied*, 198 Wn.2d 1038 (2022). The Court of Appeals published the decision at issue. There is no need to accept review for the sole purpose of updating binding precedent on the doctrines of frustration, impossibility, or impracticability.

B. The Court of Appeals Correctly Applied Settled Rules of Contract Interpretation and Established Standards for Summary Judgment.

Fitness International also cites RAP 13.4(b)(1), which applies only if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; …" Fitness International's argument largely repeats its argument on the merits. The argument was flawed then and remains so today.

1. The Court of Appeals construed the Lease as a whole and gave words their ordinary meaning.

Fitness International first attacks the Court of Appeals' contract interpretation. The Court of Appeals correctly recited this Court's precedent on contract interpretation: "The primary goal is to determine the parties' intent." *Fitness Int'l*, 524 P3d at 1061 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990)). The Court of Appeals determined the parties' intent, as this Court has said, by "focusing on the objective manifestations of the parties in the written contract." *Id*. (citing, *inter alia*, *Hearst Commc'ns Inc. v. Seattle Times Co*., 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). In doing so,

the Court of Appeals explained that courts "generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id*. (citing, *inter alia*, *Hearst*, 154 Wn.2d at 504). Finally, the Court of Appeals recognized that a contract "should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions." *Id*. (citing *Colo. Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007)).

The Court of Appeals correctly applied these settled rules to the specific Lease at issue. Fitness International argues it ignored "the plain language of the Lease" in holding that Fitness International's agreement to comply with government use regulations cannot constitute a breach of National Retail's covenant of quiet enjoyment. (Petition at 23.) Ironically, this argument requires one to ignore the express limitation on the scope the covenant in 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** …

CP 132 § 27.2 (emphasis added). The argument also requires one to ignore other terms in the Lease—namely the provision requiring Fitness International to "comply with all applicable… orders, …regulating the use by Tenant of the Premises, …" CP 112 § 9.2. It is Fitness International's reading of the Lease that conflicts with this Court's precedent—not the Court of Appeals' reading.

Fitness International also argues the Court of Appeals ignored the express covenant of quiet enjoyment in the Lease in favor of a generic implied covenant. (Petition at 24-25.) This argument ignores the Court of Appeals' extensive analysis of the express covenant—section 27.2 of the Lease. Reading the Lease as a whole, the Court of Appeals correctly observed that "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." *Fitness Int'l*, 524 P.3d at 1062. The Court of Appeals then held that adherence to section 9.2 of the Lease "cannot now constitute a breach of quiet enjoyment." *Id*.

The lower court's opinion cites real property treatises primarily in *dicta* addressing to Fitness International's assertion that the "covenant" and "warranty" in section 27.2 refer to different promises. *See id*. at 1062-63. Even there, the analysis begins with a clear statement that the terms of the express covenant in the Lease control: "First, any distinction is immaterial because both terms are subject to other provisions of the [L]ease." *Id*. at 1062. The subsequent *dicta* explaining the difference between a "covenant" and "warranty" merely responds to one of Fitness International's primary arguments. That *dicta* is not a reason for further review by this Court.

2. Summary judgment was appropriate because the Lease is unambiguous and the material facts are undisputed.

Finally, Fitness International misconstrues the summary judgment standard in arguing that a summary disposition was inappropriate here. "The interpretation of an unambiguous contract is a question of law and may be resolved on summary judgment." *Matter of Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983). A contract "term will be deemed ambiguous if it is susceptible to more than one reasonable interpretation." *McLaughlin v. Travelers Commercial Ins. Co*., 196 Wn.2d 631, 642, 476 P.3d 1032 (2020) (quoting *Holden v. Farmers Ins. Co. of Wash.*, 169 Wash.2d 750, 756, 239 P.3d 344 (2010)).

Fitness International contends that the Lease is ambiguous because Fitness International proffered a reasonable alternative interpretation. Fitness International's interpretation was not reasonable because it violates the rule that a contract "should be construed as a whole and, if reasonably possible, in

a way that effectuates all of its provisions." *Colo. Structures*, 161 Wn.2d at 588.

Further, Fitness International has never identified the kind of ambiguity that courts use extrinsic evidence to resolve. Courts may use extrinsic evidence only "'to determine the meaning of **specific words and terms used**" and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Hearst*, 154 Wn.2d at 503 (quoting *Hollis v. Garwall*, Inc., 137 Wn.2d 683, 693, 974 P.2d 836 (1999)) (emphasis in original). The seminal *Berg v. Hudesman* case is instructive. There, the parties disagreed over the meaning of "gross rentals" in a ground lease. *Berg*, 115 Wn.2d at 671-72. The term was undefined in the lease itself. *Id*. at 672. This Court reversed summary judgment and remanded for admission of extrinsic evidence to determine what the parties intended that specific phrase to mean. *Id*. at 679.

Unlike *Berg*, Fitness International has never attributed a different meaning to a specific word or term in the Lease. Instead, Fitness International simply wanted the lower courts to ignore certain terms outright—namely the phrase "subject to other provisions of the Lease" in section 27.2 and the requirement in section 9.2 that Fitness International "promptly shall comply with all…orders…regulating the use" of the Property. CP 112 § 9.2, 132 § 27.2. That has never been a dispute over the meaning of a specific word or phrase. It has been a dispute over whether cross-references and specific words should be honored or ignored.

The trial court was right to resolve this dispute on summary judgment, and the Court of Appeals was right to affirm. The Court should decline to review the matter further.

IV. REQUEST FOR ATTORNEY FEES AND COSTS

National Retail respectfully requests an award of attorney fees and costs in answering Fitness International's petition for review. RAP 18.1(j). "A contractual provision for attorney fees

at trial supports an award of fees on appeal under RAP 18.1." *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 578, 161 P.3d 473, 483 (2007) *rev. denied* 163 Wn.2d 1042 (2008). The Lease entitles the prevailing party to an award of reasonable attorney fees and costs:

> …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.

CP 131 § 25.1. National Retail prevailed in both of the lower courts, and both courts awarded National Retail its fees and costs. *See Fitness Int'l*, 524 P.3d at 1066. This Court should do the same. Should it deny Fitness International's petition, National Retail will file an affidavit in the manner provided in RAP 18.1(d) if the Court awards fees and costs. RAP 18.1(j).

V. CONCLUSION

This case does not present an issue of substantial public interest that merits review by this Court. The facts of this case do not support adoption of the temporary frustration doctrine,

and the general common law on frustration, impossibility, and impracticability has not evolved in ways that require an update to Washington law.

Also, the Court of Appeals' decision does not conflict with this Court's precedent. The Court of Appeals correctly applied settled rules of contract interpretation and established standards for summary judgment in a contract dispute.

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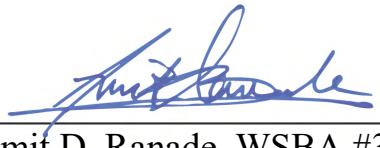
Accordingly, National Retail respectfully requests that this Court deny Fitness International's petition for review and award the reasonable attorney fees and costs National Retail has incurred in this appeal.

This document contains 4,165 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of April, 2023.

SNELL & WILMER L.L.P.

By 

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be delivered via agreed email service and via Washington State Courts' Portal to the following:

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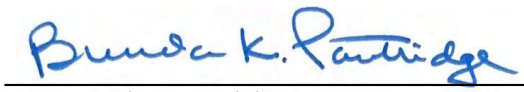
I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 21st day of April, 2023, at Seatac, Washington.



Brenda Partridge

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