

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

<b>LOW T HOLDINGS TEXAS, INC.</b>	§	<b>CIVIL ACTION</b>
	§	
<b>VS.</b>	§	<b>NO. 4:15-cv-00529</b>
	§	
<b>LTF, INC. d/b/a</b>	§	
<b>LIFE TIME FITNESS, INC.</b>	§	

**DEFENDANT LIFE TIME FITNESS, INC.'S  
ORIGINAL ANSWER AND COUNTERCLAIM**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW LIFE TIME FITNESS, INC., Defendant, and makes and files this its Original Answer, and in support thereof respectfully shows as follows:

1. Defendant admits the statements of fact in Paragraph 1 of Plaintiff's Original Petition, but denies that Plaintiff is a Texas business consumer within the meaning of the Texas Deceptive Trade Practices Act.

2. Defendant admits the statements of fact in Paragraph 2 of Plaintiff's Original Petition.

3. Defendant denies the statements of fact and conclusions of law in Paragraph 3 of Plaintiff's Original Petition.

4. Defendant denies the statements of fact and conclusions of law in Paragraph 4 of Plaintiff's Original Petition.

5. Defendant denies the statements of fact and conclusions of law in Paragraph 5 of Plaintiff's Original Petition.

6. Defendant denies the statements of fact and conclusions of law in Paragraph 6 of Plaintiff's Original Petition.

7. Defendant denies the statements of fact and conclusions of law in Paragraph 7 of

Plaintiff's Original Petition.

8. Defendant denies the statements of fact and conclusions of law in Paragraph 8 of Plaintiff's Original Petition.

9. Defendant has insufficient information to admit or deny the allegations contained within Paragraph 9 of Plaintiff's Original Petition and accordingly denies same.

10. Defendant denies the allegations contained within Paragraph 10 of Plaintiff's Original Petition, but admits that Defendant and Plaintiff each saw mutual benefits in embarking upon a contractual relationship.

11. Defendant denies the allegations contained within Paragraph 11 of Plaintiff's Original Petition, but admits that Plaintiff and Defendant entered into a contractual relationship, and that this agreement between the parties speaks for itself as to the terms of the contract.

12. Defendant denies the allegations contained within Paragraph 12 of Plaintiff's Original Petition, but admits that Plaintiff and Defendant entered into a contractual relationship, and that this agreement between the parties speaks for itself as to the terms of the contract.

13. Defendant denies the allegations contained within Paragraph 13 of Plaintiff's Original Petition, but admits that the parties entered into a written agreement.

14. Defendant denies the allegations contained within Paragraph 14 of Plaintiff's Original Petition.

15. Defendant denies the allegations contained within Paragraph 15 of Plaintiff's Original Petition.

16. Defendant denies the allegations contained within Paragraph 16 of Plaintiff's Original Petition, but admits that Plaintiff and Defendant entered into a contractual relationship, and that this agreement between the parties speaks for itself as to the terms of the contract.

17. Defendant denies the allegations contained within Paragraph 17 of Plaintiff's Original Petition.

18. Defendant denies the allegations contained within Paragraph 18 of Plaintiff's Original Petition.

19. Defendant denies the allegations contained within Paragraph 19 of the Plaintiff's Original Petition, but admits that Plaintiff and Defendant entered into a contractual relationship, and that the agreement between the parties speaks for itself as to the terms under which either party may terminate the agreement.

20. Defendant denies the allegations contained within Paragraph 20 of Plaintiff's Original Petition.

21. Defendant denies the allegations contained within Paragraph 21 of Plaintiff's Original Petition.

22. Defendant denies the allegations contained within Paragraph 22 of Plaintiff's Original Petition.

23. Defendant denies the allegations contained within Paragraph 23 of Plaintiff's Original Petition.

24. Defendant denies the allegations contained within Paragraph 24 of Plaintiff's Original Petition.

25. Defendant denies the allegations contained within Paragraph 25 of Plaintiff's Original Petition.

26. Defendant denies the allegations contained within Paragraph 26 of Plaintiff's Original Petition.

27. Defendant denies the allegations contained within Paragraph 27 of Plaintiff's

Original Petition.

28. Defendant denies the allegations contained within Paragraph 28 of the Plaintiff's Original Petition, but admits that Plaintiff is represented by David Moraine of Moraine & Associates, P.L.L.C.

**AFFIRMATIVE DEFENSES**

29. Pleading further, and by way of affirmative defense, Defendant maintains that Plaintiff is not a "consumer" within the meaning of the Deceptive Trade Practices Act, and that the transaction made the basis of this suit is an exempt transaction within the meaning of the Deceptive Trade Practices Act.

30. Pleading further, and by way of affirmative defense, Defendant maintains that pursuant to the contract made the basis of this suit, its liability if any is subject to a limitation of liability clause.

31. Pleading further, and by way of affirmative defense, Defendant maintains that pursuant to the contract made the basis of suit, Minnesota law is to govern this transaction.

32. Pleading further, and by way of affirmative defense, Defendant maintains that a failure of consideration supporting the contract made the basis of suit has occurred, in that Plaintiff failed to make the payments it is contractually required to make to Defendant.

33. Pleading further and by way of affirmative defense, Defendant maintains that Plaintiff has failed to mitigate its damages, if any.

34. Pleading further and by way of affirmative defense, Defendant maintains that Plaintiff's own acts or omissions caused or contributed to any injury to Plaintiff, if any.

35. Pleading further and by way of affirmative defense, Defendant maintains that Plaintiff's suit is merely a breach of contract suit, and thus is not actionable under the DTPA. See, for example, Tony Gullo Motors I, L.P. v. Chapa, 212 S.W. 3d 299, 304 (Tex. 2006).

### COUNTERCLAIM

36. Pleading further, and pursuant to Federal Rule of Civil Procedure 13, Defendant counterclaims against Plaintiff, and in support thereof would show as follows:

37. Plaintiff and Defendant entered into a Media Sponsorship Agreement (“the Agreement”) with the effective date of August 13, 2014. Pursuant to the Agreement, Plaintiff was obligated to pay Defendant the Media Sponsorship Fees specified pursuant to the Fees and Payment Schedule set forth in Exhibit B to the Agreement. This Schedule provided for a set monthly amount due from Plaintiff to Defendant for each Activated Center, and specified an annual minimum fee to be paid by Plaintiff to Defendant as a guarantee. For the year 2014, this Annual Minimum Fee was \$528,000.00, for 2015, the Annual Minimum Fee was \$1,987,200.00; and for 2016, the Annual Minimum Fee was \$2,815,200.00. In addition, per the Agreement Plaintiff agreed to pay Life Time a service fee of 1.5% “of the outstanding balance per month on all overdue accounts until such account is paid in full,” along with “all reasonable attorneys fees and collection costs incurred by Life Time to collect” these amounts.

38. Defendant/Counter Plaintiff Life Time Fitness has performed, and continues to perform, its obligations under the Agreement. However, Plaintiff/Counter Defendant has failed to pay Life Time the amounts due under the contract. For January 2015 through July 2015, that amount (including 1.5% service fees assessed through June and totaling \$25,169.67) comes to \$936,969.67. The remainder owed for 2015 pursuant to the Agreement amounts to \$183,400 per month for each of the months of August, September, October, November, and December, making the total amount owed by Plaintiff/Counter Defendant to Defendant/Counter Plaintiff for 2015 \$1,889,969.67 (including \$25,169.67 in late fees). The minimum owed by Plaintiff/Counter Defendant to Defendant/Counter Plaintiff for 2016 under the Agreement is \$2,815,200.00. Under the Agreement, Plaintiff/Counter Defendant is permitted to terminate the

contract without cause at any time after December 31, 2016. Prior to that date, Plaintiff/Counter Defendant is only allowed to terminate the Agreement for cause in the event that Life Time materially fails to perform or otherwise materially breaches and such material failure or breach is not cured within fifteen (15) calendar days of notice of such breach.

39. A valid, enforceable contract, the Agreement, existed between the parties. Defendant /Counter Plaintiff Life Time Fitness, Inc., is a proper party to sue or counterclaim for breach of this contract. Defendant/Counter Plaintiff Life Time Fitness, Inc. has performed and continued to perform its contractual obligations. However, Plaintiff/Counter Defendant Low T Holdings Texas, Inc. has breached the contract by failing to pay Life Time the amounts it is owed under the contract. As a result of this breach, Defendant/Counter Plaintiff has been injured.

40. Pleading further, and/or in the alternative, Defendant/Counter Plaintiff Life Time Fitness, Inc. asserts a counterclaim based on quantum meruit. Defendant/ Counter Plaintiff provided, and continues to provide, valuable services or materials to Plaintiff/ Counter Defendant pursuant to the Agreement. These services or materials were provided and continue to be provided for Plaintiff/Counter Defendant, and Plaintiff/Counter Defendant has accepted these services or materials. Moreover, Plaintiff/Counter Defendant had reasonable notice that Defendant/Counter Plaintiff expected compensation for providing these services and/or materials. Plaintiff/Counter Defendant has been unjustly enriched by its failure to pay Defendant/Counter Plaintiff for these services and/or materials.

PRAYER

WHEREFORE, premises considered, Defendant prays that Plaintiff take nothing by its cause of action, that Defendant receive judgment on its Counterclaim against Plaintiff, and for such additional relief, in law and in equity, to which it may be justly entitled.

Respectfully submitted,

**PASSMAN & JONES, P.C.**

By: /s/ John G. Browning

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ATTORNEYS FOR DEFENDANT  
LIFE TIME FITNESS, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Defendant's Original Answer and Counterclaim has been forwarded via ECF and/or certified mail, return receipt requested, on this the 11th day of August, 2015 to the following:

David Moraine  
MORAINE & ASSOCIATES, P.L.L.C.  
60 Village Lane, Suite 110  
Colleyville, Texas 76034

/s/ John G. Browning  
John G. Browning