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SHERRI ADELSTEIN  
Denton County District Clerk  
By: Joanna Price, Deputy

CAUSE NUMBER 15-04834-362

LOWT HOLDINGS TEXAS, INC.  
Plaintiff

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IN THE DISTRICT COURT

v.

\_\_\_\_ JUDICIAL DISTRICT

LTF, INC.  
Defendant

DENTON COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW PLAINTIFF, and makes and files this its Original Petition and in support thereof, respectfully shows as follows:

(i) This suit seeks monetary monetary relief over \$200,000 but not more than \$1,000,000, together with all other relief to which Plaintiff may be entitled, and is governed by a Level 2 Discovery Control Plan.

(ii) Defendant is requested to disclose that information required to be disclosed pursuant to Texas Rule of Civil Procedure Rule 194.2 within fifty days of the date of service hereof.

**IDENTITY OF PARTIES AND COUNSEL**

1. Plaintiff LowT Holdings Texas, Inc. is a Delaware chartered corporation doing business in Texas. Plaintiff may be served by and through its attorney of record, David J. Moraine, 950 East Highway 114, Suite 160, Southlake, Texas 76092. Plaintiff is a Texas business consumer with the meaning of the Texas Deceptive Trade Practices Act, and maintains a place of business in this county at 4300 Windsor Centre Trail Suite 100 Flower Mound, Texas.

2. Defendant LTF, Inc. a/k/a Life Time Fitness, Inc. is a foreign corporation doing business in Texas under the assumed name Life Time Fitness, and has registered with the Texas Secretary of State and has been assigned Texas SOS File Number 0013516506, and is Texas taxpayer number xxxxxxxx7464. All references herein to LTF, Inc. refer to Life Time Fitness, Inc. d/b/a Life Time Fitness. Defendant maintains a registered agent for service of process in this state, to wit: National Registered Agents, Inc., 1999 Bryan St., Suite 900, Dallas, Texas 75201 and may be served with process at such address.

### **LONG ARM JURISDICTION**

3. Texas has jurisdiction over the parties to this suit, and this court has subject matter jurisdiction over the claims made the basis of this suit. This Court further has jurisdiction under the Texas long-arm statute. This is because the defendant engages in business in this state and the causes of action asserted herein arise from business done in this state and this county. Defendant committed torts, in whole or in part, in this state. Defendant further directs its marketing and advertising to this state for the purpose of soliciting business in this state. Defendant contracts with Texas residents and performance of the contracts was to occur and did occur in this state. Defendants are parties to agreements, and the agreements were to be performed in Texas.

4. Texas has specific jurisdiction over the defendant because there is a substantial connection between Defendant's contacts with this state and the operative facts of this litigation. Defendant employed and contracted Texas residents in this state in connection with Defendants' business in this state. Defendants are parties to agreements made the basis of this suit, and the agreements were to be performed in Texas.

5. Defendants have purposefully availed themselves of the privilege of conducting business in this state.

6. The assumption of jurisdiction by the court over the defendants does not offend traditional notions of fair play and substantial justice, and does not deprive Defendant of due process as guaranteed by the Constitution of the United States.

#### **JURISDICTION AND VENUE**

7. This Court has personal jurisdiction over the parties, and subject matter jurisdiction. This Court is a Court of proper venue because a substantial portion of the acts and omissions made the basis of this petition occurred in this county, and the contracts and agreements by and between the parties required performance in this county. Defendant further maintains a principal place of business in this state where the decision makers for the organization within this state conduct the daily affairs of the organization, at 3100 Churchill Drive, Denton County (Flower Mound) Texas, and at 3419 Trinity Mills Road, Denton County, (Dallas) Texas. The contract at issue in this litigation was to be performed in substantial part at 3100 Churchill Drive in Denton County, Texas and 3419 Trinity Mills Road in Denton County, Texas.

#### **FACTS**

8. Plaintiff is a business consumer in this state as defined by Texas Business and Commerce Code §17.45(4).

9. Plaintiff is the leading national MSO providing men's testosterone replacement therapy (TRT). The patients seen in the facilities operated by Plaintiff lead lifestyles centered on health, fitness, and quality of life. Recognizing the dramatic health and wellness benefits

afforded to patients receiving regular, physician-directed, TRT (hereafter, "Treatment"), Lifetime Fitness, Inc. (Lifetime) has intermittently attempted to enter the Treatment space, through relationships with other groups, as well as through its own "in-house" treatment centers. Largely, these efforts by Lifetime have been unsuccessful. Consequently, Lifetime sought to enter into a relationship with Plaintiff.

10. During 2014, Lifetime sought out and interviewed several institutional providers of TRT for the purpose of expanding its member service offerings. After meeting with several groups, Lifetime approached Plaintiff and expressed a desire to enter into a cooperative arrangement to extend these critical health services to Lifetime members in an effort to enhance the Lifetime brand, and provide it a competitive value-add in the fiercely competitive health and fitness club marketplace. Over the course of several meetings, Lifetime rolled out its proposed program, which was represented to include a multi-faceted approach to developing member awareness initiatives, and patient education processes. Each of these were designed to enhance the members' total Lifetime experience, commitment to the club, as well as extending and promoting Plaintiff as the "exclusive" Lifetime affiliated provider of Treatment. Plaintiff relied on the representations of Lifetime, and sought to enhance its patient base, and facilitate increased exposure of health-minded individuals to the benefits of TRT.

11. Lifetime represented and warranted that in exchange for the payment of a sliding scale fee, Lifetime would provide to Plaintiff exclusive affiliation, exclusive advertising and educational space within each club in this county (and others), a program of personal development and trainer outreach, comprehensive media reach for patient education (which included print, television, and narrowcast programs,) and would issue various press releases

announcing the relationship and new initiatives that would be available to Lifetime members.

12. Lifetime further sought to use Plaintiff's facilities in this county as a distribution point for promotional club literature and membership information, as well as a distribution point for promotional "trial membership" cards. Lifetime represented that it would work with its professional training staff, and incorporate education regarding the Treatment into its member education and training programs, and through the affiliation, Plaintiff would realize increased patient draw, and a segway into new markets.

13. The parties entered into a written agreement which provided that Lifetime would be responsible for meeting certain performance targets. Lifetime failed to meet those targets, even after several instances of written notice, in person meetings, and executive problem solving sessions. Although Plaintiff was awarded the Best Business Collaboration award by Lifetime in early 2015, the deficiencies of Lifetime have persisted since at least October 2014. Lifetime has been advised on multiple occasions of its material breaches of the parties' agreement. Plaintiff has attempted to work with Lifetime in good faith, and has met with Lifetime and its leadership team throughout 2015 in an effort to convince Lifetime to honor its commitments and perform under the agreement. Lifetime has consistently failed to comply.

14. On October 8, 2015, Lifetime was notified by Plaintiff's President that its performance was deficient and it was not meeting expectations. When Lifetime refused to comply with its initial representations regarding cooperative media, Plaintiff wrote, "this release is far from what you guys pitched in the meeting, as you know this was a critical piece for us doing the deal. This sounds like I am buying media space . . . if that's our deal I want to renegotiate the price . . . " Lifetime assured Plaintiff that the relationship was intact, that Plaintiff

was not merely buying media space, and it intended to honor the terms of the deal as presented. However, contrary to its representations, after securing the agreement, Lifetime consciously and intentionally chose to "water back" its actual performance under the agreement. Rather than terminate the agreement with Plaintiff, and refund the monies paid, Lifetime concealed its true intentions, and continued to fraudulently induce Plaintiff to make payments, for benefits it knew it was not providing and had no intention of providing. For instance, Lifetime knowingly and intentionally failed to activate clubs on time. It failed to perform under its media sponsorship commitments and spot run rates. It failed to display banners and other promotional material required under the agreement in the Denton County, Texas clubs, and in other clubs.

15. Although it had "sold" Plaintiff exclusivity, it knowingly and intentionally accepted competitors' advertisements and posted them in the various clubs, including but not limited to the clubs located in Denton County, Texas. Lifetime failed to complete design and implementation of the Member Advantage Program on time, ruining the promotional synergy that it had represented and warranted to Plaintiff would be created through a series of press releases and member education programs. And, it embarked on a series of "member education" programs focused not on TRT as represented, but falsely representing to members that through the consumption of advertised nutritional supplements, members could achieve the same benefits as the Treatment, without incurring the costs of Treatment. Even today, Lifetime is actively attempting to "sell" its members ineffective, non-medical, over-the-counter "testosterone supplements" on its websites, telling its members ". . . before resorting to TRT, we'd recommend acting on all the nutrition, exercise and lifestyle choices that help optimize testosterone . . . There are also dozens of testosterone-boosting supplements on the market . . ." In short, while

collecting from and charging monies to Plaintiff under the guise of it being a "Best Business," Lifetime was misleading Plaintiff, the public, and its members, and actively working against Plaintiff's interests, all the while representing to Plaintiff that it was not.

16. Lifetime's agreement states that Lifetime "shall not grant any advertising, promotion, sponsorship, or sponsorship rights to any TRT or BHRT product . . . Such products . . . competitive to [Plaintiff] include . . . all testosterone and hormone treatment companies . . . any testosterone . . . supplements, or testosterone boosters . . . " Despite Lifetime's obligations in the agreement, it continues to market, advertise and promote testosterone supplements and boosters competitive to Plaintiff. For instance, Lifetime provides advertising for a product called LibidoStim-M from competitor Designs for Health. Lifetime told and continues to this day to tell its members and the general public that "LibidoStim-M™ is designed to naturally increase testosterone levels, men with metabolic syndrome may expect to see improvements in their health and observe less signs of aging from regular use of LibidoStim-M™." These acts are directly in violation of Lifetime's agreement with Plaintiff.

17. In addition, Lifetime has allowed numerous TRT and/or BHRT providers to advertise in its clubs, and has collected fees and become enriched from doing so, all in violation of its exclusivity obligation. Some examples of these include advertisements from Harmony Medica, Alpha Male Clinic, Dynamic Health Solutions, and several others, all of which were permitted to advertise competitive products and/or services in Lifetime fitness clubs after the date of the agreement, in violation of the agreement. While accepting these advertisements and being paid for them, Lifetime continued to mislead Plaintiff, failed to disclose that it was not honoring its exclusivity agreements, and failed to disclose that it was promoting competing

advertisements, in violation of its duties to Plaintiff.

18. In addition to the above, Lifetime's continuing failures include, but are not limited to: (i) Failure to make introductions between Center Directors and Lifetime General Managers in each market as required by the agreement; (ii) failure to hold the meeting with Lifetime's Corporate Wellness division as required by the agreement, (iii) failure to hold the meeting with Lifetime's Benefits Department as required by the agreement, (iv) failure to create and implement the Member Advantage Program within an acceptable time frame, and failure to schedule the initial meeting regarding same within 30 days as required by the agreement, (v) failure to adhere to media production dates and schedules, and failure to run media in clubs at the rates and intervals specified in the agreement, (vi) hiding or otherwise incorrectly placing banners in some clubs, and taking down or refusing to display banners in other clubs, and (vii) other material breaches as set forth herein.

19. The parties' agreement states, "Either party shall have the right to terminate this Agreement at any time if the other party materially fails to perform or observe any of its obligations hereunder, or otherwise materially breaches any representation or warranty hereunder and such material failure or breach is not cured within fifteen (15) calendar days of notice of such breach by the non-breaching party. Plaintiff has consistently reminded Lifetime of its multiple failures to perform since October 8, 2014, and Lifetime has consistently failed and refused to bring its organization into compliance with the requirements of the agreement, consistently partially performing, performing late, or failing to perform at all. Plaintiff canceled the agreement effective October 31, 2014.

20. Following several attempts to reach a resolution of issues, on June 9, 2015



Plaintiff served Lifetime with notice and demand for the monies paid pursuant to the canceled agreement. Lifetime refused to comply.

**BREACH OF CONTRACT**

21. Plaintiff sues Defendant for breach of contract. Plaintiff is entitled to restitution of all amounts paid pursuant to the contract. Plaintiff avers that beginning in September 2014, Lifetime materially and substantially breached the express terms of the written contract without justification or excuse.

**FRAUDULENT INDUCEMENT AND EQUITABLE RESTITUTION**

22. Plaintiff sues Defendant for fraudulent inducement, and shows that Lifetime falsely represented material facts to Plaintiff for the purpose of inducing Plaintiff to enter into a relationship which it otherwise would not have entered. Defendant utilized its fraud to obtain the payment of monies from Plaintiff. Plaintiff demanded restitution of the monies paid, and Defendant refused to restitute the proceeds of its fraud. Plaintiff seeks disgorgement and restitution consistent with the principles of equity. Defendant has been wrongfully enriched by the retention of the monies misappropriated from Plaintiff.

**VIOLATIONS OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT**

23. On June 9, 2015 Defendant was served with a written demand for restitution, which it failed to honor. Defendants' conduct as described herein violates to the Texas Deceptive Trade Practices Act, and is further unconscionable and constitutes a false, misleading or deceptive act or practice in Texas. Defendants, with knowledge and intent, and in violation of Tex. Bus. & Com. Code § 17.46(b):

Represented that goods or services have characteristics, benefits, or quantities that they do not have;

- Falsely represented that goods or services are of a particular standard, quality, or grade;
- Represented that an agreement confers or involves rights, remedies, or obligations that it does not have or involve; and
- Failed to disclose information concerning goods or services that was known at the time of the transaction if the failure to disclose was intended to induce the consumer into a transaction the consumer would not have entered into had the information been disclosed.

24. Plaintiff now sues for recovery of all economic damages, together with statutory and treble damages, and shows that the conduct of Defendants was intentional, criminal, and unconscionable. Plaintiff further pleads for recovery of its reasonable and necessary attorneys fees incurred herewith.

**BREACH OF EXPRESS WARRANTY BY AFFIRMATION**

25. Plaintiff further shows that Defendant:

- a. Made an affirmation of fact or promise relating to goods and services offered to the Plaintiff, particularly as same related to locations, timing of services, and offerings;
- b. The affirmation of fact or promise became a part of the basis of the bargain;
- c. The goods and services sold by the Defendant failed to comply with the promises or affirmations of fact made to the Plaintiff.

26. Plaintiff was harmed, and the failure to comply was a proximate cause of the harm. All conditions precedent have been performed or have occurred. Plaintiff now sues for recovery of all legally recoverable damages incurred as a direct and proximate cause of the breach by Defendant.

**MONEY HAD AND RECEIVED**

27. Plaintiff further shows that each of the Defendants received and is in possession of money or other property that rightfully belongs to Plaintiff in that it is money and property obtained from Plaintiff as the proceeds of Defendant's inequitable conduct described herein. It would be unconscionable for Defendant to retain Plaintiff's money and property, and Plaintiff sues for recovery of said monies and property.

**ATTORNEY FEES**

28. Plaintiffs have been forced to retain David Moraine, of Moraine & Associates, P.L.L.C. to bring this action to protect the rights of Plaintiff. Plaintiff seeks recovery of its reasonable attorneys fees and expenses incurred herein pursuant to the Texas Deceptive Trade Practices Act, and Chapter 38 of the Texas Civil Practice and Remedies Code.

**PRAYER:**


**WHEREFORE, PREMISES CONSIDERED,** Plaintiff prays that Defendant be cited to appear and answer, and that upon final trial, Plaintiff have judgment against Defendant for:

- a. Damages within the jurisdictional limits of the Court;
- b. Statutory and enhanced damages in an amount determined by the trier of fact, subject to the limitations pleaded herein;
- c. Restitution and recovery of monies and property as pleaded for herein, subject to the limitations pleaded herein;
- d. All costs of suit including reasonable attorney's fees; and

Such other and further relief to which Plaintiff may be justly entitled including but not limited to pre-judgment and post-judgment interest as allowed by law.

Respectfully Submitted,

**The Moraine Firm**



by DAVID J. MORAINÉ, J.D., M.A., LL.M.

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