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 8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 9 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

10 FITNESS INTERNATIONAL, LLC, a
 California limited liability company,
 11
 Plaintiff,
 12
 vs.
 13 NBCUNIVERSAL CAHUENGA, LLC, a
 Delaware limited liability company;
 14 DOES 1 through 10, inclusive,
 15
 Defendants

Case No. **21STCV00075**
COMPLAINT FOR:
 1. **BREACH OF WRITTEN CONTRACT**
 2. **COMMON COUNT – MONEY HAD AND RECEIVED**
 3. **COMMON COUNT – MONEY PAID BY MISTAKE**
 4. **DECLARATORY RELIEF**
DEMAND FOR JURY TRIAL

17
 18 Plaintiff, Fitness International, LLC for its Complaint alleges against
 19 Defendant, NBCUniversal Cahuenga, LLC, as follows:

20 **INTRODUCTION**

21 1. The government-mandated stay-at-home orders and non-essential
 22 business closures in connection with the 2019 Novel Coronavirus Disease (“COVID-
 23 19”) pandemic have had an unanticipated and catastrophic impact on the economy,
 24 the full extent of which remains unknown.

25 2. Plaintiff Fitness International, LLC (“Tenant”), a nationwide operator of
 26 health clubs and fitness centers, including in California, is among the many
 27 businesses that have been materially and negatively impacted by the government-
 28 mandated closures due to COVID-19. Indeed, due to the nature of COVID-19 and the

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1 perceived manner in which it is spread, health clubs and fitness centers were
2 included in the first closure orders in California and have been among the last
3 permitted to reopen under phased reopening orders, subject to specific guidelines and
4 restrictions. All indoor clubs in California remain closed due to the government-
5 mandated closures.

6 3. Tenant leases premises for the operation of its health club and fitness
7 center located in the Universal City neighborhood of Los Angeles, California, from
8 Defendant NBCUniversal Cahuenga, LLC.

9 4. As set forth below, Tenant is prohibited from using the Universal City
10 premises as a result of certain closure orders by state and government officials due to
11 COVID-19, and the landlord's own breach of the parties' lease.

12 5. During the periods of the government-mandated closures, the essential
13 purpose of the parties' lease is frustrated and Tenant does not receive the benefit of
14 its bargain. Tenant's performance is rendered temporarily impossible and
15 impracticable because Tenant is prohibited from using the Premises and Tenant did
16 not generate any revenue from the Premises, as membership dues/fees/monetary
17 payments were frozen. Tenant has dutifully and consistently paid its rent timely for
18 over 150 consecutive months, in the total amount of nearly Fifteen Million Dollars
19 (\$15,000,000), as part of a once cooperative and fruitful relationship with its
20 landlord. Nevertheless, and in contravention of the lease and the legal principles
21 applicable to the circumstances, NBCUniversal Cahuenga, LLC demands Tenant pay
22 full rent.

23 6. Tenant thus brings this claim for breach of written contract and
24 equitable claims. Tenant also seeks a declaration as to its rights under the lease,
25 either based upon the lease or based upon applicable law as applied to the facts.

26 **PARTIES**

27 7. Tenant, Fitness International, LLC, formerly known as L.A. Fitness
28 International, LLC, is a party to the lease at issue in the present action.

1 14. Pursuant to the Lease, Tenant leased the Premises for the operation of a
2 health club and fitness facility. *Lease, §§1.5, 1.9, 1.17, and 8.1.*

3 15. In consideration for Tenant entering into the Lease and as an
4 inducement for Tenant to lease the Premises, Landlord made representations,
5 warranties and covenants in the Lease and Landlord expressly acknowledged that (i)
6 each such representation, warranty and covenant is material to Tenant and is being
7 relied upon by Tenant in entering into the Lease and (ii) each such representation,
8 warranty and covenant shall survive the execution and delivery of the Lease by
9 Tenant and Landlord. *Lease, §§2.1 and 2.2.*

10 16. In the Lease, Landlord represented, agreed, and covenanted that
11 Tenant would have exclusive control and use of the Premises. *Lease, §§1.9 and 2.1.*

12 17. In the Lease, Landlord represented, agreed, and covenanted to Tenant
13 that the Premises which it pledged to demise and deliver to Tenant were free and
14 clear of conditions and restrictions which might in any manner or to any extent
15 prevent or adversely affect the use of the Premises. *Lease, §2.2.*

16 18. In the Lease, Landlord represented, agreed, and covenanted that
17 Tenant shall have, throughout the entire term of the Lease, peaceful and quiet
18 possession and enjoyment of the Premises. *Lease, §22.1.*

19 19. In the Lease, Landlord represented, agreed, and covenanted that
20 Tenant shall quietly enjoy the Premises for the entire term of the Lease without any
21 hindrance or interruption. *Lease, §22.1.*

22 20. Pursuant to the Lease, if either party is delayed or hindered in or
23 prevented from the performance of any act required under the Lease because of
24 lockouts, inability to procure labor, restrictive laws, other casualty or other reason of
25 a similar or dissimilar nature beyond the reasonable control of the party delayed (a
26 “Force Majeure Event”), performance of such act shall be excused for the period of
27 delay caused by the Force Majeure Event. *Lease, §22.3.*

28 ///

1 21. Pursuant to the Lease, among other things, in consideration and
2 exchange for Landlord’s delivery of the Premises to Tenant, Tenant’s use of the
3 Premises and Tenant’s peaceful and quiet possession and enjoyment of the Premises,
4 Tenant is to pay base monthly rent in equal monthly installments and its share of
5 common area expenses, taxes and insurance (collectively, the “Rent”). *Lease, §1.7 and*
6 *Article V.*

7 22. The Lease is construed in accordance with the laws of the State of
8 California. *Lease, §22.14.*

9 23. On or about May 25, 2006, Tenant and Landlord’s predecessor-in-
10 interest Cahuenga Investors, LLC entered into an agreement titled “First
11 Amendment To Retail Lease.”

12 24. On or about December 10, 2014, Tenant and Landlord entered into an
13 agreement titled “Second Amendment To Retail Lease.”

14 The 2019 Novel Coronavirus Disease And Its Effect

15 25. On March 11, 2020, the World Health Organization declared the 2019
16 Novel Coronavirus Disease (“COVID-19”) to be a global pandemic (the “COVID-19
17 Pandemic”). A week earlier, on March 4, 2020, California Governor Gavin Newsom
18 proclaimed a State of Emergency because of the threat of COVID-19.

19 26. On March 12, 2020, California Governor Gavin Newsom issued a
20 statewide directive known as the Safer at Home order: “All residents are to heed any
21 orders and guidance of state and local public health officials, including but not
22 limited to the imposition of social distancing measures, to control the spread of
23 COVID-19.”

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

27 28. The federal government’s National Emergency Declaration was followed
28 on March 19, 2020, by Governor Gavin Newsom’s issuance of Executive Order N-33-

1 20, directing that all individuals in California follow the State Public Health Officer's
2 Stay-at-Home order requiring all residents to stay at home, with certain exceptions,
3 and directing all non-essential businesses, including gyms and fitness centers, to
4 immediately cease operating to prevent further spread of COVID-19.

5 29. Tenant ceased operating its business from the Premises on March 17,
6 2020 due to the government-mandated closure. Pursuant to government phased re-
7 opening orders, Tenant was briefly permitted to re-open its business from the
8 Premises from June 12 until July 13, 2020, but since that time has again been
9 prohibited from operating its business from the Premises as a result of additional
10 government-mandated closure orders.

11 30. Although Tenant was briefly permitted to once again operate its
12 business from the premises, the government imposed material restrictions on
13 Tenant's use and occupancy of the premises during such time.

14 31. The government-mandated closure orders for gyms and fitness centers
15 remain in effect for the Universal City location as of the filing of this action.

16 Landlord's Actions In Reaction To The COVID-19 Pandemic And Closures

17 32. For separate periods, from (a) March 17, 2020 to June 11, 2020 and (b)
18 from July 14, 2020, to the present, Tenant has been prohibited from using the
19 Premises due to the government-mandated closure orders (the periods of closure are
20 referred to herein as the "Closure Periods"). But for the brief four-week period,
21 Tenant has been prohibited from operating its business from the Premises for nearly
22 nine (9) months.

23 33. On or about June 26, 2020, Landlord and Tenant entered into a letter
24 agreement (the "Letter Agreement") wherein Landlord deferred one-hundred percent
25 (100%) of the Modified Gross Rent that was allegedly due for May 2020 and June
26 2020 to a date no later than November 1, 2020, with Tenant reserving all rights and
27 remedies with regard to such deferred Rent. Tenant paid such deferred Rent in
28 September 2020.

1 34. Although Tenant was briefly permitted to re-open its business from the
2 Premises during the periods of June 12 to July 13, 2020, the government imposed
3 many restrictions on Tenant’s operations, including, without limitation, a capacity on
4 occupancy of only fifty percent (50%) at all times of operation during the June 12 to
5 July 13 period and Tenant anticipates the cap on occupancy being decreased to ten
6 percent (10%) when Tenant is permitted to re-open, as has been the case in other
7 counties in California (the “On-Going Restrictions”).

8 35. State and local government officials, including the County of Los
9 Angeles Department of Public Health, have indicated that when Tenant is again
10 permitted to operate its business from the Premises, it will be subject to the On-
11 Going Restrictions.

12 36. The government-mandated closures resulting from the COVID-19
13 Pandemic are unanticipated events, completely out of the control of Tenant, and
14 catastrophic in result.

15 37. Pursuant to the Lease, if either party is delayed or hindered in or
16 prevented from the performance of any act required under the Lease because of
17 lockouts, inability to procure labor, restrictive laws, other casualty or other reason of
18 a similar or dissimilar nature beyond the reasonable control of the party delayed (a
19 “Force Majeure Event”), performance of such act shall be excused for the period of
20 delay caused by the Force Majeure Event. During the Closure Periods, the Force
21 Majeure Event of the government orders prevented Tenant from operating its
22 business from the Premises and Tenant timely placed Landlord on notice of such a
23 Force Majeure Event. Further, the cause of the delay, hindrance or prevention could
24 not be cured by the payment of money, as there is no amount of money that could
25 have been paid to eliminate the Force Majeure Event. Even if Tenant had paid Rent
26 during the government-mandated closures, the underlying problem would not have
27 been solved—the government closures would still be in effect and Tenant would still
28 not have been able to operate its business from the Premises. *Lease*, §22.3.

1 38. By operation of California law, specifically California Civil Code
2 §1511(1), the performance of an obligation, or any delay in performance is excused
3 when the performance or delay is prevented by operation of law. The government-
4 mandated closures qualify as an operation of law under California Civil Code
5 §1511(1), so Tenant is excused from performance.

6 39. By operation of California law, specifically California Civil Code
7 §1511(2), the performance of an obligation, or any delay in performance is excused
8 when the performance or delay is prevented or delayed “by an irresistible,
9 superhuman cause.” The government shutdowns resulting from the COVID-19
10 pandemic operates as an irresistible, superhuman cause such that Tenant is excused
11 from its performance obligations under the Lease.

12 40. Tenant’s obligations under the Lease, including the payment of Rent,
13 during the Closure Periods are legally excused and Tenant is entitled to
14 proportionately abate Rent during the period of time Tenant’s operations are subject
15 to the On-Going Restrictions, by virtue and application of California Civil Code
16 §§1511(1) and 1511(2).

17 41. The essential purpose of the Lease and, in turn, the totality of the
18 bargain that Tenant is to receive under and through the Lease, is to allow Tenant to
19 use the Premises to operate a full-service health club and fitness center for Tenant’s
20 members and invitees. As Tenant has been prohibited from using the Premises by
21 the government mandates, the purpose of the Lease is frustrated.

22 42. During the Closure Periods, Tenant is prohibited from using the
23 Premises, rendering performance under the Lease temporarily impossible.

24 43. During the Closure Periods, performance under the Lease is
25 impracticable because Tenant is prohibited from using the Premises and Tenant did
26 not generate any revenue from the Premises, as membership dues, fees, and/or
27 monetary payments were frozen.

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1 44. As represented and warranted to Tenant by Landlord in the Lease,
2 Tenant is to have, at all times, full, quiet and peaceful possession and enjoyment of
3 the Premises. During the Closure Periods, Tenant did not have full, quiet and
4 peaceful possession and enjoyment of the Premises as covenanted and warranted by
5 Landlord. As a result, Landlord breached its covenants and warranties and therefore
6 breached the Lease, thereby excusing any obligation to pay Rent.

7 45. During the Closure Periods, Landlord did not deliver the Premises to
8 Tenant for its use and enjoyment and Tenant was not legally permitted to operate its
9 business from the Premises.

10 46. Landlord's compliance with its representations, warranties and
11 covenants in the Lease is a condition precedent to Tenant's obligation to pay Rent.

12 47. Landlord's delivery of use and enjoyment of the Premises to Tenant to
13 enable it to be open for business and conduct its business at the Premises is a
14 condition precedent to Tenant's obligation to pay Rent.

15 48. Tenant's ability to use the Premises and operate its business from the
16 Premises is a condition precedent to its obligation to pay Rent.

17 49. As the Lease is an installment agreement, Landlord's obligation to
18 deliver the Premises was constant, consistent, repetitive, and repeatable each and
19 every month of the Lease.

20 50. During the Closure Periods, Tenant did not generate any revenue as it
21 has not collected any dues/fees/monetary payments from its members.

22 51. To date, the government-mandated closures due to the COVID-19
23 Pandemic led to the filing for protection under the U.S. Bankruptcy Code by at least
24 four other national gym and fitness centers, Gold's Gym International, Inc., 24 Hour
25 Fitness Worldwide, Inc., Town Sports International, and YouFit Health Clubs, LLC,
26 because, upon information and belief, the essential purpose of their various leases
27 has been frustrated and/or circumstances have made it temporarily impossible and/or
28 impracticable to operate its business from the premises and to generate revenue

1 under the closures and on-going restrictions enacted by various governmental
2 entities.

3 52. Although Tenant placed Landlord on notice that Tenant’s obligation to
4 pay Rent during the Closure Periods was excused and/or abated, equitably or
5 otherwise due to the government-mandated closures resulting from COVID-19, and
6 offered an extension of the lease term in proportion to the length of government
7 mandated closure, Landlord demanded that Tenant pay Rent in full (the “Demand”).
8 Tenant and Landlord subsequently entered into the Letter Agreement, wherein Rent
9 allegedly due for May and June was deferred to September 2020, with Tenant
10 reserving all right and remedies to such deferred rent, waiving none.

11 53. Tenant paid Rent in March 2020. As a result of the closures, Tenant is
12 entitled to a credit, in the amount of \$51,254.43, for Rent it paid for the period of
13 March 17 through March 31, 2020 when it was not permitted to use the Premises.

14 54. In each of April 2020 and May 2020, Tenant paid Rent in the amount of
15 \$105,925.82, reserving all rights. As Tenant was not permitted to operate from the
16 Premises for the entirety of April and May 2020, Tenant is due reimbursement of
17 \$211,851.64, i.e., all Rent paid for these two months.

18 55. In June 2020, Tenant paid Rent in the amount of \$105,925.82, reserving
19 all rights. As Tenant was not permitted to operate from the premises from June 1
20 through June 11, 2020, Tenant only owed Rent for the period June 12 through June
21 30, 2020. Because Tenant was permitted only to operate at 50% capacity during the
22 June 12 to 30 period, the Rent owed is 50% of the monthly amount of \$105,925.82
23 (i.e., \$52,962.91), prorated to the 19 days in June that Tenant was permitted to
24 operate (i.e. \$33,543.18). As Tenant paid \$105,925.82 in June 2020, Tenant is due the
25 amount of \$72,382.64 for the month of June 2020 (i.e., the \$105,925.82 paid by
26 Tenant, less the \$33,543.18 Tenant should have paid).

27 56. For July 2020, Tenant paid Rent in the amount of \$105,925.82, as
28 Tenant was permitted to operate from the Premises as of July 1, 2020; however, (i) as

1 Tenant was not permitted to operate from the Premises after July 13th, Tenant only
2 owed Rent for the period July 1 through July 13, 2020 and (ii) because Tenant was
3 permitted only to operate at 50% capacity during the July 1 to 13 period, the Rent
4 owed is 50% of the monthly amount paid by Tenant (i.e., 50% of the \$105,925.82,
5 which is \$52,962.91), prorated to the 13 days in July that Tenant was permitted to
6 operate. Therefore, the amount of \$22,210.25 is due for the month of July. As Tenant
7 paid \$105,925.82 in July 2020, Tenant is due the amount of \$83,715.57 for the month
8 of July 2020 (i.e., the \$105,925.82 paid by Tenant, less the \$22,210.25 Tenant should
9 have paid).

10 57. Tenant paid Rent for each of August and September 2020, reserving all
11 rights, in the amount of \$107,366.17, for a total of \$214,732.34. As Tenant was not
12 permitted to operate from the Premises for these months, Tenant is due the
13 \$214,732.34 paid.

14 58. Accordingly, as described in paragraphs 53 through 57 Tenant is due
15 the amount of \$633,936.62 from Landlord.

16 59. Tenant is excused from paying and/or permitted to abate Rent due
17 during the Closure Periods, and also is permitted to proportionately abate Rent
18 during any time period in which Tenant's operations are subject to the On-Going
19 Restrictions.

20 60. An indicium of the parties' meeting of the minds concerning their intent
21 to excuse Tenant from paying Rent and/or to allow Tenant to abate Rent when
22 Tenant is unable to use the Premises is evidenced by Article XV of the Lease which
23 provides that if Tenant's business is materially and adversely interfered with as a
24 result of any casualty and the Lease is not terminated, Tenant's obligation to pay
25 Rent is abated from the date of the casualty and does not resume until the date on
26 which Tenant resumes use of the Premises. *See Lease, §15.2.*

27 61. A further indicium of the parties' meeting of the minds that when
28 Tenant is unable to use the Premises it does not have to pay Rent is evidenced by

1 Article XVI of the Lease which provides that if all or any portion of the Premises is
2 taken and the Lease does not terminate, Tenant’s obligations for Rent and any other
3 amounts owing from Tenant to Landlord under the Lease shall be equitably abated
4 following the taking based upon the extent of the interference with the operation of
5 Tenant’s business from the Premises. *See Lease, §16.1.*

6 62. In issuing the Demand and refusing to comply with the provisions in the
7 Lease concerning Tenant’s use of the Premises, full quiet enjoyment and possession
8 of the Premises, and delays caused by Force Majeure Events, Landlord breached the
9 Lease and otherwise failed to engage in the good faith and fair dealing conduct that
10 Landlord must employ in dealing with Tenant, its contracting counterpart.

11 63. In failing to (a) deliver the use and enjoyment of the Premises as a
12 health club and fitness center, (b) allow Tenant full, quiet and peaceful possession
13 and enjoyment of the Premises, (c) provide a credit to Tenant for Rent paid during
14 the Closure Periods, (d) excuse Tenant from payment of Rent during the Closure
15 Periods, and (e) proportionately abate Rent during the time period in which Tenant’s
16 operations are subject to the On-Going Restrictions, Landlord has breached the
17 Lease.

18 64. In issuing the Demand and refusing to comply with the provisions in the
19 Lease, Tenant was denied the rental credits to which it was entitled and has had to
20 incur costs and expenses, including attorneys’ fees, in responding to the Demand and
21 the improper, unfounded, inequitable, and draconian positions taken by Landlord.

22 65. Tenant reserves the right to plead further orally upon trial of this
23 matter.

24 **FIRST CAUSE OF ACTION**

25 **(Breach of Written Contract as against all Defendants)**

26 **Breach of the Lease – Breach of Landlord’s Representations, Warranties, and**
27 **Covenants**

28 66. Tenant realleges and incorporates by reference the foregoing

1 paragraphs as though fully set forth herein.

2 67. The Lease constitutes a valid and enforceable contract between Tenant
3 and Landlord.

4 68. Landlord is in breach of the representations, warranties and covenants
5 by Landlord to Tenant in the Lease, including those that provide (a) Tenant shall
6 have the right throughout the term of the Lease to use the Premises, or any portion
7 thereof, and operate its business from the Premises, (b) Tenant shall have exclusive
8 use and control of the Premises, (c) Tenant shall have and hold, throughout the
9 entire term of the Lease, peaceful and quiet possession and enjoyment of the
10 Premises, and (d) Tenant's use of the Premises shall be free and clear of any
11 conditions or restrictions which might in any manner or to any extent prevent or
12 adversely affect the use of the Premises by Tenant.

13 69. Despite notice of its breach of the Lease, Landlord has failed to cure its
14 breach of the Lease.

15 70. Tenant has fulfilled any and all conditions precedent to commencing
16 this action against Landlord.

17 71. As a direct and proximate result of Landlord's breaches of the Lease,
18 Tenant has incurred, and will continue to incur, injury and damages in the principal
19 amount of at least \$633,936.62 through the date of this filing.

20 72. Pursuant to the Lease, Tenant is entitled to its costs and reasonable
21 attorneys' fees related to Landlord's breaches of the Lease. *Lease, §22.7.*

22 73. In addition, pursuant to the Lease, Plaintiff is entitled to interest on the
23 amounts due and owing from Defendant at the per annum rate of interest equal to
24 the lesser of (1) three percent (3%) over the then most recent prime or reference rate
25 of interest being charged by Bank of America N.A. or (2) the maximum rate
26 permitted by applicable law. *See Lease, §1.13.*

27 Breach of the Lease-Failure to Provide Credit

28 74. Tenant realleges and incorporates by reference the foregoing

1 paragraphs as though fully set forth herein.

2 75. Landlord is in breach of the Lease for failing to provide a credit to
3 Tenant for Rent paid during the Closure Periods.

4 76. Despite notice of its breach of the Lease, Landlord has failed to cure its
5 breach of the Lease.

6 77. Tenant has fulfilled any and all conditions precedent to commencing
7 this action against Landlord.

8 78. Tenant has made repeated requests to Landlord to allow it a credit for
9 Rent paid during the Closure Periods in accordance with the Lease including,
10 without limitation, due to the Force Majeure Event, and California law, including,
11 without limitation, California Civil Code, §§1511(1) and 1511(2), and under the
12 circumstances, but Landlord has refused to allow the credit.

13 79. As a direct and proximate result of Landlord's failure to allow Tenant a
14 credit for Rent paid during the Closure Periods, in breach of the Lease, Tenant has
15 been damaged in the principal amount of at least \$633,936.62 through the date of
16 this filing.

17 80. Pursuant to the Lease, Tenant is entitled to its costs and reasonable
18 attorneys' fees related to Landlord's breaches of the Lease. *Lease, §22.7.*

19 81. In addition, pursuant to the Lease, Plaintiff is entitled to interest on the
20 amounts due and owing from Defendant at the per annum rate of interest equal to
21 the lesser of (1) three percent (3%) over the then most recent prime or reference rate
22 of interest being charged by Bank of America N.A. or (2) the maximum rate
23 permitted by applicable law. *See Lease, §1.13.*

24 Breach of the Lease-Failure to Abate Rent

25 82. Tenant realleges and incorporates by reference the foregoing
26 paragraphs as though fully set forth herein.

27 83. Landlord is in breach of the Lease for demanding Rent and late fees
28 during the Closure Periods, and not proportionately abating Rent during the time

1 period the On-Going Restrictions are in effect.

2 84. Despite notice of its breach of the Lease, Landlord has failed to cure its
3 breach of the Lease.

4 85. Tenant has fulfilled any and all conditions precedent to commencing
5 this action against Landlord.

6 86. Tenant has made repeated requests to Landlord to excuse its obligation
7 to pay Rent during the Closure Periods in accordance with the Lease including,
8 without limitation, due to the Force Majeure Event, and California law, including,
9 without limitation, California Civil Code, §§1511(1) and 1511(2), and under the
10 circumstances, but Landlord has refused to excuse Tenant from payment of Rent
11 during the Closure Periods.

12 87. As a direct and proximate result of Landlord's failure to (i) excuse
13 payment of Rent during the Closure Periods, and (ii) proportionately abate Rent
14 during the time period the On-Going Restrictions are in place, and Landlord's
15 breaches of the Lease, Tenant has incurred, and will continue to incur, injury and
16 damages in the principal amount of at least \$633,936.62 through the date of this
17 filing.

18 88. Pursuant to the Lease, Tenant is entitled to its costs and reasonable
19 attorneys' fees related to Landlord's breaches of the Lease. *Lease, §22.7.*

20 89. In addition, pursuant to the Lease, Plaintiff is entitled to interest on the
21 amounts due and owing from Defendant at the per annum rate of interest equal to
22 the lesser of (1) three percent (3%) over the then most recent prime or reference rate
23 of interest being charged by Bank of America N.A. or (2) the maximum rate
24 permitted by applicable law. *See Lease, §1.13.*

25 **SECOND CAUSE OF ACTION**

26 **(Common Count – Monies Had and Received As Against All Defendants)**

27 90. Tenant realleges and incorporates by reference the foregoing
28 paragraphs as though fully set forth herein.

1 Closure Periods.

2 112. A justiciable controversy exists with respect to whether Rent during the
3 period of time Tenant is subject to the On-Going Restrictions is proportionately
4 abated (*e.g.*, if 10% capacity, Rent is reduced to 10%, which is (\$10,592.58/month).

5 113. Accordingly, Tenant seeks a declaratory judgment that:

6 (a) Tenant has no obligation to pay Rent to Landlord during the
7 Closure Periods;

8 (b) Landlord is required to excuse Tenant's performance under the
9 Lease during the Closure Periods due to the Force Majeure Event of the
10 government-mandated closures;

11 (c) Landlord is required to excuse Tenant's performance under the
12 Lease during the Closure Periods by operation of California law, including,
13 without limitation, California Civil Code §1511(1) and (2);

14 (d) Landlord is required to excuse Tenant's performance under the
15 Lease because the parties' intent and purpose in entering the Lease is
16 frustrated during the Closure Periods;

17 (e) Landlord is required to excuse Tenant's performance under the
18 Lease because performance was impracticable during the Closure Periods;

19 (f) Landlord is required to excuse Tenant's performance under the
20 Lease because performance was temporarily impossible during the Closure
21 Periods;

22 (g) Landlord is required to return to Tenant all monies paid by
23 Tenant to Landlord during the Closure Periods;

24 (h) Rent during the period of time Tenant is subject to the On-Going
25 Restrictions is proportionately abated (*e.g.*, if 10% capacity, Rent is reduced to
26 10%);

27 (i) Tenant may recover its costs and reasonable attorneys' fees;

28 (j) Tenant may recover interest at the rate set forth in the Lease;

1 and

2 (k) Tenant may recover such other relief deemed just and reasonable.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Tenant, Fitness International, LLC, prays for entry of
5 judgment in its favor and against defendants as follows:

6 On the First Cause of Action for Breach of Written Contract:

7 (a) Damages in an amount to be determined at trial, but at least \$633,936.62,
8 plus interest;

9 (b) Lost Profits;

10 (c) Tenant’s attorney’s fees, costs and disbursements incurred herein; and (d)

11 Such other relief deemed just and reasonable.

12 On the Second Cause of Action for Common Count – Money Had And Received

13 (a) Damages in an amount to be determined at trial, but at least \$633,936.62,
14 plus interest;

15 (b) Tenant’s attorney’s fees, costs and disbursements incurred herein; and

16 (c) Such other relief deemed just and reasonable.

17 On the Third Cause of Action for Common Count – Money Paid By Mistake

18 (a) Damages in an amount to be determined at trial, but at least \$633,936.62,
19 plus interest;

20 (b) Tenant’s attorney’s fees, costs and disbursements incurred herein; and

21 (c) Such other relief deemed just and reasonable.

22 On the Fourth Cause of Action for Common Count – Declaratory Relief

23 (a) Damages in an amount to be determined at trial, but at least \$633,936.62,
24 plus interest;

25 (b) Tenant’s attorney’s fees, costs and disbursements incurred herein; and

26 (c) Such other relief deemed just and reasonable.

27 Tenant also seeks a judicial declaration that:

28 (d) Tenant has no obligation to pay Rent to Landlord during the Closure

1 Periods;

2 (e) Landlord is required to excuse Tenant’s performance under the Lease
3 during the Closure Periods due to the Force Majeure Event of the government-
4 mandated closures;

5 (f) Landlord is required to excuse Tenant’s performance under the Lease
6 during the Closure Periods by operation of California law, including California Civil
7 Code §§1511(1) and 1511(2);

8 (g) Landlord is required to excuse Tenant’s performance under the Lease
9 because the parties’ intent and purpose in entering the Lease is frustrated during the
10 Closure Periods;

11 (h) Landlord is required to excuse Tenant’s performance under the Lease
12 because performance was impracticable during the Closure Periods;

13 (i) Landlord is required to excuse Tenant’s performance under the Lease
14 because performance was temporarily impossible during the Closure Periods;

15 (j) Landlord is required to return to Tenant all monies paid by Tenant to
16 Landlord during the Closure Periods;

17 (k) Rent during the period of time Tenant is subject to the On-Going
18 Restrictions is proportionately abated (e.g., if 10% capacity, Rent is reduced to 10%);

19 (l) Tenant may recover its costs and reasonable attorneys’ fees;

20 (m) Tenant may recover interest at the rate set forth in the Lease;

21 (n) The length of the current term at the current rental rate is extended by the
22 length of the Closure Period;

23 (o) To the extent the Court determines Landlord is owed any portion of Rent,
24 Tenant be given time to perform; and

25 (p) Tenant may recover such other relief deemed just and reasonable.

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Date: January 1, 2021

LEVATOLAW, LLP



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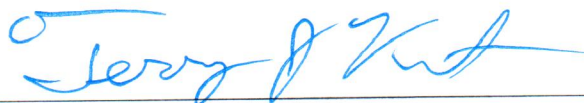
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury for all issues triable by jury in the above-entitled action.

Date: January 1, 2021

LEVATOLAW, LLP



TERRY J. KENT
Attorneys for Plaintiff
FITNESS INTERNATIONAL. LLC