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**SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH**

**UTAH DIVISION OF CONSUMER
PROTECTION,**

Plaintiff,

v.

PERFORMAX GYMS, INC., a Utah
corporation; and **BAILEY NOLAN HALL**

Defendants.

**VERIFIED COMPLAINT FOR
INJUNCTION AND OTHER RELIEF**

DISCOVERY TIER 3

Case No.

Judge:

Plaintiff, the Division of Consumer Protection (Division or DCP), acting through statutory authority, hereby commences a civil action against Performax Gyms, Inc. and Bailey Hall, and for its Verified Complaint for Permanent Injunction alleges as follows:

SUMMARY

This action involves the closure of the Performax gym in Clearfield, Utah. The gym closed abruptly without notice to the Division or to its members. Hundreds of Utah consumers who purchased gym memberships from Performax have been left with no services; services for which they had paid. To add insult to injury, Performax and other entities controlled by Bailey Hall continue to bill Utah consumers for services, even after the gym's closure. Performax's website continues to offer gym memberships for sale without informing consumers that the facility has been closed, the property has been foreclosed and a creditor is in the process of repossessing its gym equipment. Despite the Division's attempts to obtain records from Defendants, they have not provided important documents to the Division.

JURISDICTION AND VENUE

1. The Division brings this action under Utah Code Ann. § 13-2-1(2) (authorizing Division to administer and enforce the Utah Consumer Sales Practices Act ("CSPA") and the Health Spa Services Protection Act ("HSSPA"); § 13-11-17 (authorizing the enforcing authority to bring a judicial action to enforce the provisions of § 13-11-1 et seq); § 13-11-7(1)(a) (authorizing enforcing authority to enforce CSPA); § 13-11-16(3) (authorizing Division to file action to enforce subpoena compliance); § 13-23-7 (authorizing the Division to file an action to enforce the provisions of the HSSPA and the rules promulgated thereunder); and Rule 65A of the Utah Rules of Civil Procedure (injunctions).
2. Jurisdiction over the subject matter of the claims for adjudication in this complaint is

conferred by the above-referenced statutes.

3. Personal jurisdiction and venue are proper in this Court because the causes of action arose in Davis County, Utah. *Id.* § 78B-3-307.

PLAINTIFF

4. The Division is a state agency within the Department of Commerce of the State of Utah. *Id.* § 13-2-1 et seq. The Division is charged with protecting the public, Utah Code Ann. §§ 13-1-1, 13-11-2(4), and is authorized to take action necessary to protect the public, § 13-2-5(6). The Division is also authorized to issue administrative citations, to issue cease and desist orders, and to impose fines for violations of the CSPA and HSSPA or rules promulgated thereunder; to serve the citations by mail, enter defaults, seek civil enforcement of agency orders, and recover attorney fees. *Id.* §§ 13-2-6(1), -(3)(a), (e); 13-11-17(4)(a); 13-11-17.5; 13-23-7; 63G-4-201(1), -(2); 63G-4-209; 63G-6-501. The Division is also authorized to issue subpoenas and administer rules to enforce the laws administered by the Division. *Id.* § 13-2-5(1).

DEFENDANTS

5. Performax Gyms, Inc. (“Performax”) is a Utah corporation established in April 2005 with its principal place of business in Davis County, Utah. Performax is a registered Health Spa facility as defined by the HSSPA administered by the Division.
6. Bailey Nolan Hall (“Hall”) is a resident of Davis County, Utah. Hall is the principal of Performax. Hall is also the domain registrant, administrator and technical contact for Performax’s website.

STATUTORY AUTHORITY

7. The CSPA prohibits deceptive acts or practices by a supplier in connection with a consumer transaction. *Id.* §13-11-4. The CSPA also prohibits unconscionable acts or practices. *Id.* § 13-11-5; *see also* UTAH ADMIN CODE R152-11-1 through -13 (rules governing CSPA).
8. The HSSPA requires the registration with the Division of health spas, gyms, health clubs or any other facility that offers services or facilities to assist patrons to improve their physical condition or appearance through enumerated services. UTAH CODE ANN. § 13-23-5. The HSSPA establish procedures that govern covered facilities when they close or cease operation. UTAH ADMIN CODE R152-23-7 (procedure when facility closes).
9. Personal liability attaches to violations of the CSPA. *Id.* §§ 13-11-3(6) (defining “supplier” under CSPA as a person who solicits, engages in or enforces consumer transactions).

FACTS

10. Performax is a gym registered with the Division operating in Davis County, Utah.
11. As of September 29, 2015, Performax reported to the Division that it had 1,722 active contracts.
12. In or about April 2016, eviction proceedings were filed against Performax and others, Case No. 160700378 in Utah Second District Court, Davis County by AMRA Enterprise, LLC, the property owner where the gym is located.
13. In or about April 2016, a Performax creditor, Continental Bank, commenced legal

proceedings based upon Performax's failure to make payments on a loan secured by gym equipment located at the Performax facility. *Continental Bank v. Performax Gyms, Inc. et al.*, Case No. 160700343, Utah Second District Court, Davis County.

14. On or about June 16, 2016, the Court in Performax's eviction proceeding issued a Writ of Execution, ordering Performax to vacate the premises.
15. On or about June 24, 2016, Performax abruptly ceased operations.
16. On or about July 1, 2016, the Continental Bank in Performax's loan default case filed a motion for a Writ of Replevin in which the bank sought Court approval to seize exercise equipment in the gym. The Writ of Replevin issued on July 1, 2016 and was made permanent on July 19, 2016.
17. Upon information and belief, Performax owes approximately \$429,922.11 in unpaid rent for the gym's premises.
18. Performax has ceased operations for a period exceeding ten consecutive business days.
19. Prior to cessation of operations, Performax did not notify the Division of its intent to cease operations.
20. Performax maintained a page on the social media site Facebook, www.facebook.com/performax gyms. Performax also maintained a website, <http://www.performaxgyms.com>.¹
21. In response to a consumer inquiry, a Division investigator reviewed Performax's Facebook page on June 28, 2016. That page reflected that Performax had closed on June

¹ This page has since been taken down from the Internet.

- 24, 2016 and that law enforcement officers had been present during the closure.
22. A post reviewed by the Division's investigator indicated that:
- The best way to cancel is through me alex@performaxgyms.com... Please write on the subject line your full name and last name and best number to reach you... I will take care of every single one of you. Don't bother calling National [Fitness] I will resolve every issue if the Third Party Processor releases the money... We have requested an "EMERGENCY HEARING" with the courts... Let's keep our faith above all...
23. Additional posts reviewed by the Division investigator reflect that consumers requested to cancel their membership, receive a refund and/or to stop continued billing for gym memberships.
24. On July 7, 2016, the Division investigator reviewed Performax's website and observed that the website continued to offer gym memberships for sale, despite the gym's closure.
25. Utilizing a prepaid credit card and an alias, the Division investigator entered into an online purchase of a Performax gym membership.
26. The Division investigator received a confirmation email from Performax and the charge was completed and fully processed on July 9, 2016. The charge for the purchase of the gym membership was reflected as "Performax Gyms Inc. 801-825-7629, UT 90561704."
27. Under the terms of the contract entered into between the Division investigator and Performax, cancellation with a 3-day right of rescission period was to be done by physically delivering or sending a written notice of cancellation by certified mail to the gym's physical address.

28. At the time the contract was entered into, the gym was closed, an eviction proceeding had been commenced, and mail was not being delivered to the premises.
29. The Division investigator issued a subpoena to Performax and Hall requesting the production of gym membership records, including contact information, contracts and billing information for each active member as of June 1, 2016. The subpoena requested the records be delivered within 30 days.
30. To date, the Division has received no response and no records from Performax or Hall.
31. On July 27, 2016, the Division sent a cease and desist letter to Performax and Hall, advising them that it was unlawful to, among other things:
 - * Fail to adhere to provisions of the *Health Spa Services Protection Act* and Administrative Rules;
 - * Fail to respond to the subpoena;
 - * Bill consumer's membership dues after the gym's closure on June 24, 2016; and
 - * Enter into new membership contracts online after the gym's closure on June 24, 2016.
32. To date, no response has been received to the cease and desist letter.
33. As a consequence of Defendants' failure to respond to the subpoena and comply with Utah law, the Division is unable to calculate restitution to consumers, analyze contracts and contact all affected consumers.
34. To date, the Division has received approximately 198 consumer complaints related to Performax gym memberships.
35. Consumers complain that Performax is continuing to bill monthly membership

dues, personal training services, and semi-annual membership fees, even after the gym closed in June 2016.

36. Upon information and belief, Performax owes thousands of Utah consumers prorated refunds for untendered services and full refunds for billing that has occurred after June 24, 2016.
37. According to the information contained in the consumer complaints received by the Division, Performax has profited an estimated \$85,273.44 per month from billing that occurred after the gym's closure.
38. Consumer losses are ongoing. Every day Performax and Hall receive funds for consumer services that are not rendered.
39. Consumers are beginning to receive collection notices from Defendants and others acting in concert with them for gym membership services that are not being provided. Consumers fear that their credit may be adversely affected by these notices.
40. Violations of the HSSPA and CSPA are ongoing. Thousands of consumers are being defrauded for services that are not being provided.

FIRST CAUSE OF ACTION

(Failure to Provide Services)

41. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
42. Defendants, and each of them, have violated Utah Code Ann. § 13-11-4(2)(1) by

knowingly or intentionally failing to furnish services after receipt of payment for services.

43. These acts constitute deceptive acts and practices under the CSPA.

SECOND CAUSE OF ACTION

(Misrepresentations Regarding Services Provided)

44. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
45. Defendants, and each of them, represent, either directly or indirectly, expressly or by implication that they will provide gym memberships to consumers.
46. In truth and fact, defendants were unable to provide gym memberships and failed to disclose to current and prospective consumers that the gym was the subject of a writ of eviction and that the gym equipment was subject to a writ of replevin.
47. Despite the fact that the gym was closed, defendants knowingly or intentionally have continued to bill consumers for fees for services that they are not providing.
48. These acts constitute a deceptive act or practice by Defendants under Utah Code Ann. § 13-11-4(1).

THIRD CAUSE OF ACTION

(Unconscionable Act or Practice)

49. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
50. Defendants, and each of them, represent, either directly or indirectly, expressly or by implication that they will provide gym memberships to consumers.

51. In truth and fact, defendants were unable to provide gym memberships and failed to disclose to current and prospective consumers that the gym was the subject of a writ of eviction and that the gym equipment was subject to a writ of replevin.
52. Despite the fact that the gym was closed, defendants knew or had reason to know that Defendants have continued to bill consumers for fees for services that they are not providing.
53. These acts or practices are unconscionable and violate Utah Code Ann. § 13-11-5.

FOURTH CAUSE OF ACTION

(Failure to Notify the Division of Closure)

54. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
55. On or about June 24, 2016, Defendants closed the facility registered with the Division.
56. Defendants failed to notify the Division that the registered Performax gym had ceased operation and failed to offer an alternative location within five miles in violation of Utah Code Ann. § 13-23-5(7).

FIFTH CAUSE OF ACTION

(Failure to Notify Consumers, Refund Consumer Fees, and Provide Contracts)

57. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
58. The Performax gym facility ceased operation on or about June 24, 2016.
59. Defendants have violated Rule R152-23-7 (1) by failing to immediately refund the unused

portion of all fees, including the proration of any fees paid up front.

60. Defendants have violated Rule R152-23-7 (2) by failing to provide the Division with a copy of each consumer contract that was valid on the date of closure within ten business days.
61. Defendants have violated Rule R152-23-7 (6) by failing to notify consumers of the closure in writing and set forth what action the facility plans to take in regards to transfers, cancellations or refunds.

SIXTH CAUSE OF ACTION

(Continuing to Offer or Sell Contracts within 45 days of Closure)

62. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
63. Defendants have violated R153-23-7 (7) by offering, selling, attempting to sell, soliciting the sale of, or become a party to any new contracts to provide services within 45 days of the anticipated date of closure.

SEVENTH CAUSE OF ACTION

(Subpoena Enforcement)

64. The Division realleges and incorporates by reference the allegations set forth in paragraphs 1 through 40 above.
65. The Division issued a valid subpoena on July 1, 2016 pursuant to its enforcement authority found in Utah Code Ann. §13-11-16(1).
66. Defendants have failed to provide the documents and records requested in the subpoena

and have failed to respond in any way to the Division's subpoena request.

67. This Court has the authority to enforce the Division's subpoena pursuant to Utah Code Ann. § 13-11-16 (3) which provides: "Upon a failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the court for an order compelling compliance."
68. Defendants, and each of them, have failed to obey a subpoena without lawful excuse.
69. This Court has the authority to enforce the Division's subpoena pursuant to Utah Code Ann. § 78B-6-313 which provides:
 1. If a person, officer, referee, arbitrator, board, or committee with the authority to compel the attendance of witnesses or the production of documents issues a subpoena and the person to whom the subpoena is issued refuses to appear or produce the documents ordered, the person shall be considered in contempt;
 2. The person, officer, referee, arbitrator, board, or committee may report the person to whom the subpoena is issued to the judge of the district court. The court may then issue a warrant of attachment or order to show cause to compel the person's appearance.
 3. When a person charged has been brought up or appeared, the person's contempt may be purged in the same manner as contempts mentioned in this part.

PRAYER FOR RELIEF

WHEREFORE, the Division, pursuant to Utah Code Ann. §§ 13-11-17, 13-11a-4, 13-23-7 and 78B-6-313 and the Court's own equitable powers, requests that the Court:

1. Award the Division such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of continued consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including, but not limited to, temporary restraining order, a preliminary injunction, an order freezing assets and a prohibition against destruction of

documents;

2. Enter an order requiring Defendants to comply with the subpoena issued by the Division on July 1, 2016;
3. Enter an order of permanent injunction to prevent future violations by Defendants of the Consumer Sales Practices Act and the Health Spa Services Protection Act;
4. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the Consumer Sales Practices Act and the Health Spa Services Protection Act, including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and disgorgement of ill-gotten monies;
5. Award the Division the costs of bringing this action, attorney's fees as well as such other and additional relief that the Court may determine to be just and proper.

SEAN D. REYES
UTAH ATTORNEY GENERAL



Thomas M. Melton
Jennifer R. Korb
Assistant Attorneys General

VERIFICATION

I, Elizabeth Blaylock, having been first duly sworn upon oath hereby state that I have read the foregoing Complaint and verify that, to the best of my knowledge, information and belief based upon an inquiry reasonable under the circumstances, the contents thereof are true and correct and well supported in law and fact.

Dated this 11th day of August 2016.



Elizabeth Blaylock, Investigator
Division of Consumer Protection

SALT LAKE COUNTY)
 ss.
STATE OF UTAH)

SUBSCRIBED and sworn to before me this 11th day of August, 2016.



Notary Public
Salt Lake City, Utah
Commission expires 9/19/2016