

No. _____

THE STATE OF TEXAS,
Plaintiff

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IN THE DISTRICT COURT OF

V.

TRAVIS COUNTY, TEXAS

BALLY TOTAL FITNESS
CORPORATION
Defendant

_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff the STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbott, (“Plaintiff” or “The State”) complains of BALLY TOTAL FITNESS CORPORATION (“Defendant” or “Bally”) and for cause of action would respectfully show the Court the following:

I. DISCOVERY CONTROL PLAN

1.1 The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. P. 190.3.

II. JURISDICTION

2.1 This action is brought by Attorney General Greg Abbott, through his Consumer Protection Division in the name of the State of Texas and in the public interest under the authority granted to him by TEXAS DECEPTIVE TRADE PRACTICES–CONSUMER PROTECTION ACT, TEX. BUS. & COM. CODE § 17.41 *et seq.* (Vernon 2002 & Supp. 2009)(“DTPA”) upon the grounds that Defendant has engaged in false, misleading and deceptive acts and practices in the conduct of trade and commerce as defined and declared unlawful by § 17.46(a) of the DTPA. This action is also brought pursuant to § 392.403 of the TEX. FIN. CODE, and § 702.552 of the Texas Health Spa Act, TEX.OCC.CODE § 702.001 *et seq.*

III.

DEFENDANT AND SERVICE

3.1 Defendant is a foreign corporation doing business in the State of Texas. The Defendant may be served with process by serving its registered agent, CT Corporation System, at 350 N. St. Paul Street, Suite 2900, Dallas, TX 75201-4234.

IV.

VENUE

4.1 Pursuant to § 702.552(b) of the Texas Health Spa Act, venue of this suit lies in Austin, Travis County, Texas.

V.

PUBLIC INTEREST

5.1 Because Plaintiff has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff believes that Defendant has caused, and will cause adverse effects to legitimate business enterprise(s) which conduct trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

VI.

TRADE AND COMMERCE

6.1 Defendant has engaged in trade and commerce as that term is defined by § 17.45(6) of the DTPA.

VII.

ACTS OF AGENTS

- 7.1 Whenever in this Petition it is alleged that Defendant did any act, it is meant that:
- a. Defendant performed or participated in the act; or
 - b. Defendant's officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

VIII.

STATEMENT OF FACTS

8.1 Defendant operates twenty-four (24) health spas in and around the Dallas, Houston, and San Antonio, Texas areas. Consumers who want to use a Bally Total Fitness Club in Texas can become members by entering directly into a "month-to-month" membership, known as the "Easy Monthly Payment Membership," or by entering into a contractual agreement (which normally has a term of at least one year) that can be paid on a monthly basis. Consumers who have completed their contractual agreement can continue to pay and use Defendant's Clubs on a "month-to-month" basis.

8.2 Between the Summer 2009 and March 2010, Bally sent thousands of "past due" notices to Texas consumers who did not owe Defendant any money.

8.3 The "past due" notices Bally sent represented to consumers that they owed Bally a past due amount from the previous month (or from several previous months), as well as an additional amount for the current month. In truth and in fact, most of the recipients of these notices were former Bally members who had cancelled their membership and no longer had a financial obligation to Bally.

8.4 In these “past due” notices Bally represented to consumers that failure to pay “past due” amounts may cause Bally to submit a negative credit report to credit reporting agencies, which could result in a negative entry on the consumer’s credit report.

8.5 These “past due” notices also represented that the recipient could contact Defendant to make an inquiry about the “past due” notice by calling 1-866-402-2559. However, a customer attempting to contact Defendant at this number would reach an automated telephone menu with options for making a payment, hearing available offers, enrolling in or updating electronic funds transfer services, inquiring about cancellation, and hearing Bally’s mailing address. None of these options are relevant to the notice described above, and the menu offers no option to speak with a live customer service representative.

8.6 One consumer who filed a complaint about Bally’s “past due” notice was able to navigate the automated phone system and eventually speak with a representative. This consumer’s complaint reports that Bally’s customer service representative told the consumer that the “past due” notice was actually an attempt by the Defendant to convince former customers to become members of Bally’s Clubs again. Another complaint from a different former Bally’s customer who contacted the Defendant via e-mail regarding a “past due” notice they received was told that the notice was “a renewal offer.” This complaint, attached hereto as Exhibit A, includes a copy of the “past due” notice and e-mail correspondence between Bally and the consumer.

8.7 The fact that these “past due” notices were actually marketing letters was not disclosed in the original documents. Furthermore, these marketing letters failed to include disclosures required in all health spa advertisements in Texas.

8.8 On information and belief, it is estimated that approximately ten percent of the 11,000

Texas consumers who received these notices in the Summer 2009 made payments to Bally after receiving these “past due” notices.

IX.

VIOLATIONS OF TEXAS DECEPTIVE TRADE PRACTICES ACT

9.1 The State incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

9.2 Defendant, as alleged and detailed above, has in the course of trade and commerce engaged in false, misleading and deceptive acts and practices as declared unlawful in § 17.46(a) of the DTPA;

9.3 Defendant, as alleged and detailed above, has in the course of trade and commerce violated § 17.46(b)(5) of the DTPA by representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; and

9.4 Defendant, as alleged and detailed above, has in the course of trade and commerce violated § 17.46(b)(12) of the DTPA by representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

X.

VIOLATIONS OF CHAPTER 392 OF TEXAS FINANCE CODE

10.1 The State incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

10.2. Defendant, as alleged and detailed above, has violated Chapter 392 of the Texas Finance Code by engaging in the following behavior:

- a. misrepresenting the character, extent, or amount of a consumer debt;
- b. representing falsely the status or nature of the services rendered by the debt collector;
- c. using any other false representation or deceptive means to collect a debt; and
- d. threatening to take an action prohibited by law.

10.3 Pursuant to Section 392.404 of the Texas Finance Code, a violation of Chapter 392 is a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code, and is actionable under that subchapter.

XI.

VIOLATIONS OF THE TEXAS HEALTH SPA ACT

11.1 The State incorporates and adopts by reference the allegations contained in each and every preceding paragraph of this petition.

11.2 Defendant, as alleged and detailed above, has violated Chapter 702.404 of the Texas Health Spa Act.

11.3 Pursuant to Section 702.403 of the Texas Health Spa Act, a violation of Chapter 702 is a deceptive trade practice under Subchapter E, Chapter 17, TEX. BUS. & COMM. CODE.

XII.

TRIAL BY JURY

12.1 Plaintiff herein requests a jury trial and will tender the jury fee to the Travis County District Clerk's office pursuant to Texas Rules of Civil Procedure 216 and Texas Government Code § 51.604.

XIII.

PRAYER

13.1 WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendant be cited according to law to appear and answer herein; that a TEMPORARY INJUNCTION be issued against Defendant and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendant, its agents, servants, employees, and representatives from making the following representations and doing the following acts and engaging in the following practices in the pursuit and conduct of trade or commerce within the State of Texas as follows:

- a. Sending correspondence to consumers which represents that they owe money to Defendant when in fact the consumers have no financial obligation to the Defendant;
- b. Falsely representing to consumers that amounts are “past due;”
- c. Falsely representing to consumers that that they have a financial obligation to Defendant;
- d. Proceeding with any collection action against any customer and/or former customer unless the customer in fact has an unpaid financial obligation to the Defendant;
- e. Submitting a negative credit report to any of the credit bureaus for any of the Defendant’s customers unless the customer in fact has an unpaid financial obligation to the Defendant;
- f. Threatening to submit an adverse credit report when Defendant’s records reflect that a consumer in fact owes Defendant no money; and

- g. Representing to a customer and/or former customer that he or she owes a debt to the Defendant when in fact no debt is owed.

13.2 Plaintiff further requests, that upon final hearing, this Court will order Defendant:

- a. To pay civil penalties of up to \$20,000.00 per violation for each and every violation of the DTPA as authorized by TEX. BUS. & COM CODE § 17.47(c)(1);
- b. To restore all money or other property acquired by means of unlawful acts or practices, or in the alternative, to compensate identifiable persons for actual damages;
- c. To pay civil penalties up to \$1,000.00 per violation not to exceed a total of \$25,000.00 for violations of the Health Spa Act (TEX. OCC. CODE § 702.553); and
- d. To pay all costs of Court, costs of investigation, and reasonable attorney's fees pursuant to TEX. GOVT. CODE ANN. § 402.006(c).

13.3 Plaintiff further prays for post-judgment interest and such other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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