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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRYAN HARPER et al., Plaintiffs and Appellants, v. 24 HOUR FITNESS, INC., Defendant and Respondent.	B243322 (Los Angeles County Super. Ct. No. BC245746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant Deason, Judge. Affirmed.

Law Offices of Stephen Glick, Stephen Glick; Daniels, Fine, Israel, Schonbuch & Lebovits, Paul R. Fine, Scott A. Brooks; Law Offices of Ian Herzog, Ian Herzog, and Evan D. Marshall, for Plaintiffs and Appellants, Bryan Harper and Mark Salzwedel.

Carlson & Nicholas, Richard A. McDonald; Horgan, Rosen, Beckham and Coren; Caldwell, Leslie & Proctor, Robyn C. Crowther, Albert Giang and Kelly L. Perigoe, for Defendant and Respondent, 24 Hour Fitness, Inc.

Bryan Harper and Mark Salzwedel, on behalf of themselves and a class of similarly situated individuals who had entered into prepaid membership contracts with 24 Hour Fitness, Inc., sued 24 Hour Fitness for unfair competition and false advertising under Business and Professions Code sections 17200 and 17500 (UCL),[1] alleging, in part, the form enrollment contracts at issue were likely to mislead or deceive a reasonable consumer. After 13 years of litigation, including multiple appellate proceedings, the trial court entered judgment in favor of 24 Hour Fitness following a bench trial, ruling Harper and Salzwedel had failed to prove it was probable a significant portion of the targeted consumers, acting reasonably in the circumstances, would be misled by the enrollment agreement. Applying the requisite deferential standard of review to the trial court's factual findings, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dispute Regarding the Length of the Renewal Term; the Class Action Complaint*

24 Hour Fitness operates workout and health club facilities throughout California. From 1996 until 2000 24 Hour Fitness offered memberships to use its facilities under a form contract that authorized a prepaid membership with a guaranteed renewal rate, the V.9.96 contract. Harper and Salzwedel became 24 Hour Fitness members during this period and entered into prepaid, multi-year V.9.96 contracts for the "Keep Fit Plus" plan.

Each V.9.96 contract contained blank spaces on the front page for the 24 Hour Fitness sales counselor to insert the amount of the prepaid dues, the beginning and ending dates of the current prepaid membership period and the amount and due date for the "Next Prepaid Dues" to renew the membership agreement. The contract did not, however, expressly state the length of the renewal period—the focal point of the parties' dispute.

Harper and Salzwedel contend the renewal term was three years, the same length as their initial membership terms; 24 Hour Fitness maintains the form contract provided

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[1] Statutory references are to the Business and Professions Code unless otherwise indicated.

for annual renewals only. Harper and Salzwedel's interpretation is primarily based on the specification of the "Prepaid Period [Months]" as 36 in the membership section of the form contract; the failure to indicate the amount owing for "Next Prepaid Dues" in the payments section was for a period less than the length of the initial term (for example, the contract could have stated "next prepaid *annual* dues," a modification to the form contract made by 24 Hour Fitness in 1999); and the assurance in paragraph 3(c) that, "If you have a Monthly Membership, 24 Hour may increase your Dues at any time. But, if you have a 'Keep Fit Plus' or 'Keep Fit' program, or you continue prepaying your membership, 24 Hour will not modify your Dues unless you permanently move to another District with different rates. If you do, 24 Hour may modify your Dues." (Copies of the front page of Harper's and Salzwedel's contracts are reproduced in the appendix to this opinion.)

When Harper and Salzwedel's initial three-year memberships were about to expire, 24 Hour Fitness refused to renew for a new three-year term at the guaranteed rate, permitting renewal at the specified amount for only annual terms. In February 2001 Harper and Salzwedel initiated this lawsuit and on June 29, 2001 filed a third amended putative class action complaint on behalf of themselves and others similarly situated, alleging 24 Hour Fitness's contracts and sales techniques were deceptive and falsely implied that members who prepaid their dues for the entire contract term were entitled to keep their dues at the same rate if they renewed their membership when the initial term expired. The complaint alleged causes of action for unfair competition and false advertising in violation of sections 17200 and 17500, unfair or deceptive practices under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.), breach of contract and common law fraud and deceit.

2. *Class Certification*

In June 2002 Harper and Salzwedel moved to certify two classes, one consisting of all persons in California who had entered into prepaid membership contracts with 24 Hour Fitness, whether or not the individuals had renewed their memberships; the second consisting of all persons in California who had entered into any contract with 24 Hour Fitness that contained several provisions Harper and Salzwedel contended were unconscionable under the Consumer Legal Remedies Act.

On March 3, 2003 the trial court granted limited class certification, allowing class treatment for Harper and Salzwedel's UCL claims, but denying class certification as to their unconscionability, breach of contract and fraud claims.[2] The court restricted participation to "[t]hose persons who, on or after February 12, 1997, in the State of California, entered into a 'prepaid membership' contract on a 'V.9.96' form with 24 Hour Fitness, with an initial period exceeding 12 months, and who renewed by prepayment for additional period in the same program (that is, the same 'kind,' 'type' and 'benefits'), and who did not permanently move . . . during the term of their initial contract." Significantly—and a source of extensive motion practice whether any evidence of discussions that occurred contemporaneously with completion of the membership agreements should be admitted at trial—the court limited the basis for the UCL claims to the face of the V.9.96 contract form only, without reference to any alleged statements or representations by 24 Hour Fitness personnel. The court explained, "Limiting the claims to this proposed class satisfies commonality of the issues of fact and law, and avoids individualized inquiry into either qualification for inclusion in the class or entitlement to damages."

After the trial court certified the class in March 2003, multiple attempts to change the class definition were made by both sides. In June 2004, after 24 Hour Fitness moved to limit the class originally certified, the trial court redefined it to exclude those members

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2 The order denying class certification for the unconscionability claims was affirmed by Division Eight of this court in a nonpublished opinion. (*Harper v. 24 Hour Fitness, Inc.* (Aug. 31, 2004, B166123).)

who had "bonus time" notations written on the face of their contracts. The court explained, "The central purpose of limiting the class to the face of the form was [to] satisfy the numerosity and typicality criteria, and given the integration clause to avoid reference to prior representations not set forth in the writing itself. . . . [¶] . . . The presence of these handwritten terms means that not all the putative class members' contracts have the same terms." After the seventh attempt to change the class definition, the court issued an order to show cause why it should not decertify the class, instructing the parties to brief (1) the requirement for class certification that common issues predominate; (2) the requirement that a class action be a superior method of adjudication; and (3) the requirement of typicality. In January 2006, following briefing and oral argument, the trial court decertified the class, in part finding the almost five-year battle to define and redefine the class demonstrated the ineffectiveness of the class action procedure in this case.

This court reversed the trial court's decertification order in *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966. We held several points "essential to the trial court's conclusion a class action was not advantageous to the judicial process or to the litigants [were] legally incorrect." (*Id.* at p. 975.) For example, in reassessing the superiority of a class action, the trial court believed the relief granted under sections 17200 and 17500 in a representative action could extend beyond the named parties. However, as we explained, "Proposition 64, which the voters approved at the November 2, 2004 General Election, modified the UCL by imposing new standing requirements for parties seeking relief under section 17200 (standing is limited to certain specified public officials and to any person who has suffered injury in fact and has lost money or property as a result of unfair competition) and requiring individuals, such as Harper and Salzwedel, pursuing representative actions to satisfy the class action requirements of Code of Civil Procedure section 382. [Citations.] Proposition 64 made identical changes to the requirements for standing and representative actions under section 17500, the false advertising law. [Citations.] As a result of these amendments, absent class certification, relief—and, in particular, restitution—cannot extend beyond

the named parties. These significant statutory changes apply retroactively to this case, filed before passage of Proposition 64, but still pending postenactment [citation] and fundamentally undermine the trial court's superiority analysis." (*Id.* at pp. 975-976, fn. omitted.)

3. *The Motion in Limine To Exclude Parol Evidence*

On January 25, 2011 Harper and Salzwedel moved in limine to exclude parol evidence regarding the meaning of the renewal provision in the V.9.96 contract, arguing it was expressly precluded by the membership agreement's integration clause[3] and the trial judge who had heard the class certification motions had ruled that class issues would be adjudicated based solely on the face of the contract. 24 Hour Fitness responded the trial court had not ruled parol evidence was categorically inadmissible and had found a "fundamental ambiguity" in the V.9.96 contract when it denied Harper's and Salzwedel's motion for summary adjudication on their individual breach of contract claims in 2003. Moreover, the court had reiterated in its decertification order, "[O]n the merits of their individual contract claims, the Court is permitting (and has always permitted) extrinsic evidence on the meaning of the agreement." Thus, 24 Hour Fitness asserted, parol evidence was essential to determine the parties' intent as to the renewal term and the integration clause only barred using oral representations to alter the express terms of the writing. 24 Hour Fitness further contended the passage of Proposition 64 after class certification changed the landscape: Whereas Harper and Salzwedel had not needed to demonstrate materiality, reliance, causation and injury in fact when the class was originally defined and certified, they were now required to do so; and the evidentiary universe necessarily had to expand beyond the four corners of the V.9.96 contract.

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[3] The integration clause provided, "Entire Agreement & Enforcement: You acknowledge that neither 24 Hour, nor anyone else, made any representations or promises upon which you relied that are not stated in this Agreement. This document contains the entire agreement between you and 24 Hour and replaces any oral or other written agreement. . . ."

After extensive argument on April 22, 2011 the trial court ruled parol evidence would be admissible during the liability phase of the trial on the UCL claims as it would be for the later trial of the individual breach of contract claims.[4] On May 9, 2011 Harper and Salzwedel filed a trial brief arguing parol evidence should be excluded because the V.9.96 contract was not reasonably susceptible to the interpretation advocated by 24 Hour Fitness, as well as a compendium of orders and rulings demonstrating class claims had been limited to the face of the contract. The court, however, did not change its ruling permitting evidence of the circumstances surrounding execution of the membership agreements.

4. *Summary of the Evidence at Trial*

a. *The plaintiffs' case-in-chief*

i. Salzwedel's membership

The V.9.96 contract Salzwedel signed provided the cost of his initial membership was $602, comprised of an enrollment fee of $289, processing fee of $49 and "Prepaid Monthly Dues" of $264; the membership began on March 6, 1998 and ended on March 6, 2001; and the number of "Prepaid Period [Months]" was 36. Under the box labeled "Next Prepaid Dues," the contract stated, "Pay $264" on March 6, 2001.

Salzwedel testified he joined the 24 Hour Fitness facility in West Hollywood because it had offered him a better rate than four other gyms, including the 24 Hour Fitness facility in Santa Monica. The sales counselor convinced Salzwedel that, assuming he renewed at the guaranteed rate of $264, a three-year prepaid membership would be less expensive than a month-to-month membership by the fourth year notwithstanding the $289 enrollment fee.

When the sales counselor was ready to fill out the V.9.96 form contract, Salzwedel asked him the length of the renewal term. The sales counselor replied it was three years, "the same as the initial period." Salzwedel read the front of the contract and skimmed the

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[4] The court had previously ordered, consistent with the parties' stipulation, that trial of the UCL claims be bifurcated into liability and restitution phases.

back. He testified the contract confirmed what the sales counselor had told him: "Because of the term 'Prepaid Membership' and 'Prepaid Dues,' they seem to go together. So it says my initial period was 36 months under prepaid membership. Then it says next prepaid dues, so that seems to be the same class of things." Salzwedel, however, could not recall what the sales counselor said about any of the other dollar figures on the V.9.96 contract.

Sometime in March 2001, after his entrance card had been scanned at the front desk, an employee told Salzwedel he needed to renew his membership. Salzwedel paid $264 and was given a receipt that said, "NEXT DUES 3-01-02." Salzwedel told the employee there was an error because his renewal term was supposed to be three years, but was informed, "according to our system, you are on a yearly renewal." A few days later Salzwedel spoke to a manager and showed her his contract. The manager explained the current version of the contract used by 24 Hour Fitness referred to next prepaid "annual" dues and she believed his renewal period was meant to be just one year. Salzwedel talked about the situation with his workout partner, Joe Watson, an attorney, and eventually became a class representative. Salzwedel testified he would not have purchased a three-year prepaid membership if he had known the renewal period was only one year because it made the membership more expensive than others he had been offered.

ii. Harper's membership

The V.9.96 contract Harper signed provided the cost of his initial membership was $591, comprised of an enrollment fee of $428, processing fee of $49 and "Prepaid Monthly Dues" of $114; the membership began on January 6, 1998 and ended on January 6, 2001; and the number of "Prepaid Period [Months]" was 36. Under the box labeled "Next Prepaid Dues," the contract stated, "Pay $228" on January 6, 2001.

Harper testified he had asked the Santa Monica 24 Hour Fitness sales counselor to give him the "best deal for the longest period for the lowest rate." The sales counselor told him the longest membership he could purchase was three years with a three-year renewal. Harper believed, "[W]hen I signed the contract that I purchased a three-year

membership with an option stated as to how much money right in the box it would be for an extension of three more years. So I anticipated that would be a six-year membership for the amount of money on the face of the contract. Divide that and find out how much it is in a month, that's how much I figured I would be paying for the membership. I was not willing to just do otherwise." Although Harper conceded the sales counselor had explained to him the dollar figures on the contract, including the prepaid monthly dues amount of $114, Harper could not recall "the specifics" and did not know the reason there was a difference between the prepaid monthly dues amount of $114 and the next prepaid dues amount of $228. Harper also conceded the V.9.96 contract did not expressly state the length of time for the "next prepaid dues," but explained, "It says 'Next Prepaid Dues.' And it says 'Prepaid Period, 36 months.' To me, they're one and the same."

After Harper renewed his membership and learned the renewal term was only one year, he complained but did not receive a satisfactory explanation. Harper mentioned to a friend he was unhappy about the renewal, and the friend told him Watson knew of other people who were similarly dissatisfied. Harper contacted Watson and later became a class representative.

iii. Watson's membership

Over 24 Hour Fitness's objection,[5] Watson testified he believed his V.9.96 membership agreement included a three-year renewal term. After Watson attempted to renew at the front desk and was told the term was 12 months, he explained his contract provided for a 36-month renewal for $228. The front desk employee disputed this, showing him a copy of a V.7.99 contract that said "next annual prepaid dues." Watson subsequently reviewed his original contract with a manager at the facility. According to Watson, the manager acknowledged it had a 36-month renewal term, but told him there

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5 24 Hour Fitness moved in limine to preclude Watson's testimony on the grounds Watson, who had been identified by plaintiffs as a possible trial witness, was formerly (and perhaps still) counsel for plaintiffs and plaintiffs had repeatedly asserted attorney-client and work product privileges during his deposition.

was nothing she could do about it and referred Watson to 24 Hour Fitness's corporate office.

Watson contacted Alexis Hunt at the corporate office. Watson testified Hunt also agreed the contract included a 36-month renewal term, but explained 24 Hour Fitness would not honor it because the company renewed only for annual terms. After Watson asked to speak to someone with more authority, Hunt transferred him to Mike Freeman, a vice president. According to Watson, Freeman told him, "I know what your contract says. I'm not going to honor it. . . . If you want to pay an annual renewal, you can, but we're not going to honor the 36-month contract. That's not what we do with these contracts anymore." "Read your contract. We can change the policies any time we want. We can change the dues any time we want."

b. *24 Hour Fitness's defense*

24 Hour Fitness presented the testimony of corporate personnel explaining membership pricing, including for the plans purchased by Harper and Salzwedel, and the company's policies and procedures regarding membership sales.

i. Bobbi Quick

Bobbi Quick, the director of membership processing in 1997, testified she was responsible during the relevant time period for preparing, updating and distributing to the individual facilities a document explaining the policies and procedures for completion of membership agreements as well as distributing price lists and price laminates, which set forth the cost of various membership options. Price laminates were shown to prospective customers to assist them in choosing which membership to purchase. For example, a January 1999 price laminate introduced into evidence presented pricing for memberships including the "Keep Fit All Club Accelerated Results" plan at a cost of $375 for enrollment, $49 for processing and a $29 "Monthly Investment"; the laminate emphasized, "BUY 1 YEAR GET 18 MONTHS FREE! *Save $522*." Although price lists were not shown to prospective customers, the pricing information on the laminates corresponded with the price lists.

Quick testified, and the membership agreement policies and procedures guide stated, "If member is pre-paying dues, the Next Prepaid Dues amount and the date must be completed. Next Prepaid Amount is equal to one year of EFT dues regardless of prepaid amount being paid at enrollment." Quick explained, "EFT" meant "electronic fund transfer" and "EFT dues" referred to "the monthly amount that member would be required to pay if they chose to not prepay their membership." Accordingly, "the annual renewal is monthly times 12." Quick conceded, however, that nothing in the V.9.96 form contract stated the "next prepaid period" is one year.

Quick also supervised the auditing of new member agreements to ensure the agreements were completed pursuant to company policy and the price paid matched the then-current price list. Sales counselors would not get paid commission if they sold memberships at prices that deviated from the price list. Quick testified she would have learned through the audit process if sales counselors failed to comply with the membership agreement policies and procedures guide on a routine basis.

With respect to Harper's and Salzwedel's membership agreements Quick testified company records generated during the audit process demonstrated the price they had paid matched the applicable price lists when they joined. Harper purchased a Keep Fit Plus single membership in January 1998 requiring him to prepay six months at $19 per month ($114), in addition to the enrollment and processing fees, to receive an additional two-and-one-half years free. The next prepaid dues amount of $228 was derived by multiplying the $19 monthly rate by 12 months. Salzwedel purchased a Keep Fit Plus single membership in March 1998 requiring prepayment of 12 months at $22 per month ($264), in addition to the enrollment and processing fees, to receive an additional two years free. The next prepaid dues amount of $264 was equivalent to 12 months of dues.

According to Quick, 24 Hour Fitness added the word "annual" to the phrase "next prepaid dues" when the company updated its membership agreement to the V.7.99 form because the word had inadvertently been omitted from the V.9.96 form. Quick explained 24 Hour Fitness was created by a merger of two independent companies, Family Fitness and 24 Hour Nautilus. The post-merger period was a chaotic time when the company

was drafting its new membership agreement; the omission of the word "annual" from the V.9.96 form contract was simply an oversight. Renewals had always been only for a 12-month period. Notwithstanding the oversight, Quick never heard that a significant number of members who had signed the V.9.96 contract complained about the length of the renewal term. Although club managers were "empowered to resolve member issues at the club level" if they thought they could, Quick would have been informed if there were a large volume of complaints about the length of the renewal term. Quick did not learn about the complaints from Harper, Salzwedel and Watson until after the instant action was filed.

Quick also laid the foundation for admission into evidence of a class member list including information about the cost of class members' initial membership, number of renewals and amount paid for renewal. That list reflected 97 percent of class members had renewed in 2001, 93 percent in 2002, 82 percent in 2003, 71 percent in 2004 and further declining percentages in each successive year.

ii. Ronald Thompson

Ronald Thompson, vice president of sales beginning in approximately 1998, testified he served on 24 Hour Fitness's price committee. After prices were set, the individual facilities received price lists and laminates. The laminates were placed in presentation books and shown to prospective members after they had been given a tour of the club and were discussing options with a sales counselor. Once a prospective member decided which membership option to purchase, the counselor would present a membership agreement and explain it while filling out the form. Although there was no "script" sales counselors were given telling them exactly what to say, they were taught how to present the prices and the process to follow. A gym manager would often sit in on presentations, and new sales counselors would work near the manager so he or she could overhear presentations and step in if necessary.

Thompson, who also sat on the company's advertising committee, further testified the company never offered multi-year renewals or advertised that they were available.

c. *The plaintiffs' rebuttal witness*

At the close of 24 Hour Fitness's defense, counsel for Harper and Salzwedel informed the trial court he wanted to present the testimony of several class members to rebut Quick's testimony she was unaware of a significant number of complaints about the length of the renewal term, as well as to rebut any inference class members were not deceived by the contract or had not complained about it that might be drawn from the class list. After 24 Hour Fitness objected on several grounds including none of the witnesses was on the witness list or had been disclosed in discovery, the court ruled Harper and Salzwedel could present the testimony of their best witness because any additional witness testimony would be cumulative.

Mark Trepanier testified he joined 24 Hour Fitness in 1997, paying $885 for a three-year couple's membership. He believed the next prepaid dues amount of $288 entitled him to a three-year renewal term although he admitted on cross-examination he was not told when he signed his contract the renewal term was three years. Trepanier nevertheless renewed several times for annual terms because he did not want to pay an enrollment fee at another gym and it was more convenient and economical at that point simply to renew.

5. *The Statement of Decision*

After posttrial briefing, including denial of Harper and Salzwedel's motion to strike parol evidence and 24 Hour Fitness's motion to decertify or redefine the class, the court ruled in favor of 24 Hour Fitness on the UCL claims, finding, in part, Harper and Salzwedel had failed "to prove that 'it is probable a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled' based ***solely*** upon the face of the V.9.96 form of agreement,' without reference to oral representations." The court additionally found, "even acknowledging Plaintiffs' evidence beyond 'the face of the agreement,' they still failed to prove that it was probable that 'a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.' In fact, substantial evidence at trial established that the V.9.96 pre-printed form does not state 'on the face of

the agreement' that the membership can be renewed for the same number of months as purchased in the initial term, and that [24 Hour Fitness] did not use the V.9.96 form in a way that violated BP 17200 or BP 17500." The court also found, "Finally, Plaintiffs failed to rebut or contradict [24 Hour Fitness's] class survey/statistical evidence regarding the 17,717 alleged class members who joined 24 Hour Fitness under a V.9.96 form and, therefore, had the very option to renew at issue in this case. [Citations.] That statistical evidence shows the overwhelming majority (e.g. 70% or more) renewed on an annual basis more than once without any complaints—unlike Plaintiffs (or Joe Watson)—and in some cases, repeatedly over the past decade."

Harper and Salzwedel dismissed their individual claims with prejudice and appeal from the final judgment entered on July 17, 2012.

DISCUSSION

1. *Standard of Review*

We generally apply the familiar substantial evidence test when the sufficiency of the evidence is at issue on appeal. Under this test, "'[W]e are bound by the established rules of appellate review that all factual maters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*." [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.'" (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60; accord, *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) "When we consider whether the evidence was sufficient to support the . . . verdict, we review the entire record in the light most favorable to the judgment to determine whether there are sufficient facts, contradicted or uncontradicted, to support the judgment. [Citation.] Substantial evidence is evidence that is reasonable and credible. In evaluating the evidence, we accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence." (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462-463.)

However, when the trier of fact has expressly or implicitly concluded the party with the burden of proof did not carry the burden and that party appeals, "'it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838; accord, *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

"Where, as here, the judgment is against the party who has the burden of proof, it is almost impossible for him to prevail on appeal by arguing the evidence compels a judgment in his favor. That is because unless the trial court makes specific findings of fact in favor of the losing plaintiff, we presume the trial court found the plaintiff's evidence lacks sufficient weight and credibility to carry the burden of proof. [Citations.] We have no power on appeal to judge the credibility of witnesses or to reweigh the evidence." (*Bookout v. State of California ex rel Dept of Transportation* (2010) 186 Cal.App.4th 1478, 1486.)

2. *The Law Generally Governing UCL Claims*

Unfair competition under the UCL means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ."[6] Written in the disjunctive, section 17200 establishes "three varieties of unfair

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6 Like section 17200, section 17500 (the false advertising law) generally prohibits advertising that contains "any statement . . . which is untrue or misleading, and which is known, or should be known, to be untrue or misleading . . . ." To prove a violation under section 17500, however, the plaintiff must also demonstrate the defendant knew, or in the exercise of reasonable care, should have known, that the advertisement was untrue or misleading. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 224.)

competition—acts or practices which are unlawful, unfair, or fraudulent." (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*); accord, *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.)

The "unlawful" prong of the UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143; accord, *Kasky v. Nike, supra,* 27 Cal.4th at p. 949; *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539.) The "unfair" prong authorizes a cause of action under the UCL if the plaintiff can demonstrate the objectionable act, while not unlawful, is "unfair" within the meaning of the UCL. (*Cel-Tech, supra,* 20 Cal.4th at p. 182.)

Under the "fraudulent" prong, a business practice violates the UCL "if it is 'likely to deceive the public. [Citations.] It may be based on representations to the public which are untrue, and "'also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under'" the UCL. [Citations.] The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer." (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471; see *Paduano v. American Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1469.)

In cases involving advertising or statements that are not literally false, "'likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." (*Lavie v. Proctor & Gamble Co.* (2003) 105 Cal.App.4th 496, 508; accord, *Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226; *People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1016.)

3. *Harper and Salzwedel Failed To Prove the V.9.96 Contract Was Likely To Mislead a Significant Portion of the Public Acting Reasonably*

Harper and Salzwedel contend the V.9.96 form unambiguously communicated that the renewal term was the same length as the initial prepaid membership period. No amount of explaining how the figures filled in by the sales counselor were derived, they insist, made the contract any less likely to mislead consumers as to 24 Hour Fitness's true intent and policy that renewal terms were only annual. Indeed, the fact 24 Hour Fitness had to introduce extrinsic evidence to explain the length of the renewal term demonstrated the V.9.96 form itself was likely to mislead a reasonable consumer.

There is no question the V.9.96 contract did not specifically state the renewal term was limited to one year. Moreover, Harper and Salzwedel's apparent understanding, based upon the clearly specified length of the initial prepaid membership, that the renewal term was for the same, three-year period was not unreasonable. But this ambiguity in the contract's express language, standing alone, did not establish that 24 Hour Fitness's use of the V.9.96 form contract was a fraudulent business practice as a matter of law.[7] As Harper and Salzwedel acknowledge, whether a statement or advertisement is likely to mislead is generally a question of fact. (See *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 134 ["[w]hether a practice is deceptive, fraudulent or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides'"]; accord, *Paduano v. American Honda Motor Co., Inc., supra,* 169 Cal.App.4th at p. 1469 [reversing order granting summary adjudication in favor of defendant].) Although California state courts have held "'the primary evidence in a false advertising case is the advertisement itself'"

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7 In addition to the identification of the length of the prepaid membership on the front of the contract, Harper and Salzwedel argue paragraph 2(c) of the contract directs the member seeking to determine the length of the initial or renewal terms to the "Membership" section of the contract where the type of membership is specified, that is, Keep Fit Plus, Keep Fit or other membership programs. Like the rest of the contract, however, paragraph 2(c) does not address the renewal period. It merely states, "**Monthly and Prepaid Memberships.** See the 'Membership' section on the front page regarding when your Monthly or Prepaid Membership begins and ends."

(*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 100), it is not the only evidence bearing on the question whether a statement or advertisement is likely to mislead.

In *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, for example, our colleagues in Division Five of this court held substantial evidence supported the trial court's judgment finding an automobile rental company had engaged in unfair competition and made false and misleading statements with respect to the collision damage waiver it sold to customers when they rented cars. In addition to the contract, which the court found was "'ambiguous, misleading and deceptive in both form and content, both as to the extent of the customers' responsibility for damage to the rental vehicle and the coverage provided by [the collision damage waiver],'" the court found "[t]estimony of former customers, rental agents, and even the testimony of defendants' executives, demonstrate a history of false and misleading business practices and training procedures which had the actual, if not intended, effect of confusing the car rental public about the liability protection afforded by [the collision damage waiver] and deceived customers into purchasing [collision damage waivers] under false pretenses." (*Id.* at p. 129; see *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 888 ["trial court properly rejected South Bay's contention that the absence of an explicit disclosure of the interest calculation method in the parties' wholesale security agreement compelled a finding GMAC was liable as a matter of law" in light of evidence lender and borrower knew, understood, agreed and expected challenged method of interest calculation would be used].) Thus, the core of the problem in *People v. Dollar Rent-A-Car Systems, Inc.* was not the ambiguity of the contract, as Harper and Salzwedel argue, but the ambiguity of the waiver in conjunction with the defendant's business practices, including its sales personnel's misrepresentation of the waiver to customers.

Similarly, in *Brockey v. Moore*, *supra*, 107 Cal.App.4th 86, relied upon by Harper and Salzwedel, there was substantial evidence the defendant had "engaged in a prolonged pattern of unfair business practices" of which a misleading advertisement was only part. (*Id.* at p. 98.) In stating the primary evidence of a misleading advertisement is the

advertisement itself, the *Brockey* court was rejecting defendant's argument the plaintiff "had to prove 'via extrinsic evidence' that his misstatements would likely deceive a reasonable person . . . and that what [defendant] terms 'anecdotal' evidence, that is, testimony by people that they were in fact misled, is insufficient." (*Id.* at p. 99; see *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682 [federal authorities requiring extrinsic evidence such as expert testimony or consumer surveys to prove misleading representation "'do not accurately reflect California law'"].) Accordingly, Harper and Salzwedel were not required to use consumer surveys or statistical evidence to prove the V.9.96 contract form was likely to deceive a significant portion of the public. However, 24 Hour Fitness was entitled to defend itself with evidence that, as actually used, the form did not, in fact, mislead a significant portion of the targeted consumers, including evidence that the overwhelming majority of class members renewed their memberships for several years and testimony by Quick that she was unaware of a substantial volume of complaints. (See *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 34 ["We have long observed that the class action procedural device may not be used to abridge a party's substantive rights. . . . [Citations.] While class action defendants may not have an unfettered right to present individualized evidence in support of a defense, our precedents make clear that a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions."].)[8]

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8 On appeal Harper and Salzwedel continue their indefatigable effort to exclude evidence of 24 Hour Fitness's policies and procedures governing membership pricing and sales. They argue, in part, it was improper to admit such evidence because it had no bearing on the parties' mutual intent, and, in any event, the central issue was whether the contract was likely to deceive the public, not the parties' intent. (As evidence of whether the contract was likely to deceive, it is a misnomer to refer to it as parol evidence.) Although the trial court's rulings permitting use of this evidence was made before the Supreme Court's decision in *Duran v. U.S. Bank National Assn.*, *supra*, 59 Cal.4th 1, *Duran* lays to rest any doubt the court properly admitted evidence essential to 24 Hour Fitness's defense that the V.9.96 contract was not likely to mislead a significant portion of the public acting reasonably, the purpose for which it was introduced and used.

As a question of fact, it was squarely within the province of the trial court to evaluate whether the V.9.96 contract was likely to deceive a significant portion of the public acting reasonably by examining the language of the contract and weighing, on the one hand, Harper and Salzwedel's explanations for their belief the V.9.96 contract, on its face, included a three-year renewal term against the evidence presented by 24 Hour Fitness, on the other hand, that it offered only one-year renewals; pricing plans included up to two-and-one-half years free of charge; how the renewal price was calculated; the policies and procedures governing the sale of memberships, including the presentation of pricing laminates to potential customers and explanation of the dollar figures on the contracts; the high renewal rate; and the lack of a significant number of complaints about the renewal term. The trial court found Harper and Salzwedel, who could not recall the "specifics" of what they were told about the pricing for their memberships, were not credible: "[B]oth Plaintiffs were impeached repeatedly on cross-examination with their 2002 deposition transcripts, which led their testimony ultimately to fall apart in a sea of 'I do not remember answers' that were neither credible, nor reasonable as required under California law." Because of Harper's poor memory, the court had no explanation reconciling his belief the renewal term was the same length at the same price as the initial term with the fact his contract specified "Prepaid Monthly Dues" of $114 but $228 for the renewal term.

The court also found Harper and Salzwedel had failed to rebut the "class survey/statistical evidence" demonstrating "the overwhelming majority (e.g. 70% or more) [of class members] renewed on an annual basis without any complaints—unlike Plaintiffs (or Joe Watson)—and in some cases, repeatedly over the past decade." (See *Consumer Advocates v. Echostar Satellite Corporation* (2003) 113 Cal.App.4th 1351, 1361 [lack of complaints about, or return of, defendant's satellite television system "highly relevant"].) Harper and Salzwedel contend the evidence does not establish there were no complaints about the renewal term. They argue Quick's testimony she was unaware of a high volume of complaints is essentially meaningless in light of her explanation that individual club members often resolved complaints at the club level and

her concession she did not learn about Harper, Salzwedel and Watson's complaints until after the action was filed. Her testimony, they assert, demonstrates only that complaints about renewals did not routinely come to her attention. (See *Benson v. Honda Motor Co.* (1994) 26 Cal.App.4th 1337, 1346 [in design defect case, evidence of absence of prior similar accidents is stronger when "made by a witness in a product safety department or division which has kept records of the safety performance of the product in question"].) They also argue, because the class was defined to include only those persons who renewed, there was no evidence as to those individuals who did not renew after they learned the renewal term was shorter than the initial prepaid membership period. Even for class members who did renew, Harper and Salzwedel contend, they may have done so notwithstanding the misleading nature of the V.9.96 contract.

Like Harper's and Salzwedel's credibility, the trier of fact is exclusively responsible for weighing the evidence; and the prevailing party is afforded the benefit of all reasonable inferences in support of the judgment. (See *Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363.) Harper and Salzwedel had the burden of proving the V.9.96 form was likely to mislead a significant portion of the public, not just them and a handful of others. Although they were not required to prove this with consumer surveys or statistical evidence, they ran the risk in failing to adduce such evidence that their anecdotal evidence would not be as persuasive as 24 Hour Fitness's. That Quick was unaware of Harper, Salzwedel and Watson's complaints until after the case was filed does not render incredible her testimony she would have known if a significant number of complaints had been lodged and there simply was no such volume. Regardless of the class definition, Quick's testimony was broader than members who renewed. It was certainly a reasonable inference that, if there had been complaints by members who did not renew because they were unhappy about the alleged "bait and switch," she would have heard about it, as well as receiving complaints from members who simply renewed because it was more convenient or less expensive than finding a new gym.

Similarly unpersuasive—because it is an argument challenging reasonable inferences—is Harper and Salzwedel's contention no sales person testified the one-year

renewal policy was explained to potential customers or that the price for the renewal term would be 12 times the monthly electronic fund transfer amount. Harper and Salzwedel conceded the pricing on the front of their contracts was explained to them although they did not recall the explanations. Quick testified the price of the renewal was 12 times the monthly dues and sales counselor were trained to present pricing plans; Thompson testified sales counselors would explain the membership agreement while they were filling it out. It was a reasonable inference that, in the process of explaining the numbers on the contract to members, sales counselors explained how the "next prepaid dues" amount was calculated; new members were not likely to be deceived into thinking the rate based on 12 months of dues was for a renewal term longer than one year.[9]

In sum, Harper and Salzwedel failed to carry their burden of proof. Their evidence was not uncontradicted or unimpeached and of such a character and weight to leave no room for a judicial determination it was insufficient to support the trial court's conclusion a consumer acting reasonably under the circumstances—that is, signing a contract after explanation by the sales counselors of the membership options and pricing plans—would not find the V.9.96 agreement misleading as to the length of the renewal term because it was silent on that point.[10]

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9 Because we hold Harper and Salzwedel failed to carry their burden to prove the V.9.96 contract was likely to mislead a significant portion of the public acting reasonably, we need not address 24 Hour Fitness's argument the membership agreement did not constitute an advertisement within the scope of section 17500.

10 Harper and Salzwedel's reliance on *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342 for the proposition failure to disclose the renewal term was misleading as a matter of law is misplaced. This court in *Klein* merely held the trial court erred in sustaining Chevron's demurrer to plaintiff's class action complaint for violation of the UCL under the unfairness prong. (See *Klein*, at p. 1376 ["[a]t the pleading stage, we cannot presume that these alleged harms are not 'substantial' or are otherwise outweighed by benefits that consumers derive from Chevron's practice of selling non-temperature adjusted motor fuel at the retail level"].) The analysis whether a business practice is unfair is different from the analysis whether it is fraudulent, and the standard of review of a UCL claim at the demurrer stage is very different from the standard of review after trial.

4. *Use of the V.9.96 Contract Was Not an Unfair Business Practice*

"In consumer cases arising under the UCL, a business practice is 'unfair' if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1376.)[11] Whether a business practice is unfair is generally a question of fact requiring the weighing of evidence (*ibid.*) and therefore subject to the same standard of review on appeal as whether such a practice is fraudulent.

Although a business practice may be unfair even if not deceptive (see *Cel-Tech, supra,* 20 Cal.4th at p. 180), our conclusion Harper and Salzwedel failed to prove the V.9.96 form contract was likely to deceive a significant portion of the public is dispositive; they also simply failed to carry their burden of proving class-wide consumer injury. We need not examine the other factors. (See *Daughtery v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 839.)

DISPOSITION

The judgment is affirmed. 24 Hour Fitness is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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11 As we explained in *Klein v. Chevron U.S.A., Inc., supra,* 202 Cal.App.4th at page 1376 and footnote 14, although there is currently a split of authority with respect to the proper definition of the term "unfair" in the context of consumer cases arising under the UCL, the Second District has consistently followed the definition enunciated by our colleagues in Division Eight in *Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403. As we did in *Klein,* we apply that definition here.

01 Club Membership Agreement

AG01590

AG01590

PERSONAL INFORMATION

Last Name: HARPER | First: BRYAN | M.I.:

Street Address No.: [redacted] | Apt.:

City: [redacted] | State: [redacted] | Zip Code: [redacted]

Date of Birth: [redacted] | Age: [redacted] | M ☒ F ☐ | Home: [redacted] | Work Ph: [redacted]

Employer: [redacted] | Corp. Number:

MEMBERSHIP

KIND: ☒ Single ☐ Couple ☐ Family ☐ Family Add On ☐ Upgrade ☐ Rewrite/Reinstate

Related Memb #:

Orig Memb #:

BENEFITS: ☒ All Clubs (Premier) ☐ All Clubs (non-Premier) ☐ Club of Enrollment Only

TYPE: ☒ Keep Fit Plus ☐ Keep Fit ☐ CP Keep Fit ☐ Shape-Up ☐ Value Plus: All Hours ☐ M-W-F-Su ☐ Tu-Th-Sa-Su ☐ Value: Limited Hrs 12 am-12 pm ☐ Other

GM/CC

☐ MONTHLY Membership Begins M D Y Initial X

A Monthly membership ends the last day of the month following the month 24 Hour receives written termination notice. The last month is non-refundable, except as stated in 6(a) & 6(b) on the back page.

☒ PREPAID Membership Begins 1 16 98 Ends 1 16 01

A Prepaid membership is non-cancelable and the prepaid monthly Dues are non-refundable, except as stated in 6(a) and 6(b) on the back page.

Prepaid Period Mths: 36

Initial ☒ [redacted]

ACCOUNTING

Enrollment Fee	$ 428
First Month's Dues	$
Last Month's Dues	$
Prepaid Monthly Dues	$ 114
Processing Fee	$ 49
Other	$
Total Due Now	$ 591

PAYMENTS

☐ Check ☒ Card ☐ Cash — Deposit: $ 591 — Balance: $

Payment Plan

Pay	$	By / /
Pay	$	By / /
Pay	$	By / /

Next Prepaid Dues: Pay $ 229 1601

PREFERRED GUEST LIST

Preferred Guest	Phone

EFT AUTHORIZATION

☐ Member ☐ Cosigner — MONTHLY EFT Dues: $ — Begins M — ☐ 1st ☐ 15th — Y

☐ Checking ☐ Credit Card — Name on account or card

Bank Name: | Number: | Expires:

I authorize 24 Hour to electronically deduct ("EFT") my monthly Dues or any past unpaid Dues from the account I used to pay the deposit in the PAYMENTS section or the above account, whichever is better, for the monthly EFT. The deductions may begin on the above date and continue until my membership is terminated, canceled, or I tell 24 Hour, in writing, to stop.

Signature X

Must Attach Sample Void

COSIGNER

☐ Parent: On behalf of my minor child and myself, I agree to the Assumption of Risk and Arbitration clauses in this Agreement, and I promise to pay any financial obligation that my minor child does not pay for any reason.

☐ Cosigner: I agree to the Arbitration clause in this Agreement, and I promise to pay any financial obligation that the member does not pay for any reason.

Whether Parent or Cosigner, I understand my obligation can only end if the member properly terminates the membership according to this Agreement. If I signed the EFT Authorization, I agree to directly pay according to the terms in this Agreement.

X Dated / /

Print Name | Hm Ph: ( )

Street | Wk Ph: ( )

City, State, Zip

ASSUMPTION OF RISK • 3-DAY NOTICE •

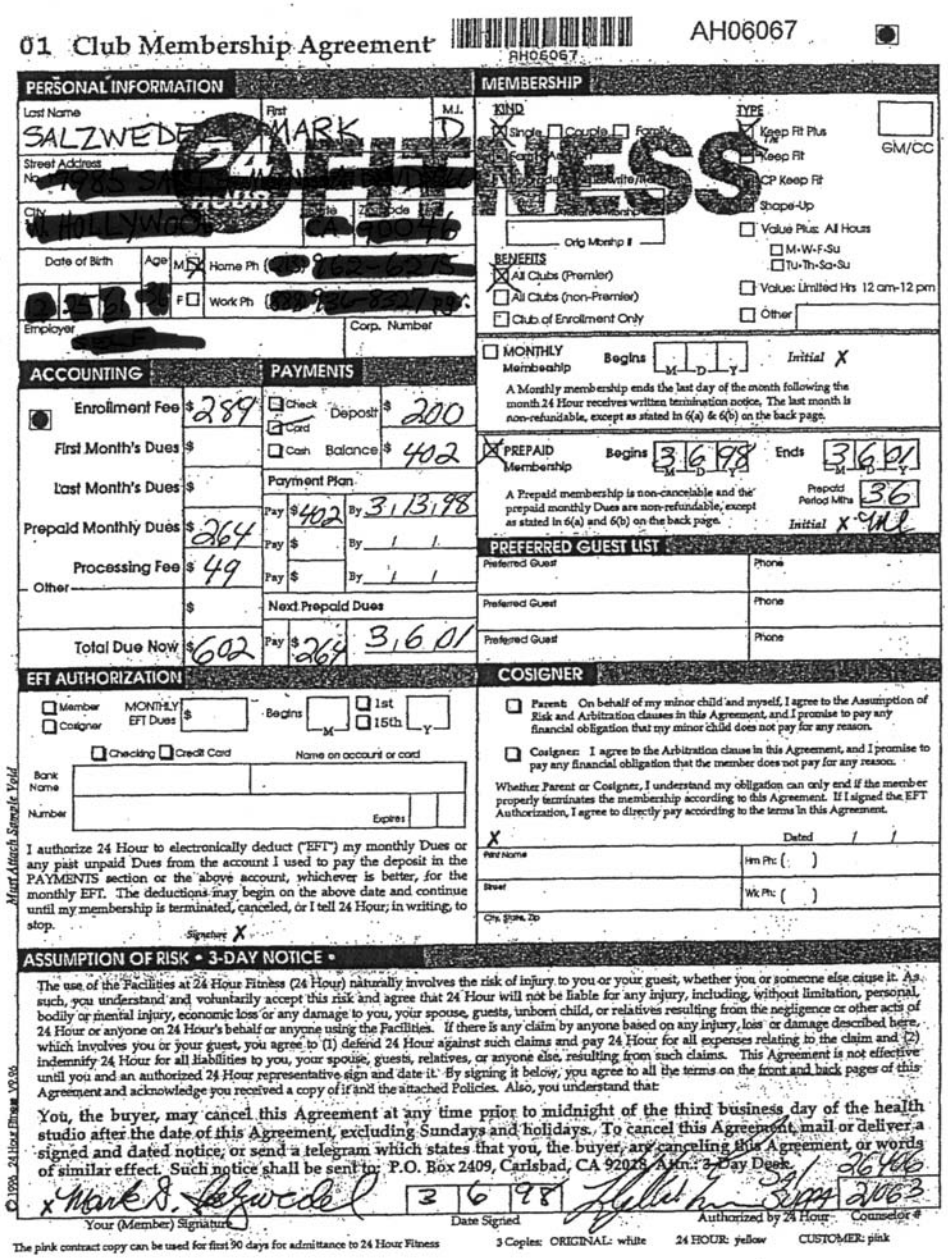
The use of the Facilities at 24 Hour Fitness (24 Hour) naturally involves the risk of injury to you or your guest, whether you or someone else cause it. As such, you understand and voluntarily accept this risk and agree that 24 Hour will not be liable for any injury, including, without limitation, personal, bodily or mental injury, economic loss or any damage to you, your spouse, guests, unborn child, or relatives resulting from the negligence or other acts of 24 Hour or anyone on 24 Hour's behalf or anyone using the Facilities. If there is any claim by anyone based on any injury, loss or damage described here, which involves you or your guest, you agree to (1) defend 24 Hour against such claims and pay 24 Hour for all expenses relating to the claim and (2) indemnify 24 Hour for all liabilities to you, your spouse, guests, relatives, or anyone else, resulting from such claims. This Agreement is not effective until you and an authorized 24 Hour representative sign and date it. By signing it below, you agree to all the terms on the front and back pages of this Agreement and acknowledge you received a copy of it and the attached Policies. Also, you understand that:

You, the buyer, may cancel this Agreement at any time prior to midnight of the third business day of the health studio after the date of this Agreement, excluding Sundays and holidays. To cancel this Agreement, mail or deliver a signed and dated notice, or send a telegram which states that you, the buyer, are canceling this Agreement, or words of similar effect. Such notice shall be sent to: P.O. Box 2409, Carlsbad, CA 92018, Attn: 3-Day Desk.

[redacted] 1 16 98 [redacted] 11763

Your (Member) Signature — Date Signed — Authorized by 24 Hour — Counselor #

The pink contract copy can be used for first 90 days for admittance to 24 Hour Fitness — 3 Copies: ORIGINAL: white — 24 HOUR: yellow — CUSTOMER: pink



01 Club Membership Agreement AH06067

PERSONAL INFORMATION

Last Name SALZWEDEL First MARK M.I. D

Street Address [redacted]

City HOLLYWOOD State CA Zip Code [redacted]

Date of Birth Age M X Home Ph [redacted]

F ☐ Work Ph [redacted]

Employer [redacted] Corp. Number

ACCOUNTING

		PAYMENTS		
Enrollment Fee	$ 289	☐ Check ☐ Card	Deposit	$ 200
First Month's Dues	$	☐ Cash	Balance	$ 402
Last Month's Dues	$	Payment Plan		
Prepaid Monthly Dues	$ 264	Pay $ 402	By 3/13/98	
Processing Fee	$ 49	Pay $	By / /	
Other	$	Pay $	By / /	
Total Due Now	$ 602	Next Prepaid Dues Pay $ 264		3/6/01

EFT AUTHORIZATION

☐ Member ☐ Cosigner MONTHLY EFT Dues $ Begins M ☐ 1st ☐ 15th Y

☐ Checking ☐ Credit Card Name on account or card

Bank Name

Number Expires

I authorize 24 Hour to electronically deduct ("EFT") my monthly Dues or any past unpaid Dues from the account I used to pay the deposit in the PAYMENTS section or the above account, whichever is better, for the monthly EFT. The deductions may begin on the above date and continue until my membership is terminated, canceled, or I tell 24 Hour, in writing, to stop.

Signature X

Must Attach Sample Void

MEMBERSHIP

KIND ☒ Single ☐ Couple ☐ Family

TYPE ☒ Keep Fit Plus ☐ Keep Fit ☐ CP Keep Fit ☐ Shape-Up GM/CC

Orig Mbrship # ☐ Value Plus: All Hours ☐ M-W-F-Su ☐ Tu-Th-Sa-Su

BENEFITS ☒ All Clubs (Premier) ☐ All Clubs (non-Premier) ☐ Club of Enrollment Only ☐ Value: Limited Hrs 12 am-12 pm ☐ Other

☐ MONTHLY Membership Begins M D Y Initial X

A Monthly membership ends the last day of the month following the month 24 Hour receives written termination notice. The last month is non-refundable, except as stated in 6(a) & 6(b) on the back page.

☒ PREPAID Membership Begins 3 6 98 Ends 3 6 01 Prepaid Period Mths 36

A Prepaid membership is non-cancelable and the prepaid monthly Dues are non-refundable, except as stated in 6(a) and 6(b) on the back page. Initial X

PREFERRED GUEST LIST

Preferred Guest	Phone
Preferred Guest	Phone
Preferred Guest	Phone

COSIGNER

☐ Parent: On behalf of my minor child and myself, I agree to the Assumption of Risk and Arbitration clauses in this Agreement, and I promise to pay any financial obligation that my minor child does not pay for any reason.

☐ Cosigner: I agree to the Arbitration clause in this Agreement, and I promise to pay any financial obligation that the member does not pay for any reason.

Whether Parent or Cosigner, I understand my obligation can only end if the member properly terminates the membership according to this Agreement. If I signed the EFT Authorization, I agree to directly pay according to the terms in this Agreement.

X Dated / /

Print Name Hm Ph ( )

Street Wk Ph ( )

City, State, Zip

ASSUMPTION OF RISK • 3-DAY NOTICE •

The use of the Facilities at 24 Hour Fitness (24 Hour) naturally involves the risk of injury to you or your guest, whether you or someone else cause it. As such, you understand and voluntarily accept this risk and agree that 24 Hour will not be liable for any injury, including, without limitation, personal, bodily or mental injury, economic loss or any damage to you, your spouse, guests, unborn child, or relatives resulting from the negligence or other acts of 24 Hour or anyone on 24 Hour's behalf or anyone using the Facilities. If there is any claim by anyone based on any injury, loss or damage described here, which involves you or your guest, you agree to (1) defend 24 Hour against such claims and pay 24 Hour for all expenses relating to the claim and (2) indemnify 24 Hour for all liabilities to you, your spouse, guests, relatives, or anyone else, resulting from such claims. This Agreement is not effective until you and an authorized 24 Hour representative sign and date it. By signing it below, you agree to all the terms on the front and back pages of this Agreement and acknowledge you received a copy of it and the attached Policies. Also, you understand that:

You, the buyer, may cancel this Agreement at any time prior to midnight of the third business day of the health studio after the date of this Agreement, excluding Sundays and holidays. To cancel this Agreement, mail or deliver a signed and dated notice, or send a telegram which states that you, the buyer, are canceling this Agreement, or words of similar effect. Such notice shall be sent to: P.O. Box 2409, Carlsbad, CA 92018 Attn.: 3-Day Desk.

X Mark D. Salzwedel 3 6 98 Authorized by 24 Hour 26406 Counselor # 21063

Your (Member) Signature Date Signed

The pink contract copy can be used for first 90 days for admittance to 24 Hour Fitness 3 Copies: ORIGINAL: white 24 HOUR: yellow CUSTOMER: pink