


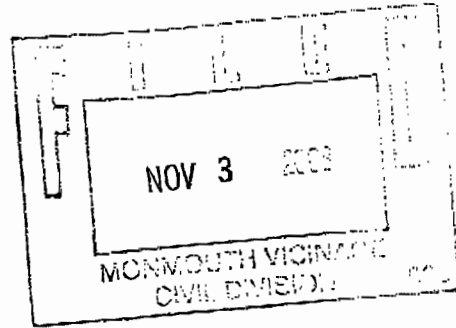


Appendix XII-B1

<b>CIVIL CASE INFORMATION STATEMENT</b> (CIS)		FOR USE BY CLERK'S OFFICE ONLY	
 <p>Use for initial Law Division Civil Part pleadings (not motions) under Rule 4:5-1 <b>Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or if attorney's signature is not affixed.</b></p>		PAYMENT TYPE: CK CG CA CHG/CK NO. AMOUNT: OVERPAYMENT: BATCH NUMBER:	
ATTORNEY/PRO SE NAME Peter C. Lucas, Esquire		TELEPHONE NUMBER (732) 663-9100	COUNTY OF VENUE Monmouth
FIRM NAME (if applicable) LUCAS & MCGOUGHAN, LLC		DOCKET NUMBER (When available) <i>LS092-08</i>	
OFFICE ADDRESS 725 Carol Avenue P. O. Box 490 Oakhurst, New Jersey 07755		DOCUMENT TYPE Complaint	JURY DEMAND <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
NAME OF PARTY (e.g., John Doe, Plaintiff) Peter Gorham, individually and Model A. Fitness, Inc.		CAPTION v. Retrofitness Enterprises, LLC, Retrofitness Corp., and Eric Casaburi, individually	
CASE TYPE NUMBER (See reverse side for listing) 508	IS THIS A PROFESSIONAL MALPRACTICE CASE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.		
RELATED CASES PENDING? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF YES, LIST DOCKET NUMBERS		
DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY, IF KNOWN <input type="checkbox"/> NONE <input checked="" type="checkbox"/> UNKNOWN		
<b>THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.</b>			
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION			
DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF YES, IS THAT RELATIONSHIP <input type="checkbox"/> EMPLOYER-EMPLOYEE <input type="checkbox"/> FRIEND/NEIGHBOR <input type="checkbox"/> OTHER (explain) <input type="checkbox"/> FAMILIAL <input type="checkbox"/> BUSINESS		
DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO			
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION:			
 DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION:		
WILL AN INTERPRETER BE NEEDED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF YES, FOR WHAT LANGUAGE:		
ATTORNEY SIGNATURE 			

**LUCAS & McGOUGHAN, L.L.C.**  
 725 Carol Avenue  
 Post Office Box 490  
 Oakhurst, New Jersey, 07755  
 Tel: (732) 663-9100  
 Fax: (732) 663-0029  
 Attorney for Plaintiff



Model A. Fitness, Inc. and  
 Peter Gorham, individually

SUPERIOR COURT OF NEW JERSEY

MONMOUTH COUNTY: LAW DIVISION

Plaintiff,

DOCKET NO.

*L 5092-08*

v.

*Civil Action*

Retrofitness Enterprises, LLC  
 Retrofitness Corp., and  
 Eric Casaburi, individually

**COMPLAINT, JURY DEMAND,  
 DESIGNATION OF TRIAL COUNSEL AND  
 CERTIFICATION OF COUNSEL**

Defendant,

Plaintiff, Model A Fitness, Inc., with offices at 91 Fulton Street #3, Boonton, NJ 07005, and Peter Gorham, individually, by way of Complaint against the defendant, Retrofitness Enterprises, LLC with offices at 522 Route 9 North, Manalapan, NJ 07726, Retrofitness Corp., and Eric Casaburi, individually, says:

**BACKGROUND**

1. Plaintiff, Model A Fitness, Inc. (hereinafter "Model A"), and Peter Gorham, individually, are residents of Morris County with an address at 91 Fulton Street #3, Boonton, New Jersey.
2. Defendant, Retrofitness Enterprises, LLC is a limited liability company operating and organized under the laws of the State of New Jersey.

3. Defendant, Retrofitness Enterprises, LLC, is a resident of Monmouth County with offices located at 522 Route 9 North, Manalapan, New Jersey.

4. Upon information and belief, defendant, Retrofitness Corp., is the parent company of Retrofitness Enterprises, LLC. Both companies are controlled by Eric Casaburi.

5. Retrofitness owns, operates and franchises body building, health and fitness facilities under the Retrofitness brand.

6. Defendant, represented by its president and owner Eric Casaburi, and Plaintiff, Peter Gorham, entered into a "License Agreement" on or about November 4, 2005 for use of the service mark "Retrofitness", herein referred to as the "Agreement". Thereafter, plaintiff Peter Gorham assigned the License Agreement to Model A. Fitness, Inc.

7. By letter dated August 30, 2007, Mr. Casaburi terminated the Agreement and waived the non-compete buy-out fee.

8. The Agreement provided for the use of the mark "Retrofitness" in conjunction with the operation of a body building, fitness and health facility.

9. The Agreement provided for the exclusive use of the mark "Retrofitness" and related logo for a two year term. The Agreement was automatically renewable unless terminated by one of the parties upon sixty (60) days written notice prior to the end of the current term.

10. The Agreement was effective within a five (5) mile radius and granted plaintiffs a right of first refusal for the establishment of a separate new license for any Retrofitness facility within a 10 mile radius of Gorham's established location.

11. The Agreement also contained a restrictive covenant prohibiting Model A from competing within a 25 mile radius of any Retrofitness facility for a two year period.

12. The Agreement provided plaintiffs with the right to buy out of the non-competition clause for a fee of Eighteen Thousand Five Hundred Dollars (\$18,500).

13. The Agreement provided standards for the operation of the facility such as usable square foot requirements, use of wall and floor colors and approval for design and layout by Retrofitness Enterprises. It also provided for hours of operation, dress code, and a maximum price cap on the daily user fee. Mr. Casaburi further required that plaintiffs use ABC Financial for all billing services & club management software in order to administer automatic deductions for royalty and membership tag payments to Retrofitness and provide Retrofitness Enterprises with access to member information and billing.

14. The Agreement also provided for various support services including, without limitation, free use of Retrofitness website including on-line membership sign ups, mapping and location information. Shortly after Plaintiffs opened their location, Defendant terminated Plaintiffs' access to online membership sign ups. Defendant also denied Plaintiffs' access to the website when Plaintiffs refused to sign unto a new agreement.

15. Plaintiffs were "strong armed" by Retrofitness to purchase equipment from its' approved vendors and suppliers only with whom Retrofitness claimed to have negotiated advantageous pricing.

16. Mr. Casaburi repeatedly assured plaintiff that he could trust his choice of vendors since they had been well researched and was confident that the pricing was

competitive based on group purchasing and would not be available on an individual basis. This claim has turned out to be untrue since plaintiff has continued to enjoy the same pricing since the termination of the Agreement.

17. Despite the Agreement's provision allowing plaintiff to choose his own vendors, any attempt on plaintiff's part to use a different vendor than that recommended by Mr. Casaburi was met with hostility and threats of breach of the Agreement.

18. Mr. Casaburi also recommended a bank and a particular loan officer from whom plaintiff could obtain a Small Business Loan. Mr. Casaburi claimed that the bank already had a pre-approved business plan for the facility. This representation turned out to be false.

19. The Agreement also provided for 30 hours of Health Club Management Training.

20. At the time, plaintiff entered into the Agreement, plaintiff had no prior experience in the health and fitness industry.

21. Retrofitness Enterprises, LLC through Eric Casaburi provided plaintiff with a business plan and assured plaintiff that he would provide start-up assistance with the facility.

22. The business plans provided to plaintiff misrepresented the start up costs and revenue to be generated. The start up costs for the operation turned out to be higher than represented in the business plan and the revenue was overestimated.

23. Defendant, Mr. Casaburi knew or should have known of the inaccuracies found in the business plan given to plaintiff.

24. Upon information and belief, plaintiff alleges that Mr. Casaburi was getting rebates or other economic benefits from the various approved vendors.

25. Plaintiff was presented with a Uniform Franchise Offering Circular (UFOC) issued by Retrofitness Corp, an affiliate of Retrofitness Enterprises owned and controlled by Eric Casaburi in June of 2007.

26. In the UFOC, Retrofitness Corp. asserted that it expects to derive either rebates or other benefits from the purchases from vendor and expects these rebates to be a percentage of sales back to Retrofitness Corp. of between ¼% to 10%. Among the Vendors listed are Royale brand juice bar equipment and systems, ABC Financial, Life Fitness equipment, and Getmembers.com direct mail marketing. Plaintiff used all of these vendors at Mr. Casaburi's recommendation, request and insistence. The total payments made to these vendors and to Retrofitness as royalties for the twelve months preceding the termination of the Agreement exceeds \$80,000.

27. Mr. Casaburi neither disclosed these financial arrangements nor did he pass on any rebates he may have received. It is plaintiff's belief that these financial arrangements were in fact kickbacks paid directly to Mr. Casaburi and not "savings" passed on to customers, licensees or franchisees as Mr. Casaburi represented.

28. Not long after plaintiff's execution of the Agreement, Mr. Casaburi approached Mr. Gorham about converting to a Franchise Agreement. Mr. Casaburi presented plaintiff with a Franchise Agreement that plaintiff chose not to sign.

29. Several months prior to the expiration of the Agreement, Mr. Casaburi again approached plaintiff with a Franchise Agreement. Mr. Casaburi informed Mr. Gorham that Retrofitness Enterprises, LLC would no longer be offering Licenses and

thus he would have to convert to the Franchise Agreement or lose his License and thus his right to operate as a Retrofitness facility. Plaintiff considered the newly presented Franchise Agreement and determined that its terms were less favorable than the terms he currently enjoyed.

30. During the several months preceding the termination of the Agreement, plaintiff became aware that the defendants were searching for a new location within 10 miles of plaintiff's facility. The Agreement provided plaintiff with a right of first refusal within a 10 mile radius of his location.

31. As far back as April of 2007 when Mr. Gorham met with Mr. Casaburi to negotiate a franchise agreement that Mr. Casaburi had presented to Mr. Gorham, Mr. Casaburi had in his office a white board indicating planned locations for Retrofitness franchises. Among these locations was a Lincoln Park, NJ location.

32. Within a month or so of the termination of the Agreement, a new facility began membership pre-sales in Fairfield, New Jersey within 10 miles of plaintiff's facility. This facility is across the street from the Lincoln Park town line. At no time was plaintiff offered the right of first refusal for this facility as required by the Agreement. Consequently, plaintiff now has a direct competitor within 10 miles of his facility which directly impacts his business.

33. Mr. Casaburi's course of conduct indicates that it was never his intent to renew plaintiff's License Agreement. In fact, the response email plaintiff received to his first inquiry into Retrofitness was entitled "Retrofitness Franchise".

34. Mr. Casaburi enticed Mr. Gorham into signing the Agreement entitled "License Agreement", which is actually a franchise agreement, with favorable terms and

then coerced Mr. Gorham by threat of termination to sign unto a new agreement with less favorable terms.

35. Plaintiff's Agreement was terminated when he refused to submit to that threat.

36. Further, in a CNN interview, Mr. Casaburi stated that it was his intention to create a franchise from the very start.

37. In its July 2006 UFOC, Retrofitness Corp. lists Mr. Gorham's Boonton facility as one of its franchisees.

38. A NJBIZ article dated November 13, 2006 featuring Retrofitness and quoting Mr. Casaburi, describes Retrofitness as a franchise chain and states that Casaburi owns two Retrofitness outlets and franchises the rest.

39. Retrofitness Enterprises justifies the termination by stating it was no longer offering Licenses. However, upon information and belief, plaintiff understands that there are at least two Retrofitness locations still operating under a License type of agreement. These locations are in Lumberton, NJ and in Methuen, MA.

### **FIRST COUNT**

#### **(Breach of Contract)**

40. Plaintiff hereby repeats and realleges the facts previously set forth in paragraphs 1 – 39 as if fully set forth herein.

41. Defendant's opening of a new location in Fairfield, NJ within 10 miles of Plaintiff's location without first affording Plaintiff that opportunity is a violation of Plaintiff's right of first refusal as provided in the Agreement.



42. Defendant's failure to provide Plaintiff with the right of first refusal for the new Fairfield, NJ location amounts to a breach of the Agreement.

43. As a direct and proximate result of Defendant's actions, Plaintiff has suffered damages, including but not limited to financial loss, loss of economic gain, loss of business opportunity, attorneys fees and costs, and such other damages as will be determined at the time of trial.

WHEREFORE, plaintiff demands judgment against defendant, for damages and attorney's fees together with costs of suit.

### **SECOND COUNT**

#### **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

44. Plaintiff repeats and realleges the facts previously set forth set forth and the all prior allegations of the Complaint as if fully set forth at length herein.

45. Defendant's conduct indicates that Defendant never intended on renewing the Agreement with Plaintiff.

46. Defendant's conduct and course of dealing indicates that it was Defendant's intention to lure Plaintiff into making a substantial business investment, by way of the Agreement with favorable terms, and then coerce Plaintiff with the threat of termination to sign unto a "Franchise Agreement" with less favorable terms.

47. During the term of the Agreement, Plaintiff performed all of Plaintiff's obligations under the Agreement.

48. Defendant justified the termination of the Agreement by alleging that Defendant no longer offered Licenses. However, upon information and belief, Defendant continues to operate two locations under License Agreements.

49 Defendant's termination of the Agreement was in bad faith and intended to coerce Plaintiff into signing a more onerous and less favorable "Franchise Agreement".

50. Further during the course of the Agreement, Defendant failed to disclose to Plaintiff that Defendant was receiving remuneration from the recommended and required vendors.

51. Defendant's conduct constitutes a violation of the implied covenant of good faith and fair dealing.

52. As a direct and proximate result of Defendants' actions, plaintiff has suffered damages, including but not limited to financial loss, loss of economic gain, loss of business opportunity and such other damages as will be determined at the time of trial.

WHEREFORE, plaintiff demands judgment against defendant, for damages and attorney's fees together with costs of suit.

### **THIRD COUNT**

#### **(Fraud and Misrepresentation)**

53. Plaintiff repeats and realleges the facts previously set forth and all prior allegations of the First and Second Count of the Complaint as if set forth at length herein.

54. At the time Defendant presented Plaintiff with the offer to operate a Retrofitness location, Defendant presented Plaintiff with a business plan which contained estimates for start up costs and revenue.

55. The business plan presented to Plaintiff by Defendant was for an existing location in Cherry Hill, NJ.

56. The business plan presented to Plaintiff underestimated the start up costs of the operation and overestimated the revenue.

57. Plaintiff subsequently learned that the Cherry Hill location had not performed in accordance with the business plan presented and that Defendant was aware of this fact.

58. Plaintiff relied on the business plan presented by Defendant and invested significant sums of money in the start up of the business.

59. At the time of Defendant's termination of the Agreement, Plaintiff had not yet generated a profit from the business contrary to the business plan presented by Defendant.

60. Defendant made material misrepresentations to Plaintiff, knowing that they were false, and with the intention that Plaintiff rely on same to Plaintiff's detriment.

61. Defendant's actions were malicious, intentional, wanton and willful, and caused Plaintiff significant harm.

62. As a direct and proximate result of Defendants' actions, plaintiff has suffered damages.

WHEREFORE, plaintiff demands judgment against defendant, for damages and attorney's fees together with costs of suit.

#### **FOURTH COUNT**

#### **(Violation of the Franchise Practices Act)**

63. Plaintiff repeats and realleges the facts previously set forth and the prior allegations of the First, Second and Third of the Complaint as if set forth at length herein.

64. The Agreement between Plaintiff and Defendant constitutes a Franchise under the New Jersey Franchise Practices Act (NJFPA) N.J.S.A. § 56:10-1.

65. Under the NJFPA, a franchisor cannot terminate, cancel or fail to renew a franchise without good cause. N.J.S.A. §56:10-5. Good Cause is defined by the NJFPA as a failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise. N.J.S.A. §56:10-5.

66. At all times during the term of the Agreement, Plaintiff complied with the requirements imposed upon him by the Agreement.

67. Defendant terminated the Agreement without cause.

68. Defendant's termination of the Agreement is a violation of the NJFPA.

69. As a direct and proximate result of Defendants' actions, plaintiff has suffered damages.

WHEREFORE, plaintiff demands judgment against defendant, for damages and attorney's fees together with costs of suit.

#### **FIFTH COUNT**

#### **(Violation of the Consumer Fraud Act)**

70. Plaintiff repeats and realleges the facts previously set forth and the prior allegations of the First through Fourth Counts of the Complaint as if set forth at length herein.

71. Defendant's intentional failure to disclose to Mr. Gorham his intention to convert the Agreement to a Franchise constitutes a knowing concealment and misrepresentation in violation of the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. 56:8-2.

72. Defendant's threat to terminate the Agreement and ultimate termination of the Agreement without good cause with the intent of pressuring Plaintiff into signing unto the Franchise Agreement, constitutes an unconscionable commercial practice under the NJCFA.

73. Defendant's failure to disclose the fact that he was receiving an economic benefit from the various vendor contracts with whom he had financial arrangements constitutes an omission of a material fact with the intent that others rely upon such omission. Had Plaintiff been aware of these financial arrangements, he would have been more diligent in researching vendor pricing and securing more competitive pricing. Having received remuneration from the various approved vendors, Defendant became an agent of those vendors and should have disclosed his relationship with the vendors to Plaintiff.

74. Defendant's failure to state his true intentions with regard to the Agreement constitutes a concealment and/or omission of a material fact with the intent that others rely on such concealment. Had Plaintiff been aware of Defendant's plans to switch Plaintiff unto a different agreement with less favorable terms, Plaintiff may not have signed unto the Licenses and invested his time and money.

75. Defendant's misrepresentations regarding the start up costs and revenue associated with the business, also constitutes a violation of the NJCFA. Defendant intended that Plaintiff rely on these figures to invest in the start up of a Retrofitness location and Plaintiff did in fact rely on these representations.

76. As a direct and proximate result of Defendant's fraud and misrepresentations, Plaintiff suffered damages in the form of overpayment for vendor equipment, increased

start up costs and loss of revenue. Plaintiff also incurred conversion costs upon the termination of the Agreement in excess of \$100,000.

WHEREFORE, plaintiff demands judgment against defendants, for treble damages and attorney's fees together with costs of suit.

LUCAS & MCGOUGHAN, L.L.C.  
Attorneys for Plaintiff

Dated: October 31, 2008

By:   
PETER C. LUCAS, ESQ.

#### **DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Peter C. Lucas, Esq. is hereby designated as Trial Counsel in the above entitled action.

#### **JURY DEMAND**

Plaintiff demands a trial of jury, pursuant to Rule 4:35-1.

#### **CERTIFICATION**

I do hereby certify that the within pleading was filed within the time prescribed by Rule 4:6. I further certify that all counsel of record appearing in the within Civil Action are being served with copies of this pleading, said service being made pursuant to the provisions of Rule 1:5.

#### **CERTIFICATION PURSUANT TO RULE 4:5-1**

The undersigned, PETER C. LUCAS, ESQ., certifies on behalf of the plaintiff as follows:

1. I am an Attorney-At-Law of the State of New Jersey, counsel for the plaintiff in the subject litigation.

2. The matter in controversy in this case is not, to the best of my knowledge, the subject of any other action pending in any court or pending arbitration proceeding, nor is any action or arbitration contemplated.

3. I am not aware of any other parties who should be joined in this action at the present time.

4. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the statements made by me are willfully false, I am subject to punishment.

LUCAS & MCGOUGHAN, L.L.C.  
Attorneys for Plaintiff

By: 

\_\_\_\_\_  
PETER C. LUCAS, ESQ.

Dated: October 31, 2008