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GOLD'S GYM INTERNATIONAL, INC., Appellant, vs. CLARK CHAMBERLAIN and BRENT STATHAM VINCE ENGLE, Appellees. : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

GOLD'S GYM INTERNATIONAL, INC., Appellant, vs. CLARK CHAMBERLAIN and BRENT STATHAM VINCE ENGLE, Appellees.	**GOLD'S GYM INTERNATIONAL, INC.'S SUPPLEMENTAL BRIEF** Appellate Case No. 20170146-SC

On Appeal from the Third Judicial District Court for Salt Lake County, State of Utah Civil No. 090919785, Honorable T. M. SHAUGHNESSY

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INTRODUCTION

On April 29, 2019, the Utah Supreme Court issued a Supplemental Briefing Order ("Order") to which Gold's Gym International, Inc. (hereinafter referred to as "Gold's Gym"), the Appellant in this appeal, hereby responds. The Utah Supreme Court's Order identified several legal issues and Gold's Gym will now address the legal issues the order as stated in the Order. It appears that the Order covers only legal issues, as opposed to factual ones as well, and thus, Gold's Gym will not include in this Supplemental Brief an additional "Statement of the Case." For the Statement of the Case, Gold's Gym refers this Court to its opening Appellate Brief. Gold's Gym will also not include in this Supplemental Brief an additional "Statement of the Issues" because the Order already outlines the legal issues upon which the Utah Supreme Court would like to focus.

ARGUMENT

1. In Interpreting the Findings of Fact and Conclusions of Law, the Trial Court Concluded that Plaintiffs' Claims Were Not Derivative, Yet Even If They Were Derivative, They Fell Within the Closely Held Corporation Exception. On March 21, 2019, the Honorable Todd Shaughnessy of the Third Judicial District Court of the State of Utah submitted to the Utah Supreme Court a Response to Temporary Remand Order and Supplemental Findings of Fact and Conclusions of Law ("Judge Shaughnessy's Response"). (Doc. 562). In Judge Shaughnessy's Response, he stated that his 2016 Findings of Fact and Conclusions of Law made "no effort to re-examine these issues, and the court has no recollection of having done so on the record. Rather, as stated at page 22 of the findings, the court merely incorporated by reference Judge Toomey's 2013 ruling…." (Doc. 562 ¶7). Thus, in order to correctly interpret the 2016 Findings of Fact and Conclusions of Law, reviewing Judge Toomey's September 6, 2013 Memorandum Decision re: Gold's Gym's Summary Judgment Motion is necessary ("Judge Toomey's Memorandum Decision"). (Doc. 154 pp. 13-14). The relevant part of Judge Toomey's Memorandum Decision reads as follows:

> The Court must first determine whether this is a derivative action. Derivative suits seek to enforce rights belonging to the corporation. *Aurora Credit Serv. Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1276 (Utah 1998). In contrast, direct actions by members are appropriate where "the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on contract to which he is a party, or on a

> right belonging severally to him, or on a fraud affecting him directly, it is an individual action." *Id*. ***The Court is not convinced that this is a derivative suit. First, the Utah Supreme Court has noted that derivative actions may not be required where the corporation is closely held with a limited number of principals. Here, the claims are brought by two of the three remaining members of Health Source; clearly, Health Source was closely held with a very limited number of principals. Second, derivative actions are alleged against the corporation itself. Here, Gold's is challenging the claims against Gold's, not Health Source or Mr. Engle. Gold's does not cite to authority requiring a derivative suit for claims against a party who is not the primary corporation.***
>
> Plaintiffs Clark Chamberlain and Brent Statham are not improper parties, and Gold's has not shown that this is a derivative action of the sort that would require Health Source to be named a Plaintiff.

(Doc. 154) (September 6, 2013 Memorandum Decision re: Gold's Summary Judgment Motion, p.13-14) (Internal footnote omitted) (Emphasis added).

In examining Judge Toomey's Memorandum Decision, as noted *supra*, the trial court erroneously permitted this matter to proceed as a direct action because the claims were asserted against a third party – Gold's Gym – and not against directors or managers of the company. The closely held corporation exception was the trial court's fall-back position in permitting the claims to proceed. The trial court stated that "Health Source was closely held with a very limited number of principals." Accordingly, the interpretation of the Findings of Fact and Conclusions of Law is that the trial court allowed the claims to proceed because the claims were not derivative and, even if they were, the closely held corporation exception applied.

The trial court also outlined generic case law, citing *Aurora Credit Serv. Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1276 (Utah 1998), to determine whether a claim is, by nature, direct or derivative. Following this case law, the trial court held that it was "not convinced that this is a derivative suit." After citing the closely held corporation exception as the exception to the general rule, the district court provided a "first" legal conclusion to allow the claims to proceed. The trial court reasoned that the claims were, by nature, not derivative because "derivative claims are alleged against the corporation itself", and Health Source was never a named party to this action. Consequently, the trial court held that the claims were direct by nature.

Therefore, the correct interpretation of the Findings of Fact and Conclusions of Law is that the trial court concluded that the claims were (i) not derivative by nature, and (ii) even if they were derivative, the closely-held corporation exception applied.

2. Gold's Gym Was Significantly Prejudiced and Endured Six (6) Additional Years of Litigation Because the Trial Court Determined that the Claims Could Proceed Because They Were Not Derivative Claims. On September 6, 2013, the trial court entered a Memorandum Decision denying Gold's Gym's Motion for Summary Judgment seeking to dismiss the claims because the Appellees lacked standing to bring the claims on behalf of the entity. (Doc. 154). Gold's Gym is a franchisor. Franchisors must report litigation in their

federal and most state disclosure documents. FTC Rule 16 C. F.R. Part 436. Reporting litigation often has a significant impact on the ability to sell new franchises. This case lasted for an additional (6) six years with reporting requirements because the Plaintiffs were erroneously allowed to pursue a direct claim. The trial court's September 6, 2013 Memorandum Decision meant that the Appellees' claims survived a motion for summary judgment, and as such, the Appellees were privileged to bring claims that belonged to the entity and stepped into the shoes of the entity in doing so. Moreover, Gold's Gym incurred significant legal expenses, costs, and time. Thus, the impact of the trial court's decision that the claims were not derivative had a long-lasting and substantial effect on Gold's Gym.

Second, the Appellees failed to comply with Rule URCP 23A that establishes the procedural process with which a member of a company must comply in order to bring a valid derivative claim on behalf of the company. The failure to comply with Rule 23A was excused given the Trial Court's ruling that the claims were not derivative because Rule 23A was never followed by Appellees. Thus, Appellees' failure to comply with Rule 23A was another factor in contributing to the delayed outcome of this case.

Third, the trial court's decision to not require the claims to proceed derivatively caused BACH to defend the claims that otherwise should have been dismissed for lack of standing, causing BACH significant legal expenses, including

additional oral and written discovery, motions, trial preparation, court-ordered mediation, trying the claims before the court during a three-day bench trial, arguing post-trial motions, and now this appeal. Put simply, the trial court missed the mark on the crux of this case. Had the Appellees prevailed at trial, they would be seeking attorneys' fees under the exact same contract that BACH is now seeking attorneys' fees as prayed in the complaint for all claims (see complaint) ¶ ¶5 120, 125, 131, 143, 159, 177, 183, 189, 205, 213, 218, and Eighteenth cause of action) The Appellees prayed for attorney's fees on both contract and tort claims against Gold's. See Complaint, Prayer ¶5. The Appellees claimed both damages for their own indirect injuries resulting from loss of value to their membership interests and also on behalf of Health- Source based on: (1) lost customer contracts that belonged solely to Health Source; (2) lost equipment that the Appellees never owned; and (3) expectation damages under the Health Source – Gold's Gym License Agreement. Moreover, all of the claims that were tried by Appellees arose from and related to the Licensing Agreement containing an attorneys' fee provision. In other words, the Appellees were fully aware that they were bringing claims arising directly under the contract that contained an attorneys' fee provision and that their claims were being brought on behalf of the entity. They cannot claim the benefits of the contract to prosecute BACH, and then escape from the same contract's burdens when BACH prevails on all claims.

3. The Courts of Utah Should No Longer Follow the *Aurora* Closely Held Corporation Exception For Third Party Claims. For the following reasons, the *Aurora* closely-held corporation exception should no longer be followed by Utah courts, especially under these circumstances.

a) The District Court Applied Current Precedent Under *Aurora* to Allow the Claims to Be Brought By a Member of a Limited Liability Company. The trial Court's decision to apply the closely-held corporation exception in the context of claims being brought by a member of a limited liability company is consistent with current Utah law. For example, the Utah Court of Appeals in *Banyan Inv. Co., LLC v. Evans*, 2012 UT App 333, ¶ 14, 292 P.3d 698, 703, held that the closely-held corporation exception is applicable to limited liability companies. The *Banyan* Court provided that "[w]e see no reason to deny members of LLCs the opportunity to invoke the closely-held corporation exception, where appropriate, while subjecting them to the same requirements as shareholders of corporations under rule 23A." *Id.* The Utah Court of Appeals further reasoned that closely-held LLCs are just as "vulnerable to malfeasance" as are closely-held corporations. *Id*. (quoting *Angel Inv'rs, LLC v. Garrity*, 2009 UT 40, ¶ 21, 216 P.3d 944, 950). The rationale for this holding is founded upon the following:

> [I]n closely held corporations; it becomes easy for the majority shareholders to identify themselves as the corporation. These shareholders not only receive the majority of the profits

> the corporation generates, but they often serve on the board and make operating decisions for the corporation....Majority shareholders of closely held corporations have increased control over the corporation because they likely serve on the corporation's board; their dual roles can make malfeasance easier to conduct as well as justify. Likewise, the nature of a closely held corporation, where there is often a small number of shareholders and many of those may have close ties to each other, lessens the likelihood that a minority shareholder will speak out against corporate malfeasance. [1](Footnote Omitted)

As held by the Utah Court of Appeals in *Banyan*, the closely-held corporation exception can apply to LLCs. To the extent that it applied the current Utah law, as found in *Banyan*, *supra*, or in *Aurora Credit Serv. Inc. v. Liberty W. Dev., Inc.*, 970 P.2d 1273, 1276 (Utah 1998), as applied to corporations, the trial court in this matter merely followed precedent. However, the facts and legal issues in the present case before this Court are distinguishable from *Banyan* and *Aurora* for the reasons stated *infra*.

b) The Closely-Held Corporation Exception Should Not Apply to Claims Asserted Against Third-Parties. The closely-held corporation exception should not allow claims against third-parties because such a rule permits nonsignators to a contract to assert contract claims that bind third-parties to submit

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[1] 6 In *Heppler*, the court observed that the plaintiffs "had total control of the litigation," and "were primed to take the benefits of an award of attorney fees if they won...." (*Heppler, supra,* 73 Cal.App.4th at p. 1291, 87 Cal.Rptr.2d 497.) The *Heppler* court relied on these facts in determining that there was sufficient evidentiary support for the trial court's conclusion that the plaintiffs' attorney fee **417 obligation was within the scope of the contractual assignment at issue in that case. As in *Heppler,* Nicholas was in control of the litigation and was primed to take the benefits if he had prevailed.[7] The result we reach in this case is thus both legally correct as well as equitable.

to obligations they did not agree to. Gold's Gym did not agree to be liable to pay the Plaintiffs' for damages they personally suffered. Moreover, there is no Utah case that applies the closely-held corporation exception to a third party, and thus, because allowing derivative claims against third-parties would sanction injustice of exposing third-parties to claims that they did not contractually accept, it should not be expanded to do so. Just the opposite should occur. The closely-held corporation exception should be limited to claims against directors and managing members if not eliminated altogether.

The Court of Appeals recognized limitations to the closely-held entity exceptions that allows a derivative action to be maintained only if: (i) The defendants will not be unfairly exposed to a multiplicity of actions; (ii) the interests of the LLC's creditors will not be materially prejudiced; and (iii) the direct suit will not interfere with a fair distribution of the recovery among the interested persons. *Bouycen Inc. Co. v. Evans, 2012 UT App. 333, ¶16, citing, GLFP, Ltd. V. CL Mgmt., Ltd., 163 p.3d 636* (Utah ct. App. 2007); quoting American Law Institute, *Principles of Corporate Governance; Analysis and Recommendations* §7.01(d) (1994).

Third-party direct actions will almost always run afoul of all three limitations. Defendants would be exposed to a multiplicity of lawsuits because the minority interest suit leaves the third-party exposed to suit by other members (or shareholders) and also by the management and company itself. Creditors are

unfairly prejudiced because they are forced to defend claims asserted by individuals with whom they did not contract or agree to be subject to potential liability. Further, a fair distribution of the proceeds requires proceeds to remitted to the company and then distributed - - but only a minority of members are parties to collect proceeds. As in this case, it is likely to be unclear just who is entitled to any proceeds that may be recovered. Thus, closely-held derivative action rules should not allow claims against third-parties.

It is worth noting that every case in Utah which has applied the closely-held exception has been claims against company management by members or shareholders and not against third parties.

c) The Closely-Held Corporation Exception Should No Longer Be Recognized Under Utah Law, and Certainly Not Under the Facts of This Case. To bring a direct claim a shareholder or LLC member should be required to show an injury distinct from the entity for which recovery is sought. Requiring a distinct injury independent from the entity insures that recovery is limited to the amount suffered by the plaintiffs directly. When less than all members of Limited Liability Company assert an action or behalf of the company, the non-participating members may gain a windfall. The non-participating members should not be responsible for attorneys' fees when they do not control litiagation. If recovery is limited to the named Plaintiffs' for their own damages then issues of amount of

damages, who is entitled to judgment funds recovered and who is liable for attorneys' fees if there is a loss are all determined as a matter of law. However, if plaintiffs are allowed to pursue claims against third parties for injuries suffered only by the company, then all of these issues may result in injustice. In third party actions for example, only those bringing an action should be responsible for attorneys' fees because they control the litigation decisions. They also should alone be responsible for attorneys' fees because they made the decision to pursue litigation. See *Heppler v. J.M. Peters Co.*, 73 Cal. App. 4th 1263, 1291 87 Cal. Rptr. 2nd 497 (1999)[2] (Footnote omitted)

The Utah Supreme Court has recently stated that "[f]rom our vantage point eight years after *Aurora,* we can see that our proclamation of a "growing trend" in recognizing an exception to the derivative action rule for closely held corporations may have overstated matters." *Dansie v. City of Herriman*, 2006 UT 23, ¶ 16, 134 P.3d 1139, 1145. "Some jurisdictions have rejected the closely held corporation exception or severely limited it." *Id.* (citing Peter H. Donaldson, *Breathing Life Into Aurora Credit Services, Inc. v. Liberty West*

[2] 6 In *Heppler,* the court observed that the plaintiffs "had total control of the litigation," and "were primed to take the benefits of an award of attorney fees if they won...." (*Heppler, supra,* 73 Cal.App.4th at p. 1291, 87 Cal.Rptr.2d 497.) The *Heppler* court relied on these facts in determining that there was sufficient evidentiary support for the trial court's conclusion that the plaintiffs' attorney fee **417 obligation was within the scope of the contractual assignment at issue in that case. As in *Heppler,* Nicholas was in control of the litigation and was primed to take the benefits if he had prevailed.[7] The result we reach in this case is thus both legally correct as well as equitable.

Development, Inc., 2002 Utah L.Rev. 519, 532–33). "Since *Aurora*, we have not had the opportunity to fully delineate the bounds of the exception in Utah. However, such a task must wait for another day because the Company in this case is not a closely held corporation, nor is its cast of shareholders and principals as small as that present in *Aurora*." *Id.* That "another day" has come.

The closely-held corporation exception should be eliminated in third-party cases based on the very problems this case illustrates. When members of a closely-held corporation step into the shoes of the corporation, and sue a third party on behalf of the corporation, the members are allowed to impose on third parties obligations to respond to claims by members where the third-party never agreed to accept the risk or liability. Furthermore, if the members sue a third-party on behalf of the corporation pursuant to a contract – *of which the members are nonsignatories* – the members should be required to be bound by the burdens of the contract if they are seeking the benefits thereunder.

4. A Non-Party to a Contract Who Asserts the Benefits of the Contract Cannot Escape the Burdens of the Contract, Including an Attorneys' Fee Provision In the Contract. Under Utah law, "[a] party cannot accept the benefits of a contract and reject its burdens." *Richardson v. Rupper*, 2014 UT App 11, ¶ 11, 318 P.3d 1218, 1221; *see also Prudential Fed. Sav. & Loan Ass'n v. Hartford Acc. & Indem. Co.*, 7 Utah 2d 366, 372, 325 P.2d 899, 903 (1958) ("In the absence of expressly so reserving its rights, Hartford cannot accept the benefits of the contract

and reject the burdens."); *Francisconi v. Hall,* 2008 UT App 166 ("However, Hall could not continue to receive the benefits of the bargain and simultaneously claim to be released from further performance of her own obligations."); *see id.* ("A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions.") (Quoting *Southern Energy Homes, Inc. v. Gregor,* 777 So.2d 79, 82 (Ala.2000)).

As a practical matter, the trial court erred in allowing Appellees to proceed as a direct action. The trial court held in essence that Appellees could assert claims under a contract to which they were not parties.

"Traditionally, five theories for binding a nonsignatories to a [contract] have been recognized: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter-ego; and (5) estoppel." *Ellsworth v. Am. Arbitration Ass'n,* 2006 UT 77, 148 P.3d 983, 989 n.11 (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 417 (4th Cir.2000). "Sometimes a sixth theory, third-party beneficiary, is added, but it is closely analogous to the estoppel theory." *Id.* (citing *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 356, 362 (5th Cir.2003)). "Another variety of nonsignatory estoppel is that enforced *by a nonsignatory* when the signatory plaintiff sues a nonsignatory defendant on the contract but seeks to avoid the contract-mandated arbitration by relying on the fact that the defendant is a nonsignatory." *Id.* at 989 n.12 (citations omitted). "The rationale behind [these] exception[s] is that a nonsignatory should

be estopped from avoiding [the burdens of the contract] when the nonsignatory seeks to benefit from some portions of the contract…." *Id.* at 989 (citations omitted).

Although it appears that the nonsignatory estoppel exception has not been applied in Utah, it is a recognized legal doctrine in Utah, *see supra*. *See id.* at 989 n.11 ("Mr. Ellsworth correctly points out that the nonsignatory estoppel exception has never been [correctly] applied in Utah. Nevertheless, we know of no reason why it could not be, in the appropriate situation."). In *Ellsworth*, the nonsignatory estoppel exception did not apply because the plaintiff was "not attempting to sue Lowell on the contract; on the contrary, he seeks to avoid the obligations of the contract altogether." *Id.* at 989. In addition, "he has not received any direct benefit from the contract." *Id.* As a result, the Utah Supreme Court in *Ellsworth* held "that the nonsignatory estoppel exception does not apply to Mr. Ellsworth, a nonsignatory who is not suing on the contract and who has not received direct benefits from the contract." *Id. Ellsworth* is distinguishable from the present matter because Appellees asserted a claim against Gold's Gym under the License Agreement. Not only did Appellees sue Gold's Gym pursuant to the License Agreement, all of their remaining claims arose out of and related to rejects created solely by the License Agreement. For example, Appellees claimed that Gold's Gym converted the Appellees' franchise rights created by the License Agreement and that Gold's Gym conspired with the other Defendants to do so. In

addition, Appellees sought multiple direct benefits under the contract, including interests owned solely by Health Source under the Licensing Agreement:

(i) All of the real and personal property at the St. George franchise location and building;

(ii) All of the gym membership contracts pursuant to the License Agreement;

(iii) The rights to the franchise agreement.

Thus, Appellees were allowed to pursue claims against a party to the License Agreement (Gold's Gym) to which they were not parties. The nonsignatory estoppel exception is not appropriate under these circumstances. Finally, multiple other jurisdictions have applied the nonsignatory estoppel exception in a variety of settings, including requiring a non-party to a contract to pay attorneys' fees. An overview of the circumstances when the nonsignatory estoppel exception applies is critical to the present analysis to determine that Appellees cannot accept the benefits of the License Agreement and then escape its burdens.

a) Arbitration. The Supreme Court of Texas' decision *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133 (Tex. 2005), is demonstrative of this legal principle in the arbitration context. In *Weekly Homes*, the plaintiff claimed the authority of the Purchase Agreement and "repeatedly demanded extensive repairs to "our home," personally requested and received financial reimbursement for

expenses "I incurred" while those repairs were made, and conducted settlement negotiations with Weekley (apparently never consummated) about moving the family to a new home." *Id.* "Having obtained these substantial actions from Weekley by demanding compliance with provisions of the contract, Von Bargen cannot equitably object to the arbitration clause attached to them." *Id.* "In addition to these benefits, Foresting and the Trust have sued Weekley on claims which are *explicitly based on the contract*." *Id*. (emphasis added). Therefore, the Texas Supreme Court concluded that "we agree with the federal courts that when a nonparty consistently and knowingly insists that others treat it as a party, it cannot later "turn[ ] its back on the portions of the contract, such as an arbitration clause, that it finds distasteful." *Id*. (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (estopping nonsignatory from denying agreement to arbitrate "when he has consistently maintained that other provisions of the same contract should be enforced to benefit him."); *see Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361–62 (5th Cir. 2003) ("Direct[-]benefits estoppel applies when a nonsignatory 'knowingly exploits the agreement containing the arbitration clause.' ") (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001)); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (requiring nonsignatories to arbitrate pursuant to provision in

contract they neither requested nor executed, as they had duty to obtain that contract and received copies of it and direct benefits under the contract).

b) Forum Selection Provisions. Many courts have found that non-signators are bound by forum selection clauses. For example the Court in *Carlyle Inv. Mgmt. LLC v. Moonmouth Co.* held that:

> With respect to the second element, even if defendants are not parties to the agreement or third-party beneficiaries of it, they may be bound by the forum selection clause if they are closely related to the agreement in such a way that it would be foreseeable that they would be bound. *See Weygandt,* 2009 WL 1351808, at *4. In determining whether a non-signatory is closely related to a contract, courts consider the non-signatory's ownership of the signatory, its involvement in the negotiations, the relationship between the two parties and whether the non-signatory received a direct benefit from the agreement. *See id.* at *4–5; *CapitalGrp.*, 2004WL2521295,at*6–7.

Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 219 (3d Cir. 2015)

In addition, the Court in *Keehan, Tennessee Inc. LLC. v. Praetorium Secured Fund* I, held that:

> An exception to this rule exists when a non-party "is so closely related to the dispute that it is foreseeable that the party will be bound." *Highway Commercial Servs. v. Zitis*, No. 2:07–cv–1252, 2008 WL 1809117, *4 (S.D.Ohio Apr. 21, 2008).[3] 20 {¶ 34} Some jurisdictions have applied this exception to shareholders, officers, and directors of a corporation-signatory and to corporations wholly owned and controlled by a signatory. *See Marano Ents. of Kansas v. Z–Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Circ.2001); *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209–210 (7th Circ.1993). In Ohio, this exception appears to have only been applied, thus far, to agent-principal situations and to third-party beneficiaries of a contract. *See WashPro Express*, *supra*, at ¶ 13; *Barrett v. Picker Internatl., Inc.*, 68 Ohio App.3d 820, 826, 589 N.E.2d 1372 (8th Dist.1990). The essential inquiry is whether, under the totality of the circumstances, " 'it is fair and reasonable to bind a non-party to the forum selection clause. * * * [T]his approach places emphasis on whether it should have been reasonably foreseeable to the non-signatory that situations might arise in which the non-signatory would become involved in the relevant contract dispute.' " *Veteran Payment Sys., LLC v. Gossage*, No. 5:14CV981, 2015 WL 545764, *8 (N.D.Ohio Feb. 10, 2015), quoting *Regions Bank v. Wyndham Hotel Mgt., Inc.*, No. 3:09–1054, 2010 WL 908753, *6 (M.D.Tenn. Mar. 11, 2010).

Finally, the Court in *XR Co. v. Block & Balestri* stated:

> Where the interests of a non-party are "completely derivative of", that is, "directly related to, if not predicated upon" those of a contracting party, the non-party is bound by the contract's forum selection clause. *Id.* In this case, it is undisputed that Koeppel is the sole and controlling shareholder of XR Co. and that the acquisition of Ocean by XR Co. would inure to his personal benefit. Therefore, even if Koeppel did not sign the letter agreement in his individual capacity, he is still bound by the forum selection clause contained in the agreement.

XR Co. v. Block & Balestri, P.C., 44 F. Supp. 2d 1296, 1301 (S.D. Fla. 1999)

c) Bankruptcy. "Section 365(f) requires a debtor to assume a contract subject to the benefits and burdens thereunder." *In re Fleming Companies, Inc.*, 499 F.3d 300, 308 (3d Cir. 2007) (citations omitted). "The [debtor]...may not blow hot and cold. If he accepts the contract he accepts it *cum onere.* If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other." *Id.* (citations omitted); *see also In re Shangra-La, Inc.*, 167 F.3d 843, 849 (4th Cir. 1999) ("When the debtor assumes its unexpired lease, however, it assumes it *cum onere*-the debtor must accept obligations of the executory contract along with the benefits", including the collection of "[a]ttorneys' fees incurred in attempting to collect sums due from debtors following default…."); *In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) ("Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere*—the debtor accepts both the obligations and the benefits of the executory contract."). Thus,

there is ample case law holding that a non-party to a contract is subjected to the benefits as well as the burdens of an assumed contract in the bankruptcy setting.

d) Attorneys' Fees. In *Brusso v. Running Springs Country Club, Inc.*, 228 Cal. App. 3d 92, 110, 278 Cal. Rptr. 758, 768 (Ct. App. 1991), the California Court of Appeals dealt with the precise issue at hand, and held that:

> "[i]t would be "extraordinarily inequitable" to deny them attorney's fees because plaintiffs who are not signatories chose to sue on the contracts in an action on behalf of the corporation when the corporation would not bring suit itself." In addition to principles of equity, the *Brusso* court found that "liabilities for fees here are predicated on breach of three contracts." *Id*. at 108, 278 Cal. Rptr. at 767. First, "[t]he individual warranties on the purchase agreement signed by the plaintiffs, individually and not on behalf of the corporation, specifically apply to section 11, the attorney's fees section." *Id*. at 109, 278 Cal. Rptr. at 767. Second, "Section 16 of the purchase agreement states, "[t]he parties hereto agree that *any* breach of *any* term or condition of this Agreement shall constitute a material breach of this Agreement." (Emphasis added). Thus, the parties contemplated that a breach of the management agreement would be a material breach of the purchase agreement, and also subject to the section 11 attorney's fees provision." *Id.* As for third contract at issue, the court noted that "the lease also contains its own attorney's fees provision. The only signatories there are the corporation and defendant William E. Clark. However, as we discuss below, the trial court was correct in directing the individual plaintiffs, not the corporation, to pay the defendants' fees." *Id.*

In the present matter, the Appellees must be liable for Gold's Gym's costs and attorneys' fees.

However, the Members cannot use the entity as a sword when it is advantageous but then utilize it as a shield to avoid fees. Because the Members

elected to sue Gold's Gym on behalf of HSSG, despite the fact that the Members are not signatories to the License Agreement, the Members assumed all of the risks and obligations thereunder, including the obligation to reimburse Gold's Gym its reasonable attorneys' fees.

Similarly, in *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, 96 Cal. App. 4th 598, 608, 117 Cal. Rptr. 2d 390, 396–97 (2002), "the Plaintiff, CalPly, is the nonsignatory party and the defendant, Wilson, signed the subcontract." The court stated that "[h]ad CalPly prevailed on its cause of action as the assignee of Johnwall's rights under the Wilson/Johnwall subcontract, Wilson would have been liable to CalPly for attorney fees pursuant to the subcontract. Consequently, because Wilson would have been liable for attorney fees pursuant to the attorney fee provision had CalPly prevailed, Wilson is entitled to recover attorney fees pursuant to the subcontract now that it has prevailed." *Id.* at 397 (citations omitted). The court concluded that although CalPly was a nonsignatory to the subcontract between Wilson and Johnwall, it could be held liable for Wilson's attorney fees. *Id.*

In *Heppler v. J.M. Peters Co.*, 73 Cal. App. 4th 1265, 1290, 87 Cal. Rptr. 2d 497 (1999), the Plaintiffs were assigned contractual rights although they were nonsignatories to the contract. "By virtue of the assignment, plaintiffs became owners of Peters's indemnity rights and were completely in charge of the litigation. Plaintiffs chose to pursue each of the prevailing nonsettling subcontractors through

trial. They had the option to settle with the subcontractors without incurring attorney fee obligations (Civ. Code, § 1717, subd. (b)(2)), but chose not to." *Id.* "Plaintiffs also had the power to dismiss the cross-complaints against the subcontractors and avoid any obligation for attorney fees. This is so because unless the cross-complaint went to judgment there would be no prevailing party within the meaning of Civil Code section 1717 and no one would have the right to recover attorney fees under the subcontracts." *Id.* at 1290-91. "Plaintiffs were primed to take the benefits of an award of attorney fees if they won; thus it was reasonable for the court to infer plaintiffs were prepared to take the concomitant obligation to pay attorney fees under Civil Code section 1717 if they lost." *Id.* at 1291. The court provided: "An age-old maxim of equity is particularly appropriate here: "He who takes the benefit must bear the burden." *Id.* (citing Civ. Code, § 3521). "Clearly, the plaintiffs were prepared to reap Peters's presettlement and their post settlement attorney fees if they had prevailed in the indemnity trial." *Id.* Thus, in this scenario, the nonsignatory to the contract was held liable for attorneys' fees.

5. There Are Multiple Circumstances That When a Party "Steps Into the Shoes" of Another Party to a Contract. The theories outlined in part IV of this Brief are instances of non-signatories stepping into the shoes of those who signed the contract. A party "steps into the shoes" of a contract signatory when it seeks to benefit from claims under another's contract. Common examples of "stepping into the shoes of others" include factual transfers of contractual interest

by assignment of the contract to a third party or subrogation right in which a third party accedes to the rights of a first party to a contract.

In effect, the trial court in this case treated Plaintiffs as if though they were formal assignees of Health Source's claims. An assignee accepts both the benefit and burdens of a contract, including the obligation to pay attorneys' fees.

CLAIM FOR ATTORNEYS' FEES - Rule 24(a) (9) U.R.A.P.

As argued herein at length, Gold's Gym is entitled to attorneys' fees under the License Agreement because it was the prevailing party to this action.

CONCLUSION – Rule 24(a) (10) U.R.A.P.

For the a reasons set forth above, Gold's Gym respectfully requests this Court to reverse the trial court's order denying Gold's Gym the right to attorneys' fees, and to award Gold's Gym its attorneys' fees and costs incurred throughout the duration of this lawsuit.

CERTIFICATE OF COMPLIANCE – Rule 24(a) (11) U.R.A.P.

I certify that in compliance with U.R.A.P. 24(a) (11), this brief contains 6,376 words, excluding the Table of Contents, Table of Authorities, and addenda. I

relied on my word processor to obtain the count, which is Microsoft Word. I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word in compliance with Utah R. App. P. 27(b). I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

ADDENDUM– Rule 24(a) (12) U.R.A.P.

RESPECTFULLY SUBMITTED this 12th day of June, 2019.

OSTLER MOSS & THOMPSON

/s/ Blake T. Ostler
By: Blake T. Ostler
Attorney for Gold's Gym International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June, 2019, I caused to be served by the method indicated below a true and correct copy of the foregoing **GOLD'S GYM INTERNATIONAL, INC.'S APPEAL** on the following:

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