

NO. \_\_\_\_\_

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, T E X A S
	§	
AMAPD, INC. D/B/A	§	
WESTLAKE FITNESS, AND	§	
CHARLES BURNETT, INDIVIDUALLY	§	
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Plaintiff, STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbott (“State” or “Plaintiff”), complains of AMAPD, INC. D/B/A WESTLAKE FITNESS AND CHARLES BURNETT, INDIVIDUALLY (“Defendants”), and for cause of action would respectfully show as follows:

**DISCOVERY CONTROL PLAN**

1. The discovery in this case is intended to be conducted under Level 2 pursuant to TEX. R. CIV. P. 190.2(b)(3); 190.3(a).

**JURISDICTION**

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the State of Texas and in the public interest under the authority granted him by § 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 2002) (“DTPA”) upon the grounds that the Defendants have engaged in false, deceptive and

misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, §§ 17.46(a) and (b) of the DTPA.

3. This action is further brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the State of Texas under the authority granted him by § 702.552 of the Texas Health Spa Act, TEX. OCC. CODE ANN. § 702.001 *et seq.* (Vernon 2004) (“HSA”) upon the grounds that the Defendants have engaged in actions declared to be violations of the HSA.

### **DEFENDANTS**

4. Defendant AMAPD, Inc. is a Texas corporation doing business in this State as alleged below under the name “Westlake Fitness.” Defendant may be served with process by serving its president, Charles Burnett, at his home at 17111 E. Darleen Drive, Leander, Texas 78641.

5. Defendant Charles Burnett is an individual doing business in this State as alleged in detail below. Defendant may be served with process at his home at 17111 E. Darleen Drive, Leander, Texas 78641.

### **VENUE**

6. Venue of this suit lies in TRAVIS County, Texas, because:
- A. Under DTPA § 17.47(b) Defendants maintain their principal place of business, and have done business, in Travis County, Texas; and
  - B. Under HSA § 702.552, venue for suits brought under the HSA is expressly authorized in Travis County, Texas.

## **PUBLIC INTEREST**

7. Because Plaintiff State of Texas has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff has reason to believe the Defendants have caused adverse effects to consumers and legitimate business enterprises which lawfully conduct trade and commerce in this State, and that imminent harm exists in that Defendants will continue to cause such adverse effects.

## **TRADE AND COMMERCE; SELLER**

8. Defendants have, at all times described below, engaged in conduct which constitutes “trade” and “commerce” as those terms are defined by DTPA § 17.45(6).

9. Defendants have, at all times described below, engaged in conduct as a “seller” as that term is defined by HSA § 702.003(13).

## **ACTS OF AGENTS**

10. Whenever in this Petition it is alleged that Defendants did any act, it is meant that:

- A. Defendants performed or participated in the act; or
- B. Defendants’ officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendants.

## **NOTICE BEFORE SUIT**

11. Pursuant to DTPA § 17.47(a), the Consumer Protection and Public Health Division informed Defendants in general of the alleged unlawful conduct described below, at least seven days before filing suit.

## **SPECIFIC FACTUAL ALLEGATIONS**

12. Defendants owned and operated a health spa in Austin, Texas as “Westlake Fitness,” at 1020 Walsh Tarlton. Defendants sold membership contracts to consumers for their health spa, which included both month-to-month memberships (where a consumer only paid for one month of services at a time) and prepaid memberships (where a consumer would make one payment for several months of services). Defendant Burnett maintained day to day operational control of Westlake Fitness, which included selling memberships to consumers, and making direct representations to consumers regarding the rights and terms associated with a membership with Westlake Fitness.

13. In late 2003, Westlake Fitness began experiencing financial difficulty and Burnett attempted to renegotiate the lease with the property owner of the facility. During this time, Burnett continued to sell Westlake Fitness membership agreements, including prepaid memberships, despite his inability to renegotiate the lease and despite the financial difficulties. On or about January 30, 2004, Defendant Burnett posted a notice on the Westlake Fitness facility which represented that Westlake Fitness was temporarily closed due to a gas leak. In reality, Burnett did not close Westlake Fitness for a gas leak, but rather used this time to remove any equipment he had in the facility. On or about February 1, 2004, Burnett abandoned the property, permanently closing the health spa.

14. Following the closing of the health spa, Defendants did not provide any alternative facility for former members. Former pre-paid members were able to file claims with the Texas Secretary of State’s Office to recover on the \$20,000.00 security that Defendants had

posted with that office. As a result of the large number of claims, members were only able to receive approximately one-half of their claim amount.

15. Some former members who had purchased pre-paid memberships via credit cards sought charge-backs from their credit card company for their contract amount. Defendant Burnett disputed many of these charge-backs, representing that the consumer was entitled to a lesser claim amount. Burnett's calculations of these claim amounts was inconsistent with the calculation method provided for in the Health Spa Act.

16. Following Defendants' closing of Westlake Fitness, Defendant Burnett participated in the founding of Northwest Fitness Center, L.L.C., which owns and operates a health spa at 10700 Anderson Mill Road in Austin, Texas.

#### **VIOLATIONS OF THE HEALTH SPA ACT**

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

18. Defendants, as alleged and detailed above, have made material misrepresentations to members, prospective members, or purchasers regarding the availability, quality, or extent of the facilities or services of the health spa, in violation of HSA §702.402(a)(2)(B).

#### **VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES ACT**

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

20. Defendants, as alleged and detailed above, have engaged in false, misleading, or deceptive acts or practices in the conduct of trade or commerce, in violation of DTPA §17.46(a).

21. Defendants, as alleged and detailed above, have represented that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not, in violation of DTPA § 17.46(b)(5).

22. Defendants, as alleged and detailed above, have represented that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law, in violation of DTPA § 17.46(b)(12).

23. Defendants, as alleged and detailed above, have failed to disclose information concerning goods or services which was known at the time of the transaction with an intent to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed, in violation of DTPA § 17.46(b)(24).

24. Defendants, as alleged and detailed above, have violated the HSA, and such violations are specifically made false, misleading, or deceptive acts or practices in violation of the DTPA, pursuant to HSA § 702.403.

### **PRAYER**

25. Because Defendants have engaged in the unlawful acts and practices described above the Defendants have violated the law as alleged in this Petition.

26. WHEREFORE, Plaintiff prays that upon final hearing a permanent injunction be issued, restraining and enjoining Defendants, their officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants, from engaging in the following acts or practices:

- A. Closing a health spa, or allowing a health spa to close, for which Defendants serve as an operator or owner, without either:
  - 1. Making arrangements with a comparable health spa not more than ten (10) miles from the closed health spa to allow members to have their contracts honored by the comparable health spa immediately upon the prior health spa's closing without any additional cost to the members; or
  - 2. Providing a prorated refund to members of the closed health spa for the remaining time on the members' contracts within ten (10) days of the health spa's closing;
- B. Failing to immediately disclose in a clear and conspicuous notice posted at the health spa the fact, if true, that Defendants have received notice from the landlord or property manager of the location of the health spa that Defendants are at risk of being locked out of their facility;
- C. Closing a health spa temporarily for any reason, or representing to any person that a health spa will be closed temporarily for any reason, unless:
  - 1. Defendants provide at least seven days notice to members by clearly and conspicuously posting their intent to close in a conspicuous place at the location which will be closed, unless an emergency prevents the seven days notice, in which case Defendants shall provide the maximum amount of notice to members which is reasonably possible under the circumstances;

2. The notice posted at the location provides the reason why the location will be temporarily closed, and an estimate of the period of time the location will be closed;
  3. Defendants are in fact temporarily closing the location for the reason stated in the notice; and
  4. Defendants are in possession of documentation reflecting the reason for the temporary closure; and
- D. Misrepresenting that a consumer is entitled to a refund or claim amount on a prepaid membership to a health spa that differs from the amount calculated pursuant to HSA §702.252.
27. Plaintiff further requests that upon final hearing this Court award such relief as the Court finds necessary to redress injury to consumers including, but not limited to, restitution of monies paid by consumers, and further order each Defendant to pay to the State of Texas:
- A. Civil penalties of up to \$20,000.00 per violation of the DTPA;
  - B. Civil penalties of \$1,000.00 per violation not to exceed a total of \$25,000.00 for violations of the HSA;
  - C. Pre-judgment and post-judgment interest on all awards of restitution, damages, or civil penalties, as provided by law; and
  - D. All costs of Court, costs of investigation, and reasonable attorney's fees pursuant to TEX. GOVT. CODE ANN. § 402.006(c).
28. Plaintiff further prays for such other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

BARRY R. McBEE  
First Assistant Attorney General

EDWARD D. BURBACH  
Deputy Attorney General for Litigation

PAUL D. CARMONA  
Chief, Consumer Protection and Public Health  
Division

---

PAUL SINGER  
Assistant Attorney General  
State Bar No. 24033197  
Office of the Attorney General  
Consumer Protection and Public Health Division  
P.O. Box 12548  
Austin, Texas 78711-2548  
(512) 936-1791 (telephone)  
(512) 473-8301 (facsimile)