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Attorney for New Jersey Division of Consumer Affairs

STATE OF NEW JERSEY
JAN 15 2010
Division of Consumer Affairs

By: Jeffrey Koziar
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STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

In the Matter of

:
: Administrative Action
:

BALLY TOTAL FITNESS
CORPORATION,

:
: **ASSURANCE OF**
: **VOLUNTARY COMPLIANCE**
:

Respondent.

WHEREAS this matter having been opened by the New Jersey Division of Consumer Affairs, Office of Consumer Protection (“Division”), as an investigation in order to ascertain whether violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), the Health Club Provisions of the CFA, N.J.S.A. 56:8-39 et seq. (“Health Club Provisions”), and the Regulations Governing Sellers of Health Club Services, N.J.A.C. 13:45A-25.1 et seq. (“Health Club Regulations”), have been or are being committed by Bally Total Fitness Corporation (“Bally”);

WHEREAS the investigation concerned whether Bally committed any violations of the CFA, the Health Club Provisions and/or the Health Club Regulations after Bally filed its

bankruptcy petition on December 2, 2008 in United States Bankruptcy Court, Southern District of New York;

WHEREAS Bally has cooperated with the Division;

WHEREAS Bally denies having committed any violation of law, including, but not limited to, the CFA, Health Club Provisions and the Health Club Regulations;

WHEREAS the Division and Bally (collectively, "Parties") have reached an amicable agreement under the terms of this Assurance of Voluntary Compliance ("AVC") thereby resolving the issues in controversy and concluding this matter without the need for further investigation.

WHEREAS this AVC is made and entered into this 15th day of January 2010, by and between Bally and Anne Milgram, the Attorney General of New Jersey, and David Szuchman, Director, New Jersey Division of Consumer Affairs (collectively referred to as the "State").

1. EFFECTIVE DATE

1.1 This AVC shall be effective on the date that it is fully executed by the Parties ("Effective Date").

2. NO ADMISSION OF LIABILITY

2.1 This AVC is entered into by the Parties for settlement purposes only. Neither the fact of, nor any provision contained in this AVC shall constitute, or be construed as an admission by Bally that any of its acts or practices described in or prohibited by this AVC are unfair or deceptive or violate the CFA, the Health Club Provisions and/or the Health Club Regulations. Neither the existence of, nor the terms of this AVC, shall be deemed to constitute evidence or precedent of any kind except in: (a) any action or proceeding by one of the Parties to enforce, rescind or otherwise implement or affirm any or all of the terms herein; or (b) any action or

proceeding involving a Released Claim (as defined in Paragraph 8.1) to support a defense of res judicata, collateral estoppel, release or other theory of claim preclusion, issue preclusion or similar defense.

3. DEFINITIONS

As used in this AVC, the following words or terms shall have the following meanings, which meanings shall apply wherever the words and terms appear in this AVC.

- 3.1 “Attorney General” shall refer to the Attorney General of the State of New Jersey and the Office of the Attorney General of the State of New Jersey.
- 3.2 “CALA” shall refer to Consumer Affairs Local Assistance offices within counties and/or municipalities in the State.
- 3.3 “Clearly and Conspicuously” shall mean a statement that, regardless of the medium in which it is made, is presented in such type, size, color, contrast, duration, location and audibility, compared to the other information with which it is presented, that it is readily apparent and understandable and in language and terms used in accordance with their common or ordinary usage and meaning. If such statement materially modifies, explains or clarifies other information with which it is presented, it must be presented in proximity to the information it materially modifies, explains or clarifies and in a manner that is readily apparent and understandable.
- 3.4 “Consumer” shall refer to any Person who is offered Merchandise for Sale.
- 3.5 “Consumer Complaint” shall refer to any Consumer who submits to the Division directly or through another agency a written Consumer complaint concerning Bally’s business practices after the Effective Date.

- 3.6 “Director” shall be defined in accordance with N.J.S.A. 56:8-39(a).
- 3.7 “Health Club” shall be defined in accordance with N.J.S.A. 56:8-39(b). For purposes of the Health Club Regulations, “Health Club” shall be defined in accordance with N.J.A.C. 13:45A-25.1(a).
- 3.8 “Health Club Services” shall be defined in accordance with N.J.S.A. 56:8-39(c).
- 3.9 “Health Club Services Contract” shall be defined in accordance with N.J.S.A. 56:8-39 (d).
- 3.10 “Merchandise” shall be defined in accordance with N.J.S.A. 56:8-1(c) and includes, but is not limited to, Health Club Services and Health Club Services Contracts.
- 3.11 “Person” shall be defined in accordance with N.J.S.A. 56:8-1(d).
- 3.12 “Restitution” shall refer to all methods undertaken by Bally to resolve Consumer complaints including, but not limited to, the issuance of credits or refunds or the reversal of credit card or debit card charges.
- 3.13 “Sale” shall be defined in accordance with N.J.S.A. 56:8-1(e).
- 3.14 “State” means the State of New Jersey.

4. BUSINESS PRACTICES AND INJUNCTIVE RELIEF

4.1 Bally shall not engage in any unfair acts or deceptive practices in the conduct of its business in the State and shall comply with all applicable State and/or Federal laws, rules and regulations, as now constituted or as may hereafter be amended, including, but not limited to, the CFA, the Health Club Provisions and the Health Club Regulations.

4.2 Bally Health Clubs shall not offer for Sale Health Club Services at any new location in the state of New Jersey without first registering with the Director, in accordance with N.J.S.A. 56:8-40.

4.3 Bally Health Clubs shall not offer for sale Health Club Services at a new location in New Jersey without first obtaining a registration number in accordance with N.J.A.C. 13:45A-25.2.

4.4 Bally Health Clubs shall not sell or offer Health Club Services to any Consumer without providing the Consumer with a written Health Club Services Contract, as required by N.J.S.A. 56:8-42(a).

4.5 In each and every Health Club Services Contract, Bally's Health Clubs shall on the first page set forth the buyer's total payment obligation for Health Club Services to be received pursuant to the contract, as required by N.J.S.A. 56:8-42(b).

4.6 In each and every Health Club Services Contract, Bally's Health Clubs shall include statements as to cancellation of the Health Club Services Contract in accordance with N.J.S.A. 56:8-42 (e), (f) and (g).

4.7 To the extent not otherwise specifically noted, Bally's Health Clubs shall comply with the requirements of N.J.S.A. 56:8-42 for each and every Health Club Services Contract.

5. FUTURE CONSUMER COMPLAINTS

5.1 For a period of one (1) year from the date of this AVC, the Division shall forward to Bally copies of any Consumer Complaints received by the Division or forwarded to the Division by any CALA office. The Division shall forward to Bally the Consumer Complaint within thirty (30) days of the Division's receipt thereof.

5.2. During this one year period, the Division shall notify the consumers submitting a Consumer Complaint, in writing, of the following: (a) that the Consumer Complaint has been forwarded to Bally; (b) that he/she should expect a response from Bally within forty-five (45) days and (c) the right to refer the Consumer Complaint to the ADR Unit for binding arbitration if Bally disputes the Consumer Complaint and/or the Consumer Complaint otherwise remains unresolved.

5.3 Within forty-five (45) days of receiving the Consumer Complaint from the Division, Bally shall send a written response to each Consumer filing a Consumer Complaint, with a copy to the following: The New Jersey Division of Consumer Affairs, Office of Consumer Protection, Attention: Case Management Tracking Supervisor, 124 Halsey Street, P.O. Box 45025, Newark, New Jersey 07101.

5.4 If Bally does not dispute the Consumer Complaint and requested relief, Bally's written response shall so inform the Consumer and contemporaneously forward to the Consumer the appropriate Restitution. Where Restitution concerns the reversal of credit or debit card charges, Bally shall include documents evidencing that such adjustments have been made. Where Restitution concerns a refund or other payment, such shall be made by check made payable to the Consumer. If Bally disagrees with the Consumer's demand for resolution or needs additional information, Bally may informally negotiate with the Consumer to reach a mutually agreeable resolution to the Consumer's Complaint. During such informal negotiations, Bally will not tell Consumers that they do not have the ADR option.

5.5 Within sixty (60) days of Bally's receipt of the Consumer Complaint, Bally shall notify the Division as to whether such Consumer Complaint has been resolved. Such notification shall include the following:

- (a) The name and address of the Consumer;
- (b) Whether or not the Consumer Complaint has been resolved;
- (c) An identification of any Restitution provided to the Consumer;
- (d) In the event Bally's written response was returned as undeliverable, the efforts Bally had undertaken to locate the Consumer; and

Following the Division's receipt and verification that a Consumer Complaint has been resolved, the Consumer Complaint shall be deemed closed for purposes of this AVC.

5.6 If within seventy-five days (75) of Bally's receipt of the Consumer complaint: (a) Bally has not notified the Division that the Consumer complaint has been resolved; (b) Bally has notified the Division that the Consumer complaint has not been resolved; or (c) Bally has notified the Division that the Consumer refuses Respondent's offer of Restitution, the Division shall forward such Consumer Complaint to the ADR Unit to reach a resolution of the Complaint through binding arbitration. Bally agrees herein to consent to this arbitration process and to be bound by the arbitrator's decision. Bally further agrees to be bound by the immunity provisions of the New Jersey Arbitration Act, N.J.S.A. 2A:23B-14, and the New Jersey Tort Claims Act, N.J.S.A. 59:10A-1 et seq. The Division shall notify in writing the Consumer filing the Consumer Complaint of the referral of the Complaint to the ADR Unit. Thereafter, the arbitration shall proceed in accordance with the ADR Guidelines (a copy of which is attached as Exhibit A).

5.7 If Bally refuses to participate in the ADR program, the arbitrator may enter a default against Bally. Unless otherwise specified in the arbitration award, Bally shall pay all arbitration awards within thirty (30) days of the arbitrator's decision. Bally's failure or refusal to

participate in the arbitration process or to pay an arbitration award timely shall constitute a violation of this AVC.

5.8 If a Consumer filing a Consumer Complaint refuses to participate in the ADR program, that Consumer Complaint shall be deemed closed for the purposes of this AVC.

5.9 The Parties may agree in writing to alter any time periods or deadlines set forth in this Section.

6. SETTLEMENT PAYMENT

6.1 Bally agrees that in settlement of this matter, it shall pay to the State the sum of Thirty Five Thousand and 00/100 Dollars (\$35,000.00) ("Settlement Payment"). From the Settlement Payment, the Division shall receive Twenty One Thousand Eight Hundred Eighteen and 71/100 Dollars (\$21,818.71) in furtherance of consumer initiatives and/or interests of the State pursuant to N.J.S.A. 56:8-13 and Twelve Thousand One Hundred Five and 00/100 Dollars (\$12,105.00) as reimbursement of the Division's attorneys' fees pursuant to N.J.S.A. 56:8-19, and One Thousand Seventy Six and 29/100 (\$1,076.29) as reimbursement of the Division's investigative costs pursuant to N.J.S.A. 56:8-19. Bally shall pay the Settlement Payment in seven (7) monthly installments of \$5,000 each, and the first installment shall be due thirty (30) days after the Effective Date. Each remaining installment shall be due in thirty (30) day intervals thereafter until the full amount has been paid. Payments shall be made by check made payable to the New Jersey Division of Consumer Affairs and forwarded to the following address: Jeffrey Koziar, Deputy Attorney General, New Jersey Division of Law, 124 Halsey Street, P.O. Box 45029, Newark, New Jersey 07101. Bally shall immediately be fully divested of any interest in, or ownership of, the monies paid and all interest in the monies, and any subsequent

interest or income derived therefrom, shall inure entirely to the benefit of the Division pursuant to the terms herein.

7. GENERAL PROVISIONS

7.1 This AVC does not constitute an admission by Bally that any of its acts and/or practices are unfair or deceptive or violate any of the consumer protection laws of New Jersey, all of which Bally expressly denies and the Parties agree that neither Party shall make any statement to the contrary. No part of this AVC constitutes or shall be deemed to constitute an admission by Bally that it has ever engaged in conduct proscribed by this AVC. Further, to the extent that any changes in Bally's business practices are made to achieve or facilitate conformance to the terms of this AVC, such changes shall not constitute any form of evidence, explicit or implicit, by Bally of wrongdoing or failure to comply with any law.

7.2 This AVC is entered into by the Parties as their own free and voluntary act and with full knowledge and understanding of the obligations and duties imposed by this AVC.

7.3 This AVC shall be governed by, and construed and enforced in accordance with, the laws of the State.

7.4 The Parties have negotiated, jointly drafted and fully reviewed the terms of this AVC and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this AVC.

7.5 This AVC contains the entire agreement between the Parties. Except as otherwise provided herein, this AVC shall be modified only by a written instrument signed by or on behalf of the Parties.

7.6 Except as otherwise explicitly provided in this AVC, nothing in this AVC shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State.

7.7 If any portion of this AVC is held invalid or unenforceable by operation of law, the remaining terms of this AVC shall not be affected.

7.8 This AVC shall be binding upon Bally employees, representatives, successors and assigns, and any entity or device through which it may now or hereafter act, as well as any Persons who have authority to control or who, in fact, control and direct its business.

7.9 This AVC shall be binding upon the Parties and their successors in interest. In no event shall assignment of any right, power or authority under this AVC be used to avoid compliance with this AVC.

7.10 This AVC is entered into by the Parties for settlement purposes only. Neither the fact of, nor any provision contained in this AVC shall constitute, or be construed as an approval, sanction or authorization by the Attorney General, the Division or any other governmental unit of the State of any act or practice of Bally.

7.11 The Parties represent and warrant an authorized representative of each has signed this AVC with full knowledge, understanding and acceptance of its terms and that the representative has done so with authority to legally bind the respective Party.

7.12 Unless otherwise prohibited by law, any signatures by the Parties required for this AVC may be executed in counterparts, each of which shall be deemed an original, but all of which shall together be one and the same AVC.

8. RELEASE

8.1 This AVC constitutes a complete settlement and release of all claims, causes of actions, damages, fines, costs and penalties which were asserted or could have been asserted by the State against Bally and/or all of its subsidiaries and affiliates, past and present and their past and present representatives, successors, administrators, employees, shareholders, officers, directors, boards of directors, attorneys, agents, servants and assigns (collectively the "Releasees") concerning the alleged violations of the CFA by Bally with respect to its sale of Health Club Contracts (the "Released Claims"). The State will not proceed with or institute any civil or administrative action or proceeding in any forum against Bally based upon or related to any Released Claims, including, but not limited to, any action or proceeding seeking restitution, injunctive relief, fines, penalties, attorneys' fees or costs. Nothing herein shall be deemed to limit the State's right to institute an action or proceeding to enforce the terms of this AVC or to take action based on future conduct by Bally.

8.2 Nothing contained in this AVC shall be construed to limit or affect the rights of any persons or entities who are not parties to this AVC with respect to any of the matters contained herein.

8.3. Nothing contained in this AVC herein shall in any manner or fashion be construed to limit or affect any position that the Parties may take in any future or pending action not specifically encompassed herein.

9. PENALTIES FOR FAILURE TO COMPLY

9.1 Failure by Bally to comply with any material requirements of this AVC, including, but not limited to, the Business Practices provisions of Paragraphs 4.1 through 4.7, the Consumer Complaint Resolution provisions of Paragraph 5.3 and 5.4, and the Settlement

Payment provision of paragraph 6.1 shall constitute a breach of this AVC. The State may attempt to take whatever action it deems necessary and appropriate under the circumstances, including, but not limited to, seeking an Order from the New Jersey Superior Court requiring the specific performance of the terms of this AVC and/or seeking the imposition of penalties, costs and attorneys' fees.

10. COMPLIANCE WITH ALL LAWS

- 10.1 Except as provided in this AVC, no provision herein shall be construed as:
- (a) Relieving Bally of its obligation to comply with all State and Federal laws, regulations or rules, as now constituted or as may hereafter be amended, or as granting permission to engage in any acts or practices prohibited by any such laws, regulations or rules; or
 - (b) Limiting or expanding any right the Division may otherwise have to obtain information, documents or testimony from Bally pursuant to any State or Federal law, regulation or rule, as now constituted or as may hereafter be amended, or limiting or expanding any right Bally may otherwise have pursuant to any State or Federal law, regulation or rule, to oppose any process employed by the Division to obtain such information, documents or testimony.

11. NOTICES UNDER THIS AVC

11.1 Except as otherwise provided herein, any notices or other documents required to be sent to the Division or Respondent pursuant to this AVC shall be sent by United States mail, Certified Mail Return Receipt Requested, or other nationally recognized courier service that provides for tracking services and identification of the Person signing for the documents. The notices and/or documents shall be sent to the following addresses:

For the Division:

Bureau Chief
Officer of Consumer Protection
New Jersey Division of Consumer Affairs

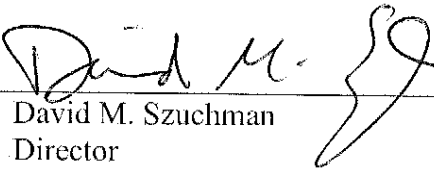
124 Halsey Street - 7th Floor
P.O. Box 45025
Newark, New Jersey 07101

For Bally:

Clayton S. Friedman, Esq.
Manatt, Phelps & Phillips
695 Town Center Drive
Costa Mesa CA 92626

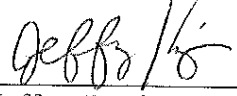
THE PARTIES CONSENT TO THE FORM AND CONTENT OF THIS AVC ON THE DATES UNDER THEIR RESPECTIVE SIGNATURES.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By:  Dated: 1/15, 2010
David M. Szuchman
Director
Division of Consumer Affairs

FOR THE DIVISION:

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By:  Dated: 1/15, 2010
Jeffrey Koziar, Deputy Attorney General
Consumer Fraud Prosecution Section

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