

Attorney no. 30727

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

C.A. No. 06 L 007663

LOIS M. FOWLER, Personal
Representative of the Estate of Gary
Fowler, deceased
Plaintiff,

v.

BALLY TOTAL FITNESS CORP.,
Defendant

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, LOIS M. FOWLER, Personal Representative of the Estate of Gary Fowler, deceased, by her attorneys, Weinberg & Garber, P.C. and Law Offices of Robert B. Patterson, Ltd., for her Complaint against the Defendant BALLY TOTAL FITNESS CORPORATION, a corporation, states as follows:

PARTIES

1. Plaintiff, LOIS M. FOWLER is a resident of Bethesda, Maryland. She is the mother of the decedent, Gary Fowler. Lois M. Fowler is the personal representative of Gary Fowler's estate under an appointment by the Montgomery County Register of Wills dated December 22, 2005. Gary Fowler's only surviving dependents, heirs and next of kin are his parents, James Fowler, Jr., and Lois Fowler, residents of Bethesda, Maryland, and his adult sister, Cynthia Parker, a resident of Houston, Texas.

2. Defendant, BALLY TOTAL FITNESS CORPORATION ("BALLY") is a Delaware corporation with a principal place of business in Chicago, Cook County, Illinois. BALLY

directly owned the fitness center in Montgomery County, Maryland, where plaintiff's decedent suffered sudden cardiac arrest (SCA) on November 7, 2005, and made all policy decisions and directions regarding provision of defibrillation equipment at and from its corporate headquarters in Chicago, Cook County, Illinois.

FACTUAL BACKGROUND

3. On November 7, 2005, Gary Fowler suffered sudden cardiac arrest while exercising at a fitness club owned and operated by Defendant BALLY and located in Gaithersburg, Montgomery County, Maryland. He was 46 years old and a professional land surveyor.

4. Gary Fowler had been a member of the club since December 31, 2003.

5. Mr. Fowler's sudden cardiac arrest was witnessed by club members, who immediately notified BALLY employees.

6. No BALLY employee began CPR when Gary Fowler collapsed. This was contrary to published fitness industry standards as well as requirements in the BALLY Emergency Procedures and Employee Manuals. Employees did call 911.

7. When it became apparent that no BALLY employee was trained and/or willing to assist Gary Fowler by performing cardio-pulmonary resuscitation (CPR), bystander members performed CPR while waiting for emergency medical services ("EMS") to arrive.

8. Approximately 6 minutes after the 911 alarm, an EMS unit arrived outside the fitness club. Once EMS personnel arrived at Mr. Fowler's side, the monitor on their defibrillator showed that his heart was in a shockable rhythm called ventricular tachycardia.

9. Approximately 8 minutes after the 911 alarm, EMS personnel applied the first electric shock with a defibrillator to Gary Fowler.

10. Because of the passage of time between his collapse and the first defibrillation shock, the

efforts by EMS to resuscitate Mr. Fowler were unsuccessful, and Mr. Fowler died on November 7, 2005.

11. BALLY did not have a defibrillator available at its club in Gaithersburg on November 7, 2005.

Automated External Defibrillators (AEDs) and Public Access Defibrillation

12. Sudden Cardiac Arrest (“SCA”) is a life-threatening event which occurs when the heart's electrical system goes awry and causes the heart to go into abnormal rhythms called arrhythmias. It is essentially a short-circuit of the electrical function which controls the heart. These conditions prevent the heart from effectively pumping oxygen to the brain. The victim becomes unconscious almost immediately. The most common arrhythmias associated with SCA are ventricular fibrillation and ventricular tachycardia.

13. SCA kills over 300,000 people in the United States every year. It often strikes at places where groups of people combine with excitement or exertion, such as casinos, stadiums, airplanes, airline terminals and exercise facilities. Studies have shown that the risk of SCA is nearly 20 times higher during or immediately following vigorous exercise.

14. The only significant determinant of survival for victims of SCA is the brevity of the time from collapse to administration of a shock (defibrillation) to try to restore normal cardiac function, including the flow of oxygenated blood to the brain and other vital organs.

15. Automated External Defibrillators (“AEDs”) are lightweight, portable defibrillators which are able to analyze a cardiac rhythm and determine whether or not a shock is necessary. By the mid-1990s, AEDs were available which were designed to be used even by laypersons, with little or no training. Targeted users included lifeguards, fitness trainers, security guards, flight attendants, fire and police department employees, and other persons who are likely to be

early on the scene where a person has experienced SCA. These persons are called “first responders.”

16. AEDs by definition are computerized, fully automated, and will not deliver a shock unless the heart is in a rhythm that will respond to a shock, such as ventricular fibrillation or ventricular tachycardia. In the late 1990s, AEDs cost as much as \$2,500. By 2005, the cost for an AED had dropped to approximately \$1,500.

17. As early as 1986, recognized authorities such as the American Heart Association (“AHA”) and the Journal of the American Medical Association (“JAMA”) identified “health club personnel” as capable first responders and recommended users of AEDs.

18. By 1988, the efficacy of AEDs was recognized in the medical community and in medical journals, such as JAMA and the New England Journal of Medicine. Beginning in about 1994, numerous media, including newspapers, magazines and television, began publicizing the ease of use and importance of widespread deployment of AEDs.

19. By 1992, organizations such as the AHA and the American Red Cross had widely publicized information which indicated that the chances of a SCA victim being resuscitated successfully decreased 7 to 10% for every minute defibrillation was delayed. It was widely recognized that CPR alone could only provide a limited amount of time for a victim of SCA and that, unless defibrillation took place within five minutes or less from the time of arrest, a victim was unlikely to be successfully resuscitated.

20. By 1994, the AHA had published standards which included AED use as part of Basic Life Support and stated as a principle that any person who is expected to respond to a victim of SCA must be trained in the use of and equipped with an AED.

21. Starting in 1996, the domestic airline industry began to announce publicly its intention to

install AEDs on all passenger aircraft, some five years before the Federal Aviation Administration ultimately required them.

22. As early as 1997, national organizations such as the YMCA had drafted internal recommendations for deployment of AEDs in their fitness centers. Around that time, YMCA and other, for-profit, fitness clubs began deploying AEDs and saving members' lives.

23. By 1999, many organizations, including many health clubs, had publicly recognized that traditional responses to cardiac emergencies which did not employ immediate access to AEDs were ineffective in resuscitating SCA victims and preventing neurological damage.

24. In October, 1999, the International Health Racquet and Sportsclub Association ("IHRSA"), the major trade and lobbying association of for-profit fitness clubs, polled some of its member clubs concerning AED use. Over 40% of the clubs which responded reported they either had AEDs or planned on acquiring them in the near future.

25. By November of 2000, all 50 states had enacted Good Samaritan laws providing immunity for lay users of AEDs. The purpose of these laws was to encourage widespread use of AEDs by lay responders by removing largely unfounded fears of liability. The guiding policy behind these laws, which were promoted by organizations like the AHA and the American Red Cross, is known as Public Access Defibrillation.

26. The federal Cardiac Arrest Survival Act, passed in November, 2000, provided broad immunity to any class of lay AED responders not otherwise covered by a specific state's Good Samaritan statute.

27. By 2001, the American Red Cross stated that instruction in the use of AEDs was an "integral" component of first aid training, much like CPR.

28. Beginning in 1997 and continuing through 2004, well-publicized studies had shown that

AEDs used by lay responders resulted in a dramatic increase of survival rates when they were deployed quickly in closed environments, such as airplanes, casinos, and health clubs. These survival rates were over 50% and approached 70% in some studies when the first shock was administered within 4 minutes, with even higher survival rates where response time was shorter.

29. In March, 2002, the American College of Sports Medicine (“ACSM”), a pre-eminent authority in exercise physiology, and the AHA, a pre-eminent authority in cardiovascular issues, issued a joint recommendation concerning AED placement in health clubs. The two groups “strongly recommended” that AEDs be placed in any club that had 2,500 members, was more than five minutes from an EMS response, or which catered to older or deconditioned members.

30. As of November, 2005, most, if not all, BALLY clubs had more than 2,500 members.

31. As of November, 2005, the average EMS response time for arrival at curbside to most BALLY clubs was more than 5 minutes.

32. As of November, 2005, more than 25% of BALLY members were 45 years of age or older.

33. In September, 2004, the Food and Drug Administration granted marketing clearance for over-the-counter sales of AEDs for home use, because the device could be safely and effectively used by lay people with minimal training.

34. In the years before Gary Fowler’s death, many large health club chains had either acquired AEDs or were in the process of doing so. These included Gold’s Gym International, Wellbridge, Fitcorp, Club Corp USA, Tennis Corporation of America, Sport and Health Clubs, and The Sports Club Company.

35. BALLY knew, or should have known, of all of these published standards and industry developments as they happened.

**BALLY's Awareness of Cardiovascular
Emergencies in its Clubs**

36. As of 2004, BALLY claimed to be the largest commercial operator of fitness centers in North America, with approximately 4 million members and more than 420 facilities located in 29 states, Canada, Asia and the Caribbean.

37. BALLY further claimed that, as of 2004, approximately 140,000 Maryland residents were members of BALLY fitness clubs in that state and made over 3 million visits per year. On information and belief, BALLY operated 11 clubs in Maryland in 2004.

38. In November, 2005, at the time of Gary Fowler's death, BALLY operated at least 30 clubs in its home state, Illinois.

39. Since at least 2001, BALLY has been a member of IHRSA. As a member of IHRSA, and as a subscriber to the standards of the ACSM, BALLY pledged and agreed to:

- (1) "Systematically upgrade our professional knowledge and keep abreast of new developments in our field;"
- (2) "...design our facilities and programs with the members' safety in mind..."
- (3) "...respond in a timely manner to any reasonably foreseeable emergency event that threatens the health and safety of the club users. Toward this end, the club must have an appropriate emergency plan that can be executed by qualified personnel in a timely manner;" and
- (4) "conform to all relevant laws, regulations, and published standards."

40. By 2000 at the latest, BALLY knew that moderate to vigorous physical exercise can precipitate fatal cardiovascular events. In 2000, several BALLY executives, including its Risk Manager, Judie Lasch, co-authored an abstract for presentation to the American Heart Association. They presented a retrospective review (for the years 1997 and 1998) of member death records and their respective exercise histories. That review disclosed that at least 71 fatal cardiovascular events had occurred during the period studied. During this period, nearly 3

million members or guests worked out at BALLY centers.

41. According to the BALLY study, the number of deaths amounted to approximately one death per 100,000 members per year from a cardiovascular event.

42. In light of the number of Maryland members claimed, according to its own study, beginning in 2000, BALLY could reasonably have expected that at least one or two of its own Maryland members would die every year of acute cardiac events as a result of vigorous exercise in its clubs if it did not acquire AEDs.

43. Since 1997 and 1998, the number of members at BALLY clubs has increased due to acquisitions, expansion and additional memberships. Consequently, the number of member cardiovascular fatalities in BALLY clubs has also increased.

44. Prior to November, 2005, several BALLY facilities throughout the country had been the scene of member cardiovascular fatalities on more than one occasion in a two- or three-year period.

45. BALLY claims to have a Sports Fitness Medicine Advisory Board comprised of fitness experts from around the nation. BALLY continues to advertise this Board on its web site and claims that it meets four times per year to advise and assist BALLY in the development of programs and services. BALLY claims its website is visited over three million times per year.

46. BALLY's advertised mission of its Sports Fitness Medicine Advisory Board is "to increase the value to the existing and prospective member, to increase the fitness level of our membership base, and enhance the image of BALLY Total Fitness within the communities where our centers are located by supporting the guidelines and recommendations of the Surgeon General's Report on Physical Activity and Health and the American College of Sports Medicine."

47. One such guideline was the March 2002 ACSM joint recommendation with the AHA which “strongly recommended” AEDs in health clubs. See Paragraphs 29-32, above.

48. By 2002, at least two of the members of the BALLY Sports Fitness Medicine Advisory Board, Barry Franklin and Cecil Bryant, were public advocates for placement of AEDs in health clubs. On information and belief, BALLY actually disbanded its Sports Fitness Medicine Advisory Board in 2002, though BALLY continues to advertise it on its website.

49. In or about 2000, BALLY reviewed the data concerning cardiovascular fatalities in its clubs. Despite its actual and/or constructive knowledge, described in paragraphs 12-35 and 39-48, above, BALLY made a decision not to include AEDs in its clubs at that time, unless mandated by law.

50. In late 2002 or early 2003, BALLY decided to begin deploying AEDs in its clubs. BALLY planned to install AEDs at first only in states, counties or municipalities where the devices were, or were about to be, required by law.

51. BALLY planned not to complete the process in the rest of its clubs, in locales where AEDs were not required by law, until some time in 2006.

52. In December, 2002, after member deaths from SCA in its Orchard Park and Amherst clubs in upstate New York, 40 members of the Orchard Park club petitioned BALLY to acquire an AED at that club. They offered to contribute twenty dollars each toward the price. BALLY declined their offer. Members at the Amherst club had also requested that BALLY provide an AED at that club.

53. In January, 2003, a member of the Amherst club, Dr. Lance van Dusen, died of SCA while exercising at that facility. BALLY had not deployed an AED and the EMS response was too late to save Dr. Van Dusen.

54. In August, 2003, a BALLY spokesperson, Sarah Matheu, told a newspaper in Washington state that “we currently have CPR trained personnel in each of our 420 clubs as the safety and security of our members is of the utmost importance. Should a law be passed mandating that defibrillators must be in health club facilities, we will certainly comply.”

55. In June, 2004, BALLY began training certain key employees who were slated to train other BALLY employees in the use of AEDs as the AED implementation program began.

56. As of November, 2005, BALLY had been sued at least three times because of its failure to deploy AEDs. Those suits were pending at the time of Gary Fowler’s death. Other suits against BALLY in the decade before Mr. Fowler’s death had alleged inadequate emergency responses to members suffering SCA, and particularly the failure of BALLY employees to provide CPR.

AED Laws

57. BALLY claims in its employee manual that “the health and safety of employees and others on BALLY property are of critical concern to BALLY. We strive to obtain the highest possible level of safety in all activities and operations. BALLY also intends to comply with all health and safety laws applicable to our business.”

58. Despite this and its public pledges, alleged above, and despite BALLY’s actual and constructive knowledge of the high number of member cardiovascular fatalities and the ease of use and effectiveness of AEDs as life-saving devices, BALLY has consistently, in conjunction with the club industry trade group, IHRSA, fought any attempt by legislators to mandate AED placement in health clubs.

59. By November 7, 2005, at least 7 states, 2 counties, and several municipalities had passed ordinances or laws to require health clubs to have AEDs in place and available, along with staff trained to use them. BALLY was subject to many of these laws. BALLY and IHRSA

consistently sought to oppose, delay or undermine such legislative efforts.

60. IHRSA's stated mission is: "To protect and promote the industry..." One of IHRSA's stated primary objectives, beginning in July, 2002, was to "... forestall AED legislation for as long as possible."

61. IHRSA began its campaign in early 2001 and enlisted support from BALLY executives. IHRSA utilized its Industry Leadership Council to solicit donations from member clubs to assist in these efforts. BALLY, through its President, Paul Toback, has contributed at least \$50,000 per year towards these goals. This makes BALLY one of the largest, if not the largest, contributor in the efforts to defeat AED legislation.

62. IHRSA regularly proclaims victory when it is able to defeat, delay or weaken AED legislation.

63. BALLY, together with IHRSA, lobbied and published position papers and letters, aimed at legislators considering AED legislation, which contained numerous inaccuracies, omissions and misrepresentations concerning fatalities in health clubs and the positions of pre-eminent organizations such as the AHA and the ACSM.

64. In August, 2004, the Illinois legislature enacted Public Act 093-0910, known as the "Colleen O'Sullivan Law." Again, IHRSA and BALLY opposed this legislation. The law required operators of health clubs like BALLY to have AEDs on site on or before July, 2006 or they would be liable for civil penalties.

65. BALLY had deployed AEDs in its Illinois clubs by November, 2005.

66. In July, 2004, the legislature of Suffolk County, New York, approved a law requiring health clubs to have defibrillators. Prior to passage of the law, BALLY, through associate general counsel, Earl J. Acquaviva, Jr., wrote and opposed the legislation. The Suffolk County

law required AEDs in clubs by February, 2005. BALLY did not comply with the law in Suffolk County until after a news report publicized its non-compliance.

67. In the fall of 2004, the legislature of the State of New York passed legislation requiring AEDs in all health clubs with over 500 members. Again, IHRSA and BALLY lobbied against this legislation.

68. In 2004, the legislature of Montgomery County, Maryland (where decedent Gary Fowler lived) began to debate a similar ordinance, which would require AEDs in all health clubs in the county.

69. Again, BALLY, through a paid lobbyist and Attorney Acquaviva, and in tandem with IHRSA, opposed the legislation. In January, 2005, the Montgomery County Legislature passed the ordinance and required AEDs in clubs by July 1, 2005.

70. Gaithersburg, Maryland, which is in Montgomery County, may have been exempt from this ordinance due to a Home Rule exception. Nevertheless, several other health clubs in Gaithersburg deployed AEDs anyway.

71. Since the Montgomery County ordinance went into effect, AEDs have been used on four occasions by health club personnel. All four victims of SCA in those health clubs were saved.

72. On November 7, 2005, the day Mr. Fowler died of SCA in the BALLY club in Gaithersburg, none of the three BALLY clubs located in Montgomery County had AEDs. Four days later, all three clubs had AEDs and staff trained to use them.

73. If BALLY had chosen to acquire AEDs for all its clubs in the United States and train its employees nationwide, the cost would have been approximately \$2 million, or a one-time equivalent charge of fifty cents per member. In a typical fiscal three-month quarter, BALLY spends at least \$15 million on advertising.

74. If BALLY had chosen to acquire AEDs for all its clubs in the United States and train its employees nation-wide in the same timeframe, this could have been accomplished in less than three months from the purchase of the first AED.

75. If an AED had been present and readily accessible at the Gaithersburg club, Gary Fowler would have been resuscitated successfully.

COUNT I
WRONGFUL DEATH ACT
(BREACH OF EXPRESS WARRANTY)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act (“Act”), provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another’s wrongful conduct.

77. Before, during and after the time Gary Fowler became a BALLY club member, BALLY pledged, agreed and warranted to its members that it would:

- (1) “Systematically upgrade our professional knowledge and keep abreast of new developments in our field;”
- (2) “...design our facilities and programs with the members’ safety in mind...;”
- (3) “...respond in a timely manner to any reasonably foreseeable emergency event that threatens the health and safety of the club users. Toward this end, the club must have an appropriate emergency plan that can be executed by qualified personnel in a timely manner;” and
- (4) “conform to all relevant laws, regulations, and published standards.”

78. In conjunction with its Medical Advisory Board, BALLY also pledged, agreed and warranted that it would support and abide by guidelines and recommendations of the American College of Sports Medicine. One such guideline was the joint AHA/ACSM statement in March 2002, “strongly recommending” AEDs in health clubs.

79. In failing to respond appropriately to Gary Fowler’s cardiac arrest on November 7, 2005,

including by its failure to have an emergency response plan, and in failing to have and use an AED at the club, BALLY breached these agreements, pledges and warranties.

80. As a direct and proximate result of BALLY's breach, Gary Fowler died on November 7, 2005, and thereby his heirs and dependent next of kin, James Fowler, Jr., Lois M. Fowler, and Cynthia Parker have suffered pecuniary loss and the loss of decedent's society, companionship, and services which he would have provided to them.

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY TOTAL FITNESS CORP., in an amount of money in excess of FIFTY THOUSAND DOLLARS (\$50,000), which will fully and fairly compensate decedent's heirs and next of kin for the damages they have sustained, and for such other and further relief as this Court deems just and proper.

COUNT II
WRONGFUL DEATH ACT
(IMPLIED WARRANTY)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another's wrongful conduct.

77. BALLY agreed to provide health and fitness club services to Gary Fowler.

78. BALLY impliedly warranted that its services were of good quality and reasonably safe, at least with respect to risks known to BALLY.

79. BALLY breached its implied warranty to Gary Fowler in failing to respond appropriately to Gary Fowler's cardiac arrest on November 7, 2005, including by its failure to have an emergency response plan, and by its failure to have an AED and staff trained in its use.

80. As a direct and proximate result of BALLY's breach, Gary Fowler died on November 7, 2005, and thereby his heirs and dependent next of kin, James Fowler, Jr., Lois M. Fowler, and Cynthia Parker have suffered pecuniary loss and the loss of decedent's society, companionship, and services which he would have provided to them.

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY TOTAL FITNESS CORP., in an amount of money in excess of FIFTY THOUSAND DOLLARS (\$50,000), which will fully and fairly compensate decedent's heirs and next of kin for the damages they have sustained, and for such other and further relief as this Court deems just and proper.

COUNT III
WRONGFUL DEATH ACT
(NEGLIGENCE)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another's wrongful conduct.

77. BALLY owed at least a duty of ordinary and reasonable care to its member, Gary Fowler.

78. BALLY breached its duty of care to Gary Fowler by carelessly and negligently failing to respond appropriately to his cardiac arrest at the Gaithersburg, Maryland BALLY club on November 7, 2005, including by its failure to have an emergency response plan, and by its failure to have an AED and staff trained in its use.

79. As a direct and proximate result of BALLY's breach, Gary Fowler died on November 7,

2005, and thereby his heirs and dependent next of kin, James Fowler, Jr., Lois M. Fowler, and Cynthia Parker have suffered pecuniary loss and the loss of decedent's society, companionship, and services which he would have provided to them.

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY TOTAL FITNESS CORP., in an amount of money in excess of FIFTY THOUSAND DOLLARS (\$50,000), which will fully and fairly compensate decedent's heirs and next of kin for the damages they have sustained, and for such other and further relief as this Court deems just and proper.

COUNT IV
WRONGFUL DEATH ACT
(GROSS NEGLIGENCE)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another's wrongful conduct.

77. BALLY owed a duty of ordinary and reasonable care to its member, Gary Fowler.

78. BALLY breached its duty of care to Gary Fowler by recklessly failing to respond appropriately to his cardiac arrest at its Gaithersburg, Maryland club on November 7, 2005, including by its failure to have an emergency response plan, and by its failure to have an AED and staff trained in its use.

79. BALLY's conduct constituted gross negligence. As BALLY knew, for at least seven or eight years before Mr. Fowler's death, cardiac arrest killed three or more of its members per month. As has been the case for the past nine or ten years, all or most of these fatalities could be easily avoided through use of AEDs with minimally trained staff in the BALLY clubs. BALLY

executives made a calculated decision not to deploy AEDs at its clubs, unless ordered to do so by legislation, despite knowledge of the likely fatal consequences for its members. BALLY's failure to provide defibrillation equipment to prevent this enormous death toll at a relatively minor cost was, by itself, reckless and grossly negligent. BALLY's culpability is magnified by what it knew and did:

- a) By 2000 at the latest, BALLY knew that exercise, of the kind it encouraged in its members, increased the risk of cardiac arrest by a factor of 20;
- b) For purposes of a study, BALLY documented in 1997 and 1998 that at least 71 of its members had died of cardiac events;
- c) BALLY knew that by 2001 (five years before Gary Fowler's death), other health clubs, including other large chains, routinely used AEDs to save member lives, and that by 2004, many other health club chains had adopted them;
- d) BALLY knew that casinos, including those it previously owned and operated, had begun saving people with AEDs in the mid-1990s; and that the Las Vegas BALLY's casino had been one of the first casinos to do so;
- e) BALLY publicly pledged to embrace all the applicable published safety standards but ignored those standards (from the AHA, ACSM, YMCA, etc.), which had strongly recommended AEDs in health clubs as early as 1986 and no later than 2002;
- f) BALLY publicly pledged to stay abreast of industry developments and timely respond to medical emergencies, but it never actually tried to do so when the lives of its members were at stake, as in the case of cardiac arrest and AEDs;
- g) BALLY knew of the widespread media coverage of AEDs in the mid- and late-1990s, that AEDs were required in similar environments like schools and airplanes, and that by 2001 federal and state (including Maryland and Illinois) legislation had been enacted to promote AED use through Good Samaritan immunities and similar laws;
- h) BALLY knew AEDs were required by law in health clubs in many states, counties and municipalities by 2004, including states where BALLY did business and was required to install them;
- i) Throughout the late 1990s and early 2000s, BALLY publicized its Medical Advisory Board as providing it with cutting edge fitness-related medical knowledge for the benefit of members. By 2002, two members of this Board publicly advocated for AEDs in health clubs. At about the same time, BALLY disbanded its Medical Advisory Board.
- j) Acquisition and training for AEDs would have cost BALLY about \$2 million in the

early- and mid-2000s. Its advertising budget regularly exceeded \$15 million per three-month quarter during the same period.

- k) Despite its extensive knowledge of the benefits of AEDs, beginning several years before Gary Fowler's death, BALLY lobbied vigorously against proposed legislation to require AEDs in health clubs;
- l) Following the wide publicity and criticism in Montgomery County resulting from Gary Fowler's death, BALLY installed AEDs at all of its Montgomery County clubs as of four days later.
- m) According to its own study, beginning in 2000, BALLY knew that one or two of its own Maryland members would die every year of cardiac arrest as a result of vigorous exercise in its clubs if it did not acquire AEDs.

80. As a direct and proximate result of BALLY's breach, Gary Fowler died on November 7, 2005, and thereby his heirs and dependent next of kin, James Fowler, Jr., Lois M. Fowler, and Cynthia Parker have suffered pecuniary loss and the loss of decedent's society, companionship, and services which he would have provided to them.

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY TOTAL FITNESS CORP., in an amount of money in excess of FIFTY THOUSAND DOLLARS (\$50,000), which will fully and fairly compensate decedent's heirs and next of kin for the damages they have sustained, and for such other and further relief as this Court deems just and proper.

COUNT V
WRONGFUL DEATH ACT
(CONSUMER FRAUD AS TO RELEASES)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another's wrongful conduct.

77. Despite BALLY's knowledge of member deaths, BALLY made a conscious decision not to take reasonable steps to protect the safety of their members who were at risk for SCA.

78. BALLY did continue to proclaim and warrant its dedication to member safety as set forth above.

79. Rather than actually take reasonable steps to enhance member safety, BALLY chose instead to protect itself by use of liability waivers embedded in its Membership Agreement.

80. BALLY chose not to inform its members of its policy against deploying simple, life-saving measures to assist in medical emergencies.

81. In August, 2003, a California intermediate appellate court ruled that the BALLY's waiver and release language (similar to that in Gary Fowler's contract) did not release BALLY from a failure to assist a member who was a victim of a cardiac emergency because such action was not in the reasonable contemplation of the parties. Rather than change its policies on emergency responses, BALLY changed its waiver language, to try to release it specifically from liability for the failure to administer emergency assistance. This change was made after Gary Fowler joined BALLY.

82. BALLY's practice of attempting to shield itself from tort liability, through use of putative contractual releases contained in membership contracts, in light of its actual or constructive knowledge of SCA, AEDs and industry developments, as alleged above, and in light of its express and implied warranties as to safety, conformance with public standards, and response to medical emergencies, also as alleged above, was an unfair and deceptive practice in violation of consumer protection law.

83. BALLY's unfair and deceptive practice has caused and/or threatens to cause substantial harm to decedent's survivors by impairing and/or threatening to impair their statutorily-granted

right to recovery due to decedent's death..

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY Total Fitness Corp., and that (1) this Court declare that the alleged waiver of liability in Gary Fowler's BALLY contract is void as in violation of consumer protection laws, and as against public policy; (2) that this Court enjoin the use in Illinois of waiver language purporting to relieve BALLY of liability for failure to take reasonable measures to assist a member having a medical emergency; and (3) that this Court award attorneys' fees, costs, punitive damages, and such other and further relief as it deems just and proper.

COUNT VI
WRONGFUL DEATH ACT
(CONSUMER FRAUD, DAMAGES)

1-75. Plaintiff incorporates herein as if set forth in full the allegations set forth above in Paragraph nos. 1 through 75 above.

76. The Wrongful Death Act provides a cause of action for recovery for the benefit of surviving family members in the case of death caused by another's wrongful conduct.

77. BALLY's breaches of its express and implied warranties, as alleged above in Counts I and II, were unfair and deceptive acts or practices in violation of consumer protection law.

78. BALLY's unfair and deceptive practices caused substantial harm to Gary Fowler by depriving said decedent of defibrillation equipment as of November 7, 2005, the use of which would have likely succeeded in resuscitating him from sudden cardiac arrest.

79. By reason of the foregoing, Gary Fowler died on November 7, 2005, and thereby his heirs and dependent next of kin, James Fowler, Jr., Lois M. Fowler, and Cynthia Parker have suffered pecuniary loss and the loss of decedent's society, companionship, and services which he would have provided to them.

WHEREFORE, Plaintiff, Lois M. Fowler, Personal Representative of the Estate of Gary Fowler, deceased, requests judgment in her favor and against the Defendant, BALLY TOTAL FITNESS CORP., in an amount of money in excess of FIFTY THOUSAND DOLLARS (\$50,000), which will fully and fairly compensate decedent's heirs and next of kin for the damages they have sustained, and for such other and further relief as this Court deems just and proper.

PLAINTIFF, LOIS M. FOWLER, Personal
Representative of the Estate of Gary Fowler,
deceased

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