STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

FITNESS INTERNATIONAL, LLC, f/k/a L.A. FITNESS INTERNATIONAL, LLC, a California limited liability company,

Plaintiff,

vs.

COLE LA BLOOMFIELD HILLS MI, LLC, a Delaware limited liability company, successor-in-interest to TIFFRAE, L.L.C.,

Defendant.
_____/

Case No. 2021-187516-CB
Hon: Victoria Valentine

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At a session of said Court held on the
4th day of November 2022 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on cross motions for summary disposition. Defendant, COLE LA BLOOMFIELD HILLS MI, LLC, successor in interest to TIFFRAE, L.L.C. ("Landlord" and/or "Defendant") seeks Summary Disposition under MCR 2.116 (C)(8) and (C)(10). Plaintiff FITNESS INTERNATIONAL, LLC f/k/a L.A. FITNESS INTERNATIONAL LLC ("Fitness" and/or "Tenant") seeks Summary Disposition under MCR 2.116(I)(2). The Court heard oral argument on September 28, 2022 and took the matter under advisement. After reviewing the briefs, supplemental authority submitted by both parties, which include opinions/orders issued by nonbinding courts across the county,[1] hearing oral argument, and being fully advised in the premises, the Court respectfully GRANTS Defendant's Motion under MCR 2.116 (C)(10).[2]

UNDISPUTED FACTS

- Plaintiff, as tenant ("Tenant") and Defendant, as landlord ("Landlord"), are parties to that certain Retail Lease[3] dated March 5, 2007, as amended (the "Lease"), for premises located at 2050 S. Telegraph Road, Bloomfield Hills, Michigan 48302 (the "Premises").[4]
- Pertinent provisions contained in the lease include:

  1.9 INITIAL USES: The "Initial Uses" of the Premises shall be for the operation of a health club and fitness facility which may include, without limitation, weight and aerobic

[1] The Court recognizes that some of the cited nonbinding sister court opinions/orders issued throughout the country include cases where Fitness is a party. See *Fitness International, LLC v Cole LA Riverside CA LP*, Case No. CVR12101805 (Cal Sup Ct, 4/6/2022); *Fitness International, LLC v 135th and Aurora, LLC,* Case No. 21-2-00704.6 SEA (Wash Sup Ct, 7/1/2022); *BAI Century LLC v Fitness International, LLC,* Case No. 2021 L 1322 (Ill Cir Ct, 4/6/2022); *Fitness International, LLC v Vereit Real Estate, PP,* Case No. 2020-027207-CA-01(11th Judicial Circuit for the Miami-Dade County); *National Retail Properties, LP v Fitness International, LLC*, Case No. 20-014449-CB (Wayne County Circuit Court, 2/3/2022); *ROIC Four Corner Square LLC Fitness International, LLC,* Case No. 21-2-04531-8 (Washington Sup Ct, 10/8/2021); *Fitness International, LLC v DDRM Hill Top Plaza LP*, Case No. 21-00142-CJC (US Dist CD Cal, 2/25/2021); *StoreSPELaFItness 2013-7, LLC v Fitness International, LLC,* Case No. SACV 20-953 JVS (ADSx), (2020 US Dist CD Cal, 2020 WL 8116171).

[2] Because Defendant's Motion is granted under (C)(10), the Court need not address the Motion under (C)(8).

[3] The Lease is not attached to the Amended Complaint. The Amended Complaint, however, indicates a copy of the lease is in possession of Defendant. See ¶16 of Amended Complaint ("AC"). Under MCR 2.113(C)(2), the Lease is part of the pleading for all purposes.

[4] ¶16 of AC. "The original parties to the Lease were Tiffrae, L.L.C., a Michigan limited liability company, as Landlord, and Plaintiff, as Tenant." ¶17 of AC. "Upon information and belief, Defendant is the successor-in-interest to Tiffrae, LLC." ¶18 of AC.

training, racquetball, yoga, exercise dancing, personal training, free weights, spinning, boxing, basketball, karate, swimming pool, sauna and whirlpool facilities. As part of the health club and fitness facility operated within the Building, Tenant may use portions of the Building for uses ancillary to a health club and fitness facility (hereinafter the "Ancillary Uses"), including, but not limited to, a health club and fitness facility related selling apparel and other fitness related items, physical therapy center, spa services, sports medicine, weight loss and nutritional advising, health and fitness related programs, exercise dance and spinning classes, therapeutic massage, chiropractic care, swim lessons, racquetball lessons, tanning salon, juice bar, vitamin and nutritional supplement sales, ATM machines located inside the Building, vending machines located inside the Building, child care facility for members and food and beverage service including, but not limited to the sale of healthy and/or natural foods as well as the sale of health related videos and/or DVDs and other related electronic media items. Tenant (or its successor or assigns) shall have the right throughout the Term and all Option Terms to operate for uses permitted under this Lease. Notwithstanding anything to the contrary contained in this Lease, without the prior written consent of Landlord, Tenant shall not utilize the Premises for any golf-related sales or activities. If any governmental license(s) or permit(s) shall be required for the proper and lawful conduct of Tenant's business or other activity carried on in the Premises, or if a failure to procure such a license or permit might or would in any way adversely affect Landlord or the Premises, then Tenant, at Tenant's expense, shall duly procure and thereafter maintain such license(s) or permit(s) and submit the same for inspection by Landlord. Tenant, at Tenant's expense, shall at all times materially comply with the requirements of such license(s) or permit(s).

2.2 LANDLORD'S REPRESENTATIONS, WARRANTIES AND COVENANTS. In consideration for Tenant entering into this Lease and as an inducement for Tenant to lease the Premises, Landlord makes the following representations, warranties and covenants in addition to such other representations, warranties and covenants as may be contained elsewhere in this Lease and Exhibit C, each of which is material and is being relied upon by Tenant. All of such representations, warranties and covenants shall survive the execution and delivery of the Lease by Tenant and Landlord. (Emphasis in original).

Landlord hereby represents, warrants and covenants to Tenant that:

(a) Landlord is a duly organized, validly existing Michigan limited liability company in good standing under the laws of the State of Michigan. Landlord has the full right, power and lawful authority to make this Lease for the Term of this Lease and all renewals and extensions hereof.

(b) Landlord has good and insurable title to the Premises in fee simple, free and clear of all tenancies, covenants, conditions, restrictions, encumbrances, liens and easements which might in any manner or to any extent prevent or adversely affect the use of the Premises by Tenant for Tenant's intended purposes or disturb

Tenant's peaceful and quiet possession and enjoyment thereof, and that there are, and will be at the Commencement Date no unrecorded or inchoate liens affecting the Premises. **Landlord agrees to defend said title and represents and warrants that, so long as Tenant substantially fulfills the material covenants and conditions of this Lease required by Tenant to be kept and performed, Tenant shall have, throughout the entire Term and any extensions and renewals hereof, peaceful and quiet possession and enjoyment of the Premises without any ejection by Landlord or by any other person by, through or under Landlord**. (Emphasis added).

(c) The individuals executing this Lease and the instruments referenced herein on behalf of Landlord have the power, right and authority to bind Landlord.

(d) Landlord's Work (as defined in Section 3.1 below), as of the Commencement Date, shall be in compliance with all Applicable Laws, including, without limitation, the provisions of the Americans with Disabilities Act of 1990, as amended (the "ADA").(Emphasis in original).

(e) Landlord's Work will, as of the Commencement Date, be free from latent or patent defects on the Commencement Date.

(f) Except as otherwise expressly provided in Section 7.1 below, Landlord shall be responsible for and shall pay all development and impact fees, including, without limitation, school fees, transportation, traffic and trip fees, park fees, hook-up, sewer, water, and other utility fees and any similar or other development or impact fees, exactions or charges (collectively, "Development Fees"), regardless of the nature thereof and to whomsoever payable for which Tenant is or could be responsible in connection with the construction of Landlord's Work, the construction of Tenant's Work or the operation of the Initial Uses; provided, however, that in the event that, following the completion of Landlord's Work and Tenant's Work (including the construction of the Building Improvements) in accordance with Exhibit C, Tenant constructs any future improvements on the Premises (and such future construction is not contemplated or required by the terms of this Lease or Applicable Laws, including, without limitation, pursuant to Articles XII, XV or XVI of this Lease), Landlord shall not be responsible for any additional Development Fees that may arise from such future construction by Tenant. (Emphasis in original).

(g) During the Term of this Lease, Tenant and its members, customers, guests, licensees, invitees, permitted subtenants, employees, suppliers and agents shall have rights of ingress to and egress from all contiguous streets to the Premises.

Landlord shall indemnify, defend and hold harmless Tenant from and against any and all losses, demands, claims, liabilities, damages, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) arising as a result of any inaccuracy or breach of any representation, warranty or covenant of Landlord set forth in this Lease.

8.1 TENANT'S INITIAL USE. Promptly following the completion of Tenant's Work and receipt of all necessary governmental and operational approvals and permits and a Temporary or Final Certificate of Occupancy**, Tenant shall open for business from the Premises for one (1) day (the "Required Operating Period") for the Initial Uses set forth in Section 1.9 under the trade name set forth in Section 1.11.** Upon expiration of the Required Operating Period, Tenant shall have the right at any time and from time to time to cease operating the business conducted upon the Premises after giving Landlord prior written notice thereof, provided Tenant shall continue to pay to Landlord all Minimum Rent, Additional Rent and all other charges in the amounts and at the times due and payable as provided herein, and Tenant shall continue to fully perform all of the other terms and provisions of this Lease to be performed by Tenant. (Emphasis added).

8.2 CHANGE IN USE. After the expiration of the Required Operating Period, Tenant shall have the right to change the use of the Building to any alternate legal use which is not expressly prohibited pursuant to Section 8.3 below or otherwise by this Lease. (Emphasis added).

22.1 QUIET ENJOYMENT. Upon payment by Tenant of the Rent and the observance and performance of all of the agreements, covenants, terms and conditions on Tenant's part to be observed and performed, Tenant shall quietly enjoy the Premises for the Term **without hindrance or interruption by Landlord or any other person or persons lawfully or equitably claiming by, through or under Landlord, subject to the terms of this Lease.** (Emphasis added).

22.3 FORCE MAJEURE. If either party is delayed or hindered in or prevented from the performance of **any act** required hereunder because of strikes, lockouts, inability to procure labor or materials, failure of power, **restrictive laws,** riots, insurrection, war, fire, inclement weather (and any effects from inclement weather) or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), subject to any limitations expressly set forth elsewhere in this Lease, performance of such act shall be excused for the period of the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event). **Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events**. (Emphasis added).

- On March 10, 2020, Michigan Governor Gretchen Whitmer issued Executive Order ("EO") No. 2020-04, declaring a state of emergency in Michigan due to COVID-19.[5]
- On March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic (the "COVID-19 Pandemic").[6]
- On March 13, 2020, President Trump issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.[7]
- On March 15, 2020, Governor Whitmer issued EO 2020-9, ordering all gyms and fitness centers to close, effective Monday, March 16 at 3:00 p.m., to prevent further spread of COVID-19.[8]
- Gyms and fitness centers were permitted to begin reopening in Oakland County, Michigan on September 9, 2020, subject to specific guidelines and material restrictions on Tenant's use and occupancy of the Premises.[9]
- From March 17, 2020, through September 8, 2020, it was illegal for Tenant to use the Premises **as a gym** due to the government mandated closure.[10]
- On March 17, 2020, Fitness sent correspondence to its Landlord, which *inter alia*, asserted that the global pandemic constituted a force majeure event, making performance under the lease impossible and impracticable and which allowed Fitness to abate the rent for the remainder of the closure.[11]
- Plaintiff closed its Premises from March 17, 2020, to September 8, 2020.[12]
- On April 9, 2020, Defendant Landlord sent Plaintiff Tenant a "Notice to Pay Rent or Vacate Premises" letter for being in default for payment of rent.[13]
- Plaintiff paid rent and now seeks reimbursement and/or credit for rent it paid Landlord during the COVID closure and/or restrictive periods.
- Plaintiff Fitness filed its 4-Count Amended Complaint:
    - Count I-Breach of the Lease-Closure Period, which alleges Defendant:
        - Failed to reimburse Tenant for Rent paid during the closure period and for demanding rent during the closure period.[14]
        - Breached the representations, warranties and covenants contained in the lease.[15]
        - Breached the force majeure provision in the Lease.[16]
    - Count II-Breach of the Lease-On-Going Restrictions, which alleges Defendant:

[5] ¶33 of AC.
[6] ¶34 of AC.
[7] ¶35 of AC.
[8] ¶36 of AC.
[9] ¶37 of AC.
[10] ¶¶38-39 of AC. (emphasis added).
[11] Plaintiff's Response Brief: Exhibit 1, attached to Exhibit A.
[12] ¶¶ 38-37 of AC.
[13] Exhibit A attached to AC.
[14] ¶ 81 of AC.
[15] ¶ 82 of AC.
[16] ¶ 83 of AC.

        - Failed to reimburse Tenant and/or provide a credit for rent paid during the On-Going Restrictions period.[17]
        - Breached the representations, warranties and covenants contained in the lease.[18]
    - Count III-Declaratory Judgment-Future Closure Periods
    - Count IV-Declaratory Judgment-Future Periods of On-Going Restrictions
- Defendant Landlord files this Motion for Summary Disposition under MCR 2.116(C)(8) and (C)(10), arguing that:
    - The Force Majeure provision of the Lease does not excuse Plaintiff's payment of rent because Plaintiff was not required to use or operate a fitness center under the lease.
    - The Force Majeure provision does not excuse the obligation to pay rent.
    - Contract defenses of impossibility, impracticability and frustration of purpose do not establish a breach by Defendant.
    - The Government's enactment of temporary COVID restrictions does not constitute a breach by Defendant of any representations, warranties, or covenants under the Lease.
- Plaintiff responds, seeking Summary Disposition under MCR 2.116(I)(2) and argues that:
    - It was denied the right to operate its business from the premises in breach of the landlord's promises and guarantees.
    - The force majeure provision of the lease excused its performance during the period of the Government mandated closures.
    - The doctrines of frustration of purpose, temporary impossibility and/or impracticability excused its obligation to pay rent.

STANDARD OF REVIEW

Summary disposition under MCR 2.116(C)(10) may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is Summary disposition under MCR 2.116(C)(10) may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm 'rs,* 227 Mich App 621, 625 (1998).

[17] ¶ 94 of AC.
[18] ¶ 95 of AC.

"A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Smith v Globe Ins Co,* 460 Mich 446, 454 (1999), quoting *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363 (1996). A court must examine the evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Quinto v Cross & Peters Co,* 451 Mich at 362. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *West v Gen Motors Corp,* 469 Mich 177, 183 (2003).

MCR 2.116(I)(2) provides, "(2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

ANALYSIS

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr Inc,* 495 Mich 161, 178 (2014).

> This Court's "main goal in the interpretation of contracts is to honor the intent of the parties." *Mahnick,* 256 Mich.App. at 158–159, 662 N.W.2d 830. The words used in the contract are the best evidence the parties' intent. *Id.* at 159, 662 N.W.2d 830, citing *UAW–GM Human Resource Ctr. v. KSL Recreation Corp.,* 228 Mich.App. 486, 491, 579 N.W.2d 411 (1998). "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent." *Mahnick,* 256 Mich.App. at 159, 662 N.W.2d 830.

Kyocera v Hemlock Semiconductor, 313 Mich App 437, 446-447(2015).

The Court finds that Defendant did not breach the Lease. The Court also finds that neither the force majeure clause of the Lease nor the doctrines of frustration of purpose, temporary impossibility and/or impracticability excuse Fitness' obligation to pay rent.

FORCE MAJEURE PROVISION

"Generally, the purpose of a force-majeure clause is to relieve a party from penalties for breach of contract when circumstances beyond the party's control render performance untenable or impossible. See *Erickson v. Dart Oil & Gas Corp.,* 189 Mich. App. 679, 689, 474 N.W.2d 150 (1991)." *Kyocera v Hemlock Semiconductor,* 313 Mich App 437, 446-447(2015).

> [O]ur general rules of contract interpretation, such as the rule that terms used in a contract are to be given their commonly used meanings unless defined in the contract, apply to the interpretation of force-majeure clauses. Further, contracts must be read as a whole. Force-majeure clauses are typically narrowly construed, such that the clause will generally only excuse a party's nonperformance if the event that caused the party's nonperformance is specifically identified."

Kyocera v Hemlock Semiconductor, 313 Mich App 437, 446-447(2015) (internal citations and quotations omitted).

Here, Fitness argues that there is no dispute that the government orders, which prohibited the operation of health clubs, were "restrictive laws." Fitness also argues that there is no dispute that the government's closure orders, due to the COVID-19 Pandemic, are events that are "beyond the reasonable control of the party delayed," and thus constitute a Force Majeure Event that excuses its performance during the closure period.[19]

[19] Plaintiff's Response Brief, pp 9-10.

The Court, however, disagrees. Rather, it agrees with Defendant that the plain language of the following Force Majeure Clause does not support Fitness' claim and does not protect Fitness from the payment of rent owing under the Lease:

> **22.3 FORCE MAJEURE. If either party is delayed or hindered in or prevented from the performance of *any act* required hereunder** because of strikes, lockouts, inability to procure labor or materials, failure of power, *restrictive laws,* riots, insurrection, war, fire, inclement weather (and any effects from inclement weather) or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (any "Force Majeure Event"), subject to any limitations expressly set forth elsewhere in this Lease, performance of such act shall be excused for the period of the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event). **Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events**. (Emphasis added).[20]

Here, as Defendant argues, the Lease did not "require" Plaintiff to operate a fitness facility at the Premises during the relevant closure time. Section 1.9 of the Lease provides that the "Initial Uses" of the Premises "shall be for the operation of a health club and fitness facility."[21] Significantly, this "Initial Use" obligation was limited under Section 8.1 of the Lease to a "one (1) day," period of time, defined as the "Required Operating Period for the Initial Uses set forth in Section 1.9."[22] "After the expiration of the Required Operating Period, Tenant shall have the right to **change the use of the Building to any** alternate legal use which is not expressly prohibited

[20] Lease, p. 31, §22.3.
[21] Lease, pp. 2-3, §1.9
[22] Lease, p. 12, §8.1.

pursuant to Section 8.3 below[23] or otherwise by this Lease."[24] Therefore, according to the terms of the lease, but for the one-day "Required Operating Period," Fitness was not required under any contractual requirement to use the premises as a fitness facility. Rather, it was permitted under the Lease to "change the use of the Building to any alternate legal use which is not expressly prohibited pursuant to Section 8.3 below or otherwise by this Lease."[25]

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[23]"8.3 **OPERATION OF BUSINESS.** Tenant hereby covenants to Landlord that, during the Term of the Lease and for so long thereafter as Tenant occupies the Premises, Tenant shall (a) pay or cause to be paid when and as due all required governmental license fees, permit fees and charges of a similar nature relating to the conduct by Tenant or any subtenant or concessionaire of any business or undertaking authorized hereunder to be conducted in, on or from the Premises; (b) observe all reasonable requirements promulgated by Landlord at any time and from time to time relating to delivery vehicles, the delivery of merchandise, the storage and removal of trash and garbage, or any other matter relating to the use or occupancy of the Premises; (c) not use the plumbing facilities in the Premises for any purpose other than that for which they were constructed, nor dispose of any foreign substances therein; (d) keep the Premises and any platform, loading dock or service area used by Tenant in a neat, clean, safe and sanitary condition; **(e) not use or allow the Premises to be used for any illegal purposes;** (f) be authorized to do business in the State; (g) contract for and utilize termite and pest extermination services for the Premises as necessary; (h) not store, display, sell or distribute any dangerous materials without the prior written consent of Landlord; (i) not sell, distribute or display any paraphernalia commonly used in the use or ingestion of illicit drugs, or any pornographic or so-called "adult" newspaper, book, magazine, film, picture, video tape, video disk or other similar representation or merchandise of any kind; (j) not use, or permit to be used, the Premises in a manner that would constitute a nuisance; (k) maintain Tenant's windows, exterior signs and exterior advertising displays adequately illuminated during Tenant's business hours and for one (I) hour thereafter; (I) not conduct any auction, distress, fire, bankruptcy or going-out- of business sale or similar sales in the Premises; (m) not commit waste on the Premises; (n) not overload the floor, or any mechanical, electrical, plumbing or utility systems serving the Premises; or (o) not permit any noises or sounds (due to intermittence, beat, frequency, shrillness or loudness) above the legal decibel level permitted in the Premises, or obnoxious odors or nuisances to emanate from the Premises. Subject to the provisions of Section 8.1 above, provided Tenant pays the Rent due under the Lease and continues to maintain insurance in place for the Premises, Tenant shall at all times and from time to time have the right to cease business operations from the Premises at any time after the Required Operating Period." Lease, p 12, § 8.3. (Emphasis added).

[24] Lease, p 12, §8.2.

[25] Lease, p 12, §8.2. See also Lease, p 12, §8.4, Restricted Uses:
Tenant shall not use the Premises or allow the Premises to be used for any of the following uses without the prior written consent of Landlord: any golf related sales or activities; gambling establishments, tattoo parlor; piercing places; live entertainment venues; "pink awning" (i.e. porn, XXX, etc) venues; bail bond establishments; check cashing establishments; adult bookstores; massage parlors: so-called "penny arcades", video or pinball arcades, "video game rooms", or "amusement centers" featuring electronic video games, pinball machines, slot machines or other similar coin operated devices; topless bars or other topless or "adult" establishments; retail facilities (other than the Initial Uses) operated on a "24-hour" basis or "late-night" basis; fast-food restaurants; so-called head shops or other establishments using the Premises or any portion thereof, the use of the Premises to emit excessive noise, odors or light pollution; distribution or display of any paraphernalia commonly used in

Consequently, Fitness was not "delayed or hindered in or prevented from the performance of *any act* required hereunder" so as to trigger the protection of the Force Majeure clause. See *Fitness International, LLC v 135th and Aurora LLC,* Case no. 21-2-00704-6 SEA at 5 (Sup Ct of Washington, 7/1/2022),[26] where the Superior Court of the State of Washington considered a substantially similar Force Majeure clause and found:

> Tenant has alleged that its obligation to pay rent to Landlords was excused under the Force Majeure Clause because it was prevented from operating a fitness center at the premises due to State COVID restrictions. However, the Lease does not affirmatively require Tenant to operate a fitness center at the premises during the COVID restrictions time periods, so Tenant cannot establish that those restrictions prevented it from performing an "act required," under the Leases.

Based on the above, the Court finds that it is beyond dispute that the Force Majeure Clause does not apply and, thus, does not excuse Fitness from its contractual obligation to pay rent under the Lease.

The Court also agrees with Defendant that even if the Force Majeure Clause applied, it does not excuse Fitness' obligation to pay rent. This clause contains a carve-out that specifically provides that "[d]elays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events."[27] Fitness does not seek to excuse its performance under the Lease; rather it seeks to excuse its obligation to pay rent. In fact, Fitness' lawsuit seeks a refund/credit towards its obligation to pay rent under the Lease.

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the use or ingestion of illicit drugs; any establishment which advertises itself in any way as a seller or distributor of, or which has a name which indicates the sale or distribution of, or which sells, displays or distributes any amounts of, or which violates any applicable law, statute or ordinance with respect to any x-rated, pornographic, lewd or so-called "adult" newspaper, book, magazine, film, picture, video tape, video disk or similar representation or merchandise; any facility whose primary purpose is the manufacture, storage or distribution of munitions, fireworks or other explosive or incendiary devices or materials. Unless specifically restricted hereunder, any other use by Tenant its assigns or sub-tenants is permitted without Landlord's approval or consent.

[26] Defendant's Supplemental Authorities in Support of Motion for Summary Disposition: Exhibit 2.

[27] Lease, p 31, § 22.3.

Fitness cannot establish that "restrictive laws" prevented it from paying rent because Fitness paid rent to Defendant. And yet even if restrictive laws had prevented Plaintiff from paying rent, the Force Majeure Clause excludes failures to perform "which can be cured by the payment of money," which includes rent. See *Fitness Int'l, LLC v DDRM Hill Top Plaza LP*, 2021 WL 5456666 *4 (US Dist Ct, CD Cal, 10/21/2021),[28] where the United States District Court construed a similar Force Majeure clause and found:

> Tenant, on the other hand, was obligated to pay rent under the Lease, even during the closure periods. The force majeure provision explicitly states that "[d]elays or failures to perform ... which can be cured by the payment of money shall not be Force Majeure Events[.]" (Lease Agreement § 22.3.) Here, Tenant's "failure[ ] to perform," *i.e.*, its failures to pay rent, can "be cured by the payment of money" and thus cannot constitute a force majeure event.

IMPOSSIBILITY AND/OR IMPRACTICABILITY

The Court finds that Fitness' obligation to pay rent is not excused by the doctrine of impossibility and/or impracticability.

First, the Court finds Judge Warren's holding in *Livonia v Burn Fitness-3 Llc*, 2021 Mich Cir Lexis 74, Case No. 20-181630-CB, 2/25/2021,[29] persuasive. There, Judge Warren ruled that the force majeure clause supersedes the doctrine of impossibility.

Second, even if the doctrine force majeure clause did not supersede this doctrine, Fitness could still perform its obligation under the Lease. Our Michigan Court of Appeals recently rejected Fitness' arguments in the unpublished opinion of *Fitness International, LLC v National Retail Properties Ltd Partnership*, 2022 WL 7723954 *6-7 (released October 13, 2022).[30] There the Court of Appeals specifically held:

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[28] Exhibit 3 attached to Exhibit B of Defendant's Brief.
[29] Exhibit 5 attached to Exhibit B of Defendant's Brief.
[30] Unpublished decisions are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive," *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3 (2010).

Plaintiff also argues that the circuit court erred by refusing to excuse plaintiff from its rental payment obligation under the doctrine of impossibility/impracticability. According to plaintiff, the fact that it was impossible for it to use the premises during the shutdown period relieved it of its rental payment obligations and the court erred by concluding that the doctrine was inapplicable. We disagree.

The doctrine of impossibility/impracticability provides an excuse for nonperformance of contractual obligations when a contracting party's performance becomes objectively impossible to perform. *Liggett Restaurant Group, Inc*, 260 Mich App at 133; see also *Roberts v Farmers Ins Exch*, 275 Mich App 58, 73; 737 NW2d 332 (2007). Michigan courts have recognized two types of impossibility: original and supervening. *Roberts*, 275 Mich App at 73. Original impossibility of performance exists "when the contract was entered into, so that the contract was to do something which from the outset was impossible." *Bissell v L W Edison Co*, 9 Mich App 276, 284; 156 NW2d 623 (1967). "[S]upervening impossibility develops after the contract in question is formed." *Roberts*, 275 Mich App at 74. "Although absolute impossibility is not required, there must be a showing of impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Id*. (quotation marks and citation omitted).

In this case, the circuit court ruled that that impossibility/impracticability doctrine did not excuse plaintiff from its rental obligation during the shutdown period because plaintiff could perform its obligations under the lease. Mainly, despite the shutdown and plaintiff's loss of revenue from membership fees, plaintiff had enough funds to pay the monthly rental payments in total after defendant sent its demand notice. "Economic unprofitableness is not the equivalent of impossibility of performance. Subsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve the contractor." *Chase v Clinton Co*, 241 Mich 478, 484; 217 NW 565 (1928). The fact that plaintiff faced some economic hardship because of the shutdown did not make its performance under the lease—its contractual obligation to pay rent—impossible. The circuit court did not err in this regard.

On appeal, plaintiff asserts that, because it was impossible for it to use the premises during the shutdown period, it should be excused from its rental payment obligations. Plaintiff's focus on its inability to use the premises as a health club during the shutdown is misplaced. Under the lease, plaintiff was contractually obligated to pay the rent in monthly installments—and this is the promised performance that must be evaluated for purpose of the impossibility doctrine. See *Roberts*, 275 Mich App at 73 ("A promisor's

> liability may be extinguished in the event his or her *contractual promise* becomes objectively impossible to perform." (Emphasis added.)) **Comparatively, the lease did not obligate plaintiff to use the premises as a health and fitness club; instead, it provided that plaintiff "may" use the premises as a health and fitness center or such other use as plaintiff deemed fit in its reasonable business judgment. Consequently, even though plaintiff could not temporarily use the premises as a health and fitness club, plaintiff did not experience an impossibility of performance for purposes of the impossibility doctrine.**
>
> Plaintiff's inability to use the premises as a health and fitness club does not support plaintiff's position because plaintiff assumed the risk of the government shutdown. "[I]mpossibility ... will not serve to discharge a party who has assumed the risk that a given event will be rendered impossible." *Frank's Nursery Sales, Inc v American Nat'l Ins Co*, 388 F Supp 76, 82 (ED Mich, 1974). Further, plaintiff cites no authority to support its claim that a lessee's inability to use the premises in a way it sees fit, for which it is not obligated under the lease, excuses the lessee's obligation to pay rent under the doctrine of impossibility/impracticability.

FRUSTRATION OF PURPOSE

Similarly, Fitness' obligation to pay rent is not excused under the doctrine of frustration of purpose. A contractual frustration of purpose exists when "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract," despite the fact that nothing impedes the party from performing the contract. *Liggett Restaurant Group, Inc. v. Pontiac*, 260 Mich App 127, 133-134 (2003) (quotation marks and citation omitted). The frustration "must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract" and "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." *Id* at 135. See also *Fitness International, LLC v National Retail Properties Ltd Partnership*, supra at * 3. The following conditions must be satisfied for a party to avail itself of the doctrine:

> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both

> parties when the contract was made; [and] (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.

Liggett at 134-135.

Again, the Court finds Judge Warren's holding in *Livonia v Burn Fitness-3 Llc*, 2021 Mich Cir Lexis 74, Case No. 20-181630-CB, 2/25/2021,[31] instructive. There the court found the force majeure clause superseded the doctrine of frustration of purpose where the contract allocated the risk involved in the frustrating event. *Id.* supra at *32.

Judge Warren found that "the force majeure provision in Section 22.26 of the Lease [at issue in that case] demonstrates the parties' express agreement that frustrating events [act of God and orders of government authorities] do not excuse performance which is exactly what the [Tenant] Defendants argue they are entitled to do." *Id* at * 33. This allocation of risk was, therefore, reasonably foreseeable at the time the contract was made. Thus, the third element under the *Liggett Restaurant Group, Inc. v. Pontiac*, 260 Mich App at 135, which requires that "this purpose must have been basically frustrated by an event **not** reasonably foreseeable at the time the contract was made" was not satisfied. *Id* at * 33-34 (Emphasis added).

Here too, the force majeure provision in Section 22.3 demonstrates the parties expressly allocated the risk of a frustrating event, such as a restrictive law. And the Lease expressly permitted Fitness to change the use of the premises to any legal use upon the expiration of a one-day Required Operating Period.[32] Lastly, the Court also finds that Fitness assumed the risk of legal compliance under § 8.3(e) of the Lease, which provides in pertinent part:

[31] Exhibit 5 attached to Exhibit B of Defendant's Brief.
[32] Lease, pp. 2-3 & 12, §§ 1.9 & 8.1

> **8.3 OPERATION OF BUSINESS.** Tenant hereby covenants to Landlord that, during the Term of the Lease and for so long thereafter as Tenant occupies the Premises, Tenant shall . . . **(e) not use or allow the Premises to be used for any illegal purposes. . ..**[33]

Fitness is thus precluded from its reliance on frustration of purpose due to the occurrence of a force majeure event. **"**'[I]f the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not involve the doctrine of frustration to escape their obligations.'" *Livonia v Burn Fitness-3 Llc*, 2021 Mich Cir Lexis 74 * 33 citing *In re Hitz Restaurant Group,* 616 BR 374, 377 (2020), citing *Commonwealth Edison Co v Allied-General Nuclear Sews*, 731 F Supp 850, 855 (ND Ill 1990).

WARRANTY OF QUIET ENJOYMENT

The Court finds that there is no question of fact that Defendant did not breach the promise/express warranty of "Quiet Enjoyment" set forth in § 22.1 of the Lease, which provides:

> **22.1 QUIET ENJOYMENT. Upon payment by Tenant of the Rent** and the observance and performance of all of the agreements, covenants, terms and conditions on Tenant's part to be observed and performed, Tenant shall quietly enjoy the Premises for the Term **without hindrance or interruption by Landlord or any other person or persons lawfully or equitably claiming by, through or under Landlord, subject to the terms of this Lease.** (Emphasis added).[34]

The Court again finds the recent unpublished opinion of *Fitness International, LLC v National Retail Properties Ltd Partnership*, *supra* at * 5 instructive. There, the Court of Appeals rejected Fitness' arguments, which Fitness similarly makes here:

> Plaintiff argues further that the circuit court erred by relying on a common-law rule applicable to the common-law warranty of quiet enjoyment, that "the covenant of quiet enjoyment is breached only when the landlord

[33] Fitness admits that it "ceased operating its health club at the Premises on March 17, 2020 as it was illegal for Tenant to use the Premises for the operation of its business." (¶ 38 of AC). It also admits that "[f]rom March 17, 2020 through September 8, 2020, it was illegal for Tenant to use the Premises due to the government mandated closure orders (the period of closure is referred to herein as the "Closure Period")" (¶ 39 of AC).
[34] Lease, p 30, § 22.1.

> obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold." *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003) (quotation marks and citation omitted). Because defendant did not interfere with plaintiff's quiet enjoyment, the circuit court dismissed the claim. Plaintiff's argument lacks merit. As explained, § 27.2 does not grant an absolute right to quiet enjoyment. Further, plaintiff cites no authority in support of its claim that when the contracting parties expressly include a warranty of quiet enjoyment, common-law principles of the warranty of quiet enjoyment do not apply. Indeed, plaintiff identifies nothing in the lease, or § 27.2, indicating that the parties intended to diverge from common-law principles of quiet enjoyment on which the circuit court relied. Generally, "where terms having a definite legal meaning are used in a written contract, the parties to the contract are presumed to have intended such terms to have their proper legal meaning, absent a contrary intention appearing in the instrument." *In re Estate of Moukalled*, 269 Mich App 708, 721; 714 NW2d 400 (2006) (quotation marks and citation omitted). A landlord's covenant of quiet enjoyment has a particular meaning in Michigan law and inherent in that meaning is the concept that the landlord's promise is breached only when it interferes with the tenant's use of the leasehold. See *Slatterly*, 257 Mich App at 258; see also 49 Am Jur 2d, Landlord and Tenant § 481, pp 511-512 ("The interference with a tenant's possession and enjoyment of the demised premises by public officials in the exercise of police power, if not due to any default on the part of the landlord, is not a breach of the landlord's covenant of quiet enjoyment."). Plaintiff's contention that any interference, no matter by whom, constitutes a breach of the warranty of quiet enjoyment, is not consistent with the meaning of the warranty of quiet enjoyment in Michigan law and is not supported by the contractual language. Accordingly, we conclude that the circuit court did not err by dismissing the claim on the grounds that defendant did not interfere with plaintiff's quiet enjoyment of the premises.

Here, § 22.1, does not indicate that the parties intended to diverge from common-law principles of quiet enjoyment. Such black letter law provides that "the covenant of quiet enjoyment is breached only when the *landlord* obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold." *Slatterly v Madiol*, 257 Mich App 242, 258 (2003)(emphasis added).

In fact, the language set forth in § 22.1 comports with common-law principles of quiet enjoyment. It specifically protects Tenant's quiet enjoyment from "hindrance or interruption **by Landlord** or any other person or persons lawfully or equitably claiming by, through or under Landlord, subject to the terms of this Lease."[35] Further, this provision is contingent "[u]pon payment by Tenant of the Rent." As a result, it is beyond dispute that Defendant is not responsible for the executive orders issued regarding COVID-19 and did not breach the covenant of quiet enjoyment.[36]

DECLARATORY JUDGMENT

Defendant also seeks to dismiss Fitness' Declaratory Judgment Counts, Counts III and IV. Defendant argues that declaratory relief is a remedy, not a claim. Therefore, Defendant argues that the declaratory relief stands or falls with the success of the other claims in the complaint, which here would be Counts I and II.

Defendant also argues that Fitness' claims for declaratory relief involve some type of "hypothetical" or "anticipated" future event that doe does not constitute a "present legal controversary."[37]

Fitness, however, does not respond to these arguments. It is well-settled that "[t]rial courts are not the research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). *See also Moses, Inc v Southeast Mich Council of Governments*, 270

[35] Lease, p 30, § 22.1. (Emphasis added).
[36] The Court also does not find that Defendant breached § 2.2(b) of the Lease as this section relates to Defendant having "good and insurable title to the Premises in fee simple" and provides that "Tenant shall have . . . peaceful and quiet possession and enjoyment of the Premises without any **ejection by the Landlord** or by any other person by, through or under Landlord." (Emphasis added). Lease, pp. 5-6, § 2.2.
[37] Defendant's Brief, pp 19-20.

Mich App 401, 417 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

Therefore, the Court finds that Fitness has abandoned this argument.

CONCLUSION

IT IS HEREBY ORDERED for the reasons set forth above that Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Disposition pursuant to MCR 2.116(I)(2) is DENIED.

This is a final order and closes the case.

IT IS SO ORDERED.

/s/Victoria A. Valentine