



**ONTARIO
SUPERIOR COURT OF JUSTICE**

Electronically issued : 09-Jun-2020
Délivré par voie électronique
Ottawa

P. GARITO

Plaintiff

- and -

**FITNESS DEPOT INC. AND NORTHERN LIGHTS FITNESS
PRODUCTS INCORPORATED**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyer or, where the Plaintiff do not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 8, 2020

Issued by _____

Local Registrar

Address of court office: 161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: FITNESS DEPOT INC.
P.O. Box 1748
700 Wallrich Avenue
Cornwall, Ontario
K6H 5V7

AND: NORTHERN LIGHTS FITNESS PRODUCTS INCORPORATED
P.O. Box 1748
700 Wallrich Avenue
Cornwall, Ontario
K6H 5V7

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Data Breach**” means the cyberattack intrusion by unauthorized persons (i.e. “hackers”) into the Defendants’ e-commerce computer system at www.fitnessdepot.ca from February 18, 2020 through to May 22, 2020;
- (b) “**Magecart Attack**” means the form of data skimming whereby the attackers implant malicious code into e-commerce websites that enable them to capture sensitive information from online payment forms on checkout pages, such as email addresses, passwords, and credit card numbers;
- (c) “**Fitness Product(s)**” means the Defendants’ Strength Training Equipment, Cardio Equipment, Functional Fitness Equipment, and Accessories, which include barbells, dumbbells, kettlebells, chin up bars, cross boxes, equipment packages, free weight equipment (e.g. benches and stations), functional trainers, racks, & home gyms, lifting bars, storage, and weight plates, bikes, ellipticals, product accessories (e.g. consoles, racks, pedals, seats, straps, monitors etc.), rowers, and treadmills, balls, class setting group, core training, high impact (i.e. trampolines and accessories thereto), ropes, strength (e.g. weighted vests, mats etc.), and yoga equipment, ability and balance equipment, boxing equipment, bands, rollers, and tubes, bars & dumbbells, cable attachments, flooring, lifting accessories, and massage equipment;

- (d) “**Class**”, “**Proposed Class**”, or “**Class Members**” means all persons residents in Canada whose Personal and Private Information was accessed by hackers as a result of the Data Breach;
- (e) “**Personal and Private Information**” includes, but is not limited to: name, address, email address, telephone number, credit card number, or any combination thereof;
- (f) “**Credit Monitoring and Identity Theft Protection Service**” means a paid monthly service by a credit agency, such as Equifax Canada, that monitors a person’s credit file for signs of identity theft, changes to a credit score and credit reporting, as well as, offers insurance in the case of identity theft;
- (g) “*Courts of Justice Act*” means the Ontario *Courts of Justice Act*, RSO 1990, c. C-43, as amended;
- (h) “*Class Proceedings Act*” means the *Class Proceedings Act, 1992*, SO 1992, c. 6, as amended;
- (i) “*Consumer Protection Act*” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14 & 15;
- (j) “**Consumer Protection Legislation**” means:
- (i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia);

- (ii) The *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta);
- (iii) The *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan);
- (iv) The *Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba);
- (v) The *Consumer Protection Act*, CQLR c P-40.1, including ss. including ss. 219, 228, 253 & 272 (Quebec);
- (vi) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland and Labrador);
- (vii) The *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick);
- (viii) The *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia);
- (ix) The *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island);
- (x) The *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon);
- (xi) The *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and

- (xii) The *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut);
- (k) “**PIPEDA**” means the *Personal and Private Information Protection and Electronic Documents Act*, SC 2000, c 5, as amended, including ss. 5 and following and Schedule 1;
- (l) “**Digital Privacy Act**” means the *Digital Privacy Act*, S.C. 2015, c. 32, as amended;
- (m) “**Freedom of Information and Protection of Privacy Act**” means the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, including ss. 38, 39, 41, 42, and 61;
- (n) “**Provincial Privacy Protection Legislation**” means:
- (i) The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, as amended (British Columbia);
 - (ii) The *Privacy Act*, RSBC 1996, c 373, as amended (British Columbia);
 - (iii) The *Personal and Private Information Protection Act*, SA 2003, c P-6.5, as amended (Alberta);
 - (iv) The *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, as amended (Alberta);
 - (v) *The Privacy Act*, RSS 1978, c P-24, as amended (Saskatchewan);

- (vi) *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, as amended (Saskatchewan);
- (vii) *The Privacy Act*, CCSM c P125, as amended (Manitoba);
- (viii) *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, as amended (Manitoba);
- (ix) *An Act respecting the Protection of Personal and Private Information in the Private Sector*, CQLR c P-39.1, as amended (Quebec);
- (x) *The Civil Code of Québec*, CQLR c CCQ-1991, as amended (Quebec);
- (xi) *The Charter of Human Rights and Freedoms*, CQLR c C-12, as amended (Quebec);
- (xii) *The Privacy Act*, RSNL 1990, c P-22, as amended (Newfoundland and Labrador);
- (xiii) *The Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, as amended (Newfoundland and Labrador);
- (xiv) *The Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, as amended (New Brunswick);
- (xv) *The Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, as amended (Nova Scotia);
- (xvi) *The Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, as amended (Prince Edward Island);

- (xvii) The *Access to Information and Protection of Privacy Act*, RSY 2002, c 1,
as amended (Yukon);
- (xviii) The *Access to Information and Protection of Privacy Act*, SNWT
1994, c 20, as amended (Northwest Territories);
- (xix) The *Access to Information and Protection of Privacy Act*, SNWT (Nu)
1994, c 20, as amended (Nunavut);
- (o) “**Defendants**” or “**Fitness Depot**” means Fitness Depot Inc. and Northern
Lights Fitness Products Incorporated; and
- (p) “**Plaintiff**” or “**Representative Plaintiff**” means P. Garito.

THE CLAIM

2. The proposed Representative Plaintiff claims the following on his own behalf and on behalf of the members of the Class of persons as defined in paragraph 5 below (the “Class”) as against the Defendants:

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that the Defendants committed the tort of intrusion upon seclusion;
- (c) A declaration that the Defendants were negligent in failing to safeguard Class Members’ Personal and Private Information;

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- (d) A declaration that the Defendants breached their fiduciary duty to Class Members;
- (e) A declaration that the Defendants breached *PIPEDA*;
- (f) A declaration that the Defendants breached the *Freedom of Information and Protection of Privacy Act* as well as the parallel provisions of the Provincial Privacy Protection Legislation;
- (g) A declaration that the Defendants breached the *Consumer Protection Act* as well as the parallel provisions of the other provincial Consumer Protection Legislation;
- (h) An order pursuant to s. 25 of the *Class Proceedings Act* directing individual hearings, inquiries, and determinations for Class Members who have suffered or may have suffered special damages as a result of unlawful conduct by third parties, including identity theft, which may have been occasioned by or attributable to the Defendants' breaches as alleged, and all necessary directions relating to the procedures to be followed in conducting hearings, inquiries, and determinations;
- (i) General and special damages in an amount to be determined in the aggregate for the Class Members;
- (j) Punitive, exemplary, and/or aggravated damages in the aggregate in an amount to be determined as this Honourable Court deems appropriate;

- (k) A declaration that the Defendants are jointly and severally liable for any and all damages awarded;
- (l) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (m) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;
- (n) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128, 129, and 130 of the *Courts of Justice Act*;
- (o) Costs of notice and administration of the plan of distribution of recovery in this action, plus applicable taxes, pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (p) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (q) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff is an individual residing in the city of Mississauga, in the province of Ontario.

4. On May 4, 2020, the Plaintiff purchased Fitness Equipment from the Defendants through www.fitnessdepot.ca for in-store pickup from Fitness Depot Mississauga located at 3663 Mavis Road, Unit 9, in Mississauga, Ontario, L5C 2Z2.

5. On June 3, 2020, the Plaintiff received an email from the Defendants informing him of the Data Breach and that his Personal and Private Information had been compromised. The Defendants claimed this was the result of an error by its Internet Service Provider (“ISP”) for neglecting to activate anti-virus software. No Credit Monitoring and Identity Theft Protection Service was offered to the Plaintiff.

The Class

6. The Plaintiff seeks to represent the following class of which he is member (the “Proposed Class”):

All persons resident in Canada whose Personal and Private Information was accessed by hackers as a result of the Data Breach;

The Defendants

7. The Defendant, Fitness Depot Inc., is a Canadian corporation with its principal place of business in Cornwall, Ontario. It is the registrant and owner of the trade-mark “FITNESS DEPOT” (TMA436322), which was registered on November 25, 1994.

8. The Defendant, Northern Lights Fitness Products Incorporated, is a Canadian corporation with its principal place of business in Cornwall, Ontario.

9. The Defendants market, promote, advertise, label, and sell the Fitness Equipment under the Fitness Depot brand name in Canada, including within the province of Ontario.

10. Fitness Depot describes itself as “the largest retailer of specialty exercise equipment in Canada, with the guaranteed lowest prices in North America”, with 40 stores nationwide and two in the United States.

11. Given the close ties between the Defendants and considering the preceding, they are jointly and severally liable for the acts and omissions of each other.

12. Unless the situation indicates otherwise, both Defendants will be referred to as “Fitness Depot” throughout this proceeding.

THE NATURE OF THE CLAIM

13. These class proceedings concern a large privacy breach has impacted thousands of Canadian consumers who have had their sensitive Personal and Private Information compromised and placed into the hands of criminals.

14. The Defendants failed to take proper steps to safeguard their own customers’ Personal and Private Information, a duty they are legally obligated to do, and in violation of their own express promises to Class Members.

15. To make matters worse, even after the delayed discovery (it took over 3 months for the Defendants to uncover the breach) and the delayed disclosure (it took the

Defendants approximately 2 weeks to inform the public) of the Data Breach, the Defendants have shown little remorse and have attempted to shift the blame for their own failings to their Internet Service Provider and have left their customers on their own to deal with the security fallout, by giving no assistance to them (such as offering them a free Credit Monitoring and Identity Theft Protection Service).

16. The Plaintiff, on behalf of the Class Members, seek an award of damages against the Defendants for their intentional, wilful, reckless, and/or grossly negligent failures as described.

Overview – The Data Breach

17. The Defendants' website at www.fitnessdepot.ca contains a written Privacy & Security Policy, which states, *inter alia*, the following representations:

Fitness Depot 12 Privacy Principles

Fitness Depot is committed to protecting the privacy and security of your personal information.

Our policies and practices have been designed to comply with the Personal Information Protection and Electronic Documents Act (PIPEDA) and corresponding provincial privacy acts.

...

Accountability:

Fitness Depot is responsible for Personal Information under its control, including Personal Information disclosed to a third party for data and list processing.

Identifying Purposes:

Fitness Depot collects Personal Information in an effort to improve your shopping experience and to communicate with you about our products, services, contests and promotions. Fitness Depot identifies either before or at the time of collection the purposes for which Personal Information is being collected; and how the Personal Information may be used or disclosed.

Consent:

The cornerstone to protecting your privacy is consent. Fitness Depot will only collect, use, and disclose your Personal Information with your consent, except where otherwise permitted by law. Fitness Depot does not, as a condition of the supply of a product or service to you, require you to consent to the collection, use, or disclosure of your Personal Information beyond that information which is required to complete the transaction. You may choose not to provide us with any of your Personal Information. However, if you make this choice Fitness Depot may not be able to provide you with the product, service or information that you requested or that could be offered to you.

Limiting Collection:

Fitness Depot will limit the collection of your Personal Information to only those details that are necessary for the purposes identified.

Fitness Depot collects Personal Information from the Customer for:

- In-store purchase, telephone and online surveys and contests
- Processing your applications
- Processing and keeping track of transactions and reporting back to you
- Limiting Use, Disclosure and Retention:
- For warranty purposes, in case of product recall and/or manufacturer notifications
- We do not share your personal information with third party organizations except to offer you a product or service. If your personal information is shared with third parties, these third parties are bound by appropriate agreements with Fitness Depot to secure and protect the confidentiality of your personal information. Fitness Depot retains your personal information only as long as it is required for our business relationship or as required by federal and provincial laws.

Accuracy:

Fitness Depot keeps Personal Information as accurate, complete and up-to-date as necessary for the purposes for which it is to be used.

Updates Personal Information as it is made available by Customers
Customers are responsible for informing Fitness Depot about changes to Personal Information, as appropriate.

Fitness Depot does not routinely update Personal Information unless such a process is necessary to fulfill the purposes for which the Personal Information is collected.

Safeguards:

Protecting your information is important to us. Fitness Depot uses Secure Sockets Layer (SSL) technology to protect your online information as it is transmitted

over the Internet. When accessing a secure server, the first characters of the site address will change from "http" to "https."

Openness:

Fitness Depot is committed to providing you with understandable and easily available information about our policy and practices related to management of your personal information. This policy and any related information is available at all times on our web site.

18. Based on the information known at the present time, it would appear that the Defendants' e-commerce computer system was the subject of a *Magecart Attack*, "where the threat actors were able to compromise Fitness Depot's online store and inject a malicious form designed to harvest and exfiltrate customer information. In such attacks, cybercrime groups known as Magecart groups hack e-commerce stores and inject malicious JavaScript-based scripts into their checkout pages as part of web skimming (aka e-skimming) attacks. The attackers' end goal is to steal all the payment or personal information submitted by the compromised sites' customers and to collect it on remote servers under their control."

19. In order for a Magecart Attack to work, the hackers must achieve 3 things to be successful:

- (a) Gain access to the e-commerce website: there are typically 2 ways to gain access to a website to place the skimming code; either break into the infrastructure or server and place the skimmer there or the hacker can infect a third-party vendor and infect a third-party tag that will run malicious script on the website when it is called in the browser;

- (b) Skim sensitive information from a form: there are many ways to capture data, but the skimming code is always JavaScript that listens for Personal and Private Information and collects it. It can monitor all keypresses on a sensitive webpage or it can intercept input into specific parts of a webform like the credit card and CVV fields;
- (c) Send information back to their server: Once hackers gain access to your website and scrape the data they want – it's game over. They can send the information from the end users' browsers to almost any location on the internet.

20. On June 3, 2020, Fitness Depot sent emails to its customers stating the following:

Notice of Data Breach

We are writing to inform you that Personal and Private Information about you may have been involved in the recent cyberattack on Fitness Depot. This notice contains information about the incident that occurred, as well as services Fitness Depot is providing and additional steps you can take to protect yourself against any potential misuse of your Personal and Private Information. Fitness Depot sincerely regrets that this incident occurred and takes the security of all customer information seriously.

What Fitness Depot is Doing

Fitness Depot is taking prompt action to notify potentially affected customers via email. We have taken measures that we believe are designed to remove the cyber criminal's access to our E-commerce system and we are monitoring for any signs of further activity or compromise.

What Information Was Involved

Fitness Depot believes that the cyber criminals may have accessed and or removed Personal and Private Information relating to certain individuals who made purchases for delivery and or who made purchases for in-store pick up at one of our retail locations. The information accessed may have included for example; name, address, email address, telephone number, and credit card number used in the transaction.

What Happened

On May 22nd, 2020 Fitness Depot was informed of a potential data breach on transactions involving our Ecommerce operations. Fitness Depot immediately shut down this service and launched an investigation. Based on our preliminary findings it appears our Internet Service Provider [ISP] neglected to activate the anti-virus software on our account. All of our transactions for E-commerce are through PayPal. It appears the cyber criminals were able to place a form on our Fitness Depot website that was misleading. Once our customers where redirected to this form the customer information was copied without the authorization or knowledge of Fitness Depot. This is how the Personal and Private Information was captured and stolen. This data breach dates as far back as Feb 18, 2020. Only customers with home delivery were affected from 2020-02-18 through 2020-04-27. From 2020-04-28 until 2020-05-22 any customer that ordered product for Home delivery or ordered product for in-store pick-up could have been potentially affected.

What You Can Do

You should always remain vigilant for incidents of fraud and identity theft by, for example, regularly reviewing your account statements and monitoring free credit reports. If you discover any suspicious or unusual activity on your accounts or suspect identity theft or fraud, be sure to report it immediately to your financial institution. As of the writing of this notification, Fitness Depot has no knowledge that any of our customer information was compromised in any manner. If you feel that your personal customer information was in fact compromised in any way, please let us know immediately.

In Closing

We take the safety and security of your Personal and Private Information very seriously. We apologize for any inconvenience and we want you to know we are here to answer any questions or concerns. Please contact us at privacyofficer@fitnessdepot.ca

21. Of note in the above email to Class Members are the following:
 - a) The information accessed by the hackers may have included their name, address, email address, telephone number, and credit card number;
 - b) The Defendants have known about the Data Breach since as early as May 22, 2020, but waited until June 3, 2020 to share this information with its customers (almost 2 weeks);

- c) The Defendants allowed criminals to have unabated and unauthorized access to their customers' Personal and Private Information since February 18, 2020 and only discovered the breach to their e-commerce platform on May 22, 2020 (approximately 3 months later).
- d) The Defendants are blaming its Internet Service Provider ("ISP") for failing to activate for the antivirus software on their account, though this supposed excuse is unclear as "it's not an ISP's job to protect its customers' e-commerce platforms with anti-malware solutions";
- e) Customers who ordered home delivery were affected from February 18, 2020 until May 22, 2020, while customers who ordered in-store pickup were affected from April 28, 200 until May 22, 2020;
- f) The Defendants have passed on the problem to Class Members by telling them that they must monitor their credit reports and report any suspicious or unusual activity on their accounts to their financial institutions – no Credit Monitoring and Identity Theft Protection Services were offered free of charge to its customers.

22. There are several things that the Defendants could have done to prevent the Data Breach and its size, including, but not limited to:

- (a) Implementing a zero-trust policy protection approach with JavaScript on their e-commerce website, including blocking access by default to any sensitive information entered in web forms and stored cookies. From there, you only

allow a select set of vetted scripts (usually only your own) to access sensitive data. And as a result, if this type of skimming code does get on your site, it simply can't access any of the sensitive information;

(b) Auditing their e-commerce website on a regular basis.

23. Many consumers put their trust in the online stores and sites that they shop at and the Defendants, being such a large corporation are no different. Consumers expect that when they input their Personal and Private Information into a website to purchase a product from a large retailer, there would be adequate and effective policies in place that would ensure that it would be protected from hackers; these reasonable expectation are enhanced considering the Defendants' representations made in their Privacy & Security Policy.

What can be done after a cyberattack?

24. The Data Breach should never have been able to happen and, it should never have been able to last as long as it did without detection. However, given that it did, now Class Members must monitor their credit card statements and credit reports and the Defendants ought, at the very least, to offer them Credit Monitoring and Identity Theft Protection Services.

25. Equifax Canada offers 3 different Credit Monitoring and Identity Theft Protection Services (4 if you include the "Friends and Family" package) – none of which were offered free of charge to Class Members:

- (i) Equifax Identity Pro for \$11.95 per month;
- (ii) Equifax Complete Advantage for \$16.95 per month; and

(iii) Equifax Complete Premier for \$19.95 per month.

26. While the services vary depending on price, they include certain security features such as (in the case of Equifax Complete Premier, all such security features):

- a) Identity Theft Assistance: A dedicated Identity Restoration Specialist will guide you step-by-step to help you restore your identity should you become a victim of identity theft;
- b) Identity Restoration: A dedicated Identity Restoration Specialist will work on your behalf to help restore your identity should you become a victim of identity theft;
- c) Internet Scanning: Consumer data is traded online every day. Be alerted in the event that the credit card numbers, bank account numbers or Social Insurance Number that you provided are found on suspected fraudulent websites;
- d) Lost Wallet Assistance: If you lose your wallet, we'll help you cancel and re-issue your cards and ID;
- e) Credit Report Monitoring: Receive alerts of key changes to your credit report based on your personal alert preferences;
- f) Credit Score Monitoring: Receive alerts of key changes to your educational credit score based on your personal alert preferences;

- g) Identity Theft Insurance: Helps pay certain out-of-pocket expenses in the event you become a victim of identity theft;
- h) Customer Care: Access to our knowledgeable Customer Care representative 7 days a week.

27. These Credit Monitoring and Identity Theft Protection Services could have, at least, helped alleviate some of the Class Members' stress and anxiety that their Personal and Private Information had been stolen by criminals with intended purpose (why else would some steal such information?) of being be used for nefarious purposes, including impersonating and defrauding them.

28. The Class Members have suffered injury, loss, and damages as a result of the Defendants' failure to fulfill their duties, failure to respect their representations, and failure to protect and respect Class Members' Personal and Private Information.

THE REPRESENTATIVE PLAINTIFF

29. On May 4, 2020, the Plaintiff purchased a 27.5-pound urethane solid steel dumbbell for \$62.15 (including sales tax) through the Defendants' e-commerce computer system at www.fitnessdepot.ca for in-store pickup from Fitness Depot Mississauga located at 3663 Mavis Road, Unit 9, in Mississauga, Ontario, L5C 2Z2 (Order Confirmation Number 6000036214-SP-OMI).

30. In making this purchase, the Plaintiff was required to fill out the Defendants' online form(s), which included creating an account and entering his full name, address, email, telephone number, and credit card information.

31. On June 3, 2020, the Plaintiff received an email from the Defendants informing him of the Data Breach and that his Personal and Private Information had been compromised. The excuse given for this breach was that the Defendants' ISP neglected to activate the anti-virus software on their account. No Credit Monitoring and Identity Theft Protection Service was offered.

32. Plaintiff believed that his Personal and Private Information would be safeguarded with all appropriate means by the Defendants and that his privacy would not be breached by criminals.

33. Plaintiff had a reasonable expectation that his Personal and Private Information would remain private and not be intercepted, collected, recorded, utilized, and/or transmitted by third parties, especially considering the Defendants' own Privacy & Security Policy.

34. Plaintiff would not have purchased his Fitness Product had he known that his privacy would or could be so easily compromised or that the Defendants would not live up to their promises to protect his Personal and Private Information.

35. Plaintiff is now experiencing stress, anxiety, and anguish because he realizes that his Personal and Private Information is now in the hands of criminals, who will likely try to impersonate and defraud him. He must now suffer the trouble and inconvenience of

cancelling his credit card and being on constant lookout for suspicious activity on his credit record. Plaintiff would have taken advantage of a free Credit Monitoring and Identity Theft Protection Service had it been offered to him; now he is left with the difficult decision of whether he is prepared to pay up to \$19.95 per month for an indefinite period for some peace of mind.

36. Plaintiff's damages are a foreseeable, direct, and a proximate result of the Defendants' conduct.

CAUSES OF ACTION

A. Tort of Intrusion Upon Seclusion

37. The actions of the Defendants constitute willful or intentional or reckless intrusions upon seclusion that would be highly offensive to a reasonable person in that:

- a) They failed to take appropriate steps to guard against unauthorized access Personal and Private Information involving Class Members' private affair or concerns;
- b) They acted in violation of their own privacy promises set out in their written Privacy & Security policy;
- c) Their actions were highly offensive, causing distress and anguish to Class Members. This was exacerbated by the Defendants making no effort to alleviate Class Members' legitimate concerns by offering any kind of Credit Report Monitoring and Identity Theft Protection.

B. Tort of Civil Negligence

38. The Defendants owed Class Members a duty of care in the collection, retention, use, and disclosure of their Personal and Private Information and a duty to safeguard the confidentiality of same. The Defendants were at all times aware of the likelihood of harm that would occur should they fail to act reasonably under the circumstances described above.

39. The Defendants also had a duty as the custodian of Class Members' Personal and Private Information, to protect their customers from, and warn them within a reasonable period of, their interception, collection, and/or transmission from unauthorized disclosure. Such a duty arises out of the special relationship between the Defendants and Class Members.

40. The Defendants knew that their customers (including Plaintiff and Class Members) were wholly reliant on them to adequately protect their privacy; particularly so as their represented as much to Class Members.

41. The Defendants breached the standard of care in, at least, the following ways:

- a) They failed to live up to their own Privacy & Security policy;
- b) They failed to take adequate steps to ensure that their website was not vulnerable to unauthorized access which would result in the exposure of Personal and Private Information;
- c) They failed to detect the unauthorized breach when it first occurred in mid-February 2020, thereby giving the hackers the opportunity to access large

amounts of Personal and Private Information without being detected for over 3 months;

- d) Subsequent to detecting the existence of the breach on May 22, 2020, they waited almost 2 weeks before making a public disclosure of the Data Breach;
- e) After the Data Breach was made public on June 3, 2020, they failed to provide any means to determine whether any particular customer had been affected by the Data Breach; and
- f) They failed to comply with the minimum standards provided in the *Personal and Private Information Protection and Electronic Documents Act*, S.C. 2000, c. 5;

42. As a result of the Defendants' acts and omissions, Class Members suffered reasonably foreseeable damages and losses, for which the Defendants are liable.

C. Breach of Fiduciary Duty

43. The Defendants were in an *ad hoc* fiduciary relationship with the Plaintiff and Class Members by reason of its entrustment with their Personal and Private Information and its ability to exercise its discretionary powers unilaterally, affecting the Plaintiff' and Class Members' legal and/or practical interests. In addition, the Defendants either expressly or impliedly undertook to exercise its discretionary powers in Class Members' best interests.

44. By virtue of this fiduciary relationship and the vulnerability and dependency of the Plaintiff and Class Members, the Defendants had a duty of care to use reasonable means to keep the said Personal and Private Information strictly confidential and secure. The Defendants unlawfully breached this duty.

D. Negligent Misrepresentation

45. The tort of negligent misrepresentation can be made out as:

- (a) There was a relationship of proximity in which failure to take reasonable care would foreseeably cause loss or harm to the Class;
- (b) The Defendants made a representation that was untrue, inaccurate and/or misleading;
- (c) The Defendants acted negligently in making the representation;
- (d) The representation was reasonably relied upon by the Class; and
- (e) The Class has sustained damages as a result of their reliance.

46. The Defendants represented to the Class Members in their Privacy & Security Policy that:

- i. They were “committed to protecting the privacy and security of your Personal and Private Information”;

- ii. Their “policies and practices have been designed to comply with the *Personal and Private Information Protection and Electronic Documents Act* (PIPEDA) and corresponding provincial privacy acts”;
- iii. “The cornerstone to protecting your privacy is consent. Fitness Depot will only collect, use, and disclose your Personal and Private Information with your consent, except where otherwise permitted by law”; and
- iv. “Protecting your information is important to us. Fitness Depot uses Secure Sockets Layer (SSL) technology to protect your online information as it is transmitted over the Internet.”

47. These representations were inaccurate as the Defendants did not use all reasonable measures to safeguard Class Members’ Personal and Private Information.

48. At the time that the Defendants made the misrepresentations herein alleged, they knew or should have known that they were false and misleading, they had no reasonable grounds to believe that they were true, and the Defendants made the material representations recklessly.

49. The Defendants made the representations herein alleged with the intention of inducing the Class Members to act by purchasing their Fitness Products.

50. Class Members acted in justifiable and reasonable reliance on these material misrepresentations and purchased the Fitness Products specifically under the belief that their Personal and Private Information would be safe.

51. The Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendants to this end.

STATUTORY REMEDIES

52. The Defendants are in breach of the *Consumer Protection Act*¹, *PIPEDA*, and the *Freedom of Information and Protection of Privacy Act*².

53. The Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction, and the equivalent/similar legislation and common law in other Canadian provinces and territories.

¹ While the *Consumer Protection Act* applies only in Ontario, other Canadian provinces and territories have similar Consumer Protection Legislation including, but not limited to: the *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10; the *Fair Trading Act*, RSA 2000, c. F-2, as amended, including ss. 6, 7 & 13; *The Consumer Protection Act*, SS 1996, c. C-30.1, as amended, including ss. 5-8, 14, 16, 48 & 65; *The Business Practices Act*, CCSM, c. B120, as amended, including ss. 2 & 23; the *Consumer Protection Act*, RSQ c. P-40.1, as amended, including ss. 219, 228, 253 & 272; the *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, as amended, including ss. 7, 8, 9 & 10, and the *Trade Practices Act*, RSNL 1990, c. T-7, as amended, including ss. 5, 6 & 14; the *Consumer Product Warranty and Liability Act*, SNB 1978, c. C-18.1, including ss. 4, 10, 12, 15-18, 23 & 27; the *Consumer Protection Act*, RSNS 1989, c. 92, including ss. 26 & 28A; the *Business Practices Act*, RSPEI 1988, c. B-7, as amended, including ss. 2-4; the *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86; the *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71; and the *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71.

² While the *Freedom of Information and Protection of Privacy Act* applies only in Ontario, other Canadian provinces and territories have similar Provincial Privacy Legislation including, but not limited to: the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, as amended; the *Privacy Act*, RSBC 1996, c 373, as amended; the *Personal Information Protection Act*, SA 2003, c P-6.5, as amended; the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, as amended; *The Privacy Act*, RSS 1978, c P-24, as amended; *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, as amended; *The Privacy Act*, CCSM c P125, as amended; *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, as amended; *An Act respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1, as amended; the *Civil Code of Québec*, CQLR c CCQ-1991, as amended; the *Charter of Human Rights and Freedoms*, CQLR c C-12, as amended; the *Privacy Act*, RSNL 1990, c P-22, as amended; the *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2, as amended; the *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, as amended; the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, as amended; the *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, as amended; *The Access to Information and Protection of Privacy Act*, RSY 2002, c 1, as amended; the *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, as amended; the *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20, as amended.

A. Breach of the *Consumer Protection Act*

54. At all times relevant to this action, the Plaintiff and Class Members were “consumer[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

55. At all times relevant to this action, the Defendants were “supplier[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

56. The transactions by which the Plaintiff and Class Members purchased Fitness Products were “consumer transaction[s]” within the meaning of that term as defined in s.1 of the *Consumer Protection Act*.

57. The Defendants are residents in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

58. The Defendants have engaged in an unfair practice by making a representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act*, as follows:

59. These representations were materially misleading as the Defendants do not abide by their commitments to users as outlined in their own Privacy & Security policy.

60. The representation was and is unconscionable because *inter alia* the Defendants know or ought to know that consumers are likely to rely, to their detriment, on their misleading statements as to the security of their Personal and Private Information.

61. The Plaintiff and Class Members are entitled to recover damages and costs of administering the plan to distribute the recovery of the action in accordance with the *Consumer Protection Act*.

B. Breach of *PIPEDA*

62. The Defendants' business of marketing, promoting, advertising, and/or selling Fitness Products consisted of a "commercial activity" within the meaning of the that term as defined in s.2 of *PIPEDA*.

63. The Defendants are "organization[s]" within the meaning of that term as defined in s.2 of *PIPEDA*.

64. The Personal and Private Information that was intercepted was "Personal Information" and was in the form of a "record" within the meaning of those terms as defined in s.2 of *PIPEDA*.

65. Under *PIPEDA*, the Class Members have a right to protection, privacy and security of their Personal and Private Information and the Defendants are under a corresponding obligation to protect their customers' rights to privacy.

66. The Defendants are responsible for the Personal and Private Information of Class Members as it was wholly under their control to do so and they breached their duty to protect this information.

67. The breach of the Class Members' privacy by the Defendants constitutes a breach of *PIPEDA* for which damages may be awarded.

C. Breach of the *Freedom of Information and Protection of Privacy Act*

68. At all times relevant to this action, Class Members' Personal and Private Information consisted of "Personal Information" and it was in form of a "record" within the meaning of those terms as defined in s. 2 of the *Freedom of Information and Protection of Privacy Act*.

69. The Defendants' storage of Class Members' Personal and Private Information was in the form of a "Personal Information bank" within the meaning of that term as defined in s.2 of the *Freedom of Information and Protection of Privacy Act*.

70. The Defendants was in breach of the *Freedom of Information and Protection of Privacy Act* in failing to safeguard Class Members' Personal and Private Information.

CAUSATION

71. The acts, omissions, wrongdoings, and breaches of legal duties and obligations on the part of the Defendants are the foreseeable, direct, and proximate cause of the Plaintiff' and Class Members' injuries.

72. The Plaintiff pleads that by virtue of the acts, omissions and breaches of legal obligations as described above, he is entitled to legal and/or equitable relief against the Defendants, including damages, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

73. By reason of the acts, omissions and breaches of legal obligations of the Defendants, the Plaintiff and Class Members have suffered damages, the particulars of which include, but are not limited to, the following general, special, and punitive damages.

A. General Damages (Non-Pecuniary Damages)

74. The general damages being claimed in this Statement of Claim include:

- a) Damage to reputation;
- b) Pain and suffering;
- c) Loss of enjoyment of life;
- d) Stress/distress;
- e) Anxiety/anguish;
- f) Trouble; and
- g) Inconvenience.

B. Special Damages (Pecuniary Damages)

75. The special damages being claimed in this Statement of Claim include:

- a) Damages resulting from synthetic or fictitious identity fraud schemes
- b) Damage to credit ratings and perceived credit worthiness;
- c) Costs incurred to remedy and prevent identity theft;
- d) Out-of-pocket expenses; and

- e) Damages caused by unlawful conduct by third parties, including identity theft, occasioned by or attributable to the Defendants' breaches as alleged herein;

C. Punitive, Exemplary, and/or Aggravated Damages

76. The Defendants have taken a cavalier and arbitrary attitude to their legal and moral duties to the Class Members.

77. At all material times, the conduct of the Defendants as set forth was malicious, deliberate, and oppressive towards their customers and the Defendants conducted themselves in a wilful, wanton and reckless manner as to Class Members' privacy rights, such as to warrant punitive damages.

78. By engaging in such deplorable conduct and tactics, the Defendants committed a separate actionable wrong for which this Honourable Court should voice its disapproval and displeasure with an award of punitive damages.

79. In addition, it should be noted since the Defendants are part of a highly-revered, multi-million-dollar corporation, it is imperative to avoid any perception of evading the law without impunity. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

COMMON ISSUES.

80. Common questions of law and fact exist for the Class Members and predominate over any questions affecting individual members of the Class. The common questions of fact and law include:

- (a) Did the Defendants owe a duty of care to Class Members in the collection, retention, use, disclosure and safeguard of their Personal and Private Information?
- (b) If so, did the Defendants breach that duty?
- (c) Did the Defendants violate the privacy of Class Members?
- (d) Did the Defendants invade, without lawful justification, the Class Members' private affairs or concerns by failing to take reasonable steps to ensure that Class Members' Personal and Private Information was protected from misappropriation by hackers?
- (e) Was the Defendants' conduct intentional or reckless?
- (f) Would a reasonable person regard the invasion as highly offensive, causing distress, humiliation or anguish?
- (g) Did the Defendants engage in unfair, misleading, and/or deceptive acts or practices through the representations made in their Privacy & Security policy?
- (h) Did the Defendants breach their fiduciary duty to Class Members?
- (i) Did the Defendants commit negligent misrepresentation?

- (j) Did the Defendants' acts or practices breach the *Consumer Protection Act*, the *Consumer Protection Legislation, PIPEDA*, the *Freedom of Information and Protection of Privacy Act*, and/or other similar/equivalent legislation?
- (k) Should an award of aggregate damages pursuant to s. 24(1) of the *Class Proceedings Act* be made?
- (l) Are the Defendants liable to pay punitive, exemplary, and/or punitive damages to the Class Members, and, if so, in what amount?

EFFICACY OF CLASS PROCEEDINGS

81. The Class Members are so numerous that joinder into one action is impractical and unmanageable. The Class Members are geographically dispersed and number in the thousands. Continuing with the Class Members' claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

82. Given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendants. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded, and, at the very least, is not in the interests of judicial economy. Furthermore, individual litigation of the factual and legal issues raised by the conduct of the Defendants would increase delay and expense to all parties and to the court system.

83. By their very nature, privacy violations affect many individuals and if it were not for the class action mechanism which facilitates access to justice, these types of claims would never be heard.

84. This class action overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

85. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the Class.

86. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the Class to effectively pursue their respective legal rights and have access to justice.

87. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Classes and has given the mandate to his counsel to obtain all relevant information with respect to the present action and intend to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

88. The Plaintiff pleads and relies on the *Class Proceedings Act*, the *Courts of Justice Act*, the *Consumer Protection Act*, the Consumer Protection Legislation, *PIPEDA*, and the

Freedom of Information and Protection of Privacy Act.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

89. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) The Defendants have their head office in Cornwall, Ontario;
- (b) The Defendants engage in business with residents of Ontario;
- (c) The Defendants derive substantial revenue from carrying on business in Ontario; and
- (d) The damages of Class Members were sustained in Ontario.

90. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

DEFENDANTS' JOINT AND SEVERAL LIABILITY

91. The Plaintiff pleads that by virtue of the acts and omissions described above, the Defendants are liable in damages to himself and to the Class Members and that each Defendant is responsible for the acts and omissions of the other Defendants for the following reasons:

- (a) Each was the agent of the other;

- (b) Each companies' business was operated so that it was inextricably interwoven with the business of the other as set out above;
- (c) Each company entered into a common advertising and business plan to market and sell the Fitness Products;
- (d) Each owed a duty of care to the other and to each Class Member by virtue of the common business plan to market and sell the Fitness Products; and
- (e) The Defendants intended that their businesses be run as one global business organization.

Date: June 8, 2020

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Plaintiff

**FITNESS DEPOT INC.
& NORTHERN LIGHTS FITNESS PRODUCTS INC.**
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED IN OTTAWA

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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