

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

[Plaintiff's Name],)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. -cv- (TSC)
)	
[Defendant's Name],)	
)	
Defendant.)	
)	

**PLAINTIFFS' RESPONSES TO DEFENDANT'S STATEMENT OF UNDISPUTED
FACTS AND PLAINTIFFS' FURTHER STATEMENT OF MATERIAL FACTS**

A. RELATIONSHIP BETWEEN WELLBRIDGE AND MONSANTO

1. In 1989, Defendant Monsanto founded a company called the Wellbridge Company (the "Former Wellbridge Company"). (Complaint ¶ 9; Answer ¶ 9.)

Response:

Plaintiffs admit this statement.

2. In 1989, Club Sports International ("Club Sports") managed athletic clubs for several different developers mostly in the western half of the United States. (Ex. B, Curtis dep. at 5:22 - 6:4.)

Response:

Plaintiffs admit this statement.

3. In or around March 1999, Monsanto sold certain assets and trademarks of the Former Wellbridge Company, including the Atlantic Center, to Club Sports. (Ex. B, Curtis dep. at 26:2- 5; Answer ¶ 16.)

Response:

Plaintiffs deny this statement. The closing documents produced by the Defendants show that the Asset Purchase Agreement was dated and signed as of December 31, 1998. (Excerpts from Asset Purchase Agreement, Pltf. Ex. J).

4. In 2001, Club Sports changed its name to Wellbridge Club Management, Inc. ("Wellbridge"). (Ex. U, Mass. Secretary of State filing.) For convenience, all current and former Club Sports and Wellbridge entities will be referred to as "Wellbridge."

Response:

Plaintiffs admit this statement regarding the name change, but suggest that the use of the term "Wellbridge" for all entities, pre- and post-purchase, will be confusing.

B. PLAINTIFF HERBERT FRUH'S MEMBERSHIP AT THE ATLANTIC CENTER

5. The reasons that Mr. Fruh chose to join the Atlantic Center were because he wanted to exercise and the Atlantic Center was close to where he worked. (Ex. S, H. Fruh Int. Resp. No. 29.)

Response:

Plaintiffs admit that these reasons are to the best of Virginia Fruh's recollection, and that Herb Fruh does not now recall the circumstances of his joining the Atlantic Center due to his severe anoxic brain injury, which includes memory loss. See, Response to Statement No. 9. According to the Medical History and Health Evaluation filled out by Mr. Fruh on October 27, 1995, his four most important reasons for joining the Wellbridge Center were to (1) improve sense of well-being, (2) become more physically fit, (3) improve cholesterol, and (4) lose weight. See, Pltf. Exhibit E at p. 5, Bate no. 10.

6. The Agreement includes the following provisions:

6. Member Responsibilities.

6.1 Member acknowledges that:

- The physical fitness programs offered by the Center and any health risk appraisal provided by the Center are not a substitute for regular medical checkups and proper diet or other activities related to good health maintenance; and
- Participation in physical fitness activities, including those available at the Center, may be physically stressful and may result in illness or physical injury. Member acknowledges

that his or her physical capability to engage in the specific activities offered by the Center must be reviewed and approved by Member's personal physician...

MEMBER FURTHER AGREES TO: Consult a physician if any new or existing medical or physical injury or other problem or condition arises which may affect or limit Member's ability to participate in the physical fitness activities offered by the Center, or in the event of any new illness, injury, discomfort or other health problem.

(Ex. V, Membership Ag. § 6.)

Response:

Plaintiffs object to this statement on the grounds that the member responsibilities are not relevant to the grounds for Summary Judgment raised by the Defendants. Defendants have not pressed a waiver or assumption of the risk defense. Without waiving this objection, Plaintiffs admit that this is an accurate excerpt of the Agreement, but may be misleading in the context of all representations made by the Defendants and/or all documents signed by Mr. Fruh in connection with joining Wellbridge.

7. Mr. Fruh submitted a form titled "Wellbridge ParQ++" to Wellbridge dated October 25, 1995. (Ex. W, Wellbridge ParQ++.) On the ParQ++, Mr. Fruh's responded "no" to questions about, among other things, whether a doctor has ever told him that he has heart trouble, whether he has had pains in his heart or chest, whether he has at times felt faint or had spells of severe dizziness, and whether a doctor has ever said that his blood pressure was too high. (*id.*, Nos. 1, 4, 5, 11.)

Response:

Plaintiffs admit this statement. Responding further, Plaintiffs state that Mr. Fruh also disclosed a moderately high cholesterol level, that he was a male 40 or older, and that he led a sedentary lifestyle, in responding to questions in a Wellbridge form at or around the time he joined Wellbridge as a member. All of these are coronary risk factors recognized by Wellbridge. (Medical History and Health Evaluation, Pltf. Ex. E, Bates nos. 4, 6-7, 9).

8. Mr. Fruh also submitted a form titled "Wellbridge Membership Patient Referral Form" to Wellbridge dated October 26, 1995. (Ex. X, Patient Ref. Form.) The form states that it is in

reference to Herbert Fruh, is signed by a physician. Dr. Michael Guidi, and has a box marked indicating that "[p]atient [is] cleared to exercise without restriction." (*Id.*) Dr. Guidi was Mr. Fruh's primary care physician. (Ex. F, V. Fruh dep. at 41:20-22.)

Response:

Plaintiffs admit this statement.

9. At no time prior to April 1999 did Mr. Fruh have any heart-related problems, high or elevated blood pressure, or any condition requiring medication (other than an impotence problem). (Ex. F, V. Fruh dep. at 56:12-23.)

Response: Plaintiffs object to the phrase "heart-related problems" as being vague and subject to varying interpretations. Furthermore, at the time of his cardiac arrest, when he was in the hospital, physicians diagnosed a blockage in a coronary artery which likely existed prior to April, 1999. (Link report, Pltf. Ex. N, at 2) Plaintiffs deny this statement and respond further that, according to Wellbridge records, Herbert Fruh disclosed that he had moderately high cholesterol, a condition diagnosed in 1992, three years before he sought to join Wellbridge as a member. (Medical History and Health Evaluation, Pltf. Ex. E, Bates no. 7).

**PLAINTIFFS' FURTHER STATEMENT OF FACTS IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

A. Wellbridge Background

1. Wellbridge was founded in 1989. (Answer, Pltf. Ex. A, ¶ 9).
2. At the time Herbert Fruh joined the Wellbridge facility as a member, in October 1995, Wellbridge was a division of the NutraSweet Company ("NutraSweet"), based in St. Louis. (*id.*). Monsanto Company ("Monsanto") owned NutraSweet. (*id.* at ¶¶ 7 and 8).
3. There were four Wellbridge health club facilities in the Boston area and two in St. Louis in 1995. (Turgiss dep., Pltf. Ex. B, at 47, 51).
4. When Wellbridge was founded, its mission read:

The face of health care in this country is changing by the minute. Every seven and a half seconds, another citizen turns 50. To meet the special health and wellness needs of this growing market, Monsanto Corporation has created Wellbridge—a rapidly expanding network of health and fitness centers designed to work in active partnership with hospitals. (Wellbridge Marketing Materials, Pltf. Ex. C, Bates 01277).

5. Describing the purpose of Wellbridge, Monsanto’s chairman and CEO of its Life Sciences Company, Robert Shapiro, stated as follows:

With Wellbridge, we have created a new kind of company dedicated to meeting the growing need for better nutrition and health of maturing adults—not just in this country, but worldwide. It is fast-moving, technology-driven, intensely competitive, and global in scope. We’re committed to meeting the challenges of an ever-changing market with continuous innovation and unprecedented speed. The culture and systems required for sustained success are in place. The future has just begun. (Wellbridge Marketing Materials, Pltf. Ex. C, Bates 01285).

B. Dramatis Personae

6. Herbert Fruh signed his initial membership agreement with Wellbridge Health and Fitness Center, located at Atlantic Avenue in Boston, on October 30, 1995. (Fruh Membership Agreement, Pltf. Ex. D, Bates 00001-2).

7. The annual fee for membership paid by Herbert Fruh was \$814. (*id.*) Herbert Fruh was age 49 when he joined Wellbridge in 1995. (ParQ++, Pltf. Ex. E, Bates 00004).

8. William Patjane was Wellbridge’s regional fitness manager, in Massachusetts, with authority over the four Wellbridge clubs located in Boston, including the one on Atlantic Avenue of which Herbert Fruh was a member. (Patjane dep., Pltf. Ex. F, at 9).

9. The fitness manager acted as safety officer, among other duties. (Idell dep. Pltf. Ex. KK at 25).

10. Wellbridge has identified Jennifer Turgiss as a former Wellbridge National Fitness Manager, “responsible for the investigation, development, and preparation of the Wellbridge programs”. (Defendants’ Answers to Plaintiffs’ First Set of Interrogatories, Pltf. Ex. G, Answer

to Interrogatory No. 2).

11. As of April, 1999, Jennifer Turgiss was the Director, Whole Person Health, prior to the combined Club Sports International/Wellbridge merger; Cheryl Rankin was the general manager of the Atlantic Avenue club in which Herbert Fruh was a member; Jennifer Idell was a fitness manager at the Atlantic Avenue Wellbridge facility. (Turgiss dep., Pltf. Ex. B, at 45, 46, 47).

12. Wellbridge was a member of the International Health, Racquet and Sports Club Association (“IHRSA”), the most prominent trade organization for the health and fitness club industry. (McCarthy dep., Ex. H, at 50).

13. John McCarthy founded IHRSA in 1981 and has been its chief executive since that time. (McCarthy dep., Pltf. Ex. H, at 20).

14. Before March, 1999, Club Sports International (“CSI”) was a health club chain with clubs around the country, but mainly in Minnesota, New Mexico and Colorado. (Defendants’ Answers to Plaintiffs’ Second Set of Interrogatories, Pltf. Ex. G, Answer to Interrogatory No. 24 and Exhibit A thereto, see ¶12 below).

15. CSI’s chief operating officer was Art Curtis. (Curtis dep., Pltf. Ex. I at 5).

16. By agreement dated December 31, 1998, CSI acquired the Wellbridge assets (the health club business and the trademarks) from Monsanto. As part of the agreement, CSI agreed to assume all of Monsanto’s liabilities arising from the Wellbridge clubs, and to indemnify Monsanto as to these liabilities. (Pltf. Ex. J).

17. At the time CSI acquired the Wellbridge clubs, CSI was the third largest health club chain in the United States. (Curtis dep., Pltf. Ex. I at 29).

18. Art Curtis became the Chief Operating Officer of the combined companies. (Curtis dep., Pltf. Ex. I at 5). The CSI entity which had acquired the Wellbridge facilities ultimately adopted the Wellbridge name for all of its clubs. (*id.* at 97).

19. As of March, 2000, the merged Club Sports/Wellbridge companies had 42 health clubs around the country, with a significant presence in Massachusetts, Minnesota, New Mexico, and Colorado. (Ex. K, Bates 00313-315).

20. George Murphy is the Captain for the Boston Emergency Medical Services (“EMS”), which includes oversight of the area AED program in which free AED training has been offered for employees of “corporate partners” since 1996. (Murphy dep., Pltf. Ex. L at 10-11, 64-66). Murphy is currently the Basic Life Support national faculty person for Massachusetts in the American Heart Association. (*id.* at 78).

By _____

Law Firm