

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT	)	
OF AGRICULTURE AND CONSUMER	)	
SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 95-2964
	)	
MIAMI FITNESS, INC.,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Susan B. Kirkland, held a formal hearing in this case on August 22, 1995, in Miami, Florida.

APPEARANCES

For Petitioner: Lawrence J. Davis  
Senior Attorney  
Department of Agriculture and  
Consumer Services  
Room 515, Mayo Building  
Tallahassee, Florida 32399-0800

For Respondent: Lloyd B. Silverman, Esquire  
2880 West Oakland Park Boulevard  
Number 103, Suite 201  
Fort Lauderdale, Florida 33311

STATEMENT OF THE ISSUES

Whether Respondent, a health studio, provided its members a facility of equal quality, within five driving miles, at no extra cost, when Respondent's business ceased operations in February, 1995.

PRELIMINARY STATEMENT

By letter dated May 9, 1995, Petitioner, Department of Agriculture and Consumer Services (Department), notified Patty Kinast, President of Respondent, Miami Fitness, Inc. (Miami Fitness), that the Department had received claims against Miami Fitness' letter of credit and intended to make a demand under the terms of the security. Miami Fitness requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on June 13, 1995 for assignment to a Hearing Officer.

At the final hearing, the Department called the following witnesses: Joe Alexionok, Karen Booher, Florence Brookmire, Lisa Hartman, Maria Ricco-Brizard,

Karen Rosenfeld, Arlice Whiting-Larkin, Delilah Storey, Renay Rossi, and Mary Jo Weinberg. Department's Exhibits 1-27 were admitted in evidence.

At the final hearing, Miami Fitness called the following witnesses: Jason Gonzalez, Anna Asavida, Carmen Dorrschuck, John Andrew Seymour, and Patti Kinast. Miami Fitness' Exhibits 1-9 were admitted in evidence.

The parties agreed to file proposed recommended orders within ten days after the date of the filing of the transcript. The transcript was filed on September 5, 1995. The parties timely filed their proposed recommended orders. The parties' proposed findings of fact are addressed in the Appendix to this Recommended Order.

#### FINDINGS OF FACT

1. Respondent, Miami Fitness, Inc. (Miami Fitness), advised Petitioner, the Department of Agriculture and Consumer Services (Department), by letter dated October 30, 1993, that Miami had purchased the assets of Body Mystique, a health studio, and would honor all of its memberships. Miami Fitness was to begin operations as of November 1, 1994.

2. Miami Fitness registered with the Department as a health studio and posted an irrevocable standby letter of credit for \$50,000. The letter of credit was amended on July 26, 1994, to extend the expiration date to October 29, 1995.

3. The purpose of the letter of credit is to protect the members of the health studio. Money would be available to compensate members if Miami Fitness went out of business or the members' contracts were not assigned to a facility of equal quality within a five mile radius of Miami Fitness. Refunds would be made on a pro rata basis.

4. Body Mystique had been a women's only health studio as was its predecessor My Fair Lady. At one time Body Mystique had requested permission from the Department to turn the all women's facility into a coed health studio, but the Department denied the request. When Miami Fitness purchased Body Mystique, it continued to operate the facility as an all women health studio. The facilities occupied by Miami Fitness had been an all women's health studio for 23 years.

5. Miami Fitness advertised and promoted the health studio as the "total fitness studio for women." It also advertised that its weight room was for women by stating: "Our weight training area is unique in that it is specifically designed for women."

6. Miami also promoted its wet area. One advertisement stated: "We have all the amenities that a woman needs: sauna, steamroom, eucalyptus room, showers, dressing area; and great aerobic classes on a suspended wood floor, with a fully equipped weight room and cardiovascular area specifically designed for women."

7. The contracts between Miami Fitness and its members included a provision that the member may cancel and receive a refund if Miami Fitness closes and does not provide the member with "similar facilities of equal quality" within a five mile radius of the closed facility.

8. On February 10, 1995, Joe Alexionok, a consumer services consultant with the Department, was notified that Miami Fitness had closed its doors. By letter dated February 26, 1995, Mr. Alexionok requested Miami Fitness to advise the Department whether Miami Fitness was going to provide services or make pro-rata refunds. By letter dated March 10, 1995, Patty Kinast, President of Miami Fitness, notified the Department that Miami Fitness had made an agreement with U.S. 1 Fitness to assume Miami Fitness memberships.

9. Having determined that U.S. 1 Fitness was not a facility of equal quality, the Department sent certified letters to the bank holding the letter of credit and to Patty Kinast that the Department would make a demand upon the letter of credit to refund members who filed a complaint against Miami Fitness because U.S. 1 Fitness was not of equal quality.

10. A notice was also published in the Miami Post advising that anyone having a claim against Miami Fitness must file the claim with the Department by September 30, 1995.

11. U.S. 1 Fitness is a coed health studio which is located within a five mile radius of Miami Fitness. U.S. 1 Fitness does not have a sauna, steamroom or eucalyptus room.

12. U.S. 1 Fitness has approximately 2,500 members with approximately 900 active members. Miami Fitness had a membership of about 1,000 with approximately 400 members who were active.

13. U.S. 1 Fitness' facility has approximately 11,000 square feet. Miami Fitness' facility had approximately 4,600 square feet.

14. Miami Fitness was open during the following hours: Monday and Tuesday, 7:00 a.m. - 9:30 p.m.; Wednesday-Friday, 7:00 a.m. - 9:00 p.m.; Saturday, 9:00 a.m. - 5:00 a.m.; and Sunday 10:00 a.m. - 5:00 p.m. U.S. 1 Fitness is open during the following hours: Monday-Friday, 5:00 a.m. - 11:00 p.m. and Saturday and Sunday, 7:00 a.m. - 8:00 p.m.

15. U.S. 1 Fitness offers 38 exercise-type classes each week, including a yoga class on Tuesday and Thursday mornings. Miami Fitness offered 32 exercise-type classes each week with a yoga class on Tuesday and Thursday mornings and on Wednesday evening. The yoga classes at U.S. 1 Fitness are taught by the same instructor who taught morning yoga classes at Miami Fitness. U.S. 1 Fitness has exercise classes which are equal in quality to those provided by Miami Fitness.

16. As part of the agreement with U.S. 1 Fitness, Miami Fitness transferred some of its equipment to U.S. 1 Fitness. U.S. 1 has equipment which is newer than the Miami Fitness' equipment. U.S. 1 Fitness has as good or better equipment than Miami Fitness did.

17. U.S. 1 Fitness has babysitting services as did Miami Fitness. U.S. 1 Fitness' babysitting services are as good as or better than the babysitting services at Miami Fitness.

18. U.S. 1 Fitness is located in well-lighted shopping center area and has as good or better security as Miami Fitness.

19. After Miami Fitness closed, the Department received 12 written complaints from Miami Fitness members. The majority of the complaints were based on a lack of wet facilities at U.S. 1 Fitness and U.S. 1 Fitness not being

an all women's facility. Most of the complainants had joined Miami Fitness because it was a women's only facility. They felt uncomfortable and self conscious exercising in a coed facility. They liked the facility because it was small, not crowded, and had a friendly, intimate atmosphere. At least two of the complainants had visited U.S. 1 Fitness before signing up with Miami Fitness and preferred Miami Fitness over U.S. 1 Fitness.

20. While Miami Fitness was operating, between 25 and 50 members regularly used the wet facilities each week.

21. U.S. Fitness 1 is not a facility of equal quality to Miami Fitness as it relates to the wet area and the membership being exclusively women.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

23. The Department of Agriculture and Consumer Services, is the state agency responsible for administering and enforcing the provisions of Sections 501.012-501.019, Florida Statutes, regulating health studio contracts.

24. Section 501.107, Florida Statutes, requires health studio contracts to have a provision for cancellation and refund if the health studio goes out of business and fails to provide within 30 days a facility of equal quality located within five driving miles of the closed health studio.

25. A facility of equal quality is determined pursuant to Rule 5J-4.012, Florida Administrative Code as follows:

(1) For purposes of Section 501.017, Florida Statutes, and this chapter, the Department shall consider the following factors in determining equal quality among health studios:

(a) A comparison of equipment, facilities and health studio-related services offered or available to members;

(b) The availability of the equipment and facilities for use on the same days and times by the consumers;

(c) The distance between the facilities.

(2) The Department shall consider the factors listed above and make a determination of whether a health studio is a facility of equal quality, which determination shall apply to all applicable members.

26. The exercise equipment at U.S. 1 Fitness is of equal quality with the equipment which was offered at Miami Fitness. In fact, some of Miami Fitness' equipment was transferred to U.S. 1 Fitness.

27. With the exception of the wet area, the U.S. 1 Fitness physical facility is of equal quality to Miami Fitness. U.S. 1 Fitness does not have a sauna, steamroom or eucalyptus room; thus, the facility at U.S. 1 Fitness is not of equal quality to the facilities at Miami Fitness. The availability of the

equipment and facilities for use on the same days and times by the consumers at U.S. 1 Fitness is of equal value to Miami Fitness.

28. The distance between Miami Fitness and U.S. 1 Fitness is less than five miles; therefore, the two businesses are of equal value as it relates to distance.

29. Section 501.0125(2), Florida Statutes, defines "health studio services" as "privileges or rights offered for sale or provided by a health studio."

30. Miami Fitness marketed itself as a women's only health studio. The emphasis of its advertising was that the facility and the equipment were geared for women. The majority of the women who filed written complaints were unhappy because they joined Miami Fitness because it was for women only and they did not want to work out in a coed facility. The restriction of memberships to women is a health studio service as defined by Section 501.0125(2), Florida Statutes. The members of Miami Fitness bought the privilege of working out with only women. U.S. 1 Fitness is a coed facility and not of equal quality to Miami Fitness.

31. Considering the factors in Rule 5J-4.012, Florida Administrative Code, U.S. 1 Fitness is not a facility of equal quality to Miami Fitness.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered finding that Miami Fitness, Inc. did not provide its members with a facility of equal quality and that the twelve written claims made by the members of Miami Fitness, Inc., because it was not a facility of equal quality be certified as valid claims against the irrevocable standby letter of credit given to the Department of Agriculture and Consumer Services by Miami Fitness, Inc., and that any written claims filed on or before September 30, 1995 by members on the basis their contracts were not assigned to a facility of equal quality be certified as valid claims against the irrevocable standby letter of credit.

DONE AND ENTERED this 25th day of September, 1995, in Tallahassee, Leon County, Florida.

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SUSAN B. KIRKLAND  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of September, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-2964

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

1. Paragraphs 1-14: Accepted in substance.
2. Paragraph 15: Rejected as unnecessary detail.
3. Paragraphs 16-21: Accepted in substance.
4. Paragraph 22: The first, fifth, sixth, seventh, ninth, and eleventh sentences are accepted in substance. The remaining is rejected as unnecessary detail.
5. Paragraph 23: The first, fourth, and sixth sentences are accepted in substance. The remaining is rejected as unnecessary detail.
6. Paragraph 24: The first, fourth, fifth and sixth sentences are accepted in substance. The remaining is rejected as unnecessary detail.
7. Paragraph 25: The first, second, third, sixth, and eleventh sentences are accepted in substance. The remaining is rejected as unnecessary detail.
8. Paragraph 26: Rejected as unnecessary.
9. Paragraph 27: Accepted in substance.
10. Paragraph 28: The first, third, sixth, and seventh sentences are accepted in substance. The eighth sentence is rejected as not supported by the greater weight of the evidence. The remaining is rejected as unnecessary detail.
11. Paragraph 29: The first, third, fourth, fifth, seventh, eighth, and fourteenth sentences are accepted in substance. The remaining is rejected as unnecessary detail.
12. Paragraph 30: The first and third sentences are accepted in substance. The second sentence is rejected as unnecessary detail.
13. Paragraph 31: Accepted in substance.
14. Paragraph 32: The first and third sentences are accepted in substance. The remaining is rejected as unnecessary detail.
15. Paragraph 33: The last sentence is rejected as unnecessary. The remainder is accepted in substance.
16. Paragraph 34: Rejected as unnecessary.
17. Paragraph 35: Accepted in substance.
18. Paragraph 36: The fourth sentence is accepted in substance. The remaining is rejected as unnecessary detail.
19. Paragraphs 37-40: Rejected as subordinate to the facts found.
20. Paragraph 41: The third, fourth, eighth, ninth and tenth sentences are accepted in substance. The fifth sentence is accepted in substance as it relates to equipment and number of classes but not as to atmosphere. The remainder is rejected as unnecessary.
21. Paragraphs 42-43: Rejected as unnecessary.
22. Paragraph 44: The fifth sentence is accepted in substance. The remainder is rejected as unnecessary.
23. Paragraph 45: The first, fourth, sixth, seventh, eighth, eleventh, and twelfth sentences are accepted in substance. The ninth sentence is rejected as it relates to those women who filed complaints because U.S. 1 Fitness was coed. The remainder is rejected as unnecessary detail.
24. Paragraph 46: Rejected that the facilities were comparable.
25. Paragraph 47: Accepted in substance except U.S. 1 Fitness had 38 classes.
26. Paragraph 48: Accepted in substance.

Respondent's Proposed Findings of Fact.

1. Paragraphs 1-14: Accepted in substance.
2. Paragraph 15: The first sentence is accepted. The second sentence is rejected to the extent that it implies that the wet facility at Miami Fitness was not a reason for choosing Miami Fitness and was not used or enjoyed by it members.
3. Paragraphs 16-17: Accepted in substance.
4. Paragraph 18: Rejected as subordinate to the facts found.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.