COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY SUPERIOR COURT
CIVIL ACTION NO.: 2284CV00831D

JANE DOE 1 AND JANE DOE 2, on behalf of themselves and others similarly situated, *Plaintiffs*, v. JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.), FIRST FITNESS MANAGEMENT, LLC, AND COMMONWEALTH FLATS DEVELOPMENT CORP. D/B/A SECOND WAVE HEALTH & FITNESS, *Defendants*.	**DEFENDANTS' JOINT CONSOLIDATED MOTION AND MEMORANDUM OF LAW TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS** **Mass. R. Civ. P. 12(f) and 23**

Pursuant to Massachusetts Rule of Civil Procedure 12(f), Defendants First Fitness Management LLC ("First Fitness") and John Hancock Life Insurance Company (U.S.A.) ("Hancock")[1] hereby move to strike all allegations from the Amended Complaint purporting to pursue any claims on behalf of absent members of a putative class action. As reasons therefor, the defendants state that, on the face of the Amended Complaint, the plaintiffs are unable to satisfy the prerequisites for certifying their putative class set forth in Massachusetts Rule of Civil Procedure 23.

[1] The instant motion is also assented-to by Defendant Commonwealth Flats Development Corp. d/b/a Second Wave Health & Fitness ("Second Wave"). Second Wave's Motion to Dismiss the original class action Complaint was granted and Second Wave has moved to dismiss the Amended Complaint. For purposes of this consolidated motion and memorandum, Hancock, First Fitness, and Second Wave are hereinafter collectively referred to as "the defendants."

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

I. BACKGROUND

A. Substantive Claims

The plaintiffs' recently filed Amended Complaint spans 93 pages and contains over 500 paragraphs of allegations against the defendants. The overbreadth of these allegations makes them difficult to summarize, but the plaintiffs' core allegations are as follows:

From late 2004 through 2018, Hancock operated office space at 601 Congress Street in Boston, which included a gym facility made available to Hancock employees. FR No. 38, ¶¶ 27-32, 37. Sometime in 2015, the plaintiffs allege Hancock installed a hidden pinhole camera, a mount fixture, and coaxial cables in the ceiling space above the women's locker room as part of its covert surveillance program supposedly "for business purposes." *Id.*, ¶¶ 66-68. Using this setup, employees of Hancock are alleged to have viewed the plaintiffs and others who used the women's locker room between 2015 and 2018. *Id.*, ¶¶ 71-75. The plaintiffs allege that Hancock knew or should have known that its own surveillance equipment was being misused to invade their privacy and failed to monitor use of equipment to ensure its proper use. *Id.*, ¶¶ 280-286. The plaintiffs also allege that after the camera was discovered, Hancock supposedly took steps to destroy evidence and conducted a negligent investigation. See, e.g., *id.*, ¶¶ 1, 5-6 and ¶¶ 100-219.

At different times, Hancock had retained the two other defendants to manage the employee gym on its behalf. Second Wave managed the gym for Hancock from between 2015 and 2017. On March 17, 2017, First Fitness then took over and managed the gym for Hancock from until January 2021 when Hancock relinquished its lease at 601 Congress to move to a new location in the Back Bay. *Id.*, ¶¶ 39, 41, 65, 253-254. As against these two defendants, the plaintiffs do not allege that Hancock made its management agents aware of the presence of hidden surveillance cameras in the

women's locker room. Rather, they allege that they should have detected and removed the surveillance camera from the premises. *Id.*, ¶ 311. The gym managers, it is alleged, "were aware of the risks and special vulnerability that locker rooms pose for exposing patrons to covert surveillance" and that "the only safe and legal way for health club operators to ensure that there is no authorized or unauthorized surveillance of the locker room is to conduct frequent checks and look for hidden cameras." *Id.*, ¶¶ 313-314.

As a result of Hancock's alleged misuse of its surveillance equipment, and Second Wave and First Fitness's alleged failure to uncover and prevent the abuse, the plaintiffs claim to "have suffered and continue to suffer significant damages, including emotional anguish...." *Id.*, ¶ 343. Specifically, Jane Doe 1 claims to suffer with episodes of controllable crying, loss of sleep, "extreme worry, anxiety, and nervousness about hidden cameras in situations where she has to use public bathrooms, the need for "therapy with various providers to overcome trauma" associated with the hidden camera incident, the need for "pharmacological treatment for depression and anxiety," "intrusive thoughts," "avoidance behavior," "paranoia," "uncontrollable fear," and "post traumatic stress disorder." *Id.*, ¶¶ 348-364. The plaintiffs allege that these problems have manifested themselves in specific ways in Jane Doe 1's case. She claims she is no longer able to maintain any kind of gym or fitness club membership and frequently engages in compulsive behavior when using public restrooms. Her allegations also recount an incident in which she experienced intrusive thoughts that contractors she had hired to work in her home were installing surveillance equipment to view her in the nude. *Id.*, ¶ 361.

Jane Doe 2 claims to continue to experience "trouble sleeping," "anxiety," "intrusive thoughts," and "significant avoidance behavior around using a public restroom." *Id.*, ¶¶ 365-372. Unlike Jane Doe 1, Jane Doe 2 still has a gym membership, but no longer changes or showers in

the locker room, and cites as an element of her damages having to remain sweaty and uncomfortable until getting home from the gym to shower because she does not want to use the locker rooms at public facilities. *Id.*, ¶ 370.

On these allegations, Jane Doe 1 brings claims against Hancock for negligence, intrusion of a person's physical solitude or seclusion, invasion of privacy, intentional and negligent infliction of emotional distress, and negligent training and supervision (see Counts I, III, IV, V, VI, and VIII). Against Second Wave and First Fitness, Jane Doe 1 has lodged claims for negligence and negligent infliction of emotional distress (see Counts II and VII). Jane Doe 2 is only joining Jane Doe 1 on the claims against Second Wave and First Fitness, and has not pled any claims against Hancock.

B. Class Allegations

The plaintiffs purportedly bring these claims not only for themselves, but "on behalf of others who are similarly situated." *Id.*, ¶ 373. As for damages, Jane Doe 1 and Jane Doe 2 allege that "each person who used the women's locker room at 601 Congress Street between 2014 and 2018 to change clothes or shower at least once suffered an injury" (whether or not they were actually viewed in a state of undress) and that the claims of absent members of their putative class are "typical" of their claims. *Id.*, ¶¶ 374 and 380.

While Jane Doe 1 and Jane Doe 2 necessarily devote significant effort in their 93-page Amended Complaint to descriptions of their individual emotional injuries, they make no specific allegations about the injuries sustained by absent members of their putative class. Rather, they summarily claim without support that the absent "Class Plaintiffs have been harmed and continue to suffer harm as a result of Defendants' negligence." *Id.*, ¶¶ 409, 431, 442, 450, 461, 482, 489. The plaintiffs allege that the absent putative class members, "suffer the distress that any healthy,

well-adjusted person *would likely feel* as a result of being [] victimized" in the manner they were. *Id.*, ¶¶ 416, 443, 451, 485, 504 (emphasis added). The plaintiffs claim that the alleged violation of the absent members' seclusion "was of a kind that *would be* highly offensive and objectionable to the ordinary woman." *Id.*, ¶ 427 (emphasis added); see also *id.*, ¶¶ 465, 484 ("A reasonable person *would have* suffered emotional distress under the same circumstances") (emphasis added).

On these allegations, the plaintiffs maintain that their claims on behalf of themselves and the absent members of their putative class "are capable of class-wide resolution such that a determination of their truth or falsity will resolve issues that are central to the validity [of] all claims in one stroke." *Id.*, ¶ 379.

II. LEGAL STANDARD

Pursuant to Massachusetts Rules of Civil Procedure 12(f), this Court is empowered to strike class allegations in the plaintiffs' Amended Complaint. *Kantzelis* v. *Commerce Ins. Co.*, 34 Mass. L. Rptr. 534, 2017 WL 7053905, at *4 (Mass. Super. Nov. 13, 2017) (Kaplan, J.). In doing so, courts apply the same standard that is applied to motions to dismiss brought under Rule 12(b)(6). "[T]his means that, [if,] accepting as true all factual allegations (as opposed to legal conclusions), the [C]ourt concludes that it is [] 'obvious from the pleadings that the proceeding cannot possibly move forward on a class-wide basis because one of the requirements for class certification defined in Mass. R. Civ. P. 23(a) and (b) cannot be established," the rules empower the Court to "delete the complaint's class allegations." *Kantzelis*, *supra*, at *4, citing *Manning* v. *Boston Medical Center Corp.*, 725 F.3d 34, 59 (1st. Cir. 2013); *Grabau* v. *Commerce Ins. Co.*, 2018 WL 4700547, at *2 (Mass. Super. Aug. 3, 2018) (Sanders, J.); *Hennessy* v. *Brookdale Senior Living Communities, Inc.*, 35 Mass. L. Rptr. 232, 2018 WL 4427020, at *5 (Mass. Super. Aug. 1, 2018) (Salinger, J.); *DeOliveira* v. *Liberty Mut. Ins. Co.*, 35 Mass. L. Rptr. 126. 2018 WL 3118545, at

*1 (Mass. Super. May 10, 2018) (Kaplan, J.); *In re Tokai Pharms., Inc.*, 35 Mass. L. Rptr. 307, 2018 WL 6977434, at *2 (Mass. Super. Dec. 17, 2018) (Sanders, J.).

III. ARGUMENT

To proceed as a putative class action, the plaintiffs' operative complaint must allege facts that, taken as true, satisfy Massachusetts Rule of Civil Procedure 23. The rule's prerequisites are:

1. ***Numerosity***, that is, that the proposed class is so numerous that joinder of all absent members is impracticable;
2. ***Commonality***, that is, that there are questions of law or fact common to all members of the class (as it is defined in the Amended Complaint);
3. ***Typicality***, that is, that the claims of Jane Doe 1 and Jane Doe 2 are typical of the claims or defenses of their proposed class;
4. ***Adequacy***, that is, that Jane Doe 1 and Jane Doe 2 will fairly and adequately protect the interests of the proposed class;
5. ***Predominance***, that is, that the questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual members; and
6. ***Superiority***, that is, that a class action would be superior to other available methods for the fair and efficient adjudication of the controversy.

See Mass. R. Civ. P. 23(a) and (b). Furthermore, this Court has repeatedly held that the plaintiffs must also, as a preliminary matter, plead a class definition that is "ascertainable," adding a seventh prerequisite to those listed in Rule 23:

7. ***Ascertainability***, that is, that the proposed class definition is "administratively feasible for the court to determine whether a particular individual is a member[.]" *Reis* v. *Knight's Airport Limousine Service, Inc.*, 2016 WL 2625397, at *3 (Mass. Super. Mar. 24, 2016); *Marquis* v.

Google, Inc., 32 Mass. L. Rptr. 269, at *10 (Mass. Super. July 27, 2014); *Donovan* v. *Philip Morris USA. Inc.*, 268 F.R.D. 1, 9 (D. Mass. 2010); *Astrazeneca AB* v. *UFCW*, 777 F.3d 9, 19 (1st Cir. 2015).

Here, on the face of Plaintiffs' Amended Complaint, the Court should strike the plaintiffs' class allegations because they cannot satisfy the prerequisites of ascertainability, commonality, predominance, or typicality.

As a preliminary matter, the proposed class defined by the plaintiffs' Amended Complaint **cannot be ascertained**. The proposed class includes those allegedly surveilled as well as those who used the locker room but were not surveilled. The plaintiffs have not alleged and cannot establish, which if any members of the putative class were surveilled.

A class also cannot be certified because Plaintiffs cannot establish **commonality.** By their own allegations, the plaintiffs concede that issues of fact—specifically as to each class member's alleged damages—are not common as between Jane Doe 1 and Jane Doe 2, and are certainly not shared by all of the absent members of their putative class. See pp. 2-3, *supra* (comparing Doe 1's alleges damages with those of Doe 2). That is, the significant differences in the alleged harms suffered by the class members, and necessarily individual determinations about whether each of those harms rise to the requisite levels required by the elements of the plaintiffs' various causes of action, will prevent any determination that the element of commonality has been satisfied.

Moreover, even if the Court determines that there are questions of law or fact common to the proposed class, the plaintiffs cannot establish **predominance** in view of the substantial differences in the facts of absent members' distress injuries, which will overshadow the limited common issues regarding the defendants' alleged breaches of duty.

Finally, the proposed class cannot be certified for want of **typicality**. As evidence before the Court shows, numerous absent members of the plaintiffs' putative class have signed gym membership agreements that require private arbitration of disputes between the defendants and gym members. Jane Doe 1 and Jane Doe 2 did not sign such agreements and therefore stand on different ground than absent members who are contractually bound to arbitrate their claims out of court. They also lack the standing required to challenge the enforceability of arbitration agreements signed by absent class members.

Each of these facial defects is addressed in turn below:

A. Ascertainability

The class allegations must be struck because the proposed class is unascertainable. To be ascertainable, the makeup of a class must be "determinable by stable and objective factors." *Reis*, *supra*, at *3. "A class is ***not*** ascertainable when [its] members can only be identified via individualized fact-finding and litigation." *Id.*, quoting *Marquis*, supra, at *27; *Crosby* v. *Social Sec. Admin. of U.S.*, 796 F.2d 576, 580 (1st Cir. 1986).

In their Amended Complaint, the plaintiffs have defined their class in a way that sweeps in large swaths of uninjured individuals, requires individualized analysis, and is not ascertainable. See *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012) (If "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."). A class that includes everyone who used the subject locker room to shower or change clothes "at least once" between 2014 and 2018 (see FR No. 38, ¶ 374) necessarily includes individuals who were not surveilled, were not in a state of undress, and therefore did not suffer any injury. Such a class is not ascertainable.

This Court's decision in *Kantzelis*, *supra*, is on point. There, after the named plaintiff was in a car collision, he sued his insurer based on the insurer's subsequent refusal to pay off the car's secured loan because the plaintiff had misrepresented his address. This refusal led, the plaintiff alleged, to the repossession of the car. *Id.* In bringing the suit, the plaintiff claimed to represent a putative class of those covered by a car insurance policy issued by the insurer who were involved in a car collision and thereafter subject to the insurer's alleged refusal to make payments to secured lenders for claim settlement. *Id.* at *3.

The court there analyzed the plaintiff's class allegations and concluded that they should be struck because "[a] review of the overbroad class definition alleged in the Complaint makes [it] clear" that "[t]he question of whether an insured suffered damage as a result of [the insurer's] position … appears to introduce individualized and predominant questions of fact." *Id.* at *6. In reaching that conclusion, the court reasoned that, if the plaintiff's class definition was taken at face value, "many insureds, if not most of them, would not have suffered any loss as a result of [the insurer's] failure to pay the secured lender, have no claim, and consequently not be a member of the proposed class." *Id.* As but one example the court listed, the proposed class definition would include instances where a car was a total loss, or where the car could be repaired; in the latter situation, an insured may choose to fix the car, continue making loan payments on the car, and thus have suffered no loss. *Id.* The court emphasized that "this case requires individual factfinding not only to determine the amount of damages, but whether a claimant suffered *any* damages and therefore could be a member of the class," and was further subject to ascertainability hurdles that could not be overcome. *Id.* at *6-*7 (emphasis added).

Here, the plaintiffs' proposed class definition suffers from the identical ascertainability defect. As an initial matter, the plaintiffs' class definition is broader than their class theory. The

plaintiffs define their class as "[e]ach person who used the women's locker room at 601 Congress Street between 2014 and 2018 to change clothes or shower at least once." FR No. 38, ¶ 375. But this over-inclusive class definition does not match Plaintiffs' causes of action or core theory for injury. For instance, Plaintiffs maintain that their suit is based on the harms they suffered as a result of "John Hancock and its employees" allegedly "view[ing] and surveill[ing] the Plaintiffs in a state of undress." *Id.*, ¶ 3. In contrast, the class definition only asks whether a person used the locker room to "change clothes" or "shower," without regard to whether the employee was viewed or surveilled as alleged in the Amended Complaint.

The plaintiffs' class definition is therefore overbroad because it does not take into account whether the individuals were actually viewed or surveilled or in a state of "undress" when they changed clothes. If a potential class member was not viewed at all, which given the nature of the alleged camera is very likely or unknowable, or did not undress, they were not injured under the proposed definition, and these facts are not provable on a class-wide basis. This means that the plaintiffs' class definition would require, as in *Kantzelis*, "individual factfinding … to determine … whether a claimant suffered any damages and therefore could be a member of the class," at all, which numerous courts have held cannot satisfy Rule 23(a) and is sufficient grounds to grant the motion to strike. *Kantzelis*, at *6.

B. Commonality

Even if the plaintiffs' class definition is not fatally flawed, their claims cannot satisfy Rule 23(a) or (b) because, as in *Kantzelis*, on the face of the pleadings, the proposed class cannot possibly satisfy the commonality requirement. *Kantzelis*, at *6. For example, in support of each of their claims, Plaintiffs allege that they have suffered harm through emotional distress. FR No. 38, ¶¶ 398-399; 415-416; 431-432; 442-443; 450-451; 471-473; 490-492; 504. But there are

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

significant differences between individual members' degrees of distress (and factual determinations about whether each member's distress is legally actionable) and whether the camera caused their physical symptoms or whether those symptoms were preexisting. This is the opposite of commonality.

An examination of the plaintiffs' own claims proves this. To succeed on her claims of intentional infliction of emotional distress ("IIED") against Hancock, Jane Doe 1 will need to prove, among other things, that she suffered "severe" emotional distress caused by Hancock's conduct. *Polay* v. *McMahon*, 468 Mass. 379, 385–386 (2014). In other words, if Jane Doe 1 cannot show that her emotional distress rose to the requisite level of severity—defined as "the kind of distress that no reasonable [person] could be expected to endure —she cannot recover for IIED. *Kennedy* v. *Town of Billerica*, 617 F.3d 520, 530 (1st Cir. 2010). Indeed, Massachusetts common law demands that, for each class member, an individual inquiry be made whether her distress constituted nonactionable distresses such as "fear," "anxiety," "sadness," "nervousness," "nightmares," "loss of sleep," "upset," "nervousness," and "emotional devastat[ion]." *Young* v. *Wells Fargo Bank, N.A.*, 717 F.3d 224, 240 (1st Cir. 2013); *Kennedy*, 617 F.3d at 530-531; Restatement (Third) of Torts, § 46 cmt (*j*) (2012). And each member would have to individually prove that her emotional distress, if any, was caused by defendants' conduct.

Similarly, to establish her negligent infliction of emotional distress ("NIED") claim against Hancock (Count II), Jane Doe 1 will need to prove, among other elements, that she suffered "serious" (as opposed to "severe") emotional distress ***and*** physical harm manifested by objective symptomatology. *Payton*, 386 Mass. at 557; Restatement, *supra*, cmt (*j*). Stated differently, before there can be an assessment of the precise *measure* of Jane Doe 1's damages, an individualized assessment of the severity of her distress will be required to establish Hancock's liability on the

NIED claim. A further individualized assessment of whether Jane Doe 1 suffered physical harm manifested by objective symptomatology will also be required to establish Hancock's liability. Jane Doe 1 and Jane Doe 2 will carry the same burdens on their NEID claim against Second Wave and First Fitness (Count III).

The named plaintiffs' allegations demonstrate the variation posed by their claims. For instance, Jane Doe 1 claims that the defendants' conduct caused her to develop post-traumatic stress disorder; Jane Doe 2 does not. Compare allegations at FR No. 38, ¶¶ 348-364 with those at ¶¶ 365-372. Jane Doe 1 claims that she can no longer go to the gym at all as a result of learning she was recorded in a state of undress; Jane Doe 2 does not. *Id*. Jane Doe 1 alleges that the intrusive thoughts of voyeurism follow her inside the privacy of her own home and made her suspicious of contractors working in her home; Jane Doe 2's intrusive thoughts are limited to public places. *Id*.

Thus, the differences between the extent of harm allegedly suffered by the two named plaintiffs alone will require separate presentations of evidence, including through experts, to establish their injury, causation, and the measure of damages. Both named plaintiffs and each absent class member will need to present evidence about, for example: (i) medications prescribed before and after the incident, (ii) the fact and length of any therapy or other treatment sought, (iii) the severity and duration of symptoms of anxiety, avoidance behavior, intrusive thoughts, and the like, and (iv) the alleged permanency of each member's symptoms. The plaintiffs' allegations also show that the extent of injury, causation, and damages may depend on the number of times a particular class member was surveilled in a state of undress in the subject locker room (*e.g.*, a class member who only showered in the locker room once as compared with a member who showered there daily). *Compare with Clark* v. *Creative Hairdressers, Inc*., 2005 WL 3008511, *6 (D. Md.

2005) (individualized inquiry into number of instances of discrimination precluded certification of class claiming emotional distress injuries).

Courts routinely agree that these kinds of issues are exactly the kind that defeat commonality. In *In re Bayview Crematory, LLC*, the New Hampshire Supreme Court reversed a trial court's certification of a class of families of decedents whose bodies were mishandled by defendant funeral homes and funeral directors. The trial court had certified the class but reserved for individualized resolution the issue of each class member's damages. 930 A.2d 1190, 1192 (N.H. 2007). The Supreme Court determined this was in error because, under New Hampshire law (as under Massachusetts law), establishing a claim for NEID required "as an element of liability," that each member prove that physical injury resulted from the emotional distress caused by the defendant. The court noted that this would require expert testimony to establish a causal connection between the defendant's conduct and each member's distress. In the view of the court, these individualized inquiries precluded any finding that issues common to all members predominated issues specific to each member:

> Because of these requirements for establishing a cause of action in NIED, each plaintiff will have to demonstrate, with expert testimony, the physical symptoms that he or she suffered. This will require an inquiry into the physical symptoms claimed by each putative class member, each member's prior medical and psychological history, and the qualifications of each member's experts. These proceedings would undermine the economies of time, effort and expense that class actions are designed to promote. In short, the questions relating to the individual putative class members regarding NIED will predominate over those common to all putative class members.

930 A.2d at 1195. This same reasoning pervades the decisions of many other courts. See e.g., *Light* v. *SCI Funeral Services of Florida, Inc.*, 2003 WL 25877569, *31 (Fla. Cir. Ct. 2003) ("the need for individualized emotional injury determinations also compels a finding that common issues do

not predominate and that a class action is not the superior vehicle for the members' claims"); *Steering Comm.* v. *Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) (certification not appropriate where evaluation of members' damages must focus almost entirely on facts and issues specific to individuals rather than the class as a whole); *Crutchfield* v. *Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 378 (5th Cir. 2016) (same); *Smith-Williams* v. *United States*, 2019 WL 1866316, *5 (W.D. Wis. 2019) (same); *Katlin* v. *Tremoglie*, 43 Pa. D.&C. 4th 373, 400 (Pa. Com. Pl. 1999) (same).

Thus, it is not enough that the plaintiffs allege in conclusory fashion that all of the absent members of their class suffered emotional distress that was "severe" and that they all suffered physical harm manifested by objective symptomatology—without any factual basis for doing so. FR No. 38, ¶¶ 452, 463, 490. Each member of the plaintiffs' putative class must individually prove that she suffered the requisite degree of emotional distress and establish, where applicable, that she also suffered physical harm manifested by objective symptomatology. Each class member will need to show Defendants' conduct caused their symptoms and will need prove their amount of damages based on their individual circumstances. Looking at the plaintiffs' claims alone shows that there is no commonality.

C. Predominance

Even if the Court determines that there are common issues of law and fact, there is no way the plaintiffs could show that the common questions predominate over the numerous individualized questions. This too, is fatal to the class claims.

The plaintiffs attempt to deal with the obvious problems with their class definition and proposed class by suggesting to the Court that this action could be litigated in a "two-stage process whereby the first phase will be to determine Defendants' liability on a class-wide basis, and the

second phase will be to determine ***the process by which: (a) individualized damages will be determined***, and (b) ***class wide remediation efforts will be undertaken and/or funded***." (FR No. 20, p. 11) (emphasis in original). This proposal does not solve the plaintiffs' problems, however.

While it is true that courts have held that individualized damages inquiries need not preclude certification if all other elements of Rule 23 are met, as explained above, the issues with the class here are not limited to calculation of damages, but go to the core question of whether class members were injured, and whether class members suffered emotional distress both of which are elements of the alleged offenses. This means that if the court certified a class solely for the purpose of determining the defendants' liability to the plaintiffs' proposed class, that so-called "first phase" would still require individualized assessments of absent members' degree of emotional distress, since the defendants' liability for multiple claims depends on a showing that the distress each member was at least "serious" (in the case of NIED claims) if not "severe" (in the case of the IIED claim). Thus, even if, at the plaintiffs' suggestion, the court proceeds with a two-stage process on a presumption that certain core allegations (if accepted as true) could establish the defendants' liability, that first phase will still require extensive individualized inquiry.

The decisions of numerous courts are in accord with this view. "It is primarily when there are significant individualized questions ***going to liability*** that the need for individualized assessments of damages is enough to preclude [class] certification." *Collier* v. *Adar Hartford Realty, LLC*, 2022 WL 18054024, *13 (Conn. Super. 2022), quoting *Ahmad* v. *Yale-New Haven Hospital, Inc*., 933 A.2d 1208, 1214 (Conn. App. 2007) (emotional distress injuries are "inherently claimant specific" requiring courts to address "the nature and extent of the individual's emotional distress, any prior history of such distress, the totality of the exposure to the injury causing defect or circumstance and other potential causative factors potentially contributing to the distress.");

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

Roadhouse v. *Las Vegas Metro. Police Dep't*, 290 F.R.D. 535, 546 (D. Nev. 2013), citing *Rader* v. *Teva*, 276 F.R.D. 524, 530–31 (D. Nev. 2011) (individualized inquiry of class members' emotional distress damages defeats certification because ascertaining each member's measure of damage is insusceptible to a mathematical or formulaic calculation); *Brandner* v. *Abbott Lab'ys, Inc*., 2012 WL 195540, *5 (E.D. La. 2012) (establishing the emotional damages of individual class members would require "mini-trials" not suggestive of common issues of fact); *Allison* v. *Citgo Petroleum Corp*., 151 F.3d 402, 417 (5th Cir.1998) ("[t]he very nature of [emotional distress] damages … necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy."); *Kornberg* v. *Carnival Cruise Lines, Inc*., 1985 WL 69, *2 (S.D. Fla. 1985) ("To establish that they are entitled to compensation, Named Plaintiffs will have to prove they suffered actual injury, emotional or otherwise. The idea that individual injury could be settled on a class-wide basis is preposterous."); *In re Three Mile Island Litig*., 87 F.R.D. 433, 441-442 (M.D. Pa. 1980) (denying class certification for claims alleging emotional distress from nuclear accident because each claim required "individual proof").

Even if the Court were to take Plaintiffs' suggestion and cabin all possible individual inquires in a second phase, the proposed two-phase approach to adjudication of their claims does not obviate the requirement for predominance of common issues over individual ones. The distress claims they have pled are far too individualized (as the differences between their alleged injuries show) to maintain this action as a class. The differences between the damages claims of Jane Doe 1 and Jane Doe 2 explained above validate this point. So even under the plaintiffs' proposed case management plan, the Court would be bogged down for months in "Phase 2" mini-trials of each member's emotional distress damages, defeating the purpose of Rule 23 to adjudicate only those class claims whose value is susceptible to mathematical or formulaic calculation. Thus, Plaintiffs'

proposed bifurcation merely highlights that the proposed class fails both predominance and superiority.

Ultimately, the Amended Complaint does not plead the existence of a group of putative class members whose claims are susceptible of resolution on a class-wide basis, and the class allegations in that pleading should therefore be stricken and dismissed. *Kantzelis*, *supra*, at *3, citing *Manning*, 725 F.3d at 34. Any claims that survive pending motions to dismiss should proceed only as by Jane Doe 1 and Jane Doe 2 in their individual capacity.

D. Typicality

The Court should also strike the plaintiffs' class allegations because their claims are not typical of the claims of absent members of their putative class (as they have defined it), where any member who joined the gym during First Fitness's management of the facility must arbitrate her claims individually, and not as a member of any class.

The Amended Complaint defines the putative class "[e]ach person who used the women's locker room at 601 Congress Street between 2014 and 2018 to change clothes or shower at least once." ¶ 375. This definition was carried over verbatim from the original complaint (see FR No. 1, ¶ 170). This definition includes women who signed up to be members of Hancock's employee gym during First Fitness's management of the facility (on and after March 17, 2017, per the Amended Complaint). The Court was previously presented evidence that all women (and men) who signed up to be members of the facility during First Fitness's management were required to execute a Membership Agreement containing the following provision:

> Member agrees that any dispute, controversy, or claim arising out of or relating in any way to the Membership Agreement, including without limitation any dispute concerning the construction, validity, interpretation, enforceability, or breach of this Membership Agreement, shall be exclusively resolved by binding arbitration administered by the American Arbitration Association under its

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

> Commercial Arbitration Rules. The place of the arbitration shall be the city of your club location and state of your club location law shall apply.

FR No. 19, Ex. C., ¶ 9; *id*., Ex. B, p. 2. Moreover, these membership agreements preclude members from consolidating their claims with those of other members, or pursuing claims in arbitration on behalf of a putative class:

> MEMBER UNDERSTANDS AND AGREES THAT THE MEMBER AND THE CLUB ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT. NEITHER THE MEMBER NOR THE CLUB SHALL BE ENTITLED TO JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS IN ANY ARBITRATION, OR TO INCLUDE IN ANY ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR MEMBER OF A CLASS, OR TO ACT IN ANY ARBITRATION IN THE INTEREST OF THE GENERAL PUBLIC OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.

Id. Under the Federal Arbitration Act, 9 U.S.C., §§ 1-10, any putative class member who signed an agreement containing this language would be required to arbitrate their claims against the defendants individually because the arbitration clause in the membership agreement does not explicitly permit arbitrations to be filed on behalf of a class. *Lamps Plus, Inc*. v. *Varela*, 139 S. Ct. 1407, 1416-1417 (2019).

Jane Doe 1 and Jane Doe 2 did not sign membership agreements containing the above-excerpted language because they became members of the facility before First Fitness assumed contractual responsibility for its management and operation. FR No. 19, Ex. C, ¶ 11. In its original motion to dismiss, First Fitness asked the Court to make a determination that neither of the plaintiffs may sustain their case as a class action because they lack standing to represent putative class members who signed arbitration agreements. (FR No. 19, pp. 19-20), citing *Conde* v. *Open Door Mktg., LLC*, 223 F. Supp. 3d 949 (N.D. Cal. 2017) and *Forby* v. *One Techs., LP*, 2020 WL 4201604, *9 (N.D. Tex. 2020). See also (FR No. 37, Ex. A, pp. 2-4), citing *Amansac* v. *Midland*

Credit Mgmt., Inc., No. CV 15-8798, 2022 WL 14563253, at *6 (D.N.J. Oct. 24, 2022), *Cornejo* v. *Big Lots Stores, Inc.*, No. 2:22-CV-01247-MCE-DB, 2023 WL 3737058, *3 (E.D. Cal. May 31, 2023), *Gile* v. *Dolgen California LLC*, 2022 WL 3574168, *3 (C.D. Cal. Aug. 2, 2022), and *Andrade* v. *Am. First Fin., Inc.*, 2022 WL 3369410, *5 (N.D. Cal. Aug. 16, 2022).[2] The Court (Connolly, J.) ruled on the defendants' motions to dismiss the plaintiffs' original complaint without reaching this issue of class certification.

The plaintiffs' inability to represent absent members who signed arbitration agreements is ripe for determination by the Court on the defendants' instant motion to strike the class allegations of the Amended Complaint. All of the cases previously cited to the Court assessed this issue in the context of evaluating whether the typicality element of Rule 23 had been, or could be, satisfied. The previously cited decisions in *Conde*, *Forby*, *Amansac*, *Cornejo*, *Gile*, and *Andrade* (and cases cited therein) all held that a named plaintiff cannot represent absent members of his or her putative class that signed arbitration agreements if he or she did not sign such an agreement. In each case, the court denied the plaintiff's request to certify a class for want of typicality. *See Forby*, 2020 WL 4201604, at *9 (striking class allegations because it was "facially apparent on the pleadings" that typicality not where, unlike the putative class representative, absent members of the class would be bound arbitration agreement); *see also Conde*, 223 F. Supp. 3d at 959, citing *Avilez* v. *Pinkerton Government Services, Inc.*, 596 Fed. Appx. 579, 579 (9th Cir. 2015) (no typicality where named plaintiff could not represent the interests of absent members who were potentially bound by arbitration and class action waiver provisions he had opted out of); *Amansac*, *supra*, at *6, citing *Spotswood* v. *Hertz Corp.*, 2019 WL 498822, *11 (D. Md. 2019) ("[Plaintiff] cannot meet the typicality requirement because he did not sign an arbitration agreement while other putative class

[2] Slip copies of these recent decisions were provided in supplemental briefing. (FR No. 37, Ex. A).

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

members did."); *Gile*, supra, at *3, citing *Lawson* v. *Grubhub, Inc*., 13 F.4th 908, 913 (9th Cir. 2021) (putative class representative's inability to defend against a motion to compel arbitration of claims of unnamed class members "makes him an atypical and inadequate class representative"); *Cornejo*, supra, at *3 (collecting cases).

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully requested that the Court: *allow* this motion to strike the class allegations from the plaintiffs' Amended Complaint.

[signature page follows]

Respectfully submitted:

/s/ Kevin Buono
Kevin W. Buono

Joseph M. Desmond (BBO# 634883)
Kevin W. Buono (BBO#693548)
MORRISON MAHONEY LLP
250 Summer Street
Boston, Massachusetts 02210
Telephone: +1 617 439 7500
Fax: +1 617 439 7590
E-mail: kbuono@morrisonmahoney.com

Attorneys for Defendant First Fitness Management, LLC

/s/ Dana McSherry
Dana M. McSherry

Mark W. Pearlstein (BBO# 542064)
Dana M. McSherry (BBO# 664430)
MCDERMOTT WILL & EMERY LLP
200 Clarendon Street, Floor 58
Boston, Massachusetts 02116-5021
Telephone: +1 617 535 4000
Fax: +1 617 535 3800
E-mail: mpearlstein@mwe.com
dmcsherry@mwe.com

Attorneys for Defendant John Hancock Life Insurance Company (U.S.A)

ASSENTED TO BY:

/s/ Tawny Alvarez
Tawny L. Alvarez

Michael K. Fee (BBO# 544541)
Tawny L. Alvarez (BBO#672255)
VERRILL DANA LLP
One Portland Square
Portland, ME 04101-4054
Telephone: +1 (617) 309-2600
Fax: +1 (207) 253-4523
E-mail: talvarez@verill-law.com

Attorneys for Defendant Commonwealth Flats Development Corp. d/b/a Second Wave Health & Fitness

Date Filed 10/11/2023 4:34 PM
Superior Court - Suffolk
Docket Number 2284CV00831

CERTIFICATE OF SERVICE

I, Kevin W. Buono, hereby certify that this document filed through the Odyssey File & Serve System will be sent electronically to the registered participants as identified on the Case Service Contacts List and/or paper copies will be sent to those, via email, indicated as non-registered participants or participants as listed below on August 25, 2023.

Ilyas Rona, Esq., BBO #642964
Michael Joseph Duran, Esq., BBO #569234
Milligan Rona Duran and King LLC
50 Congress Street, Suite 600
Boston, MA 02109
Tel: (617)395-9570
Fax: (855) 395-5525
ijr@mrdklaw.com
mjd@mrdklaw.com

Date: August 25, 2023

/s/ *Kevin Buono*
Kevin W. Buono