AMERICAN ARBITRATION ASSOCIATION
CASE NO. 01-19-0002-4281-2-AS

SHAWN CHESHIRE,

Claimant,

vs.
FITNESS & SPORTS CLUBS LLC d/b/a LA FITNESS,

Respondent.
_________________________________/

Expert Report of Matthew W. Dietz, Esq.

The issue that the undersigned was retained to render an opinion is whether a requested accommodation is a reasonable accommodation under the Americans with Disabilities Act and would not be an undue burden or a fundamental alteration to the Respondent's business practices.

Background and Experience:

The undersigned has been an attorney that specialized in disability rights and disability accommodations since 1998 and is the president and founder of Disability Independence Group, Inc., a non-profit organization, whose mission is to expand opportunities for persons with disabilities. In addition to over three hundred written opinions on many different facets of disability rights, I am a frequent speaker and author on accommodating persons with disabilities, from attorneys to persons with intellectual and developmental disabilities. As president of DIG, we provide a range of programs and services to the community, such as training municipalities and persons with autism on appropriate police interaction and dangers of using the Baker Act with the Autistic Population, reintegrating persons from nursing homes to in-home settings, the use and incorporation of assistance animals, and policies how to do so, policies and procedures on how to ensure the domestic violence services are available to persons with disabilities, and policies and procedures to ensure that the vote is open and accessible to persons with disabilities. In 2019, I was awarded the American Bar Association's Paul G. Hearne Award for Disability Rights that is awarded to an individual or an organization for performing exemplary service in furthering the rights, dignity, and access to justice for people with disabilities. My Curriculum vitae is attached hereto as Exhibit "A".

Materials Considered in Preparation of this Report

Interview with Shawn Cheshire
Review of website - www.lafitness.com
Documents produced by LA Fitness - bates stamped 1-116 (including the videos on the website).
May Rojas depo transcript and exhibits to depo.

Frank Hayne depo transcript and exhibits to depo.
LA Fitness Corporate Rep depo transcript and exhibits to depo.
Amended Demand for Arbitration.
Answer to Amended Demand for Arbitration.
LA Fitness' Answers to Revised Interrogatories.
LA Fitness' Responses to Revised Requests for Production.

Context of Reasonable Accommodations for a Public Accommodation.

The expert opinion rendered is an application to the facts to the legal framework of reasonable accommodations, which is a burden-shifting application. The initial responsibility begins with the person with a disability, who is required to make a request for a reasonable accommodation. After an accommodation is made, the burden shifts to the public accommodation to demonstrate that the accommodation is either a fundamental alteration to their business or is an undue financial burden.

Statute:

Pursuant to 42 U.S.C. § 12182 (a) –

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Discrimination is defined as:

> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; [42 U.S.C. § 12182(b)(2)(A)(ii)

The terms "reasonable" and "fundamental alteration" are the terms that are highly dependent on the facts of each case. In Schaw v. Habitat for Humanity of Citrus County, Inc., 938 F.3d 1259 (11th Cir. 2019), the Eleventh Circuit recently clarified both when deciding whether a financial accommodation is reasonable in the context of Habitat for Humanities housing program under the Fair Housing act – which is similar to the analysis under the Americans with Disabilities Act.

> First, what do we mean when we talk about a "reasonable accommodation" under the Act? The reasonableness inquiry considers "whether the requested accommodation 'is both efficacious and proportional to the costs to implement it…. This Court has explained—in imaginative terms—that "[t]he differences between [an] accommodation that is required and [a] transformation that is not is the difference between saddling a camel and removing its hump." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1260 (11th Cir. 2001) (interpreting the term

> "reasonable accommodation" in the analogous Americans with Disabilities Act context).
>
> …The Supreme Court has explained that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, *i.e.,* ordinarily or in the run of cases." *Id*. at 401, 122 S.Ct. 1516 (citation omitted). …
>
> If a plaintiff's request is facially reasonable, the burden shifts to the defendant, who must prove that the accommodation would nonetheless impose an "undue burden" or result in a "fundamental alteration" of its program. *Schwarz*, 544 F.3d at 1220. An accommodation requires a "fundamental alteration" if it would "eliminate an 'essential' aspect of the relevant activity," *id*. at 1220–21—or, if you prefer, would "remov[e] [the camel's] hump,"

Schaw, 938 F.3d at 1264–66

> So, what's the upshot? From these decisions, we glean the following principles. First, a plaintiff need only demonstrate a facially reasonable request—or one that seems reasonable in "the run of cases." Willis, 108 F.3d at 286; Barth, 2 F.3d at 1187. Second, a defendant may then proffer evidence that the plaintiff's request would nonetheless cause an undue burden or a fundamental alteration of its policy or program. Third, in evaluating the evidence, a court may consider whether the plaintiff's requested accommodation would eliminate an "essential aspect" of the defendant's policy or program or simply inconvenience it, keeping in mind the "basic purpose" of the policy or program at issue, and weighing the benefits to the plaintiff against the burdens on the defendant.

Schaw, 938 F.3d at 1267

Step I – Was there a request for accommodation

There is no duty to make an accommodation unless a request is made, or the need is obvious. While there were prior requests made verbally, the request and the scope of the request was confirmed in an email to petitioner's counsel on April 19, 2018 (bate stamp 28). The request was as follows:

(1) Place Braille Numbers on the weights and machines to assist Shawn Cheshire to identify the weights/machines
(2) Repack the dumbbells
(3) Provide an escort in the facility for the days when Gregory Anderson did not accompany Ms. Cheshire.

Even though there were requests made, there was no interactive process between Ms. Cheshire and the Respondent, and the matter was relayed to its corporate attorney. On June 27th, Ms. Vu

and Mr. Klein, Ms. Cheshire and Mr. Anderson had a call where the accommodation was discussed.

In the discussion, Ms. Cheshire discussed how she is a professional athlete and goes to the gym with Mr. Anderson and would need assistance infrequently (approximately 12 times per year) when Mr. Anderson is not in town. When she uses the facility, the weights are not re-racked and present a tripping hazard. In addition, she needs assistance in navigating through the free weights. In addition, when using the weights, she does not know the amounts of weights of the dumbbells, as they are not marked, and where she starts on the weight machines – as they are not marked as well. As an athlete, Ms. Cheshire's schedule is flexible, and she would not use the facility in its busiest times and could accommodate the facilities schedule. During this conversation, with Ms. Vu, there was no back-and-forth, as what could work- but rather a description of how Ms. Cheshire is able to independently use other types of public accommodations with her guide dog, Nick, or her cane. The purpose of the discussion for Ms. Cheshire was to attempt to work out a method in which she could go to the facility on those few occasions without Greg Anderson, and not place herself in physical danger, as she is still very concerned about having another brain injury.

The fact that there are physical barriers that could pose a hazard (such as dumbbells on the ground or barbells on a bench press) caused her great concern and would prohibit her independent use of the facility. As such, her attempt was to be as flexible as possible to accommodate the needs of the facility as well as her needs to work out – which is part of her occupation as an athlete. According to Ms. Cheshire, she has three different types of routines, each of which focus on a particular section of her body. She does not do cardiovascular exercises (treadmill, bikes) at the respondent's facility, and her workout usually lasts approximately one hour to one hour and fifteen minutes when she is with Mr. Anderson, when they both use the machines. There was no discussion with Ms. Vu about the particulars of Ms. Cheshire's exercise routine.

Ms. Vu's takeaway from the phone call was as follows:

> On our call, Ms. Cheshire stated that she is concerned about encountering obstacles as she moves around the Facilities and is unable to find the free weights she needs because they are not labeled with Braille and usually not put back on the weight rack. According, she is requesting that LA Fitness, with one hour's notice, designate an employee to accompany her during her workout to guide her through the facility and locate the weights she needs. She is requesting this assistance for the three Facilities, and states that she would only need this accommodation when her partner is not with her.

While the one-hour notice is not accurate – according to Ms. Cheshire – there was no discussion as to whether any notice would be enough. Ms. Cheshire stated that she could give a days' notice because her work out routine is planned with her coach. The entire accommodation was denied, and only assurances of help when possible was provided – and then the demand that if there was any more assistance needed than on the occasion where an employee was not doing their duties, then there could be no assistance.

> While LA Fitness is sympathetic to Ms. Cheshire's situation, it cannot assign a personal assistant to her for her workout. Doing so would require LA Fitness to hire an employee for this specific purpose and would fundamentally alter the nature of LA Fitness' business model. LA Fitness is able to keep its membership fees low by staffing each location with only the minimum number of employees needed to operate the facility. Existing employees already have duties such as attending to the front desk, handling membership matters, and keeping the facility clean, safe, and operational. These employees would attempt to help Ms. Cheshire on occasion when they are not performing their job duties, but it is highly unlikely that they could ever attend to Ms. Cheshire for her entire workout. In other words, if there are available employees who can help Ms. Cheshire during her workouts, they will provide assistance, but LA Fitness is unable to provide any assurance that they will be, especially with respect to remaining with her throughout her workout.

Letter of Minh Vu, dated July 19, 2018.

Obligation to determine reasonableness of Respondent's proposed alternatives:

A court must consider first whether the petitioner's own requested accommodation "seems reasonable on its face" before turning to consider a defendant's objections and counterproposals. See Schaw, 938 F.3d at 1269. The purpose of first considering and giving deference to a person with a disability is because the person with a disability has the best knowledge of what would work for them. The issue of alternate accommodations is only relevant when the requested accommodation is not reasonable because it is an undue burden or a fundamental alteration. This obligation was detailed in the Joint Statement of the U.S. Department of Housing and Urban Development and the U.S. Department of Justice Reasonable Accommodations Under the Fair Housing Act- Question 7 to 10.

Step II – Was the request "reasonable"

The question of reasonableness is if it seems reasonable in "the run of cases." Is it "is both efficacious and proportional to the costs to implement it" Is the accommodation closer to saddling a camel than cutting off its hump?

When the ADA was enacted, the Department of Justice published an on-line tutorial to explain how a business owner can assist customers with disabilities.
https://www.ada.gov/reachingout/intro1.htm In Lesson 1, it states as follows:

Doing what works

The ADA does not spell out exactly what you must do in every situation. It lets you decide what is reasonable based on how your business operates and what kind of accommodation the person need because of his or her disability. The idea is not to exclude a customer by being unwilling to make an accommodation that is fairly simple and easy to make.

At a self-serve food bar, a staff person is preparing a tray of food for a customer using a walker.

Here is some basic guidance on judging whether a request is reasonable or not

It is reasonable to provide some extra assistance to a customer with a disability when needed, even during busy periods when other customers are waiting.

When only one staff person is on duty, it may or may not be possible for him or her to assist a customer with a disability. The business owner or manager should advise the staff person to assess whether he or she can provide the assistance that is needed without jeopardizing the safe operation of the business.

A customer with a food allergy may ask a restaurant if it is possible to omit a sauce or ingredient from a dish he or she wishes to order. When it is easy to do, the request should be honored.

In other Department of Justice guidance, the DOJ provides guidance on reasonability in the "run of the cases"

For example,

- a hotel providing assistance for a blind person to guide from place to place was cited as an accommodation in Restaurants and Hotels - Americans with Disabilities Act, GUIDE FOR PLACES OF LODGING: SERVING GUESTS WHO ARE BLIND OR WHO HAVE LOW VISION. United States Department of Justice - https://www.ada.gov/lodblind.htm
- A grocery store would need to assist customer who uses a wheelchair or a little person by retrieving merchandise from a higher shelf. In addition, a grocery store would need to help a blind customer to retrieve merchandise;
  see https://www.ada.gov/reachingout/lesson11.htm;
  see also https://www.ada.gov/taman3.html (III-3.3100)
- Provide refueling assistance upon the request of an individual with a disability. A service station or convenience store is not required to provide such service at any time that it is operating on a remote-control basis with a single employee, but is encouraged to do so, if feasible. ADA Business BRIEF: Assistance at Gas Stations
  https://www.ada.gov/gasbrief.htm

A. Accommodation 1: Labeling weights and machines with Braille Labels

A Braille Labeler is a low-tech device that places Braille dots on a sticker – the same type of device that sighted persons use to create labels in their home. The device can be as simple as the manual device with a dial to select the letter or number, and then squeeze to press each letter – which costs approximately $30.00 to a battery-operated device from one to three hundred dollars. The labels can be clear and would not be noticeable by any user other than the blind user who is oriented how to find it on a weight or on a machine.

In the Blind fitness world, publications often refer to such labels as a DIY method to make a health club more accessible. In the following article, the authors just recommend the users of the fitness agreements to come into the facility with their own braille labelers and label weights, machines and treadmills. However, the authors relent and state:

> It is also a good idea to talk with your fitness center's managers about using the gym. They may have had other customers who were blind or had low vision and can provide some advice on the basis of past experience. You can also talk to them about adding some braille or other markers to the machines, instead of simply barging in and labeling things. That way, you can convince them that you will not be ruining their machines with a little braille. Most gym managers will be accommodating but be sure to stand up for your rights if they have no knowledge of the abilities of blind people and try to insist that you hire a personal trainer for all your workouts. Do not let them tell you that you cannot go independently but be willing to work with them by explaining the type of assistance you may need or how you can independently and safely use the equipment. Be proactive about your rights.

American Foundation for the Blind, Exercising your right to fitness: An Overview of the Accessibility of Exercise Equipment. (Nov. 2007), Found at https://www.afb.org/aw/8/6/14300

In another article from American Printing House for the Blind, one of the oldest, and most established organizations for information and resources for the Blind, the author stated as follows:

> **Exercise Training in a Health Club**
>
> In this section I discuss exercise training, which focuses on muscular strength and endurance training. Weight training improves bone density, muscular strength, and flexibility. The safest way to perform muscular strength and endurance training is by using a circuit of stationary machines. The machines may consist of free weights or weight machines. …
>
> The following are some adaptations to the physical environment:
>
> Providing pictures or instructions in appropriate reading media. Allow the person time to look at performance pictures and to have an opportunity to read about the exercise. Explain the muscles used and why there is a proper and safe way to lift.
>
> Creating a visual and a tactual perimeter. For safety, mark the perimeter of the exercise machines on the floor with rope covered with tape or with contrasting colored tape. The tape helps the participant with low vision to locate the perimeter of the weight machines and the rope with tape signals the perimeter to the person who is blind or deafblind.
>
> Numbering the stations. Label each piece of equipment with a designated number, using large print, hi-mark paint, or Braille. A rope, tape, or tactile guide can lead from one piece of equipment to the next one.
>
> Recording performance. Participants should have some way to record the number of repetitions and weight for each exercise to document improvement.
>
> Adapting equipment. Many fitness gyms have aerobic equipment such as treadmills, step-masters, or stationary bicycles with electronic switches. Identify on-off switches by marking them with large print, hi-mark paint, or Braille. Participants can keep track of time on machines with ringing or vibrating timers worn around their necks or in their pockets.

Fitness for individuals who are visually impaired or deafblind. Lieberman, Lauren J.. 34(1),13-8023. 2002. https://sites.aph.org/physical-education/articles/fitness-for-individuals-who-are-visually-impaired-or-deafblind/

Accordingly, Braille labels is the ordinary, run of the cases, little or no cost, example of an easy to do accommodation.

B. Accommodation 2 – Re-racking the weights

The Respondent has a policy and procedure of re-racking the weights. Moreover, in the testimony and documents, the staff who is across the facility also has a requirement to rerack the weights and clear the facility of hazards (such as loose weights) on a constant basis. The 10/20 plan is as follows:

> Hot Topic 2/21 - What's a 20/10
>
> What is a 20/10? 20 minutes after the hour and 10 minutes to the hour, the PT team gets away from their desks and walks the club. We do a club pride so our house always looks nice, all while saying hi to every member, client and trainer we pass. This enables you to prospect, service clients and manage your trainers all at one time.
>
> Now, by being out there at this time we can meet and greet clients at the beginning and end of their sessions. This is a great opportunity to find out how their workouts are going and see if they are making progress. Not only does this show the clients how much we care, but it also provides valuable feedback for our trainers for when we meet with them one on one. Go inspect some journals on your 20/10's today!

(Def 26, 33). Later emails stated that PTs should spend 15 minutes on the floor and 15 minutes at the desk, unless they are in a set. In addition, the trainers, maintenance staff, and managers also have a duty to survey and ensure safety across the premises.

In Ms. Cheshire's situation, her complaint was that this policy was not being followed when she was in the facility and it was a danger to her. The accommodation would be to ensure that this policy is diligently followed when she is at the facility for the twelve times per year for the one- and one-half hours that would be the maximum time for her workout. What makes this even more reasonable is the fact that she could provide notice before she arrives.

For Ms. Cheshire – this was the most crucial issue that she had as it is a danger to her well-being, and there is nothing that she could do independently to ensure that the weights are appropriately racked, or to avoid a hazard (with a dog or a cane). If she does trip and fall, she will injure herself. The burden to ensure that the respondent diligently follows their own policies for approximately one- and one-half hours, approximately twelve times per year, is minimal compared to the risk to Ms. Cheshire.

C. Accommodation 3 – Providing Shawn Cheshire an escort when Greg Anderson is not with her.

According to the documents presented, this accommodation request was denied, and the facility made the alternate accommodation suggestion of either hiring a trainer, having a "guide person" without charge, or having a service dog. According to Schaw, the requested accommodations should be considered prior to any alternate accommodations.

The primary method to determine if an accommodation reasonable is whether the accommodation has been adjudged reasonable in a similar facility. Attached as Exhibit B is Reveyoso v. Town Sports Club, the original decision overturning the jury verdict, and the appellate opinion reinstating the verdict.

In Reveyoso v. Town Sports Club, Case No., 157500/2012, a jury in New York found that a health club denied a reasonable accommodation to a blind guest an escort to a stationary bike, assistance setting up the bike's computer, and an escort from the bike. The trial court set aside the jury's verdict when the Defendant demonstrated that the health club attempted to assist the Plaintiff by requesting that she schedule when she was going to attend, due to staffing issues, or delaying assistance. On appeal, the Appellate Division reversed, finding that the employee escort was reasonable, and there was no reason to request Medicare to provide her a trainer.

Reveyoso v. Town Sports Int'l, LLC, 162 A.D.3d 510, 511, 79 N.Y.S.3d 27 (N.Y. App. Div. 2018). The court found that by requiring a guide provided by the plaintiff, "defendant would have been abdicating its legal obligation to provide a reasonable accommodation altogether, by shifting the burden entirely to another party." Id.

In Reveyoso, the Health Club made attempts to accommodate the plaintiff, including having staff assist with some delays, until the health club finally refused the accommodation and advised Ms. Reveyoso to get her own guide paid by Medicare. The rationale was that the club was inadequately staffed and the person at the front desk would need to leave the desk to assist Mr. Reveyoso. Notwithstanding their defenses, the jury still found the Health Club liable.

In view of the Department of Justice guidelines and the examples of run of the cases, where there is more than one staff member available, then it would be feasible to escort Ms. Cheshire from one machine to another when needed. In reviewing the response as to why it was not reasonable, it was not supported by the facts in this matter:

> Doing so would require LA Fitness to hire an employee for this specific purpose and would fundamentally alter the nature of LA Fitness' business model. LA Fitness is able to keep its membership fees low by staffing each location with only the minimum number of employees needed to operate the facility. Existing employees already have duties such as attending to the front desk, handling membership matters, and keeping the facility clean, safe, and operational. These employees would attempt to help Ms. Cheshire on occasion when they are not performing their job duties, but it is highly unlikely that they could ever attend to Ms. Cheshire for her entire workout.

1. The accommodation was approximately 12 times per year, during off-hours, and with significant advance notice.

There is no evidence as to what is the "minimum number of employees" needed to operate the facility. This is significantly more than Reynoso, where the front desk staff was used. This facility had sales staff, personal trainers, maintenance staff, and others at all time. It is difficult

to believe, without daily staff schedules, to determine a time when Ms. Cheshire could come in and obtain assistance for the duration of her workout, or when she needed assistance from a person on the floor of the facility to escort her from one machine to another.

2. The escort duties were unskilled duties and sporadic during the time frame of her workout

This was not a skilled professional, such as a sign language interpreter, who needs to be scheduled days in advance and charges $95.00 per hour. This duty could be done by any employee of the facility and would only need to be done for the few times during the workout where Ms. Cheshire would need an escort.

3. Its approximately twelve times per year for approximately one- and one-half hours.

This cannot be overemphasized. Further, this is on notice with flexible hours. It would not be any burden to assign and pay for any employee to assist Ms. Cheshire during her workout. Without the escort, she is unable to use the facility.

This is no different from an employee assisting a Blind shopper in a supermarket, however, in the supermarket, there is no notice when a blind shopper will arrive, or how long a blind shopper will shop. Furthermore, staff in a supermarket do not have a primary job to assist the shopper to find items, in a health club, the primary responsibility is to assist customers.

In addition, the Respondent has policies to ensure that staff is constantly on the floor with a presence to ensure that the weights are re-racked and that the staff is friendly and welcoming to the guests. The 10/20 policy and the "15 minutes on the floor and 15 minutes at the desk" policies are indicative of the frequent presence of staff to assist Ms. Cheshire.

Accordingly, providing an escort is a very reasonable accommodation.

Step III: If an accommodation request is reasonable, the burden shifts to the defendant to establish that the request would pose an undue burden or result in a fundamental alteration of the program.

In the letter denying the accommodation, it stated that "such an accommodation would fundamentally alter the nature of the goods and services that it offers."

> The Seyfarth Letter goes on to state "**Doing so would require LA Fitness to hire an employee for this specific purpose and would fundamentally alter the nature of LA Fitness' business model. LA Fitness is able to keep its membership fees low by staffing each location with only the minimum number of employees needed to operate the facility.**
>
> Existing employees already have duties such as attending to the front desk, handling membership matters, and keeping the facility clean, safe, and operational. These employees would attempt to help Ms. Cheshire on occasion when they are not performing their job duties, but it is highly unlikely that they could ever attend to

> Ms. Cheshire for her entire workout. In other words, if there are available employees who can help Ms. Cheshire during her workouts, they will provide assistance, but LA Fitness is unable to provide any assurance that they will be, especially with respect to remaining with her throughout her workout."

The Respondent asserted the undue burden defense in their original denial – if Shawn Cheshire was provided with a dedicated staff member for the approximately 12 hours per year of using the defendant's facility, they would be unable "to keep its membership fees low by staffing each location with only the minimum number of employees needed to operate the facility."

Even assuming that this accommodation request required additional staffing, to determine the effect, if any, this would have on membership fees, is a fact-intensive inquiry that would require a review of the overall financial resources of the facility. The Undue Burden analysis requires analyzing the costs of the accommodation to determine if there is significant difficulty or expense. According to the ADA Title III regulation:

> In determining whether an action would result in an undue burden, factors to be considered include –
>
> (1) The nature and cost of the action needed under this part;
>
> (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
>
> (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
>
> (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. § 36.104. In this matter, the respondent did not produce any financial information, and as the burden is on the respondent, there is no evidence of any undue burden. Further, the respondent affirmatively stated that they were not relying on their finances for any affirmative defenses. While the respondent does not bring up undue burden, it does state "to hire an employee for this specific purpose … would fundamentally alter the nature of LA Fitness' business model."

In any event, to have an employee to escort Ms. Cheshire for the duration of her workout would be approximately 20 to 30 dollars, even for the most skilled employee at the facility. To state that

hiring an additional employee is required to assist a customer for twelve hours per year is remote from an undue burden. Furthermore, it is impossible to determine if an additional employee would be an undue burden if the profits and losses were not reviewed, and whether other staff members could assume additional duties, which may not even require that they be paid an hour additional wage. There was no analysis of the cost of Ms. Cheshire's accommodation, the costs of additional staffing, effect on expenses, profitability or any issue related to the effect of financial resources was not an defense proffered, and was waived. (Corp. Rep. 80-83, 90)

In light of Ms. Cheshire's minimal needs of wayfinding, this really is not an issue, however, when others with more substantial disabilities are involved with more needs, the question of what types of accommodation is necessary prior to refusing services is a question that must be more in depth than "we can't hire another employee." To make this statement as a matter of course is an abdication of the duty to determine if providing equal services to a person with a disability is an undue burden.

There is a difference between an undue burden and a fundamental alteration. An undue burden is when an accommodation is necessary, but not reasonable because of the costs of requested accommodation. Whether an action would be an undue burden depends on the financial well-being of the entity. An example of an issue that would raise a serious question of an undue burden would be if Ms. Cheshire complained that the cardiovascular machines, such as the treadmills and stationary bikes, had touch screens, and she could not use them, and as an accommodation, she requested that the facility provide machines with touch controls or audio controls. Because each machine may cost multiple thousands of dollars per machine, and she may use several LA fitness facilities; and there may be leases for this type of equipment throughout the chain of all fitness facilities, the cost and logistical burden may be great. On the other side of this continuum is a Braille label that a staff member can stick to a weight.

On the other hand, the fundamental alteration defense is when providing an accommodation would "eliminate an essential aspect of the relevant activity, or, in other words, it would remove the camel's hump. For fundamental alteration, the court must evaluate the "basic purposes of the rule or policy at issue" Schaw, 938 F.3d at 1267. The Supreme Court case of PGA Tour, Inc. v. Martin, 532 U.S. 661, 689, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001) is the seminal example where the Court found that the PGA's walking rule was not an essential rule of competition and as such, a contestant can use a golf cart instead of walking. On the other hand, a fundamental alteration would be requiring a nursing school to waive all clinical requirements for a deaf applicant. Schaw at 1266.

To determine if it is a fundamental alteration, the first question is what the essential aspects of LA Fitness' activities are. In this matter, the essential activities of the staff at a health club are to assist the patrons of the health club. The nature of a health club is in their video in their website: https://www.lafitness.com/Pages/WhyJoin.aspx - "Here, you'll find everything you need to accomplish your fitness goals, have fun and find all of the support you need to Exercise Your Options®"

Accordingly, the essential aspect of the health club is to assist its members to use their facilities to reach their fitness goals. All of the videos demonstrate the many aspects in which the staff assists its members. As such, the question is what would be outside of the essential aspects of its activities. This is not a difficult question and is tantamount to putting a saddle on a camel or cutting off its hump. Assisting a member to use an exercise machine that has minimal needs would be similar to saddling a camel, creating a new exercise class with a specialized therapist for persons with debilitating rheumatoid arthritis would be a fundamental alteration – as this is not within what LA fitness does.

The issue of what would be reasonable and not reasonable with regard to assisting a Blind person with a certain weight was an issue that was questioned. For example, in the deposition of Frank Hayne, the manager of the LA Fitness, he testified that providing Ms. Cheshire with her desired weight would "have been a complication" and would require the training staff because it required physical assistance. depo, p. 111-112. However, the corporate representative stated: "We told her that with at least an hour's notice, we'd have someone available to take her to the area she wanted to be in. They could give her the weights that she asked for." (Corp. Rep. p. 86) And again "We told her that with at least an hour's notice, we'd have someone available to take her to the area she wanted to be in. They could give her the weights that she asked for." (Corp. Rep. p. 87). Then the corporate representative summarized the position as follows:

> THE WITNESS: Okay. The issue at hand is that she is saying that she wanted one person to be available to her whenever she came in to escort her and we're looking at that saying, "Okay. You can bring in that one person or we can have a person available to bring you to the area that you're interested in." Refamiliarize her with where things are in the club. They can check back with her, but as far as guaranteeing that a person can stay with her throughout the hour, hour and a half that she is there, wasn't something that we could do, but certainly we can assist her. We can help her as far as showing her where things are. Bring her the weights or bring her to where the bikes are and, you know, she's going to be on the bike for 45 minutes, they can come back in 45 minutes.

(Corp Rep. p. 88). The corporate representative went further - "But as far as -- the only thing I can think of that would fundamentally alter the nature of the goods or services would be by having extra staff scheduled" (Corp Rep 80). As such, this accommodation is not outside of the facilities normal business experience.

Requirements of public accommodations

LA fitness prides itself (and shows many pictures) of support that is provided. The respondent publishes its policies under the ADA in its website and intranet (for employee access) as follows:

> Fitness International complies with the Americans with Disabilities Act and related state laws. Accordingly, Fitness International does not discriminate against individuals with disabilities and will take all steps necessary to provide our

> members with disabilities full and equal enjoyment of our facilities and services. If you have a disability that requires an accommodation or modification of policies, practices or procedures to achieve full and equal enjoyment of our facilities, please notify Fitness International staff so that we may assist you.

While this is a policy, from the depositions and discovery in this matter, there is no training or procedures that would implement this policy. Other than this policy, the training consists of a video regarding the use of service animals. (Corp. Rep. p. 23). The employees are not even asked if they have read the policies. (Corp. Rep. p. 56).

With regards to Shawn Cheshire, the request was not even handled by the health club, but was provided to defense litigation counsel.

If there had been training, the support Shawn Cheshire needed to "Exercise Your Options®" would be to discuss her needs and her schedule with the manager of the facility to see what could be done to ensure that she receive equal use and enjoyment of the facility. This would include

1. Understand how Shawn Cheshire uses the facility. It is important to understand if most of the time is spent on cardiovascular machines, classes, free weights, etc?
2. What programs or services would she like to use and what barriers does she have?
3. What is the cost of the accommodation she is requesting?
4. If, in light of the corporation's total resources, the accommodation is too expensive, are there less expensive alternatives?
5. If an accommodation is requested that there may be fundamental alteration?

This is customer service training for entities that have day to day operations which may be patronized by customers with disabilities. The goal should be how can we accommodate a person with a disability to "take all steps necessary to provide our members with disabilities full and equal enjoyment of our facilities and services" and if it is a fundamental alternation or undue burden, what steps can they take.

Most accommodations have a cost. It's not an answer to an accommodation request to claim that any additional cost or administrative inconvenience would result in an undue burden, and an additional cost cannot equate into a fundamental alteration.

Time and Costs expended on this report.

Ms. Cheshire agreed to pay my normal hourly fee of 415.00 per hour and I have expended 21.7 hours in the research, interviews, review of documentation, and drafting the report.

These opinions are based on the materials I have reviewed thus far. I reserve the right to supplement this Report should new materials become available to me.

I hereby declare under penalty of perjury this 16th day of March, 2020 that the foregoing is true and correct to the best of my knowledge and belief.

By: s/ Matthew W. Dietz
Matthew W. Dietz, Esq.