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In the Matter of the Arbitration between

Case Number: 01-19-0002-4281

Shawn Cheshire
-vs-
Fitness & Sports Clubs LLC d/b/a ("LA Fitness")

AWARD OF ARBITRATOR

I, Hon. Alex E Ferrer, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, and having previously rendered an Interim Award dated May 21, 2021, which is confirmed, adopted, and incorporated as if fully set forth herein, do hereby, AWARD, as follows:

FINAL AWARD WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on to be heard before Arbitrator Alex E Ferrer at final hearing on March 2-3, 2021, in Fort Lauderdale, Broward County, Florida. Present at the final hearing were Claimant, Shawn Cheshire along with her counsel, Joshua Entin and Michael Elkins, and Respondent's counsel David W. Reid and Scott J. Ferrell. Respondent's corporate representative, Robert Bryant, was present by video conference. On May 21, 2021, the Arbitrator entered an Interim Award and invited the parties to address the issue of attorney's fees by motion and response or by agreement. The parties having failed to reach an agreement as to attorney's fees and costs and the Arbitrator having reviewed Claimant Shawn Cheshire's Motion for an Award of Attorney's Fees and Costs and Incorporated Memorandum of Law, as well as Respondent Fitness & Sports Clubs, LLC's Response in Opposition to Claimant's Motion for an Award of Attorneys' Fees and Costs, the Final Award with Findings of Fact and Conclusions of Law is as follows:

For the reasons set forth herein, I find for the Claimant, Shawn Cheshire, on her claim that Respondent LA Fitness has violated the Americans With Disabilities Act, and enter an injunction as set forth herein.

FINDINGS OF FACT

Ms. Cheshire Is a Qualified Individual With a Disability

Ms. Shawn Cheshire ("Ms. Cheshire" or "Claimant") is a United States Army veteran, who served for eight years as a helicopter armament systems mechanic. Following her years of military service, Ms. Cheshire became an EMT-Paramedic.

In 2009, while working on an ambulance, Ms. Cheshire was involved in an accident and sustained a traumatic brain injury which resulted in total loss of vision. After Ms. Cheshire's accident, she received extensive treatment including occupational and physical therapy several times a week, treatment with a neurologist, and treatment at a blind rehabilitation center in Palo Alto, California. Due to her injury and the resulting blindness, Ms. Cheshire had to re-learn many basic life skills such as cooking and using a cell phone. According to Ms. Cheshire, there are a

number of life activities that she can no longer perform and clearly misses. Specifically, Ms. Cheshire testified that she cannot drive, watch a sunrise, watch a sunset, ride her bike on her own, run on her own, watch kids grow up. Ms. Cheshire uses a cane and has a Seeing Eye dog. She also has some ability to read braille numbers and letters. Based on the foregoing, and as stipulated between the parties, it is undisputed that Ms. Cheshire is a qualified individual with a disability.

Ms. Cheshire's Employment History, Participation in High Level Athletic Activity, and Experience at LA Fitness

Ms. Cheshire is currently employed as a professional athlete. She has been a professional athlete since 2013 and has competed at the National (Team USA) and International levels in multiple para-sports, including adaptive rowing, adaptive biathlon, tandem road para-cycling, and tandem track para-cycling. Working out often is significant and important for Ms. Cheshire to continue to compete as a professional athlete.

Ms. Cheshire became a member of Fitness & Sports Clubs LLC d/b/a LA Fitness ("LA Fitness" or "Respondent") in 2014 and has remained a member during the entire pendency of this lawsuit. She goes to LA Fitness gyms with her friend, Greg Anderson ("Mr. Anderson"). They met in 2013, began a relationship in 2014, and have lived together since approximately 2015.

The LA Fitness locations that Ms. Cheshire has used and that are at issue in this case are the gyms located in Fort Lauderdale, Florida[1] and Pompano Beach, Florida.[2] Although the Fort Lauderdale location is closer to Ms. Cheshire's house, she and Mr. Anderson primarily use the Pompano location because it is newer and bigger. When Ms. Cheshire is at an LA Fitness gym with Mr. Anderson, it is typical that both the dumbbells and free weights are on the floor and it is difficult for Mr. Anderson to find the weights that Ms. Cheshire needs for her workout. According to Mr. Anderson, when he is at the Pompano Location the dumbbells and free weights are strewn across the floor 100% of the time.[3]

When Mr. Anderson is with Ms. Cheshire at an LA Fitness gym, he escorts her around the gym (bringing her from machine to machine and/or area to area). He brings her the dumbbells she needs, gets her the free weights she needs and helps her to navigate around the obstructions created by the weights on the floor. Because she is blind, Ms. Cheshire cannot find the dumbbells or free weights on her own, and she cannot safely navigate the gyms.
Ms. Cheshire's workouts consist of grouping muscle groups (biceps/triceps; chest/back), and she has a leg day which is typically a longer workout. She uses free weights, dumbbells and some machines. For example, Ms. Cheshire uses the bench press, Smith machine, the hex bar for deadlifts and dumbbells for biceps and triceps. If a machine or piece of equipment is being used by another member, Ms. Cheshire can improvise and do another part of her workout so as not to delay herself, or anyone who may be assisting her.

Ms. Cheshire's Request for an Accommodation

When Mr. Anderson is not available to accompany her to the gyms, Ms. Cheshire must still train and would like to use the LA Fitness gyms by herself. To that end, Mr. Anderson, on behalf of Ms. Cheshire, spoke to May Rojas ("Ms. Rojas"), who was the General Manager of the Pompano Location, in early 2018.
Mr. Anderson requested that Ms. Cheshire be provided with a person to guide her from station to station and hand her the dumbbells and free weights at the Pompano Location during times when she was utilizing the location without a companion. Unless they are labelled in braille, a visually impaired person who does not have a companion to hand them the dumbbells or weights, has no ability to know the amount of the weights.
Mr. Anderson further stated that Ms. Cheshire's need for an escort would be infrequent. Ms. Rojas indicated that

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[1] 3825 N. Federal Hwy, Fort Lauderdale, FL 33308 (the "Ft. Lauderdale Location").
[2] 1000 N Federal Hwy, Pompano Beach, FL 33062 (the "Pompano Location").
[3] LA Fitness members are required by policy to re-rack their own weights. Despite this policy, members often leave weights lying around on the floor. As a result, LA Fitness has established what it calls its "20/10 policy," which requires staff to walk through the club for 15 minutes (20 minutes after every hour and 10 minutes before the end of every hour) cleaning up the facility and re-racking weights. They then return to their desk for 15 minutes, after which their next 30 minute window commences.

she didn't think an escort would be possible. Nonetheless, she provided Mr. Anderson the number for the LA Fitness corporate office. Ms. Rojas also told Mr. Anderson that Ms. Cheshire could hire a personal trainer to escort her throughout the facility during her workouts.

Mr. Anderson, on Ms. Cheshire's behalf, subsequently spoke with a representative of LA Fitness at the corporate level by telephone, regarding accessibility accommodations for Ms. Cheshire. The corporate representative promised to get back to Mr. Anderson, but never did. After not hearing back from the corporate office, Mr. Anderson again spoke with Ms. Rojas and asked her if she had spoken with anyone at the corporate office, at which time she disclosed that she had not.

Thereafter, Ms. Cheshire and Mr. Anderson spoke with an attorney named Nolan Klein ("Mr. Klein"). Mr. Klein had a professional connection to an attorney named Minh Vu ("Ms. Vu"), who had previously represented LA Fitness on an Americans with Disabilities Act (the "ADA") public accommodation issues. Mr. Klein suggested that he reach out to Ms. Vu to try and resolve the matter.

On April 17, 2018, Mr. Klein sent an email to Ms. Vu, addressing, among other things, the fact that dumbbells and free weights are not racked where they're supposed to be (resulting in Ms. Cheshire being unable to find the proper weights) and that the dumbbells and weights do not have braille (making it impossible to determine which weights are which). Mr. Klein requested that Ms. Cheshire be provided with an escort to assist her navigate through and use the facility.

On June 27, 2018, Mr. Anderson, Mr. Klein, and Ms. Cheshire held a conference call with LA Fitness' representative, Minh Vu, regarding Ms. Cheshire's accessibility accommodation requests. During the conversation, Ms. Cheshire discussed how she is a professional athlete and that she goes to the gym with Mr. Anderson, and therefore would need assistance infrequently when Mr. Anderson is not in town (approximately 12 times per year). During this call, Ms. Cheshire and Mr. Anderson discussed the issues Ms. Cheshire faces when she does not have assistance, including: (1) the weights and dumbbells are not re-racked presenting a tripping hazard; (2) the fact that when they are re-racked, the dumbbells are not placed in the correct weight rack, making it impossible for Ms. Cheshire to locate the correct weights; (3) the need for assistance navigating through the free weight area; (4) that when using the weights, Ms. Cheshire does not know the weight of the dumbbells because she cannot see the numbers marking the amounts; and (5) the need for assistance with knowing the starting weight on the weight machines since Ms. Cheshire cannot see the numbers marking the weights.

They further explained that, Ms. Cheshire would not need to use the facility during its busiest times and could accommodate the facilities' schedules because her own schedule was flexible.

During the conversation with Ms. Vu there was no back-and-forth (or interactive process) regarding what accommodations might work for Ms. Cheshire. Instead, Ms. Vu questioned Ms. Cheshire about her inability to use the gym on her own when she is able to independently use other types of public accommodations, and walk down the street, with her guide dog or her cane.

On July 19, 2018, Ms. Vu sent a letter to Mr. Klein denying the requested accommodation. Contrary to Ms. Vu's assertion in the letter Ms. Cheshire never asked LA Fitness to provide her with a personal assistant or a personal trainer who would be "remaining with her throughout her workout." Further, the letter makes no mention of the infrequency of Ms. Cheshire's need for an escort. LA Fitness offered Ms. Cheshire complimentary guest access, however, this was insufficient since Ms. Cheshire does not have anyone, besides Mr. Anderson, with whom she can set up a schedule to attend the gym. LA Fitness' offer to provide Ms. Cheshire with an orientation of the facilities was insufficient since Ms. Cheshire would still require someone to give her the weights and bring her from station to station for her safety. A guided tour of the facility would not resolve the issues raised in Ms. Cheshire's request for an accessibility accommodation.

As to the orientation session, Ms. Vu testified at the final hearing as to what she "envisioned" would happen when Ms. Cheshire visited LA Fitness. However, as per Ms. Vu's admission during her direct examination, what she "envisioned" was not laid out in the letter.

Although Ms. Vu explained the absence of certain issues from her letter by saying that her letter was only a memorialization of the important items from the conversation with Ms. Cheshire, needing a way for a member, who does not have an available companion, to be able to identify the weights they are paying to use seems like an important issue to address. That important issue was absent from Ms. Vu's letter.

Ms. Vu, on behalf of LA Fitness, offered to allow Ms. Cheshire to bring her service animal to the gym—a concession that is already required by Florida law.

Ms. Cheshire testified that because of her flexible schedule, she does not have to go to the gym during its busiest time, how she envisioned getting to know and developing a friendly relationship with the staff at LA Fitness and reiterated her flexibility for use of an escort.

LA Fitness' Policies and Procedures in relation to the ADA and Analysis Performed on the Requested Accommodations

LA Fitness' training materials for employees regarding the ADA during the relevant time period (12/27/14 to present) is comprised of two documents on the LA Fitness intranet and a video about service dogs. All of the training that all LA Fitness employees receive relating to accommodating members with disabilities is pointing those employees to the two documents on the intranet and the video regarding service animals that's available on the intranet and on the website. There may also be sales meetings where the ADA is discussed, but the dates and locations of such meetings are unknown.

An employee of LA Fitness can access the accommodation documents through the intranet. However, LA Fitness has no way of knowing if and when its employees viewed the documents, and never tests employees on the contents of the documents. Likewise, LA Fitness does not have any way of knowing if or when its employees viewed the service animal video posted on the LA Fitness website and intranet, or read the ADA policies on the intranet. LA Fitness does not know if corporate headquarters or managers follow up with employees as to whether the employees have read the policies. LA Fitness is not aware of any employee having been disciplined for not reading the ADA policies on the intranet.

LA Fitness did not take into account the profitability of the Pompano Location, or the cost of staffing, in making the determination that it could not provide Ms. Cheshire with the accommodations she requested.[4] Further, LA Fitness is not aware of whether it provides specific training to operations managers on how to address members who may call regarding accommodations based on a disability. In fact, it does not know who from corporate would have been involved in addressing Ms. Cheshire's requests for accommodations, made on the conference call with Ms. Vu on June 27, 2018.

LA Fitness admitted it has people available who could, with notice, bring someone over to an area of the club. In fact, Frank Hayne ("Mr. Hayne"), Operations Manager at the LA Fitness Pompano Beach location, testified that staff members routinely use a lift to help members with a disability to get in and out of the pool, and, more even more importantly, that they sometimes stay with the member while the member is in the pool, depending on the need. That level of assistance goes way beyond Ms. Cheshire's request.

More importantly, contrary to Ms. Vu's letter (Exhibit 33) denying Ms. Cheshire's accommodation requests, LA Fitness' Vice President of Human Resources, Mindy Stokesberry, testified that, with one hour's notice, LA Fitness could have someone available for Ms. Cheshire, to take her to the area where she wanted to exercise and give her the weights that she wanted to use; checking on her frequently to see if she needed further assistance.

LA Fitness does not know whether it performed any analysis or hired any experts to determine whether it would be

[4] LA Fitness presented no testimony or evidence at the Final Hearing as to any financial burden that Ms. Cheshire's requested accommodations would impose on it, performed no financial based analysis, and therefore it did not establish any undue burden defense as to the provision of auxiliary aids and services.

feasible to put braille stickers on dumbbells that would identify the weights. Mr. Hayne testified that he never did any search for whether weights with braille are available in the fitness industry. Mr. Hayne also testified that he never did any testing or analysis as to whether braille stickers could withstand the new COVID cleaning agent LA Fitness was using.

While LA Fitness has rules requiring members to re-rack weights, it knows that members do not always follow this rule.

Cheshire's Expert, Matthew Dietz

Cheshire's expert in this matter is Matthew Dietz, Esq. ("Mr. Dietz") A copy of Mr. Dietz' Expert Report dated March 16, 2020 and Curriculum Vitae were admitted into evidence as Exhibits 2 and 3. The parties stipulated that Mr. Dietz is a qualified expert. Mr. Dietz was retained to render an opinion as to whether Ms. Cheshire's requested accommodations were reasonable accommodations under the ADA and would not be an undue burden or a fundamental alteration to LA Fitness' business practices.
Mr. Dietz opined on three areas:

i. Obligations of places of public accommodations to comply with the ADA;

ii. Requests for reasonable and necessary modifications of policies, practices and procedures under the ADA for persons with visual impairments; and

iii. Analyzing whether the requested accommodation or modification would be an undue burden on the public accommodation, or would fundamentally alter the public accommodation's business practices.

According to Mr. Dietz, one of the four areas that are considered discrimination under the ADA would be a failure to make reasonable modifications of policies and procedures. A modification being sought must be both reasonable and necessary. In the context of Title III of the ADA, the terms reasonable accommodation and reasonable modification are used interchangeably.

Mr. Dietz opined that, based on the nature of Ms. Cheshire's requested accommodations and LA Fitness' response (Ms. Vu's letter), LA Fitness denied Ms. Cheshire's requests in their entirety.

Matt Dietz' Analysis of Each Accommodation Request

Accommodation Request 1 - Labeling weights and machines with braille labels

Mr. Dietz opined that Ms. Cheshire's request for having braille stickers placed on the machines and dumbbells was reasonable. Providing this accommodation would be providing an auxiliary aid or effective communication, which is the third of the four types of discrimination under Title III of the ADA.

Accommodation Request 2 – Providing Ms. Cheshire an escort

Mr. Dietz opined that Ms. Cheshire's request for an escort during the times that Mr. Anderson could not be with her was reasonable. According to Mr. Dietz in his Expert Report, this requested accommodation was reasonable because:

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

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

c. The workouts were for approximately one-and one-half hours.

d. Without the escort, Ms. Cheshire would be unable to use the facility.

Providing this accommodation would fall under a modification of policies and procedures.

As Ms. Cheshire testified, she was very flexible with when she would need this accommodation (it could be any time of the day), she would only need the accommodation approximately 12 times per year, and she would provide advance notice to LA Fitness of the need for the accommodation.

Accommodation Request 3 - Re-racking the weights

Mr. Dietz opined that Ms. Cheshire's request for enforcement of the policy on re-racking weights was reasonable on its face. According to Mr. Dietz in his Expert Report,

e. 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.

f. 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.

g. What makes this even more reasonable is the fact that she could provide notice before she arrives.

h. 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.

i. 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.

Mr. Dietz opined that LA Fitness must enforce its 20/10 policy to ensure that weights are not left on the floor. Mr. Dietz testified that undue burden is a financial based defense and is not a defense to having to modify policies and procedures. Mr. Dietz testified that LA Fitness produced no financial records to allow him to even do an undue burden analysis. He further testified that Ms. Cheshire's requests would not fundamentally alter the nature of goods and services at LA Fitness.

LA Fitness' Expert, Neal Casper

LA Fitness' expert in this matter is Neal Casper ("Mr. Casper"). A copy of Mr. Casper's Expert Report dated February 20, 2020 and Supplemental Report dated April 10, 2020 were admitted into evidence as Exhibits 37 & 38. The parties stipulated that Mr. Casper is a qualified expert.

While both experts were qualified and provided valuable information, the Arbitrator found Mr. Dietz' testimony to be more persuasive. For example, in rendering his opinion, Mr. Casper never reviewed the depositions of Ms. Cheshire or Mr. Anderson, testifying that he never requested them. Further, although Mr. Casper understands that the request for braille on the dumbbells and free weights is a request for an auxiliary aide or service to provide effective communication, his initial analysis on the braille issue was done as an architectural barrier to access issue.

CONCLUSIONS OF LAW

A. INTRODUCTION

The American's With Disabilities Act ("ADA") prohibits discrimination in major areas of public life, including employment (Title I), public services (Title II), and ***public accommodations (*****Title III**). *See Lane,* 541 U.S. at 516-17.
Title III provides:
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.

Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d 1357, 1362 (S.D. Fla. 2001) (citing 42 U.S.C. § 12182(a)).

To clarify the general rule's scope, Title III also sets forth "[g]eneral prohibition[s]," *see id.* 42 U.S.C. § 12182(b)(1)[5], and "[s]pecific prohibitions," *see id.* § 12182(b)(2). The specific prohibitions provide a non-exhaustive list of "examples of actions or omissions that constitute [prohibited] discrimination." *A.L. ex rel. D.L. v. Walt Disney Parks & Resorts US, Inc.,* 900 F.3d 1270, 1292 (11th Cir. 2018); *see* 42 U.S.C. § 12182(b)(2)(A)(i)-(v).[6]

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[5] **(1)** General prohibition.

(A) Activities.

(i) Denial of participation. It shall be discriminatory to subject an individual … on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual … to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual …, on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual …, on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual … with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual …" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

…

[6] **(2)** Specific prohibitions.

(A) Discrimination. For purposes of subsection (a), discrimination includes—

The relevant portions of the general prohibitions applicable to this case fall under §§ 12182(b)(1)(A)(i-iii) and (B). The relevant portions of the specific prohibitions applicable to this case fall under § 12182(b)(2)(A)(ii) and § 12182(b)(2)(A)(iii).

B. THE ELEMENTS OF MS. CHESHIRE'S TITLE III CLAIM

Broadly speaking, Ms. Cheshire must prove that (1) she is a disabled individual; (2) LA Fitness owns, leases, or operates a place of public accommodation; and (3) LA Fitness discriminated against Ms. Cheshire within the meaning of the ADA. *See Segal v. Rickey's Restaurant and Lounge, Inc.*, 2012 WL 2393769, at *7 (S.D. Fla. 2012) (citing 42 U.S.C. § 12182(a)); *see also South Florida Stadium Corp.*, 161 F.Supp.2d at 1363 (citing *Tugg v. Towey*, 864 F.Supp. 1201, 1205 (S.D. Fla. 1994)). Here, Ms. Cheshire contends she was discriminated against based on LA Fitness' violations of the general prohibitions section of Title III as set forth in 42 U.S.C. §§ 12182(b)(1)(A)(i-iii) and (B) as well as the more specific prohibitions against discrimination set forth in 42 U.S.C. §§ 12182(b)(2)(A)(ii)-(iii).

1. <u>Ms. Cheshire Has Standing to Bring Her Claims</u>

As an initial matter, and before reaching the elements of Ms. Cheshire's prima facie claim, I address LA Fitness' affirmative defense that Ms. Cheshire lacks standing to bring this action.

The Constitution limits the jurisdiction of federal courts to "cases" and "controversies," U.S. Const. Art. III § 2, and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges ... a real and immediate-as opposed to a merely conjectural or hypothetical-threat of future injury." *Wooden v. Board of Regents of University System of Georgia,* 247 F.3d 1262, 1284 (11th Cir. 2001).

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability … with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(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;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

42 U.S.C. § 12182(b)(2)(A)(i)-(v) (emphasis added).

The elements of standing are (1) "injury in fact," (2) a causal connection between the injury and the conduct complained of, and (3) that the injury "is likely to be redressed by a favorable judicial decision." *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 924 (11th Cir. 2020) (quoting *Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016)). The "injury in fact" element requires a plaintiff to demonstrate a personal stake in the litigation and an "[a]bstract injury is not enough." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). In addition, when seeking injunctive relief, a plaintiff "must show past injury and a real and immediate threat of future injury" that is not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Houston v. Marod Supermarkets, Inc.,* 733 F.3d 1323, 1329 (11th Cir. 2013). With respect to ADA cases, "courts have held that a plaintiff lacks standing to seek injunctive relief unless [she] alleges facts giving rise to an inference that [she] will suffer future discrimination by the defendant." *Shotz v. Cates,* 256 F.3d 1077, 1081 (11th Cir. 2001). "[I]n the context of future violations of the ADA, courts have generally focused on four factors when deciding the likelihood that [Ms. Cheshire] will return to [LA Fitness'] facility and suffer a repeat injury: '(1) the proximity of the place of public accommodation to [Ms. Cheshire's] residence; (2) [Ms. Cheshire's] past patronage of [LA Fitness's] business; (3) the definitiveness of [Ms. Cheshire's] plan to return and (4) [Ms. Cheshire's] frequency of travel near respondent.'" *See Segal v. Ricky's Restaurant and Lounge, Inc.*, Case No. 11-61766-CIV, 2012 WL 2393769, at *5 (S.D. Fla. June 25, 2012) (citing *Fox v. Morris Jupiter Assocs.,* Case No. 05–80689–CIV, 2007 WL 2819522, at * 4 (S.D. Fla. Sept. 25, 2007)).

In this case, Ms. Cheshire meets the requirements for both types of standing. First, Ms. Cheshire has been a member of LA Fitness since December 27, 2014 (Ex. 16), used LA Fitness facilities many times (Ex. 29), and both Ms. Cheshire and Mr. Anderson have maintained their LA Fitness memberships. Second, Ms. Cheshire, through her companion Mr. Anderson, attempted to obtain an accommodation from LA Fitness. Third, after encountering barriers to access while trying to use LA Fitness' facilities, requesting accommodations from LA Fitness through Mr. Anderson, and LA Fitness failing to provide an accommodation, Ms. Cheshire's private counsel (Nolan Klein) engaged with LA Fitness in an attempt to resolve the issues. Ms. Cheshire, her counsel, and Mr. Anderson spoke with a representative of LA Fitness (Minh Vu) regarding Ms. Cheshire's experiences at LA Fitness and requests for accommodations, and even then, LA Fitness failed to provide Ms. Cheshire with accommodations as required under the ADA. Therefore, there is no question that Ms. Cheshire has suffered an injury in fact that is causally connected to LA Fitness' conduct.

As concerns injunctive relief, the testimony and evidence presented at the final hearing established that Ms. Cheshire will suffer future discrimination by LA Fitness and that she intends to return to LA Fitness' facilities. Ms. Cheshire has kept her membership active; she resides in close proximity to LA Fitness' facilities, she frequented LA Fitness' facilities in the past, and she is definitively returning to LA Fitness' facilities in the future. The travel distance from Ms. Cheshire's home address to the Pompano Location is only 4.4 miles.

The difficulties caused by Ms. Cheshire's inability to access LA Fitness' goods and services constitute a "concrete and particularized" injury that is not "conjectural" or "hypothetical," and will continue if the goods and services are not made available to her. *See Muransky*, 979 F.3d at 925; *Lujan*, 504 U.S. at 560-61. Therefore, Ms. Cheshire has standing to bring a claim for injunctive relief.

2. Ms. Cheshire Is Disabled

A legally blind person is considered a disabled individual for purposes of Title III of the ADA. *See generally Gomez v. General Nutrition Corporation*, 323 F.Supp.3d 1368 (S.D. Fla. 2018). It is undisputed that Cheshire is disabled because she is blind.

Ms. Cheshire established at the Final Hearing that she is blind. Ms. Cheshire is a United States Army veteran, who served for eight years as a helicopter armament systems mechanic. Following Ms. Cheshire's years of military service, she became an EMT-Paramedic. In 2009, while working on an ambulance, Ms. Cheshire was involved in an accident and sustained a traumatic brain injury which resulted in total loss of vision. Ms. Cheshire utilizes a cane to detect obstacles as she walks, and also uses a service animal for assistance. Further, LA Fitness stipulated at the Final Hearing that Cheshire was a qualified individual with a disability.

Ms. Cheshire has therefore satisfied her burden of establishing that she is a qualified individual with a disability.

3. LA Fitness Is A Place Of Public Accommodation

LA Fitness admits in its Answer to the Demand for Arbitration that it is a place of public accommodation within the meaning of Title III of the ADA. Further, LA Fitness stipulated in the Parties' Stipulated Facts submitted prior to the Final Hearing that it is a place of public accommodation under the ADA.
Ms. Cheshire has therefore satisfied her burden of establishing that LA Fitness is a place of public accommodation under the ADA.

4. LA Fitness Discriminated Against Cheshire Under the ADA

a) LA Fitness Violated Title III's General Prohibitions

Title III sets forth "[g]eneral prohibition[s]" *against discrimination.* 42 U.S.C. § 12182(b)(1). The relevant provisions here are,

(1) General prohibition.

(A) Activities.

(i) Denial of participation. It shall be discriminatory to subject an individual … on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual … to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual …, on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual …, on the basis of a disability or disabilities of such individual …, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual … with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual …" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

42 U.S.C. § 12182(b)(1)(A)(i)-(ii) and B.

LA Fitness violated these general prohibitions against discrimination. For example, LA Fitness violated 42 U.S.C. § 12182(b)(1)(A)(i) by refusing to provide Ms. Cheshire with the requested accommodations of an escort to guide her through the LA Fitness location upon reasonable notice and to identify for her the weight amounts for dumbbells and other weights at the LA Fitness' gyms (and failed to put any identifiers on the weights and dumbbells to permit Ms. Cheshire to identify the weights – such as braille stickers. Although such stickers would not resolve the dangers inherent in having a blind person traverse a weightroom where weights can be left strewn around and Olympic bars jut out from bench press benches at waist level, and shoulder press or squat racks at chest or head

level, they would at least provide Ms. Cheshire the ability to identify weights once safely at her workout location). In addition, specifically at the Pompano Location, Ms. Cheshire was denied the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of LA Fitness. Without such accommodations, Ms. Cheshire would be unable to independently utilize the LA Fitness goods and services.

Further, LA Fitness violated 42 U.S.C. § 12182(b)(1)(A)(ii) when, in response to Mr. Anderson's request that Ms. Cheshire be provided an escort to identify weights for her during her workouts, its general manager, Ms. Rojas, suggested to Mr. Anderson that Ms. Cheshire hire a personal trainer to guide her through the Pompano Location. Requiring Ms. Cheshire to hire a personal trainer in order to have a sighted guide provided an un-equal opportunity for Ms. Cheshire to participate in the goods and services offered by LA Fitness, as compared to that afforded to non-disabled customers who were not required to pay a premium of hiring a personal trainer to identify weights and assist them in navigating through the facility. Further, requiring Ms. Cheshire to hire a personal trainer to act as a sighted guide amounted to a surcharge she would have to pay to cover the cost of a modification of a policy or procedure and for auxiliary aids and services, which is a direct violation of 28 U.S.C. § 36.301(c) ("A public accommodation ***may not impose a surcharge*** on a particular individual with a disability or any group of individuals with disabilities ***to cover the costs of measures, such as the provision of auxiliary aids***, barrier removal, alternatives to barrier removal, ***and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act*** or this part." (emphasis added).

Additionally, LA Fitness violated 42 U.S.C. § 12182(b)(1)(B) by failing to afford Ms. Cheshire goods and services in the most integrated setting appropriate for Ms. Cheshire (braille stickers on weights, or in the alternative, a sighted guide who could identify the weights for her during her workouts).

As set forth herein, LA Fitness violated the general prohibition provisions of Title III, as further evidenced by its violations of Title III's specific prohibitions against discrimination as set forth below.

b) <u>LA Fitness Violated Title III's Specific Prohibitions</u>

LA Fitness also violated Title III's specific prohibitions against discrimination set forth in 42 U.S.C. § 12182(b)(2)(A)(ii) and 42 U.S.C. § 12182(b)(1)(A)(iii), which state, respectively:

(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;[7]

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.[8]

c) <u>Accommodations are reasonable and necessary for Ms. Cheshire to receive the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations at LA Fitness Facilities, including the Pompano Location</u>

As a preliminary matter, I find that as it relates to both of these specific prohibitions against discrimination, accommodations are reasonable and necessary for Ms. Cheshire to receive the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.

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[7] Hereinafter referred to as the "Modifications in Policies and Procedures Section."

[8] Hereinafter referred to as the "Auxiliary Aids and Services Section."

Ms. Cheshire bears the burden of proving not only that she is disabled but also that her requested modification is both "reasonable" and "necessary." *A.L.,* 900 F.3d at 1292. No ADA violation occurs, however, when the private entity demonstrates that the requested modifications would "fundamentally alter the nature of" its services and facilities. *Id*., citing 42 U.S.C. § 12182(b)(2)(A)(ii); *Martin,* 532 U.S. at 682 (quoting § 12182(b)(2)(A)(ii)). The defendant private entity bears the burden of proof on the fundamental alteration inquiry. *Id*.

The Supreme Court has explained that the statutory text of § 12182(b)(2)(A)(ii) "contemplates three inquiries" for determining whether a requested modification to a public accommodation's procedures is required. *Id.,* citing *Martin,* 532 U.S. at 683 n.38. The three inquiries are: (1) whether the requested modification is "reasonable"; (2) whether the requested modification is "necessary" for the disabled individual; and (3) whether the requested modification would "fundamentally alter the nature" of the public accommodation. *Id.*

Ms. Cheshire Made a Request for Reasonable Accommodations

The reasonableness inquiry involves whether the requested accommodation 'is both efficacious and proportional to the costs to implement it." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.,* 765 F.3d 1277, 1289 (11th Cir. 2014).[9]

In *Schaw v. Habitat for Humanity of Citrus County, Inc.,* 938 F.3d 1259 (11th Cir. 2019), the court found that the burden of the plaintiff was to demonstrate a reasonable request and then the burden would shift to the defendant to prove that the accommodation would be a fundamental alteration or undue burden. *Id*. at 1266. The court held it was error to shift the burden to establish that the accommodation provided to Mr. Schaw was not reasonable. *Id.* at 1269.

A court must consider first whether the claimant'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. As addressed in *Schaw*:

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.' " *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc*., 765 F.3d 1277, 1289 (11th Cir. 2014) (quoting *Oconomowoc Residential Programs v. City of Milwaukee,* 300 F.3d 775, 784 (7th Cir. 2002)). Assessing reasonableness "require[s] a balancing of the parties' needs." *Id*. An accommodation isn't reasonable if it requires "a fundamental alteration in the nature of a program" or imposes "undue financial and administrative burdens." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (interpreting the term "reasonable accommodation" in the analogous Rehabilitation Act context); *see also Schwarz*, 544 F.3d at 1220.

Id. at 1264-65.

As testified to by Mr. Dietz at the Final Hearing, a determination of reasonableness involves the question of whether the accommodation is closer to saddling a camel than cutting off its hump.[10] Specifically, the difference between a

[9] The standards for demonstrating the failure to reasonably accommodate are the same under the Americans with Disabilities Act and the Fair Housing Act and are interpreted identically. *Good Shepherd Manor Found., Inc. v. City of Momence,* 323 F.3d 557, 561 (7th Cir. 2003); *Sinisgallo v. Town of Islip Hous. Auth*., 865 F.Supp.2d 307, 337 (E.D.N.Y. 2012)), *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003)*; Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896, 907 (M.D. La. 2017)

[10] The Department of Justice also 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;

reasonable accommodation and a fundamental alteration is the difference between putting a saddle on a camel (reasonable accommodation) and cutting the hump off (fundamental alteration).

To that end, Mr. Anderson, on behalf of Ms. Cheshire, spoke to Ms. Rojas, who was the General Manager of the Pompano Location. Mr. Anderson requested that Ms. Cheshire be provided with a person to guide her from station to station and hand her the dumbbells and free weights at the Pompano Location during times that she was utilizing the location without a companion. Ms. Rojas indicated that she did not think an escort would be possible. Nonetheless, she provided Mr. Anderson the number for the LA Fitness corporate office. Ms. Rojas also told Mr. Anderson that Ms. Cheshire could hire a personal trainer to escort her throughout the facility during her workouts. Mr. Anderson, on Ms. Cheshire's behalf, subsequently spoke with a representative of LA Fitness at the corporate level by telephone regarding accessibility accommodations for Ms. Cheshire and the corporate representative promised to get back to Mr. Anderson, but never did. After not hearing back from the corporate office, Mr. Anderson again spoke with Ms. Rojas and asked her if she had spoken with anyone at the corporate office. Ms. Rojas had not spoken to the corporate office.

Thereafter, Ms. Cheshire and Mr. Anderson spoke with their attorney Mr. Klein. Mr. Klein had a professional connection to Ms. Vu, who had previously represented LA Fitness on ADA public accommodation issues. Mr. Klein suggested that he reach out to Ms. Vu to try and resolve the matter. On April 17, 2018, Mr. Klein sent an email to Ms. Vu. Therein, Mr. Klein addresses matters including but not limited to that the dumbbells and free wrights are not racked where they're supposed to be (resulting in Ms. Cheshire being unable to find the proper weights), that the dumbbells and weights do not have braille (making it impossible to determine which weights are which) and that Ms. Cheshire was requesting an escort to assist her through the facility (and provide her the proper dumbbells and free weights).

Thereafter, on June 27, 2018, Mr. Anderson, Mr. Klein, and Ms. Cheshire communicated with LA Fitness' representative, Ms. Vu, telephonically regarding Ms. Cheshire's accessibility accommodation requests. During the conversation, Ms. Cheshire discussed how she is a professional athlete and that she goes to the gym with Mr. Anderson, and therefore would need assistance infrequently when Mr. Anderson is not in town (approximately 12 times per year). During this call, Ms. Cheshire and Mr. Anderson discussed the issues Ms. Cheshire faces when she does not have assistance, including: (1) the weights and dumbbells are not re-racked presenting a tripping hazard; (2) dumbbells not being in order making it impossible for Ms. Cheshire to locate the correct weights; (3) need for assistance navigating through the free weights; (4) when using the weights, Ms. Cheshire does not know the weight of the dumbbells because she cannot see the numbers marking the amounts; and (5) need for assistance with knowing the starting weight on the machines since Ms. Cheshire cannot see the numbers marking the weights. *See id*. As an athlete, it was explained during the call that Ms. Cheshire's schedule is flexible, and Ms. Cheshire would not use the facility during its busiest times and could accommodate the facilities' schedules.

During the conversation with Ms. Vu there was no back-and-forth regarding what accommodations might work for Ms. Cheshire. Instead, Ms. Vu questioned Ms. Cheshire on how she is able to independently use other types of public accommodations with her guide dog or her cane. On July 19, 2018, Ms. Vu sent a letter to Mr. Klein. Therein, Ms. Cheshire's entire accommodation requested was denied.

<u>Ms. Cheshire's Request for an Escort was a Request for a Reasonable Accommodation</u>

The most obvious way Ms. Cheshire can overcome the barriers to her use of the facilities (the existence of obstacles on the floor, the existence of weight bars protruding from benches at waist and chest level, and Ms. Cheshire's complete inability to determine the location of weights and machines or the amounts of the weights she

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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
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selects) is to have the assistance of a sighted individual. A health club's refusal to provide a guide is a violation of the ADA.

Reveyoso v. Town Sports Club involved a very similar issue to what is presented here. This includes the original decision of the Supreme Court of New York (which is the trial court in New York) overturning the jury's verdict in favor of the defendant, 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.

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. 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 (N.Y. App. Div. 2018). The Appellate Division went on to state, "Notably, there is no evidence in the record that the accommodation cost defendant any money at all, or otherwise represented any sort of undue hardship on defendant as that term is defined in the statute (*see* Administrative Code of City of NY § 8-102 [18] [a]-[d]; *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 835 (2014))." *Id*. The Appellate 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 view of the Department of Justice guidelines and the examples of run of the cases, where there is more than one staff member available, Cheshire's request for an accommodation in the form an escort during her limited independent visits to LA Fitness' gyms, was very reasonable. This reasonableness of this accommodation request is supported by the following:

- <u>The accommodation was approximately 12 times per year, during off-hours, and with significant advance notice.</u> There was no evidence submitted by LA Fitness as to what is the "minimum number of employees" needed to operate the Pompano Location. This facility had sales staff, personal trainers, maintenance staff, and others at all times. This is substantially more than the limited front desk staff in *Reveyoso*.

- <u>The escort duties are unskilled duties and sporadic during the time frame of her workout.</u> This accommodation did not require a skilled professional, such as a sign language interpreter. This duty could be done by any employee of the facility and would only need to be done for the few times Ms. Cheshire would need an escort when Mr. Anderson was unavailable. Further, Ms. Cheshire (a Para-Olympian) expressly testified that she did not request or require a personal trainer.

- <u>It is for approximately one-and one-half hours on those few occasions</u>. The request was for the accommodation upon reasonable notice with flexible hours. It would not be any burden to assign any employee to assist Ms. Cheshire during her workout. Without the escort, she is unable to independently use the facility. This is no different from an employee assisting a blind shopper in a supermarket; however, in the supermarket, there would typically be no notice as to 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, as opposed to a health club where the primary responsibility is to assist customers. In addition, LA Fitness 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 20/10 policy and the "15 minutes on the floor and 15 minutes at the desk" policies are indicative of the frequent presence of staff available to assist Ms. Cheshire. Moreover, Ms. Cheshire testified that she would be satisfied if someone gave her several sets of weights and then left her at that station to perform her exercises, returning to assist her on relocating when she was done. In addition to the employees performing their duties under the 20/10 policy, Operations

Manager Frank Haynes testified that he and the other staff members also are responsible for making rounds to pick up weights and keep the gym clean; stating further that he does so once or twice an hour. It would seem that between the employee handling their 20/10 duties and the operations manager and "other staff" making the rounds to clear up weights left by members, there should be no shortage of individuals who could continually check on Ms. Cheshire to see if she needed a new set of weights or an escort to another machine or part of the facility. Accordingly, providing an escort is a very reasonable accommodation.

Ms. Cheshire's Request that the Weights and Machines be labeled with Braille, and that the policy to have them re-racked be followed Was a Request for a Reasonable Accommodation

Providing braille is specifically mentioned as a measure which a public accommodation should take to ensure that a blind person can access those areas where goods and services are made available to the public. *See Van Winkle v. Pinecroft Center, L.P.*, Case No. H-16-2694, 2017 WL 3648477, at *3 (S.D. Tex. August 23, 2017).

As part of the letter from Ms. Cheshire's counsel Mr. Klein, to LA Fitness' counsel, Ms. Vu, Ms. Cheshire specifically noted that the machines and dumbbells do not have braille or raised numbers. Therefore, absent another person assisting, there is no way for a blind person to determine what machine they're using, what weight on the machine they're using or what size dumbbell they're using. Accordingly, the lack of braille on the machines is preventing Ms. Cheshire from enjoying the use of the facilities.

Providing braille on the machines and dumbbells is a reasonable accommodation. Putting braille on the dumbbells is not difficult. In fact, during the hearing, a simple Google search revealed that there are dumbbells available that have braille built in.

LA Fitness has no basis for denying this accommodation. The testimony at the Final Hearing demonstrated that LA Fitness: (1) does not know whether it performed any analysis of whether it would be feasible to put braille stickers on dumbbells that would identify weights; (2) does not know what vendors, if any, might be used to put braille on weights and machines; and (3) what experts were hired to determine whether installation of braille on weights and machines was feasible.

Further, it is obvious that a failure of LA Fitness to enforce its re-racking of weights policy could pose a substantial safety hazard to a blind member of LA Fitness, including Ms. Cheshire. In Ms. Cheshire's experience at LA Fitness gyms, including the Pompano Location, the dumbbells and free weights are strewn across the floor, and are not in the correct order. Members often times do not re-rack the weights. It was established at the Final Hearing that LA Fitness does not always enforce its rules requiring members to re-rack weights.

For the reasons set forth herein, I find that Ms. Cheshire has satisfied her burden of establishing that her requests for accommodations were reasonable.

Ms. Cheshire's Requests for Accommodations were Necessary

To determine whether an accommodation is "necessary" under § 12182(b)(2)(A), we consider "how the[] [public accommodation's goods and services] are used by nondisabled [customers]" and then ask whether the operator of the public accommodation has provided its disabled customers with a "like experience and equal enjoyment." *A.L.,* 900 F.3d at 1296 (vacating in part grant of summary judgment because a factual dispute existed as to whether a theme park's program creating a tailored experience for disabled patrons offered an experience comparable to the experience offered to nondisabled patrons). If the operator of a public accommodation has failed to provide disabled customers with "an experience comparable to that of [nondisabled customers]," then an accommodation is necessary. *Id.* at 1294 (quoting *Baughman v. Walt Disney World Co.,* 685 F.3d 1131, 1135 (9th Cir. 2012));[11] *see also Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.,* 339 F.3d 1126, 1133 (9th Cir. 2003) (concluding that an accommodation was necessary when a movie theater, which offered seating to patrons who

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[11] In *A.L.* the Eleventh Circuit adopted the Ninth Circuit's approach in *Baughman. See A.L.*, 900 F.3d at 1296.

used a wheelchair in the front row only, failed to afford these patrons a viewing experience comparable to that offered to nondisabled patrons by denying them access to "comfortable viewing locations").

Here, using the standard established in *A.L.*, accommodations were necessary because LA Fitness failed to provide its disabled customer, Ms. Cheshire, with an experience comparable to the one it provided nondisabled customers. *A.L.* requires us to compare LA Fitness' treatment of sighted customers (who could navigate the LA Fitness facilities on their own, see obstacles on the floor and elsewhere, and identify weights of dumbbells and weights on machines) with its treatment of visually-impaired customers, such as Ms. Cheshire, who could not independently avail themselves of those features. *See* 900 F.3d. at 1296.

By offering inferior treatment to Ms. Cheshire, LA Fitness failed to provide her with an "experience comparable to that of" its sighted customers. *Id.* at 1294 (internal quotation marks omitted); *see also* 42 U.S.C. § 12182(b)(2)(A)(iii) (requiring that disabled individuals are not "excluded, denied services, segregated[,] or *otherwise treated differently* than other individuals because of the absence of auxiliary aids") (emphasis added). Because of that failure, it was "necessary" for LA Fitness to provide an accommodation unless providing such an accommodation would "fundamentally alter the nature of [LA Fitness' goods and services]" in relation to both the Modification in Policies and Practices Section and Auxiliary Aids and Services Section, or result in an "undue burden" in relation to the Auxiliary Aids and Services Section.

For the reasons set forth herein, Ms. Cheshire has satisfied her burden of establishing that her requests for accommodations were necessary.

LA Fitness failed to satisfy its burden of showing that Ms. Cheshire's requested accommodations would "fundamentally alter the nature" of LA Fitness

LA Fitness bears the burden of proof on the fundamental alteration inquiry. *A.L.,* 900 F.3d at 1292; citing 42 U.S.C. § 12182(b)(2)(A)(ii); *Martin,* 532 U.S. at 682 (quoting § 12182(b)(2)(A)(ii)). For the reasons set forth herein, I find that LA Fitness has failed to meet its burden.

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 (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.

In *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 682 (2001), the Supreme Court expounded on the meaning of "fundamental alteration" within the context of whether a professional golfer with a mobility impairment can participate in a competition if he was permitted to use a golf cart and the other competitors were not. The Court analyzed this issue (in part) as follows:

In this case, however, the narrow dispute is whether allowing Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q–School, is a modification that would "fundamentally alter the nature" of those events.

In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.

As an initial matter, we observe that the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking—using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible… The walking rule that is contained in petitioner's hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.

Indeed, the walking rule is not an indispensable feature of tournament golf either. As already mentioned, petitioner permits golf carts to be used in the SENIOR PGA TOUR, the open qualifying events for petitioner's tournaments, the first two stages of the Q–School, and, until 1997, the third stage of the Q–School as well. …

PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–86 (2001).

For example, a fundamental alteration would be requiring a nursing school to waive all clinical requirements for a deaf applicant. *Schaw,* 938 F.3d at 1266. To determine if it is a fundamental alteration, the first question is what the essential aspects of LA Fitness' activities are.

Ms. Cheshire's expert, Mr. Dietz, opined that providing the requested accommodations would not amount to a fundamental alteration. Mr. Dietz stated in his report:

[T]he 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. *See* Hayne 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.
The accommodation of providing a person to guide Ms. Cheshire is not a fundamental alteration. First, LA Fitness' trainers already frequently walk their facilities. As already stated, LA Fitness has a 20/10 policy which requires personal trainers to do a "Club Walk Through" 20 minutes after every hour and 10 minutes before the end of every hour. Accordingly, having someone assist Ms. Cheshire in navigating the facility (not training) would not interfere with the already mandated function of walking the facility, and therefore is not a fundamental alteration.
Second, Ms. Cheshire would only require the accommodation approximately 12 times a year. Such a limited time frame would not be an interruption to LA Fitness' business. Indeed, the individual does not have to be an actual

trainer, it could be any available employee. Ms. Cheshire seeks only an escort, not free personal training. Thus, there is no fundamental alteration.

Third, as Ms. Cheshire's expert opined, the essential aspect of a health club is to assist its members in the use of its facilities. Assisting a member in finding an exercise machine or weight would fit within the essential aspect of LA Fitness' business, a health club and therefore not be a fundamental alteration.

For these reasons, LA Fitness failed to meet its burden of establishing that Ms. Cheshire's accommodations would fundamentally alter the nature of its good or services.

As to the provision of auxiliary aids and services necessary to permit effective communication, LA Fitness failed to satisfy its burden of showing that Ms. Cheshire's requested accommodations would be an Undue Burden.

The Undue Burden defense only applies to the Auxiliary Aids and Services Section (42 U.S.C. § 12182(b)(1)(A)(iii)), and not the Modifications in Policies and Procedures Section (42 U.S.C. § 12182(b)(1)(A)(ii)). 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.

Ms. Cheshire's expert, Mr. Dietz, also opined that providing the requested accommodations would not amount to an undue burden. Mr. Dietz stated in his report:

[T]he 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 a 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.

Mr. Dietz testified that undue burden is a financial based defense. LA Fitness stipulated that undue burden is not a defense to a modification of policies and procedures. Mr. Dietz further testified that LA Fitness produced no financial records to allow Mr. Dietz to even do an undue burden analysis. Mr. Casper, LA Fitness' own expert conceded that undue burden is not a defense to a modification of a policy or procedure.

Here, LA Fitness did not meet its burden of establishing the undue burden defense. LA Fitness did no financial analysis whatsoever when deciding to deny the accommodations requested and has not otherwise proven that the accommodations at issue cause a "significant difficulty" to LA Fitness. As Mr. Dietz pointed out in his expert report, "[m]ost 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."

For these reasons, LA Fitness failed to meet their burden of establishing the defenses of fundamental alterations and undue burden.

C. LA FITNESS FAILED TO MEET ITS BURDEN ON ITS REMAINING DEFENSES.[12]

LA Fitness raised the following additional affirmative defenses in its Answer to the Amended Demand for Arbitration, but failed to meet its burden on any of these additional defenses. These defenses are as follows: (1) Statute of Limitations; (2) Alternative Methods; (3) Removal of Architectural Barriers not Readily Achievable; (4) Equivalent Facilitation; (5) Technical Infeasibility; (6) Unclean Hands; and (7) Mootness.

1. <u>Statute of Limitations</u>

The *ADA* does not provide a statute of limitations so courts "apply the most analogous state statute of limitations." *Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 841 (11th Cir. 2017). "The most analogous state *limitations* period comes from personal injury actions, which in Florida is a four-year period, Fla. Stat. § 95.11(3)." *Id.* (citing *Everett v. Cobb Cty. Sch. Dist.,* 138 F.3d 1407, 1409 (11th Cir. 1998)). This limitations period starts on the date a plaintiff's claim accrues. *Everett,* 138 F.3d at 1410.

Accrual dates vary based on the nature of the relief sought. For example, claims for damages under Title II of the ADA based on discrete, past acts of discrimination "accrue when the plaintiff is informed of the discriminatory act." *Id*. Title III claims for injunctive relief, however, (such as the one presented by Ms. Cheshire here) are different. In contrast to damages, injunctions are forward-looking remedies. *Strickland v. Alexander,* 772 F.3d 876, 883 (11th Cir. 2014) ("injunctions regulate future conduct only; they do not provide relief for past injuries already incurred and over with"). Title III suits are not time-barred where the relief sought is an injunction to prevent "threatened future injur[ies]." *Alonso v. Alonso*, 2019 U.S. Dist. LEXIS 123801 at *8 (S.D. Fla. 2019); citing *Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1136-37 (9th Cir. 2002) ("A plaintiff has no cause of action under the ADA for an injury that occurred outside the limitations period. But he or she has a cause of action, and is entitled to injunctive relief, for an injury that is occurring within the limitations period, as well as for threatened future injury."); *see also Silva*, 856 F.3d at 841 n.16 (approving application of the "continuing violations" doctrine to Title III claim for injunctive relief, and distinguishing discrete acts of discrimination from ongoing, continuing violations).

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[12] La Fitness' affirmative defenses 1 (Standing), 3 (Failure To Request Reasonable Modification In Practices, Policies And Procedures), 6 (Fundamental Alteration), and 7 (Fundamental Alteration or Undue Burden), have already been addressed above.

Here, Ms. Cheshire has brought an ADA Title III claim for injunctive relief, and therefore there is no statute of limitations that bars her claim. Further, even if Florida's four-year statute of limitations for personal injury were to apply to this matter, the claim was timely brought. Ms. Cheshire's requests for accommodations were made and denied in early 2018, and the original Complaint in this matter was filed by Ms. Cheshire in the United States District Court for the Southern District of Florida on August 15, 2018.

For these reason I find that the statute of limitations defense fails.

2. <u>Alternative Methods</u>

The concepts of the use of alternate methods other than that requested by the person with a disability was addressed in *Schaw v. Habitat for Humanity of Citrus County, Inc.,* 938 F.3d 1259, 1269 (11th Cir. 2019) that when it comes to reasonable accommodation of a disability, a court must consider first whether the plaintiff's own requested accommodation "seems reasonable on its face" before turning to consider a defendant's objections and counterproposals." If the requested accommodation is unreasonable – i.e. a fundamental alteration or undue burden, then the entity can use an alternative method to achieve compliance. However, alternate methods are in the ADA regulations as an alternative when removal of architectural barriers would not be readily achievable under 42 U .S.C. § 12182(b)(2)(A), which provides as follows:

(a) General. Where a public accommodation can demonstrate that barrier removal is not readily achievable, the public accommodation shall not fail to make its goods, services, facilities, privileges, advantages, or accommodations available through ***alternative methods***, if those methods are readily achievable.

(b) Examples. Examples of alternatives to barrier removal include, but are not limited to, the following actions—
(1) Providing curb service or home delivery;
(2) Retrieving merchandise from inaccessible shelves or racks;
(3) Relocating activities to accessible locations;

Here, Ms. Cheshire seeks modifications of policies and procedures and the provision of auxiliary aids and services. This is different than the removal of architectural barriers to access. Since the alternative methods issue does not come into play when dealing with modification to policies and procedures or auxiliary aids and services to provide effective communication, the defense is inapplicable to the issues here. Further, LA Fitness did not provide any testimony or evidence that it offered any alternate methods that would provide Ms. Cheshire the ability to independently use the LA Fitness gyms without a companion. As set forth in Ms. Vu's letter, LA Fitness only offered to provide Ms. Cheshire a companion at no charge, the ability to use her service animal, and someone form the gym upon notice to orient Ms. Cheshire to the areas she wants to work out in. None of these would allow Ms. Cheshire to independently use the gym without a companion, identify the weights, and ensure that her path of travel and workout areas are free of obstacles during her workouts.

3. <u>Removal of architectural Barriers Not Readily Achievable</u>

This matter does not involve architectural barriers and does not involve the readily achievable standard. The operative section of the ADA is 42 U.S.C. § 12182(b)(2)(A), which provides as follows:
(A) Discrimination
For purposes of subsection (a), discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(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;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are ***readily achievable***.

(emphasis added). The case at bar involves subsection (ii), which involves accommodations or modifications to policies, practices and procedures, and subsection (iii) which involves effective communication for those with sensory impairments. The readily achievable defense does not apply to these two sections, and is therefore not a bar to Ms. Cheshire's claims. Further, LA Fitness presented no evidence or testimony at trial to support its defense that the accommodations sought by Ms. Cheshire were not readily achievable.

4. Equivalent Facilitation

As with the prior defenses, equivalent facilitation is a term defined and used with regards to architectural barriers. The ADA Standards for Accessible Design,[13] which are found at the guidance promulgated by the United States Access Board and the Department of Justice and incorporated in the regulations. The standards define "Equivalent Facilitation" as follows:

103 Equivalent Facilitation

Nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed, provided they result in substantially equivalent or greater accessibility and usability.

The purpose of this section was not to promote the use of new technologies or strategies for increasing access that were not originally contemplated in the 1994 standards, or the, as amended, 2010 standards. In addition, it also allows the use of ways to provide greater accessibility that may not be required under the ADA. The seminal example of this is the use of an automatic door where a door may be too heavy or there is not sufficient clearance between the door and the wall. See *e.g. Thomas v. Ariel W*., 242 F. Supp. 3d 293, 303 (S.D.N.Y. 2017) (finding that it is not equivalent facilitation to fail to provide physical access to all merchandise display areas, by simply displaying the same merchandise in another accessible area of the store, or by having an employee bring merchandise to a wheelchair user.).

Equivalent Facilitation is not a defense to the modifications of policies and procedures section or the auxiliary aids and services sections of the ADA. Further, LA Fitness presented no testimony or evidence at the Final Hearing that would support a defense that it provided equivalent facilitation for Ms. Cheshire that would allow her to independently use the gym without a companion.

5. Technical Infeasibility

Similar to Equivalent facilitation, Technical Infeasibility is also a defense used in architectural barrier issues.

[13] https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm.

This is a defined term in section 106.5 of the ADA Standards as follows:

Technically Infeasible. With respect to an alteration of a building or a facility, something that has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member that is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with the minimum requirements.

See, *e.g. Ass'n for Disabled Americans v. City of Orlando,* 153 F. Supp. 2d 1310, 1319 (M.D. Fla. 2001)("that the stepped nature of the Arena makes the dispersal of accessible seating 'technically infeasible.'" Again, there is nothing regarding structural conditions or physical or site constraints that is applicable in this arbitration, and LA Fitness did not present any evidence or testimony to demonstrate that accommodating Ms. Cheshire would be technically infeasible.

6. <u>Unclean Hands</u>

LA Fitness presented no testimony or evidence at the Final Hearing that would support an unclean hands defense. I therefore find that this defense fails.

7. <u>Mootness</u>

LA Fitness raises the defense of mootness in its Answer. However, LA Fitness presented no evidence or testimony that would support its defense that Ms. Cheshire's claims are moot.

"Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of 'Cases' and 'Controversies.' "*Troiano v. Supervisor of Elections in Palm Beach Cnty.*, Fla., 382 F.3d 1276, 1281 (11th Cir.2004) (citation omitted). "The doctrine of mootness derives directly from the case-or-controversy limitation because an action that is moot cannot be characterized as an active case or controversy. A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id*. at 1282 (citation omitted). "If events that occur subsequent to the filing of a lawsuit ... deprive the court of the ability to give the plaintiff ... meaningful relief, then the case is moot and must be dismissed. Indeed, dismissal is required because mootness is jurisdictional. Any decision on the merits of a moot case or issue would be an impermissible advisory opinion." *Id*. (citation omitted).

In *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), a blind individual brought an ADA and Rehabilitation Act claim for injunctive relief and declaratory relief after their guide dog had been denied access to certain areas of diagnostic imaging facility. The court held the claims were **<u>not moot</u>**, despite facility's purported voluntary cessation of the allegedly wrongful conduct by implementing a new, written service animal policy; plaintiff's treatment was not an isolated incident, but was the result of a years-long animal policy created by facility's owner, communicated through its ranks, and enforced on multiple occasions, sometimes vehemently, the facility's change in policy did not appear to have been motivated by a genuine change of heart, but by a desire to avoid liability, as it occurred almost nine months into the lawsuit and coincided with a change in counsel and a motion for summary judgment on grounds of mootness, and facility did not acknowledge wrongdoing, but consistently urged the validity of its actions. *Id*. at 1184-1188. *See also Sec'y of Labor v. Burger King Corp.*, 955 F.2d 681, 684 (11th Cir. 1992) ("five-year history of violations" cut against finding of mootness); *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1000 (5th Cir. Unit B Spet. 1981) ("longstanding practice" cut against finding of mootness).

Additionally, a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains. *See U.S. v. W.T. Grant*, 345 U.S. 629, 632 (1953) (noting that the "public interest in having the legality of the practices settled[ ] militates against a mootness conclusion"); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944) (controversy remains where defendant "has consistently urged the validity of the [practice] and would presumably be free to resume [it] were not some effective restraint made"); *United States v. Trans–Mo. Freight Ass'n*, 166 U.S.

290, 308 (1897) ("[M]ere [cessation] is not the most important object of this litigation.

Here, Ms. Cheshire made requests for reasonable and necessary modifications under Title III of the ADA. These requests began at the Pompano Location, continued through the corporate level, and then continued through counsel for LA Fitness (Ms. Vu). At all steps of this process, the accommodations requested by Ms. Cheshire were denied (she was never provided with an escort to stay with her during her workouts and identify the weights on the dumbbells and machines she desired to use). LA Fitness failed to modify its policies and practices and failed to provide auxiliary aids to Ms. Cheshire that would have allowed Ms. Cheshire full and equal access to the goods and services offered by LA Fitness and which would have allowed Ms. Cheshire to avail herself of the LA Fitness facilities independently. LA Fitness vigorously defended against these claims when they were filed in federal court, as well as in the subject arbitration. LA Fitness contended, through the Final Hearing, that it was not required to provide Ms. Cheshire with her requested accommodations. LA Fitness has not ceased its discriminatory treatment and practices toward Ms. Cheshire, and has not accepted responsibility for its failure to comply with Title III of the ADA. Finally, LA Fitness did not present any testimony or evidence at the Final Hearing to suggest that the claims in this case are moot. In fact, if Ms. Cheshire was to visit the Pompano Location tomorrow to work out without a companion, she would have no way of identifying weights and navigating the facility and LA Fitness would not provide her with the escort she has requested and needs for those limited purposes.

Consequently, there exists a case and controversy, and Ms. Cheshire's claims have not been mooted. I find that LA Fitness has failed to meet its burden on this defense.

CONCLUSION

As such, based on the record before the Arbitrator, and after having provided all Parties with the opportunity to present evidence, witnesses and their respective cases, the Arbitrator hereby enters a verdict and judgment in favor of Ms. Cheshire finding that Ms. Cheshire is entitled to injunctive relief under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189. In this Final Award, the Arbitrator hereby Orders and Adjudges that LA Fitness:

1. Shall, effective immediately, modify its policies and procedures and provide auxiliary aids and services to Ms. Cheshire, upon reasonable notice of at least one hour prior to her arrival at the Pompano Location or the Ft. Lauderdale Location, during times when Ms. Cheshire does not have a companion with her to assist her (for up to 12 times per year), by providing an employee who will: (a) escort Ms. Cheshire through the Pompano Location or the Ft. Lauderdale Location during her workouts; (2) ensure that any dumbbells, weights or obstacles are removed from Ms. Cheshire's path of travel; and (3) locate and identify for Ms. Cheshire the dumbbells and free weights that Ms. Cheshire desires to use during that part of her workout as well as the weight designations per plate on machines to be used; returning or having someone else return to check on her progress periodically (ie. every 10 – 15 minutes), in order to assist her in obtaining other weights or in moving to another exercise location. For purposes of this injunction, Ms. Cheshire may provide such reasonable notice to the Pompano Location or the Ft. Lauderdale Location telephonically.

2. LA Fitness shall enforce its rules and policies to ensure that dumbbells and free weights are properly re-racked after use at the Pompano Location and Ft. Lauderdale Location.

3. LA Fitness shall be required to comply with the Injunction set forth herein so long as Ms. Cheshire maintains her membership with LA Fitness. In the event Ms. Cheshire cancels her membership, she will continue to be entitled to the accommodations set forth in this Injunction upon reinstatement of such membership.

4. LA Fitness shall not impose any additional charges upon Ms. Cheshire for the accommodations set forth in this Injunction.

5. If Ms. Cheshire believes the Injunction has been violated, she shall give written notice via E-Mail to LA

Fitness through its counsel, Dave Reid, Esq. at dreid@pacifictrialattorneys.com of such violation (or through an alternative e-mail address provided to Ms. Cheshire by LA Fitness for that purpose). LA Fitness shall then have 7 days from the receipt of the written notice to investigate and correct any alleged violations. If LA Fitness fails to correct the violation, Ms. Cheshire may then seek relief from the undersigned Arbitrator or another arbitrator designated by the American Arbitration Association, and the Arbitrator and the American Arbitration Association shall retain jurisdiction to enforce the terms of this Injunction.

ATTORNEYS' FEES & COSTS

As the prevailing party, the Arbitrator allowed Ms. Cheshire to file a motion seeking to recover reasonable attorneys' fees and costs, with LA Fitness having the opportunity to respond thereto. This matter was fully litigated in the most professional manner by counsel for both parties who displayed a remarkable grasp of legal issues, none of which could be described as routine. Their knowledge of the law emanating from the Americans with Disabilities Act was extensive and greatly assisted in the resolution of this claim. Having reviewed Claimant Shawn Cheshire's Motion for an Award of Attorney's Fees and Costs and Incorporated Memorandum of Law, as well as Respondent Fitness & Sports Clubs, LLC,s Response in Opposition to Claimant's Motion for an Award of Attorneys' Fees and Costs, and having considered the arguments raised therein, the Arbitrator finds that the fees and costs sought by Claimant Shawn Cheshire in this matter are reasonable and proper, and makes a small downward adjustment for minor matters related to the pleadings and the cause.

6. Accordingly, Respondent LA Fitness shall pay to Claimant Shawn Cheshire the sum of $141,000.00 in attorney's fees and $38,440.46 in costs, for a total sum of $179,440.46.

DONE AND ORDERED in Miami-Dade County, Florida this 20th day of July, 2021.

The administrative fees of the American Arbitration Association (AAA) totaling $2,400.00 shall be borne as incurred, and the compensation of the arbitrator totaling $14,500 shall be borne as incurred.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

/s/ Alex E Ferrer

Hon. Alex E Ferrer, Arbitrator