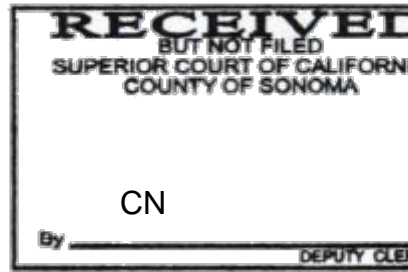


August 23, 2021

The Honorable Gary Nadler
Superior Court Judge
Courtroom 19
3055 Cleveland Avenue
Santa Rosa, CA 95403



RE: *Skaff v. Rio Nido Roadhouse*, Case No. SCV 254094
Request for Leave to File Amicus Letter and Amicus Letter

Dear Judge Nadler:

The undersigned are disability rights, civil rights, and legal services organizations that advocate for the civil rights and civil liberties of underrepresented individuals, including individuals with disabilities. The *amici* organizations include legal services providers and support centers funded by the State Bar of California to serve indigent, disabled, and senior residents of California. The Californians with disabilities represented by *amici* have the right to full and equal access to public accommodations, freedom from discrimination, and the ability to live their lives fully included in and integrated within their communities. Those rights depend in large part upon the private enforcement of state anti-discrimination statutes, including the Unruh Civil Rights Act, by disabled individuals such as Richard Skaff.

The undersigned organizations request leave to file this amicus letter in support of plaintiff's opposition to defendant's motion for fees and costs.

INTRODUCTION

This case arose after Richard Skaff was unable to patronize the Roadhouse restaurant because he encountered a parking lot without accessible parking. Mr. Skaff uses a wheelchair and requires a van-accessible parking spot. Mr. Skaff also testified that he saw no accessible route to the restaurant, and no signage indicating how a wheelchair user might access the restaurant. (Statement of Decision After Court Trial (Sonoma Cty. Super Ct., June 8, 2017), pp. 2-3 [hereinafter "Trial Court Decision"].) Immediately thereafter, he contacted the owner of the restaurant to resolve the issue informally; the owner referred Mr. Skaff to the County. (*Id.* at 3.) Mr. Skaff then retained counsel to make several attempts to resolve the matter informally, prior to litigation. (*Id.* at 3-4.) When these efforts failed, Mr. Skaff's lawyers filed a complaint under the Unruh Civil Rights Act and Health & Safety Code § 19955.

At all times, Mr. Skaff sought access improvements, not money for himself. (*See* Memorandum of Points & Authorities in Support of Motion For Attorneys' Fees (Sonoma Cty. Super Ct., Aug. 2, 2021) at 19 ["Lowbrau offered to pay \$50,000 to settle this case, but Mr. Skaff refused."].)

Under the Unruh Civil Rights Act, which incorporates the standards of Title III of the ADA, defendant Rio Nido had an affirmative obligation to make "readily achievable" changes to

remove access barriers at its restaurant. (Civ. Code § 51(f); *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 669-670 [94 Cal.Rptr.3d 685, 208 P.3d 623].) It is undisputed that there were access barriers at the Roadhouse at the time that Mr. Skaff attempted to visit the facility – and for several years thereafter. (Trial Court Decision at 4-5; *see also Skaff v. Rio Nido Roadhouse* (2020) 55 Cal.App.5th 522, 537 [269 Cal.Rptr.3d 578].)

During the course of the litigation, the defendant restaurant made significant access improvements. Other than with respect to a parking lot that was not owned or controlled by the restaurant, *cf.* Trial Court Decision at pp. 11-13, defendant did not argue that the access changes it completed were not readily achievable. (*Accord Lozano v. C.A. Martinez Family L.P.* (S.D. Cal. 2015) 129 F. Supp. 3d 967, 973 [“Removal of the architectural barrier was readily achievable, as evidenced by the corrective measures Defendants took after the Complaint was filed.”].) The trial court found that plaintiff Skaff’s litigation was the catalyst for all of the remedial work done at the restaurant. (Trial Court Decision at 9.) The facility is now compliant and accessible to people with mobility disabilities. (*Id.* at 5, 7.)

As detailed further below, Mr. Skaff and his counsel presented evidence and good faith arguments in support of each of his claims. But ultimately, plaintiff Skaff lost on appeal. The appellate court gave two reasons. First, the appellate court found that Mr. Skaff did not prevail under Section 19955 because there was no new construction or alternation triggering access upgrades. (*Skaff, supra*, 55 Cal.App.5th at 538.) Second, the appellate court affirmed the trial court’s ruling that, during his attempted visit, Mr. Skaff was not deterred by the barriers at the Rio Nido property, but by the barriers in a parking lot that was owned and controlled by a third party at the time of the attempted visit. The appellate court concluded that this meant that Mr. Skaff did not have standing under the Unruh Act. (*See id.* at 542.)

Now the defendant seeks **\$925,010** in attorneys’ fees, citing the fee-shifting provision applicable to a claim brought under Section 19955. This request should be denied. Granting such a massive fee award would be unfair to Mr. Skaff, and would deter and prevent plaintiffs with disabilities from bringing important cases to enforce California’s disability rights laws. Private enforcement by individuals with disabilities, including through litigation when required, is a lynchpin of California’s disability access scheme.¹ Countless public accommodations – including the Roadhouse – would remain inaccessible but for private individuals such as Mr. Skaff sending demand letters and, where such letters are unsuccessful, bringing litigation.

As a group, people with disabilities are particularly unable to shoulder awards of attorneys’ fees. Disability is closely associated with poverty. Among working-age adults, 22.5% of people with disabilities live below the federal poverty line, compared to 8.4% of people without disabilities.² This is particularly true for wheelchair users and blind people, who are the individual plaintiffs

¹ *See Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1054-55 [123 Cal.Rptr.3d 395]; *Blackwell v. Foley* (N.D. Cal. 2010) 724 F.Supp.2d 1068, 1075-1076; *Donald v. Cafe Royale, Inc.* (1990) 218 Cal.App.3d 168, 180 [266 Cal.Rptr. 804].

² Jessica Semega, *et al.*, Income and Poverty in the United States: 2019 (U.S. Census, Sept. 2020), at 13 & fig. 8, <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf>.

who privately enforce access standards such as those at issue here. Almost 28% of blind people live below poverty.³

In *Turner*, the first appellate district ruled that attorneys' fees are properly denied when disability rights claims subject to the conflicting attorneys' fees provisions found at Sections 52 and 55 are inextricably intertwined. (*Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1054-55 [123 Cal.Rptr.3d 395].) Any other outcome would undermine the Legislature's decision in making attorneys' fees for claims brought under the Unruh Civil Rights Act available only to prevailing plaintiffs. (*Id.*) The *Turner* rule applies here.

Moreover, it is undisputed that the defendant was in violation of the ADA and the Unruh Act, because it had access barriers that it should have removed and remediated under the "readily achievable" standard. The appellate court wrote: "Like all public accommodations, the Roadhouse has an ongoing obligation under the ADA to remove readily achievable barriers to access. The record confirms that the Roadhouse was not ADA compliant, and it remediated access barriers from September 2014 through 2016." (*Skaff*, 55 Cal.App.5th at 537.) And it is undisputed that the defendant corrected and removed these barriers as a result of Mr. Skaff's litigation.⁴ In such a case, the reasonable attorneys' fees should be \$0.

ARGUMENT

In 1992, the California legislature incorporated the Americans with Disabilities Act (ADA) into the Unruh Civil Rights Act to expand the private remedies available to individuals for ADA violations. (*See Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 673 [94 Cal.Rptr.3d 685, 208 P.3d 623].) This incorporation included the requirement that covered entities affirmatively make "readily achievable" disability access changes. (*Id.* at 669-670.)⁵

Similar to the Unruh Act, Section 19955 requires that public accommodations comply with state access standards. (Health & Safety Code § 19955; Gov. Code § 4450.) Section 19955 is part of a "body of legislation intended to reduce or eliminate the physical impediments" to disabled persons' participation in their communities. (*People ex rel. Deukmejian v. CHE, Inc.* (1983) 150

³ National Federation of the Blind, Blindness Statistics, <https://nfb.org/resources/blindness-statistics>.

⁴ Trial Court Decision at 9; *see also* (11/29/2017) RT 27: 13-19 ["After listening to the 10 or 12 or 15 days of trial as well as the numerous motions that followed," the trial court did not believe that defendant would have brought the Roadhouse into full compliance with federal and California accessibility standards "but for the fact that this action was brought and Mr. Skaff brought that action."].

⁵ Depending upon the facts, such readily achievable access changes may include restroom changes (*see Munson*, 46 Cal.4th at 666; *Crandall v. Starbucks Corp.* (N.D. Cal. 2017) 249 F. Supp. 3d 1087, 1122), path of travel changes (*see Chapman v. Pier 1 Imps. (U.S.) Inc.* (9th Cir. 2015) 779 F.3d 1001, 1009 [aisles]), parking lot changes (*see Johnson v. Cala Stevens Creek/Monroe, LLC* (N.D. Cal. 2019) 401 F. Supp. 3d 904, 912; *Lozano v. C.A. Martinez Family L.P.* (S.D. Cal. 2015) 129 F. Supp. 3d 967, 973), and changes to furniture or fixtures (*see Crandall*, 249 F. Supp. 3d at 1122). This type of barrier removal is made with reference to the federal ADA accessibility guidelines. (*See* U.S. Department of Justice, 2010 ADA Standards for Accessible Design (Sept. 15, 2010) [adoption of the 2010 standards provides a "reference for Title III entities undertaking readily achievable barrier removal"].)

Cal.App.3d 123, 133 [197 Cal.Rptr. 484].) Regulations containing the state standards make them applicable to newly constructed buildings and facilities or altered portions of existing buildings and facilities. (Cal. Code Regs., tit. 24, § 11B- 201.1; *Donald v. Sacramento Valley Bank* (1989) 209 Cal.App.3d 1183, 1192–1193.)⁶

California’s disability access statutes reflect a determination by the Legislature to embrace the full integration of disabled people into the community, including through enforcement of disability access standards:

The California legislature has determined that the rights of the disabled to be fully integrated into the community is of great value to society. Although many may see the technical violations of the ADAAGs here as trivial, they are of “surpassing importance to individuals with disabilities.” Bagenstos, *supra*, 54 U.C.L.A. L. Rev. at 24. “Technical as they are, the ADA Accessibility Guidelines are simply designed to remove the manmade barriers that exclude people with disabilities from participating in major parts of our nation's economic and community life.” *Id.*

(*Kittok v. Leslie’s Poolmart, Inc.* (C.D. Cal. 2009) 687 F.Supp.2d 953, 961.)

The burden of enforcing California’s disability rights statutes has fallen primarily on private plaintiffs. (*See Blackwell v. Foley* (N.D.Cal. 2010) 724 F.Supp.2d 1068, 1075.) And despite efforts made over the last 30 years to encourage attorneys to handle California law disability rights cases which seek public interest injunctive relief, relatively few competent private attorneys have been willing to do so. (*Id.*)

The attorneys’ fees provision associated with the Unruh Civil Rights Act, Section 52, permits prevailing plaintiffs to recover fees, but not prevailing defendants. This “one-way” fee provision reflects the Legislature’s intent to encourage vigorous enforcement of the Unruh Civil Rights Act “by removing the potent economic obstacles presented by the cost of obtaining representation and the risk of an adverse fee award.” (*Turner, supra*, 193 Cal.App.4th at 1063-1064.) Section 52 “serve[s] the well-established public purpose of encouraging private enforcement of disability rights law.” (*Id.* at 1069.)

In this matter, Plaintiff Skaff and his counsel presented substantive and good faith arguments and evidence in support of each of his claims in the trial court and on appeal. With regard to Section 19955, they presented evidence of a 2007 kitchen remodel, and urged that this project triggered

⁶ The state standards may not “prescribe a lesser standard of accessibility or usability than provided by the Accessibility Guidelines prepared by the federal Access Board as adopted by the United States Department of Justice to implement the Americans with Disabilities Act of 1990.” (Gov. Code § 4450(c).) The federal standards provide a measure for the requirement that all public accommodations make readily achievable access changes, regardless of the occurrence of new construction or alteration. (*See* 2010 ADA Standards for Accessible Design, *supra*.)

the obligation to make access improvements.⁷ No such improvements were made.⁸ They presented evidence that the defendant restaurant completed access projects that were not compliant with the standards, and argued that these projects also violated Section 19955.⁹

With regard to the Unruh Act, Mr. Skaff testified that he saw no signage or any accessible route when he attempted to visit the restaurant,¹⁰ and therefore encountered barriers for which Rio Nido was indisputably responsible. Plaintiff's counsel presented evidence that the restaurant had leased the parking lot for several years prior to Mr. Skaff's attempted visit, but made no efforts to create accessible parking,¹¹ thereby contributing to the circumstances that deterred Mr. Skaff in violation of the Unruh Act. They argued that the broad reach of the Unruh Civil Rights Act reached Mr. Skaff's experience.¹² Mr. Skaff lived minutes away from the restaurant,¹³ knew and learned of the undisputed access barriers at the facility, and wished to patronize the restaurant during the pendency of the litigation. This, plaintiff's counsel argued, was enough to establish standing under the Unruh Civil Rights Act.¹⁴

Where a plaintiff brings two intertwined claims, one associated with Section 52 and one associated with Section 55, and the hours expended cannot be segregated, the conflict is reconciled by denying the defendant fees. (*Turner, supra*, 193 Cal.App.4th at 1068.) Here, despite the defendant's claims,¹⁵ the fees incurred in the defense of the Section 12955 claim cannot reasonably be segregated from the fees incurred in defending the Unruh Act claim, because the facts underlying the two claims are inextricably intertwined. Awarding fees against Mr. Skaff would undermine the private enforcement of the Unruh Act. (*Turner, supra*, 193 Cal.App.4th at 1069-1070.) Defendant's motion should be denied.

Moreover, while plaintiff's lawyers did not persuade the appellate court that Mr. Skaff had shown his claims under the Unruh Act or Section 19955, the following is undisputed here:

- the Roadhouse restaurant was in violation of the ADA and the Unruh Civil Rights Act because it failed to make readily achievable access changes over several years

⁷ *Skaff v. Rio Nido*, Nos. A152462 & A153606 (Cal. Ct. App. Apr. 19, 2019) Respondent's Combined Opening Brief at pp. 13-15, 62, 81-83 (citing evidence).

⁸ Respondent's Combined Opening Brief at pp. 64, 72.

⁹ Respondent's Combined Opening Brief at pp. 16, 22-23, 67-68, 82-83 (citing evidence).

¹⁰ Respondent's Combined Opening Brief at pp. 18 (citing evidence).

¹¹ Respondent's Combined Opening Brief at pp. 15-16 (citing evidence).

¹² Respondent's Combined Opening Brief at pp. 36-39.

¹³ Respondent's Combined Opening Brief at p. 17 (citing evidence).

¹⁴ See Respondent's Combined Opening Brief at p. 39 [citing *Wilson v. Pier 1 Imports (U.S.), Inc.* (E.D. Cal. 2006) 439 F.Supp.2d 1054, 1064 (once a plaintiff learns of architectural barriers, even if through observation, he suffers injury in fact and may seek relief under Title III)], 40 [Mr. Skaff was "subsequently deterred from returning to the Roadhouse"].

¹⁵ For example, while the defendant contends that "the entire appeal was solely based on the Section 19955 issues," this is not accurate. The Unruh Act claim was fully briefed, and then reviewed and decided by the appellate court.

- Mr. Skaff, who lived minutes away from the restaurant, could not patronize the restaurant due to access barriers
- Mr. Skaff brought litigation not for money, but to remove the barriers
- As a result of Mr. Skaff's litigation, defendant Rido Nido brought its facility into compliance with the ADA and the Unruh Act

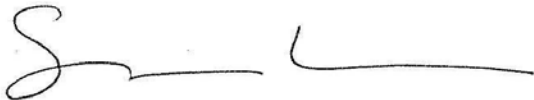
In other words, with little to gain personally, Plaintiff Skaff sought and achieved substantial remediation of an inaccessible public accommodation, "advancing the time when public accommodations will be compliant with the ADA." (*See Kittok, supra*, 687 F.Supp.2d at 959.) The Roadhouse is now accessible to a large class of persons – all individuals with mobility disabilities who will patronize the business in the future. In such a case, the appropriate award of reasonable fees is \$0.

The undersigned *amici* urge the court to deny defendant's motion for attorneys' fees.

Sincerely,



Claudia Center
Legal Director
Disability Rights Education & Defense Fund



Jinny Kim
Director, Disability Rights Program
Legal Aid at Work

On behalf of the following *amici*:

AIDS Legal Referral Panel
The Arc of California
Californians for Disability Rights
Civil Rights Education and Enforcement Center
Coalition of California Welfare Rights Organization
Disability Community Resource Center
Disability Rights Advocates
Disability Rights California
Disability Rights Education & Defense Fund
Disability Rights Legal Center

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Family Violence Appellate Project

Hand in Hand: The Domestic Employers Network

Impact Fund

Law Foundation of Silicon Valley

Legal Aid at Work

Public Interest Law Project

Public Law Center

Root and Rebound

Western Center on Law and Poverty

Worksafe

Wry Crips Disabled Women's Theater