GREENBERG TRAURIG, LLP
GREGORY F. HURLEY (SBN 126791)
STACEY L. HERTER (SBN 185366)
650 Town Center Drive, Suite 1700
Costa Mesa, CA 92626
Telephone: (714) 708-6500
Facsimile: (714) 708-6501
Email: herters@gtlaw.com

Attorneys for Defendant
CHIPOTLE MEXICAN GRILL, INC.

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

MAURIZIO ANTONINETTI,

Plaintiff,

vs.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant.

CASE NO.: 3:05-CV-01660-J-WMC

Assigned to Hon. Judge Napoleon A. Jones, Jr.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CHIPOTLE MEXICAN GRILL, INC.'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION**

*[Filed concurrently with Notice of Motion, Separate Statement, Declaration of Shippey, Declaration of Sedillo, Declaration of Stupp, Declaration of Blackseth, Declaration of Herter, Request for Judicial Notice, and Order]*

Date: May 21, 2007
Time: 9:00 a.m.
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# I.

# INTRODUCTION

This is an ADA Title III lawsuit[1] and, as far as ADA claims go, Plaintiff Maurizio Antoninetti's ("Plaintiff") lawsuit is relatively typical to dozens, if not thousands, of other ADA lawsuits filed against countless businesses. This lawsuit alleges many of the same boilerplate, hyper-technical violations of the Americans With Disabilities Act Accessibility Guidelines ("ADAAG") or Title 24. In fact, none of the alleged barriers ever deterred Plaintiff from visiting the restaurants. Ironically, despite all of the claimed lack of access, inconveniences and humiliation, Plaintiff ate dinner with his entire family at the San Diego restaurant on the weekend prior to his deposition. (SUF # 20.)[2] Plaintiff has also admitted placing his order by using the menu board. (SUF #21.) Moreover, Plaintiff's requested modification of Chipotle's food preparation counter lacks any support under controlling ADA regulations.

Plaintiff's claims satisfy neither the letter nor the spirit of the ADA. The ADA requires facilities to provide disabled individuals equal enjoyment of goods and services, to maintain a facility that is accessible to and usable by individuals with disabilities, and not to discriminate against individuals based on their disability. The point of the ADA is to protect the disabled from actual denial of access, actual deterrence, and actual discrimination. But that simply has not happened here. What the ADA could not possibly have been intended to do is to provide financial windfalls – to Plaintiff and Plaintiff's counsel – whenever there exists a technical deviation from a construction standard that injured no one and deterred no one, let alone the Plaintiff himself. Yet that is precisely what Plaintiff seeks.

Fortunately, case law prohibits this illegitimate strategy. Under both the ADA and

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[1] The Americans With Disabilities Act, 42 U.S.C. §§ 12100 *et seq*. (the "ADA") consists of three subchapters pertaining to employment, public services and public accommodations. Subchapter III, commonly referred to as "Title III," pertains to disabled access to public accommodations operated by private entities.

[2] "SUF" refers to Chipotle's Statement of Undisputed Facts, filed concurrently herewith.

related California statutes, plaintiffs cannot challenge barriers to access that they never actually encountered, were not personally aware of prior to filing suit, and that are unrelated to their particular disability. *Martinez v. Longs Drug Stores, Inc.*, No. CIVS-03-1843DFL CMK, 2005 WL 2072013 *3-4 (E.D.Cal. Aug. 25, 2005).

Fundamentally, Plaintiff cannot continue to sue under the ADA for alleged problems that have already been remedied by Chipotle. As to each and every one of the items that Plaintiff identified, Chipotle has addressed it and either determined that the item was already in compliance, or accomplished a fix. The alleged architectural barriers do not exist at the restaurants. Plaintiff's ADA claim must therefore be dismissed as moot, and because he lacks standing.

If this Court dismisses the ADA claim, there will no longer be any pending question of federal law; nor is there diversity of parties. Consequently, the Court may – and should – decline to exercise supplemental jurisdiction and dismiss Plaintiff's state law claims without prejudice.[3] For all these reasons, Chipotle is entitled to summary judgment as to each of Plaintiff's claims.

## II.

## FACTUAL BACKGROUND

Plaintiff, a disabled individual, argues that he was denied access to two Chipotle restaurants because of his disability. (SUF # 1.) Specifically, Plaintiff claims that on February 15th and 22nd of 2005, he visited the Chipotle restaurants located at 268 N. El Camino Real in Encinitas (individually, the "Encinitas restaurant") and 1504 Garnet Avenue in San Diego (individually, the "San Diego restaurant") (collectively, the "restaurants") and encountered various structural barriers at the entrance to the restaurants, the restaurants' parking lots and restrooms. (SUF # 2.) Plaintiff further claims that the alleged barriers denied him access to the food serving and viewing counters as "people in wheelchairs have no opportunity to view the foods available for

[3] In the alternative, Chipotle moves for Summary Adjudication as to specific items of injunctive relief requested by Plaintiff that are now moot or for which Plaintiff lacks standing to pursue.

selection." (SUF # 3.) .) More specifically, Plaintiff complains that, because of an obstruction, he was "unable to choose exactly what he wanted from the Chipotle food selection" and that he "could not see the food preparer make his food." (SUF # 4.) He seeks, in addition to injunctive relief, substantial compensatory damages, as well as his attorney's fees and costs. (SUF # 5.)

The claimed violations include technical violations ranging from "barriers in the bathrooms, parking lot, dining tables and path of travel." (SUF # 6.) These technical violations were generally referenced in the Complaint but more specifically articulated by an ADA consultant hired by Plaintiff in a FRCP 26(a)(2) disclosure. Chipotle completed all repairs by October 5, 2006. (SUF # 7.) In support of this purported sight-line obligation, Plaintiff's consultant points only to a state building code regulation requiring that a restaurant have a 28-34-inch high transaction counter.

Chipotle's expert witness, Mr. Kim Blackseth, finds the analysis of Plaintiff's expert fundamentally flawed. (See Declaration of Kim Blackseth, filed concurrently herewith.) Mr. Blackseth is a licensed architect, a 2006 appointee of Governor Schwarzenegger to the California Building Standards Commission (responsible for requirements and modifications to the CBC, including its disabled access provisions) and is perhaps the most respected ADA expert in the State of California. *See id.* Mr. Blackseth appropriately points out that the Chipotle food preparation area is fully compliant with all ADA regulations and that the Chipotle restaurants possess the required transaction counter. *See id.*

Finally, Chipotle, as discussed *infra*, has closely examined the restaurants, and has modified them to comply with the ADAAG, including adoption and implementation of an effective nationwide Customers With Disabilities Policy. As a result, Plaintiff's demands for injunctive relief under the ADA are moot.

## III.

## ARGUMENT

### A. Summary Judgment Should be Granted as to Plaintiff's ADA Claim Because the Court Lacks Subject Matter Jurisdiction.

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001). "Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." *Renne v. Geary*, 501 U.S. 312, 320-21 (1991) (citation omitted). "This requisite ensures that the courts are able to grant effective relief, rather than rendering advisory opinions." *Medical Society of New Jersey v. Herr*, 191 F. Supp. 2d 574, 581 (D.N.J. Mar. 21, 2002). "The question is whether there can be *any* effective relief." *West v. Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000); *Brother v. CPL Invts., Inc.*, 317 F. Supp. 2d 1358, 1372 (S.D. Fla. Mar. 22, 2004) (Martinez, J.) ("An issue is moot when actions subsequent to the commencement of a lawsuit create an environment in which the Court can no longer give meaningful relief."). "[*P]art* or all of a case may become moot if (1) 'subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur,' and (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Grove v. De La Cruz*, 407 F. Supp. 2d 1126, 1130 (C.D. Cal. Oct. 31, 2005) (Snyder, J.) (citations omitted) (emphasis added).

Mootness is a jurisdictional defect that can be raised at any time by the parties or the court sua sponte. *Barilla v. Ervin*, 886 F.2d 1514, 1519 (9th Cir. 1989) ("this court cannot be divested of its obligation to consider the issue of mootness on the grounds that the timing or manner in which a party has raised the issue is somehow procedurally improper"). Generally, a defendant's remedial efforts will render a plaintiff's ADA claim for injunctive relief moot. *See, e.g.*, *Troiano v. Supervisor of Elections in Palm Beach County*, 382 F.3d 1276, 1286 (11th Cir. 2004) (holding that a defendant County's

subsequent voluntary installation of audio devices in all voting precincts rendered the ADA class action by visually-impaired registered voters moot); *Grove v. De La Cruz*, 407 F.Supp.2d 1126, 1131 (C.D. Cal. Oct. 31, 2005) (Snyder, J.) (holding that the plaintiff's ADA claim to install grab bars in the women's restroom was moot); *Brother v. CPL Invts., Inc.*, 317 F. Supp. 2d 1358, 1372 (S.D. Fla. Mar. 22, 2004) (Martinez, J.) (holding that a hotel's modifications made after it was notified of alleged barriers via the ADA lawsuit rendered the claims moot); *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F.Supp.2d 1128, 1130 (E.D. Cal. Apr. 1, 2002) (Shubb, J.) ("Plaintiff concedes, as she must, that defendants' latest remedial efforts have rendered her ADA claim for injunctive relief moot."); *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp.2d 1065, 1087 (D. Haw. 2000) (dismissing plaintiff's ADA claims predicated on alleged violations that had been corrected as moot); *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 771 (D. Or. 1997) ("If plaintiffs already have received everything to which they would be entitled, i.e., the challenged conditions have been remedied, then these particular claims are moot absent any basis for concluding that these plaintiffs will again be subjected to the same alleged wrongful conduct by this defendant.").

In *Hickman v. State of Missouri*, 144 F.3d 1141 (8th Cir. 1998), the Eighth Circuit held that an ADA action brought by state prison inmates against state and various governmental entities was moot notwithstanding the voluntary cessation of illegal conduct doctrine. The Eighth Circuit noted that the "*defendants' compliance with the ADA, including structural changes* such as installation of ramps, pull and grab bars, and chair lifts, is *far 'more than a mere voluntary cessation of alleged illegal conduct*, where we would leave [t]he defendant[s] . . . free to return to [their] old ways.'" *Id.* at 1144 (emphasis added). The Eighth Circuit also held that in federal courts, there is no public interest exception to mootness. *Id.* ("'[A]lthough state law may save [a] case from mootness based on public interest, federal courts require litigants' rights be affected.'") (citation omitted).

"Monetary relief is not an option for private individuals under Title III of the ADA." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000). "As a result, a plaintiff who files an ADA claim can at most hope to improve access through an injunction." *Id.*; 42 U.S.C. § 12188(a)(1). In addition, the prospect of attorneys fees does not affect whether the underlying claim is justiciable. *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1269 (10th Cir. 2004). As the Supreme Court has stated, the "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). "A claim for equitable relief is moot 'absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *Ostendorf v. Dawson County Corrections Bd.*, No. 4:98CV3038, 2002 WL 31085085, at *6 (D. Neb. Sept. 18, 2002) (citation omitted).

1. The Injunctive Relief Requested by Plaintiff is Either Not Required or Has Already Been Accomplished.

The injunctive relief as to particular alleged barriers that Plaintiff seeks under the ADA cannot be granted because every "barrier" item either was already in compliance with the ADAAG, or Chipotle has modified the item to be in compliance. Consequently, Plaintiff's ADA claim is moot.

As demonstrated below, Chipotle's remedial efforts have rendered Plaintiff's ADA claim for injunctive relief moot.[4] The Declaration of Scott Shippey filed concurrently herewith, provides direct and uncontroverted testimony regarding the current condition of the restaurants. Likewise, the Declaration of Ron Sedillo, also filed concurrently herewith, provides undisputed testimony regarding Chipotle's effective "Customers With Disabilities" policy. As such, there is no further remedy under the ADA that this Court can provide.

[4] Plaintiff is free to pursue his state law claims via a state court action.

The results of Chipotle's investigation and remediation efforts as to each item, respectively, are as follows:[5]

**A. The San Diego Restaurant**

**1. Parking Lot and Driveway Items**

a) The curb ramp at the disabled-accessible parking space does not interfere with the access aisle. (ADAAG § 4.6.3) (SUF # 8.)

b) The tow away signs already had the proper phone number to contact on them (Cal. Title 24 § 1129B.5) (SUF # 9);

**2. Entrance**

a) ISA signage is posted at all entrances to the restaurant. (Cal. Title 24 § 1127B.3 and ADAAG § 4.1.3(16)(b).) (SUF # 10.)

**3. Men's Restroom**

a) Door pressure does not exceed 5 lbf. (ADAAG § 4.3.11 (2)(b).) (SUF # 11.)

b) The accessible stall has an automatic-closing device in the men's restroom (Cal. Title 24 § 1115B.7.1.4) (SUF # 12.)

c) A loop/U-shaped handle was installed on the designated accessible stall door (Cal. Title 24 § 1115B.7.1.4 and ADAAG § 4.13.9) (SUF # 13.)

**B. The Encinitas Restaurant**

**1. Parking Lot and Driveway Items**

a) The curb ramp at the disabled-accessible parking space does not interfere with the access aisle. (ADAAG § 4.6.3) (SUF # 14); and

[5] Although this memorandum will sometimes cite to California Title 24 regulations hereinafter, it does this only to demonstrate its good faith in attempting to comply in every aspect. For the purposes of this motion to dismiss the federal ADA claims, only compliance with the ADAAG need be shown.

b) The tow away signs already had the proper phone number to contact on them (Cal. Title 24 § 1129B.5) (SUF # 15.).

2. **Men's Restroom**

a) Door pressure does not exceed 5 lbf. (ADAAG § 4.3.11 (2)(b)) (SUF # 16.);

b) The accessible stall has an automatic-closing device in the men's restroom (Cal. Title 24 § 1115B.7.1.4) (SUF # 17.);

c) A loop/U-shaped handle was installed on the designated accessible stall door (Cal. Title 24 § 1115B.7.1.4 and ADAAG § 4.13.9) (SUF # 18.); and

d) The center of the lavatory is 18 inches from the nearest side wall (Cal. Title 24 § 1115B.2.1.2.1) (SUF # 19.).

Here, Chipotle has taken significant steps to ensure that Plaintiff will not suffer any future alleged disability discrimination at the restaurants. As such, Plaintiff's request for injunctive relief has been satisfied and there is no cognizable danger of Chipotle violating any of the alleged ADA violations in the future. Correspondingly, all of Plaintiff's demands for injunctive relief, as stated above, have been satisfied and rendered nugatory, and, therefore, should be dismissed as moot. See, *e.g.*, *Parr*, 96 F.Supp.2d at 1087 (remediated architectural barriers mooted plaintiff's claims); *Pickern*, 194 F.Supp.2d at 1130 (removal of architectural barriers renders ADA claim moot.) Unless Plaintiff can come forward with admissible evidence creating a reasonable expectation that Chipotle's expressed intent is disingenuous and that its purported actions are always so short as to evade review, Plaintiff's ADA claim must be dismissed. *Brewer v. Wisconsin Bd. of Bar Examiners*, 2007 WL 527484, at *4-*5 (E.D. Wis. Feb. 14, 2007) ("It is no secret that defendants are interested in ending this litigation, but neither the timing of defendants' offer nor the fact that it might work a benefit in their favor (i.e., result in dismissal of this case) suggests the offer itself is disingenuous.").

2. Chipotle's Food Preparation Area and Transaction Station Fully Comply with Pertinent Accessibility Regulations.

Plaintiff complains that, because of an obstruction -- namely, a 44 inch high counter -- he was "unable to choose exactly what he wanted from the Chipotle food selection" and that he "could not see the food preparer make his food." In support of his position, Plaintiff's expert, Mr. Steven Schraibman, points to Section 5 of the ADAAG which refers to "restaurants and cafeterias." Specifically, Section 5.1 (General) provides:

> Except as specified or modified in this section, restaurants and cafeterias shall comply with the requirements of 4.1 to 4.35. Where fixed tables (or dining counters where food is consumed but there is no service) are provided, at least 5 percent, but not less than one, of the fixed tables (or a portion of the dining counter) shall be accessible and shall comply with 4.32 as required in 4.1.3(18). In establishments where separate areas are designated for smoking and non-smoking patrons, the required number of accessible fixed tables (or counters) shall be proportionally distributed between the smoking and non-smoking areas. In new construction, and where practicable in alterations, accessible fixed tables (or counters) shall be distributed throughout the space or facility. (Emphasis added.)

Likewise, Section 5.2 (Counters and Bars) provides:

> Where food or drink is served at counters exceeding 34 in (865 mm) in height for consumption by customers seated on stools or standing at the counter, a portion of the main counter which is 60 in (1525 mm) in length minimum shall be provided in compliance with 4.32 or service shall be available at accessible tables within the same area.

Plaintiff's position is incorrect. The counters referred to in sections 5.1 and 5.2 clearly are counters "where food is consumed" (i.e., bar and dining counters, not transaction counters). No food or drink is consumed by customers at the counter in question. (SUF # 22 & # 23.) On the contrary, Chipotle's food preparation area is fully compliant with all ADA regulations and CBC sections insofar as a retail establishment such as Chipotle is only required to have a portion of the transaction counter (e.g., where sales are made) that is 34 inches high by 36 inches long. (SUF # 24.)

Moreover, Chipotle's food preparation area is a sales or service counter (SUF #26.) and the applicable federal ADA requirements are found in Section 7.2 (Sales and Service Counters, Teller Windows, Information Counters) as follows:

> (1) In department stores and miscellaneous retail stores where counters have cash registers and are provided for sales or distribution of goods or services to the public, at least one of each type shall have a portion of the counter which is at least 36 in (915 mm) in length with a maximum height of 36 in (915 mm) above the finish floor. It shall be on an accessible route complying with 4.3. The accessible counters must be dispersed throughout the building or facility. In alterations where it is technically infeasible to provide an accessible counter, an auxiliary counter meeting these requirements may be provided.
>
> (2) At ticketing counters, teller stations in a bank, registration counters in hotels and motels, box office ticket counters, and other counters that may not have a cash register but at which goods or services are sold or distributed, either:
>
> (i) a portion of the main counter which is a minimum of 36 in (915 mm) in length shall be provided with a maximum height of 36 in (915 mm); or
>
> (ii) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to the main counter shall be provided; or
>
> (iii) equivalent facilitation shall be provided (e.g., at a hotel registration counter, equivalent facilitation might consist of: (1) provision of a folding shelf attached to the main counter on which an individual with disabilities can write, and (2) use of the space on the side of the counter or at the concierge desk, for handing materials back and forth).
>
> All accessible sales and service counters shall be on an accessible route complying with 4.3.

Similarly, CBC 1122B.4 (Height of Work Surfaces) provides as follows:

> The tops of tables and counters shall be 28 inches to 34 inches (711 mm to 864 mm) from the floor or ground. Where a single counter contains more than one transaction station, such as (but not limited to) a bank counter with multiple teller windows or a retail sales counter with multiple cash register stations at least 5 percent, but never less than one, of each type of station

> shall be located at a section of a counter that is at least 36 inches (914 mm) long and no more than 28 to 34 inches (711 to 864 mm) high.

This "work surface" requirement demands the presence of certain table-like surfaces at heights low enough to be utilized by individuals in wheelchairs. The only "work surface" that is required here is that to enable the receipt of food items and the payment of money: the "transaction station." (SUF # 25.)

CBC Section 1122B.4 pertains to and specifically notes the required existence of work services or transaction counters. (SUF #27.) Mr. Schraibman concedes that the Chipotle restaurants possess a compliant transaction station. (SUF # 28.) This "transaction station" requirement mirrors the Federal ADAAG regulations. ADAAG Section 7.2 requires that retail establishments possess counters with "a portion of the counter which is at least 36 in (915 mm) in length with a maximum height of 36 in (915 mm) above the finish floor." (SUF # 29.)

Second, Plaintiff alleges that the counter is non-compliant because a seated wheelchair user cannot view the food and "select" their order. In support of Plaintiff's and Mr. Schraibman's position that there is a requirement for a "food viewing counter," Mr. Schraibman cites only to an inapplicable California building code provision as support for Plaintiff's unique sight-line claim. In particular, Mr. Schraibman suggests that CBC Section 1122B.4 applies to Chipotle's food preparation area and constitutes a sight-line requirement. This argument fails for a number of reasons.

First, Plaintiff conveniently ignores the fact that food is selected verbally by referencing the large menu hung above the counter, not by pointing at food behind a sneeze guard. Nobody is required to see the condiments and components to place an order. (SUF # 30 & # 31.) Second, sight-line requirements, when they exist, are addressed very directly by the ADA regulations. (SUF # 31.) See, for example, ADAAG Section 4.33.3, the regulation pertaining to "Assembly Areas/Placement of Wheelchair Locations" and creating a "sight-line" requirement. As one would expect, sight-line requirements exist for appropriate industries, namely, theatre venues. (SUF

# 32.) Plaintiff may not, therefore, impose such a theatre-specific requirement on a restaurant such as Chipotle.

3. Chipotle Possesses a Policy to Accommodate its Customers with Disabilities and to Deliver Excellent Customer Service.

On February 23, 2007, as part of Chipotle's longstanding and ongoing efforts to ensure that all of its customers receive excellent customer service, Chipotle implemented a nationwide "Customers With Disabilities" policy that sets forth in writing that which Chipotle has always done informally, i.e., provide excellent customer service to all of its customers, including customers with disabilities (the "Policy"). (SUF # 33.)

Chipotle's Customers With Disabilities policy provides:

> Excellent customer service is of paramount importance at every Chipotle restaurant at all times. A customer with a disability (for example, a visual or mobility impairment) may benefit from some alternative means of presenting or describing our food. In all such cases the restaurant staff will offer a suitable accommodation based on the individual circumstances, and will be responsive to the customer's requests. Depending on the circumstances, our crew member or manager may ask the customer if we can accommodate them during their visit. Examples of some of the ways we accommodate individuals include:
>
> 1. Samples of the food can be placed in soufflé cups and shown or handed to the customer.
>
> 2. Some customers may prefer an opportunity to see or even sample the food at a table.
>
> 3. Customers may simply wish to have the food or food preparation process described to them.
>
> 4. Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual.
>
> The point of good customer service is that it has to be personalized. It is the manager and crew's responsibility to ensure that the experience a customer with a disability has is excellent.

> Considerations of throughput, productivity or efficiency are secondary to ensuring a positive experience for disabled customers. Crew members are encouraged to inform their Restaurant Manager regarding the experiences of their disabled customers and such experiences will be considered during the performance review process, both for the crew member and the manager.
>
> The above example details a scenario involving only a visual or mobility impaired customer. Other disabilities may exist among our customers and it is our policy at Chipotle to make good faith, reasonable accommodations for all of our disabled customers. This practice is consistent with our goal of providing excellent customer service to all of our customers.

Chipotle disseminated the Policy via high priority email to its Regional Directors, Human Resources Training Directors, and Operations Directors and began formally training its employees on the Policy between March and May 2007. (SUF # 34.) The Policy training efforts involve the Director of Training and Development going out to the field and working in conjunction with Chipotle's Human Resource Generalists and Human Resource Training Directors to train Chipotle's Operations Directors, Area Managers, and Managers, who will in turn train their respective crews. (SUF #35.) Additionally, this policy is incorporated into Chipotle's "The Know" policy as an addendum and has been added as a new section: "5.5 Customers With Disabilities." (SUF # 36.)

As evidence of the success and effectiveness of the Policy, Chipotle received an email from a customer who visited Chipotle's River Oaks restaurant in Houston, Texas on March 13, 2007. (SUF # 37.) Chipotle received this email in the ordinary course of business via the "SPEAK" section of Chipotle's website, which is reachable directly at www.chipotle.com/speak. (SUF # 38.) The customer comment stated:

> I frequently visit the location in the River Oaks area, it is close to my work. On my recent visit, I saw something that stirred my curiousity [sic]... there was a blind gentleman infront [sic] of me in line with a lady. I was extremely curious to how the food was going to be presented to him. The manager, it was obviously the manager with the polo red shirt, noticed the seeing eye dog and the dark shades on the gentlemen so he made his way to the tortila [sic] machine. The manager greeted the gentlemen with a warm

> "hello" and asked him for his order. As he was heating the tortilla, he asked him if he had been there before, it was obvious that the answer was no. The manager started by explaining to the gentlemen "the heat you are feeling is from the tortilla press", "you now have your choice of two beans, pento [sic] or black", he further explained the choice of meats. The manager did not pass the burrito down to the other lady on the line, he politely signaled her to take care of the next customer. He explained to the customer the different choices of "fixins"... not once did he make the customer feel out of place or uncomfortable, he was very curteous [sic] and his explanations of the food to me sounded more accurate than what my eyes were telling me.
> When it was my turn to pay, I complimented him on his excellent service, he very politely nodded and said thank you. I grabbed several of Aiyad's business cards that I will be passing to everyone at my place of employment. Thank you Chipotle for being so curteous [sic] to EVERYONE.

Given that the restaurants have a policy regarding accommodating customers with disabilities, including one that resolves Plaintiff's complaint that "people in wheelchairs have no opportunity to view the foods available for selection," Plaintiff's demand for injunctive relief on these claims has been satisfied and rendered nugatory, and, therefore, should be dismissed as moot. Case law supports this proposition.

For instance, in *Lonberg v. Sanborn Theatres, Inc.* (1999 WL 33993012, *2 (C.D.Cal., 1999)), Judge Matz in the Central District held that "plaintiffs' desire to have the wheelchair accessible portion of the concession counter staffed separately from the rest of the counter has no support in the law." Judge Matz went onto grant summary judgment for the defendants, finding that the evidence showed that defendants' challenged practices and policies were sufficient to meet its obligations under the ADA. (*Citing Long v. Coast Resorts, Inc.,* 32 F.Supp.2d 1203, 121 (D.Nev. 1998) (alterations not required where defendant had "substantially compl[ied] with the spirit of the law"); *Independent Living Resources v. Oregon Arena Corp.,* 982 F.Supp. 698, 716 (D.Ore. 1997) (concluding that arena is in compliance with wheelchair number and dispersal requirement so long as "deviation from absolute proportionality does not exceed ten percent"); *Paralyzed Veterans Inc. v. Ellerbe Becket Architects & Engineers,* 950 F.Supp.

393 (D.D.C. 1996) (requiring defendants to provide wheelchair seating which "substantially complies" with ADA requirements).

In *Gathright-Dietrich v. Atlanta Landmarks, Inc*., 435 F.Supp.2d 1217 (N.D.Ga., 2005) wheelchair bound theater patrons sued a historic theater alleging violations of Title III of the ADA. The theater moved for summary judgment. The District Court granted the motion and held that the disabled patrons failed to establish that their proposed solutions to alleged violations were readily achievable and that the theater complied with Title III of ADA:

> Plaintiffs' claim of access to concession facilities centers on complaints that the facilities made available to wheelchair patrons are not comparable to the concessions available to other patrons. Plaintiffs appear to argue that this existing facility is required to provide access to wheelchair patrons at the same locations, under the same circumstances and with the same selection of items, as those available to other patrons. They, again, rely on strict compliance with the Standards. The Court finds, using the Standards as a guide, that the undisputed facts show that wheelchair-accessible concession areas are available and that what is available does not constitute a barrier to access. The Court finds that The Fox concession areas are accessible to wheelchair patrons and The Fox provides persons to assist wheelchair patrons to purchase concession items. *Id.* at 1233.

Similarly, in *Association for Disabled Americans v. City of Orlando* (153 F.Supp.2d 1310 (M.D.Fla., 2001)), disabled plaintiffs maintained that they could not use the concession counters when seated in their wheelchairs because the counters were too tall. In response, defendant contended that the counters were part of the "structural design" of the Arena because the return air ducts were located underneath the counters. Defendant also asserted that ushers were instructed to assist disabled patrons in obtaining concessions. The court conducted a bench trial and found that the concession stands were accessible to and usable by individuals with disabilities.

Chipotle, like the defendants in the cases detailed above, has an effective policy to accommodate disabled customers and to provide them with excellent customer service and a dining experience comparable to that of able-bodied customers -- Chipotle's own

customer testimonials prove this point. Accordingly, summary judgment should be entered on behalf of Chipotle and Plaintiff's action should be dismissed.

**B. Plaintiff Cannot Rely On The General Anti-Discrimination Provisions Of The ADA To Require Chipotle To Re-Design The Restaurants.**

Chipotle expects that Plaintiff will ask this Court to ignore the ADAAG and find that the general anti-discrimination requirements of the ADA mandate that this Court order Chipotle to re-design the restaurants and lower its transaction and sales counter at the restaurants.

Although Section 302 of the ADA (42 U.S.C. § 12182) broadly precludes discrimination against the disabled, Congress defined discrimination with reference to regulations which it explicitly required the Department of Justice ("DOJ") to promulgate. *See Caruso v. Blockbuster-Sony Music Entertainment Centre*, 968 F.Supp. 210, 217 (D.N.J. 1997) ("Congress did not intend for the ADA to be enforceable except through the adoption of a detailed regulatory framework"), aff'd., 193 F.3d 730 (3rd Cir 1999); *Independent Living Resources v. Oregon Arena Corp*., 982 F.Supp. 698, 707 (D.Or. 1997) ("[i]n drafting Title III of the ADA, Congress painted with a broad brush and then directed the Attorney General to promulgate regulations to implement the law"). The legislative history of the ADA further explains that "the specific provisions, including the limitations in those provisions, control over the general provisions." H. Rep. No. 101-485(II) at 104, reprinted in 1990 U.S. CODE. CONG. & ADMIN. NEWS 387. Allowing Plaintiff to create new requirements not found in the specific regulations would offend not only the clear intent of Congress, but would contravene fundamental principles of statutory construction. It is well established that the specific governs the general, and that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. See *Doe v. National Board of Medical Examiners*, 199 F.3d 146, 155 (3d Cir. 1999); *Security Pac. Nat'l Bank v. Resolution Trust Corp*., 63 F.3d 900, 904 (9th Cir. 1995).

Congress, through ADA Section 504, has created a complex regulatory scheme for the enforcement of the general directives contained in ADA Title III. *National Amusements*, 180 F.Supp.2d at 257 and *Independent Living Resources*, 982 F.Supp. at 746. Second, Congress, through ADA section 306(d), provided a default set of standards that applied prior to the passage of the now-controlling regulations. *National Amusements*, 180 F.Supp.2d at 258 and *Independent Living Resources*, 982 F.Supp. at 746. Third, Congress, through ADA Section 303(a), provides that new construction must be accessible "in accordance with … regulations issued under this subchapter." *National Amusements*, 180 F.Supp.2d at 258 and *Independent Living Resources*, 982 F.Supp. at 746. The Courts applying and otherwise interpreting the effect of these statutory provisions appropriately concluded that compliance with the ADA regulations would represent compliance with the ADA.

In *Independent Living Resources*, the court noted the inherent unfairness and due process concerns implicated by asking the courts to craft regulations under the ADA:

> The courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable. In addition, although plaintiffs would limit such claims to design issues that DOJ and the Access Board have not expressly addressed, the courts often would have no way of knowing whether the Access Board had considered enacting such a requirement, but decided against it. *Id.* at 746.

Courts addressing Plaintiff's secondary argument in other cases have flatly rejected it. See, for example, *U.S. v. National Amusements*, 180 F. Supp.2d 251, 260 (D. Mass 2001) ("Compliance with a specific regulation must mean something; the Court rejects the Attorney General's attempt to render such compliance entirely meaningless by opening it to challenge under the general regulatory provisions"); *Independent Living Resources v. Oregon Arena Corporation*, 982 F.Supp. 698, 746 (D. Ore. 1997) ("I am convinced that Congress intended that compliance with the design standards enacted by the Access Board and DOJ for new construction would be deemed to satisfy the Title III obligations with respect to the design of a structure"), supplemented by: 1 F.Supp.2d

1159 (D. Oregon 1998); *Mass. v. E*Trade Access, Inc*., WL 2511059 (D. Mass. 2005) ("the DOJ's regulations therefore establish the limits of ADA liability;" and "If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations") and *Caruso v. Blockbuster-Sony Music*, 968 F.Supp. 210, 217 ("in the absence of an applicable regulation, we cannot rely solely on the "full and equal enjoyment" statutory language to hold the defendants liable").

Even if the language of the ADA and the ADAAG were not enough to refute Plaintiff's argument, it has been noted that the constitutional right to due process and the notice and comment procedures of the Administrative Procedures Act prevent the imposition of a specific ADA design requirement via a mere statutory directive. The court in *Caruso* emphasized that due process required that new ADA requirements be adopted only through the rulemaking process: "Compliance with ADA rulemaking ensures, hopefully at least, that all points of view are heard and that the resulting regulation provides concrete guidance" and "Congress did not intend for defendants to be responsible, in the absence of applicable regulations…Therefore, in the absence of an applicable regulation, we cannot rely solely on the "full and equal enjoyment" statutory language to hold the defendants liable…" (*Caruso v. Blockbuster-Sony Music Entertainment Centre*, 968 F. Supp. at 215-217.) Rather, it is through the ADA regulations that business owners are placed on notice of the design requirements to which their facilities will be held. To demand that a company such as Chipotle adhere to a design requirement supported only through by general statutory directive, when the regulations interpreting the statute lack the requirement, is to ignore Chipotle's fundamental right to be placed on notice of the requirement.

Finally, Plaintiff's argument that an ADA violation may exist in the absence of an ADAAG or code violation, raises important public policy considerations. Business owners, architects, developers and others consistently look to the ADAAG and building

code to confirm that a design or structure is or will be compliant. These regulations are voluminous and this process alone requires substantial investment of time and money. Public facilities are designed and constructed to be compliant with the regulations. Therefore, it would be unfair and potentially economically devastating to suddenly determine that compliance is simply not compliance any longer. If developers never enjoyed any certainty of compliance, the increased risk would drastically reduce the number and frequency of future development and structural improvement projects. Also, under Plaintiff's theory, public facilities would always be subject to a re-design and associated costs and downtime. Such costs would fall disproportionately upon small businesses, for which even one costly re-design could result in closure or bankruptcy.

In short, Plaintiff's contention that they may require Chipotle to lower its transaction and sales counter based on the "full and equal enjoyment" provision of Section 302 contravenes the text of the ADA and offends due process.

**C. Section 19957 of the Health and Safety Code Provides Local Building Departments With Discretion to Enforce the California Building Code.**

Plaintiff's Complaint and the allegations therein fail to appreciate that the certificates of occupancy issued by the local building officials charged with enforcement of the accessibility provisions of the California Building Code, as well as other requirements constitute prima facie evidence that the restaurants were constructed in compliance with the California Building Code. (SUF # 39 & # 40.) (*See* Request for Judicial Notice Exs. 1 & 2.)

Section 19956 of the California Health and Safety Code provides in relevant part that "[a]ll public accommodations constructed in this state shall conform to the provisions of Chapter 7 (commencing with Section 4450) of Division 5 of Title 1 of the Government Code." (Cal. Health & Safety Code § 19956.) Section 19958 provides that "[t]he building department of every city, county, or city and county shall enforce this part within the territorial area of its city, county, or city and county." (Cal. Health & Safety Code § 19958.)

Historically, the local building department has been designated as the enforcing agency tasked with the responsibility of ensuring compliance with applicable Building Code standards. (Cal. Bldg. Code § 2-105(b)(6) & (11)(C)(3) (1981).) This remains in effect to date. (Cal. Code of Regs., Title 24, § 101.17.11.4.3.) Thus, the judgment, expertise and discretion of the local building officials and their staff are expressly required to evaluate whether existing occupancies comply with the California Building Code.

The Court can and should infer that the issuance of certificates of occupancy by the local building officials tasked with enforcing the California Building Code indicates that such officials either determined that the restaurants complied with the California Building Code or determined that some type of exemption warranted some deviation from the California Building Code. *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 89 (1960) (noting presumption that official duty was performed and that necessary facts were found to exist to grant variance).

The analysis in *Thompson v. City of Lake Elsinore*, 18 Cal.App.4th 49 (Cal. Ct. App. 1993), regarding the nature and scope of a certificate of occupancy and the process whereby it is issued, is instructive. First, the Court of Appeal noted that section 307 of the Uniform Building Code in effect during the relevant time frame (i.e., the 1985 edition of the Uniform Building Code) provided as follows:

> (a) Use or Occupancy. No building or structure . . . shall be used or occupied . . . until the building official has issued a Certificate of Occupancy therefor as provided herein . . . .
> . . .
> (c) Certificate Issued. After the final inspection *when it is found that the building or structure complies with the provisions of this code and other laws which are enforced by the code enforcement agency*, the building official shall issue the Certificate of Occupancy . . . .
> *Thompson*, 18 Cal. App. 4th at 56 (quoting Uniform Building Code § 307(a) & (c) (1985)) (emphasis added).

Second, the Court of Appeal recognized that some *discretion* is, in fact, exercised by a building official before a certificate of occupancy is issued (even if such discretion is not as broad the discretion exercised to issue a building permit). The Court of Appeal proceeded to clarify that while the discretion to issue a certificate of occupancy was not as broad as the discretion to issue a building permit, such circumstance did not *automatically* entitle the holder of a building permit to a certificate of occupancy. That is, the building official did not have a *mandatory* duty to issue one.

The *Thompson* decision is significant for several reasons. First, the *Thompson* decision goes to great lengths to point out the *discretion* utilized by local building officials in determining whether a building complies with the applicable building code requirements. Subsequent court decisions have relied upon *Thompson* for this proposition. *See, e.g.*, *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 502, 993 P.2d 983 (2000) (noting that the defendant city had discretion to determine whether a completed project met building permit requirements in order to issue a certificate of occupancy); *Inland Empire Health Plan v. Superior Court*, 108 Cal. App. 4th 588, 594, 133 Cal. Rptr. 2d 735, 740 (Cal. Ct. App. 2003) (holding that a building official called upon to determine whether a renovation project meets the requirements of the local building code is making a discretionary decision). The *Thompson* decision is also consistent with *Fox v. County of Fresno*, 170 Cal. App. 3d 1238 (Cal. Ct. App. 1985), wherein the California Court of Appeal construed section 17980 of the California Health and Safety Code, applicable to housing, as providing the enforcement agency a choice or discretion to choose which course of action would be appropriate when a violation of the building standards published by the State Building Standards Code is found notwithstanding that such statute makes several references to the seemingly obligatory term "shall". *Id.* at 1243-44. Thus, local building officials have discretion to decide how the applicable building code should be applied. *Cf. Sutherland v. City of Fort Bragg*, 86 Cal. App. 4th 13, 24, 102 Cal. Rptr. 2d 736, 742-43 (Cal. Ct. App. 2000) (holding that the fire chief "exercises considerable *discretion* in deciding how [the fire code] *should be applied*")

(emphasis added); ("Aware of a violation of the [fire] code's exit provisions, the chief has an array of remedies at his disposal under the code, all involving the exercise of official *discretion*. These enforcement remedies include orders requiring an offending use to cease, declaring a building a public nuisance to be abated or, *in his discretion, declining any enforcement measures at all*.") (emphasis added).

Second, the *Thompson* decision makes it clear that the issuance of a certificate of occupancy should not occur unless and until the local building official has found the inspected building to be in compliance. The California Uniform Retail Food Facilities Law ("CURFFL") governs the uniform statewide health and sanitation standards for retail food facilities. Section 113915 of the CURFFL regarding submission of plans provides as follows:

> A person proposing to build or remodel a food facility shall submit complete, easily readable plans, drawn to scale, and specifications to the local enforcement agency for review and approval before starting any new construction or remodeling of any facility for use as a retail food facility as defined in this chapter. Plans and specifications may also be required by the local enforcement agency if it determines that they are necessary to assure compliance with the requirements of this chapter. The plans shall be approved or rejected within 20 working days after receipt by the local enforcement agency and the applicant shall be notified of the decision. Unless the plans are approved or rejected within 20 working days, they shall be deemed approved. The building department shall not issue a building permit for a food facility until after it has received plan approval by the local enforcement agency. Nothing in this section shall require that plans or specifications be prepared by someone other than the applicant.

Thus, the issuance of certificates of occupancy for the restaurants is prima facie evidence that the respective local building officials charged with enforcement of the California Building Code and the CURFFL determined that the restaurants complied with the provisions of the California Building Code and the CURFFL at the time such certificates were issued or were exempt based upon local conditions.

**D. The Height Of The Food Service Counter And The Placement Of The Sneeze Guard Is Required By Law To Ensure Sanitary Conditions for Chipotle's Customers.**

In determining that sneeze guards were required along the food service lines at the restaurants, Chipotle relied upon and complies with applicable CURFFL Sections 114080(b)(2)(A) and 114080(c) and Health & Safety Code Section 114080. (SUF # 41.)

A subsection of California Health & Safety Code § 114080 pertaining to the storage of food, as well as the display and sale of unpackaged food provides in pertinent part:

> (c) Unpackaged food may be displayed and sold in bulk in other than self-service containers if both of the following conditions are satisfied:
>
> (1) The food is served by an employee of the food establishment directly to a consumer.
>
> (2) The food is displayed in clean, sanitary, and covered or otherwise protected containers.

Therefore, in order to ensure sanitary dining conditions, as required by California law, Chipotle is legally justified in maintaining the counter height and the sneeze guard at the restaurants.

**E. If Plaintiff's Federal Claims are Dismissed, His State Law Claims Should Also Be Dismissed.**

Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction over state law claims "if [*inter alia*]. . . the court has dismissed all the original-jurisdiction claims." *Patel v. Penman*, 103 F.3d 868, 877 (9th Cir. 1996).

If this court should decide to grant summary judgment on the ADA claims herein, there will be no original jurisdiction claims remaining. The law is clear: "The district courts may decline to exercise supplemental jurisdiction over a claim. . . if. . . the district court has dismissed all claims over which it had original jurisdiction." 28 U.S.C. § 1367(c)(3). Indeed, as the Supreme Court has written:

> [I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988) (emphasis added).

Plaintiff's sole claim grounded in federal law is his ADA claim. Should the Court dismiss Plaintiff's ADA claim, the Court may decline to exercise supplemental jurisdiction over the companion state law claims. *See* 28 U.S.C. § 1367(c)(3).

The Ninth Circuit has given guidance on this issue in a case similar to the present one. See *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002). In that case, plaintiff brought claims for injunctive relief under Title III of the ADA and for damages under the California Disabled Person's Act. Plaintiff's claims for injunctive relief under the ADA became moot. Defendants sought the dismissal of the federal claim. Defendants also sought the dismissal of the claim under the California statute, without prejudice. The district court agreed, dismissing the ADA claim as moot and dismissing the state claims without prejudice by declining to exercise supplemental jurisdiction.

The Ninth Circuit affirmed. It wrote:

> We hold today that there is no federal-question jurisdiction over a lawsuit for damages brought under California's Disabled Person's Act, even though the California statute makes a violation of the federal Americans with Disabilities Act a violation of state law. Congress intended that there be no federal cause of action for damages for a violation of Title III of the ADA. To exercise federal-question jurisdiction in these circumstances would circumvent the intent of Congress.

*Id.* at 857.

Upon dismissing Plaintiff's ADA claim, the Court possesses the discretion to, and should, dismiss Plaintiff's companion state law claims without prejudice for lack of subject matter jurisdiction as the Ninth Circuit has suggested.

## IV.

## CONCLUSION

Plaintiff's claims for injunctive relief under the ADA have been rendered moot by Chipotle's remediation efforts. For that reason and all the foregoing reasons, Chipotle respectfully requests that the Court enter an Order granting its Motion for Summary Judgment and dismissing Plaintiff's ADA claim, and enter judgment in favor of Chipotle. Chipotle also respectfully requests that the Court dismiss Plaintiff's companion state law claims without prejudice for lack of subject matter jurisdiction.

DATED: April 16, 2007 GREENBERG TRAURIG, LLP

By /s/ Stacey L. Herter
Gregory F. Hurley
Stacey L. Herter
Attorneys for Defendant CHIPOTLE MEXICAN GRILL, INC.

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ORANGE COUNTY**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 650 Town Center Drive, Suite 650, Costa Mesa, CA 92626.

On the below date, I electronically filed the **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CHIPOTLE MEXICAN GRILL, INC.'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION** with the Clerk of the United States District Court for the Southern District of California, using the CM/ECF System. The Court's CM/ECF System will send an email notification of the foregoing filing to the following parties and counsel of record who are registered with the Court's CM/ECF System:

Amy B. Vandeveld
Law Offices of Amy B. Vandeveld
1850 Fifth Avenue, Suite 22
San Diego, CA 92101
T: (619) 231-8883
F: (619) 231-8329
Email: abvusdc@hotmail.com

*Attorneys for Plaintiff*

**BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM)**

In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system.

☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 16, 2007, at Costa Mesa, California.

/s/ Stacey L. Herter
STACEY L. HERTER