Amy B. Vandeveld, State Bar No. 137904
LAW OFFICES OF AMY B. VANDEVELD
1850 Fifth Avenue, Suite 22
San Diego, California 92101
Telephone: (619) 231-8883
Facsimile: (619) 231-8329

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MAURIZIO ANTONINETTI

Plaintiff,

vs.

CHIPOTLE MEXICAN GRILL, INC. and DOES 1 THROUGH 10, Inclusive,

Defendants.

Case No.: 05 CV 1660 J (WMc)

PLAINTIFF'S REPLY TO CHIPOTLE'S TRIAL BRIEF RE: ISSUE OF INJUNCTIVE RELIEF

Trial Date: November 27, 2007
Time: 8:00 a.m.
Courtroom: 12
Judge: The Honorable Napoleon A. Jones, Jr.

Plaintiff MAURIZIO ANTONINETTI hereby submits his Reply to Chipotle's Trial Brief Re: the issue of injunctive relief.

I.

PLAINTIFF NEED ONLY SHOW A VIOLATION OF THE ADAAG TO ESTABLISH AN ENTITLEMENT TO INJUNCTIVE RELIEF

A. Background.

Plaintiff contends that the wall which Chipotle constructed in front of its food preparation area prevents him and other wheelchair users from seeing the food ingredients available for selection and the making of his burrito. Plaintiff contends that the opportunity to see these things is integral to the Chipotle experience. Plaintiff further contends that Chipotle's "Policy" of accommodation fails to provide him with

substantially equivalent or greater access to the benefits, services, privileges and accommodations that Chipotle provides to the general public at its food preparation areas.

Plaintiff contends the wall must be lowered to a height which will enable him to see the food preparation area. Plaintiff has not identified any particular design that must be followed to achieve the objective of allowing people in wheelchairs, with eye levels between 43 and 51 inches, to see the food preparation area. In fact, there are myriad ways of accomplishing this. Plaintiff merely seeks an order from the Court ordering Chipotle to modify its wall, in whatever manner Chipotle chooses, as long as the modification results in the ability of people in wheelchairs to see the food preparation area and the ingredients available for selection in the same manner that it is available to standing customers.

B. General Injunctive Relief Elements are Inapplicable.

Defendant Chipotle Mexican Grill, Inc. ("Chipotle") incorrectly relies upon *Walters v. Reno,* 145 F.3d 1032, 1048 (9th Cir. 1998) as setting forth the elements that a plaintiff must prove to obtain injunctive relief in a case brought under the Americans with Disabilities Act ("ADA") for new construction. The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief. *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 259-61 (10th Cir.1981); see *United States v. City and County of San Francisco,* 310 U.S. 16, 30-31, 60 S.Ct. 749, 756-57, 84 L.Ed. 1050 (1940).

In the instant case, Chipotle violated a specific statute designed to protect Plaintiff from the very harm at issue. The Pacific Beach and Encinitas restaurants were designed and constructed for first occupancy in 2002 and, therefore, are "new construction". The obligations of a public accommodation, with respect to the design

///

///

and construction of new facilities, are set forth at 42 U.S.C. Section 12183[1] of the ADA which states in pertinent part:

> ...(D)iscrimination for purposes of this part includes a failure to design and construct facilities... that are readily accessible to and usable by individuals with disabilities.

Further, 42 U.S.C. Section 12188 of the ADA, states in pertinent part:

> In the case of violations of ...section 12183(a) of this title, injunctive relief **shall** include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. (emphasis added.)

The elements which Plaintiff must satisfy to entitle him to injunctive relief, therefore, are different than the general standards applicable to garden variety claims for injunctions.

C. Cost is Not a Factor in Fashioning a Remedy for Violations of New Construction Standards.

Plaintiff need not prove the cost of the remedy to bring the facility into compliance with the ADA. Rather, Chipotle had an obligation to design the facility so that it was accessible to and useable by people in wheelchairs from day one. Chipotle allegedly opted to adopt a Policy of accommodation instead of designing the food preparation area with a wall at a height low enough to allow people in wheelchairs to see the food ingredients and the assembly of their entrees. Chipotle's penalty for guessing wrong is that it must modify the wall to accommodate people in wheelchairs, even if that means completely destroying the whole wall.

> (A) designer who chooses to utilize alternative methods that it believes will provide equal or greater access runs the risk that DOJ or the courts will not share his or her enthusiasm. **In any enforcement action the burden will be upon the designer to demonstrate that the alternative method qualifies as an equivalent facilitation**. See TAM (1994 supp.) § III-7.2100. The penalties for guessing wrong can be quite severe, **especially for new construction**; **in extreme**

---

[1] The parallel regulations is 28 CFR 36.401.

> **cases the court may order a non-compliant structure to be torn down and rebuilt in compliance with ADA standards**. That prospect should serve to discourage abuse of the equivalent facilitation exception.

Independent Living Resources v. Oregon Arena, (D. Or. 1997) 982 F.Supp. 698, 727

In *Independent Living Resources*, the court addressed the different standards applicable to new construction and to existing facilities:

> This particular discussion (about Technical Assistance Manual ("TAM") § III-4.4600) concerned the requirements for removing barriers in existing construction. **The Rose Garden is subject to the rules for new construction. Consequently, the "readily achievable" qualification is inapplicable here, since new construction must meet the highest standards.** See H.R. Rep. No. 101-485 (III) at 60 (explaining distinction between the two standards), reprinted at 1990 U.S.C.C.A.N. 445, 483, 485-86. **In contrast to existing construction, there is no cost defense to the requirements for new construction. TAM § III-5. 1000**. (emphasis added.)

Independent Living Resources, 982 F.Supp. 698 at fn. 38

Chipotle's reliance on *Access Now, Inc. v. South Florida Stadium Corporation,* 161 F.Supp.2d 1357, 1369 (S.D. Fla. 2001) is inapposite. That case involved an existing facility. The "readily achievable" standard applied, which involved a consideration of the cost and effort required to remove the barrier. (See 28 C.F.R. Sec. 36.304 and 28 C.F.R. Sec. 36.104 (definition of "readily achievable").)

In contrast, new construction must be designed and constructed in the first instance so that it is accessible to and useable by people with disabilities. The only defense to compliance with the ADA is structural impracticability.

> The ADA requires that newly-constructed facilities be "readily accessible and usable by individuals with disabilities. " See *42 U.S.C. § 12183(a)(1)*. This command to build accessible facilities is excepted only if meeting the requirements of the Act would be "structurally impracticable." (citation omitted); See also *Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001)*("We need not decide whether the ADA forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations of *§ 12183(a)* . . . because there is no room for discretion even if it exists")(citation omitted)).

Eiden v. Home Depot, 2006 U.S. Dist. LEXIS 38423 (E.D. CA. May 26, 2006)

While the Magistrate Judge in *Long v. Coast Resorts, Inc.,* 267 F.3d 918 (9th Cir. 2001) was persuaded by an argument similar to that raised by Chipotle in this case, ("Considering the enormous expense required to modify the structure, and the near absence of hardship and that constituting a minimal inconvenience to wheelchair users, this Court is loathe [sic] to grant injunctive relief to Plaintiffs on this issue"), our Ninth Circuit decidedly rejected that position:

> **The magistrate judge's ruling was in error.** In contrast to grandfathered facilities, the ADA requires that newly constructed facilities be "readily accessible and usable by individuals with disabilities." *42 U.S.C. § 12183*(a)(1). We need not decide whether the ADA forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations of § 12183(a), see e.g., *Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978),* because there is no room for discretion here even if it exists. This violation resulted in the very discrimination the statute seeks to prevent: it denied individuals with disabilities access to public accommodations. Moreover, the **only statutory defense** for noncompliance -- structural impracticability -- does not apply to the Orleans because the terrain on which it is constructed has no unique characteristics which would make accessibility unusually difficult to achieve. See *42 U.S.C. § 12183*(a)(1). **Thus, we reverse the magistrate's determination that, because the Orleans demonstrated obedience to the spirit of the ADA, plaintiffs were not entitled to injunctive relief.**

Long v. Coast Resorts, Inc., 267 F.3d 918, 923 (9th Cir. 2001) (emphasis added.)

D. Chipotle Must Modify the Wall to Satisfy Its Obligation to Provide Equivalent Facilitation.

The Court previously ruled on the parties' motions for summary judgment and decided that ADAAG Section 7.2(2) applied to the food preparation area at issue. ADAAG Section 7.2(2) provides three options for compliance with a public accommodation's obligations to provide full and equal access to its goods, services, facilities, accommodations, privileges, etc. The Court rejected the first two options and held that Chipotle might still satisfy its obligations under the third option if its Policy provided "equivalent facilitation" to people in wheelchairs.

In the instant case, if the Court determines that Chipotle's Policy does not provide equivalent facilitation, Chipotle has offered no other alternative design, construction or method that would provide equivalent facilitation. The Court, then, would have no discretion but to order Chipotle to modify the wall so that people in wheelchairs, with eye levels of between 43 and 51 inches, can see the food preparation area. Chipotle can only avoid this obligation if it can show that it was structurally impracticable in the first instance to design a food preparation area that is accessible to and useable by people in wheelchairs.

II.

CONCLUSION

Plaintiff need not establish that the wall can be modified. Nor must he show that the cost of modification is outweighed by the benefit to people in wheelchairs. If Chipotle fails to establish that the Policy does not provide equivalent facilitation, it must provide a food viewing area that is visible to people in wheelchairs, regardless of the expense.

Respectfully submitted.

DATED: November 26, 2007

LAW OFFICES OF AMY B. VANDEVELD

/S AMY B. VANDEVELD
Attorney for Plaintiff
email: abvusdc@hotmail.com