NINTH CIRCUIT CASE NOS. 08-55867, 08-55946

IN THE

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURIZIO ANTONINETTI,
Plaintiff, Appellant and Cross-Appellee,

vs.

CHIPOTLE MEXICAN GRILL, INC.
Chipotle , Appellee and Cross-Appellant.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA,
CASE NO. 05 CV 1660 J (WMC)
NAPOLEON A. JONES, JUDGE

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal raises legal issues of first impression regarding the interpretation of the Americans with Disabilities Act ("the ADA") and its regulations, including the interpretation of "equivalent facilitation". It raises an issue regarding the applicability of equitable considerations in ordering injunctive relief, which was mentioned, but not decided, by this Court in *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 921 (9th Cir. 2001).

Plaintiff Maurizio Antoninetti ("Antoninetti") uses a wheelchair for mobility. He sued Chipotle Mexican Grill, Inc. ("Chipotle") under Title III of the ADA. Chipotle restaurants are unlike other typical fast food joints, where customers simply walk up to a counter and order a "burrito supreme". At Chipotle, customers[1] move along a 12-foot long line of food on display. Rather than serve themselves, customers direct the food crew as to the types of ingredients, and the amount of each ingredient, they want on their entrees. The crew make the entrees while the customers watch. Customers can see into the open kitchen and are "brought more completely into the dining experience."

1

"Customers" shall mean customers who can see the food preparation area and the open kitchen, unless otherwise noted.

Chipotle built a wall higher than Antoninetti's eye level in front of the food preparation area, preventing Antoninetti from seeing the making of his burrito, any of the 16 food items available for selection, or "the open kitchen," all of which are intended visual elements of the "Chipotle Experience".

The District Court (hereinafter "the district") applied to Chipotle's food ordering line a Standard from the ADA Accessibility Guidelines ("ADAAG") which relates to counters at which "goods and services are sold or distributed" (ADAAG § 7.2), but which makes no reference to the visual opportunities and advantages that are integral to the Chipotle Experience. This ruling raises a central issue in this case - does a Standard apply to a novel situation not specifically addressed in the ADAAG ("we serve you at your direction and while you watch food lines"), if the application allows architectural designs which exclude people in wheelchairs from the visual components of the food lines?

The district also ruled that ADAAG § 2.2, which defines "equivalent facilitation" as "alternative designs and technologies," should be interpreted to include "policies" of providing methods of accommodation to overcome architectural barriers. According to the district, a new facility can be designed to be inaccessible in the first instance, as long as a public accommodation adopts a written policy of providing methods of accommodation to overcome the inaccessible design.

Other important and novel issues are raised in this Appeal, as noted below.

II. STATEMENT OF JURISDICTION

On August 22, 2005, Antoninetti filed his case in the United States District Court, Southern District, California, asserting claims for violations of the ADA, California Civil Code[2] § 51, et seq. and Cal. Civ. Code § 54, et seq. and for declaratory relief.[3] The district court had jurisdiction over Antoninetti's claims under 28 U.S.C. §§ 1331, 1367, 2201 and 2202. This Court has jurisdiction over this appeal under 28 U.S.C.§ 1291.

This appeal is taken from: 1) the Findings of Fact, Conclusions of Law and Judgment ("Findings")[4]; 2) the Order Denying Antoninetti's Motion for Summary Judgment ("MSJ")[5]; and 3) all interlocutory and other Orders prior to and following the trial of this matter.[6]

2

Hereafter "Cal.Civ."

3

Court Record Docket No. 1, Excerpts of Record, Volume II, Tab 10 (Hereafter, "CR 1 / ER II-10").

4

CR 229 / ER I-3.

5

CR 129 / ER I-9.

6

CR 239 / ER I-2 (Order denying Antoninetti's Motion to Amend Findings of Fact, Conclusions of Law); CR 205 / ER I-4 (Order Dismissing Antoninetti's

III. ISSUES PRESENTED FOR REVIEW

1. Whether the district applied the correct ADAAG Standard to the "Chipotle Experience" and whether the application of ADAAG Standards is informed by the general anti-discrimination provisions of the ADA.

2. Whether "equivalent facilitation," as defined at ADAAG § 2.2, includes the adoption of policies to provide "methods of accommodation" to overcome architectural barriers.

3. Whether the determination of "equivalent facilitation" requires consideration of the general anti-discrimination provisions of the ADA that require full and equal enjoyment of all of the privileges, accommodations and advantages provided to the general public, *in addition to* the goods and services provided.

4. Whether, even if policies can constitute "equivalent facilitation," Chipotle's Policy fails because it does not include the "two new requirements" on which the district relied and because the Policy suffers the same failures that rendered the earlier unwritten policy invalid.

5. Whether the district improperly denied Antoninetti injunctive relief because it placed improper burdens of proof on Antoninetti and because it's factual findings were contrary to the Parties' factual stipulations.

6. Whether Antoninetti may recover damages under Cal. Civ. Code § 54.3 for litigation-related visits to the restaurants.

7. Whether Antoninetti was entitled to summary judgment or judgment.

Supplemental Legal Standards); CR 203 / ER I-5 (Order Denying Antoninetti's Motions in Limine); CR 173 / ER I-6 (Order Denying Antoninetti's Motion to Amend Amended Pretrial Order); CR 157 / ER I-7 (Amended Pretrial Order); CR 147 / ER I-8 (Order Denying Antoninetti's Motion for Reconsideration of Denial of Summary Judgment).

IV. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

Antoninetti filed his Complaint on August 22, 2005. Chipotle answered the Complaint, without raising the affirmative defense of structural impracticability.[7] In April of 2007, the Parties filed their MSJs.[8] On June 14, 2007, the district denied Antoninetti summary judgment, holding that ADAAG § 7.2(2), relating to sales and service counters, applied to Chipotle's food preparation areas and the "Chipotle Experience."[9]

The district further ruled that, pursuant to ADAAG §§ 2.2 and 7.2(2)(iii), Chipotle's written accommodations policy[10] could potentially constitute "equivalent facilitation," but that a question of fact existed as to whether the Policy of showing customers food in spoons or at tables was "equivalent facilitation" or whether it was enough that Antoninetti simply received a burrito.[11] Antoninetti filed a Motion for

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7 CR 3 / ER II-11.

8 CR 86 - CR 92, CR 161; CR 93 - CR 102.

9 CR 129 / ER I-9.

10 Hereinafter "the Policy".

11 CR 129 / ER I-9, page 17, line13 - page18, line 2 (hereafter 17:13 - 18:2).

Reconsideration on July 16, 2007 on the basis that the district's ruling was clear legal error because "policies" are not "alternative designs and technologies," as provided by ADAAG § 2.2, and because, among other things, Chipotle failed to raise a dispute of fact because it offered no evidence that its "methods of accommodation" provided "equivalent facilitation".[12] Antoninetti's Motion was denied on August 23, 2007.[13]

The district struck portions of the Pretrial Order filed on September 4, 2007 and ordered the Parties to file an Amended Pretrial Order which omitted, among other things, legal issues and facts relating to Chipotle's written and unwritten policies, the application of ADAAG § 7.2 and the application of 42 USC § 12182 to the Chipotle Experience.[14] Antoninetti filed a Motion to Amend the Amended Pretrial Order.[15] The Motion was denied on October 4, 2007.[16]

On October 3, 2007, Antoninetti filed Motions in Limine to exclude, among other things, evidence of Chipotle's "policies of accommodation" on the basis that

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12 CR 134.

13 CR 147 / ER I-8.

14 CR 157 / ER I-7.

15 CR 158.

16 CR 173 / ER I-6.

Chipotle's policy, written or unwritten, was not "equivalent facilitation" under ADAAG § 2.2.[17] Antoninetti's Motions in Limine Nos. 1 and 2 were denied on November 8, 2007.[18] The district summarily rejected Antoninetti's proposed legal standards, including standards relating to burdens of proof and the application of the ADA's general anti-discrimination provisions.[19]

A bench trial was held on November 27, 29, 30, 2007 and December 3, 2007. The district entered its Findings on January 10, 2008.[20] Antoninetti filed his Motion to Amend the Findings on January 22, 2008 because the district's Findings failed to include material undisputed facts relating to the full scope of the visual elements of the "Chipotle Experience" and relating to the insufficiently specific directives of the

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17 CR 169.

18 CR 203 / ER I-5.

19 CR 205 / ER I-4.

20 CR 229 / ER I-3.

Policy.[21] The Motion was denied on April 21, 2008.[22] Antoninetti filed his appeal on May 15, 2008.[23]

In its Findings, the district ruled: 1) written policies of providing methods of accommodation can constitute "equivalent facilitation" pursuant to ADAAG § 2.2; 2) Chipotle's Policy provided "equivalent facilitation" because it imposed "two new requirements"[24]; 3) Chipotle's prior unwritten policy did not constitute "equivalent facilitation" because it relied upon the judgment and "common sense" of the crew and managers, rendering the subjective interpretation incapable of uniform enforcement;[25]

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21 CR 230.

22 CR 239 / ER I-2.

23 CR 255 / ER I-1.

24 The district held: "Under the written Customers with Disabilities Policy, the pre-existing accommodations that Chipotle provided as part of its mission for excellent customer service ***are set forth plainly with two new requirements***: (1) it established that it is the *responsibility of the manager on duty at the Restaurant, rather than his or her crew members*, to carry out the policy (by requiring the manager on duty to greet a customer with disability and inquire as to whether he or she desires any accommodations as soon as he or she approaches the tortilla station in the food serving line) and (2) it established that *the manager on duty must affirmatively inform the customer with a disability* of the various methods of accommodations options without waiting for the customer to request them through oral communications or non-oral cues." CR 229 / ER I-3, Conclusions of Law (hereafter "CL") 16. (Emphasis added.)

25 The district held that under the unwritten practice "...(Chipotle's) managers and

4) Antoninetti was denied injunctive relief because he had not presented any "credible" evidence that the written policy did *not* provide "equivalent facilitation," he had not proven he intends to return to the restaurants, he failed to prove that the requested injunction was in the public interest and he failed to satisfy his burden of proving that the requested injunction (lowering the obstructing wall) was "justified by the relief it will provide"; 5) Antoninetti could not recover damages for visits that were "litigation-related".[26]

B. Statement of Facts.

The district adopted, virtually wholesale and verbatim, Chipotle's proposed Findings of Fact and Conclusions of Law, including Chipotle's omission of material undisputed facts and including findings that are contrary to the evidence.[27]

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crew were to use their own judgment and common sense to determine when and how to accommodate a customer in a wheelchair. This subjective interpretation and enforcement of (Chipotle's) informal Policy rendered the unwritten policy incapable of uniform enforcement or a confidant (sic) conclusion that these actions were equivalent facilitation". CR 229 / ER I-3, CL 12.

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CR 229 / ER I-3, CL 25, CL 27, CL 31, CL 32.

27

The reviewing Court is respectfully requested to review the district's Findings closely. The district's Findings, like Chipotle's Proposed Findings, do not even reference Antoninetti's undisputed inability to see over the wall. Nor do they reference the design of the kitchen being a "feast for the eyes" and "open" so that customers will "be brought more completely into the dining experience" which are undisputed intended visual benefits provided by Chipotle. CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 311:8-11.

1. The Parties.

Chipotle operates a chain of fast food restaurants, including locations in San Diego/Pacific Beach and Encinitas, California, which are "new construction" as defined by the ADA.[28] Ron Sedillo, Jim Adams, Matt Cieslak and Josefina Garcia were Chipotle managers or directors.[29] Scott Shippey was the person most

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The district also adopted Chipotle's misleading and incorrect interpretations of actual testimony, including, for example, at CR 227 / ER IV-24, Fact 144, adopted by the district at CR 229 / ER I-3, Fact 140:

> "Plaintiff admitted that during the site inspections of the Restaurants he found the samples that he was shown by the employees who served him (all of which represented actual serving sizes) to be very helpful in determining what to order. TR, at p. 463, lns. 16-21 (November 30, 2007)."

This "Finding of Fact" is contrary to the evidence. Antoninetti *actually* said: "If I knew the quantity, the standard quantity, that would be an improvement." He also testified that he "*did not know*" if the quantity in the souffle (sample) cups was the standard quantity per serving. CR 267 / ER VI-27, 463:16-24. He also testified that he could not see how much of an ingredient was actually placed on his burrito and was never told the portion size of any ingredients that were actually being placed on his burrito. CR 267 / ER VI-27, 399:15-400:3, 402:12-21, 403:9-11, 404:2-13, 410:22- 411:7. Chipotle's only witness to testify on the subject, Ms. Arriaga, admitted that she never told Antoninetti that the amount of an ingredient she was showing him was the amount she actually placed on his burrito. CR 268 / ER VII-28, 612: 20-23.

[28] CR 109 / ER III-21, Facts 9-11; CR 157 / ER I-7, Facts 9, 10; CR 229 / ER I-3, Findings of Fact (hereafter "FF") 1, 4-7.

[29] CR 109 / ER III-21, Facts 1-7; CR 157 / ER I-7, Facts 1-7; CR 229 / ER I-3, FF 33, 34, 36.

knowledgeable regarding the design and construction of Chipotle restaurants.[30]

Antoninetti is a paraplegic who uses a wheelchair for mobility.[31] His eye level is 45 inches from the finished floor. He could not see over the wall obstructing the view to the food preparation area.[32] Antoninetti lives very close to the Pacific Beach Chipotle restaurant.[33] Before and after filing his lawsuit, Antoninetti visited the Pacific Beach Chipotle at least 6 times and the Encinitas Chipotle 2 times.[34] He wants to return to Chipotle's restaurants to have the "Chipotle Experience" - to see all of the wonderful, tasty ingredients on display, to see his burrito assembled and rolled, to make his "perfect burrito," quickly.[35]

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CR 109 / ER III-21, Fact 1; CR 157 / ER I-7, Fact 1; CR 265 / ER IV-25, 14:8-12, 16:2-4.

31

CR 89 / ER II-13, p.1, par. 2; CR 229 / ER I-3, FF 8.

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CR 157 / ER I-7, Fact 65; CR 89 / ER II-13, pars. 2, 8, 9, 12, 13; CR 92 / ER II-15, DVDs at 205, 206; CR 109 / ER III-21, Fact 48; CR 267 / ER V-26, 377:6-13; CR 268 / ER VII-28, 648:21-22, 649:7 (referencing Trial Exhibit 6, site inspection DVD).

33

CR 267 / ER VI-27, 422:17-20.

34

CR 89 / ER II-13, p.7, par. 24; CR 229 / ER I-3, FF 128, 129, 130, 131, CL14.

35

CR 89 / ER II-13, p. 7, par. 24; CR 157 / ER I-7, Fact 41.

Antoninetti would return to Chipotle's restaurants "tomorrow" if the walls were lowered and he had the chance to see the display and presentation that Chipotle provides to standing customers.[36] He has been deterred from returning to the restaurants since October 6, 2006 because the "accommodations" provided during the site inspections were not appetizing or appealing and the experience was awkward and humiliating. If he returned, he would face the same issues.[37]

2. The Chipotle Experience for Standing Customers.

Chipotle distinguishes itself from other fast food chains, like Taco Bell, by providing its customers with "the Chipotle Experience,"[38] which allows customers to watch their burritos being made and to direct what they want in their burritos.[39] Customers get to "see, select and direct" what goes into their burritos.[40] They can

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36 CR 267 / ER VI-27, 426:13-15.

37 CR 89 / ER-13, 4:9-7:28; CR 267 / ER VI-27, 407:10-21, 412:23-413:25, 426:21- 427:10.

38 CR 92 / ER II-15, p. 86 (59:23-60:12), 148:23-149:5; CR 157 / ER I-7, Fact 45.

39 CR 92 / ER II-15, 106:5-12, 109:18-23, 130-134; CR 157 / ER I-7, Facts 18, 19, 26, 27; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, pgs. 3, 6, 10, 21, 22, 23.

40 CR 92 / ER II-15, 114:24-115:24; CR 157 / ER I-7, Fact 19; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, p.1.

customize their burritos so that they receive their "perfect burrito".[41] Customers can see the portion sizes placed on their entrees and can determine if they want more or less of an ingredient.[42] Chipotle knows its customers "love to interact" and "watch closely as we put their meal together."[43] Chipotle wants its customers to "eat with their eyes".[44] Chipotle provides "the WOW factor" which is, among other things, customers being able to see their burritos being built "right before their eyes."[45]

During the ordering process, customers get to see 16 large bins of food and can simultaneously compare different food options, such as the various meat selections.[46]

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41 CR 92 / ER II-15, p. 73 (137:12-22), p. 87 (114:17-23), 94, 95, 106:55-12, 110:13-111:3, 130, 145:11-14; CR 157 / ER I-7, Facts 17 to 27; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 1, 2, 3, 6, 21, 22, 23.

42 CR 92 / ER II-15, p. 87 (114:17-23), 95; CR 157 / ER I-7, Facts 26, 27; CR 267 / ER IV-25, 57:1-7, 58:-321, 91:5-23.

43 CR 92 / ER II-15, 115:20-24, 132; CR 265 / ER IV-25, 62:14-16, 309:24-310:2; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3.

44 CR 92 / ER II-15, 115:25-116:2, 132, 133; CR 229 / ER I-3, Fact 57.

45 CR 92 / ER II-15, 121:8-122:4; CR 157 / ER I-7, Fact No. 25; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 6.

46 CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-23; CR 268 / ER VII-28,

They can decide which of the ingredients is more visually appealing to them.[47] They can determine the freshness of the food, such as whether or not the barbacoa is dry, or the beans have a crust on them.[48] Appearance of the food is so important that Chipotle provides specific details for the "look" of its food.[49]

Chipotle specifically designed its restaurants so that customers can see into the open kitchen and can see freshly marinated meats being grilled.[50] The open kitchens are designed to be a "feast for the eyes" and are intended "to bring customers more completely into the dining experience."[51]

Chipotle prides itself on long lines that "really don't take that long to get

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647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

47 CR 92 / ER II-15, DVDs at 205, 206, 207; CR 265 / ER IV-25, 68:14-18.

48 CR 92 / ER II-15, 146:22-147:15, 155:1-21; CR 265 / ER IV-25, 67:24-68:1, 68:23-25.

49 CR 92 / ER II-15, 132, 133; CR 229 / ER I-1, FF3; CR 265 / ER IV-25, 68:19-69:5; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3, 5.

50 CR 92 / ER II-15, 131; CR 266 / ER V-26, 311:8-11; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

51 CR 92 / ER II-15, 131; CR 157 / ER I-7, Fact 23; CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 308:2-12; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

through."[52] Chipotle provides customers with "instant gratification."[53] Customers typically go through the line in a minute or less.[54]

3. The Inaccessible Design - the Wall.

Chipotle restaurants are similar in design with respect to the food lines.[55] The 12-foot expanse of equipment on which the food is prepared and presented for view is approximately 34 inches from the finished floor[56]. Chipotle constructed a 44-inch high wall between the customers and the food preparation area (hereinafter "the wall".)[57] A transparent sneeze guard is located on top of the wall and is held in place by a metal strip about 2 inches high, thereby obstructing the view of the food preparation area to a height of 46 inches from the finished floor.[58]

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52 CR 92 / ER II-15, 135; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 7.

53 CR 92 / ER II-15, 135; CR 265 / ER IV-25, 135:11-13; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 7.

54 CR 92 / ER II-15, 153:14-15; CR 266 / ER V-26, 337:17-22; 345:18-346:3.

55 CR 109 / ER III-21, Fact 11; CR 157 / ER I-7, Fact 11.

56 CR 109 / ER III-21, Fact 43; CR 157 / ER I-7, Fact 34.

57 CR 92 / ER II-15, 38:13-24; CR 157 / ER I-7, Fact 29.

58 CR 109 / ER III-21, Facts 41, 42; CR 157 / ER I-7, Facts 33, 36.

4. The "Chipotle Experience" is not Accessible to People in Wheelchairs.

ADAAG Figure A3 provides a uniform reference for design not covered by the guidelines and identifies the average eye level of a person in a wheelchair as between 43 and 51 inches from the finished floor.[59] Wheelchair users, with eye levels in this range, can see no portion of Chipotle's food preparation area, the food items available for selection, or the preparation of their food.[60]

5. Antoninetti's Chipotle Experience.

At no time, prior to the site inspections of October 6, 2006, was Antoninetti shown any food ingredients.[61] At the site inspections, he was only shown food items one at a time, after he asked to see them.[62] Antoninetti has never been able to see the freshness of the ingredients, to compare ingredients to one another, to see his burrito assembled or to fully customize his entree to make his "perfect burrito". He was never told the portion size that was actually being placed on his burrito.[63]

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59 CR 109 / ER III-21, Facts 49; CR 157 / ER I-7, Fact 35.

60 CR 90 / ER II-14, pars. 12 to 18; CR 157 / ER I-7, Facts 37, 38.

61 CR 89 / ER II-13, par. 16; CR 266 / ER V-26, 375:14-20.

62 CR 89 / ER II-13, par. 17; CR 157 / ET I-7, Fact 40.

63 CR 89 / ER II-13, pars. 13, 16, 17, 19, 21, 22, 23; CR 267 / ER VI-27,

The food samples shown to him were too small, too far away and were obstructed by the plastic of the cups, the bottoms of the spoons or the crew members' fingers.[64] Seeing food in small plastic cups, or lifted by handfuls or tongfuls, is not appetizing.[65] The accommodation of taking a tray of cups of food to an adjacent table is unacceptable because it would separate Antoninetti from his companions, make him feel different and is unappetizing.[66]

It took at least three minutes, an uncomfortable amount of time[67], to show Antoninetti samples of food during the inspections, which did not include seeing his burrito assembled.[68] It is rare for a customer to take three minutes, a significant amount of time, to complete their order.[69]

410:22-411:1.

64 CR 89 / ER II-13, pars. 19, 21, 22; CR 92 / ER II-15, DVDs at 205, 206; CR 267 / ER VI-27, 399:1-14.

65 CR 89 / ER II-13, par. 22; CR 267 / ER VI-27, 407:10-21.

66 CR 267 / ER VI-27, 415:14-416:25, 418:3-13, 418:20-419:9.

67 CR 89 / ER II-13, par. 20.

68 CR 92 / ER II-15, DVD at 205; CR 267 / ER VI-27, 405:7-406:8.

69 CR 266 / ER V-26, 210:1-18.

6. Chipotle's Policy.

Almost five years after construction of the restaurants, Chipotle adopted its Policy on February 23, 2007.[70] The Policy references some methods of accommodation for people with disabilities[71] and assigns responsibilities to Chipotle's managers *and crew*[72]. It allows Chipotle employees to utilize methods of

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70 CR 109 / ER III-16, par. 3; CR 229 / ER I-3, FF 101.

71 "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. CR 96 / ER III-16, page 7; CR 229 / ER I-3, FF 110.

72 "...In all such cases the **restaurant staff** will offer suitable accommodations based upon the individual circumstances, and will be responsive to the customer's requests. Depending upon the circumstances, our **crew member** or manager **may** ask the customer if we can accommodate them during their visit.

...It is the manager **and crew's** responsibility to ensure that the experience a customer with a disability has is excellent.

...**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. CR 96 / ER III-16, 7; CR 229 / ER I-3, FF 110.

accommodation not addressed in the Policy.[73] No specific methods of accommodation are required for Pacific Beach or Encinitas employees under the Policy. [74] Instead, Chipotle employees may use their common sense in devising alternate ways to accommodate customers in wheelchairs.[75]

The Policy does not "set forth plainly" the "two new requirements" integral to the district's decision that the Policy constituted "equivalent facilitation."[76]

7. Chipotle's Failure to Present Material Evidence.

Chipotle offered no evidence that the Policy's "methods of accommodation" provide a comparable or better Chipotle Experience for wheelchair users. No evidence that the methods of accommodation (food lifted in spoonfuls, or by tongfuls, or by handfuls, or in plastic cups) are similar in appearance to, or as appetizing as, a 12-foot long display of 16 full bins of food or that they provide equivalent opportunities to determine the freshness or composition of the food items, or to compare the ingredients to one another.

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[73] CR 267 / ER VI-27, 548:25-550:15.

[74] CR 267 / ER VI-27, 549:14-19.

[75] CR 266 / ER V-26, 318:21-319:2.

[76] CR 229 / ER I-3, CL16, contradicted by actual language of Policy, found at CR 229 / ER I-3, FF 110.

No evidence of the amount of time it would take to perform the methods of accommodation for wheelchair users who want to see their entree assembled, allowing them to make their perfect burrito by asking for more or less of an ingredient. No evidence that these methods provide wheelchair users the opportunities to see into the open kitchen, to see freshly marinated meats being grilled or to be "brought more completely into the dining experience."

Chipotle offered no evidence that it would be structurally impracticable to have designed and constructed its food preparation area without the offending wall.

V. SUMMARY OF ARGUMENTS

1) An ADAAG Standard should only be applied to unique situations (i.e., "we serve you at your direction and while you watch buffet lines") if the application would provide access to all that is offered by a public accommodation, including the privileges and advantages, *as well as* the goods and services of the public accommodation.

ADAAG § 7.2 refers only to counters where goods and services are sold or distributed and does not account for the visual elements that are integral to the Chipotle Experience. ADAAG § 4.33.3 applies to the food viewing areas, requires a comparable line of sight for wheelchair users, and provides access to all aspects of the Chipotle Experience, including the visual benefits.

If ADAAG § 4.33.3 is not applicable to the Chipotle Experience, then 42 USC § 12183, along with ADAAG Figure A3, required a design that would provide wheelchair users with access to all elements of the Chipotle Experience, including the intended visual elements.

2) "Equivalent facilitation," as defined at ADAAG § 2.2, allows only the use of alternative designs and technologies, not the later adoption of policies of providing "methods of accommodation" to overcome inaccessible design and construction.

3) Even if policies can constitute "equivalent facilitation," the general anti-discrimination provisions of the ADA require that Chipotle's "methods of accommodation" provide a Chipotle Experience for wheelchair users that is not separate or different and that provides all the advantages and privileges offered to the general public.

4) Even if policies can constitute "equivalent facilitation," Chipotle's Policy fails because it does not include the "two new requirements" on which the district relied and it is too vague to be enforceable. In the alternative, Antoninetti is entitled to injunctive and declaratory relief compelling modification of the Policy.

5) The district's denial of injunctive relief was legally erroneous because it relied upon a misinterpretation of ADAAG § 2.2, it placed improper burdens of proof

on Antoninetti, it was clearly erroneous with respect to Antoninetti's intent to return to the restaurants and it ignored undisputed facts regarding the full scope of the visual elements of the Chipotle Experience. Chipotle has the burden of proving "equivalent facilitation" by something more than a mere absence of complaints. Antoninetti does not have to prove that "equivalent facilitation" was *not* provided. To obtain injunctive relief, Antoninetti does not have the burden of proving that the cost of lowering the offending walls, in new construction, is outweighed by the benefits achieved.

6) The district committed legal error in holding that Antoninetti was not entitled to damages for three visits to Chipotle restaurants because they were "litigation-related."

7) Antoninetti was entitled to summary judgment because the only dispute of fact found by the district was relative to the Policy and the district applied the wrong legal standards to this case.

VI. STANDARDS OF REVIEW

A decision to deny summary judgment is reviewed de novo. *Brewster v. Shasta County*, 275 F.3d 803, 806 (9th Cir. 2002). The interpretation of the ADA is a question of law subject to de novo review. The allocation of the burden of proof is also reviewed de novo. The decision whether to grant equitable relief under the ADA is reviewed for an abuse of discretion. *Molski v. Foley Estates Vineyard*, 531 F.3d

1043, 1046 (9th Cir. 2008).

Denial of a motion for reconsideration is reviewed for an abuse of discretion. *School District No. 1J v. AcandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993). Denial of a motion to amend the pretrial order is also reviewed for an abuse of discretion. *Byrd v. Guess,* 137 F.3d 1126, 1131 (9th Cir. 1998). The district abuses its discretion when it makes an error of law. *Agostini v. Felton,* 521 U.S .203, 238 (1997). An abuse of discretion is also "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against logic and effect of the facts as are found." *Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). A decision may be reversible for abuse of discretion if premised on an incorrect legal conclusion or a clearly erroneous factual finding. *Foster v. Skinner,* 70 F.3d 1084, 1087 (9th Cir. 1995).

Findings of fact are reviewed for clear error. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* , 532 U.S. 424, 440 (2001). The wholesale and verbatim adoption of one party's findings requires the Circuit Court to review the record and the district court's opinion more thoroughly. *Silver v. Exec. Car Leasing,* 466 F.3d 727, 733 (9th Cir. 2006). It is clear error if the reviewing court has a "definite and firm conviction that a mistake has been committed." *Husain v. Olympic Airways,* 316 F.3d 829, 835 (9th Cir. 2002).

Clear error exists when the trial judge "misapprehended the effect of the

evidence" and when "the testimony, considered as a whole, convinces the (appellate) court that the findings are so against the preponderance of credible testimony that they do not reflect or represent the truth and right of the case." *Water Craft Mgmt. LLC v. Mercury Marine,* 457 F.3d 484, 488 (5th Cir. 2006).

VII. ARGUMENTS

1) The District Applied the Wrong ADAAG Standard to the Chipotle Experience.

a. The General Anti-discrimination Provisions of the ADA Inform the Application of the Design Standards.

Historically, the application and interpretation of the ADA and the ADAAG Standards have not been considered by Courts in a vacuum but have been informed by the general anti-discrimination principles of the ADA, including 42 U.S.C. § 12182(a)[77] which states:

> 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.

42 U.S.C. § 12182(b) provides descriptions of discrimination and states in pertinent part:

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77 The related regulation is 28 CFR § 36.201.

(1)(A)(i) Denial of participation

It shall be discriminatory to subject an individual ...on the basis of a disability ...of such individual ... 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 ... of such individual ...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... of such individual ... 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.

42 U.S.C. § 12182(b) (Emphasis added.)

"The central goal of Title III of the ADA is to ensure that people with disabilities have full and equal enjoyment of the goods, services, *facilities, privileges, advantages, or accommodations* of any place of public accommodation." *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003), cert. denied, 124 S. Ct. 2903 (2004) (Emphasis added). "Full and equal enjoyment" means the right to participate in and to have *an equal opportunity to*

obtain the same results as others.[78] Affording people with disabilities the same opportunities, the same benefits and the same privileges, was central to Congress' discussion of Section 302[79] of the ADA:

> ... *(t)he Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and over-arching principle of the Committee's bill...* For example, a blind person may wish to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's guided tour...
>
> Providing services in the most integrated setting is a fundamental principle of the ADA...

H. Rpt. No. 101-485(II), page 102. (Emphasis added.)

In later discussions, Congress again affirmed this important principle:

> "It is critical that the existence of *separate specialized services never be used as justification for exclusion from programs that are not separate or different.* For example, the existence of a special art program for persons who are developmentally disabled must not be used as a reason to reject an individual who is retarded from the regular art class if that person prefers to participate in the regular art class.

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See Appendix B to 28 C.F.R. Part 36 - Preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed.Reg. 35,546 (July 26, 1991), page 593. (Emphasis added.)

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Codified at 42 U.S.C. § 12182.

H. Rpt. No. 101-485(III), page 57. (Emphasis added.)

Congress entrusted the Attorney General with the responsibility of promulgating Title III's implementing regulations "to carry out the provisions of Title III". *Fortyune v. American Multi-Cinema,* 364 F.3d 1075, 1081 (9th Cir. 2004). Regulations must be interpreted broadly and in line with the underlying statutes. *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 88 (D. Mass. 2003).

Congress directed the U.S. Department of Justice ("DOJ") to issue regulations that include standards applicable to facilities covered by the ADA. 42 U.S.C. § 12186(b). The implementing regulations were issued on July 26, 1991, and include architectural standards for newly constructed public accommodations and commercial facilities entitled the Standards for Accessible Design[80], found at 28 C.F.R. Part 36. "The Guidelines are specific design standards listed in Appendix A of the Standards for Accessible Design." *Long, supra, at* 921 (9th Cir. 2001).

As noted *in Boemio v. Love's Rest.*, 954 F. Supp. 204 (S.D. Cal. 1997) ,

> The standard cannot be 'is access achievable in some manner'. We must focus on the equality of access. If a finding that ultimate access could have been achieved provided a defense, the spirit of the law would be defeated.

Boemio, supra, at 208.

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Referred to herein as "the ADAAG" and 'the Standards".

In light of the ADA's clear mandate to eliminate discrimination against persons with disabilities, each ADAAG Standard should be applied so that it provides wheelchair users and others with disabilities with the same opportunities to experience the same privileges, advantages and accommodations *in addition to* the goods and services that are provided to the general public. Limiting "full and equal enjoyment" only to whether a person with a disability "ultimately" received goods or services would allow untenable scenarios.

Examples: 1) ADAAG § 5.5 addresses the clear width of food service lines and refers to Figure 53, which illustrates the dimensional requirements of tray slides for self-service counters. Following the district's ruling, a restaurant offering a self-serve buffet brunch could deny people in wheelchairs access to the food serving areas by designing lines with clear widths of less than 28 inches (impassable for most wheelchairs). As long as small cups of food items were shown to a patron at the check-out counter, the restaurant need not meet § 5.5's clear width requirement of 36 inches. The benefit of seeing large, appetizing quantities of food on display, the opportunity to "eat with your eyes" could legally be denied a wheelchair user, under the district's ruling.

2) Benihana restaurants are "theater restaurants" where diners sit around a central cook surface and watch a chef perform skilled knife maneuvers while he

prepares their entrees "right before their eyes." (Please see www.benihana.com) Consistent with the district's ruling, if Benihana satisfied the dimensional requirements of ADAAG §§ 5.1[81] and 4.32[82], Benihana could erect walls in front of the wheelchair users, denying them visual access to the "cooking theater". No discrimination would have occurred, per the district, as long as the customers in wheelchairs were shown cups of uncooked shrimp, rice and steak and ultimately ended up with food on their plate.

This was not the intent of Congress, which repeatedly directed that ultimate access is not sufficient.[83]

Historically, this Court has referenced the general provisions of the ADA in its interpretation and application of the ADAAG. In *Oregon PVA v. Regal Cinemas*,

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81 Sec. 5.1: Five percent, but at least one, of the fixed tables shall comply with § 4.32.

82 Sec. 4.32: Provides requirements for clear floor space, knee clearance and table heights for wheelchair locations.

83 "For new construction...the purpose is to ensure that the service offered to persons with disabilities is equal to the service offered to others. It would be a violation of this title to build a new bank with ATMs that were not readily accessible to and usable by persons with disabilities. It is not sufficient that the person with a disability can conduct business inside the bank. The ATMs provide an additional service which must be available to persons with disabilities." H.Rep.No. 101-485(III) at 61.

supra, this Court cited 42 U.S.C.,§ 12182(a) in holding that ADAAG § 4.33.3 included a viewing angle element for wheelchair locations. This Court ruled that the spaces had to be located so that the *experience* of wheelchair users was the same as that provided to non-disabled. In rejecting locations requiring wheelchair users to twist their bodies to see the movie screen, this Court held:

> We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons."

Oregon PVA, 339 F.3d at 1133.

In *Fortyune, supra,* this Court also referenced 42 U.S.C. § 12182(a), as well as § 12182(b), in finding that, although the defendant cinema's wheelchair locations complied with dimensional requirements, the cinema was still in violation of the ADA because the cinema failed to ensure the availability of companion seating for wheelchair users. "Stated differently, the presence of his wife is a condition precedent to Fortyune's 'enjoyment of the goods, services, facilities, privileges, advantages, [and] accommodations of [the AMC theater].'42 U.S.C. § 12182(a)." *Fortyune, supra,* at 1082.

It was not enough that wheelchair users could see the movie. Rather, the companion seats had to be kept available so that people in wheelchairs were provided the same *experience* as non-disabled - the right to be accompanied by companions.

More recently, in *Miller v. California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), this Court noted the general provisions of § 12182 when it interpreted and applied ADAAG § 4.33.3 to require lines of sight over standing spectators.

The Third Circuit, in *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730 (3rd Cir. 1999), addressed the interplay of the general principles of the ADA and ADAAG § 2.2's definition of "equivalent facilitation":

> (T)he language of Title III itself precludes a reading of the "Equivalent Facilitation" provision that would allow venues to restrict wheelchair access to certain areas based on a belief that wheelchair users will be better off elsewhere. *See 42 U.S.C. § 12182(b)(1)(A)(iii)* (discriminatory to provide a separate benefit unless necessary to provide equal benefit); id. at (b)(1)(B) (benefits of a public accommodation must be provided in the most integrated setting appropriate to the needs of the individual).

Caruso, supra, at 739, citing 28 C.F.R. § 36, App. B., at 622.

b. ADAAG § 4.33.3 Applies to the Chipotle Experience.

Chipotle's adoption of the Policy underscores Chipotle's own assessment of the visual import of the Chipotle Experience. The design of its kitchens to be "open" so that customers can be brought "more completely into the dining experience" illustrates the visual benefits intended by Chipotle. Incorporation of a transparent sneeze guard into the ordering lines emphasizes the important visual aspects of the Chipotle Experience.

There is no ADAAG Standard which specifically addresses "we serve you at your direction while you watch buffet lines".[84] ADAAG Figure A3, however, details the average eye levels for people in wheelchairs[85] and ADAAG §4.33.3 (the line of sight Standard) is specifically incorporated into the requirements relating to restaurants.

"Restaurants and Cafeterias" are addressed at Section 5 of the ADAAG. ADAAG §5.1 states that "restaurants and cafeterias shall comply with the requirements of 4.1 to 4.35." Section 4.33 sets forth line of sight requirements at ADAAG § 4.33.3.[86] Section 4.33 is entitled "Assembly Areas" and was always

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ADAAG § 5.5 addresses "food service lines" but only addresses path of travel and tray slide requirements. While Figure 53 arguably illustrates the appropriate design for Chipotle's ordering line, Antoninetti contends that § 4.33.3 more specifically addresses the line-of-sight requirements in restaurants, given that it is incorporated in Section 5, relating to Restaurants and Cafeterias.

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Between 43 and 51 inches.

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Section 4.33.3 states in pertinent part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. ..

intended to include more than just stadiums and theaters.[87]

"Assembly Area" was given specific meaning in the ADAAG and is defined as "a room *or space* accommodating a group of individuals for recreational, educational, political, social, or amusement purposes, *or for the consumption of food and drink.*" ADAAG § 3.5. Restaurants, then, are assembly areas, are governed by the Standards specifically applicable to assembly areas (ADAAG §4.33) and are subject to the line of sight requirements of ADAAG §4.33.3. Chipotle's "we serve you at your direction while you watch buffet line" and its "open kitchen" are exactly the sorts of situations that explain the "line of sight" requirement in restaurants and the reason that "assembly areas" include "places where food is consumed."

This line of sight requirement is applicable to Benihana theater restaurants, to Chipotle's food viewing areas and open kitchen, to sports bars where sporting events are displayed on myriad televisions, as well as to other "assembly areas" such as museums and galleries, convention centers and auditoria. If views to televisions, stages, artwork and artifacts are integral to the benefits or privileges offered by a bar, a convention center, galleries and museums, then those screens, stages, artwork and artifacts, pursuant to ADAAG §4.33.3, must be located so that people in wheelchairs

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ADAAG § 4.33.3 was modeled after existing federal accessibility Standards that "have applied since 1984 to theaters, auditoriums *and other places of assembly* constructed with federal funds." H. Rpt. No. 101-485(II)at 103.

have a comparable line of sight to them.

More precisely, if not ADAAG § 4.33.3, then what Standard does require lines of sight to gallery and museum displays, convention center stages, fairground stages or the myriad other facilities that fall within the definition of "assembly area," that have no fixed seating, but that have visual elements integral to their purpose?

It makes no sense that the ADA and the ADAAG would require access *to* assembly areas with no corresponding obligation to make the intrinsic purpose of the facility accessible - the opportunity to view artwork or to watch sporting events.

c. ADAAG §7.2 Does Not Apply to the Chipotle Experience.

The district correctly held that ADAAG § 7.2(2)(i) did not apply to this case because the lowered transaction counter was not a "lowered portion" of the food preparation area since the two areas serve different functions.[88] The district correctly held that the transaction counter does not qualify as an "auxiliary counter" under Sec. 7.2(2)(ii) because the counter, alone, does not provide customers in wheelchairs with full and equal access.[89]

The district erred, however, when it held that ADAAG § 7.2(2) applies to this case in the first instance. Section 7 of the ADAAG is entitled "Business and

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88 CR 129 / ER I-9, 14:20-22.

89 CR 129 / ER I-9, 16:8-13.

Mercantile" and addresses "areas used for business transactions with the public." Section 7.2(2) refers to "counters that may not have a cash register but at which goods or services are sold or distributed."

ADAAG § 7.2 does not apply to Chipotle's food preparation areas and open kitchens because the visual components integral to the Chipotle Experience are not "business transactions". Seeing food on display, watching and directing the assembly of an entree, looking into the kitchen and watching freshly marinated meats continuously being grilled and being brought more completely into the dining experience are not "business transactions" any more than the opportunity to view artwork at the local museum is a "business transaction".

The visual elements of the Chipotle Experience are the very sorts of "privileges, advantages, or accommodations" intended to be encompassed by the general anti-discrimination provisions of the ADA. If the application of a Standard (such as § 7.2) would eliminate access to these important and integral visual benefits, then the Standard is inapplicable. It defies logic that § 7.2 can be interpreted to apply to situations where more than just goods or services are sold or distributed if the application would create a denial of access to important benefits, privileges, accommodations and advantages offered to the general public.

d. **If Neither Section 7.2 Nor Section 4.33.3 Apply, the New Construction Regulations and Standards Still Required a View of the Food Preparation Area and Kitchen.**

The ADA provides, at 42 U.S.C. §12183,[90] that:

> ...(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.

The phrase "readily accessible to and usable by" is a term of art which is intended to enable people with disabilities to get into, enter and *use* a facility. "The term contemplates a *high degree* of convenient accessibility to the goods, services, *programs, facilities and accommodations* available at the facility." H.Rpt. No. 101-485(II) at 117-118.

"(T)he rule requires, as does the statute, that covered newly constructed facilities be readily accessible to and usable by individuals with disabilities... *To the extent that a particular type or element of a facility is not specifically addressed by the standards, the language of this section (§ 36.401) is the safest guide.*" 28 C.F.R. Part 36, App. B, page 621. (Emphasis added.)

If ADAAG §§ 4.33.3 and 7.2 are inapplicable to Chipotle's ordering lines, the restaurants could and should have been designed to be fully and equally accessible to people in wheelchairs by simply referring to the average eye levels depicted in

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The parallel regulation is found at Subpart D, 28 C.F.R. § 36.401.

ADAAG Figure A3, which provides a "uniform reference for design not covered by this guideline." See ADAAG § A4.2.4.

2) Policies of Providing Methods of Accommodation are Not "Equivalent Facilitation."

ADAAG Standards were adopted by the DOJ at the direction of Congress. The purpose of the Standards is made clear at ADAAG § 1, which states:

> This document sets guidelines for accessibility to places of public accommodation and commercial facilities for individuals with disabilities. These guidelines are to be applied *during the design, construction, and alteration* of such buildings and facilities to the extent required by regulations issued by Federal agencies, including the Department of Justice, under the Americans with Disabilities Act of 1990.

ADAAG § 1 (Emphasis added.)

Policies are not applied "during the design and construction" of a building or facility. Rather, they are typically adopted and implemented by operators of a place of public accommodation, often long after construction of the building or facility is completed and often by businesses that had no part in the design and construction of the facility. The purpose of the ADAAG, then, would not be furthered if builders could design inaccessible facilities with the hope and prayer that later public accommodations would implement policies of accommodation to overcome the inaccessible design.

Although Congress directed the adoption of specific design and scoping requirements, it also intended that the regulations issued by the executive branch allow for departures from particular technical and scoping requirements. "Allowing these departures will provide public accommodations...with necessary flexibility to *design* for special circumstances and will facilitate the application of *new technologies.*" H.Rpt. No. 101-485(II) at 119.

These allowable departures were termed "equivalent facilitation" and were codified at ADAAG § 2.2:

> Departures from particular technical and scoping requirements of this guideline by the use of other *designs and technologies* are permitted where the alternative *designs and technologies* used will provide substantially equivalent or greater access to and usability of the facility.

"When initially proposed, §2.2 read, 'Departures from particular technical and scoping requirements of this guideline by the use of other *methods* are permitted where the alternative *methods* used will provide substantially equivalent or greater access to and usability of the facility.' 56 Fed. Reg. at 2327. (Emphasis added.) Following a notice and comment period, the phrase 'design and technologies' was substituted for the word 'methods.' The Access Board explained that '[t]he purpose of the provision is to allow for flexibility to design for unique and special circumstances and to facilitate the application of new technologies.' 56 Fed. Reg. at

35,413." *Moeller v. Taco Bell Corp.*, Case No. C 02-5849 MJJ, U.S. Dist. LEXIS 41256 (N.D. Cal. August 10, 2005) at *5.

"It appears that the purpose of the exception is to give *architects* the flexibility to design facilities that may not strictly comply with the Accessibility Standards but nonetheless provide equivalent facilitation ... Indeed, when '[p]roperly read, the Equivalent Facilitation provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the [Accessibility] Standards when alternative *designs* will provide equivalent or greater access to and usability of the facility.' (Citing *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, at 739 (3rd Cir. 1999).)" *Moeller, supra,* at *8. (Emphasis added).

Given that § 2.2 was modified by the Access Board to substitute the phrase "design and technologies" for the word "methods," this intentional substitution would be nullified by interpreting "design" to include "policies of providing methods of accommodation."

"Policies" were roundly rejected as "equivalent facilitation" in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D.Or. 1997). There, the defendant Arena argued that it had provided "equivalent facilitation" because, although its suites were not ordinarily configured for wheelchair accessibility, it had adopted a written policy of providing accommodations by removing in-fill seats upon

request.

The *Oregon Arena* Court firmly rejected the argument that a policy could constitute "equivalent facilitation" and explained:

> Defendant contends that this policy is an "equivalent facilitation." Defendant could not be more mistaken. *An "equivalent facilitation" is an alternative design or technology* that will provide substantially equivalent or greater access to and usability of the facility. Standard 2.2. What defendant proposes is not an "alternative design or technology" that provides equivalent or greater access. Rather, defendant proposes a design that creates less access than is required, but --if given advance notice that a wheelchair user is in route-- defendant will remove some of the barriers and temporarily comply with the ADA. That is unacceptable...
>
> It always has been "possible" to *improvise access*, given advance notice that someone with a wheelchair is coming. You simply had two strong persons standing by to carry the wheelchair user up the stairs that could not be traversed by a wheelchair. However, Congress has served notice through the ADA that such solutions no longer are acceptable. *In new construction, the facility must be designed to be accessible from day one...*
>
> *Congress has mandated that newly constructed facilities must be fully accessible from the start.*

Oregon Arena, supra, at 764. (Emphasis added.)

This holding is particularly applicable to the instant case. The ADAAG identifies the average eye level of people in wheelchairs as between 43 and 51 inches from the finished floor. Even with this knowledge, Chipotle designed a food viewing

area with a 46-inch high obstruction that prevents people in wheelchairs from seeing the open kitchen, the display of food on the counter below and the assembly of entrees. It designed a facility that, from day one, provides less access.

There is no reason that Chipotle could not have designed its food viewing area to be accessible from "day one." Chipotle offered no evidence that it was structurally impracticable to provide an accessible viewing counter.

The district's interpretation of "equivalent facilitation" would allow a designer to design a path of travel without a required curb ramp as long as the future business operator later adopted a written policy of having its managers ask wheelchair users if they need assistance and, if the answer is "yes," to have the managers lift the wheelchair users up a curb barrier. Even portable ramps, however, have specifically been rejected in new construction.[91] It is inconceivable that the drafters of the ADA and ADAAG would have allowed policies of lifting wheelchair users to meet the standard of "equivalent facilitation" when portable ramps fail.

3) "Equivalent Facilitation" Must Be Determined by Reference to the ADA's General Anti-Discrimination Statutes.

ADAAG § 2.2 must be applied and interpreted with full consideration of whether the intent and purpose of the ADA, including full and equal access to all

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(See Technical Assistance Manual ("TAM"), III-7.2100: "portable ramps are not considered equivalent facilitation.")

privileges, advantages and accommodations (as well as goods and services), will be achieved by the proposed "equivalent facilitation." Where the facts are undisputed, it is a question of law as to whether or not "equivalent facilitation" is provided. (See, *Caruso, supra.*)

In *Caruso*, the facts were undisputed that the defendant E-Centre provided no access to its lawn area for wheelchair users. The E-Centre argued it was not required to provide lawn area access because it had provided "equivalent facilitation" by placing additional wheelchair locations in a closer, interior pavilion. The Circuit Court reversed summary judgment in favor of the E-Centre, holding the E-Centre could not rely upon the "equivalent facilitation" provision of ADAAG Sec. 2.2:

> *The principal problem with the E-Centre's "equivalent facilitation" argument is that it treats the ADA's requirement of equal access for people with disabilities as a "particular technical and scoping requirement." This is simply not the case. Rather, equal access is an explicit requirement of both the statute itself and the general provisions of the DOJ's regulations. See 42 U.S.C. § 12183; 28 C.F.R. § 36.401.* Properly read, the "Equivalent Facilitation" provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the Standards when alternative designs will provide "equivalent or greater access to and usability of the facility." Therefore, we conclude that the E-Centre cannot rely on the "Equivalent Facilitation" provision to excuse its failure to provide any wheelchair access to an assembly area that accommodates 18,000 people.

Caruso, supra, at 739. (Emphasis added.)

The *Caruso* Court did not hold that allowing a person in a wheelchair to ultimately see the event constituted "equivalent facilitation". Instead, even if the interior seats were deemed "better" by a trier of fact, they failed to satisfy the requirement for "equivalent facilitation" because :

> Title III itself precludes a reading of the "Equivalent Facilitation" provision that would allow venues to restrict wheelchair access to certain areas based on a belief that wheelchair users will be better off elsewhere. See 42 U.S.C. § 12182(b)(1)(A)(iii) (*discriminatory to provide a separate benefit* unless necessary to provide equal benefit); id. at (b)(1)(B) (benefits of a public accommodation must be provided in the most integrated setting appropriate to the needs of the individual).

Caruso, supra, at 739. (Emphasis added.)

The *Caruso* Court held that "the only way the E-Centre could justify its failure to provide access to the lawn area is by showing structural impracticability." *Caruso, supra,* at 740.

Here, Chipotle designed an otherwise accessible food viewing area with a wall making the viewing area and open kitchen inaccessible to wheelchair users. Nothing can be more plain. Customers are intended to be enticed by the display of food. The appearance of the food is paramount to Chipotle's business model. The ability of customers to see the appetizing food and to direct the making of their entrees, fast, is

integral to the Chipotle Experience.

Chipotle's methods of accommodation are not "equivalent facilitation" because the benefits offered to people in wheelchairs are *different* (food shown or provided in small, plastic cups) and *separate* (displayed at adjacent tables), contrary to 42 U.S.C. § 12182(b).

4) Even if Policies Can Constitute "Equivalent Facilitation," Chipotle's Policy Fails.

Even if policies can constitute "equivalent facilitation," Chipotle's Policy fails because it does not plainly set forth the "two new requirements" on which the district relied for its ruling. It does not require the managers, *rather than the crew members*, to carry out the Policy. Rather, the language of the Policy states that crew members *and* managers are responsible for providing accommodations to customers. The Policy does *not* require the manager on duty to affirmatively inform customers with disabilities about the availability of accommodations. Rather, it states that crew members *or* managers *may ask* customers if they want to be accommodated.[92]

Because the district's interpretation that the Policy imposes "two new requirements" is contradicted by the actual language of the Policy, this reviewing Court can only be left with a "definite and firm conviction that a mistake has been

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92 CR 229 / ER I-3, FF 110, CL 16, CL 17.

committed." *Husain v. Olympic Airways, supra.*

The Policy also fails because it allows crew members and managers to use their own judgment and common sense as to how to accommodate a customer.[93] It allows subjective interpretation and, therefore, suffers the same failure as the unwritten policy. Further, the Policy allows the use of other methods of accommodation not mentioned in the Policy[94] and not before the Court for scrutiny. The Policy, then, is too vague to be enforceable. In the alternative, Antoninetti was entitled to injunctive and declaratory relief compelling modification of the Policy so that its language reflected the "two new requirements" and placed limitations upon the methods of accommodation to be utilized by the managers.

5) The District Erred in Denying Antoninetti Injunctive Relief.

The district's denial of injunctive relief was premised, in part, upon its initial legal determination that policies can constitute "equivalent facilitation". The methods

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CR 266 / ER V-26, 318:21-319:2.

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Manager Cieslak thought acceptable methods of accommodation included: 1) bringing the hot bins of food out to the wheelchair user in line, with no apparent protection for the food in the bins, 2) lifting and tilting the pans of food above the eye level of wheelchair users. If a customer in a wheelchair, who was taken to a dining table to see the assembly of their entree, wanted more of an ingredient, Cieslak would leave the customer, go back to the kitchen and "grab more". Repeat as necessary. CR 265 / ER IV-25, 163:23-164:25, 167:16-168:13, 168:20-170:17, 171:20-172:8, 181:11-182:1.

of accommodation remain the same, however, whether provided under the written or the unwritten policy. If the methods of accommodation fail as "equivalent facilitation," Antoninetti was not required to present any evidence regarding the Policy, despite the district's ruling otherwise.[95]

The district concluded that Chipotle presented evidence that its Policy was effective[96], but the record clearly reflects that Chipotle failed to offer any evidence refuting Antoninetti's testimony that he has been deterred from returning to the restaurants because Chipotle's methods of accommodation, provided during the site inspections, were awkward, humiliating, unappetizing, different in quality, location, time and experience and Antoninetti believed that if he returned, he would face the same intolerable situation.[97] Instead, Chipotle simply offered testimony that it has adopted its written Policy and that it has received no complaints since the adoption of the written Policy.

The district also erred by requiring Antoninetti to prove that the requested injunction was "in the public interest" and that the cost of the requested injunction

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95 CR 229 / ER I-3, 35:6-10.

96 CR 229 / ER I-3, 35:6-13.

97 CR 267 / ER VI-27, 494:23-495:13; CR 267 / ER VI-25, 407:10-21, 412:23- 413:25, 426:21- 427:10.

(removal of the obstructing wall) was "justified by the relief it will provide."[98] Injunctive relief was also denied based upon the clearly erroneous factual finding with respect to Antoninetti's intent to return to the restaurants[99] because it is contrary to the Parties' stipulation[100] that Antoninetti wants to be able to have the Chipotle Experience provided to the general public, which necessarily requires an intent to return to the restaurants.

Antoninetti is entitled to injunctive relief because he seeks a statutorily authorized injunction, rather than an equitable injunction. 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. *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983), cert. denied, 464 U.S. 846, 78 L. Ed. 2d 139, 104 S. Ct. 149 (1983).

In *Long v. Coast Resorts Inc., supra*, the Ninth Circuit raised, without deciding, the issue of whether a court has equitable discretion in fashioning relief for violations of the ADA's new construction requirements:

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98 CR 229 / ER I-3, CL 25, CL 27, CL 31, CL 32.

99 CR 229 / ER I-3, 35:22-36:7.

100 CR 157 / ER I-7, 5:28-6:6.

> 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., supra, at 923 (emphasis added.)

If Congress wishes to do so, it can require the federal courts to automatically enjoin actual or imminent violations of a statute without an individualized balancing of the equities. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978). *Tennessee Valley Authority* is the leading case sustaining such a congressional restriction of the courts' equitable discretion. In that case, the district court was obliged by the statute to issue the injunction against the completion of a dam, regardless of the costs or consequences of doing so, and regardless of the result that it would have reached under the traditional equitable balancing test.

With respect to the ADA, the courts are precluded from engaging in a balancing test when ordering injunctive relief for violations of the new construction standards. 42 U.S.C. § 12188 of the ADA states in pertinent part:

> In the case of violations of ...section 12183(a) (new construction) 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.)[101]

Cost should not be a factor in fashioning a remedy for violations of the new construction standards when it is not considered as a defense to complying with new construction standards in the first instance. In *Oregon Arena,* the court addressed the consideration of cost with respect 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), (citation omitted). In contrast to existing construction, there is **no cost defense to the requirements for new construction.** TAM § III-5.1000. (emphasis added.)

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28 C.F.R. § 36.501(b) also provides: "In the case of violations of ...§ 36.401 (new construction), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities."

Oregon Arena, supra, at fn. 38.

The *Oregon Arena* court also cited TAM III-7.2100 (1994 Supp.) in holding that where a designer deviates from the standards and attempts to provide "equivalent facilitation," the burden is on the designer to show that equivalent facilitation is provided:

> The penalties for guessing wrong can be quite severe, especially for new construction; in extreme 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.

Oregon Arena, supra, at 727.

The district improperly relied upon *Access Now, Inc. v. South Florida Stadium Corporation,* 161 F.Supp.2d 1357, 1369 (S.D. Fla. 2001)[102], which involved an existing facility, in requiring that Antoninetti prove the injunction is justified by the relief provided. In *Access Now,* the "readily achievable" standard applied, which involves a consideration of the cost and effort required to remove the barrier. (See 28 C.F.R. §§ 36.104 and 36.304 (definition of "readily achievable").)

In contrast, in new construction, the only defense to compliance with the ADA is structural impracticability. *Long v. Coast Resorts, supra,* at 923; 28 C.F.R. §36.401(c) and ADAAG §4.1.1(5). The burden of proof on this defense is properly

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102 CR 229 / ER I-3, 34:17-29.

borne by the defendant. In an "existing facility" case, *Molski v. Foley Estates Vineyard, supra*, at 1046, this Court cited 28 C.F.R. § 36.405 and ADAAG § 4.1.7 in allocating the burden of production on the issue of an "historical exemption" to the defendant, noting that under ADAAG § 4.1.7(2)(b), "if the entity undertaking alterations believes that compliance with the requirements would threaten or destroy the historic significance of the building . . . **the entity should consult with the State Historic Preservation Officer.**" As this Court noted, "(T)he language of § 4.1.7(2)(b) counsels in favor of placing the burden of production upon the defendant." *Molski v. Foley, supra,* at 1049.

A similar analysis applies to the structural impracticability defense. 28 C.F.R. § 36.401(c) provides: "Full compliance...is not required **where an entity can demonstrate** that it is structurally impracticable to meet the requirements." (Emphasis added.)[103]

Thus, the district had no discretion to "balance the equities" for violations of the ADA's new construction standards. Even if a balancing was available, it was Chipotle's burden to prove that the cost of the requested injunction was outweighed by the benefits provided (structurally impracticable), rather than Antoninetti's burden.

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ADAAG §4.1.1(5) also provides "In new construction, a person or entity is not required to meet the full requirements of these guidelines where that person or entity can demonstrate that it is structurally impracticable to do so."

Finally, the district's refusal to grant injunctive relief because of the district's determination that Antoninetti lacked a "credible" intent to return is contrary to the specific stipulated facts of this case. Chipotle stipulated that Antoninetti "wants to be able to have the Chipotle Experience", which logically necessitates a return to the restaurants. The district ignored these stipulated facts and, instead, cited Antoninetti's "litigation history" and the fact that Antoninetti had not returned to the restaurants since the disastrous site inspections as the bases for its finding that Antoninetti's professed intent to return was not credible.[104]

This Court, however, has explicitly not required ADA plaintiffs to engage in the "futile gesture" of visiting or returning to an inaccessible place of public accommodation in order to satisfy the standing requirement. *D'Lil v. Best Western*, 538 F.3d 1031, *12 (9th Cir. 2008). Although *D'Lil* involves the legal analysis regarding an "injury in fact" for standing purposes the same analysis applies to "irreparable injury" required for injunctive relief.

6) Antoninetti is Entitled to Damages for "Litigation-Related" Visits.

Cal. Civ. Code § 54.3 imposes penalties against those who interfere with the rights of "an individual with a disability" under Sections 54, 54.1 and 54.2. Cal. Civ. Code § 54.1(d) provides:

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[104] CR 229 / ER I-7, 35:22-36:7.

> A violation of the right *of an individual* under the Americans with Disabilities Act of 1990 ...

Cal.Civ. Code § 54.1(d).

Recovery under the ADA is not limited to just "customers and clients," as this Court noted in *Molski v. M.J. Cable, Inc.*, 481 F.3d 724 (9th Cir. 2007):

> Title III's broad general rule contains no express 'clients or customers' limitation ..." (Citation omitted)...
> This interpretation is in accord with at least one other circuit.
>
> In *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998) ... (t)he court concluded that "both the language of Title III and its legislative history clearly demonstrate [that] the phrase 'clients or customers,' which only appears in 42 U.S.C. § 12182(b)(1)(A)(iv), is not a general circumscription of Title III and cannot serve to limit the broad rule announced in 42 U.S.C. § 12182(a)." Id. at 121. Rather, the court noted, "[t]he operative rule announced in Title III speaks not in terms of 'guests,' 'patrons,' 'clients,' 'customers,' or 'members of the public,' but instead broadly uses the word 'individuals.'" Id.
>
> Accordingly, Molski did not need to have been a client or customer of Cable's to be an "individual" entitled to the protections of Title III. One need not be a client or customer of a public accommodation to feel the sting of its discrimination.

Molski, supra, at 733.

"Customer" is defined as "one that purchases a commodity or service." "Bona fide" is defined as "made in good faith without fraud or deceit." *www.merriam-webster.com.* There is no dispute that Antoninetti was a customer of Chipotle during

his visit to Chipotle on October 1, 2006 and during the two site inspections of October 6, 2006.[105] Nor was any evidence offered at any time that Antoninetti's purchases during these visits were made in bad faith or with fraud or deceit. The district's rejection of these visits because they were "litigation-related" imposes a limitation on damages not found in the ADA or § 54.3.

7) Antoninetti Was Entitled to Summary Judgment or Judgment Because The District Committed Legal Error and/or Because Chipotle Failed to Raise a Dispute of Material Fact.

The district committed legal error in ruling that policies constitute "equivalent facilitation." It was undisputed that the design of Chipotle's food ordering lines excluded people in wheelchairs from the Chipotle Experience offered at the food preparation area and the open kitchen. Thus, Antoninetti was entitled to summary judgment or judgment following trial. In the alternative, assuming policies can constitute "equivalent facilitation," Antoninetti was still entitled to judgment in his favor because Chipotle offered no evidence to refute Antoninetti's evidence which established the inadequacies of the proffered methods of accommodation.

To defeat a motion for summary judgment, the nonmoving party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 250. Chipotle had the burden, in opposing Antoninetti's

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105 CR 92 / ER II-15, DVDs at pgs. 205, 206.

MSJ, of proving that its "methods of accommodation" provided "equivalent facilitation." This is a "heavy burden." *Oregon Arena, supra,* at 727. A moving party is entitled to summary judgment if he points to an absence of evidence as to an issue upon which the nonmoving party bears the burden at trial. *US v. AMC Entertainment, Inc.,* 232 F.Supp.2d 1092, 1098-1099 (C.D. Cal. 2003).

In his MSJ and at trial, Antoninetti submitted evidence that the viewing of food samples in small cups, by handfuls or by tongfuls, was not appetizing or pleasing, did not allow him to judge the freshness of the ingredients, did not allow him to compare the ingredients to one another, did not allow him to see the quality or composition of the food ingredients. He proved that he could not see over the wall, (which prevented him from seeing into the open kitchen) and that the offered "methods of accommodation" made him feel very uncomfortable because he was disrupting the flow of the ordering line and that he wanted to have the "Chipotle Experience," which rationally requires a return to Chipotle's restaurants.[106]

Chipotle offered no evidence establishing the methods of accommodation *were* appetizing, that small sample cups of food *do* allow wheelchair users to see the quality, composition and freshness of the food, that showing samples of food allows wheelchair users to "eat with their eyes" and to be "brought more completely into the

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See Statement of Facts, at Section IV, B.

dining experience". Chipotle offered no evidence regarding the amount of time required to assemble a burrito in front of a wheelchair user, or that the methods of accommodation provide wheelchair users with "quick gourmet."

Based upon this absence of evidence supporting Chipotle's burden of proving that the "methods of accommodation" provide an equivalent experience to wheelchair users, Antoninetti was entitled to have judgment entered in his favor.

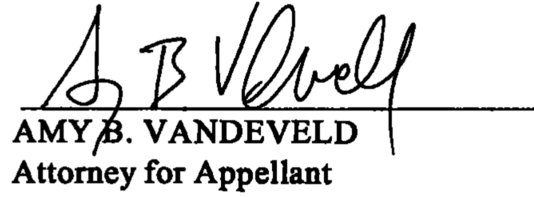
VIII. CONCLUSION

Antoninetti respectfully requests that this Court reverse the district's Order denying Antoninetti's MSJ and/or that it reverse judgment against Antoninetti on the issues of injunctive relief and damages following trial. He requests that the Court declare that policies are not "equivalent facilitation" under ADAAG § 2.2. and further requests that the Court instruct the district to issue an order requiring Chipotle to lower the offending wall so that wheelchair users can see the food preparation area and the open kitchen.

In the alternative, Antoninetti requests remand to the district with the instruction that the district order Chipotle to modify its written policy to include the "two new requirements" relied upon by the district in finding the policy constituted equivalent facilitation and to state that the methods of accommodations to be offered by Chipotle to wheelchair users are limited to those set forth in the written policy.

LAW OFFICES OF AMY B. VANDEVELD

Dated: October 1, 2008 By:

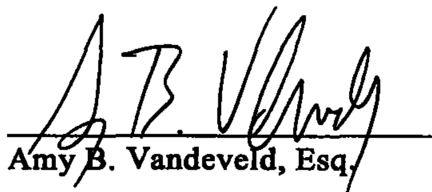


AMY B. VANDEVELD
Attorney for Appellant

STATEMENT OF RELATED CASES
FOR CASE NOS. 08-55867 AND 08-55946

Related cases: 1) *Antoninetti, et al. v. Chipotle*, USDC No. 06 CV 2671 LAB (POR), consolidated with the instant case for purposes of discovery, and 2) *Perkins, et al. v. Chipotle*, USDC No. CV 08-03002 MMM (OPx). Both suits involve the Chipotle Experience at all Chipotle restaurants in California. Neither case has been certified as a class action.

Dated: October 1, 2008

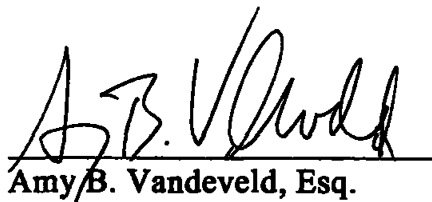


Amy B. Vandeveld, Esq.

CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER 06-56468

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is reproduced using a times new roman proportional typeface with a point size of 14, and the text contains less than 13,000 words, not counting tables and certificates. It therefore conforms to the requirements set out in Fed. R. App. p.32 (a)(7)(C) and Ninth Circuit Rule 32-1. The excerpts of record have been compiled in compliance with Circuit Rule 30-1.6.

Dated: October 1, 2008



Amy B. Vandeveld, Esq.

PROOF OF SERVICE

I, the undersigned, declare that: I am authorized to serve the following document(s) in the within action and that the documents were served on today's date as follows:

1. Case Name/USDC Number:
Antoninetti v. Chipotle Mexican Grill, Inc.
USDC No.: 05 cv 1660 J (WMc)
Circuit Case Nos. 08-55867, 08-55946

2. Document(s) served:
Appellant's Opening Brief (2 copies), Excerpts of Record - Volumes I to VII (one copy) , Index to Excerpts of Record (one copy)

3. Person(s) served/Place of service:
John F. Scalia, Esq.
Gregory F. Hurley, Esq.
GREENBERG TRAURIG, LLP
3161 Michelson Drive, Suite 1000
Irvine, CA 92612
Defendant CHIPOTLE MEXICAN GRILL, INC.

4. Manner of Service:

___ (a) Personal Service: By handing copies of the document(s) to the person served [F.R.Civ.P. 5(b)(2)(A)].

XX (b) Service by Mail: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid, at San Diego, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit. [F.R.Civ.P. 5(b)(2)(B); Cal.Code of Civil Procedure, Sections 1013a, 2015]

I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the foregoing is true and correct.

Executed On: 10/3/08

By:
LAURIE MILLER