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I.

STATEMENT OF ISSUES

Antoninetti's issues on appeal are set forth in his Opening Brief and are incorporated herein by reference. In his response and reply, Antoninetti asserts the following sub-issues are also relevant to this appeal:

1) Whether, if ADAAG[1] § 7.2(2) applies to Chipotle's food preparation areas, Antoninetti was entitled to judgment in his favor requiring Chipotle to comply with § 7.2(2)(i) by adopting a *design* that provided access to all of its visual benefits, goods and services.

2) Whether, if ADAAG § 7.2(2) applies to Chipotle's food preparation areas, Antoninetti was entitled to judgment in his favor requiring Chipotle to comply with § 7.2(2)(iii) by adopting a *design* that provided "equivalent facilitation."

3) If no ADAAG Standard can be applied to Chipotle's food preparation areas, whether Antoninetti was entitled to judgment because the general anti-discrimination provisions of the ADA required Chipotle to modify its Walls to make them accessible and Chipotle waived a "readily achievable" defense in this case.

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[1] The ADAAG or "the Standards" are codified at 28 C.F.R. Part 36, Appendix A.

II.

STATEMENT OF THE CASE

Antoninetti asserts that when Chipotle designed its restaurants with transparent sneeze guards so that its standing customers could look at the food preparation area and into the open kitchen, giving them the "Wow Factor" and the visual and quick Chipotle Experience, it was required by the Americans with Disabilities Act ("ADA") to implement a design that allowed people in wheelchairs the same opportunity to participate in and benefit from that *intended* visual and quick Chipotle Experience.

The obligation to design a food viewing area without an obstructing wall is based upon the application of ADAAG §§ 4.33.3, 5.1 and Figure A3[2], as well as the general anti-discrimination provisions of the ADA which inform the application of the Standards to specific situations.

The Standards relating to Restaurants and Cafeterias, which incorporated a requirement to provide a line of sight for wheelchair users, required that all elements within the restaurant, that involved intended lines of sight, must be designed to provide comparable lines of sight for wheelchair users.

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[2] ER II-15, p. 202; codified at ADAAG § A.4.2.4.

If no Standard is applicable to the specific situation at issue, Antoninetti was entitled to judgment in his favor because the ADA's general anti-discrimination provisions imposed barrier removal obligations on Chipotle, and Chipotle did not raise the affirmative defense that barrier removal was not "readily achievable." The district ruled on the parties' cross-motions for summary judgment that the general anti-discrimination provisions did not apply[3] and further ruled that this argument could not be raised at trial.[4]

If the Standards *are* applicable to Chipotle's new construction, Antoninetti was not required to prove the cost of modifying the Wall was outweighed by the benefit provided to the public.

III.

STATEMENT OF FACTS

This reviewing Court is again respectfully requested to independently review the transcripts and evidence in this case, particularly Chipotle's training "Zen" DVD and the site inspection DVDs[5], which depict the intended visual elements of the Chipotle Experience.

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[3] ER I-9, 18:4-19:2.

[4] ER I-6, 4:9-22.

[5] ER II-15, DVDs at pgs. 205, 206, 207.

Chipotle's Statement of Facts in its Second Brief is in essence a recitation of the Findings of Fact[6] issued by the district, which are a virtual wholesale and verbatim adoption of Chipotle's proposed Findings of Fact and Conclusions of Law[7], including Chipotle's omission of material facts and Chipotle's misconstruction of the evidence.

The virtual wholesale and verbatim adoption of one party's findings require 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). 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).

The "truth and right" of this case are not simply based on conjecture by Antoninetti but are based on the deposition and trial testimony of Chipotle's own witnesses, its training manual, its training DVD, its website and other marketing materials, the conduct of its employees during the site inspections, and its own

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6 ER I-3.

7 ER IV-24.

photographs. Antoninetti incorporates herein the Statement of Facts set forth in his Opening Brief and adds the following facts in response and reply to those asserted by Chipotle in its Second Brief:

A. Chipotle Waived the "Readily Achievable" Defense.

Chipotle waived the affirmative defense that removal of access barriers was not "readily achievable." This defense was not asserted in Chipotle's answer to the Complaint and it was specifically waived in Chipotle's responses to discovery.[8] Antoninetti was not required to offer any proof on the issue of whether barrier removal was "readily achievable," if that standard applies, and he was entitled to judgment in his favor.

Antoninetti raised this argument before the district, in his Opposition to Chipotle's Motion for Summary Judgment ("his Opposition") and in his Reply to his own Motion for Summary Judgment, which incorporated the arguments and evidence filed with his Opposition.[9]

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[8] ER II-11; ER II-15, p. 172, Response to Interrogatories 16 and 17.

[9] CR 110 / Antoninetti's Supplemental Excerpts of Record ("SER") VIII-31, 12:25-13:2, 18:8-12; 23:28-24:3; CR 115 / SER VIII-32; CR 125 / SER VIII-33, 1:19-24.

B. Figure A3 is Commonly Used in the Design of Architectural Elements.

When designing architectural elements that are affected by eye levels, architects and designers commonly refer to Figure A3, which describes the typical eye level ranges of wheelchair users.[10]

C. The DVDs Reveal the Visual Nature of the Chipotle Experience.

The "Zen DVD"[11] (10:00 to 15:00 of the DVD is particularly illustrative) shows Chipotle customers almost uniformly gazing at the display of bins of food and selecting from the food items on display. Customers watch closely as the assembly line of tasty entrees are made "right in front of them." Customers can see fresh batches of ingredients placed on the line. The DVD shows the speed with which customers, who can see all of the bins of food simultaneously, are able to place their orders and watch the assembly of their entrees.

The DVD illustrates the crowded and uncomfortable confines to which a wheelchair user would be subjected if he had his entree assembled at the cashier counter, as proposed by Chipotle. An overhead view of the display of bins is provided at 1:15 to 1:20. The Pacific Beach DVD[12] depicts the stark contrast

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[10] ER II-14, par. 8.

[11] ER II-15, DVD at pg. 207.

[12] ER II-15, DVD at pg. 205.

between the visual experience provided to standing customers and the experience provided to people in wheelchairs, which can be seen by first viewing the DVD from about 3:15 to 9:45, followed by Antoninetti's experience at 16:57 to 19:30.

Antoninetti's asked to see each of the ingredients during his second pass through the line (at approximately 23:46 to 27:15). The line cleared in front of him and he appeared to hold up the line behind him.[13] Antoninetti's consultant attempted to capture the body language of customers behind Antoninetti who appeared to the consultant to be perturbed at the length of time it took to serve Antoninetti.[14]

Contrary to Chipotle's assertion that "the food preparation counter serves one purpose: allowing customers to order and pay for their food,"[15] the DVDs and Chipotle's documents undisputedly establish that the food preparation area is intended to, and does, provide standing customers with important and intended visual culinary benefits.

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[13] ER II-13, par. 17; ER II-14, p. 8, par. 25; ER II-15, DVD at pg. 205.

[14] ER II-14, pars. 23-25.

[15] Second Brief, p. 38-39.

D. Antoninetti Wants to Return to the Restaurants and is Not a "Serial Litigant."

Chipotle stipulated that Antoninetti wants to have the Chipotle Experience provided to standing customers, which would necessitate a return to the restaurants.[16] Facts that have been stipulated to by the parties should be treated as having been proved.[17] The district committed clear error in rejecting this stipulated evidence.

It is undisputed that, since 1990, Antoninetti has filed suit against only six different sites: two Dixieline stores, a Holiday Inn, the newly-remodeled Bertrand at Mr. A's restaurant, San Diego Pier Café restaurant and the newly- constructed Oceanside Mall. Antoninetti asked to be a plaintiff in the Oceanside Mall cases because he was quite upset that a brand-new mall was constructed with so many blatant violations of the ADA. He hoped to deter other developers from constructing brand-new inaccessible facilities.[18]

It is undisputed that Antoninetti required defendants to remove architectural barriers as part of his settlements with them.[19] Chipotle offered no evidence that the

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[16] ER I-7, pgs. 5-6, Fact 41; ER IV-25, 29:5-30:13.

[17] Ninth Circuit Manual of Model Jury Instructions Civil, Instruction No. 2.2 (2007).

[18] ER VI-27, 505:3-14; 501:3-22.

[19] ER VI-27, 476:20-24.

businesses sued by Antoninetti have since removed barriers, as required by the settlement agreements.

E. Complaints by Other Customers.

The district committed clear error when it failed to consider the undisputed fact that Chipotle has received numerous complaints from customers in wheelchairs about the inaccessibility of the food viewing areas. All complained that the height of the Walls obstructed the view of the food viewing area for people in wheelchairs, who could not enjoy the same experience as standing customers.[20]

F. Chipotle Never Used the Adjacent Cashier Counter or Dining Tables for the Assembly of Entrees at the Restaurants.

Chipotle, without evidentiary support, asserts that the "expo station" can be, ***and has been***, used to allow customers to "watch their entrees being prepared."[21] This assertion is not supported by the cited evidence, including Chipotle's non-evidentiary closing argument at ER VII-28, 660-661.

Even when Antoninetti repeatedly asked to see food ingredients during the site inspections, he was never shown any ingredients at the adjacent counter or dining tables and he was never given the opportunity to see his burrito assembled so

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[20] ER II-15, p. 59 - 64.

[21] See Second Brief, p. 44, fn. 213 and p. 47, penultimate sentence of Section II, fn. 220.

he that could customize his burrito. Nor was he ever told that this was an option available to him.[22]

Chipotle produced no evidence that *any* people, in wheelchairs or not, at either the Pacific Beach or the Encinitas restaurants, have ever had their burritos assembled in front of them anywhere in the restaurants other than at the 12-foot long food viewing area. Chipotle's Pacific Beach and Encinitas restaurant witnesses testified that they have never personally assembled entrees in front of customers in wheelchairs, and they have never seen other Chipotle employees do so.[23] The district committed clear error in ignoring these undisputed and material facts.

G. Chipotle Never told Antoninetti of the Available Methods of Accommodation Nor Is the Public Provided any Written Notification of the Available Methods of Accommodation.

Although the district adopted virtually verbatim Chipotle's proposed factual findings on Antoninetti's asserted "*refusal* of accommodations[24]," the evidence

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[22] ER II-13, pars. 13, 16, 17, 19, 21, 23; Site inspection DVDs at ER II-15, pgs. 205, 206; ER V-26, 375:14-20; ER VI-27, 404:2-13, 410:22-411:7, 492:6-9; ER VII-28, 615:13-24.

[23] ER IV-25, 174:14-175:17; ER VI-27, 396:1-397:1; ER VII-28, 617: 13-16, 630:1-10.

[24] Compare ER I-3, at 25-26 (cited at Second Brief, fn. 188) and ER IV-24, pgs. 26-27.

does not support the interpretation that Antoninetti *refused* accommodations.[25] Antoninetti could not refuse something about which he was unaware.

It was undisputed that Antoninetti never asked to have his entree assembled at the dining area or at the cashier counter because he never had any reason to believe these were options available to him. No employee ever told him about the available options. Antoninetti even had to affirmatively ask to see ingredients before they were simply shown to him by spoonfuls, handfuls and tongfuls.[26]

It was undisputed that Antoninetti did not ask to be shown food items at his *pre-site inspection* visits because he only learned of the limited opportunity to have ingredients "shown to him" when this was mentioned by Chipotle's lawyer at Antoninetti's deposition just two days prior to the site inspections.[27]

It was undisputed that there are no signs posted at the restaurants advising people with disabilities of the available methods of accommodation. None of Chipotle's marketing materials, including its website, provide information for people with disabilities about the accommodations that are purportedly available for

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[25] Second Brief, p. 35, fn. 188.

[26] ER VI-27, 396:19-23; ER VII-28, 615:21-24; Site inspection DVDs at ER II-15, pgs. 205, 206.

[27] ER V-26, 377: 6-13; ER VI-27, 456:4-10; 457:18-20.

disabled customers.[28] The district committed clear error in failing to make findings based upon these undisputed, material facts.

H. The District Made No Factual Findings Regarding the Comparison Between the Experience of Wheelchair Users Subjected to Chipotle's "Methods of Accommodation" and the Experience Provided to Standing Customers.

While the district adopted almost wholesale and verbatim Chipotle's proposed legal conclusions, including that "Defendant has met its burden of establishing that its Customers With Disabilities Policy provides Plaintiff (and other customers in wheelchairs) with substantially equal or greater access to its facilities[29]," the district made no findings of fact that would support that conclusion. Nor could it.

Even if policies of providing customer service to overcome architectural barriers can constitute "equivalent facilitation" in new construction where a specific Standard applies, the district failed to find that Chipotle's methods of accommodation (seeing food in small plastic cups, by tongfuls or handfuls) provide substantially the same opportunity to see the freshness of the ingredients, that the methods are *as appetizing* as seeing sixteen bins of food on display, or that the methods allow customers in wheelchairs to be "*brought more fully into the dining*

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[28] ER V-26, 275:1-18.

[29] Compare ER I-3, p. 32, CL15 and ER IV-24, p.37, CL24.

experience." The district made no finding that the *amount of time* it takes to assemble a wheelchair user's entree in the dining room or at the cashier counter or the quality of this accommodation is substantially the same as assembling an entree in the food viewing area. The district had no evidence on this issue because this method had never actually been employed at the restaurants.

Chipotle offered no evidence that *anyone* thinks that being pulled from the ordering line, separated from one's companions, and directed to the dining area to see the assembly of an entree from small plastic cups is a "Wow" or pleasant experience. Chipotle offered no evidence of the amount of time it would actually take to prepare and assemble an entree in the dining area or at the cashier counter for customers in wheelchairs.

While the district found that methods of accommodation *were available* it never made any factual findings that those methods provide the same visual, appetizing, "Wow" experience as is provided to standing customers.

On the other hand, Antoninetti provided undisputed evidence that the food samples shown to him were too small, too far away and that his view of the small samples was obstructed by the plastic of the cups, the bottoms of the spoons or the

crew members' fingers.[30] It was undisputed that seeing food in small plastic cups, or lifted by handfuls or tongfuls, is not appetizing[31] and that 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.[32]

I. Antoninetti Never Said He Was Satisfied With the Accommodations Provided to Him at the Site Inspections.

The district committed clear error because there was no credible or admissible evidence that Antoninetti believed the accommodations provided him were acceptable.[33] The district simply adopted Chipotle's misrepresentation of the evidence on this point.

Antoninetti's cited testimony does not state in any remote fashion that Antoninetti was satisfied with the methods of accommodation provided to him or that he was satisfied with the service he received. In addition, Arriaga's cited testimony simply supports her speculative opinion that Antoninetti was satisfied

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

[31] ER II-13, par. 22; ER VI-27, 407:10-21.

[32] ER VI-27, 415:14-416:25, 418:3-13, 418:20-419:9.

[33] Second Brief, p. 27, fn.143.

with the service he received - an opinion to which Antoninetti objected, but was wrongly overruled by the district.[34]

In fact, Arriaga admitted that she simply *guessed* what Antoninetti meant when he nodded his head or said "okay" while she served him. She did not know, nor did she ask, if he meant that he could simply see the sample of food shown to him as opposed to being satisfied with the method of accommodation.[35]

Antoninetti, on the other hand, testified that when he nodded his head when shown food samples, he simply meant that he would take the ingredient shown to him.[36]

J. Chipotle Admits That The Menu Boards Do Not Provide the Chipotle Experience.

First, the district committed clear error in adopting *any* of Chipotle's "factual" findings regarding the menu boards, written menus, on-line ordering and fax ordering because those findings are clearly irrelevant to any issue in this case. Chipotle has consistently argued that its cashier counter/dining tables, along with its policy of providing methods of accommodation, provide "equivalent facilitation."

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[34] ER VII-28, 602:20-24.

[35] ER VII-28, 613:18-614:16.

[36] ER VI-27, 397:1-19.

Chipotle has never argued, nor did the district find, that the menu board or other options satisfy Chipotle's obligation to provide "equivalent facilitation." Once again, the evidence cited by Chipotle does not support the "factual finding" (which the district adopted) that the written menus "provide descriptions of the entrees and food ingredients."[37]

Further, the district committed clear error because, if evidence of other methods of ordering *was* relevant, it failed to make related material findings based upon undisputed evidence. It was undisputed that the menu board provides no information about the appearance of any of the food items. It does not provide the opportunity to see whether the chicken has grill marks or whether the rice is bright white and visually fresh, nor does it allow a customer to determine the freshness of any of the ingredients.[38]

The menu board does not describe the portions of ingredients that are actually placed on a customer's burrito. A customer cannot tell, from looking at the menu board, whether he or she wants more or less of an ingredient. The menu board does not describe or approximate the opportunity to see freshly marinated meats being grilled or the opportunity to look into the open kitchen and to be brought

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[37] Second Brief, p. 13, fn. 59.

[38] ER IV-25, 143:5-152:19; Trial Ex. 13.

more completely into the dining experience.[39] The website does not allow customers to tell the freshness of the ingredients.[40] The district clearly erred in failing to make these related material findings, if the other methods of ordering are relevant to the issues in this case.

K. Chipotle's Methods of Accommodation Provide a Different and Separate Experience for Wheelchair Users.

The district clearly erred when it failed to find that the undisputed facts established that Chipotle's "method of accommodation" of taking wheelchair users to dining tables, where entrees may be assembled and food may be shown, provides a *different* and *separate* experience for wheelchair users. This accommodation, undisputedly, requires that a disabled patron leave his companion in line, travel to the dining area, search for an available table, wait for ingredients to be brought on a tray, then travel back to the cashier counter to pay for his food.[41] This is a *separate* and *different* experience.

It was undisputed that, if a person in a wheelchair is taken to a table in the dining area so that he can have his burrito assembled in front of him and see the amount of an ingredient actually being placed on his burrito, and if he wants extra

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[39] *Id.*

[40] ER V-26, 272:16-22.

[41] ER VI-27, 415:14-416:25.

ingredients, he will have to wait, food exposed, while the food crew goes back into the kitchen, fills another plastic cup with food and returns to the dining table.[42] This is a *different* experience.

L. The Height of the Wall Serves No Practical Function.

The district committed clear error in failing to find, based upon the undisputed facts, that the Wall constructed by Chipotle could and should have been designed to allow people in wheelchairs to see the food preparation area since the electrical outlets "protected" by the Wall are at a height of 18 to 24 inches from the finished floor and would be hidden by an opaque wall only 24 inches high. It was also undisputed that the Wall does not actually hide the utensils or serving equipment, since standing customers can see these items when they look over the Wall.[43]

Antoninetti presented undisputed evidence that the design of the Wall could have been similar to those at other restaurants, including Subway and Pita Pit, which would allow him to see the food items available for selection and the assembly of his entree.[44]

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[42] ER IV-25, 171:4-173:17; 177:13-178:12; 180:17-24; 181:11-182:1.

[43] CR 126 / SER VIII-34, 55:11-19, 61:9-19.

[44] ER II-14, par. 21; ER VI-27, 493:6-15; ER V-26, 356:8-359:10.

M. The District's Findings Adopted Absurd Notions Proposed by Chipotle.

The district committed clear error when it adopted Chipotle's proposed nonsensical finding that seeing the freshness of the food ingredients during the ordering process is of "secondary importance" to the appearance of the food "once it has been prepared and served to the customer."[45]

Chipotle burritos are always wrapped in foil.[46] When customers receive their entrees, they see foil. If they unwrap the foil, they see a tortilla. The district's Finding about the appearance of the food "once it has been served to the customer" relies upon the notion that customers care less about the fresh appearance of the ingredients during the actual ordering process than they care about the appearance of the foil wrapper or the tortilla when their entree is served. This offends common sense.

Chipotle's own witnesses testified that the "appearance of the food" that is "very important" is the appearance with respect to what the customer sees and what *the employee* sees.[47] Since there was no evidence that Chipotle employees unwrapped customers' burritos to check the appearance of the ingredients once the

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[45] ER I-3, Fact 2.

[46] ER I-3, Fact 50; ER II-15, DVDs at pgs. 205, 206, 207.

[47] ER V-26, 308:13-22.

entree was "served to the customer", it is undisputed that the appearance of the food *as it sits in the sixteen bins* is "very important."

The district's error in adopting these absurd notions establishes that the district "misapprehended the effect of the evidence" and that the district's findings are so against the preponderance of credible testimony and common sense that they do not reflect or represent the truth and right of the case.

N. Chipotle's Own Evidence Establishes the Visual Nature of the Chipotle Experience.

The Chipotle Experience was described in Chipotle's training manual, marketing materials and was depicted on Chipotle's website.[48] Chipotle intended to, and does, provide standing customers with the wonderful opportunities to see large expanses of bins of plentiful food, to "eat with their eyes," to be "brought more completely into the dining experience," to customize and make their "perfect burritos," to have their entrees made "while they watch" and to get their food "fast."[49]

Chipotle specifically intends to distinguish its restaurants from "Del Taco and Taco Bell" by serving "food fresh," rather than "serving fresh food" and by giving

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[48] ER II-15, pgs. 50, 52, 76, 78, 89, 94, 95, 130 - 135.

[49] ER V-26, 265:9-14; 269:12-274:20.

its customers the opportunity to see, select and direct the making of their customized entrees and to see "piles of food put on warm tortillas."[50]

Chipotle includes a "representative photo" in its marketing materials, including its public website, which depicts a woman looking over the Wall into the food preparation area because Chipotle *intends* to provide this experience to its customers.[51]

The district erred in failing to make factual findings based upon these undisputed facts which are material to a full understanding of the intended visual Chipotle Experience.

O. Antoninetti Did Not Require Dixieline to Lower Its Service Counter Because Only Verbal Information Was Provided There.

The Dixieline stores sued by Antoninetti were existing facilities. Antoninetti agreed to allow Dixieline to adopt a policy of coming from behind the counter to provide assistance, rather than lowering the counter, because the Dixieline store was an existing facility and the counter was simply a place where verbal information was provided.[52]

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[50] ER II-15, 148:23-149:5; ER V-26, 261:9-263:22; 264:2-265:25.

[51] ER V-26, 270:17-271:7.

[52] ER VI-27, 493:25-494:22.

IV.

SUMMARY OF ARGUMENTS

Antoninetti incorporates herein the summary of arguments set forth in his Opening Brief and provides the following additional summary in response and reply to Chipotle's Second Brief:

A. Chipotle Was Required to Provide a Comparable Line of Sight to its Food Preparation/Performance Areas and Open Kitchens.

The district erred in holding that ADAAG §§ 4.33.3, 5.1 and Figure A3 did not require Chipotle to provide a line of sight to its food viewing areas. Comparable lines of sight are specifically required in the design of "Assembly Areas," which are explicitly defined to include restaurants and cafeterias. The special requirements for "Restaurants and Cafeterias" specifically incorporate the comparable line of sight requirement of § 4.33.3. Further, Figure A3 is commonly referenced by designers in the design of accessible elements.

B. The District Erred in Applying ADAAG § 7.2(2) to the Chipotle Experience.

The district erred in holding that ADAAG § 7.2(2) applies to the Chipotle Experience because the visual aspects of the Chipotle Experience are not goods or services and because the "goods" and "services" that are offered at the cashier

counters and dining tables are separate and different from those provided to standing customers.

If § 7.2(2) does, however, apply to the food preparation areas, Chipotle could not simply select between the options provided at § 7.2(2) at its discretion, but was required to implement the option that provided wheelchair users with the same visual benefits and the same goods and services.

That meant, perhaps, complying with § 7.2(2)(i) by providing a lowered 3-foot long portion in the middle of the ordering line if that design would allow access to all of the visual benefits that are provided standing customers. Or, perhaps, complying with § 7.2(2)(iii) by designing the Wall with a transparent material rather than an opaque material, thereby providing "equivalent facilitation."

If neither of these design options, standing alone, would provide access to the same benefits, goods and services, then § 7.2(2) is inapplicable.

C. Policies of Providing Methods of Accommodation are Not Equivalent Facilitation.

Policies, whether written or unwritten, of providing methods of accommodation to overcome inaccessible design do not constitute "equivalent facilitation" as defined at ADAAG § 2.2. Further, Chipotle's policies of providing methods of accommodation are not equivalent facilitation because Chipotle's

employees are entitled to use their own judgment in determining the methods that will be made available, including methods not before the Court for review.

The written Policy also fails to set forth the "two new" requirements relied upon by the district in distinguishing the written Policy from the inadequate unwritten policy.

D. If No Standard Can Be Applied to the Food Viewing Areas, the General Anti-Discrimination Provisions Required that Chipotle Provide Access for Wheelchair Users.

The regulations make clear that, if no Standard can be applied to a particular situation, then the general anti-discrimination provisions of the ADA and its regulations still required that Chipotle provide a food viewing area without an opaque obstruction in front of it. Chipotle was required to design its Walls in the first instance with transparent material to accommodate wheelchair users or it was required to remove the architectural barrier of the Wall if removal was "readily achievable." Antoninetti was not required to offer any evidence on the issue of whether modifications were "readily achievable" because Chipotle waived this affirmative defense.

E. Chipotle Was Provided Due Process.

The ADAAG has always contained a "comparable line of sight" requirement at § 4.33.3. This requirement applies to all assembly areas, including restaurants.

Section 5 of the ADAAG, which specifically addresses "Cafeterias and Restaurants," has always incorporated § 4.33.3. ADAAG Figure A3, which identifies the average eye level ranges for wheelchair users, has always been included in the ADAAG and is commonly referenced by architects in designing architectural features that are affected by eye levels.

These regulations put designers and public accommodations on notice that comparable lines of sight are required in restaurants and Figure A3 identifies accessible viewing heights. Together, these regulations and the Figure provided ample notice to Chipotle regarding how it could design its facilities to provide accessible lines of sight for wheelchair users.

The regulations have always stated that if there is no applicable Standard, designers should look to the "accessible to and usable by" requirements of the general regulations and that the general provisions will require barrier removal if it is readily achievable.

The U.S. Department of Justice's Technical Assistance Manual ("TAM") for Title III has always said that the Standards should be applied "to the extent possible" and that "where appropriate technical standards exist", they should be applied. Since 1994, the Supplement to the TAM has specifically advised that where elements are not addressed in the Standards, the obligations to provide "equal

opportunity" are still applicable, as is the obligation to make readily achievable modifications, even in new construction.

F. Antoninetti Was Entitled to Damages for All Visits.

Even if ADAAG § 7.2(2) does apply to the Chipotle Experience, and the cashier counter or dining tables satisfy the requirements of § 7.2(2)(i) or (ii), Chipotle never *used* the cashier counter or dining table to serve Antoninetti. He never saw his entree assembled. Chipotle is liable for damages for each visit during which Antoninetti did not have his entree assembled in front of him, including visits during site inspections.

The district erred in failing to award damages for each instance of discrimination. Discrimination is discrimination. If a person were directed to leave a restaurant because of the color of his skin or because she is a woman, that denial would still be discriminatory, even if it occurred during the context of litigation.

G. Antoninetti Was Entitled to Injunctive Relief.

Antoninetti was entitled to an order enjoining Chipotle to modify the Walls so that customers with eye levels as low as 43 inches can see the food preparation area and the open kitchen. If the Standards were violated, Antoninetti was not required to prove that the cost of removing barriers in new construction was outweighed by the benefit provided by the removal.

If the Standards cannot be applied, Chipotle was still required to provide access by modifying the Wall, since it waived the "readily achievable" defense. The evidence was undisputed that Antoninetti wanted to return to the restaurants. Thus, he satisfied the "irreparable harm" element of injunctive relief. The district erroneously relied upon Antoninetti's "litigation history" in determining Antoninetti's credibility.

H. The District Committed Clear Factual Errors.

The district committed clear errors of fact, including omitting material, undisputed facts and adopting misrepresentations or misconstructions of the evidence that were proposed by Chipotle. These errors show that the district misapprehended the effects of the evidence and its findings do not represent the truth and right of the case.

I. This Appeal Cannot be Rendered Moot.

Antoninetti is a plaintiff in a related class action that involves all of Chipotle's California restaurants.[53] Even if Chipotle were to take some action to attempt to moot Antoninetti's claims for injunctive relief, this appeal is not moot in light of the outstanding claims for damages and declaratory relief, and in light of the potential

[53] Please see Antoninetti's Notice of Related Cases.

res judicata effect that the underlying judgment will have on Antoninetti's pending class action suit.

V.

STANDARDS OF REVIEW

Antoninetti adopts and incorporates herein the standards of review set forth in his Opening Brief and further states that "(t)he attempted use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants (the reviewing Court's) most careful scrutiny (citation omitted). This is particularly true in the ADA context..." *D'Lil v. Best Western Encina,* 538 F.3d 1031, 1040 (9th Cir. 2008).

VI.

ARGUMENTS

Antoninetti incorporates herein the Arguments set forth in his Opening Brief and makes the following additional arguments:

A. Chipotle Was Required to Provide a Comparable Line of Sight to its Food Preparation/Performance Areas and Open Kitchens.

(i) The Standards Must Be Broadly Applied to Effectuate the Goals of the ADA.

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, 1080 (9th Cir. 2004). "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).

A regulation must harmonize with the purpose of the statute it implements. *Navarro v. Pfizer*, 261 F.3d 90, 102 (1st Cir. 2001) The ADA "as a whole remains highly relevant. It provides the purpose and general objectives that cast light on the meaning of the regulation at issue. (citation omitted.)" *U.S. v. Hoyts Cinemas*, 380 F.3d 558, 566 (1st Cir. 2004).

Security Pac. Nat'l Bank. v. Resolution Trust Corp., 63 F.3d 900 (9th Cir. 1995) also instructs that courts must avoid a construction of a statute that fails to give effect to all of its parts. A "regulation is not just an arbitrary set of words, in which we plug and unplug dictionary definitions and identically worded subsections. It is a law designed to accomplish a purpose. We must examine the meaning of an enactment to see whether one construction makes more sense than another as a means of attributing a rational purpose to the enacting authority. (citation omitted.)" *Security Pac. Nat'l Bank*, at 905-906.

Further, a broadly-drafted regulation, with a broad purpose, may be applied to a particular factual scenario not expressly anticipated at the time the regulation was promulgated. This "is a question that the Supreme Court has answered in the affirmative. See *Pennsylvania Dep't of Corr. v. Yeskey*, (1998) 524 U.S. 206, 212 (holding that, where statutory text is unambiguous, 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' (internal quotation marks omitted) (citing *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)). We see no reason to treat regulations differently." *Regal Cinemas*, *supra*, at 1133.

As noted in Antoninetti's Opening Brief, this Court has historically referenced the general provisions of the ADA in its interpretation and application of the ADAAG. In *Regal Cinemas*, *supra,* this Court cited the general anti-discrimination rule of 42 U.S.C. § 12182(a) in interpreting ADAAG § 4.33.3 to include a viewing angle element for wheelchair locations.

In *Fortyune,* this Court referenced both the general rule (42 U.S.C. § 12182(a)) and the general and specific prohibitions of the ADA (§ 12182(b)) in finding that even if there were no ADAAG violation, the defendant cinema was in violation of the ADA's general provisions because the cinema failed to ensure the availability of companion seating for wheelchair users. *Fortyune, supra*, at 1082.

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

> *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.)

Thus, the interpretation and application of the ADAAG must be broad and must further the goal of the ADA, which is to provide access for people with disabilities to all that is offered to the general public, including the *facilities, privileges, advantages, and accommodations* of a public accommodation as well as the goods and services.

Visual elements are commonly provided and intended at eating establishments. The breathtaking views at the Top of the Mark restaurant in San Francisco. The "wine angel" and wine tower at Aureole Restaurant in Las Vegas. The food selections along the cafeteria line. The performance cooktops at Benihana restaurants. The menu boards at Kentucky Fried Chicken restaurants.

It would be contrary to the purpose of the ADA to interpret and apply a Standard, such as § 7.2(2), to a situation if the application would deny people with

disabilities access to all of the benefits provided by a business to the general public, particularly if other Standards (§§ 4.33.3, 5.1 and Figure A3) could be applied to provide full and equal access.

(ii) ADAAG § 4.33.3 Requires a Line of Sight to Intended Visual Elements in Restaurants and Cafeterias.

There is no Standard that specifically refers to "Food Preparation Areas" or "Open Kitchens" or "Architectural Elements Where Visual Benefits are Intended." Given the absence of a Standard directly on point, the Standards should be applied "to the extent possible" and "where appropriate technical standards exist, they should be applied." TAM, III-5.3000.

ADAAG § 4.33.3 is the appropriate Standard that is most applicable to the Chipotle Experience because it requires a line of sight for wheelchair users, it provides wheelchair users access to the *same* benefits as are provided to standing customers and it satisfies the general requirement[54] that new construction be designed so that it is "accessible to and usable by" wheelchair users. Application of §4.33.3 harmonizes, rather than conflicts, with the general anti-discrimination provisions of the ADA and its regulations.

Figure A3 also denotes the typical dimensions relative to a person in a wheelchair, including the average eye level range of wheelchair users. Application

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[54] 28 C.F.R. § 36.401.

of the dimensional guidelines in this Figure harmonizes, rather than conflicts, with the general anti-discrimination provisions.

As applied to restaurants and cafeterias, § 4.33.3 simply requires that if a restaurant or cafeteria is designed with an intended visual element, the restaurant or cafeteria must be designed so that wheelchair users are provided a comparable line of sight to that element.

Section 5 of the ADAAG imposes *special* requirements specifically for Restaurants and Cafeterias. "Special application sections 5 through 10 provide *additional* requirements for restaurants and cafeterias..." ADAAG § 4.1.1(2) (Emphasis added.)

Section 5.1 explicitly states that "restaurants and cafeterias shall comply with the requirements of 4.1 to 4.35" and incorporates § 4.33, which sets forth the requirements for "Assembly Areas." Section § 4.33.3 imposes a "comparable line of sight" requirement for assembly areas. Thus, the "special application" section for restaurants and cafeterias specifically incorporates a comparable line of sight requirement in the design and construction of restaurants and cafeterias.

As further support that the ADAAG required Chipotle to design and construct its ordering line and food preparation area to provide a comparable line of sight for wheelchair users is the fact that the definition of "Assembly Areas" includes "a *room*

or *space* accommodating a group of individuals...for the *consumption of food and drink*."[55] Restaurants and cafeterias, clearly, are places where food and drink are consumed.

Thus, not only does § 4.33, by its own terms, apply a line of sight requirement to all "assembly areas," including restaurants, but "special application" Section 5 explicitly incorporates a *special* comparable line of sight requirement applicable to restaurants and cafeterias.

Limiting § 4.33.3 to only "fixed seating *areas*" is not only inconsistent with the actual language of § 4.33.3 (which refers to "fixed seating *plans*," not "fixed seating *areas"*), but such a limitation nullifies the inclusion of restaurants in the definition of "Assembly Areas" and it nullifies the incorporation of § 4.33.3 into the requirements of the "special application" section applicable to restaurants and cafeterias.

Section 4.33.3 applies to "Assembly Areas" and sets forth requirements relating to "wheelchair *areas*." There is no special or parochial definition for "wheelchair area" in 28 C.F.R. Part 36. The term "area" is used more than a hundred times in Part 36 to just mean a "place."

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[55] ADAAG § 3.4, "Assembly Area".

In fact, as noted above, "Assembly *Area*" is defined as a "*room*" or "*space*." Cafeteria lines, view windows and television viewing rooms at sports bars are real, identifiable spaces. These are *areas* that wheelchair users would be expected to go to in restaurants or cafeterias and where a line of sight would likely be important.

On the other hand, there is no such physical location as a "fixed seating plan" and a regulation that limits "lines of sight" to "fixed seating plans" is nonsensical, Further, "fixed seating *areas*," to which the district referred, is not a term actually used in the regulation. Moreover, there is nothing in § 4.33.3 which specifically limits its application to "fixed seating areas." Instead, this Section sets forth requirements for "wheelchair areas" and, if fixed seating is involved, it sets forth additional requirements (a fixed companion seat and integration of wheelchair areas into the fixed seating plan).

Adding some numbers to § 4.33.3 clarifies that "wheelchair areas," not "fixed seating plans," is the object of the sentence to which the requirements apply:

> Wheelchair *areas* (1) shall be an integral part of any fixed seating plan and (2) shall be provided so as to provide people with physical disabilities a choice of admission prices and (3) lines of sight comparable to those for members of the general public. (4) They shall adjoin an accessible route that also serves as a means of egress in case of emergency. (5) At least one companion fixed seat shall be provided next to each wheelchair seating area. (6) When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. (7) Readily

> removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

Section 4.33.3, numbers added.

The drafters of the ADAAG surely anticipated that lines of sight would be important in the design of some restaurants and cafeterias, unrelated to fixed seating, and they incorporated the "line of sight" requirement of § 4.33.3 into the special regulations relating to restaurants and cafeterias to ensure that these types of facilities would be designed and constructed to provide comparable lines of sight for wheelchair users.

This interpretation and application of §§ 4.33.3, 5.1 and Figure A3 makes sense and gives effect to the broader non-discrimination requirements of the ADA and to the various provisions of the ADAAG that relate to restaurants and cafeterias. For the "comparable line of sight" requirement to have any effect as applied to restaurants and cafeterias, it must be broadly applied to all design elements within these facilities which would involve intended visual benefits, including food preparation areas like those at Chipotle's restaurants.

B. The District Erred in Applying ADAAG §§ 7.2(2) to the Chipotle Experience.

(i) The District Correctly Held that the Designs Required by ADAAG § 7.2(2)(i) and (ii) Do Not Provide Access to the Chipotle Experience.

The district correctly determined that ADAAG § 7.2(2)(i) and (ii) are inapplicable to Chipotle's food preparation areas and the Chipotle Experience. Section 7.2(2)(i) is inapplicable because customers in wheelchairs "cannot receive full and equal access to Defendant's restaurants by utilizing the transaction counter alone."[56] Simply having the lowered counter, without more, would not provide full and equal access to wheelchair users.

Even Chipotle admits that "a plain reading of Subsection 7.2(2)(i) shows that the clear intent of the regulation is that the establishment *be capable of* delivering the *same* goods or services at the lowered portion of the counter..."[57]

The district also correctly ruled that the cashier counter failed to satisfy § 7.2(2)(ii) because "the transaction counters alone do not provide customers in wheelchairs with full and equal access."[58]

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[56] ER I-9, 15:1-20.

[57] Second Brief, p. 43, par. 2.

[58] ER I-9, 16:9-10.

Having correctly determined that having the lowered counters described in §§ 7.2(2)(i) and (ii), alone, would not provide full and equal access to the Chipotle Experience, the district's efforts to apply § 7.2(2) should have stopped. If the counters, *without more*, would not provide full and equal access to all of the benefits provided by Chipotle, then the Standard is inapplicable.

(ii) The Chipotle Experience Provided at Lowered or Adjacent Counters is Separate and Different From That Provided at the Food Viewing and Preparation Areas.

ADAAG §§ 7.2(2)(i) and (ii) do not apply in this case because the lowered cashier counter and the dining tables do not provide wheelchair users with views of the sixteen bins of food, the assembly line of burrito-making and the open kitchen. The visual aspects of the Chipotle Experience provided to the general public are not capable of physically being provided at the existing lowered cashier counter or at the auxiliary counters (dining tables) referenced in Section 7.2(2)(i) and (ii).

Looking into the "open kitchen" and "being brought more completely into the dining experience," seeing sixteen bins filled with food and a veritable bonanza of burrito-making and "eating with your eyes" are not simply incidental, tangential aspects of the Chipotle Experience, but are specifically intended privileges, advantages and/or accommodations, rather than goods or services. These cannot be provided at the cashier counter or at a table in the dining area.

Chipotle provides a *different and separate experience* for wheelchair users. Leaving the ordering line and your lunch date, searching for an open dining table (hopefully the accessible one) even when you simply want a take-out order, and waiting for a crew member to fill sixteen small plastic cups of food and waiting for him to carry them out to the dining area on a tray, and watching the crew member plop the cups' contents onto a tortilla, and then waiting with your tortilla's contents open and exposed while the crew member retrieves more barbacoa (because the initial portion was too small for your liking), and then watching your tortilla finally rolled, and then having to go back to the cashier counter, against traffic, to pay for your lunch, is not the *same* as the experience for standing customers. *It is different and separate*. Looking at one small sample of an ingredient, one at a time, is not the same as simultaneously comparing bins of ingredients to determine which is more appetizing.

Standing customers get to move quickly down a line while they watch a crew member serve spoonfuls of goodness from brimming pans onto their burritos, and onto the bounty of burritos along the assembly line, and the crew immediately adjusts the quantity of each of the standing customers' ingredients while they watch them being placed on their tortillas, all while in the company of their lunch

companions, easily reaching the cashier counter where they pay for their food and go on their way.

Antoninetti does not argue that §§ 7.2(2)(i) and (ii) are inapplicable in every instance where "some customers can see certain things behind a sales and service counter."[59] Rather, §§ 7.2(2)(i) and (ii) are inapplicable in those novel situations where visual elements are integral to the benefits provided to the public, rather than incidental to the exchange of goods and services and the *same* visual elements cannot be provided at a lowered or auxiliary sales counter.

(iii) The"Goods" and "Services" Provided at Chipotle's Lowered or Adjacent Counters are Separate and Different From Those Provided at the Food Viewing and Preparation Areas.

Like the "experience" provided to wheelchair users, the "goods" and "services" purportedly provided to wheelchair users as part of Chipotle's "methods of accommodation" are *different* in nature, size, quality and quantity and are *separate* from those provided to standing customers. A tray with sixteen small, plastic cups of food is not a "feast for the eyes." It is not the same as a 12-foot long expanse of bins filled with food. A plastic cupful of barbacoa, followed by a handful of lettuce is not the same as large bins of ingredients right next to each other.

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[59] Second Brief, pgs.40-41.

C. ADAAG § 7.2(2) Does Not Allow Chipotle to Avoid Designing an Accessible Food Preparation Area by Adopting "Policies of Providing Methods of Accommodation"

(i) "Methods" Were Intentionally Omitted from the Definition of "Equivalent Facilitation."

"Courts ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.' (Internal citations omitted)" *Chickasaw Nation v. United States*, (2001) 534 U.S. 84. "When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, (2004) 542 U.S. 711, n. 9.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Gonzales*, (1997) 520 U.S. 1, 5. "We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, (1983) 464 U.S. 16, 23.

As noted by the disability rights organizations ("Amici") which filed a Brief of Amici Curiae in this matter, the wording of § 2.2 changed against the backdrop of a statute that already used the phrase "alternative methods" to refer to alternatives to

barrier removal in pre-1993 facilities, 42 U.S.C. § 12182(b)(2)(A)(v), lending further support to the proposition that the Access Board was drawing a sharp distinction between alternative customer service policies permissible in older facilities and alternative physical designs or technologies permissible in new construction.

The terms "alternative methods" and "alternative designs and technologies" were clearly intended to have different and distinct meanings. "Alternative methods" was specifically included in a regulation relating to *existing facilities* (28 C.F.R. § 36.305). "Alternative designs and technologies" was included in relation to *new construction* (ADAAG § 2.2, incorporated by reference at 28 C.F.R. § 36.406(a)). Adoption of Chipotle's interpretation of ADAAG § 2.2 would read back into § 2.2 language that had been specifically replaced during the regulatory process.

The regulations make clear that "alternative methods" means customer service policies. 28 C.F.R. § 36.305 ("alternative methods" include "curb service," "retrieving merchandise," and "relocating activities to accessible locations."). This provision recognizes that not every older facility will meet the high standards for readily achievable barrier removal, so that alternative -- often service-based -- measures will be necessary to provide as much access as possible.

Antoninetti agrees with Amici that "methods of accommodation" can never be utilized in new construction where the construction is or can be addressed by the Standards. Contrary to Chipotle's assertion, this very case makes real the fear of Amici and Antoninetti that "establishments will implement policies as forms of equivalent facilitation with the intent to deny access to disabled persons."[60]

Antoninetti asserts, in addition, that where the Standards cannot be applied to a particular situation or element, the general provisions of the ADA apply and impose an obligation to remove barriers in new construction where removal is readily achievable. Only where barrier removal is not readily achievable can alternative methods be used to provide accessibility in new construction. See Section VI, D., *infra*.

(ii) Chipotle's Policy Fails, Even if Policies Can Constitute Equivalent Facilitation.

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 that managers, *rather than the crew members*, carry out the Policy. Placing responsibility on managers, *rather than* crew members, was critical to the district's conclusion that the written Policy was

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[60] Second Brief, p. 53.

effective when the unwritten policy failed.[61] The Policy also does not, as written, place an obligation on 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.[62]

Chipotle attempts to explain the discrepancies between the district's conclusions and the actual language of the Policy by asserting that the district found "the manager on duty has primary responsibility."[63] The district made no such finding. Chipotle also now explains that its "practices" (rather than the Policy) are consistent with the district's findings and conclusions.

The problem with the district's findings and conclusions of law are that they were drafted by Chipotle with reference to the trial testimony of Chipotle's witnesses. Unfortunately, Chipotle's witnesses testified that the written Policy imposed obligations that were not actually in the Policy. Further, the "practices" testified to by Chipotle's witnesses are no different that the unwritten practices under the unwritten policy, which the district found defective. In addition, the Policy

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[61] ER I-3, CL 16, contradicted by actual language of Policy, found at ER I-3, Fact 110.

[62] ER I-3, FF 110, CL 16, CL 17.

[63] Second Brief, p.56, par. 1.

allows the use of other methods of accommodation not mentioned in the Policy[64] and not before the Court for scrutiny. The Policy, then, is too vague to be enforceable.

(iii) Requiring a Policy of "Use" or "Availability" Does Not Broaden the Phrase "Designs and Technologies" to Include "Policies of Methods of Accommodation."

Chipotle argues that, since courts have referred to policies of actually *using* or making *available for use* alternative designs or technologies, that "policies" are then forms of equivalent facilitation.[65] Policies of "use," however, are different than policies of "implementing methods of accommodation to overcome inaccessible design."

For each "policy of equivalent facilitation" cited by Chipotle, there is an attendant alternative design or technology that must be *used* to provide equivalent facilitation. (E.g., *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D.Or. 1997) - high quality folding chairs versus fixed chairs. Section 7.2(2)(iii) - the side of a counter or a concierge desk versus a lowered portion of the main counter or an auxiliary counter. *Access 4 All, Inc. V. Atlantic Hotel*

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[64] 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. ER IV-25, 163:23-164:25, 167:16-168:13, 168:20-170:17, 171:20-172:8, 181:11-182:1.

[65] Second Brief, pgs. 48-50 (e.g. "providing folding chairs", "using the side of a counter").

Condominium, LLC, Case No. 04-61740, 2005 U.S. District LEXIS 41601 (S.D. Fla., Nov. 22, 2005 - couch seating area versus front desk.)

This Court addressed the attendant "available for use" policy in *Fortyune v. AMC* where this Court found that it was not enough that the cinema provided an accessible design, it was required to adopt a policy that the accessible design actually be available for *use* by wheelchair users.

Indeed, ADAAG § 2.2 defines "equivalent facilitation" as "the *use* of other designs and technologies...where the alternative designs or technologies *used* will provide substantially equivalent or greater access..." Thus, ADAAG § 2.2 requires that, in order for alternative designs and technologies to constitute equivalent facilitation, the alternatives must actually be *used*. The thing used, however, must be another *design* or another *technology*.

(iv) ADAAG § 7.2(2) Required an Accessible Design.

ADAAG § 7.2(2) would only apply, if at all, if Chipotle could implement a design, standing alone, that would give wheelchair users the same access to the Chipotle Experience and the open kitchen as is provided to standing customers. For example, if the lowered three-foot long counter were located in the middle of the 12-foot long ordering line and the sixteen bins of ingredients were situated so that wheelchair users had direct and similarly close views of all of the same bins of food

and the open kitchen from that counter, this might arguably have satisfied the requirements of § 7.2(2)(i). (It seems that Section 7.2(2)(ii), which allows the use of an adjacent counter, could never be applicable because it does not allow the provision of the *same* goods, services and benefits.)

Constructing a Wall with a transparent material rather than an opaque material might also satisfy the "equivalent facilitation" provision of ADAAG § 7.2(2)(iii), which required an accessible *design*, not a policy of providing methods of accommodation.

In *every* instance where the ADAAG describes equivalent facilitation, it references an alternative design or an alternative technology. For example, equivalent facilitation may be provided with an elevator car of different dimensions (other design). *ADAAG § 4.1.6(3)(c).* A portable text telephone may be made available rather than permanently affixing a text telephone within or adjacent to a telephone enclosure (other technology). *ADAAG §4.31.9 (1) and (3).* ADAAG § A.4.31.9 further clarifies that "movable or portable text telephones may be used" and goes on to state that "currently designed pocket type text telephones" would not be considered substantially equivalent, but that "in the future as *technology* develops this could change."

Equivalent facilitation is described as "folding shelves" (other design) or "the side of a counter or a concierge desk" (other design). *ADAAG § 7.2(iii)*. All accessible sleeping rooms may be constructed for multiple occupancy, rather than constructing some with single occupancy (other design). *ADAAG § 9.1.4.* Equivalent facilitation at a hotel balcony or patio may consist of raised decking (other design) or a ramp to provide accessibility (other design or other technology.) *ADAAG § 9.2.2(6)(d).*

The Court in *Independent Living Resources, supra,* held that the *folding companion seat* constituted equivalent facilitation not, as Chipotle argues, that the policy of *using* the folding companion seat was equivalent facilitation.

The "equivalent facilitation" provision of the ADAAG, then, required that Chipotle *design* a food viewing counter that provided a comparable line of sight for wheelchair users. This could easily be achieved by lowering the Wall and/or replacing it with a transparent material.

D. The General Anti-Discrimination Provisions Govern If There Is No Applicable ADAAG Standard.

(i) The Regulatory Language Applies the General Anti-Discrimination Provisions in the Absence of an Applicable Standard.

If the ADAAG fails to address a particular situation, element, design or feature, the general anti-discrimination provisions of the ADA[66] and its regulations[67] will still require accessibility. If no specific Standard applies, accessibility will require an accessible design in the first instance, by reference to the general provisions of 28 C.F.R. § 36.401, or accessibility will require removal of architectural barriers where removal is readily achievable.

The Department of Justice ("the Department"), in its Commentary[68], provided notice to designers and builders that they will be required to provide accessible and usable elements and facilities, even in the absence of a specific Standard:

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[66] Codified at 42 USC 12182(a).

[67] Subpart B (28 C.F.R. §§ 36.201-36.213) and Subpart C (28 C.F.R. §§ 36.301-36.310).

[68] 28 C.F.R. Part 36, Appendix B. (Appendix B relied upon by the Ninth Circuit in *Molski v. M.J. Cable, Inc.* 481 F.3d 724, 730.)

> "the 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 (Sec. 36.401) is the safest guide."

(28 C.F.R. Part 36, App. B, page 621. (Emphasis added.))

The Department also explained that where the specific provisions do not apply, the *general* anti-discrimination provisions govern:

> "Resort to the general provisions of subpart B is only appropriate where there are *no applicable* specific rules of guidance in subparts C or D."

Appendix B, p. 604, right column.

28 CFR § 36.213 also specifically addresses the interplay between the ADA's general anti-discrimination requirements (Subpart B) and its specific requirements (Subpart C), including the Standards (Subpart D)[69]:

> "Subpart B of this part sets forth the general principles of nondiscrimination applicable to all entities subject to this part. Subparts C and D of this part provide guidance on the application of the statute to specific situations. The specific provisions, including the limitations on those provisions, control over the general provisions in circumstances where ***both*** specific and general provisions apply."

Subpart B "sets forth the general principles of non-discrimination applicable to all entities...while subparts C and D provide guidance on the application of this

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[69] The Standards are incorporated into Subpart D at 28 C.F.R. § 36.406.

part to *specific situations."* Appendix B, p. 604, referencing Section 36.213. The Department made clear that it intended the general provisions to apply "where there are no applicable specific rules of guidance." *Id.*

If an accessible design is not possible in the first instance (e.g., mobile health screening vans that may be manufactured by others), under the general anti-discrimination provisions, a public accommodation will still be required to remove architectural barriers if it is readily achievable to do so. Notice of this requirement is included in the 1994 Supplement to the TAM, (TAM III-5.3000 (1994 Supplement)):

> "Although mobile health care screening vans are "facilities" subject to the requirements of Title III, *there are no specific ADAAG standards* for newly constructed or altered vans. *The vehicles are, however, subject to other Title III requirements including the obligation to provide equal opportunity and* ***the duty to remove architectural ...barriers*** to the extent that it is readily achievable to do so, and if it is not readily achievable to do so..."

In its Commentary, the Department affirmed the application of barrier removal requirements in situations where the ADAAG does not specifically refer to certain elements or features (such as arcade video machines):

> "Purchase or *modification* of equipment is required in certain instances by the provisions of §§ 36.201 and 36.202. For example, an arcade may need to provide accessible video machines in order to ensure full and equal enjoyment of the facilities and to provide an opportunity to

> participate in the services and facilities it provides. *The **barrier removal requirements** of Sec. 36.304 will apply as well....”*

App. B, p. 616, left column.

There is no Standard that specifically refers to “Food Preparation Areas” or “Open Kitchens” or “Architectural Elements Where Visual Benefits are Intended.”

If the Court determines that ADAAG §§ 4.33.3, 5.1, 7.2(2) and Figure A3 are not applicable to the unique design of Chipotle’s food viewing areas, then Chipotle was still required to provide an accessible design in the first instance by reference to the general provisions that require a facility to be accessible to and usable by people with disabilities. Certainly any designer of reasonable intelligence could determine that a 46-inch high wall would block the view of wheelchair users with eye levels below that height.

Moreover, if Chipotle was unaware of this basic fact, once Chipotle was advised by its customers that wheelchair users could not see the food preparation area[70], Chipotle was required to lower or modify the Wall under 28 C.F.R. § 36.304, if it was readily achievable to do so.

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[70] ER II-15, p. 59 - 64. (Search for emails was limited to the time period of 7/11/02 to 8/21/06 - see ER II-15, top of p.59)

Chipotle failed to raise the affirmative defense that barrier removal was not readily achievable.[71] Antoninetti, therefore, was not required to offer any evidence on this issue and was entitled to judgment in his favor.

"(D)efendant has failed to plead that barrier removal is not readily achievable in its answer. Accordingly, the defense is waived. *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 819 (9th Cir. 2004). While plaintiff has not come forward with any evidence regarding barrier removal, he need not do so where such evidence would be unnecessary, given defendant's waiver." *Wilson v. Haria & Gogri Corp.*, 479 F. Supp. 2d 1127, 1133 (E.D. Cal. 2007).

(ii) The Cases Cited by Chipotle Are Inapplicable.

Doe v. National Board of Medical Examiners, 199 F.3d 146, 155 (3rd Cir. 1999) addressed the issue of which of two ADA Sections should apply in that case. Similarly, *Security Pacific, supra,* involved the choice between two parts of a regulation. Neither case held that a general anti-discrimination provision does not govern if there is no specific provision on point or if no Standard applies to a given situation.

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[71] ER II-15, p. 172, Response to Interrogatories 16 and 17; ER II-11.

(iii) Other Cases Cited by Chipotle Are Contrary to Ninth Circuit Law.

Chipotle ignores this Court's decisions that directly contradict the cases cited by Chipotle. For example, in *Fortyune, supra*, AMC urged "that ADA plaintiffs must prove the defendant contravened a 'specific requirement of the ADAAG,' to establish a violation of the ADA." *Fortyune*, *supra*, at 1085. This Court rejected that argument and held that compliance with the ADAAG does not insulate a public accommodation from liability for failing to provide full and equal access to people with disabilities.

Chipotle also cites *United States v. National Amusements, Inc.,* 180 F.Supp.2d 251 (D. Mass. 2001) which involved the issue of whether § 4.33.3 required stadium-style theaters to provide "full and equal enjoyment" of the movie theaters to people in wheelchairs. In that case, the Government argued that § 4.33.3 required comparable viewing angles for wheelchair users. In the alternative, the Government urged that the general anti-discrimination provisions of the ADA required comparable viewing angles, since this particular element of the design was not specifically addressed in § 4.33.3. The *National Amusements* Court rejected the Government's arguments and held that § 4.33.3 was the exclusively applicable standard, that viewing angles were not addressed in § 4.33.3 and, therefore, comparable viewing angles were not required.

That holding is directly contrary to this Circuit's opinion in *Regal Cinemas*, *supra,* which addressed the very same issue regarding viewing angles in movie theaters. This Court rejected the notion that because § 4.33.3 was silent as to viewing angles, no such requirement existed. Instead, the Court relied upon the Department's interpretation of § 4.33.3 and concluded that, when read in conjunction with 42 U.S.C. § 12182(a) (the general anti-discrimination statute), § 4.33.3 required comparable viewing angles for people in wheelchairs. *Regal*, *supra,* at 1133.

E. Chipotle's "Due Process" Argument Fails.

Due process requires that the government provide citizens and other actors with sufficient notice as to what behavior complies with the law. "(B)ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. (Citations omitted.)" *U.S. v. AMC Entertainment*, 549 F.3d 760, 768 (9th Cir. 2008). Only constructive, rather than actual, notice is required. *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000).

Chipotle claims that requiring removal or modification of the Wall constitutes a "design requirement" that has not passed through the notice and comment period

under the Administrative Procedures Act, thereby violating its right to "due process." Chipotle basically seems to argue that no one ever told it it could *not* build a wall that obstructs the views for wheelchair users.

Chipotle's argument fails for several reasons. First, the regulations specifically state that newly constructed elements and facilities must be designed to be accessible to and useable by people with disabilities. 28 C.F.R. § 36.401. Chipotle had notice of the design criteria commonly relied upon by architects, Figure A3, which identifies the typical range of eye levels for wheelchair users. Anyone of ordinary intelligence could determine that a wheelchair user with an eye level of 43 inches would not be able to see through or over an opaque wall 46 inches high.

Second, Chipotle had notice of the line of sight requirement of § 4.33.3 and that this line of sight requirement was incorporated into the provisions relating to restaurants and cafeterias at § 5.1.

Third, Chipotle had notice that, when no Standard is on point, the general anti-discrimination provisions require that the element or feature be designed to be accessible and usable in the first instance or that barriers be removed, if removal is readily achievable. (See, TAM III-5.3000 (1994 Supplement)).

Fourth, even before Chipotle constructed the two restaurants at issue in this case, this Court, in *Long v. Coast Resorts, Inc.*, 267 F.3d 918 (9th Cir. 2001) had

already held that accessibility is required even when a particular element or feature is not specifically addressed in the Standards. The Technical Assistance Manual issued by the Department made clear that, if an element, feature or design were not specifically addressed in the Standards, accessibility was required under other provisions. (TAM 5-3000 (1994 Supp.))

F. Antoninetti Was Entitled to Damages for All Visits.

The district denied Antoninetti damages for three visits because it determined that Antoninetti was not a "bona fide customer" during the "litigation-related" visits. But discrimination is discrimination, even when it occurs in front of a defendant's own attorneys. Antoninetti is entitled to additional damages for three additional visits. Antoninetti incorporates his arguments in his Opening Brief on this issue.

G. Antoninetti Was Entitled to Injunctive Relief.

The district committed clear error in making a finding of fact that was contrary to the Parties' stipulation[72] 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. The district was required to accept these stipulated facts as proven.[73]

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[72] ER I-7, 5:28-6:6.

[73] Ninth Circuit Manual of Model Jury Instructions Civil, Instruction No. 2.2 (2007).

Further, the district improperly relied upon Antoninetti's "litigation history" to determine his credibility. "Although we afford great deference to a district court's credibility assessments, on this record we cannot agree that D'Lil's past ADA litigation was properly used to impugn her credibility. Accordingly, because the district court focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent to return to the Best Western Encina, we reject its purported adverse credibility determination." *D'Lil*, *supra*, at 1040.

In addition, Antoninetti was not required to provide evidence that the cost of removal of the barrier was outweighed by the benefit provided to the public. If ADAAG §§ 4.33.3, 5.1 and/or Figure A3 required Chipotle to provide a comparable line of sight to the food preparation area and open kitchen, Chipotle's violation of those Standards entitled him to a statutory injunction, regardless of the cost of the later removal. *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).

Finally, if there is no applicable Standard, Chipotle was required to remove the architectural barrier (the Wall) and Antoninetti was not required to introduce any

evidence relating to the cost of removal because Chipotle waived the defense that removal was not "readily achievable."[74]

H. The District Committed Clear Factual Errors.

(i) The District Improperly Omitted Undisputed Facts Relating to the Nature of the Chipotle Experience.

The district not only misapprehended the effect of the evidence, it completely ignored material, relevant and undisputed evidence. The district's findings are so contrary to the undisputed evidence, that this reviewing Court can only be left with the firm conviction that clear error was committed by the district.

For example, the district committed clear error in adopting Chipotle's findings which blatantly omitted the undisputed facts that Chipotle's kitchens were designed to be a "feast for the eyes" and "open" so that customers will "be brought more completely into the dining experience" and so that they can see into the open kitchen and watch freshly marinated meats being grilled[75] - material and *undisputed* facts that are fundamental to the totality of the Chipotle Experience.

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[74] ER II-11; ER II-15, p. 172, Response to Interrogatories 16 and 17; SER VIII-32.

[75] ER IV-25, 140:10-141:22; ER V-26, 311:8-11.

(ii) The District Ignored the Undisputed Fact that Chipotle's Written Policy Allows Methods of Accommodation Not Before the Court For Review.

The district correctly held that Chipotle's prior unwritten policy did not constitute "equivalent facilitation" because the "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."[76]

The district committed clear error, however, when it ignored the undisputed evidence that the written Policy suffers the same failures as the unwritten policy. The district disregarded testimony from Chipotle employees that no specific methods of accommodation are required for Pacific Beach or Encinitas employees.[77] Instead, under the written Policy, Chipotle employees may still use their common sense in devising alternate ways to accommodate customers in wheelchairs.[78]

The district also committed clear error in holding that the written Policy constitutes equivalent facilitation because the Policy "sets forth plainly" the "two

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[76] ER I-3, CL 12.

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

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

new requirements" integral to the district's decision that the Policy constituted "equivalent facilitation."[79] In fact, the Policy contains no such "two new requirements." The reviewing Court need only read the written Policy to see that it does not include the language assigned it by the District.

I. This Appeal Cannot be Rendered Moot.

Antoninetti sought declaratory relief and damages, in addition to injunctive relief.[80] He is a plaintiff in a related class action lawsuit. The resolution of legal issues in this case may have a *res judicata* effect in the related class action. Antoninetti's damages and declaratory relief claims will survive through this appeal. *Z Channel Ltd. Partnership v. Home Box Office*, 931 F.2d 1338, 1341 (9th Cir. 1991); *Forest Guardians v. Johanns*, 450 F.3d 455, 462-463 (9th Cir. 2006).

VII.

CONCLUSION

Antoninetti respectfully requests that this Court reverse the district's Order denying Antoninetti's Motion for Summary Judgment and/or that it reverse judgment against Antoninetti on the issues of injunctive relief, declaratory relief and damages following trial. He requests that the Court declare that policies are not

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[79] ER I-3, CL16, contradicted by actual language of Policy, found at ER I-3, FF 110.

[80] ER II-10, p. 9.

"equivalent facilitation" under ADAAG § 2.2. and further requests that the Court instruct the district to issue an order requiring Chipotle to lower and/or modify the offending Wall so that wheelchair users can see the food preparation area and the open kitchen. Antoninetti requests that this Court order the district to award him damages for three additional visits to the restaurants.

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. He further requests that the remand include an order that the district award Antoninetti additional damages.

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Dated: February 18, 2009 By: S/ Amy B. Vandeveld

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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.

Pursuant to Circuit Rule 28-2.6, I hereby certify that there are no known related cases pending before the United States Court of Appeals for the Ninth Circuit.

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Dated: February 18, 2009

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CERTIFICATE OF COMPLIANCE
FOR CASE NOS. 08-55867 AND 08-55946

Pursuant to Rules 28.1(e)(3) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this brief is produced using a times new roman proportional typeface with a point size of 14, and the text contains 12,980 words, exclusive of the tables and certificates. It therefore conforms to the requirements set out in Fed. R. App. p.32 (a)(7)(C) and Ninth Circuit Rule 28.1(e)(2)(A) (i). The excerpts of record have been compiled in compliance with Circuit Rule 30-1.6.

LAW OFFICES OF AMY B. VANDEVELD

Dated: February 18, 2009

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CERTIFICATE OF SERVICE
FOR CASE NOS. 08-55867 AND 08-55946

I, the undersigned, hereby certify that on February 18, 2009, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, as ordered by the Court on February 17, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First Class Mail, postage prepaid to the following non-CM/ECF participants:

Amy F. Robertson, Esq.
FOX & ROBERTSON, P.C.
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Attorney for Amici

I further certify that I caused to be filed five sets of the Appellant/Cross-Appellee's Supplemental Excerpts of Record, Vol. VIII, in paper format by overnight mail with the Clerk of the Court for the United States Court of Appeals and mailed one set to the above-mentioned counsel by First Class Mail, postage prepaid, on February 12, 2009.

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.

Dated: February 18, 2009

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