TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 5

I. The District Court Properly Held that Section 7.2(2) Applies to Chipotle's Food Preparation Counters but Erred in Holding that the Transaction Counter Does Not Satisfy the Requirements of Section 7.2(2)(i) and (ii)…….. 5

A. Antoninetti's Assertion that the District Court Erred in Holding that Section 7.2(2) Applies to the Food Preparation Counters Rests on an Unreasonable Interpretation of Section 4.33.3 and Is Contrary to Established Precedent Applying Section 7.2(2) to Similar Food Service Counters… 6

B. Because Section 7.2(2) Applies to Chipotle's Food Preparation Counters, Antoninetti Cannot Rely on the ADA's General Anti-Discrimination Provisions To Argue that the Counters Are Inaccessible 11

C. Antoninetti Has Failed To Present Any Evidence or Legal Authority To Rebut Chipotle's Arguments that the Restaurants' Counters Satisfy Subsections 7.2(2)(i) and/or (ii)..... 14

1. The evidence does not support Antoninetti's assertion that the transactions that occur at the portion of the food preparation counter are separate and distinct from those that occur at the transaction station 15

2. Antoninetti's argument that there is no evidence that the transaction station was ever actually used to allow customers to see food ingredients or the making of their food orders is irrelevant to the question of whether the food preparation counters comply with Section 7.2(2)(i) and (ii) 19

II. Antoninetti Has Failed To Refute the Evidence and Authority Cited by Chipotle Establishing that Its Prior Unwritten Practice of Accommodating Customers with Disabilities Constituted Equivalent Facilitation..... 21

A. Antoninetti's Assertion that Policies Can Never Constitute Equivalent Facilitation Under Section 2.2 and Subsection 7.2(2)(iii) Is Unsupported by the ADAAG or Relevant Case Law 21

B. Chipotle's Policy and Prior Unwritten Practice of Accommodation Provide Customers with Disabilities with Substantially Equal or Greater Access to the Food Ordering Process and Do Not Require that Customers with Disabilities Be Separated from Other Patrons..... 25

C. To the Extent that Antoninetti Did Not Receive Any Accommodations that He Wanted on Any of His Visits to the Restaurants, that Is Because He Did Not Indicate His Desire for Accommodation to Chipotle's Employees or Did Not Indicate that the Accommodations that He Received Were Not Satisfactory..... 29

CONCLUSION..... 31

CERTIFICATE OF COMPLIANCE..... 33

CERTIFICATE OF SERVICE..... 34

TABLE OF AUTHORITIES

Federal Cases

Access 4 All, Inc. v. Atlantic Hotel Condominium Ass'n, LLC, Case No. 04-61740, 2005 U.S. Dist. LEXIS 41601 (S.D. Fla. Nov. 22, 2005) 23
Doe v. National Board of Medical Examiners, 199 F.3d 146 (3d Cir. 1999) 12
Entertainment Research Group v. Genesis Creative Group, 122 F.3d 1211 (9th Cir. 1997) 5
*Commonwealth v. E*Trade Access, Inc.*, No. 03-CV-11206-MEL, 2005 WL 2511059 (D. Mass. Feb. 22, 2005) 11, 18
Greenwood v. FAA, 28 F.3d 971 (9th Cir. 1994) 5
Hubbard v. Rite Aid Corp., 433 F. Supp. 2d 1150 (S.D. Cal. 2006) 10
Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 2d 1124 (D. Or. 1998) 10
Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 746 (D. Or. 1997) 11, 22, 23
Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc., 399 F.3d 1126 (9th Cir. 2003) 12, 13
Parr v. Waianae L&L, Inc., No. Civ. 97-01177 FIY, 2000 WL 687655 (D. Haw. May 16, 2000) 10
Security Pacific National Bank v. Resolution Trust Corp., 63 F.3d 900 (9th Cir. 1995) 12
United States v. National Amusements, 180 F. Supp. 2d 251 (D. Mass. 2001) 11, 12

Federal Regulations

28 C.F.R. pt. 36 ..... passim

Miscellaneous

H. Rep. No. 101-485(II), *reprinted in* 1990 U.S.C.C.A.N. 387 11

INTRODUCTION

The only issues that Appellee/Cross-Appellant Chipotle Mexican Grill, Inc. has appealed to this Court with respect to Appellant/Cross-Appellee Maurizio Antoninetti's Americans with Disabilities Act ("ADA") and California Disabled Persons Act ("CDPA") claims are whether the District Court erred in holding that: (1) the transaction stations in Chipotle's Pacific Beach and Encinitas Restaurants (collectively "the Restaurants") do not satisfy the requirements of Subsection 7.2(2)(i) or (ii) of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"); (2) Chipotle's long-standing practice of accommodating customers with disabilities did not constitute an equivalent facilitation; and (3) that Antoninetti was therefore entitled to damages for his CDPA claims regarding Chipotle's food preparation counters.

Chipotle's position with respect to these issues is that its food preparation counters comply with the requirements of ADAAG § 7.2(2) and are therefore accessible under the ADA and the CDPA. Chipotle presented undisputed evidence on summary judgment and at trial that the transaction stations are attached to the food preparation counters and are less than 36 inches high and over 36 inches long, as required by Section 7.2(2)(i) and (ii). Chipotle also presented undisputed evidence that the transaction station can be used to provide the same goods and

services exchanged at the 44 inch high wall between the line of customers and the portion of the food preparation counters where the customers' entrées are prepared ("the Wall"). Additionally, Chipotle presented undisputed evidence that its unwritten practice of accommodating customers with disabilities provided substantially equal access to the food ordering process at the Restaurants consistent with the requirements of Section 7.2(2)(iii) and that Antoninetti unreasonably failed or refused to avail himself of the accommodations available to him.

Antoninetti fails to refute any of these arguments in his Third Brief on Cross-Appeal. Antoninetti's primary argument against Chipotle's position that its food preparation counters are compliant with Section 7.2(2)(i) and (ii) is that ADAAG Section 4.33.3 rather than Section 7.2(2) governs the food preparation counters. This argument, however, construes Section 4.33.3 in a manner that is inconsistent with the regulation's plain language. It also ignores well established precedent applying Section 7.2(2) to restaurant and concession stand counters similar to the Restaurants' food preparation counters. Antoninetti also argues that because Section 7.2(2) does not impose any sight-line requirements on the food preparation counters, the Court should create such requirements based on the ADA's general anti-discrimination provisions. This argument is contrary to the well settled principle that courts cannot use the ADA's general anti-discrimination

provisions to create new technical and design requirements that are not contained in a more specific applicable section of the ADAAG. Although Antoninetti asserts that, in *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, this Court rejected this principle and applied the ADA's general anti-discrimination provisions to a situation directly addressed by a more specific ADAAG provision, his argument grossly misstates this Court's ruling in that case. Finally, Antoninetti contends that the District Court properly held that the goods and services exchanged at the portion of the food preparation counter behind the Wall cannot be provided to customers at the transaction station, as required by Section 7.2(2)(i) and (ii). However, Antoninetti offers no evidence to support this assertion and instead relies on his own speculation.

Antoninetti also argues that Chipotle's unwritten practice of accommodating customers with disabilities cannot satisfy the requirements of ADAAG Sections 2.2 and 7.2(2)(iii) because policies and practices cannot qualify as equivalent facilitation. However, Antoninetti fails to distinguish the regulatory provisions and cases that make clear that policies and practices like Chipotle's can indeed constitute equivalent facilitation. Antoninetti further asserts that even if a policy can constitute an equivalent facilitation, Chipotle's unwritten practice of accommodation does not meet the requirements of Sections 2.2 and 7.2(2)(iii) because it provides separate and

different benefits to wheelchair users and because it never was applied to Antoninetti. These arguments, however, are flatly contradicted by the evidence presented below. Accordingly, Antoninetti has failed to rebut Chipotle's position that its unwritten practice of accommodating customers with disabilities constitutes an equivalent facilitation.

Finally, in his Third Brief on Cross-Appeal, Antoninetti attempts to present the following issues for appeal that were not raised in his Opening Brief:

1. Whether Chipotle waived a "readily achievable" defense;

2. Whether the District Court engaged in the "wholesale and verbatim adoption" Chipotle's proposed findings, and whether the District Court's findings of fact and conclusions of law therefore require greater scrutiny on appeal;

3. Whether the District Court erred in failing to consider other customer complaints of customers of other Chipotle restaurants;

4. Whether the District Court erred in failing to make factual findings regarding the comparison between the experience of wheelchair users under Chipotle's written accommodation policy and the experience of standing customers;

5. Whether the District Court erred in failing to make additional factual findings regarding the menu boards in Chipotle's restaurants;

6. Whether the District Court committed clear error by improperly relying on Antoninetti's past litigation history in determining his credibility;

7. Whether the District Court's factual finding that Antoninetti had no credible interest in returning to the restaurants was contrary to the

parties' stipulation that he wants to have the "Chipotle experience"; and

8. Whether this appeal can be "rendered moot."

It is well settled that an appellant in a cross-appeal may not assert new issues or assignments of error in the response and reply brief that were not raised and argued in his initial brief. *See Entm't Research Group v. Genesis Creative Group*, 122 F.3d 1211, 1217 (9th Cir. 1997) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). Accordingly, Antoninetti has waived these arguments.[1]

ARGUMENT

I. The District Court Properly Held that Section 7.2(2) Applies to Chipotle's Food Preparation Counters but Erred in Holding that the Transaction Counter Does Not Satisfy the Requirements of Section 7.2(2)(i) and (ii).

Antoninetti's Third Brief on Cross-Appeal fails to refute Chipotle's factual and legal arguments that the District Court erred in holding that the transaction stations attached to the food preparation counters fulfill the requirements of Section 7.2(2)(i) and (ii). Antoninetti raises a number of different arguments in opposition to Chipotle's position regarding the application of Section 7.2(2)(i) and (ii), many of which simply repeat the arguments already set forth in his Opening Brief. First, Antoninetti asserts that Section 7.2(2) is inapplicable to the food

[1] Chipotle has filed a Motion To Strike contemporaneously with this brief, affirmatively moving this Court to strike these arguments.

preparation counters because Section 4.33.3 governs those counters. Second, Antoninetti asserts that because Section 7.2(2) does not impose any sight-line requirements on the food preparation counters, the Court should interpret the ADA's general anti-discrimination provisions to require that the food preparation counters provide equivalent lines of sight to wheelchair users. Finally, Antoninetti contends that the District Court properly held that the goods and services exchanged at the portion of the food preparation counter behind the Wall cannot be provided to customers at the transaction station and that the food preparation counters therefore fail to comply with Section 7.2(2)(i) and (ii). These arguments are without support in fact or law, and therefore fail to refute Chipotle's arguments that the food preparation counters comply with Section 7.2(2)(i) and (ii).

A. Antoninetti's Assertion that the District Court Erred in Holding that Section 7.2(2) Applies to the Food Preparation Counters Rests on an Unreasonable Interpretation of Section 4.33.3 and Is Contrary to Established Precedent Applying Section 7.2(2) to Similar Food Service Counters.

Antoninetti's primary argument in response to Chipotle's position that its food preparation counters are compliant with Section 7.2(2)(i) and (ii) is that Section 4.33.3 rather than Section 7.2(2) governs the food preparation counters, and therefore compliance with Section 7.2(2)(i) and (ii) does not render the food preparation counters accessible. This argument rests, however, on an unsupported

and unreasonable reading of Section 4.33.3–one that extends the regulation's sight-line requirements to situations to which they were not intended to apply. Antoninetti's argument also ignores established case law applying Section 7.2(2) to counters similar to the Restaurants' food preparation counters.

Antoninetti appears to argue that Section 4.33.3 must be broadly interpreted to apply to the food preparation lines because the regulation is broadly drafted and has a broad purpose. Third Brief on Cross-Appeal at 28-32. However, Antoninetti does not simply propose a broad reading of Section 4.33.3; rather, he proposes a reading that is inconsistent with the regulation's plain language. Specifically, he proposes a reading of Section 4.33.3 that effectively reads out of the regulation language that limits the regulation's application to fixed seating plans in assembly areas.

Section 4.33.3 states in its entirety:

> 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. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair areas.

> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. § 36, App. A, § 4.33.3. Contrary to Antoninetti's assertions, when this provision is read as a whole, it establishes that its sight-line requirements are limited to fixed seating areas such as those found in theatres, playhouses, and concert and sports arenas.

The statement that "wheelchair areas shall be an integral part of any fixed seating plan" establishes that Section 4.33.3, including its line of sight requirements, is limited to wheelchair seating areas in *a fixed seating plan*. This plain reading of the regulation is further compelled by the language in the regulation stating that the wheelchair areas shall (1) "adjoin an accessible route that also serves as a means of egress in case of emergency," (2) be located next to at least one companion fixed seat, and (3) be provided in more than one location when the seating capacity exceeds 300, and that "readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users." *Id.*

Furthermore, Section 4.33.2 and Figure 46 establish conclusively that the "wheelchair areas" addressed in Section 4.33 and its various subsections, including

Section 4.33.3, are defined locations within fixed seating areas. Specifically, Section 4.33.2 states that "each wheelchair location shall provide minimum clear ground or floor spaces as shown in Fig. 46." 28 C.F.R. § 36, App. A, § 4.33.2. In turn, Figure 46, which depicts the spacing requirements for wheelchair areas, is entitled, "Space Requirements for *Wheelchair Seating Spaces* in Series." (Emphasis added.) The reference to seating spaces clearly establishes that the "wheelchair areas" addressed in Sections 4.33.2 and 4.33.3 are limited solely to the seating areas of assembly areas.

Indeed, had the Department of Justice intended Section 4.33.3 to apply to parts of a facility other than fixed seating areas, it would have stated that wheelchair areas shall be an integral part "of any facility, or assembly area," or used other similar language to clarify that the regulation's sight-line requirements are not limited to fixed seating areas. The fact that the DOJ did not use such broad language, and instead adopted the much more narrow language, conclusively refutes Antoninetti's position that Section 4.33.3 must be read to apply to areas other than fixed seating plans.

Furthermore, although Antoninetti is correct that ADAAG Section 5.1 requires restaurants and cafeterias to comply with the ADAAG Sections 4.1 to 4.35, Section 5.1 does not expand any of the specific requirements of Sections 4.1

to 4.35. Section 5.1 states only that "except as specified or modified in this section, restaurants and cafeterias shall comply with the requirements of 4.1 to 4.35." 28 C.F.R. § 36, App. A, § 5.1. By merely extending Section 4.33.3's fixed seating area requirements to restaurants and cafeterias, Section 5.1 does not thereby expand Section 4.33.3's sight-line requirements to all of the other areas within a restaurant or cafeteria.

The food preparation counters are not part of a fixed seating plan. There is no seating at all at the food preparation counters. Accordingly, that area of the Restaurants is not subject to Section 4.33.3's sight-line requirements. Antoninetti's argument that Section 4.33.3 rather than Section 7.2(2) governs the food preparation counters is therefore without merit.

Antoninetti's arguments against the application of Section 7.2(2) to the food preparation counters are also contrary to relevant case law applying this regulation to similar food service counters at other establishments. Federal courts have held that Section 7.2 is applicable to food service counters at stores, fast food restaurants, and food concession stands. *See* Chipotle's Opening and Response Brief at 39 (citing *Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150, 1166 (S.D. Cal. 2006); *Parr v. Waianae L&L, Inc.*, No. Civ. 97-01177 FIY, 2000 WL 687655, at *21 (D. Haw. May 16, 2000); *Indep. Living Res. v. Or. Arena Corp.*, 1 F. Supp.

2d 1124, 1137 (D. Or. 1998)). Antoninetti fails to distinguish these cases or to cite any contrary authority. Nor does he refute Chipotle's arguments and the District Court's finding that the acts performed by Chipotle's employees at the food preparation counters readily fall within the definition of "services" for purposes of Section 7.2(2). Accordingly, his arguments against the application of 7.2(2) to the food preparation counters are without merit.

B. Because Section 7.2(2) Applies to Chipotle's Food Preparation Counters, Antoninetti Cannot Rely on the ADA's General Anti-Discrimination Provisions To Argue that the Counters Are Inaccessible.

Antoninetti appears to argue that because Section 7.2(2) does not impose any sight-line requirements on the food preparation counters, the Court should find that it is inapplicable and instead rely on the ADA's general anti-discrimination provisions to impose sight-line requirements on the food preparation counters. This argument ignores the ADA's legislative history, as well as established case law holding that the specific provisions of the ADA and its regulations control over the statute's more general provisions. H. Rep. No. 101-485(II), at 104, *reprinted in* 1990 U.S.C.C.A.N. 387; *C'wealth v. E*Trade Access, Inc.*, No. 03-CV-11206-MEL, 2005 WL 2511059, at *4 (D. Mass. Feb. 22, 2005); *United States v. Nat'l Amusements*, 180 F. Supp. 2d 251, 260 (D. Mass. 2001); *Indep. Living Res. v.*

Oregon Arena Corp., 982 F. Supp. 746 (D. Or. 1997); *see also Doe v. Nat'l Bd. of Med. Examiners*, 199 F.3d 146, 155 (3d Cir. 1999); *Sec. Pac. Nat'l Bank v. Resolution Trust Corp*., 63 F.3d 900, 904 (9th Cir. 1995). Antoninetti fails to distinguish or even address the holdings of the *Independent Living Resources* or *E*Trade Access, Inc.* cases with respect to this issue. Furthermore, although Antoninetti contends that the holding of *National Amusements* is contrary to Ninth Circuit jurisprudence, that contention rests on a misreading of this Court's decision in *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 399 F.3d 1126 (9th Cir. 2003).

The court in *National Amusements* held that movie theatres are not required to provide wheelchairs users with comparable viewing angles, because Section 4.33.3 imposes no such requirement. 180 F. Supp. 2d at 260. In reaching this conclusion, the court held that the government could not rely on the ADA's general anti-discrimination provisions to impose a comparable viewing angle requirement on movie theatres where no such requirement existed in the applicable section of the ADAAG–namely Section 4.33.3. *Id.* Although Antoninetti is correct that *Regal Cinemas* held that movie theatres are required to provide wheelchair users with comparable viewing angles, he grossly misstates the Court's holding in contending that it was based on the application of the ADA's general

anti-discrimination. In *Regal Cinemas*, this Court simply held that the DOJ's interpretation of Section 4.33.3 to impose a comparable viewing angle requirement on movie theatres was reasonable and therefore entitled to judicial deference. 399 F.3d at 1132-33. Although this Court quoted the ADA's general anti-discrimination provisions, its finding that movie theatres were required to provide comparable viewing angles to wheelchair users was clearly based on Section 4.33.3–or, more specifically, on the DOJ's interpretation of that regulation. The Court did not, as Antoninetti appears to contend, use the ADA's general anti-discrimination provisions to create a new technical requirement not found in the ADAAG.

While the *Regal Cinemas* and *National Amusements* courts reached different results on the issue of whether theatres must provide comparable viewing angles to wheelchair users, they did so because they adopted different readings of Section 4.33.3 and not because one court applied the ADA's general anti-discrimination provisions to create a new technical requirement. Accordingly, Antoninetti's assertion that this Court's decision in *Regal Cinemas* directly conflicts with the *National Amusements* holding is without merit.

C. Antoninetti Has Failed To Present Any Evidence or Legal Authority To Rebut Chipotle's Arguments that the Restaurants' Counters Satisfy Subsections 7.2(2)(i) and/or (ii).

In its Opening and Response Brief, Chipotle presented evidence that the transaction station is 34 inches tall and approximately 4 feet long, and is attached to, and therefore a part of, the main food preparation counters. *See* Chipotle's Opening and Response Brief at 43 (citing ER I-3, at 10 n.4; ER I-7, at 5; ER I-9, at 10; ER III-19, at 40; ER IV-25, at 28; ER V-26, at 219; Supp. ER I-2, Ex. 25). Chipotle also presented evidence that the same services that are exchanged at the portion of the food preparation counters behind the Wall can be and are offered to customers at the transaction station. *See id.* at 44–45 (citing ER I-3, at 12–13; ER IV-25, at 177; ER V-26, at 219; ER VI-27, at 580–81, 584–85; ER VII-28, at 592, 602, 623–24, 625, 630–31, 660–61). This evidence establishes that the food preparation counters comply with the technical requirements of both Section 7.2(2)(i) and (ii), and that the District Court therefore erred in holding otherwise.

Antoninetti offers no evidence or legal authority to rebut the evidence and argument set forth in Chipotle's Opening and Response Brief establishing that the food preparation counters comply with the requirements of Section 7.2(2)(i) and (ii). Instead, he argues that the transaction station does not meet the requirements of Section 7.2(2)(i) or (ii) because the services offered at the transaction station are

separate and distinct from those offered at the portion of the food preparation counter located behind the Wall. He further argues that because there is no evidence that a wheelchair user has actually used the transaction station to place his or her order or watch his or her order being made, the transaction station cannot satisfy the requirements of Section 7.2(2)(i) and (ii). The first of these arguments is flatly contradicted by the evidence. The second is irrelevant to the question before the Court with respect to whether the food preparation counters comply with the technical and structural requirements set forth in Section 7.2(2)(i) and (ii).

1. The evidence does not support Antoninetti's assertion that the transactions that occur at the portion of the food preparation counter are separate and distinct from those that occur at the transaction station.

Antoninetti appears to argue that the food preparation counters do not serve a single function, and in particular that the portion of the food preparation counters behind the Wall provides customers with "important and intended visual culinary benefits" that are not provided elsewhere on the food preparation counters.

Antoninetti's arguments are flatly contradicted by the "Zen and the Art of Throughput" DVD (the "Zen DVD"). *See* ER II-15, DVD at p. 207. This Zen DVD conclusively shows that the food preparation counters serve a single unitary purpose: allowing customers to order and pay for their food. *Id.* Although a

substantial portion of the ordering process at the food preparation counters normally takes place before the customer reaches the transaction station, the Zen DVD shows that parts of each customer's order, including tortilla chips, guacamole, and drinks, are not made until the customer reaches the transaction station. *Id.* As such, the ordering process is not confined to the portion of the food preparation counters that is located behind the Wall; rather, the process spans the entirety of the food preparation counters, from the tortilla station to the transaction station. Although there are some visual elements to this ordering process, it simply is not possible to parse those visual elements and categorize them as separate transactions from the rest of the ordering process.

Furthermore, the Zen DVD conclusively shows that the transaction station is sufficiently large to allow a customer to see serving-size samples of all of the available ingredients and watch as his or her food is prepared. *See* ER II-15, DVD at p. 207. Additionally, Chipotle's managers presented undisputed testimony that Chipotle offers both standing customers who are not tall enough to see over the Wall and wheelchair users the opportunity to see serving-size samples of the available ingredients and to watch as their food is prepared at the expo station–the portion of the transaction station between the cash register and the salsa station.

ER IV-25, at 177; V-26, at 219–20; ER VI-27, at 580–81, 584–85; ER VII-28, at 592, 598–99, 623–25. This evidence is undisputed.

Although Antoninetti asserts that standing customers at the portion of the food preparation counters behind by the Wall, unlike customers at the transaction station, can see into the kitchen and watch "a veritable bonanza of burrito-making," this assertion is unsupported by the evidence. From the 2:30 minute mark to the 2:50 minute mark, the Zen DVD establishes that persons with eye levels slightly above the height of the transaction station (which is only 34 inches tall) can see into the kitchen and view the assembly line. ER II-15, DVD at p. 207, at 2:30-2:50 min. As Antoninetti's own expert pointed out in his declaration, the average eye level of a wheelchair user is 43 to 51 inches, which is significantly higher than the transaction station. ER II-14, at 3, ¶ 8. The Zen DVD therefore establishes that a wheelchair user with an average eye level would be able to see into the kitchen and watch the assembly line from the transaction station. As such, Antoninetti has failed to rebut Chipotle's evidence that the benefits he claims are provided at the portion of the food preparation counters located behind the Wall can be made available to customers at the transaction station.

Perhaps recognizing the lack of evidentiary support for his arguments, Antoninetti also asserts that selecting ingredients and watching as an entrée is

prepared at the transaction station is not the same as doing so along the Wall because those benefits are enjoyed in separate areas. This argument is without merit. Although wheelchair users who place their food orders and watch as their orders are made at the transaction station may engage in these aspects of the food ordering process in a different part of the food preparation counter than standing customers who can see over the Wall, this process does not run afoul of the ADAAG. Section 7.2(2)(i) and (ii) expressly permits restaurants with service counters like Chipotle's food preparation counters to offer the services available at those counters at either a specific portion of the main counter or a nearby auxiliary counter that is at least 36 inches long and no more than 36 inches tall. 28 C.F.R. § 36, App. A, § 7.2(2)(i), (ii). As set forth above, the transaction station meets these length and height requirements. Antoninetti cannot establish that the food preparation counters violate the ADA, where, as here, they fully comply with the applicable design and technical requirements of Section 7.2(2)(i) and (ii). *See E*Trade Access*, 2005 WL 2511059, at *4 (holding that "[t]he statutory language and structure of the ADA indicate that Congress intended that the DOJ's regulations and the ADAAG, when passed, would set forth standards sufficient to satisfy ADA obligations").

2. Antoninetti's argument that there is no evidence that the transaction station was ever actually used to allow customers to see food ingredients or the making of their food orders is irrelevant to the question of whether the food preparation counters comply with Section 7.2(2)(i) and (ii).

Antoninetti also argues that Chipotle's food preparation counters do not comply with Section 7.2(2)(i) and (ii) because Chipotle has not shown that the transaction counters were actually used by a wheelchair user to see the food ingredients or watch the making of his or her food order. This argument is a red herring. The ADAAG set out specific requirements for accessible design. They do not, however, mandate that persons with disabilities use the accessible designs set forth in the ADAAG; nor do they require facilities to require persons with disabilities to use those accessible designs. As such, a design that complies with the ADAAG is accessible, regardless of whether a disabled person actually uses it. For example, if a restaurant table complies with the clear floor space, knee clearance, and height requirements of Sections 4.32.2 through 4.32.4, it does not cease to be accessible just because disabled patrons choose not to use it. Similarly, because the food preparation counters comply with Section 7.2(2), they are accessible regardless of whether wheelchair users choose to use them. Accordingly, Antoninetti's argument that there is no evidence that disabled persons

have made use of the transaction stations for purposes of looking at ingredients or watching the making of their entrées is irrelevant.

As set forth above, the food preparation counters comply with Section 7.2(2)(i) and (ii) because the transaction stations are lower than 36 inches in height and over 36 inches long and can be used to view the food ingredients, order food, and watch one's order being prepared. Furthermore, Chipotle began implementing a nationwide written "Customers with Disabilities Policy" on or about February 23, 2007, as part of its ongoing efforts to improve customer service. Chipotle's Opening and Response Brief at 23 (citing ER I-3, at 19; ER V-26, at 319–21; ER VI-27, at 524–25, 534). Under that written policy, as it has been implemented, the manager on duty is responsible for greeting any customer with a disability at the tortilla station (unless the manager recognizes him or her to be a regular customer) and determining what, if any, accommodation is required. ER I-3, at 22; ER V-26, at 319–21, 349; ER VI-27, at 580–81; ER VII-28, at 598–99, 623–25. Among other things, the manager must inform new customers with disabilities or other customers desiring accommodations that the customer has the option of seeing the available ingredients and watching the making of his or her entrée at the transaction station. *Id.*

Thus, Chipotle has gone a step beyond simply designing food preparation counters that comply with the technical requirements of the ADAAG; it has created a formal written policy to ensure that its employees take affirmative steps to inform customers of their ability to use the transaction stations on the food preparation counters to see the available ingredients and watch their orders being prepared. As the District Court noted in its Findings of Fact, Conclusions of Law and Judgment, Antoninetti has failed to present any evidence to raise a dispute as to Chipotle's evidence that it has successfully implemented this policy at the Restaurants.[2]

II. Antoninetti Has Failed To Refute the Evidence and Authority Cited by Chipotle Establishing that Its Prior Unwritten Practice of Accommodating Customers with Disabilities Constituted Equivalent Facilitation.

A. Antoninetti's Assertion that Policies Can Never Constitute Equivalent Facilitation Under Section 2.2 and Subsection 7.2(2)(iii) Is Unsupported by the ADAAG or Relevant Case Law.

In his Third Brief on Cross-Appeal, Antoninetti largely repeats the

[2] Although Antoninetti appears to argue that Chipotle's written Customers with Disabilities Policy was never carried out on any of his visits to the Restaurants, he admitted at trial that he did not ever visit the Restaurants after the Customers with Disabilities Policy was implemented. *See* ER VI-27, at 423, 425–26, 448–49. As such, Antoninetti's prior experiences at the Restaurants are wholly irrelevant. Nor can Antoninetti rely on the customer complaints cited in his Third Brief on Cross Appeal, because those complaints also pre-date the implementation of the Customers With Disabilities policy and involve restaurants other than the two at issue in this case. ER II-15, 59–64.

arguments previously raised in his Opening Brief and the Brief of the Amicus Curiae that policies and practices of accommodation can never qualify as equivalent facilitation under Section 2.2 and Subsection 7.2(2)(iii). Having previously addressed these arguments in its Opening and Response Brief, Chipotle will not do so again here. However, Antoninetti raises one new argument that warrants a reply. In its Opening and Response Brief, Chipotle cited case law and portions of the ADAAG supporting its position that policies and practices of accommodating customers with disabilities can constitute equivalent facilitation. In his Third Brief on Cross Appeal, Antoninetti argues that those cases and ADAAG provisions all involved situations where public accommodations adopted acceptable alternative designs or technologies and instituted policies requiring the use of those designs and technologies. Antoninetti argues that the cited cases merely illustrate policies requiring the use of designs or technologies that constitute equivalent facilitation. However, this argument fails to meaningfully distinguish the cases and regulatory examples cited by Chipotle from the facts of this case; like the examples in those cases and regulations, Chipotle's policy and practice of accommodation requires the use of alternative designs and technologies.

In *Independent Living*, the court held that a policy of providing high quality

folding chairs as opposed to fixed seats for companion seats in wheelchair areas was a form of equivalent facilitation. 982 F. Supp. at 726-28. In *Access 4 All, Inc. v. Atlantic Hotel Condominium Ass'n, LLC*, Case No. 04-61740, 2005 U.S. Dist. LEXIS 41601 (S.D. Fla. Nov. 22, 2005), the court held that a hotel's standard operating procedure of personally accommodating a disabled person through the registration process at a couch seating area near the hotel's front desk constituted equivalent facilitation. *Id.* at *47-*48. Section 7.2(2)(iii) expressly directs that a hotel may provide equivalent facilitation for a registration counter that does not meet the specific requirements of Subsections 7.2(2)(i) or (ii) by establishing a policy of using the space on the side of the counter or at the concierge desk for handing materials back and forth to guests with disabilities. 28 C.F.R. § 36, App. A, § 7.2(2)(iii).

While it is true that each of these examples involves an alternative design that is used as part of the equivalent facilitation (the folding seats in *Independent Living*, the couch seating area in *Access 4 All*, and the side counter or the concierge desk in Section 7.2(2)(iii)), it is equally true that each of the accommodations offered as part of Chipotle's policy and practice of accommodation involves alternative designs or technologies. For example, the accommodations of offering wheelchair users the opportunity to see serving-size samples of the available food

ingredients and watch the making of their entrées at the transaction station or at a nearby table in the dining area involve several alternative designs and technologies–namely, the lowered portion of the food preparation counter at the transaction station, the table in the dining area, and/or the soufflé cup in which samples of the food ingredients are shown. ER I-3, at 16, 22; ER V-26, at 215–20, 319–21, 327–28, 335–40, 349; ER VI-27, at 576–77, 580–81; ER VII-28, at 598–99, 603–04, 623–25. Indeed, Chipotle's policy of using the transaction station and dining area tables to show wheelchair users the available ingredients and allow them to watch the making of their entrée is no different from the hotel policies expressly approved in *Access 4 All* and Section 7.2(2)(iii), which require the use of other counters or seating areas in close proximity to the hotel registration desk to provide service to wheelchair users. As such, this Court should reject Antoninetti's attempt to distinguish the policy and practice at issue in this case from the policies and practices at issue in *Independent Living* and *Access 4 All* and from the example set forth in Section 7.2(2)(iii).

B. Chipotle's Policy and Prior Unwritten Practice of Accommodation Provide Customers with Disabilities with Substantially Equal or Greater Access to the Food Ordering Process and Do Not Require that Customers with Disabilities Be Separated from Other Patrons.

Antoninetti raises two arguments in support of his assertion that the particular accommodations offered by Chipotle pursuant to its written Customers with Disabilities Policy and its prior unwritten practice of accommodation do not qualify as equivalent facilitation. First, he contends that the accommodations require that wheelchair users be separated from standing customers in order to have the opportunity to view samples of the food ingredients or watch as their entrées are made. Second, he argues that the experience of seeing serving-size samples of food ingredients and watching the preparation of an entrée at the transaction station or a table in the dining area is not identical to the experience of a standing customer who can see over the Wall. Antoninetti's first argument rests on the false and factually unsupported assumption that Chipotle will always pull wheelchair users out of the food serving lines that run along the food preparation counters in order to accommodate them. His second argument rests on a fundamental mischaracterization of what is required to establish equivalent facilitation.

Antoninetti appears to base his assertion that the benefits provided to wheelchair users by Chipotle's Customers with Disabilities Policy and its prior unwritten practice of accommodation are separate from the benefits offered at the food preparation counters on incorrect and factually unsupported assumptions about the procedures used to accommodate wheelchair users. Specifically, Antoninetti assumes that the only way that Chipotle will accommodate wheelchair users is by pulling them out of the food serving lines that run along the food preparation counters and allowing them to see the available food ingredients or the making of their entrées at nearby tables in the dining area. Antoninetti's Third Brief on Cross-Appeal, at 13. This assumption is unsupported by the evidence. Although wheelchair users have the option of viewing samples of food ingredients or the making of their entrées in the dining area, this is only one of many available accommodations under the Customers with Disabilities Policy or the prior unwritten practice. ER I-3, at 16, 22; ER V-26, at 215–20, 319–21, 327–28, 335–40, 349; ER VI-27, at 576–77, 580–81; ER VII-28, at 598–99, 603–04, 623–25. Under Chipotle's prior unwritten practice of accommodation, wheelchair users who wanted to see the available food ingredients but who did not want to exit the food serving line had the choice of viewing samples of the food ingredients either at the portion of the food preparation counter covered by the Wall or at the

transaction station (or in the dining area). *Id.* In either case, the wheelchair users would use the same line as standing customers.

Furthermore, the mere fact that some of the available accommodations are provided at areas other than the portion of the food preparation counter behind the Wall (including other portions of the food preparation counter) does not make those accommodations separate and unequal benefits. As set forth above, Chipotle's practice of offering to provide a wheelchair user with accommodations at a nearby table in the dining area is no different from the hotel accommodation policies expressly approved by Section 7.2(2)(iii) and the *Access 4 All* case.

Antoninetti's assertion that Chipotle's Customers with Disabilities Policy and its unwritten practice of accommodation are not forms of equivalent facilitation because the benefits available to wheelchair users are not identical to those available to standing customers who can see over the Wall is also without merit. An equivalent facilitation must simply ensure that customers with disabilities have *substantially equal* access to the benefits of the public accommodation. 28 C.F.R. § 36, App. A, § 2.2. Based on its plain language, this regulation does not require that an equivalent facilitation ensure an identical experience to persons with disabilities. It is undisputed that, pursuant to its written Customers with Disabilities Policy and its unwritten practice of accommodating

customers with disabilities, Chipotle offered wheelchair users a number of accommodations that provided substantially equal access to the food ordering process. Chipotle's Opening and Response Brief at 57-60. In particular, it is undisputed that Chipotle always has offered customers who cannot see over the Wall the option of seeing serving-size samples of all of the food ingredients or watching the making of their entrées at the transaction station or at nearby tables in the dining area. ER I-3, at 16, 22; ER V-26, at 215–20, 319–21, 327–28, 335–40, 349; ER VI-27, at 576–77, 580–81; ER VII-28, at 598–99, 603–04, 623–25.

Although Antoninetti speculates, without evidentiary support, that these methods of accommodation are not as "appetizing" as the experiences offered to those standing customers who can see over the Wall, such unsupported speculation is insufficient to overcome Chipotle's undisputed evidence as to the effectiveness of its accommodations. Specifically, because the samples shown to customers at the transaction counter or at the tables in the dining area are the size of Chipotle's standard servings (ER I-3, at 13; ER IV-25, at 36, 177), customers who take advantage of the above-mentioned accommodations see exactly how much of each ingredient will go into their entrées. Furthermore, if a customer desires more of a particular ingredient than is contained in the sample cup, employees can easily get more of the ingredient for the customer (ER V-26, at 229). While this experience

may not be identical to that of standing customers who can see over the Wall, it does provide a substantially equal opportunity to see the available ingredients and direct the making of one's entrée.

C. To the Extent that Antoninetti Did Not Receive Any Accommodations that He Wanted on Any of His Visits to the Restaurants, that Is Because He Did Not Indicate His Desire for Accommodation to Chipotle's Employees or Did Not Indicate that the Accommodations that He Received Were Not Satisfactory.

Antoninetti also argues that Chipotle could not establish that its written Customers with Disabilities Policy and its unwritten practice of accommodation provide equivalent facilitation because he was not adequately accommodated on any of his visits to the Restaurants. This argument has no bearing on Chipotle's written Customers with Disabilities Policy, because Antoninetti himself admitted that he never visited the Restaurants after that policy was implemented. ER VI-27, at 423, 425–26, 448–49. Furthermore, with respect to Chipotle's prior unwritten practice of accommodation, the evidence presented at trial establishes that Antoninetti never informed any of the employees at the Restaurants either that he desired accommodations or that accommodations that were provided to him were inadequate.

With respect to his visits to the Restaurants prior to the October 2006 site inspections, Antoninetti testified that he did not ask to see the available ingredients

or the making of his food because he did not know that he could make such requests. ER VI-27, at 434–35, 440, 449. However, he also testified that he generally makes similar requests when he needs assistance getting items off shelves at the grocery store. ER VI-27, at 469–70. Given that admission, it strains credulity to accept that he did not know he could make similar requests at a restaurant like Chipotle. Thus, to the extent that he was not provided with accommodations during any of his pre-site inspection visits to the Restaurants, that was because he did not indicate that he wanted to be accommodated.[3]

With respect to his October 2006 site inspection visits to the Restaurants, it is undisputed that Antoninetti asked for certain accommodations and that he received all of those accommodations. ER V-26, at 367–77; ER VI-27, at 455–59 and 463, ER VII-28, at 611-12. Although he now contends in his Third Brief on Cross-Appeal that he did not find those accommodations to be acceptable, the evidence shows that during the site inspections he never indicated that the accommodations he received were unacceptable and, in certain instances, he in fact

[3] Antoninetti's lack of interest in accommodations appears to be based on a desire to create a bad experience that he can later use in litigation against Chipotle. Indeed, he testified that at on at least one of his visits to the Pacific Beach Restaurant shortly before his deposition, he was hoping to have a bad experience. ER VI-27, at 453. Perhaps most telling, he testified that he had no interest in obtaining any accommodations because he wanted Chipotle to be forced to lower the Wall. ER VI-27, at 460–61.

indicated that they were acceptable. *Id.*; *see also* ER II-15, DVD at p. 206. Thus, to the extent that he was not provided with adequate accommodations during his site inspection visits, that was because he did not indicate that those accommodations were inadequate.

For these reasons, Antoninetti's assertion that Chipotle failed to implement its unwritten practice of accommodation in his case is without support. Alternatively, if this Court were to hold that the District Court erred in its ruling on whether Antoninetti was provided equivalent facilitation, Chipotle submits that this Court should remand the issue a determination by the District Court as to whether Antoninetti was denied access and therefore had standing.

CONCLUSION

For the reasons set forth in its Opening and Response Brief and those set forth herein, Chipotle respectfully requests that this Court: (1) hold that the transaction station on the Restaurants' food preparation counters satisfies the requirements of ADAAG Subsections 7.2(2)(i) and/or (ii); (2) reverse the portion of the District Court's Findings of Fact, Conclusions of Law, and Judgment holding that Chipotle's unwritten practice of accommodating customers with disabilities does not constitute an equivalent facilitation under ADAAG Section 2.2 and Subsection 7.2(2)(iii); (3) affirm the portion of the District Court's Findings of

Fact, Conclusions of Law, and Judgment holding that Chipotle's written Customers with Disabilities Policy constitutes an equivalent facilitation under ADAAG Section 2.2 and Subsection 7.2(2)(iii); and (4) reverse the portion of the District Court's Findings of Fact, Conclusions of Law, and Judgment holding that Antoninetti is entitled to damages for his CDPA claims regarding Chipotle's food preparation counters.

Date : March 2, 2009

Respectfully submitted,

CHIPOTLE MEXICAN GRILL, INC.

By: Gregory F. Hurley
GREENBERG TRAURIG, LLP
3161 Michelson Drive
Suite 1000
Irvine, California 92612
Telephone: (949) 732-6500
Facsimile: (949) 732-6501
hurleyg@gtlaw.com

s/ Virginia E. Robinson
John F. Scalia
Matthew H. Sorensen
Virginia E. Robinson
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102
Telephone: (703) 749-1300
Facsimile: (703) 749-1301
scaliaj@gtlaw.com
sorensenm@gtlaw.com
robinsonv@gtlaw.com
Counsel for Appellee/Cross-Appellant

CERTIFICATE OF COMPLIANCE
FOR CASE NOS. 08-55867 AND 08-55964

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 hereby certify that the attached Fourth Brief on Cross-Appeal filed by Appellee/Cross Appellant is proportionately spaced, has a typeface of 14 points or more, and contains 6,958 words, exclusive of the Table of Contents and Table of Authorities, which is no more than 7,000 words and thus complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(C).

s/ Virginia E. Robinson
Virginia E. Robinson
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102
Telephone: (703) 749-1300
Facsimile: (703) 749-1301
robinsonv@gtlaw.com
Counsel for Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on March 2, 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.

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 document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Amy B. Vandeveld, Esq.
Law Offices of Amy B. Vandeveld
1850 Fifth Avenue, Suite 22
San Diego, CA 92101
Attorney for Appellant/Cross-Appellee

Amy F. Robertson, Esq.
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Attorney for Amici Curiae

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.

s/ Virginia E. Robinson
Virginia E. Robinson
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102
Telephone: (703) 749-1300
Facsimile: (703) 749-1301
robinsonv@gtlaw.com
Counsel for Appellee/Cross-Appellant