NINTH CIRCUIT CASE NOS. 09-55327, 09-55425, 08-55867, 08-55946

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURIZIO ANTONINETTI,
Plaintiff, Appellant and Cross-Appellee,

vs.

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

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

THIRD BRIEF ON CROSS-APPEAL

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INTRODUCTION

This appeal and Antoninetti's consolidated appeal in Ninth Circuit Case No. 08-55867 were filed to address the adverse legal rulings of the District which affect not just the underlying case, but which have the potential of gravely affecting all disability access claims involving new construction. The issues are of such significance that numerous disability rights advocacy organizations joined in an amicus brief in the consolidated appeal.

If left to stand, the District's decisions will decimate one of the ADA's primary purposes - to provide people with disabilities with physical access to benefits and advantages of public accommodations. Relying on the District's rulings, public accommodations will feel free to construct inaccessible facilities because they can simply argue that they have provided "equivalent facilitation" by adopting policies to overcome the built barriers. People with disabilities would also be forced to prove that the cost of removing the barriers is outweighed by the benefit provided by removal in order to obtain injunctive relief.

Antoninetti contends that Chipotle violated his rights during his visits to the restaurants because Chipotle designed and built restaurants that have physical barriers separating customers in wheelchairs from the visual and sensory benefits of the Chipotle Experience. Antoninetti contends that the District erred when it ruled that

Chipotle could escape liability under the ADA by adopting policies of providing methods of accommodation to overcome the design barriers. Antoninetti also contends, among other things, that the District improperly interpreted and applied the "equivalent facilitation" provision of the ADAAG, placed improper burdens of proof on him and rejected undisputed evidence that Antoninetti wished to return to the restaurants.

In addition, Antoninetti's Opening Brief in this appeal is not a "mere recitation of the Opening Brief" filed in Case No. 08-55867, as contended by Chipotle. Antoninetti respectfully requests that both Briefs be read and considered by the reviewing Court.

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 to Chipotle's Second Brief on Appeal[1], Antoninetti asserts the following issues are also relevant to the issues raised by Chipotle in its cross-appeal:

1) Whether Antoninetti is entitled to recover all of his fees, even if they are disproportionate to the monetary value of his recovery, because Chipotle cannot

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[1] Hereinafter referred to as "SBA."

litigate tenaciously and then be heard to complain about the time necessarily spent by Antoninetti in response.

STATEMENT OF THE CASE

Antoninetti incorporates herein the Statement of the Case set forth in his Opening Brief. In addition, Antoninetti states as follows:

I. Antoninetti's Complaint.

Antoninetti filed his Complaint because Chipotle violated the Americans with Disabilities Act ("ADA") when it denied people in wheelchairs, like him, the opportunity to participate in the "Chipotle Experience" that was marketed by Chipotle and offered to customers who could stand and look through the transparent sneeze guards installed for their benefit. Antoninetti also contended that the restrooms, parking and entrances at the facilities were not accessible.[2]

II. Antoninetti's Motion for Summary Judgment.

After extensive discovery, Antoninetti filed his Motion for Summary Judgment ("MSJ") which was supported by site inspection DVDS, Chipotle's own documents and by testimony from Chipotle's own witnesses. Antoninetti offered evidence regarding the nature of the Chipotle Experience offered to the general public, the nature of his personal experiences at Chipotle's restaurants and the inadequacy of the

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[2] ER II-7, 4:7-20.

"methods of accommodation" that were offered to him during only two site inspection visits.

Antoninetti offered evidence that not only were Chipotle's methods of accommodation (lifting samples of food by handfuls, tongfuls and cupfuls) inferior to seeing large expanses of bins filled with food and that requiring him to leave his lunch companions to go to the cashier counter or an adjacent table provided him a "separate and different" experience than is provided to others, he also offered evidence that these methods of accommodation were never offered to him during his pre-site inspection visits.[3]

Contrary to Chipotle's representations, Antoninetti did not limit his requested remedy with respect to the Chipotle Experience to "lowering the wall."[4] Antoninetti also suggested raising the floor in front of the food viewing area as a potential alternative measure. Antoninetti simply sought a Chipotle Experience that was equal to that provided to non-disabled customers.[5]

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[3] Chipotle's Supp. ER I-7; Chipotle's Supp. ER I-8.

[4] SBA, at 5, 9.

[5] Chipotle's Supp. ER I-8, 17:12-16.

III. Chipotle's Motion for Summary Judgment.

Chipotle filed a cross-motion for summary judgment in which it revealed for the first time that it had adopted a written policy, more than five years after the restaurants were constructed, which Chipotle said simply memorialized the policies, practices and procedures in place during Antoninetti's visits.[6]

Neither party addressed the issue of "equivalent facilitation" or the application of ADAAG Sec. 7.2(2)(iii) or ADAAG Sec. 2.2 to the Chipotle Experience in their cross-motions for summary judgment.[7] Chipotle never relied upon ADAAG Sec. 7.2(2)(iii) because it contended, and continues to argue in its appeals, that it complied with ADAAG Secs. 7.2(2)(i) or (ii) simply by providing a lowered cashier counter.[8] It was not until the ruling on the MSJs that the District *sua sponte* raised the issue of "equivalent facilitation."[9]

In its MSJ, Chipotle also offered evidence that it had modified the restrooms, parking and entrances at the facilities following the filing of Antoninetti's Complaint.

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[6] ER III-14, par. 3.

[7] ER I-4, 15:14-25; Chipotle's Supp. ER I-6, I-7, I-8; Antoninetti's Supplemental Excerpts of Record (hereinafter "SER"), X-38 / Clerk's Record (hereinafter "CR") No. 94.

[8] SBA, at 10.

[9] ER I-4, 15:17-25.

The modifications at the Encinitas restaurant were significant and included removing and replacing the concrete walkway next to the building, removing and replacing the curb, creating a new approach to the asphalt parking lot, re-striping the lot, adjusting the restroom door pressure, adding ADA-compliant handles on restroom stall doors and moving the toilet to 18 inches on center in the men's restroom.[10]

The modifications made to the Pacific Beach restaurant after Antoninetti filed his Complaint were also significant and included removing and replacing the concrete walkway next to the building, re-striping the lot, re-setting the wheel stop, adjusting the restroom door pressure, installing new hinges on the stall doors, and adding ADA-compliant handles on the stall doors.[11]

Chipotle explicitly admitted that it made the modifications to the restrooms, parking and seating/dining tables as a result of Antoninetti's lawsuit.[12]

IV. The District Denied Antoninetti Summary Judgment on Some Claims Because Chipotle Modified the Facilities After Antoninetti Filed His Lawsuit and Antoninetti Did Not Seek Damages for All Barriers.

In ruling on the parties' MSJs, the District granted Antoninetti damages in relation to the parking at the facilities, although it found the ADA claims were moot

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[10] ER II-13, at 33, lines 6-25; ER III-18, at 2 through 7.

[11] ER II-13, at 33, lines 6-25; ER III-18, at 8 and 9.

[12] ER II-13, at 34, line 17 to 35, line 2.

because of the modifications made by Chipotle.[13] The District also determined that Antoninetti's claims relating to the restrooms were moot, given the later modifications, and it denied him summary judgment because Antoninetti sought only injunctive relief in relation to the restrooms.[14] The District refused to consider Antoninetti's claims relating to seating/dining tables at the restaurants because it held that Antoninetti had not specifically asserted those claims in his Complaint.[15]

V. The District Specifically Identified Those Fees For Which It Was Denying Antoninetti Recovery.

In its initial ruling on Antoninetti's fee motion, the District incorrectly determined that Antoninetti's lawsuit had conferred no benefit on the public. The District later admitted its error, but ruled that it had not relied on the "public benefit" factor to deny fees to Antoninetti.[16] Rather, the District "relied most heavily" on the "degree of success" obtained by Antoninetti in reducing his fee award.[17]

The District found that Antoninetti was entitled to recover fees for time spent litigating the issues of equivalent facilitation under the unwritten customer policy,

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[13] ER I-6, at 23-24.

[14] ER I-6, at 22-23.

[15] ER I-6, 24:24-28.

[16] ER I-2, 4:11-23.

[17] ER I-2, 4:19-21.

parking lot violations, "related ADA claims that were necessarily intertwined" and damages. With respect to the fees for which it was *denying* Antoninetti recovery, the District identified only "fees for time spent litigating the injunction to lower the 44-inch wall or the claim that the written policy did not provide equivalent facilitation."[18]

In reaching the value of the final award, the District determined the lodestar figure of $546,151.32 and then reduced Antoninetti's fees by 75 percent because of Antoninetti's "limited success" and because of purported "block billing."[19]

Importantly, the District did *not* reduce Antoninetti's fee award because of a finding that his attorney's requested hourly rate was unreasonable or that any of the fees were not necessarily and reasonably incurred. Nor did the District hold that any of the requested fees were duplicative or redundant.[20] In addition, Chipotle never contested the reasonableness of Antoninetti's attorney's hourly rate nor did it contest that the fees were necessarily and reasonably incurred.[21]

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[18] ER I-2, 6:19-22; ER I-3, 7:12-22.

[19] ER II-2, 7:27-8:19.

[20] ER I-2; ER I-3; ER I-4.

[21] ER VIII-33.

STATEMENT OF FACTS

Antoninetti incorporates herein the Statement of Facts set forth in his Opening Brief. In addition, Antoninetti states as follows:

I. Chipotle Has Never Admitted That it Violated the ADA During Antoninetti's Visits to the Restaurants.

In its MSJ, at trial and in its appeals, Chipotle contended that it had not violated Antoninetti's rights under the ADA during any of his visits. It asserted and continues to assert that it had satisfied the ADA simply by providing a lowered cashier counter.[22]

II. The Amended Pretrial Order and the District's Ruling on the MSJs Framed the Issues for Trial and Did Not Include the Issue of Whether the Written Policy Could Provide Equivalent Facilitation Even if the Unwritten Policy Was Defective.

The issues of fact and law that were to be tried in the underlying case were set forth in the Amended Pretrial Order at Sections VI and IX.[23] The paramount issues in dispute, as identified in the Amended Pretrial Order, were the *nature* of the Chipotle Experience, whether the *nature and quality* of Chipotle's "methods of accommodation" provided disabled customers with "equivalent facilitation" and

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[22] SER X–38; ER IV-25; ER V-26; ER VI-27; ER VII-28; Chipotle's Second Brief on Appeal in Ninth Circuit Case Nos. 08-55867, 08-55946.

[23] ER IV-22.

whether simply receiving a burrito was enough, even if a disabled customer could not see the ingredients or the making of his burrito.

The Amended Pretrial Order was premised on the District's ruling on the parties' Motions for Summary Judgment in which the District identified only *two* triable issues that precluded summary judgment for Antoninetti on his Chipotle Experience claims - (1) whether the *nature and quality* of the methods of accommodation offered by Chipotle provided equivalent facilitation, and (2) whether it might be enough that customers in wheelchairs could still place orders and receive entrees despite their inability to see the food viewing area:

> "A reasonable jury might accept Defendant's statements that handing sample cups to customers or displaying ingredients on an adjacent table provides equivalent access to Defendant's restaurants. A jury might find, for example, that because customers in wheelchairs are still able to place orders and purchase entrees regardless of the wall in front of the food-preparation counter, Defendant's Policy provides equivalent facilitation. On the other hand, a reasonable jury might accept Plaintiff's statements that placing samples in food cups or displaying them on an adjacent table does not provide equivalent access. A jury might find that the food samples do not enable customers in wheelchairs to judge the freshness of the food or receive fast service to the same degree as standing customers. *The Court thus FINDS that this fact-intensive issue presents material questions of fact and renders summary judgment on the question of equivalent facilitation inappropriate."*[24]

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[24] ER I-6, 17:13-18:2.

Neither the District's MSJ ruling nor the Amended Pretrial Order raised an issue as to whether the written policy could constitute equivalent facilitation even if the unwritten policy was defective because, prior to trial, Chipotle contended that the policies were one and the same. One simply formalized and memorialized the other.

III. Throughout This Case The Parties Referred to The "Policy of Providing Methods of Accommodation" as "The Policy" and Did Not Distinguish Between the Documented Policy and the Informal Policy.

Not only did the District fail to make any distinction between the written and the unwritten policies in its ruling on the MSJs, the Parties made no such distinction in the Amended Pretrial Order. The Parties used the term "the Policy" to refer simply to the "policy of providing methods of accommodation." ("On February 23, 2007, Chipotle implemented a nationwide 'Customers with Disabilities' policy that sets forth in writing that which Chipotle has always done informally - provide excellent customer service to all its customers, including customers with disabilities (the "Policy").)[25]

In fact, the Parties used the term "the Policy" to refer to events which *pre-dated* the written policy. ("The Policy was carried out in Plaintiff's case. For example, when Plaintiff...visited the Encinitas location in *February 2005*, a Chipotle

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[25] ER IV-22, 11:3-6 .

worker asked him what ingredients he wanted in his burrito.")[26] Nowhere in the Amended Pretrial Order or in their MSJs did the Parties distinguish between the effectiveness of the *written* policy versus the *unwritten* policy.

Throughout the underlying case, Antoninetti never distinguished between written and unwritten policies in either his legal or his factual arguments because, initially, he had been provided no accommodations at all and was unaware of any "policy." A year after filing his lawsuit, during the site inspections, he was provided minimal accommodations which were purportedly offered pursuant to Chipotle's customer service "policy" of providing methods of accommodations. Antoninetti contended these accommodations failed to provide an equivalent Chipotle Experience to people in wheelchairs.[27]

After learning of the written policy from Chipotle's MSJ, Antoninetti argued that Chipotle's policies, "whether formal or informal, *written or unwritten,* fail to provide the full and equal enjoyment of benefits" to people with disabilities.[28]

In his Motion for Reconsideration of the MSJ rulings, Antoninetti defined Chipotle's "policy of handing sample cup to customers or displaying ingredients on

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[26] ER IV-22, 12:16-19.

[27] Chipotle's Supp. ER I-8, 15:9-20.

[28] Chipotle's Supp. ER I-7, 22:11-23:11.

an adjacent table" as the "Policy" and argued that it did not constitute equivalent facilitation under ADAAG Sec. 2.2.[29]

In his Trial Brief, Antoninetti again defined Chipotle's policy of "accommodating people with disabilities" as "the Policy."[30] He contended that he was entitled to damages because the Policy "was not fully implemented with respect to *his visits*," which *pre-dated* the written policy. He also contended that during *his visits* he was denied the opportunity to see food ingredients and the making of his entree "despite the existence of the Policy."[31] He argued that the "ongoing Policy coupled with Plaintiff's past injury" established the potential for future injury.[32]

IV. The District Distinguished Between the Unwritten and the Written Policies Only *After* the Trial.

Contrary to its earlier declaration in support of its MSJ that the written policy was simply a memorialization of the unwritten, informal policy,[33] Chipotle's witnesses claimed for the first time at trial that the written policy was *different* than the informal policy because it imposed "two new requirements" that were "***written***

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[29] SER X-39 / CR 135-2, 2:14-16, 4:12-8:17.

[30] SER X-40 / CR 210, 2:26-3:5.

[31] SER X-40 / CR 210, 8:14-20.

[32] SER X-40 / CR 210, 8:23-24.

[33] ER III-14, par. 3 of Sedillo Declaration.

down."[34] Following trial, the District adopted Chipotle's Proposed Findings of Fact and Conclusions of Law virtually wholesale, including the reference to the "two new requirements"[35] and Chipotle's representation that the new requirements were "written down" or "set forth plainly" in the written policy.[36] For the *first time,* the District distinguished between the forms of the policies and found that the unwritten policy did not provide equivalent facilitation because it was "incapable of uniform enforcement."[37]

The District made this novel distinction between the policies despite the fact that neither party, either in their MSJs or in the Amended Pretrial Order, had raised the issue of whether the written policy might constitute equivalent facilitation even if the unwritten policy was defective.[38]

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[34] ER VI-27, 585:16-24.

[35] Compare District's Findings at ER I-5, CL 16 with Chipotle's Proposed Findings at ER VIII-30, CL 27.

[36] ER I-5, CL 16, contradicted by actual language of written policy, found at ER I-5, Fact 110.

[37] ER I-5, 31:19-21.

[38] ER I-4, 15:17-25; ER IV-22.

V. Antoninetti's Attorney's Fees Were Incurred in Relation to His Chipotle Experience Claim Which Did Not Distinguish Between Written and Unwritten Policies.

The factual investigation in this case was concluded by the close of discovery on January 31, 2007. Antoninetti was not made aware of the written policy until April 16, 2007. As of that date, Antoninetti had incurred $229,937.52 in attorney's fees.[39] These fees, then, could only have been incurred in relation to Antoninetti's visits to the restaurants when the unwritten policy was in effect.

Despite the fact that, prior to trial, neither the District nor the Parties distinguished between the written and unwritten policies, the District made such a distinction in its order on Antoninetti's fee motion. The District then denied fees to Antoninetti, in part, on the finding that Antoninetti claimed "that he incurred no fees or costs in relation to his *unsuccessful claim for injunctive relief*, since he did not believe he had a burden of proof on this issue at trial."[40] (Emphasis added.)

In fact, Antoninetti never claimed that he incurred *no* fees or costs in relation to "injunctive relief." To the contrary, he acknowledged that he *had* incurred fees in relation to the *remedy* of injunctive relief, but he argued that those fees were based

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[39] See, Antoninetti's Opening Brief at 4 and 25; ER I-4, 6:24-7:4.

[40] ER I-2, 7:7-9.

upon the *same factual investigation* necessary to support the *remedy* of damages.[41] Antoninetti merely asserted that the fees incurred in relation to both remedies were *inseparable* since they involved the same legal and factual investigation.

He then argued that he did not have the burden of proving the *additional* facts that were erroneously required by the District to support the remedy of injunctive relief (e.g., the reason for construction of the wall and the cost of removing the wall) and he stated that he incurred no fees in relation to *these* limited factual issues because he did not believe he had to prove these facts to obtain injunctive relief.[42]

Antoninetti identified, in his Reply to the Amended Bill of Costs, 12 hours of attorney's fees that were related to *non-counter* issues or *solely* to the written policy (e.g. cross-examination at trial) and he deducted these from his fee claim.[43]

At trial, Antoninetti offered evidence on the triable issues as they were identified by the District and defined in the Amended Pretrial Order - the *nature* of the Chipotle Experience, the *nature and quality* of Chipotle's methods of accommodation and whether those methods of accommodation provided wheelchair users with an experience comparable to that provided to standing customers.

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[41] ER IX-35 at 8 (Doc. 274-3, 3:4-9).

[42] ER IX-35 at 8 (Doc. 274-3, 3:10-14).

[43] ER IX-36, 10:20-24.

Antoninetti *offered* no evidence in relation to the written policy because he consistently argued that Chipotle's methods of accommodation failed to provide full and equal access. His counsel did engage in limited cross-examination of defense witnesses who raised the issue of the written policy. These hours were deducted from the fee request.[44]

All of Antoninetti attorney's fees, litigation expenses and costs were incurred in support of his claim that he was denied access to the Chipotle Experience during his numerous visits to the restaurants. The same core facts supported his requested remedy of injunctive relief under the ADA and his requested remedy of damages under the CDPA, which was premised on a *violation of the ADA.*

VI. Antoninetti Proved the Reasonableness of the Total Hours Incurred By, and the Hourly Rate of, His Counsel and the District Did Not Reduce Fees on Either of These Bases.

In his fee motion, Antoninetti proved the reasonableness of his attorney's hourly rate. He offered declarations from several other attorneys establishing that $375.00 per hour was a very reasonable fee based upon his attorney's significant experience and expertise.[45] Antoninetti offered proof, for example, that his attorney has not only significant practical experience, but she devotes significant amounts of

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[44] ER IV-25; ER V-26; ER VI-27; ER VII-28; ER IX-36.

[45] SER X-41 / CR 241-4.

her time educating others about disability rights laws and her skill and experience has been recognized by local bar associations and the California State Bar.

He proved that she has conducted disability law seminars since 1996. She was primarily responsible for the preparation, coordination and presentation of seminars at each of the Annual Meetings for the State Bar of California from 1996 to 2001, as well as at the Semi-Annual State Bar Meeting in San Francisco on April 1, 2000. In the past, she has made ADA-related presentations to members of the Regional Center of San Diego, the Equal Employment Opportunity Commission and other disability-related organizations.

Antoninetti offered proof that his attorney was a member of the State Bar of California's Standing Committee on Legal Professionals with Disabilities ("CLPD") from 1996 to 2001. She served as Vice Chair of that Committee from 1997 to 2000 and was appointed Chair of the Committee for the 2000-2001 term. She also served as the liaison for CLPD to the California State Judicial Committee for the 1997 term. Antoninetti's attorney coordinated and conducted disability rights seminars in conjunction with the San Diego County Bar Association and the Ventura County Bar Association, for which attendees received MCLE credit. She was asked to participate

in a disability rights seminar for members of the San Diego Chamber of Commerce which was postponed for lack of interest by Chamber members.[46]

Antoninetti also proved and argued in his fee motion that all of the fees, expenses and costs incurred were necessary and reasonable.[47] Chipotle never argued in opposition to the fee motion, and the District never ruled, that Antoninetti's total claimed fees were unreasonable or that his counsel's requested hourly rate was unreasonable.[48]

VII. Antoninetti Provided Additional Evidence Relating to the Purported "Block-Billed" Time Entries.

In response to Chipotle's objections to 85 purported "block billed" entries, Antoninetti addressed each of the alleged instances of "block billing" in his Reply filed on June 2, 2007. Antoninetti either allocated time for each task or explained why the "separate tasks" were not separable.[49]

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46 ER VIII-32.

47 SER X-41 / CR 241-2.

48 ER I-2; ER 1-3; ER VIII-33.

49 ER VIII-34; ER IX-35 at 10.

VIII. Litigating this Case Prevented Antoninetti's Counsel From Taking Other Cases, All to Her Financial Detriment.

Antoninetti's counsel invested 1,425.80 hours of time in this case. In her opinion, Chipotle attempted to force Antoninetti to settle this case by requiring his counsel to devote the vast majority of her time to this lawsuit, to her financial detriment. In fact, prosecuting this case had been significantly detrimental to Antoninetti's counsel financially. She was unable to accept other cases for which she could have received fees, causing a significant reduction in her income. She was fortunate to have sufficient funds from the sale of her home so that she could maintain her practice, including the prosecution of the related class actions against Chipotle.[50]

Chipotle hired three different firms and more than 11 attorneys to defend this action.[51] Much of the time invested by Antoninetti's counsel in this case was devoted to: a) motions to compel Chipotle to produce documents which it failed to produce in response to Antoninetti's discovery requests; b) responding to motions to dismiss and motions to consolidate, which were denied, and for protective orders filed by Chipotle which were later violated by Chipotle; c) responding to and negotiating a confidentiality agreement requested by Chipotle, which was later violated by

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[50] ER VIII-32, par. 13.

[51] ER IX-37.

Chipotle and then revoked; d) responding to numerous letters and communications from Chipotle's numerous counsel, as much as 10 or more per day; e) preparing for and attending depositions of Chipotle's witnesses who insisted on being deposed in Denver, Colorado.[52]

SUMMARY OF ARGUMENT

Antoninetti incurred fees in this case in excess of $500,000.00, which represents a significant amount of time invested by his attorney. Chipotle never argued that any of the fees were unnecessary, duplicative or unreasonably incurred.

Antoninetti seeks recovery of all of his attorney's fees, litigation expenses and costs because they were incurred in relation to his claim that Chipotle violated the ADA during his visits, giving rise to his claim for damages. Fees, expenses and costs were incurred in litigating the triable issues of fact related to the *nature* of the Chipotle Experience, the *nature and quality* of Chipotle's methods of accommodation and whether those methods of accommodation provided wheelchair users with an experience comparable to that provided to standing customers.

The District, in denying Antoninetti fees, litigation expenses and costs, wrongfully split Antoninetti's claim involving the Chipotle Experience into two "separate" claims: 1) the written policy claim and 2) the unwritten policy claim.

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[52] ER VIII-32, par. 14; ER IX-35, at 43 to 132.

Antoninetti succeeded in proving that Chipotle violated the ADA because he was denied the Chipotle Experience during each of his visits to the restaurants. Antoninetti's lawsuit was necessary because Chipotle contended, and continues to assert, that it complied with the ADA simply by providing a lowered cashier counter adjacent to the food viewing areas at its restaurants.

The District correctly held that ADAAG Secs. 7.2(2)(i) and (ii) do not apply to the Chipotle Experience, but it erred in applying ADAAG Sec. 7.2(2)(iii) and holding that public accommodations, like Chipotle, can build an inaccessible element or facility, as long as they adopt policies of providing methods of accommodation to overcome the built barriers. The District likewise erred in imposing improper burdens of proof on Antoninetti and in denying him damages for "litigation-related visits" despite the denial of access during those visits and in denying him injunctive and declaratory relief. The District further erred in failing to make important findings of fact where the facts were undisputed and were necessary to fully understand the Chipotle Experience. It also erred in rejecting the Parties' Stipulation that Antoninetti wanted to return to the facility.

Antoninetti is entitled to all of his fees, costs and expenses, even if the District's ruling on the merits is not reversed, because his lawsuit established that Chipotle violated the ADA during his visits and the lawsuit achieved a significant

benefit for class members in the related actions. The legal rulings in Antoninetti's lawsuit, as they currently stand, support the class members' claims for damages for all visits made while the unwritten policy was in effect.

If the District's rulings are reversed, Antoninetti will have received all of the damages sought, declaratory and injunctive relief, and he will have achieved even greater benefits for the disabled public because of the clarification of novel legal issues and the expansion of the class members' claims for damages.

ARGUMENT

I. Standards of Review.

Antoninetti incorporates the standards of review set forth in his Opening Brief and identifies the following additional standards:

Whether damages are "de minimus" or "nominal" is a question of law, which is reviewed de novo. *Barrios v. California Interscholastic Federation,* 277 F.3d 1128, 1135 (9th Cir. 2002). Failure to consider evidence is an abuse of discretion. *Jones v. Blanas*, 393 F.3d 918, 936-937 (9th Cir. 2004); *cert. denied* by U.S. Supreme Court at *County of Sacramento v. Jones,* 546 U.S. 820, 126 S. Ct. 351, 163 L. Ed. 2d 61, 2005 U.S. LEXIS 5624 (2005).

II. Standards for Determining Reasonable Attorney's Fees.

Antoninetti accepts Chipotle's standards and adds: In a motion for attorney's fees, where the underlying action was based on violations of the Unruh Act or the CDPA, "a plaintiff will be considered a prevailing party where the lawsuit was the catalyst motivating the defendants to modify their behavior or the plaintiff achieved the primary relief sought." *Barrios,* 277 F.3d at 1137 (9th Cir. 2002), citing *Donald v. Café Royale, Inc.,* 218 Cal. App. 3d 168, 266 Cal. Rptr. 804, 814 (Ct. App. 1990).

III. The District's Conclusions Were Correct Relative to the Unwritten Policy and the Inapplicability of ADAAG Sections 7.2(2)(i) and (ii).

While Antoninetti disputes that ADAAG Section 7.2 is applicable to the Chipotle Experience and that policies of providing methods of accommodation can constitute "equivalent facilitation, in new construction, the conclusions reached by the District - that ADAAG Secs. 7.2(2)(i) and (ii) do not apply to the case and that Chipotle violated the ADA during Antoninetti's visits to the restaurants - were correct.

A. The District Correctly Ruled that ADAAG Sections 7.2(2)(i) and (ii) Do Not Apply to the Food Viewing Areas.

As noted in Antoninetti's Opening Brief, the District correctly held that ADAAG § 7.2(2)(i) did not apply to this case because the lowered transaction counter was not a "lowered portion" of the food preparation area since the two areas

serve different functions. The District correctly held that customers in wheelchairs "cannot receive full and equal access to Defendant's restaurants by utilizing the transaction counter alone."[53] The District also correctly held that the transaction counter does not qualify as an "auxiliary counter" under Sec. 7.2(2)(ii) because the counter, alone, does not provide customers in wheelchairs with full and equal access to Chipotle's restaurants.[54]

The District's ruling is correct because Chipotle offered no evidence in support of its MSJ or at trial that a person in a wheelchair who is simply sitting at the cashier counter or at an adjacent dining table can see any of the food on display or the making of his or her burrito.[55]

Moreover, the District's ruling is based on common sense. Obviously, a person in a wheelchair located at the cashier counter is physically unable to see behind the offending wall to any of the food ingredients along the 12-foot long display. If a wheelchair user is positioned so that he is facing the cashier counter, his eyes would be at least as far away from the plane of the wall as the space taken up by

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[53] ER I-6, 14:22-15:2.

[54] ER I-6, 16:5-13.

[55] ER III-14 to ER III-20; ER IV-25; ER V-26; E VI-27; ER VII-28; ER VII-29.

his footrest and wheelchair seat. Seated in his wheelchair, his eyes would be in the ordering lane and he would be physically unable to see behind the wall.

If a wheelchair user is positioned at the cashier counter so that his armrest is next to the counter, his eyes would still be in the ordering lane, separated from the plane of the wall by at least half the width of his wheelchair and the space necessary to be able to grab and roll his wheel. Chipotle offered no evidence, at any time, of the line of sight of a wheelchair user from this vantage point.

Since lowered cashier counters or adjacent tables, by themselves, offer no access to the visual and sensory aspects of the Chipotle Experience, the District correctly ruled that Sections 7.2(2)(i) and (ii) do not apply to the food viewing areas.

The District did not err in this ruling and did not err in finding that Antoninetti was the prevailing party and entitled to fees.

Further, even if the District is reversed on the issue of the food viewing area in favor of Chipotle, Antoninetti is entitled to fees in relation to his parking lot claims. The District acknowledged that Antoninetti conferred a benefit on the public with respect to the substantial parking modifications that were made as a result of Antoninetti's lawsuit, but wrongly failed to rely on the "public benefit" factor in Antoninetti's fee award.[56] The District erred in refusing to consider this public

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[56] ER I-2, 4:11-23.

benefit in its award of fees. The modifications to the parking lots were substantial and, as a matter of law, conferred a significant benefit on the public.[57]

B. The District Correctly Ruled that the Unwritten Policy Did Not Provide Equivalent Facilitation.

The District correctly ruled that Chipotle violated the ADA during Antoninetti's visits because the unwritten policy allowed for subjective interpretation and was not capable of uniform enforcement.[58] The unrefuted evidence before the District proved that Chipotle employees never affirmatively offered accommodations to Antoninetti and that, on at least five occasions, Antoninetti had no opportunity to see any food ingredients at all. The undisputed evidence also proved that Antoninetti was never offered the opportunity to see his burrito assembled in front of him, denying him the ability to customize his burrito like other standing customers.[59] This unrefuted evidence supported the District's determination that the unwritten policy was defective.

The appeals court, in addition, may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied

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[57] ER II-13, at 33, lines 6-25; ER III-18, at 2 through 9.

[58] ER I-5, CL 12.

[59] ER II-11, pars. 13, 16, 17 19, 21, 22, 23.

on the same grounds or reasoning the appeals court adopts. *Lentini v. California Center for the Arts,* 370 F.3d 837, 850 (9th Cir. 2004).

Here, although the District reached the correct conclusion that Chipotle was in violation of the ADA during Antoninetti's visits, the District erred in holding, in the first instance, that policies of providing methods of accommodation to overcome built barriers in new construction are "alternative designs and technologies" as defined by ADAAG Sec. 2.2.[60]

In addition, (assuming arguendo that the adoption of policies to overcome built barriers can constitute equivalent facilitation), the District erred when it declined to rule that the unwritten policy (and the written policy) failed to provide equivalent facilitation because the methods of accommodation offered by Chipotle provided different and separate benefits to wheelchair users that were not substantially equivalent to or better than those provided to non-disabled customers and, thus, as a matter of law, were not equivalent.

Accordingly, despite these legal errors by the District, it did not err in holding that Chipotle violated the ADA during Antoninetti's visits to the restaurants.

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[60] See Antoninetti's Opening Brief in Ninth Circuit Case Nos. 09-55327, 09-55425, filed on June 17, 2009, at 29-34.

IV. Even If The District is Affirmed on the Merits of The Case, The District's Award of Fees Should Not Be Reduced.

Even if the District's ruling on the merits of the case is affirmed, Antoninetti's fee award should not be reduced, but should be increased, because his lawsuit achieved other tangible results that significantly benefitted the disabled community, including obtaining a ruling which has a favorable collateral effect for other disabled persons and his lawsuit achieved significant physical modifications to the restaurants that resulted in increased access for people with disabilities.

A. The District Abused Its Discretion in Failing to Award Antoninetti More Fees Because Antoninetti's Damages were Not "Nominal" or "De Minimus" and the District Failed to Consider the Other Tangible Benefits of Antoninetti's Suit.

i. Antoninetti's Damages Were Not Nominal or "De Minimus."

Chipotle argues that Antoninetti received only "nominal damages" under Cal. Civ. Code Sec. 54.3, the California Disabled Persons Act ("CDPA"), and the District should have awarded Antoninetti fewer or no fees.[61] While the ADA does not allow the recovery of damages, California Civil Code[62] Sections 52 and 54.3 provide damages for violations of the ADA even in the absence of actual damages. *Molski, v. M.J. Cable*, 481 F.3d 724, 7331(9th Cir. 2007).

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[61] SBA, at pgs. 26-35.

[62] Hereafter "Cal. Civ. Code."

Chipotle's depiction of Antoninetti's damages as "nominal damages" is incorrect. The penalty nature of Antoninetti's damages, as a matter of law, disqualify the damages as being characterized as "de minimus." As distinguished from punitive and compensatory damages, nominal damages are awarded to vindicate rights, the infringement of which has not caused actual, provable injury." *Cummings v. Connell,* 402 F.3d 936, 942 (9th Cir. 2005). "Nominal damages, as the term implies, are in name only and customarily are defined as a mere token or 'trifling.' (Citations omitted.)." *Cummings,* 402 F.3d at 943.

The statutory minimum damages provided by the CDPA are "*penalties* for violation of the specific disabled person access statutes..." *Munson v. Del Taco,* 46 Cal. 4th 661, 675 (2009). The statutory minimum damages awarded to Antoninetti were intended to redress the violation of Antoninetti's rights under the ADA, despite the likelihood that such a violation would not give rise to actual damages.

The California Legislature provided minimum statutory damages for denials of access, *even in the absence of actual damages*, and increased the statutory minimum amount several times specifically to "increase deterrence against civil rights violations which are profitable to businesses but which cause relatively little individual damages." *Munson*, 46 Cal. 4th at 674, fn. 9. Because statutory minimum damages are, by their nature, penalties, they cannot be "de minimus."

In addition, in *Farrar v. Hobby*, 506 U.S. 103, 115-116, 113 S.Ct. 556, 575 (1992), the seminal case addressing the issue of "nominal damages," the Court held that "when a plaintiff recovers only nominal damages *because of his failure to prove an essential element of his claim for monetary relief*, the only reasonable fee is usually no fee at all. *Farrar*, 506 U.S. at 115.

In the instant case, the District correctly ruled that Antoninetti proved that Chipotle violated the ADA during all of Antoninetti's visits to the restaurants. These ADA violations gave rise to Antoninetti's claims for damages under the CDPA. The instant case is distinguishable from *Farrar* and its progeny, then, because Antoninetti satisfied all elements of his claim for damages.

With respect to the amount of Antoninetti's recovery, Antoninetti was required to elect between Cal. Civ. Code Secs. 54.3 and 52.[63] At trial, Antoninetti sought the minimum statutory damages allowed under Cal. Civ. Code Sec. 54.3 for all visits he had made to the restaurants and for the visit he would have made "tomorrow" if the facilities were accessible. He sought $1,000.00 for each visit, and was awarded $5,000.00. If the District had not committed legal error by denying Antoninetti damages for three "litigation-related" visits, and if it had not committed clear factual error and legal error by finding that Antoninetti did not intend to return to the

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[63] ER I-5, fn. 1.

restaurants, Antoninetti would and should have recovered all of his requested damages.

ii. Antoninetti's Lawsuit Achieved Other Tangible Benefits Even if The District's Ruling is Affirmed.

In addition to imposing penalties against Chipotle, Antoninetti's lawsuit has already achieved other tangible benefits for the public. The District's conclusion otherwise was clearly erroneous.

"Benefit to the public" is not limited to affecting a change in policy or deterring widespread civil rights violations, as urged by Chipotle.[64] Rather, lawsuits proving violations of the ADA can provide important benefits that "are difficult to quantify, such as clarifying a certain area of law, forcing changes in corporate policies affecting thousands of individuals, or educating the public that the law requires them to accommodate persons with disabilities. (Citation omitted.) These are more than merely "technical" victories..." *National Federation of the Blind v. Target Corp.*, 2009 U.S. Dist. LEXIS 67139 (August 3, 2009). It is well-settled precedent within this Circuit that proving a violation of the ADA is not merely a "technical victory." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115 (9th Cir. 2000).

Tangible benefits will also include establishing a finding of fact with potential collateral estoppel effects. *Wilcox v. City of Reno,* 42 F.3d 550, 553 (9th Cir. 1994).

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[64] SAB, at 33.

A federal court decision has preclusive effect where (1) the issue necessarily decided at the previous proceeding is *identical* to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

In cases where the plaintiff has achieved other tangible benefits, an award of attorney's fees that is disproportionate to the actual damages may be appropriate. *McCown v. City of Fontana*, 565 F.3d 1097, 1105 (9th Cir. 2009).

In the instant case, Antoninetti contended that Chipotle violated his rights under the ADA during his many visits to the restaurants. Chipotle, on the other hand, contended that it met its obligations under the ADA simply by providing a lowered cashier counter. Antoninetti's lawsuit, at a minimum, clarified the law as it applied to the Chipotle Experience and confirmed that, for at least five years, Chipotle denied customers with disabilities access to the Chipotle Experience.

In establishing a finding of fact that Chipotle violated the ADA during his visits, Antoninetti obtained a judgment that benefitted not only him, but all named plaintiffs and class members in the related actions since the ruling, even if it stands, has a collateral estoppel effect against Chipotle in the related class actions. That is,

the issue of whether Chipotle violated the ADA for five years, until the adoption of its written policy, is settled and entitles class members to recover damages for visits occurring for at least two years before the filing of the related class actions.

Further, even though the District wrongly rejected Antoninetti's contention that policies of providing methods of accommodation, whether written or unwritten, are not "equivalent facilitation" in new construction, Antoninetti's lawsuit also achieved success by requiring that Chipotle modify its written policy to include the "two new requirements" that the District wrongly determined were "plainly set forth" and that Chipotle's witnesses incorrectly stated were "written down." [65]

While Chipotle contends that the District "simply made factual findings and conclusions about what Chipotle was already doing under the policy,"[66] the record is abundantly clear that the District distinguished the written policy from the unwritten policy because it believed the written policy "set forth plainly" the "two new requirements."[67] The District apparently failed to read the written policy and, instead, accepted Chipotle's representation that it included language imposing affirmative obligations on managers "rather than crew members."

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[65] ER VI-27, 585:16-24.

[66] SAB, at 32.

[67] ER I-5, CL 16.

Since the District found the unwritten policy was "incapable of uniform enforcement," it surely determined the "two new requirements" would likewise be incapable of uniform enforcement, unless they were actually written down. Since they are *not* included in the written policy, the only conclusion that can be reached is that the District either mistakenly believed they were in the written policy or that it was ordering that they be included in the policy.

The written policy does not include the "two new requirements." Thus, Antoninetti's lawsuit, if the District is affirmed, achieved other tangible benefits by requiring that the written policy be modified to include the "two new requirements."

Finally, Antoninetti's lawsuit achieved significant success and benefits for the disabled public because Chipotle modified its parking, restrooms and seating as a result of Antoninetti's lawsuit.

iii. If the District is Reversed, Antoninetti's Lawsuit Will Have Achieved Even Greater Benefits For The Disabled Community.

If Antoninetti's appeal on the merits is successful, Antoninetti will have achieved even greater success by clarifying numerous legal issues of first impression in this Circuit including: (1) whether equivalent facilitation, as defined by ADAAG Sec. 2.2, does not include the adoption of policies to overcome physical barriers in new construction; (2) whether, in new construction cases, plaintiffs seeking injunctive

relief are not required to prove that the cost of removing a barrier is outweighed by the benefit of the removal; (3) whether damages must be awarded for all denials of access, even those occurring during litigation-related site inspections or other events; (4) whether ADAAG Sec. 4.33.3 applies to visual elements of "assembly areas" regardless of whether the assembly areas have fixed seating; (5) whether, in determining if a design or technology constitutes "equivalent facilitation," reference must be made to the general anti-discrimination provisions of the ADA which provide for full and equal access to privileges, advantages, accommodations, as well as to goods and services; (6) whether a public accommodation fails to satisfy its "heavy" burden of proving that it provides equivalent facilitation simply by showing that it has received no complaints; and (7) whether, in the absence of a directly applicable ADAAG Standard, the general anti-discrimination provisions of the ADA are applied.

The resolution of each of these issues will have a far-reaching impact on other disability access cases, including the related class action cases. The District erred in failing to recognize the other tangible benefits produced by its initial ruling. It also erred in reaching legal conclusions, the reversal of which will substantially benefit the disabled public.

B. The District Did Not Abuse its Discretion in Awarding Fees That Were Not Proportional to Antoninetti's Monetary Recovery.

The District correctly held that the amount of fees awarded do not have to be proportional to the amount the court awarded to the plaintiff at trial. *City of Riverside v. Rivera,* 477 U.S. 561, 106 S. Ct. 2686 (1986). Moreover, the Supreme Court has recognized that part of an attorney's calculus of the amount of time reasonably necessary for a case is the vigor which the opponents bring to the dispute. *City of Riverside*, 477 U.S. at 580, n.11 (1986) (plurality opinion) ("'The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.'") (quoting *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980)).

In the instant case, much of Antoninetti's attorney's fees were incurred because of the vigor and tenacity with which Chipotle litigated this case. Chipotle hired three different firms and more than 11 attorneys to defend this action.[68] Much of the time invested by Antoninetti's counsel in this case was devoted to: a) motions to compel Chipotle to produce documents which it failed to produce in response to Antoninetti's discovery requests; b) responding to Chipotle's motions to dismiss and motions to consolidate, which were denied, and for protective orders filed by Chipotle; c) responding to and negotiating a confidentiality agreement requested by Chipotle,

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[68] ER IX-37.

which was later violated by Chipotle and then revoked; d) responding to numerous letters and communications from Chipotle's numerous counsel, as much as 10 or more per day; e) preparing for and attending depositions of Chipotle's witnesses who insisted on being deposed in Denver, Colorado.[69]

Antoninetti should not be entitled to a windfall in attorney's fees, but Chipotle should not be allowed to vigorously litigate this action without bearing the consequence of its vigor and tenacity. Antoninetti was forced to take this case to trial because Chipotle never admitted that it had violated the ADA during Antoninetti's visits. It continues to believe that a lowered cashier counter is all it is required to provide Antoninetti and other wheelchair users.

Antoninetti had no choice but to continue to litigate this case because the issue of whether Chipotle violated the ADA was central not just to this case, but to Antoninetti's claims in the related class action and to the claims of other class representatives and class members. Absent a finding on the issue of liability for damages during Antoninetti's visits, the same issue would necessarily have to be litigated in the related cases.

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[69] ER VIII-32, par. 14; ER IX-35, at 43 to 132.

V. The District Abused Its Discretion in Failing to Award Antoninetti More Fees.

A. The District Erred in Its Judgment on the Merits of the Case and Abused Its Discretion in Not Awarding Antoninetti All of His Fees, Litigation Expenses and Costs.

Antoninetti's Opening Brief in this appeal and his related appeal, Ninth Circuit Case No. 08-55867, establish that the District committed clear factual errors and legal errors in denying Antoninetti injunctive relief, declaratory relief and additional damages in the underlying action. Those errors were the basis for the District's improper denial of 75% of Antoninetti's fees and denial of his costs.

Further, contrary to Chipotle's assertion, if this Court rules in Antoninetti's favor on appeal, no remand for determination of the amount of fees reasonably incurred by Antoninetti is required.

Once an applicant submits evidence of the appropriate hours spent on litigation, "the party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged." *Gates v. Deukmejian*, 987 F.2d 1392, 1397 (9th Cir. 1992). In the absence of opposing evidence, the proposed hourly rate is deemed reasonable. *Cortes v. Metro. Life Ins. Co.*, 380 F. Supp. 2d 1125, 1129 (C.D. Cal. 2005).

Chipotle did not challenge the reasonableness of Antoninetti's counsel's hourly rate in its Opposition to Antoninetti's fee motion, nor did the District make a finding that the hourly rate was unreasonable. Likewise, Chipotle did not challenge the reasonableness of Antoninetti's overall fees or that any of the fees were unreasonably incurred, unnecessary, duplicative or inefficient, nor did the District make any such findings.[70]

Instead, Chipotle challenged Antoninetti's fee recovery based upon his "limited success" and it provided a "list of the specific billing entries to which Chipotle objects" because of purported "block-billing." The District reduced Antoninetti's fees and denied him costs solely on these two bases.[71] If the District is reversed in Antoninetti's favor, he should be awarded all of his fees related to the "unsuccessful" claims ,which were the basis for the reduction in fees and expenses and the denial of costs, and all fees related to the "block billed" entries, which Antoninetti sufficiently addressed.

Chipotle also argues that, if Antoninetti's appeal is successful, this Court should remand the case to the District with instructions to deny Antoninetti fees for work performed on issues relating to ADAAG Sec. 4.33.3 and the general anti-

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[70] ER VIII-33; ER I-2; I-3.

[71] ER I-3, 8:8-19.

discrimination provisions of the ADA, if these legal arguments are not the basis for the reversal.[72]

Remand for a reduction of fees on that basis is inappropriate. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983).

If this Court reverses the District and remands the case with instructions to the District to order an injunction, award additional damages and/or to award Antoninetti declaratory relief, Antoninetti will have been entirely successful, regardless of the legal reasoning relied upon by the District.

In addition, Antoninetti clearly identified the fees, expenses and costs for which he was seeking recovery in his appeal - the 75% of fees and litigation expenses and the costs denied him by the District.[73] Antoninetti argued in his Opening Brief that he was entitled to recoup these fees because they were incurred in relation to his "successful" claims and, further, but for the District's legal and factual errors, Antoninetti would have been granted injunctive relief, declaratory relief and

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[72] SBA, at 42, fn. 78.

[73] Antoninetti's Opening Brief, at 26, 27, 53, 59-60, 62.

additional damages, obviating any perceived need to allocate fees between "successful" and "unsuccessful" claims.

Antoninetti also argued that the District erred in finding that Antoninetti's claims *could* be separated between "unwritten policy" claims and "written policy" claims, since the discovery, investigation and analysis was the same with respect to these purportedly "distinct" claims.[74]

B. The District Abused Its Discretion by Refusing to Consider the Significant Public Benefit or Other Tangible Results Obtained in Antoninetti's Lawsuit.

As set forth in Section IV. A., above, Antoninetti established that the District abused its discretion in holding that his lawsuit did not confer any significant benefit on the public. The record in this case shows the District's holding is clearly erroneous and against the evidence.

C. The District Erred in Requiring Allocation of Fees Between "Written Policy Claims" and "Unwritten Policy Claims."

The District correctly held that Antoninetti was the prevailing party, but it erred in its analysis of Antoninetti's "limited success," as that analysis is set forth in *Hensley*. To determine whether a plaintiff has had limited success under *Hensley*, the court must first decide whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded. *Webb v. Sloan*, 330 F.3d 1158, 1168

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[74] *Id.*

(9th Cir. 2003). Where a plaintiff has failed to prevail on a claim that is distinct *in all respects* from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. *Hensley*, 461 U.S. at 440; *Webb*, 330 F.3d at 1158 (claims are "unrelated" if they are *"entirely distinct and separate"* from the claims on which the plaintiff prevailed).

If the unsuccessful and successful claims are related, then the court must undertake the second part of the *Hensley* analysis, in which the court evaluates the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005). Claims are related if they involve a *common core of facts* or are based on *related legal theories*. *Id.* The burdens of proof and standards of liability under the ADA and the California Civil Codes are the same. The remedy is merely different. *See, Johnson v. Makinen*, 2009 U.S. Dist. LEXIS 60850, at fn. 5.

A plaintiff does not need to receive all the relief requested in order to show excellent results warranting the full compensatory fee. *Hensley*, 461 U.S. at 435 n. 11; *Dang*, 422 F.3d at 813. It is also well-settled in this Circuit that a district court should not reduce the lodestar merely because the prevailing party did not receive the type of relief that it requested. This is especially true in civil rights cases. *Gates,* 987 F.2d at 1404. "A plaintiff who fails to recover damages but obtains injunctive relief,

or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time." *Hensley,* 461 U.S. at 436.

Even where the claims can be distinguished, apportionment is not required when the work performed on successful and unsuccessful claims are so inextricably intertwined that it would be impractical or impossible to differentiate the work. *Gracie v. Gracie*, 217 F.3d 1060, 1069 (9th Cir. 2000). Further, a court abuses its discretion when it cuts fees by an arbitrary percentage. *People Who Care v. Rockford Bd. of Educ.,* 90 F.3d 1307, 1314 (7th Cir. 1996).

Here, the District erroneously divided one claim based upon the Chipotle Experience into two "separate" claims, which it distinguished by the different remedies of injunctive relief and damages and by the one additional fact that one policy was written and the other was not. The District then committed further error by finding that these two "distinct" claims were not inextricably intertwined. In finding that Antoninetti had not provided billing statements that apportioned between these "distinct" claims, the District settled on an arbitrary figure of 75% as an appropriate reduction of fees and expenses and denial of costs.[75]

The District committed clear error in ignoring the common core facts that support both remedies: the nature of the Chipotle Experience, the nature of the

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[75] ER I-2, at 8, 9.

experience provided to Antoninetti and the nature of the methods of accommodation provided to wheelchair users. The District also committed clear error in rejecting the obvious - that *all* of the factual investigation in relation to these issues could only have been incurred in relation to the "successful claim," since Antoninetti did not learn of the written policy until after close of discovery. The District's reduction of fees and expenses by 75% and its denial of costs is also erroneous because it was arbitrary and, but for the District's legal and factual errors in the underlying judgment, Antoninetti would have succeeded on the "unsuccessful" claims.

D. The District's Holding Regarding "Block Billed" Time Entries Constitutes Reversible Error.

Not only did the District commit clear factual error and legal error in holding that Antoninetti should have provided separate billing for his purported "written policy" claim and his purported "unwritten policy" claim, the District abused its discretion in refusing to consider evidence submitted by Antoninetti in relation to the alleged "block billed" entries. *See*, *Robinson v. City of Edmond*, 160 F.3d 1275 (10th Cir. 1998) Antoninetti addressed every one of the 85 entries challenged by Chipotle.[76] Despite the fact that Antoninetti provided separate time entries for many tasks included in the challenged "block billed" entries, or explained why the time could not be separated into distinct tasks, the District made no reference to this additional

[76] ER VIII-34; ER IX-35 at 10.

evidence and did not account for Antoninetti's additional allocation in its final ruling on Antoninetti's fee motion. The District committed reversible error in failing to consider this additional evidence.

VI. The District Abused Its Discretion in Denying Antoninetti His Costs.

The District's legal and factual errors in the underlying judgment served as the basis for its denial of costs to Antoninetti. If the District is reversed, in favor of Antoninetti, all of Antoninetti's costs should be awarded to him. Further, the District abused its discretion in ignoring the clear tangible benefits to the disabled public achieved by Antoninetti's lawsuit, even assuming the District's rulings stand. These tangible benefits should have been considered by the District in determining Antoninetti's "degree of success" and, thus, his recovery of costs.

CONCLUSION

Antoninetti respectfully requests that this Court remand this matter with instructions to the District to issue an order awarding Antoninetti injunctive relief, declaratory relief and all of his claimed attorney's fees, litigation expenses and costs.

Respectfully submitted, LAW OFFICES OF AMY B. VANDEVELD

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STATEMENT OF RELATED CASES
FOR NINTH CIRCUIT CASE NOS. 09-55327, 09-55425, 08-55867 AND 08-55946

Related cases: 1) *Antoninetti, et al. v. Chipotle*, USDC No. 06 CV 2671 LAB (POR), consolidated by the District with the instant case for purposes of discovery, and 2) *Perkins, et al. v. Chipotle*, USDC No. CV 08-03002 MMM (OPx). Both suits are putative class actions and involve the "Chipotle experience" at all Chipotle restaurants in California.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that this brief is reproduced using a times new roman proportional typeface with a point size of 14, and the text contains 9,908 words, not counting tables and certificates. It therefore conforms to the requirements set out in Fed. R. App. p.32 (a)(7)(c) and Ninth Circuit Rule 32-1. The excerpts of record have been compiled in compliance with Circuit Rule 30-1.6.

LAW OFFICES OF AMY B. VANDEVELD

Dated: August 14, 2009 By: S/ AMY B. VANDEVELD

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on August 17, 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 mailed the foregoing documents by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

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I further certify that I caused to be filed five sets of the Appellant/Cross-Appellee's Supplemental Excerpts of Record, Volume X, in paper format with the Clerk of the Court for the United States Court of Appeals and I mailed one set to the above-mentioned counsel by three-day mail on August 12, 2009 for guaranteed delivery on August 17, 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.

LAW OFFICES OF AMY B. VANDEVELD

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