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CHIPOTLE MEXICAN GRILL, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MAURIZIO ANTONINETTI,

Plaintiff,

vs.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant.

CASE NO.: 05-CV-1660 J WMC

Class Action - Related to & Consolidated for Discovery With
06-CV-2671 LAB (POR)

Assigned to Hon. Judge Napoleon A. Jones, Jr.

CHIPOTLE MEXICAN GRILL, INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with Response and Objection to Plaintiff's Supplemental Separate Statement; Request for Judicial Notice]

Date: June 4, 2007
Time: 9:00 a.m.
Ctrm: 12

I.

INTRODUCTION

Placing Chipotle in the role of the discriminatory bus company and likening his desire to watch while Chipotle employees assemble his burrito to Rosa Parks' historical struggle to attain equal rights (see footnote 1, page 2 of Plaintiff's Opposition)[1], Plaintiff concedes that "[t]his case does not involve the design and construction of the food preparation counter itself." (See Plaintiff's Opposition, page 4, lines 9-10.)

Plaintiff also fails to dispute 90% of Chipotle's 41 undisputed material facts -- Plaintiff outright conceded that 21 of those facts were undisputed (see Plaintiff's Response to Chipotle's Separate Statement, Numbers 1, 2, 3, 4, 6, 8, 10, 13, 14, 15, 18, 19, 20, 21, 23, 28, 30, 31, 39, 40 & 41); as to the remaining undisputed facts, Plaintiff makes a weak attempt to dispute them, claiming that they are either not facts (see Plaintiff's Response to Chipotle's Separate Statement, Numbers 24, 25, 26, 27 & 29), or that he has insufficient information to dispute them. (See Plaintiff's Response to Chipotle's Separate Statement, Numbers 9, 11, 12, 16, 17, 33, 34, 35, 36, 37 & 38.) This latter claim should be disregarded and those facts should be deemed undisputed insofar as Plaintiff fails to dispute these facts by declaration or other written evidence. Furthermore, Plaintiff himself admits that "[e]xtensive discovery was conducted in this case, including the production of thousands of pages of documents by Chipotle and numerous depositions of defense witnesses. Discovery . . . is now complete." (See Plaintiff's Opposition, page 19, lines 22-25.)

Whether or not Chipotle admitted that modifications could be made with no difficulty or expense is of absolutely no import for the purposes of this case. (See Chipotle's Response to Plaintiff's Supplemental Separate Statement of Undisputed Facts.) The two restaurants at issue were built after the enactment of the ADA -- Plaintiff does not dispute this. (See Plaintiff's Response to Chipotle's Separate Statement, Numbers 39 and 40.) Accordingly, the readily achievable barrier removal standard, which applies to existing facilities (pre-ADA facilities) and takes into consideration factors such as

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[1] These disparaging statements violate Local Rule 83.4(a)(2), which mandates that attorneys before this Court not "disparage the ethics, morals, integrity or behavior of opposing parties . . . unless such characteristics are at issue." For these reasons, this footnote should be stricken from Plaintiff's Opposition; Chipotle anticipates filing a separate motion to strike on this issue.

difficulty and expense, does not apply and Plaintiff's Supplemental Separate Statement should be disregarded as superfluous and wholly inapplicable.[2]

For these reasons, and as further discussed in detail below, Chipotle's Motion for Summary Judgment should be granted and Plaintiff's case dismissed.

II.

ARGUMENT

A. Section 4.33.3 Of The ADAAG Does Not Impose Line Of Sight Requirements On Areas Such As Chipotle's Food Preparation Counters That Are Not Part Of A Fixed Seating Plan.

1. The plain language of Section 4.33.3 demonstrates that its line of sight requirements are only applicable to fixed seating plans and to assembly areas.

Plaintiff's opposition attempts to broaden the scope of the line of sight requirements established by Section 4.33.3 of the ADAAG by obscuring the plain language of this governing regulation. Section 4.33.3 plainly states that:

> 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.*

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[2] The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (emphasis added). In determining whether an action is readily achievable, factors to be considered include--
(A) the nature and cost of the action needed under this chapter;
(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.
(42 U.S.C. § 12181(9).)

> *Equivalent accessible viewing positions may be located on levels having accessible egress.*

28 C.F.R. § 36 - Appendix A § 4.33.3 (emphasis added). The statement that "wheelchair areas shall be an integral part of any fixed seating plan" plainly indicates that the requirements of 4.33.3, including its line of sight requirements, are limited to wheelchair seating areas in *a fixed seating plan*, such as the seating generally found in movie theatres, playhouses, and sports arenas. Chipotle's food preparation counters are not part of a fixed seating plan. Accordingly, those areas of Chipotle's restaurants are not subject to the line of sight requirements set forth in Section 4.33.3 of the ADAAG.

Plaintiff's tortured interpretation of "wheelchair areas" is inconsistent with the plain language of Section 4.33.3, and reads the phrase "of any fixed seating plan" out of the regulation. The statement in Section 4.33.3 that "wheelchair areas shall be an integral part of any fixed seating plan" plainly indicates that the wheelchair areas to which the requirements of that standard apply are located *in fixed seating areas*. If the DOJ had intended the requirements of Section 4.33.3 to apply to parts of a facility other than fixed seating areas, it would have so stated. Additionally, the remaining portions of Section 4.33.3 - requiring that accessible routes and companion fixed seats adjoin wheelchair areas - further establish that the "wheelchair areas" to which the requirements apply are located in fixed seating areas, and not in locations like Chipotle's food preparation and checkout areas.

Perhaps recognizing the problems with their proposed interpretation of Section 4.33.3 of the ADAAG, Plaintiff asserts that if Chipotle's interpretation of Section 4.33.3 is accepted, people in wheelchairs could not see museum exhibits, gallery art, stage performances, animal exhibits at the zoo, jugglers perform on stage, politicians speak on election night, watch football games at their local bars, etc. (Plaintiff's Opposition, page 5, lines 6-10). This parade of horribles does not change the plain language of the ADAAG - which limits line of sight requirements to fixed seating areas and "assembly areas." In any event, this case does not involve any of those hypothetical situations; nor is there any evidence to support Plaintiff's assertion that adopting Chipotle's interpretation of Section 4.33.3 would result in such dire consequences.

2. Sight-Line Requirements Exist For Appropriate Industries, Namely, Theatre Venues[3]

[3] For further explanation, Chipotle respectfully directs this Court to the Georgetown Law Journal Article "Down in Front!": Judicial Deference, Regulatory Interpretation, and the ADA's Line of Sight

Section 36.308 is a part of the implementing regulations of Title III and addresses "seating in assembly areas" and provides as follows:

> (a) Existing facilities.
> (1) To the extent that it is readily achievable, a public accommodation in assembly areas shall --
> (i) Provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests; and
> (ii) Locate the wheelchair seating spaces so that they --
> (A) Are dispersed throughout the seating area;
> (B) Provide lines of sight and choice of admission prices comparable to those for members of the general public.

As Chipotle's expert witness, Mr. Blackseth testified in his declaration in opposition to Plaintiff's Motion for Summary Judgment (Docket No. 109, ¶ 13), "[s]ight-line requirements, when they exist, are addressed very directly by the ADA regulations. As one would expect, sight-line requirements exist for appropriate industries, namely, theatre venues. Plaintiff may not, therefore, impose such a theatre-specific requirement on a restaurant such as Chipotle."

Likewise, if one looks to the Notice of Proposed Rulemaking and the request for comments pertaining to "assembly areas" (4.33), it is clear that the specific subsection at issue -- 4.33.3 -- applies specifically to theatres, playhouses, sports arenas and other similar venues -- not to all public accommodations as Plaintiff persists. In particular, on January 22, 1991, the Architectural and Transportation Compliance Board sought comments on two issues concerning seating in "assembly areas":

> Question 32: The first issue involves row spacing. Many people with mobility impairments find it difficult to get to mid-row seats in assembly areas such as theaters or sports arenas. Wider row spacing, with a greater distance between the edge of the seat and the back of the seat in the next row forward, would make it much easier for everyone to access mid-row seating. Building codes currently provide options in the design of seating areas. One option is to limit the number of seats in rows that have conventional narrow row spacing; and another option is to allow an increase in the allowable number of seats per row when there is a corresponding increase in the distance between rows ("continental" seating). The Board seeks comments on whether row spacing should also

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Standard, 86 Geo.L.J. 2653 (1998) for further analysis of the history and interpretation of 4.33.3. (See Request for Judicial Notice in support of Reply to Plaintiff's Opposition to Motion for Summary Judgment, filed concurrently herewith.)

be addressed as an accessibility issue.

> Question 33: The second issue involves lines of sight at seating locations for people who use wheelchairs. Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas. This requirement appears to be adequate for theaters and concert halls, but may not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event. In alterations of existing sports arenas, accessible spaces are frequently provided at the lower part of a seating tier projecting out above a lower seating tier or are built out over existing seats at the top of a tier providing a great differential in height. These solutions can work in newly constructed sports arenas as well, if sight lines relative to standing patrons are considered at the time of initial design. The Board seeks comments on whether full lines of sight over standing spectators in sports arenas and other similar assembly areas should be required.

See Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities 56 FR 2296, 2313 -2314.

3. Other Courts Have Rejected And Outright Dismissed Plaintiff's Interpretation of 4.33.3

In a factually-similar case currently pending before the United States District Court for the Eastern District of Virginia (Alexandria Division) styled *Rosemary Ciotti v. Chipotle Mexican Grill*, Case No. 1:07cv161, Plaintiffs' Complaint alleged, *inter alia*, that Chipotle discriminated against them under the ADA by failing to ensure that wheelchair users have comparable lines of sight from which to observe the freshness of the food items sold at Chipotle and the preparation of the food. (See Docket No. 109 [Request for Judicial Notice], No. 2, filed concurrently herewith.) Chipotle moved to dismiss those claims at the pleading stage pursuant to FRCP 12(b)(1) and (6) and Plaintiffs opposed the motion. (See Docket No. 109, Nos. 3 &4.) On April 20, 2007, Judge Leonie Brinkema dismissed the Plaintiffs' claims "involving sight-line problems in Defendant's restaurants" with prejudice. (See Docket No. 109, No. 5.)

Chipotle urges this Court to adopt the same approach as the Eastern District of Virginia and find that there is no line of sight requirement for Chipotle and deny Plaintiff's motion for summary judgment outright.

B. Plaintiff May Not Rely On The General Anti-Discrimination Provisions Of The ADA To Create A Cause Of Action On An Issue That Is Expressly Addressed In The Governing Regulations.

Plaintiff asserts that notwithstanding the fact that the ADAAG expressly limits sight line requirements to fixed seating locations, he may state a claim for Chipotle's alleged failure to ensure equal lines of sight in its food preparation areas under the general anti-discrimination provisions of the ADA. This assertion lacks any legal support. Plaintiff fails to genuinely distinguish the cases cited in Chipotle's original memorandum in support of its motion to dismiss holding that where the ADAAG expressly addresses the structural requirements for a particular facility, a plaintiff may not use the general anti-discrimination provisions of Title III to add new requirements for that facility.

Chipotle's moving brief cites four cases standing for the proposition that where the ADA's structural requirements for a particular facility are addressed in the ADAAG, a plaintiff may not seek to impose new or different requirements under the general anti-discrimination provisions of the ADA. *See* Chipotle's Motion for Summary Judgment *citing U.S. v. National Amusements*, 180 F.Supp.2d 251, 260 (D. Mass. 2001); *Independent Living Resources v. Oregon Arena Corporation*, 982 F.Supp. 698, 746 (D. Or. 1997), *supplemented by*, 1 F.Supp.2d 1159 (D. Or. 1998); *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 968 F.Supp. 210, 217 (D. N.J. 1997), *aff'd. by*, 193 F.3d 730 (3rd Cir. 1999); *Com. of Mass v. E*Trade Access, Inc.*, 2005 WL 2511059, *1 (D. Mass. 2005)). Plaintiff's opposition attempts to distinguish the those cases from the present case, but these arguments fail.

Independent Living Resources held that the Title III standards promulgated by the DOJ are exclusive as to all architectural design issues, including sight line requirements, and may not be expanded by a plaintiff under the general non-discrimination provisions of Title III. Plaintiff contends that this holding is in error because it would allow persons or entities to discriminate against the disabled if they can find a way to do so that the ADAAG does not expressly forbid. This argument is circular and unavailing. Discrimination is a broad term that is defined by the ADA and the interpretive regulations enacted by the DOJ pursuant to its enforcement authority. The ADAAG is part of the DOJ's interpretive regulations and sets out the specific structural requirements for facilities that qualify as places of public accommodation. The question of whether a structural feature of such a facility limits the ability of the disabled to access or enjoy the facility in such a way as to "discriminate" against the

disabled is expressly addressed in the ADAAG. Therefore, to the extent that the ADAAG limits a particular structural requirement, including sight line requirements, to certain locations within a place of public accommodation, a person or entity who owns or operates such a facility does not "discriminate" against disabled individuals by not going beyond those requirements. The court in *Independent Living Resources* based its holding on precisely this line of reasoning, as did the courts in the *National Amusements* and *E*Trade Access, Inc.* cases. *See Independent Living Resources*, 982 F.Supp. at 746 ("compliance with the DOJ regulations, once issued, would similarly suffice to satisfy the requirements of § 12183," which "provides that discrimination includes 'a failure to design and construct facilities ... that are readily accessible to and usable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection *in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter*…") (emphasis in original); *National Amusements, Inc.*, 180 F.Supp.2d at 260 ("the regulations themselves indicate that ADAAG § 4.33.3 is determinative as to whether there is a violation of the general regulatory and statutory provisions"); *E*Trade Access, Inc.*, 2005 WL 2511059 at *4 ("the 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; the DOJ's regulations therefore establish the limits of ADA liability"). As the court in *National Amusements, Inc.* noted, "[c]ompliance with a specific regulation must mean something," and courts should therefore reject attempts to render such compliance entirely meaningless by opening it to challenge under general anti-discrimination provisions of Title III. 180 F.Supp.2d at 260.

Plaintiff's attempt to distinguish *Caruso* is equally unavailing. There is no support for Plaintiff's insinuation that the Third Circuit reversed the portion of the district court's decision holding that the plaintiff could not seek to impose more stringent line of sight requirements than those contained in the ADAAG by simply invoking the general anti-discrimination provisions of Title III. The Third Circuit affirmed the district court's holding that the plaintiff in that case could not state a claim for failure to afford disabled patrons of a concert pavilion sightlines over standing spectators where the relevant ADAAG standard set forth no such requirement. *Caruso v. Blockbuster-Sony Music Entertainment Centre* ("*Caruso II*"), 193 F.3d 730 (3rd Cir. 1999). In so doing, it did not disturb the district court's

holding that a plaintiff may not seek to expand the specific requirements of the ADAAG with respect to a particular structure or facility by means of the more general provisions of Title III of the ADA. The language of Justice Alito's opinion in *Caruso II*, quoted at length by Plaintiff in his opposition, did not address the question of whether the specific requirements of the ADAAG with respect to sight lines may be expanded by means of the general anti-discrimination provisions of the ADA. Rather, that portion of the opinion addressed a separate, unrelated issue - namely, how to apply the ADA's structural impracticability exception to its general requirement that at least one accessible rout connect accessible buildings, facilities, elements and spaces that are on the same site. *Caruso II*, at 737-740. Indeed, nothing in the passage quoted by Plaintiff in any way suggests that the general provisions of the ADA may be used to impose new structural requirements that are not expressly contained in applicable ADAAG standards.

Finally, in arguing that Chipotle's position would somehow make the general anti-discrimination provisions of the ADA superfluous, Plaintiff mischaracterizes the nature of Chipotle's arguments. Chipotle does not ask this Court to read the general anti-discrimination provisions of the ADA out of the Act; rather, Chipotle's position is simply that the general provisions of the ADA cannot be applied in such a way as to create new structural requirements for facilities whose structural requirements are already expressly addressed by the more specific provisions of the ADAAG.

This Court will not be rendering the general anti-discrimination provisions of the ADA meaningless by holding that Plaintiff may not expand the specific requirements of the ADAAG through the general anti-discrimination provisions of the ADA. Those provisions still have their application. Holding that Plaintiff may not expand the specific requirements of the ADAAG by invoking the general anti-discrimination provisions of the ADA will simply ensure harmony between the requirements of the ADA as they have been interpreted by the DOJ in the ADAAG (and by the courts). Such a rule properly recognizes that "courts are ill-equipped to evaluate [building design requirements] and make what amount to engineering, architectural and policy determinations as to whether a particular design feature is feasible and desirable." *Independent Living Resources*, 982 F.Supp. at 746.

C. The Court Should Decline To Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claims.

Under 28 U.S.C. § 1367(c), the Court may decline to exercise supplemental jurisdiction over Plaintiff's state law claims "if [*inter alia*]. . . the court has dismissed all the original-jurisdiction claims." *Patel v. Penman*, 103 F.3d 868, 877 (9th Cir. 1996). So, if the Court grants summary judgment on Plaintiff's sole original-jurisdiction claim – the ADA claim – there will be no original jurisdiction claims remaining. In such case, "the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7 (1988) (emphasis added).

In this case, Plaintiff's only available remedy under the ADA – injunctive relief to compel compliance with the ADAAG – has been mooted. This is because, as shown in Chipotle's moving papers, there is no remaining injunctive relief that Plaintiff may receive for any of the ADA claims in his Complaint. Once a plaintiff has received everything the court would order, his claims are moot. See, *e.g.*, *Pickern v. Best Western Cove Lodge Marina Resort,* 194 F. Supp. 2d 1128, 1130 (E.D.Cal. 2002). Where, as here, the federal ADA claims are moot, the Court should decline jurisdiction over the state law claims. See, *e.g.*, *Wander v. Kaus*, 304 F.3d 856, 858-860 (9th Cir. 2002) (no federal subject matter jurisdiction over California Disabled Persons Act claims where all ADA violations were mooted).

Even if the Court finds that Plaintiff's ADA claim has not been entirely mooted, and that a few ADAAG violations remain, the state law causes of action *predominate* over the sole federal claim. Where "[t]he state injunctive relief Plaintiff seeks is broader than the injunctive relief Plaintiff seeks under the ADA, and Plaintiff seeks damages under California law, . . . 'the state claims substantially predominate over the federal claims.'" *Sanford*, 2006 WL 2669351 at *6 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). All that Plaintiff can receive under the federal claim for an ADAAG violation is a remedial injunction. Under the Unruh Act and DPA, however, Plaintiff stands to gain tens of thousands of dollars, in addition to potentially broader injunctive relief. *Id.* at *5-6 (dismissing state claims because, *inter alia*, "Plaintiff's state claims substantially predominate the litigation"). Thus, the state claims predominate, and the Court should allow a state court to hear the

case. *See also Molski v. Hitching Post I Restaurant, Inc.*, No. CV 04-1077SVWRNBX, 2005 WL 3952248 *7 (C.D.Cal. May 25, 2005) ("the statutory damages available to the plaintiff under the Unruh Act substantially predominate over the relief available under the ADA"); *Organization for Advancement of Minorities with Disabilities v. Brick Oven Restaurant* ("*OAMD*"), 406 F.Supp.2d 1120, 1130-31 (S.D.Cal. 2005) (same analysis).

Moreover, Plaintiff's claims under the Unruh Act and the DPA present novel and complex issues of state law. *Sanford*, *supra*, at *3-4 (declining supplemental jurisdiction over, *inter alia*, Unruh Act and DPA disability claims, because those "state law claims raise novel and complex issues of state law") (citing *Gibbs* and *Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924, 936 (C.D.Cal. 2005) (law for recovering damages under state disability statutes is poorly defined). *See also Molski v. Hitching Post*, *supra*, at *3 *et seq.* ("the damages provisions of the Unruh Act and DPA raise complex issues of unsettled state law which are better left to the California courts to resolve"); *OAMD*, 406 F.Supp.2d at 1130 ("the remedial provisions of the Unruh Act and the California DPA present novel and complex issues of unresolved state law").

Thus the Court should decline to exercise supplemental jurisdiction over the state claims, and dismiss those claims without prejudice.

III.

CONCLUSION

The ADA claims in the Complaint are moot. Thus judgment should be awarded against Plaintiff's ADA claims. Furthermore, Chipotle respectfully requests that, because there are no remaining original jurisdiction claims, the Court decline to exercise supplemental jurisdiction over Plaintiff's predominant state law claims. The Motion should be granted in its entirety.

DATED: May 25, 2007 GREENBERG TRAURIG, LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE COUNTY

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 650 Town Center Drive, Suite 650, Costa Mesa, CA 92626.

On the below date, I electronically filed the **CHIPOTLE MEXICAN GRILL, INC.'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** with the Clerk of the United States District Court for the Southern District of California, using the CM/ECF System. The Court's CM/ECF System will send an email notification of the foregoing filing to the following parties and counsel of record who are registered with the Court's CM/ECF System:

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BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM)

In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system.

☒ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 25, 2007, at Costa Mesa, California.

s/Stacey L. Herter
STACEY L.HERTER