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I. INTRODUCTION

This appeal and the cross-appeal are consolidated with the parties' cross-appeals of the underlying judgment and orders by the District Court ("the district") in Circuit Case Nos. 08-55867 and 08-55946.

The factor most heavily relied upon by the district in reducing Appellant/Cross-Appellee Maurizio Antoninetti ("Antoninetti') fees, and in denying him his costs, was Antoninetti's "degree of success." If Antoninetti should have prevailed on his claims for injunctive relief, the the district's fee ruling must be reversed and remanded for an award of additional fees and expenses and for an award of costs.

II. STATEMENT OF JURISDICTION

On August 22, 2005, Antoninetti filed his Complaint in the United States District Court, Southern District, California, asserting claims for violations of the Americans with Disabilities Act ("ADA"), California Civil Code[1] § 51, et seq. and Cal. Civil Code § 54, et seq. and for injunctive and declaratory relief.[2] The district

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[1] Hereinafter "Cal. Civil Code."

[2] Court Record Docket No. 1, Excerpts of Record, Volume II, Tab 7 (Hereafter, "CR 1 / ER II-7.")

court had jurisdiction over Antoninetti's claims under 28 U.S.C. §§ 1331, 1367, 2201 and 2202. This Court has jurisdiction over this appeal under 28 U.S.C.§ 1291.

This appeal is taken from: 1) the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs [Doc. 241]; Awarding Plaintiff Reasonable Fees and Costs Pending Submission of a Bill of Costs; and Ordering Plaintiff to Submit a Bill of Costs and Contact the Court to Set a Hearing Date; and 2) Order Denying Antoninetti's Motion for Reconsideration [Doc 273][3]; and Granting in Part and Denying in Part Plaintiff's Amended Bill of Costs.[4]

III. ISSUES PRESENTED FOR REVIEW

1. Whether the district's fee award was erroneous because it was based upon a legally and factually erroneous judgment.

2. Whether the district erred in failing to consider the public benefit achieved by Antoninetti's litigation.

3. Whether the district erred in distinguishing claims based upon Chipotle's unwritten and the written policies.

4. Whether the district erred because it failed to consider evidence that addressed the purported "block billing" entries by Antoninetti and it required excessive detail in billing statements.

5. Whether the district improperly denied Antoninetti costs.

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[3] CR 271 / ER I-3.

[4] CR 288 / ER I-2.

IV. STATEMENT OF THE CASE

A. Nature of the Case.

Maurizio Antoninetti uses a wheelchair for mobility. He filed his Complaint for disability discrimination on August 22, 2005, contending that Chipotle violated the ADA because it did not provide him and other wheelchair users with full and equal access to, and enjoyment of, the "Chipotle experience" which involves the opportunity to see a generous display of food items available for selection, to see into the open kitchen and to see, select and direct the making of one's entree.

Antoninetti contended that Chipotle wrongly designed its newly constructed restaurants to include a high wall ("the wall") in front of the food viewing area that obstructed his view to the food preparation area and to the open kitchen, although these visual opportunities are provided to standing customers who can see over the wall and through the transparent sneeze guard provided for their benefit.

Chipotle only made some effort to engage Antoninetti in the "Chipotle experience" during two site inspections, when employees lifted small food samples above the wall. Antoninetti contended that these efforts were insufficient because they were very time-consuming and he still was not able to see his entree assembled or into the open kitchen The small samples were unappetizing, too far away to be of

any visual value and they were not comparable to the twelve-foot long display of food provided to standing customers.[5]

On February 23, 2007, after the close of discovery in this case, Chipotle adopted a written "Customers with Disabilities" policy which Chipotle contended simply "sets forth in writing that which Chipotle *has always done informally.*"[6] Antoninetti was unaware of the written policy until it was referenced in Chipotle's MSJ on April 16, 2007.[7]

B. Proceedings Below.

Chipotle answered the Complaint without raising the affirmative defenses of structural impracticability or that removal of barriers was not "readily achievable."[8] The discovery cut-off date in this case was January 31, 2007.[9] In April of 2007, the parties filed their cross-MSJs.[10] On June 14, 2007, the district denied Antoninetti

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5 CR 89 / ER II-11.

6 CR 96/ ER III-14, par. 3.

7 CR 299 / ER I-4, 6:20-23.

8 CR 3 / ER II-8.

9 CR 58 / ER II-9, 1:21-22.

10 CR 86 - CR 92, CR 161; CR 93 - CR 102; CR 88 / ER II-10; CR 89 / ER II-

summary judgment, holding that Section 7.2(2) of the ADA Accessibility Guidelines ("ADAAG") applied to Chipotle's food viewing areas and the "Chipotle experience." In denying summary judgment, the district defined the issue to be tried - whether the nature of Chipotle's methods of accommodation provide "equivalent facilitation." Nowhere in its Order did the district make a distinction between Chipotle's unwritten and written policies.[11]

Antoninetti moved for reconsideration of the district's ruling, arguing that Chipotle's policy of handing sample cups to customers (defined in Antoninetti's motion as "the Policy") was not an "alternative design or technology" and could not constitute "equivalent facilitation."[12] The district denied the motion.

The parties filed their Amended Pretrial Order on September 18, 2007.[13] On October 4, 2007, the district denied Antoninetti's Motion to Amend the Amended Pretrial Order to include the legal issue that policies of providing methods of accommodation are not "designs and technologies," as referenced at ADAAG § 2.2. The district noted that it had rejected this legal argument in its Order on the MSJs and

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11; CR 90 / ER II-12; CR 92 / ER II-13.

[11] CR 129 / ER I-6.

[12] CR 135-2 / ER IV-21, 2:14-16; 4:12-8:17.

[13] CR 157 / ER IV- 22.

the Order on the Motions for Reconsideration.[14] Antoninetti also filed a Motion in Limine to exclude any evidence of Chipotle's policies of providing methods of accommodation, arguing that policies cannot constitute "equivalent facilitation" under ADAAG § 2.2."[15] The district denied this motion.

Consistent with the district's direction in its Order on the parties' MSJs, Antoninetti introduced evidence at trial that the methods of accommodation provided by Chipotle denied him full and equal access to the "Chipotle experience" because they provide different and separate benefits that are not comparable to the sensory and experiential benefits provided to standing customers.[16]

Following trial, the district entered its Findings of Fact and Conclusions of Law on January 10, 2008.[17] For the first time, the district distinguished between the written and unwritten policies and ruled: 1) *written* policies of providing methods of accommodation can constitute "equivalent facilitation" pursuant to ADAAG § 2.2;

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14 CR 173 / ER IV-23, 2:28-3:4.

15 CR 168-1 / ER IV-24, 2:5-7.

16 CR 268 / ER VII-28, 650:6-658:11.

17 CR 229 / ER I-5.

2) Chipotle's written policy provided "equivalent facilitation" because it imposed *"two new requirements"* not found in the unwritten policy;[18] 3) Chipotle's prior *unwritten* policy did not constitute "equivalent facilitation" because it relied upon the judgment and "common sense" of the crew and managers, rendering the subjective interpretation of the unwritten policy incapable of uniform enforcement;[19] 4) Antoninetti was denied injunctive relief because he had not presented any "credible" evidence that the written policy did *not* provide "equivalent facilitation," he had not proven he intends to return to the restaurants, he failed to prove that the requested

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[18] The district held: "Unlike the prior unwritten policy, the written Customers With Disabilities Policy imposes ***two new requirements*** that render it equivalent facilitation where the prior unwritten policy is not. Under the written Customers with Disabilities Policy, the pre-existing accommodations that Chipotle provided as part of its mission for excellent customer service are set forth plainly ***with two new requirements***: **(1)** it established that it is the *responsibility of the manager on duty at the Restaurant, rather than his or her crew members*, to carry out the policy (by requiring the manager on duty to greet a customer with disability and inquire as to whether he or she desires any accommodations as soon as he or she approaches the tortilla station in the food serving line) and **(2)** it established that *the manager on duty must affirmatively inform the customer with a disability* of the various methods of accommodations options without waiting for the customer to request them through oral communications or non-oral cues." CR 229 / ER I-5, Conclusions of Law (hereafter "CL") 16. (Emphasis added.)

[19] The district held that under the *unwritten* practice "...(Chipotle's) managers *and crew* were to use their *own judgment and common sense* to determine when and how to accommodate a customer in a wheelchair. This subjective interpretation and enforcement of (Chipotle's) informal Policy rendered the unwritten policy incapable of uniform enforcement or a confidant (sic) conclusion that these actions were equivalent facilitation." CR 229 / ER I-5, CL 12.

injunction was in the public interest and he failed to satisfy his burden of proving that the requested injunction (lowering the obstructing wall) was "justified by the relief it will provide;" and 5) Antoninetti could not recover damages for visits that were "litigation-related."

On May 15, 2008, Antoninetti timely filed his appeal of the district's Findings of Fact and Conclusions of Law and earlier rulings (Circuit Case No. 08-55867) arguing, among other things, that the district erred as a matter of law because policies of providing methods of accommodation are not "alternative designs or technologies," as "equivalent facilitation" is defined at ADAAG § 2.2 and as applied to new construction. Chipotle filed a cross-appeal (Circuit Case No. 08-55946) arguing that its adjacent cashier counter satisfied the requirements of ADAAG §§ 7.2(2)(i) or (ii).[20]

Antoninetti timely filed his Bill of Costs on January 29, 2008 in which he sought taxation of costs in the amount of $9,010.73.[21] He also timely filed his Motion for Attorney's Fees on May 5, 2008, in which he sought $524,925.00 in attorney's fees and $25,726.33 in litigation expenses, totaling $550,651.33. The total

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[20] CR 229 / ER I-5, CL 25, CL 27, CL 31, CL 32.

[21] CR 233 to 234-3 / ER VIII-31.

amount initially requested for fees, litigation expenses and costs, then, was $559,662.06.[22]

Chipotle objected to Antoninetti's Motion for Attorney's Fees and his Bill of Costs, arguing that Antoninetti had not succeeded on all of his claims, that Antoninetti's billing statements included 85 instances of alleged "block billing" (out of more than 800 billing entries), and that some claimed costs were objectionable. In opposing Antoninetti's fee motion, Chipotle did *not* argue that any of the time invested by Antoninetti's attorney was unnecessary or that the hourly rate claimed by Antoninetti's attorney was unreasonable.[23] Antoninetti addressed each of the alleged instances of "block billing" in his Reply filed on June 2, 2007.[24]

On August 21, 2008, the district granted in part Antoninetti's Motion for Attorney's Fees and Costs and held that Antoninetti's success was limited because he had only recovered a portion of the damages originally sought,[25] his litigation

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[22] CR 243 to 248 / ER VIII-32.

[23] CR 256 / ER VIII-33.

[24] CR 261-2 / ER VIII-34.

[25] Antoninetti requested damages of $24, 000.00 under Cal. Civil Code § 52 in his MSJ, but elected to recover damages of only $1,000.00 per visit, under Cal. Civil Code § 54.3, at the time of trial. Antoninetti was required to elect between the two statutory remedies. Cal. Civil Code § 54.3(c); *Gunther v. Lin*, (2006) 144

provided no public benefit and the issues relating to Chipotle's unwritten policy were not intertwined with those relating to the written policy. The district ruled that Antoninetti could only recover fees for time spent litigating issues under the unwritten policy and damages.[26] Even though Antoninetti had previously filed his Bill of Costs, the district ordered Antoninetti to "submit a copy of his Bill of Costs so that the Court may determine a reasonable amount for attorney's fees."[27]

On August 29, 2008, Antoninetti filed a Motion for Reconsideration of the Order on his fee motion. Antoninetti also filed his Amended Bill of Costs on September 10, 2008. He requested that the district take judicial notice of his earlier response to Chipotle's objections to "block billing."[28]

Given the ambiguity of the district's August 21, 2008 Order, Antoninetti included his request for attorney's fees and litigation expenses in the Amended Bill of Costs, again in the amount of $550,651.33. He withdrew a claim for some witness

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Cal. App. 4th 223, 232; reversed at *Munson v. Del Taco*, 2009 Cal. LEXIS 5183 (June 11, 2009).

[26] CR 271 / ER I-3, 7:13-16.

[27] CR 271 / ER I-3.

[28] CR 274-4 / ER IX-35; CR 261-2 / ER VIII-34.

fees and reduced the amount of costs to be taxed to $8,920.73, for a total of $559,572.06.[29]

In his Reply to the Amended Bill of Costs, Antoninetti reduced his claim for attorney's fees by 12 hours, which represented the amount of time invested in relation to *non-counter* issues or solely to the written policy. He also reduced his claim for expert fees to $18,879.70, reducing the fees by the amount of time his expert devoted to non-viewing counter issues and to parking at the Encinitas restaurant. Antoninetti also reduced the costs he claimed pursuant to 28 U.S.C. § 1920 to $8,172.45, deducting some copy costs objected to by Chipotle.[30]

The district heard oral argument on the fee motion and the Amended Bill of Costs on October 20, 2008.[31] On February 6, 2009, the district denied Antoninetti's Motion for Reconsideration and granted in part and denied in part Antoninetti's Amended Bill of Costs.[32] The district admitted that it committed factual error when it

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29 CR 274 to 278-2 / ER IX-35.

30 CR 285 / ER IX-36, 10:20-24.

31 CR 299 / ER I-4.

32 CR 288 / ER I-2.

earlier ruled that Antoninetti's lawsuit had not provided any public benefit, but held that it did not rely on the "public benefit" factor to deny fees to Antoninetti.[33]

The district held that Antoninetti had achieved only limited success, that Antoninetti's billing statements made it impossible for the district to identify specific hours associated with unsuccessful claims and the statements included "block billing." The district reduced Antoninetti's fees by 75 percent and denied him costs. The district "relied most heavily" on the "degree of success" obtained by Antoninetti in reducing his fee award.[34] Antoninetti timely appealed the district's rulings.

The district committed clear factual error in holding that Antoninetti reduced his fees by 12 hours in relation to "*counter height* or the written policy." (See CR 288 / ER I-2, 7:12-16.) Antoninetti's Reply states that he attributed the 12 hour reduction to *non-counter* issues or to time related solely to the written policy. (See CR 285 / ER IX-36, 10:20-24.)

C. Collateral Estoppel Effect of the District's Ruling.

The underlying district court case is related to two 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.

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[33] CR 288 / ER 1-2, 4:11-23.

[34] CR 288 / ER I-2, 4:19-21.

CV 08-03002 MMM (OPx) both of which involve the "Chipotle experience" at all Chipotle restaurants in California. The related cases were filed as class actions, but neither case has yet been certified.

The final determination of legal issues in the instant case will, at a minimum, have a collateral estoppel effect with respect to Antoninetti's claims for damages and injunctive relief in the related class action case in which he is a named plaintiff. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Since Chipotle is a common party to all cases, the final determination of legal issues will have a collateral estoppel effect with respect to the claims of class members in the related cases.

Even if the district is affirmed, the ruling in this case will entitle class members to damages for all visits during the period of the unwritten policy, which the district determined violated the ADA. If the district is reversed, and this Court determines that Chipotle should have designed a food viewing area with visual access for people in wheelchairs, this ruling will entitle class members to damages for *all* visits during the effective periods of the unwritten policy *and* the written policy. A reversal will effect the class claims for injunctive relief, as well. *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1, 1131 (9th Cir. 1995).

V. Statement of Facts.

The district adopted, virtually wholesale and verbatim, Chipotle's proposed Findings of Fact and Conclusions of Law, including Chipotle's omission of material undisputed facts and including findings that are contrary to the evidence.[35]

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[35] The reviewing Court is respectfully requested to review the district's Findings closely. The district's Findings (CR 229 / ER I-5), like Chipotle's Proposed Findings (CR 227 / ER VIII-30), do not even reference Antoninetti's undisputed inability to see over the wall. Nor do they reference the design of the kitchen being a "feast for the eyes" and "open" so that customers will "be brought more completely into the dining experience" which are undisputed intended visual benefits provided by Chipotle. (CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 311:8-11.)

The district also adopted Chipotle's misleading and incorrect interpretations of actual testimony, including, for example, at CR 227 / ER VIII-30, Fact 144, adopted by the district at CR 229 / ER I-5, Fact 140:

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

This "Finding of Fact" is contrary to the evidence. Antoninetti *actually* said: "If I knew the quantity, the standard quantity, that would be an improvement." He also testified that he "*did not know*" if the quantity in the souffle (sample) cups was the standard quantity per serving. (CR 267 / ER VI-27, 463:16-24.) He also testified that he could not see, nor was he told, how much of an ingredient was actually placed on his burrito. (CR 267 / ER VI-27, 399:15-400:3, 402:12-21, 403:9-11, 404:2-13, 410:22- 411:7.) Chipotle's only witness to testify on the subject, Ms. Arriaga, admitted that she never told Antoninetti that the amount of an ingredient she was showing him was the amount she actually placed on his burrito. (CR 268 / ER VII-28, 612: 20-23.)

A. The Parties.

Chipotle operates a chain of fast food restaurants, including locations in San Diego/Pacific Beach and Encinitas, California, which are "new construction" as defined by the ADA.[36] Ron Sedillo, Jim Adams, Matt Cieslak and Josefina Garcia were Chipotle managers or directors.[37] Scott Shippey was the person most knowledgeable regarding the design and construction of Chipotle restaurants.[38]

Antoninetti is a paraplegic who uses a wheelchair for mobility.[39] His eye level is 45 inches from the finished floor. He could not see over the wall obstructing the view to the food viewing area.[40] Antoninetti lives very close to the Pacific Beach Chipotle restaurant.[41] Before and after filing his lawsuit, Antoninetti visited the

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36 CR 129 / ER I-6, 2:4-9; CR 157 / ER IV-22, Facts 9, 10; CR 229 / ER I-5, Facts 1, 4-7.

37 CR 157 / ER IV-22, Facts 1-7; CR 229 / ER I-5, Facts 33, 34, 36.

38 CR 157 / ER IV-22, Fact 1; CR 265 / ER IV-25, 14:8-12, 16:2-4.

39 CR 129 / ER I-6, 2:4-5; CR 89 / ER II-11, p.1, par. 2; CR 229 / ER I-5, Fact 8.

40 CR 157 / ER IV-22, Fact 65; CR 89 / ER II-11, pars. 2, 8, 9, 12, 13; 7/ ER VI-26, 377:6-13; CR 268 / ER VII-28, 648:21-22, 649:7.

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

Pacific Beach Chipotle at least six times and the Encinitas Chipotle two times.[42] He wants to return to Chipotle's restaurants to have the "Chipotle experience" - to see all of the wonderful, tasty ingredients on display, to see his burrito assembled and rolled, to make his "perfect burrito," quickly.[43]

Antoninetti would return to Chipotle's restaurants "tomorrow" if the walls were lowered and he had the chance to see the display and presentation that Chipotle provides to standing customers.[44] He has been deterred from returning to the restaurants since October 6, 2006 because the "accommodations" provided during the site inspections were not appetizing or appealing and the experience was awkward and humiliating. If he returned, he would face the same issues.[45]

B. The "Chipotle Experience" for Standing Customers.

Chipotle distinguishes itself from other fast food joints, like Taco Bell, by

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[42] CR 89 / ER II-11, p.7, par. 24; CR 229 / ER I-5, Facts 128, 129, 130, 131, CL14.

[43] CR 89 / ER II-11, p. 7, par. 24; CR 157 / ER IV-22, Fact 41.

[44] CR 267 / ER VI-27, 426:13-15.

[45] CR 89 / ER II-11, 4:9-7:28; CR 267 / ER VI-27, 407:10-21, 412:23-413:25, 426:21- 427:10.

providing its customers with the "Chipotle experience"[46] which allows customers to watch their burritos being made.[47] Customers get to "see, select and direct" what goes into their burritos.[48] They can customize their burritos so that they receive their "perfect burrito".[49] Customers can see the portion sizes placed on their entrees and can determine if they want more or less of an ingredient.[50] Chipotle knows its customers "love to interact" and "watch closely as we put their meal together."[51]

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CR 92 / ER II-13, p. 86 (59:23-60:12), 148:23-149:5; CR 157 / ER IV-22, Fact 45.

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CR 92 / ER II-13, 106:5-12, 109:18-23, 130-134; CR 157 / ER IV-22 Facts 18, 19, 26, 27; CR 268 / ER VII-28, 647:11- 650:3; CR Trial Exhibits / ER VII-29, pgs. 3, 6, 10, 21, 22, 23.

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CR 92 / ER II-13, 114:24-115:24; CR 157 / ER IV-22, Fact 19; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, p.1.

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

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CR 92 / ER II-13, p. 87 (114:17-23), 95; CR 157 / ER IV-22, Facts 26, 27; CR 265 / ER IV-25, 57:1-7, 58:-321, 91:5-23.

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CR 92 / ER II-13, 115:20-24, 132; CR 265 / ER IV-25, 62:14-16, 309:24-310:2; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3.

Chipotle wants its customers to "eat with their eyes".[52] Chipotle provides "the WOW factor" which is, among other things, customers being able to see their burritos being built "right before their eyes."[53]

During the ordering process, customers can see 16 large bins of food and can simultaneously compare different food options, such as the various meat selections.[54] They can decide which of the ingredients is more visually appealing to them.[55] They can determine the freshness of the food, such as whether or not the barbacoa is dry, or the beans have a crust on them.[56] Appearance of the food is so important that Chipotle provides specific details for the "look" of its food.[57]

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52 CR 92 / ER II-13, 115:25-116:2, 132, 133; CR 229 / ER I-5, Fact 57.

53 CR 92 / ER II-13, 121:8-122:4; CR 157 / ER IV-22, Fact 25; CR 268 / ER VII-28, 647:11-650:3; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 6.

54 CR 265 / ER IV-25, 61:19-63:14, 64:3-8. 65:3-11, 67:20-23; CR 266 / ER V-26, 311:3-23; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibits / ER VII-29, 18, 19, 20, 21, 22, 23.

55 CR 265 / ER IV-25, 68:14-18.

56 CR 92 / ER II-13, 146:22-147:15, 155:1-21; CR 265 / ER IV-25, 67:24-68:1, 68:23-25.

57 CR 92 / ER II-13, 132, 133; CR 229 / ER I-5, FF3; CR 265 / ER IV-25, 68:19-69:5; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 3,

Chipotle designed its restaurants so that customers can see into the open kitchen and can see freshly marinated meats being grilled.[58] The open kitchens are designed to be a "feast for the eyes" and are intended "to bring customers more completely into the dining experience."[59] Chipotle prides itself on long lines that "really don't take that long to get through."[60] Chipotle provides customers with "instant gratification."[61] Customers typically go through the line in a minute or less.[62]

C. The Inaccessible Design - the Wall.

Chipotle restaurants are similar in design with respect to the food lines.[63] The 12-foot expanse of equipment on which the food is prepared and presented for view

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[58] CR 92 / ER II-13, 131; CR 266 / ER V-26, 311:8-11; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[59] CR 92 / ER II-13, 131; CR 157 / ER IV-22, Fact 23; CR 265 / ER IV-25, 141:19-22; CR 266 / ER V-26, 308:2-12; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 2.

[60] CR 92 / ER II-13, 135; CR 268 / ER VII-28, 647:11-650:3; CR Trial Exhibit / ER VII-29, 7.

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

[62] CR 92 / ER II-13, 153:14-15; CR 266 / ER V-26, 337:17-22; 345:18-346:3.

[63] CR 88 / ER II-10, Fact 11; CR 157 / ER IV-22, Fact 11.

is approximately 34 inches from the finished floor.[64] Chipotle constructed a 44-inch high wall between the customers and the food viewing and preparation area.[65] A transparent sneeze guard is located on top of the wall and is held in place by a metal strip about 2 inches high, thereby obstructing the view of the food preparation area to a height of 46 inches from the finished floor.[66]

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

ADAAG Figure A3 provides a uniform reference for design not covered by the guidelines and identifies the average eye level of a person in a wheelchair as between 43 and 51 inches from the finished floor.[67] Wheelchair users, with eye levels in this range, cannot see the food items available for selection or the preparation of their entrees.[68]

E. Antoninetti's "Chipotle Experience."

For at least five visits prior to the site inspections of October 6, 2006,

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64 CR 88 / ER II-10, Fact 43; CR 157 / ER IV-22, Fact 34.

65 CR 92 / ER II-13, 38:13-24; CR 157 / ER IV-22, Fact 29.

66 CR 88 / ER II-10, Facts 41, 42; CR 157 / ER IV-22, Facts 33, 36.

67 CR 88 / ER II-10, Fact 49; CR 157 / ER IV-22, Fact 35.

68 CR 90 / ER II-12, pars. 12 to 18; CR 157 / ER IV-22, Facts 37, 38.

Antoninetti was not shown any food ingredients or the making of his entree.[69] At the site inspections, with Chipotle's counsel present, Antoninetti was only shown food items one at a time, after he asked to see them, and he was never shown the making of his entree.[70] Antoninetti has never been able to see the freshness of the ingredients, to compare ingredients to one another, to see his burrito assembled or to fully customize his entree to make his "perfect burrito." He was never told the portion size that was actually being placed on his burrito.[71]

The food samples shown to him only at the site inspections were too small, too far away and were obstructed by the plastic of the cups, the bottoms of the spoons or the crew members' fingers.[72] Seeing food in small plastic cups, or lifted by handfuls or tongfuls, is not appetizing.[73] The accommodation of taking a tray of small cups of food to an adjacent table is unacceptable because it would separate Antoninetti from

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69 CR 89 / ER II-11, par. 16; CR 266 / ER V-26, 375:14-20.

70 CR 89 / ER II-11, par. 17; CR 157 / ER IV-22, Fact 40.

71 CR 89 / ER II-11, pars. 13, 16, 17, 19, 21, 22, 23; CR 267 / ER VI-27, 410:22-411:1.

72 CR 89 / ER II-11, pars. 19, 21, 22; CR 267 / ER VI-27, 399:1-14.

73 CR 89 / ER II-11, par. 22; CR 267 / ER VI-27, 407:10-21.

his companions, make him feel different and is unappetizing.[74]

It took at least three minutes, an uncomfortable amount of time,[75] to show Antoninetti samples of food during the inspections. This amount of time did not include seeing his burrito assembled.[76] It is rare for a customer to take three minutes, a significant amount of time, to complete their order.[77]

F. Chipotle's Written Policy.

Almost five years after construction of the restaurants, Chipotle adopted its written policy on February 23, 2007.[78] The written policy was not made known to Antoninetti until Chipotle filed its MSJ on April 16, 2007.[79] The written policy references some methods of accommodation for people with disabilities[80] and assigns

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

75 CR 89 / ER II-11, par. 20.

76 CR 267 / ER VI-27, 405:7-406:8.

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

78 CR 96 / ER III-14, par. 3; CR 229 / ER I-5, Fact 101.

79 CR 299 / ER I-4, 6:20-23.

80 "Examples of some of the ways we accommodate individuals include: (1) Samples of the food can be placed in soufflé cups and shown or handed to the customer. (2) Some customers may prefer an opportunity to see or even sample

responsibilities to both Chipotle's managers *and to the crew* with respect to accommodating customers with disabilities.[81] It allows Chipotle employees to utilize methods of accommodation that are not specifically addressed in the written policy.[82] No specific methods of accommodation are required for Pacific Beach or Encinitas employees under the written policy.[83] Instead, Chipotle employees may use their *common sense* in devising alternate ways to accommodate customers in

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the food at a table. (3) Customers may simply wish to have the food or food preparation process described to them. (4) Or combinations of the above accommodations with any other reasonable accommodation requested or appropriate for the individual. CR 96 / ER III-14, page 7; CR 229 / ER I-5, Fact 110.

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

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

...**Crew members** are encouraged to inform their Restaurant Manager regarding the experiences of their disabled customers and such experiences will be considered during the performance review process, both for **the crew member** and the manager. CR 96 / ER III-14, 7; CR 229 / ER I-5, Fact 110.

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

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

wheelchairs.[84]

Contrary to the district's ruling, the written policy does *not* "set forth plainly" the "*two new requirements"* integral to the district's decision that the policy constituted "equivalent facilitation."[85] It does *not* state that the managers, rather than the crew members, are responsible for carrying out the policy or that the manager on duty must affirmatively inform customers with disabilities about the available accommodations. It makes *no* mention of utilizing the cashier counter to provide accommodations. Quite simply, it appears that the district did not actually read the written policy but simply adopted Chipotle's representation of the policy in its Proposed Findings of Fact and Conclusions of Law.[86]

G. Chipotle's Failure to Present Material Evidence.

Chipotle offered no evidence in support of its MSJ or at trial on the following:

1) that the "methods of accommodation" (food lifted in spoonfuls, or by tongfuls, or by handfuls, or in plastic cups) provide a comparable or better "Chipotle experience" for wheelchair users;

2) that the accommodations are similar in appearance to, or as appetizing

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

85 CR 229 / ER I-5, CL16, contradicted by actual language of Policy, found at CR 229 / ER I-5, Fact 110.

86 CR 227 / ER VIII-30.

as, a 12-foot long display of 16 bins brimming with food or that they provide equivalent opportunities to determine the freshness or composition of the food items, or to compare the ingredients to one another;

3) the amount of time it would take to perform the accommodations for wheelchair users who also want to see their entree assembled, allowing them to make their perfect burrito by asking for more or less of an ingredient;

4) whether the accommodations provide wheelchair users with any opportunities to see into the open kitchen, to see freshly marinated meats being grilled or to be "brought more completely into the dining experience" or to receive their entrees "quickly;"

5) that it would be structurally impracticable to have designed and constructed the food preparation areas without the offending walls;

6) that modifying the wall was not readily achievable.[87]

H. Fees Allocated Solely to the Unwritten Policy.

Since the written policy was not adopted until February 23, 2007 and was not even made known to Antoninetti until April 16, 2007, no fees, expenses or costs could have been incurred in relation to the written policy prior to April 16, 2007. Antoninetti incurred fees of $229,937.52 prior to April 16, 2007.[88]

I. Antoninetti's Billing Statement.

Antoninetti's billing statement was 90 pages long and included more than 800

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87 CR 265-268 / ER IV-25 to VII-28.

88 CR 299 / ER I-4, 6:13-7:4.

billing entries.[89] Chipotle initially challenged 85 entries as consisting of "block billing." Antoninetti addressed each of the challenged entries in his Reply to his Motion for Attorney's Fees, separating tasks that could be separated and specifically explaining why other entries could not be separated.[90] This further detail was incorporated in Antoninetti's Amended Bill of Costs by Request for Judicial Notice.[91] The first 29 challenged entries involved work performed before April 16, 2007.

VI. SUMMARY OF ARGUMENTS

1) The district's fee award was based upon a judgment that was erroneous as a matter of law and that was premised upon clear factual errors. The district's legally and factually erroneous judgment improperly denied Antoninetti his full fees, expenses and costs.

2) The district committed legal erred in refusing to consider that Antoninetti's litigation provided a substantial benefit to the disabled community.

3) The district committed legal error in holding that issues relating to Chipotle's written policy were not intertwined with issues relating to the unwritten

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89 CR 276-278 / ER IX-35.

90 CR 261-2 / ER VIII-34.

91 CR 274-4 / ER IX-35.

policy.

4) The district committed legal and factual error in holding that Antoninetti engaged in "block billing." Even if some entries could be considered "block billing," the district committed legal error in refusing to consider Antoninetti's separation and explanation of tasks in his Reply to his fee motion and his Amended Bill of Costs. The detail required by the district was excessive.

5) The district committed legal erred in denying Antoninetti costs because he was entitled to them under the ADA as a prevailing party and/or as a matter of right under state statutes.

VII. STANDARDS OF REVIEW

Awards of attorney's fees are generally reviewed for an abuse of discretion. *Watson v. County of Riverside*, 300 F.3d 1092, 1095 (9th Cir. 2002). The reviewing Court only arrives at discretionary review if it is satisfied that the correct legal standard was applied and that none of the district court's findings of fact were clearly erroneous. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1147-48 (9th Cir. 2001).

If the parties contend the district court made a legal error in determining the fee award, then de novo review is required. *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985) ("Any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo."). All factual findings are

reviewed for clear error. *Fischer v. SJB-P.D. Inc*., 214 F.3d 1115, 1118 (9th Cir. 2000).

A decision to deny summary judgment is reviewed de novo. *Brewster v. Shasta County,* 275 F.3d 803, 806 (9th Cir. 2002*)*. The interpretation of the ADA is a question of law subject to de novo review. The allocation of the burden of proof is also reviewed de novo. The decision whether to grant equitable relief under the ADA is reviewed for an abuse of discretion. *Molski v. Foley Estates Vineyard*, 531 F.3d 1043, 1046 (9th Cir. 2008).

The district abuses its discretion when it makes an error of law. *Agostini v. Felton,* 521 U.S .203, 238 (1997). An abuse of discretion is also "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against logic and effect of the facts as are found." *Wing v. Asarco Inc.*, 114 F.3d 986, 988 (9th Cir. 1997). It is clear error if the reviewing court has a "definite and firm conviction that a mistake has been committed." *Husain v. Olympic Airways,* 316 F.3d 829, 835 (9th Cir. 2002). The wholesale and verbatim adoption of one party's findings requires the Circuit Court to review the record and the district court's opinion more thoroughly. *Silver v. Exec. Car Leasing,* 466 F.3d 727, 733 (9th Cir. 2006).

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

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

VIII. ARGUMENTS

A. The District Committed Legal and Clear Factual Errors in the Underlying Judgment and Denial of Summary Judgment.

1) The District Erred in Holding that Policies of Providing Methods of Accommodation Can Be "Equivalent Facilitation" in New Construction.

Congress directed the U.S. Department of Justice ("DOJ") to issue regulations that include standards applicable to facilities covered by the ADA. 42 U.S.C. § 12186(b). The implementing regulations were issued on July 26, 1991, and include architectural standards for newly constructed public accommodations and commercial facilities entitled "the Standards for Accessible Design,"[92] found at 28 C.F.R. Part 36. The *purpose* of the Standards is made clear at ADAAG § 1, which states:

> This document sets guidelines for accessibility to places of public accommodation and commercial facilities for individuals with disabilities. These guidelines are to be applied ***during the design, construction, and alteration*** of

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[92] Referred to herein as "the ADAAG" or "the Standards."

> such buildings and facilities to the extent required by regulations issued by Federal agencies, including the Department of Justice, under the Americans with Disabilities Act of 1990.

ADAAG § 1 (Emphasis added.)

The only justification for the failure to provide an accessible design in the first instance is by showing structural impracticability." *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730, 740 (3rd Cir. 1999).

The purpose of the ADAAG, then, is to establish physical and scoping requirements for accessible facilities that are to be followed at the design and construction phases. Policies of providing methods of accommodation are not applied "during the design and construction" of a building or facility. Rather, they are typically adopted and implemented by operators of places of public accommodation, often long after construction of facilities are completed and often by businesses that had no part in the design and construction of the facilities.

The ADAAG requires that new facilities are designed in the first instance to be accessible so that people with disabilities will not have to rely on human benevolence and the skill, attitude, inclination or judgment of others to provide them with accessibility. Policies of providing methods of accommodation to overcome physical barriers necessarily require reliance on the good will of others to actually provide the accommodations and the judgment of others to provide *adequate* accommodations.

Congress intended the DOJ to provide specific design requirements and it also intended to allow for departures from those technical and scoping requirements. "Allowing these departures will provide public accommodations...with necessary flexibility to *design* for special circumstances and will facilitate the application of *new technologies*." H.Rpt. No. 101-485(II) at 119.

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

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

"When initially proposed, §2.2 read, 'Departures from particular technical and scoping requirements of this guideline by the use of other *methods* are permitted where the alternative *methods* used will provide substantially equivalent or greater access to and usability of the facility.' 56 Fed. Reg. at 2327. (Emphasis added.) Following a notice and comment period, the phrase 'design and technologies' was substituted for the word 'methods.' The Access Board explained that '[t]he purpose of the provision is to allow for flexibility to design for unique and special circumstances and to facilitate the application of new technologies.' 56 Fed. Reg. at 35,413." *Moeller v. Taco Bell Corp*., Case No. C 02-5849 MJJ, U.S. Dist. LEXIS

41256 (N.D. Cal. August 10, 2005) at *5.

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

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

The district erred in holding that policies of providing methods of accommodation can constitute "equivalent facilitation" under ADAAG §§ 2.2 and 7.2(2)(iii). The purpose of the ADAAG would be undermined if builders and designers could rely on an interpretation of "equivalent facilitation" that would allow them to design and construct inaccessible facilities with the hope and prayer that public accommodations would later implement policies of providing methods of

accommodation to overcome the inaccessible design.

The limited case law addressing "equivalent facilitation" under the ADAAG uniformly rejects "policies" as "equivalent facilitation" in new construction. In *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D.Or. 1997), the defendant Arena argued that it had provided "equivalent facilitation" because, although its suites were not ordinarily configured for wheelchair accessibility, it had adopted a written policy of providing accommodations by removing in-fill seats upon request.

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

> Defendant contends that this policy is an "equivalent facilitation." Defendant could not be more mistaken. *An "equivalent facilitation" is an alternative design or technology* that will provide substantially equivalent or greater access to and usability of the facility. Standard 2.2. What defendant proposes is not an "alternative design or technology" that provides equivalent or greater access. Rather, defendant proposes a design that creates less access than is required, but --if given advance notice that a wheelchair user is in route-- defendant will remove some of the barriers and temporarily comply with the ADA. That is unacceptable...
>
> It always has been "possible" to *improvise access*, given advance notice that someone with a wheelchair is coming. You simply had two strong persons standing by to carry the wheelchair user up the stairs that could not be traversed by a wheelchair. However, Congress has served notice through the ADA that such solutions

> no longer are acceptable. *In new construction, the facility must be designed to be accessible from day one…*
>
> *Congress has mandated that newly constructed facilities must be fully accessible from the start.*

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

With respect to the instant case, the ADAAG identifies the average eye level of people in wheelchairs as between 43 and 51 inches from the finished floor. Even with this knowledge, Chipotle designed a facility that, from day one, provides less access because of the wall that prevents people in wheelchairs from seeing the open kitchen, the display of food and the assembly of entrees behind and below the wall.

The district committed legal error in holding that the later-adopted written policy constitutes "equivalent facilitation" because there was no evidence that Chipotle could not have designed its food viewing area to be accessible from "day one" and Chipotle waived any such affirmative defense.[93]

2) The Written Policy Does Not Say What the District Said it Says.

The written policy cannot constitute "equivalent facilitation" not only because policies are not "designs and technologies" but because it undeniably suffers the same failures as the unwritten policy and the district committed clear factual error in holding otherwise. Contrary to the district's holding, the written policy does *not*

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[93] CR 3 / ER II-8.

plainly set forth the "*two new requirements*" on which the district relied in distinguishing the written policy from the unwritten policy and in determining the written policy provided equivalent facilitation.

In fact, the written policy clearly states *the opposite*: crew members *and* managers are responsible for providing accommodations to customers. The written policy does *not* require the manager on duty to affirmatively inform customers with disabilities about the availability of accommodations. Rather, it states that crew members *or* managers *may ask* customers if they want to be accommodated.[94] Because the district's interpretation that the written policy imposes "two new requirements" is contradicted by the actual language of the policy, this reviewing Court can only be left with a "definite and firm conviction that a mistake has been committed." *Husain v. Olympic Airways, supra*.

Further, Chipotle's own witnesses confirmed that the *written* policy, like the unacceptable unwritten policy, allows employees to use their own judgment and common sense to devise accommodations and allows the use of methods not before the court for review and consideration.[95] The written policy also fails to require that

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94 CR 229 / ER I-5, Fact 110, CL 16, CL 17.

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

people in wheelchairs be provided the opportunity to see the assembly of their entrees so that they can customize their entrees like other members of the general public. The policy and accommodations provide no visual access to the "open" kitchens so that customers can be brought "more completely into the dining experience."

If policies *can* constitute "equivalent facilitation" in new construction, Antoninetti was entitled to injunctive relief compelling modification of the written policy so that its language reflects the "two new requirements," so that it places limitations upon the methods of accommodation to be utilized by the managers and so that access to the open kitchen is provided. The district erred in failing to order Chipotle to modify the written policy if policies can constitute equivalent facilitation.

3) Antoninetti Was Entitled to Receive the Same Benefits, Privileges, Accommodations, Goods and Services as Other Standing Customers.

Even assuming arguendo that Chipotle is entitled to rely on the "equivalent facilitation" option under ADAAG Sec. 7.2(2)(iii), the district committed a clear error of fact because Chipotle failed to establish that its methods of accommodation satisfy the definition of "equivalent facilitation."

The language of Title III itself precludes a reading of the "Equivalent Facilitation" provision that would allow public accommodations to provide *separate* or unintegrated benefits or *different* benefits. (*See*, *Caruso*, *supra,* at 739, 740, citing

42 U.S.C. § 12182(b)(1)(A)(iii) - discriminatory to provide a *separate* benefit unless necessary to provide equal benefit); 42 U.S.C. § 12182(b)(1)(B) - benefits of a public accommodation must be provided in the most integrated setting appropriate to the needs of the individual; and 42 U.S.C. § 12182(b)(1)(C) - notwithstanding the existence of *separate* or *different* programs or activities . . . an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not *separate* or *different*.)

The undisputed facts prove that Chipotle's methods of accommodation provide people in wheelchairs with access to completely *different* benefits and experiences than are available to the general public - small samples of food on a tray or lifted by spoonfuls versus a twelve-foot long expanse of food on display. The methods also provide *separate* benefits and experiences - small samples displayed in the dining area versus traveling along the same ordering line utilized by the general public.

Here, the district committed clear factual error and legal error because the benefits offered to people in wheelchairs are *different* (food shown or provided in small, plastic cups) and *separate* (displayed at adjacent tables), in violation of the general anti-discrimination provisions of the ADA. *See,* 42 U.S.C. § 12182(b).

4) The District Misapplied the Standards.

(a) ADAAG § 7.2 Does Not Apply to the "Chipotle Experience."

The district correctly held that ADAAG § 7.2(2)(i) did not apply to this case because the lowered transaction counter was not a "lowered portion" of the food preparation area since the two areas serve different functions.[96] 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.[97]

The district erred, however, when it held that ADAAG § 7.2(2) applies to this case in the first instance. Section 7 of the ADAAG is entitled "Business and Mercantile" and addresses "areas used for business transactions with the public." Section 7.2(2) refers to "counters that may not have a cash register but at which goods or services are sold or distributed."

ADAAG § 7.2(2) cannot apply to Chipotle's food preparation areas and open kitchens because the visual and sensory components integral to the Chipotle Experience are not "business transactions" as that term is commonly used and interpreted.

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[96] CR 129 / ER I-6, 14:20-22.

[97] CR 129 / ER I-6, 16:8-13.

Instead, the visual and experiential elements of the Chipotle Experience are the very sorts of "privileges, advantages, or accommodations" that are often provided by public accommodations *in addition to* the goods and services that are encompassed by the general anti-discrimination provisions of the ADA. It defies logic that § 7.2 can be interpreted to apply to situations where sensory benefits are *intended* to be provided to the general public if the application would create a denial of access to those additional important sensory benefits.

(b) ADAAG § 4.33.3 and Figure A3 Apply to the "Chipotle Experience."

There is no ADAAG Standard which specifically addresses "we serve you at your direction while you watch buffet lines and while you look into the open kitchens."[98] ADAAG Figure A3, however, details the average eye levels for people in wheelchairs and ADAAG § 4.33.3 (the line of sight Standard) is specifically incorporated into the requirements relating to restaurants, which are found at Section 5 of the ADAAG, entitled "Restaurants and Cafeterias."

ADAAG §5.1 states that "restaurants and cafeterias shall comply with the

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

requirements of 4.1 to 4.35," obviously including § 4.33 within the compliance parameters. Section 4.33 is entitled "Assembly Areas" and was always intended to include more than just stadiums and theaters.[99] "Assembly Area" was even given specific meaning in the ADAAG and is broadly defined as "a room *or space* accommodating a group of individuals for recreational, educational, political, social, or amusement purposes, *or for the consumption of food and drink*." ADAAG § 3.5. Line of sight requirements, which are incorporated into the restaurant and cafeteria requirements, are set forth at ADAAG § 4.33.3.[100]

Restaurants, then, are assembly areas, are governed by the Standards specifically applicable to assembly areas (ADAAG §4.33) and are subject to the line of sight requirements of ADAAG § 4.33.3. Chipotle's "we serve you at your direction while you watch buffet line" and its "open kitchen" are exactly the sorts of

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

[100] Section 4.33.3 states in pertinent part:

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

situations that explain the "line of sight" requirement in restaurants and are logically the reason that "assembly areas" include "places where food is consumed."

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

If the ADAAG completely fails to address a particular situation, element, design or feature, the general anti-discrimination provisions of the ADA[101] and the regulations[102] still require that a public accommodation either provide an accessible design in the first instance, with reference to the general provisions of 28 C.F.R. § 36.401, or that a public accommodation remove architectural barriers where removal is readily achievable when the public accommodation is presented with an inaccessible element that it did not design or create.

The DOJ provided notice to designers and builders that they will be required to provide accessible and usable elements and facilities, even in the absence of a specific Standard:

> "the rule requires, as does the statute, that covered newly constructed facilities be readily accessible to and usable by individuals with disabilities.... To the extent that a ***particular type or element*** of a facility is *not specifically addressed by the standards,* the language of this section (Sec. 36.401) is the safest guide."

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[101] Codified at 42 USC § 12182(a).

[102] Subpart B (General Requirements - 28 C.F.R. §§ 36.201-36.213) and Subpart C (Specific Requirements - 28 C.F.R. §§ 36.301-36.310).

(ADAAG, Appendix B,[103] page 621. (Emphasis added.))

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

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

ADAAG, Appendix B, p. 604, right column.

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

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

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

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[103] 28 C.F.R. Part 36, Appendix B relied upon by the Ninth Circuit in *Molski v. M.J. Cable, Inc.* 481 F.3d 724, 730 (9th Cir. 2007).

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

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

> "Purchase or *modification* of equipment is required in certain instances by the provisions of §§ 36.201 and 36.202. For example, an arcade may need to provide accessible video machines in order to ensure full and equal enjoyment of the facilities and to provide an opportunity to participate in the services and facilities it provides. *The* ***barrier removal requirements*** *of Sec. 36.304 will apply as well...."*

Appendix B, p. 616, left column.

If the reviewing Court determines that ADAAG §§ 4.33.3, 5.1, 7.2(2) and Figure A3 are not applicable to the architectural nature of the "Chipotle experience," Chipotle was still required to provide an accessible design in the first instance by reference to the general provisions that require a facility to be "accessible to and usable by" people with disabilities. Certainly any designer with even modest experience could determine that a 46-inch high wall would block the view of wheelchair users with eye levels below that height, particularly if a view was required

to an area behind and below the wall.

Moreover, if Chipotle was unaware of this basic fact, once Chipotle was advised by its customers, as early as 2002, that wheelchair users could not see the food preparation area,[104] Chipotle was required to lower or modify the wall under 28 C.F.R. § 36.304, if it was readily achievable to do so. Chipotle waived any defense that barrier removal was not readily achievable.

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

(d) The District Imposed Improper Burdens of Proof on Antoninetti.

Antoninetti was entitled to injunctive relief because he sought a statutorily authorized injunction, rather than an equitable injunction. The standard requirements for equitable relief need not be satisfied when an injunction is sought to prevent the violation of a federal statute which specifically provides for injunctive relief. *Trailer*

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[104] ER II-15, p. 59 - 64. (Chipotle's search for emails was inexplicably limited to the time period of 7/11/02 to 8/21/06 - see ER II-15, top of p.59)

Train Co. v. State Bd. of Equalization, 697 F.2d 860, 869 (9th Cir. 1983), cert. denied, 464 U.S. 846, 78 L. Ed. 2d 139, 104 S. Ct. 149 (1983).

In *Long v. Coast Resorts Inc.*, 267 F.3d 918 (9th Cir. 2001), the Ninth Circuit raised, without deciding, the issue of whether a court has equitable discretion in fashioning relief for violations of the ADA's new construction requirements:

> The magistrate judge's ruling was in error. In contrast to grandfathered facilities, the ADA requires that newly constructed facilities be "readily accessible and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1). **We need not decide whether the ADA forecloses the possibility that a court might exercise its equitable discretion in fashioning relief for violations of § 12183(a), see, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978), because there is no room for discretion here even if it exists.** This violation resulted in the very discrimination the statute seeks to prevent: it denied individuals with disabilities access to public accommodations. Moreover, the only statutory defense for noncompliance -- structural impracticability -- does not apply to the Orleans because the terrain on which it is constructed has no unique characteristics which would make accessibility unusually difficult to achieve. See 42 U.S.C. § 12183(a)(1). Thus, we reverse the magistrate's determination that, because the Orleans demonstrated obedience to the spirit of the ADA, plaintiffs were not entitled to injunctive relief.

Long v. Coast Resorts, Inc., supra, at 923 (emphasis added.)

If Congress wishes to do so, it can require the federal courts to automatically enjoin actual or imminent violations of a statute without an individualized balancing of the equities. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*; Tennessee Valley Authority v. Hill*, 437 U.S. 153, 57 L. Ed.

2d 117, 98 S. Ct. 2279 (1978). *Tennessee Valley Authority* is the leading case sustaining such a congressional restriction of the courts' equitable discretion. In that case, the district court was obliged by the statute to issue the injunction against the completion of a dam, regardless of the costs or consequences of doing so, and regardless of the result that it would have reached under the traditional equitable balancing test.

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

> In the case of violations of ...section 12183(a) (new construction) of this title, injunctive relief *shall* include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. (Emphasis added.)[105]

Cost is not a defense to complying with new construction standards in the first instance and should not be a factor in fashioning a remedy for violations of the new construction Standards. Requiring an aggrieved person with a disability to prove that the benefit of removing a barrier is outweighed by the cost of removal would

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

effectively provide violating defendants with a "cost" defense.

In *Oregon Arena,* the court addressed the consideration of cost with respect to new construction and to existing facilities:

> This particular discussion (about Technical Assistance Manual ("TAM") § III-4.4600) concerned the requirements for removing barriers in existing construction. The Rose Garden is subject to the rules for new construction. Consequently, the "readily achievable" qualification is inapplicable here, since new construction must meet the highest standards. See, H.R. Rep. No. 101-485(III) at 60 (explaining distinction between the two standards), (citation omitted). In contrast to existing construction, there is **no cost defense to the requirements for new construction.** TAM § III-5.1000. (emphasis added.)

Oregon Arena, *supra,* at fn. 38.

The district erred in holding that Antoninetti had the burden of proving that modification of the walls was outweighed by the benefit provided by the modification not only because the balancing of interests was inappropriate, but also because Chipotle waived the affirmative defenses of structural impracticability and that barrier removal was not readily achievable.

(e) The District Erred in Holding, Without Any Evidentiary Support, that Chipotle Met its Burden of Proving the Methods of Accommodation Provided Equivalent Facilitation.

Where a defendant deviates from the standards and attempts to provide "equivalent facilitation," the burden is *on the defendant* to show that equivalent

facilitation is provided. *Oregon Arena, supra*, at 727.

Here, the district reached the legal conclusion that Chipotle's written policy was "equivalent facilitation,"[106] but it made no factual findings upon which such a conclusion could be reached. The record undeniably reflects that Chipotle failed to offer any evidence refuting Antoninetti's declaration and testimony that he has been deterred from returning to the restaurants because Chipotle's methods of accommodation, provided only during the site inspections, were awkward, humiliating, unappetizing, different in quality, location, time and experience and Antoninetti believed that, if he returned, he would face the same intolerable situation.[107] Instead, Chipotle only offered evidence that it has adopted its written policy and that it has received no complaints since the adoption of the written policy.

Chipotle, however, was not required to simply prove that it *provided* methods of accommodation, it was required to prove those methods of accommodation were substantially equivalent or equal to the experience provided to the general public. An absence of complaints does not establish the methods of accommodation are equivalent. (*See, Oregon Arena, supra*, at 764 - "The wheelchair user may also be

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106 CR 229 / ER I-5, 35:6-13.

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

hesitant to make a fuss, or to request special accommodations.")

As a matter of law, this Court should find that simply proving that no one complained about accommodations is insufficient to prove the accommodations are "equivalent."

(f) The District Erred in Holding, Contrary to the Parties' Stipulation, That Antoninetti Did Not Prove He Wanted to Return to the Restaurants.

The district's denial of injunctive relief was also based upon the clearly erroneous factual finding that Antoninetti failed to prove his intent to return to the restaurants[108] because it is contrary to the Parties' stipulation that Antoninetti wants to be able to have the "Chipotle experience" provided to the general public, which necessarily requires an intent to return to the restaurants.[109] The district was required to accept these stipulated facts as proven.[110]

The district also improperly relied upon Antoninetti's "litigation history" to determine his credibility. "(B)ecause the district court focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent to return to the

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[108] CR 229 / ER I-5, 35:22-36:7.

[109] CR 157 / ER IV-22, 5:28-6:6.

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

Best Western Encina, we reject its purported adverse credibility determination." *D'Lil v. Best Western*, 538 F.3d 1031, 1040 (9th Cir. 2008).

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

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

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

Cal.Civ. Code § 54.1(d).

Recovery under the ADA is not limited to just "customers and clients," as this Court noted in *Molski v. M.J. Cable, Inc.*:

> Title III's broad general rule contains no express 'clients or customers' limitation ..." (Citation omitted)... the phrase 'clients or customers,' which only appears in 42
>
> U.S.C. § 12182(b)(1)(A)(iv), is not a general circumscription of Title III and cannot serve to limit the broad rule announced in 42 U.S.C. § 12182(a)." Id. at 121. Rather, ..."[t]he operative rule announced in Title III speaks not in terms of 'guests,' 'patrons,' 'clients,' 'customers,' or 'members of the public,' but instead broadly uses the word 'individuals.'" Id.
>
> Accordingly, Molski did not need to have been a client or customer of Cable's to be an "individual" entitled to the protections of Title III. One need not be a client or customer of a public accommodation to feel the sting of its discrimination.

Molski, supra, at 733.

Antoninetti, then, was not even required to be a customer to prove his rights under the ADA were violated, thus entitling him to damages. Even if Antoninetti *were* required to be a customer of Chipotle to avail himself of the protections of the ADA and, consequently, to receive damages under state law, "customer" is defined as "one that purchases a commodity or service." "Bona fide" is defined as "made in good faith without fraud or deceit." *www.merriam-webster.com.*

There is no dispute that Antoninetti was a customer of Chipotle during his visit on October 1, 2006 and during the two site inspections of October 6, 2006. Nor did Chipotle offer any evidence that Antoninetti's purchases during these visits were made in bad faith or with fraud or deceit. The district's rejection of these visits because they were "litigation-related" imposes a limitation on damages not found in Cal. Civil Code § 54.3 and Antoninetti was entitled to additional damages of at least $3,000.00, which would have resulted in recovery of all or most of the damages sought at trial.

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

Even assuming policies can constitute "equivalent facilitation," Antoninetti was still entitled to summary judgment in his favor because Chipotle offered no

evidence to refute Antoninetti's evidence that he had not been provided any accommodations during pre-site inspection visits, or that the accommodations provided at the site inspections provided Antoninetti a different, separate and unequal "Chipotle experience."

To defeat a motion for summary judgment, Chipotle had to set forth specific facts showing there was a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 250. Chipotle had the "heavy" burden, in opposing Antoninetti's MSJ, of proving that its "methods of accommodation" provided "equivalent facilitation." *Oregon Arena, supra,* at 727. Antoninetti was entitled to summary judgment if he pointed to an absence of evidence as to an issue upon which Chipotle bore the burden at trial. *US v. AMC Entertainment, Inc*., 232 F.Supp.2d 1092, 1098-1099 (C.D. Cal. 2003).

In his MSJ and at trial, Antoninetti proved that he could not see over the wall, (which prevented him from seeing into the open kitchen), that he was offered no accommodations prior to the site inspections, that the methods of accommodation offered during the site inspections were different and separate than those provided to standing customers, that the accommodations were unappetizing and made him feel very uncomfortable because he was disrupting the flow of the ordering line, and that he wanted to have the "Chipotle experience," which rationally requires a return to

Chipotle's restaurants.

Chipotle offered no evidence at any time establishing the methods of accommodation *were* appetizing, that small sample cups of food *do* allow wheelchair users to see the quality, composition and freshness of the food, that showing samples of food allows wheelchair users to "eat with their eyes" and to be "brought more completely into the dining experience." Chipotle offered no evidence regarding the amount of time required to assemble a burrito in front of a wheelchair user, or that the methods of accommodation provide wheelchair users with "quick gourmet."

Based upon this absence of evidence, Antoninetti was entitled to have summary judgment entered in his favor. The district erred in denying him summary judgment or injunctive relief following trial. Those erroneous rulings led to the district's determination that Antoninetti had achieved only partial success and was entitled to only a fraction of his fees and expenses and was not entitled to costs.

B. Antoninetti's Lawsuit Provided Substantial Benefits to the Disabled Community.

The district committed legal error in refusing to consider the public benefit and other tangible results from Antoninetti's litigation.[111] Although the district ultimately acknowledged that Antoninetti's lawsuit resulted in accessible modifications to

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[111] CR 271 / ER I-3, 5:21-22.

Chipotle's parking lots, it refused to consider these and other benefits in its award of fees.[112] The district ignored the collateral estoppel effect of its ruling and the significant legal issues that were raised and decided in Antoninetti's lawsuit. *(See, Wilcox v. City of Reno,* 42 F.3d 550, 553 (9th Cir. 1994).)

By its very nature, this case involved legal issues which are so important to the disabled community that seven disability advocacy organizations joined in an amicus brief in the consolidated cross-appeals. Antoninetti achieved not only a monetary benefit for himself, but he also achieved a major benefit for people with disabilities. The district's ruling, even if affirmed, advanced the public interest by establishing that unwritten, informal policies of providing methods of accommodation violate the rights of people with disabilities under the ADA and are not "equivalent facilitation" with respect to new construction.[113]

That ruling established a finding of fact that will have collateral estoppel effect in the related class actions (one of which was consolidated with the instant case by the district), negating the need for extensive discovery in, and litigation of, the related lawsuits. That is, the class members' right to recover damages based upon Chipotle's failure to comply with the ADA has effectively been determined by Antoninetti's

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[112] CR 288 / ER I-2, 4:3-10; 4:21-23.

[113] CR 229 / ER I-5, CL 12.

suit. While the scope of damages may well be increased by the ruling on the related appeal, at a minimum the class members are entitled to damages for visits when the unwritten policy was in effect.

Further, if the district had not committed error and Antoninetti had prevailed on the issues addressed in his related appeal, his lawsuit would have established important case law establishing that written *and* unwritten policies of providing methods of accommodation are *not* "equivalent facilitation" under the design and scoping requirements of the ADAAG and, more specifically, ADAAG §§ 2.2 and 7.2(2)(iii). His suit would also have established the standards and burdens of proof with respect to obtaining injunctive relief in new construction, the availability of damages for "litigation-related" visits, the application of the general and specific anti-discrimination provisions of the ADA to the determination of "equivalent facilitation" or in the absence of a Standard directly on point, and/or the right of class members to recover for damages for visits after the written policy went into effect.

The district erred in failing to consider the significant public benefits of Antoninetti's suit in determining his "degree of success."

C. The District Erred in Reducing Fees Based Upon "Written Policy" Claims Versus "Unwritten Policy" Claims.

There is a two-step process for analyzing a reduction of an attorney fees award for "limited success." The first step is to consider whether the plaintiff failed to

prevail on claims that were unrelated to the claims on which he succeeded. Claims are "unrelated" if they are *entirely* distinct and separate from the claims on which the plaintiff prevailed.

The second step is to consider whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. In answering that question, a district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. A plaintiff may obtain excellent results without receiving all the relief requested. *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001).

In a lawsuit where the plaintiff presents different claims for relief that "involve a common core of facts" or are based on "related legal theories," the district court should not attempt to divide the request for attorney's fees on a claim-by-claim basis. (Citation omitted) Instead, the court must proceed to the second part of the analysis and "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." (Citation omitted). *McCown v. City of Fontana*, 550 F.3d 918, 923 (9th Cir. 2008).

Where a plaintiff's successful and unsuccessful claims are "inextricably

intertwined" and the plaintiff achieves a substantial portion of the benefit sought from the suit, a fee award should not be reduced on the ground of partial success. *Passantino v. Johnson & Johnson*, 212 F.3d 493, 518 (9th Cir. 2000) (affirming fee award entered by district court after finding that reduction was not warranted where the time spent on plaintiff's unsuccessful claims contributed to her success on the remaining claim).

The district erred when it made a false distinction between Antoninetti's "unwritten" and "written" policy claims, denying Antoninetti fees on that basis.[114] First of all, the district *itself* never distinguished between the written and unwritten policies in its ruling on the parties' Motions for Summary Judgment. No distinction was appropriate because Chipotle contended that its written policy simply "set forth in writing that which we have *always done informally*..."[115] In fact, Chipotle contended that the *same* methods of accommodation were offered under the informal, verbal policy as under the written policy, but that the written policy simply articulated these practices "better."[116]

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114 CR 271 / ER I-3, 6:24 -7:5.

115 CR 96 / ER III-14, par. 3.

116 CR 267 / ER VI-27, 554:7-13.

In denying summary judgment, the district specifically identified *the* issue to be tried: whether the *nature* of Chipotle's accommodations met the standard for "equivalent facilitation." The district clearly stated:

> "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.... On the other hand... (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."*[117]

The district did *not* deny summary judgment because a question of fact existed regarding whether the *written* policy would provide equivalent facilitation where the *unwritten* policy would not. Following the district's direction, Antoninetti offered evidence at trial on the paramount issue - the nature and quality of Chipotle's methods of accommodation and whether those accommodations provide wheelchair users with an experience comparable to that provided to standing customers. The determination of these issues requires the *same analysis* and consideration of the *same core facts,* regardless of whether those accommodations are provided pursuant to an informal verbal directive or because of words on a piece of paper.

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[117] CR 129 / ER I-6, 17:13-18:2.

Antoninetti offered evidence that the "Chipotle experience" offered to the general public provides access to "the open kitchen" and the right to "see, select and direct" the making of the "perfect burrito." He proved that the design of the food viewing area provides no visual access to these sensory and experiential benefits for people in wheelchairs. He also proved the nature of the experiences provided to him during his several visits - nothing for the first five visits and only a limited view of small samples held above his head during two site inspection visits.

These facts provided the basis for Antoninetti's claim that his rights under the ADA had been violated during his visits, that he was deterred from returning to the restaurants, and they supported his argument that the walls must be modified to provide equal access to people in wheelchairs. The core facts, then, were the same in relation to the written and unwritten policies.

The district's failure to find these claims inextricably intertwined was legally and clearly factually erroneous.

Further, at trial Antoninetti offered no evidence regarding the written policy and offered no distinction between the written or unwritten policies. His counsel specifically addressed the written policy only in cross-examination of Chipotle's witnesses, which consumed less than 20 minutes of time.[118] The district's reduction

[118] CR 265-268 / ER IV-25 to ER VII-28, and trial exhibits.

of fees by 75 percent, when the district itself found that Antoninetti offered no evidence regarding the "cost versus benefit" factor of injunctive relief (disputed by Antoninetti) was improper and not rationally related to the time invested by Antoninetti's counsel on the "unsuccessful injunctive relief claim."

D) The District Erred With Respect to Purported "Block Billing" Entries.

The use of block billing does not justify an across-the-board reduction of fees. *Welch v. Metro. Life Ins. Co., Inc.*, 480 F3d 942, 948 (9th Cir. 2007). An order reducing fees must set out the degree of the challenged billing or explain the relationship between the number of hours improperly billed and the size of the reduction. *Sorenson, supra*, at 1146.

"Trial courts must recognize how lawyers work and how they notate their time. *It must be remembered that the ultimate inquiry is whether the total time claimed is reasonable." Smith v. District of Columbia*, 466 F. Supp. 2d 151 (D.D.C. 2006). (Emphasis added)

Even if any of Antoninetti's time entries qualify as "block billing," Chipotle only identified 85 of more than 800 entries which it contended were "block billed." The district erred in making a 75 percent across-the-board reduction of Antoninetti's fees based, in some indeterminate part, on the alleged "block billing." *Welch, supra.*

Further, the district required a level of detail that was unreasonable and ignored

Antoninetti's further allocation of "block billed" entries. Antoninetti explained that many of the "block billed" entries were for tasks that could not be "separated out" because they were performed concurrently. Research was conducted *during* the course of writing briefs or preparing outlines, for example. Many, if not most, attorneys research case law through on-line databases and cut and paste into documents directly from databases *while* drafting documents. The olden days are long gone when attorneys would travel to the law library and manually research cases for use back at the office and research and drafting tasks were distinctly and separately performed.

Requiring attorneys to account for each time they switch screens to conduct research, while concurrently writing a brief or creating an outline, would have two undesirable results: their fee petitions will be higher and the lawyers will simply waste precious time doing menial clerical tasks. *Smith v. District of Columbia*, *supra*, at 158.

E) Antoninetti Was Entitled to Recover Costs.

The district awarded damages to Antoninetti pursuant to Cal. Civil Code § 54.3, but denied him costs pursuant to 28 U.S.C. § 1920. California Code of Civil Procedure § 1032 provides for the recovery of costs by the prevailing party as matter of right. The "prevailing party" is defined as "the party with a net monetary

recovery." *See* Sec. 1032(a)(4). Pursuant to Sec. 1032(b), Antoninetti, as the prevailing party, was "entitled as a matter of right to recover costs in any action or proceeding." The district erred in denying Antoninetti his costs.

Further, if the district had not committed legal and factual error in the underlying judgment and rulings, Antoninetti would have been entirely successful. He should recover all of his claimed costs.

VIII. CONCLUSION

Antoninetti respectfully requests that this Court reverse the district's Order denying Antoninetti's Motion for Attorney's Fees, in part, and that it remand this case to the district with an instruction to award Antoninetti all of his attorney's fees, litigation expenses and costs.

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STATEMENT OF RELATED CASES
FOR 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 13,991 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: June 16, 2009 By: S/ AMY B. VANDEVELD
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on June 16, 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 Excerpts of Record, Volumes I - IX, 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 two-day mail on June 15, 2009 for guaranteed delivery on June 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.

Dated: June 16, 2009

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