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

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURIZIO ANTONINETTI,

Plaintiff, Appellant, and Cross-Appellee,

v.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant, Appellee, and Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF CALIFORNIA
Case No. 05 CV 1660 J (WMc)
NAPOLEON A. JONES, Judge

SECOND BRIEF ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT OF CHIPOTLE MEXICAN GRILL, INC.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to enable the Judges of this Court to evaluate possible disqualification or recusal, Chipotle Mexican Grill, Inc. hereby certifies that: (1) it is a publicly traded company; and (2) it has no parent corporation and no other publicly held corporation owns 10% or more of its stock.

Date: July 17, 2009 Respectfully submitted,

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JURISDICTIONAL STATEMENT

Appellee/Cross-Appellant Chipotle Mexican Grill, Inc. ("Chipotle") agrees with and hereby incorporates by reference the jurisdictional statement of Appellant/Cross-Appellee Maurizio Antoninetti ("Antoninetti"). In addition, Chipotle states as follows:

On January 10, 2008, the District Court entered its Findings of Fact, Conclusions of Law, and Judgment, holding that (1) Chipotle's prior unwritten practice of accommodating customers with disabilities did not constitute an equivalent facilitation, but (2) Chipotle's new written Customers with Disabilities Policy does constitute an equivalent facilitation.[1] Based on these findings, the District Court (1) awarded Antoninetti $5,000 in statutory damages under his California Disabled Persons Act claim based on his five visits to Chipotle before Chipotle had implemented the written Customers with Disabilities Policy and (2) denied Antoninetti's claims for injunctive relief.[2]

On January 22, 2008, Antoninetti filed a Motion to Amend Findings of Fact and for Additional Findings of Fact. The District Court denied that motion by order dated April 21, 2008. As of that date, the Findings of Fact, Conclusions of Law, and Judgment became a final, appealable order.

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[1] ER I-5.
[2] *Id*.

Antoninetti filed his notice of appeal of the District Court's April 21, 2008 judgment on May 15, 2008, and Chipotle filed its notice of cross-appeal on May 29, 2008. That cross-appeal (Ninth Circuit Case Nos. 08-55867, 08-55946) has been fully briefed by the parties and is presently pending before this Court.

Antoninetti filed a Motion for Attorneys' Fees And Costs in the District Court on May 5, 2008. On August 21, 2008, the District Court entered an order: (1) granting in part Antoninetti's Motion for Attorneys' Fees and Costs, in which it found that Antoninetti was a prevailing party because he had prevailed on two minor issues in the case and that he was therefore entitled to reasonable attorneys' fees for those issues. Specifically, the District Court found that Antoninetti had prevailed and should receive reasonable attorneys' fees for his claims under the California Disabled Persons Act ("CDPA") and the Americans With Disabilities Act ("ADA"), that he was not provided equivalent facilitation under Chipotle's prior unwritten practice of accommodating customers, and that the parking lots of Chipotle's Pacific Beach and Encinitas Restaurants did not meet the technical requirements of the Americans With Disabilities Act Accessibility Guidelines[3] ("ADAAG").[4] In the same decision, the District Court ordered Antoninetti to

[3] 28 C.F.R. § 36, App. A.
[4] ER I-3.

submit a Bill of Costs so that the District Court could determine a reasonable amount of attorneys' fees.[5]

On August 29, 2008, Antoninetti filed a Motion for Reconsideration of the District Court's ruling on his motion for attorneys' fees and, on September 10, 2008, submitted an Amended Bill of Costs for $546,151.33.[6] By order dated February 6, 2009, the District Court denied Antoninetti's Motion for Reconsideration and awarded Antoninetti attorneys' fees in the amount of $136,537.83.[7]

Antoninetti filed his notice of appeal on March 2, 2009,[8] and Chipotle filed its notice of cross-appeal on March 16, 2009.[9] This Court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291.

On April 28, 2009, Antoninetti filed a motion to consolidate this cross-appeal (Ninth Circuit Case Nos. 09-55327, 09-55425) with the earlier cross-appeal of the District Court's April 21, 2008 judgment on the merits of the case (Ninth Circuit Case Nos. 08-55867, 08-55946).

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[5] *Id.*
[6] ER IX-35.
[7] ER I-2, at 10.
[8] ER I-1.
[9] Chipotle's Supplemental Excerpts of Record, Vol. I, Tab 1 (Hereafter "Supp. ER ___-___").

STATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the District Court committed reversible error in awarding Antoninetti any attorneys' fees.

2. Whether the District Court committed reversible error in awarding Antoninetti attorneys' fees disproportionate to the limited success obtained by Antoninetti.

STATEMENT OF THE CASE

Chipotle incorporates herein by reference the Statement of the Case set forth in its Opening and Response Brief in the related cross-appeal of the District Court's April 21, 2008 judgment on the merits of the case (Ninth Circuit Case Nos. 08-55867, 08-55946). In addition, Chipotle states as follows:

This case involves allegations of various barriers to Anoninetti's access to Chipotle's Encinitas and Pacific Beach restaurants (collectively, the "Restaurants" and individually, the "Encinitas Restaurant" and the "Pacific Beach Restaurant"). Specifically, Antoninetti claimed that: (1) the parking lots at the Restaurants did not comply with ADAAG § 4.6.3 during his visits; (2) the entrances at the Pacific Beach Restaurant were not accessible; (3) the Men's Restrooms at the Restaurants were not accessible; (4) the tables at the Restaurants were not accessible; (5) Chipotle's food preparation counters are not accessible under ADAAG § 4.33.3 because they did not provide wheelchair users with comparable lines of sight; (6)

Chipotle's prior unwritten practice of accommodation did not provide equivalent facilitation under ADAAG §§ 2.2 and 7.2(2)(iii); and Chipotle's current written Customers With Disabilities Policy does not provide equivalent facilitation under ADAAG §§ 2.2 and 7.2(2)(iii). Antoninetti asserted claims for injunctive relief and monetary damages based on these alleged barriers to access under the ADA and the CDPA. From the outset of this case, however, Antoninetti's primary goal was to obtain an injunction requiring Chipotle to lower the wall in front of its food preparation counters.

On summary judgment, the District Court dismissed Antoninetti's ADA and CDPA claims regarding the entrances at the Pacific Beach Restaurant, the men's restrooms at the Restaurants, and the tables at the Restaurants, dismissed Antoninetti's ADA claims regarding the parking lots at the Restaurants, and expressly rejected Antoninetti's claim that ADAAG § 4.33.3 applied to Chipotle's food preparation counters. [10]

Following a four day bench trial, the District Court found Chipotle's current written Customers With Disabilities Policy constituted equivalent facilitation under ADAAG §§ 2.2 and 7.2(2)(iii) and therefore rejected Antoninetti's claims

[10] ER I-6, at 8-10 and 21-25.

regarding that policy and denied his request for an injunction requiring Chipotle to lower the wall in front of its food preparation counters.[11]

Ultimately, Antoninetti prevailed on only two minor issues in this case. Specifically, on summary judgment the District Court held that Antoninetti was entitled to damages under the CDPA for any visits that he had made to the Restaurants as a bona fide customer in which he had encountered the alleged access barriers to the Restaurants' parking areas; and, in its post-trial Findings of Fact, Conclusions of Law and Judgment, the District Court held that Chipotle's prior unwritten practice of accommodation did not constitute an equivalent facilitation.[12] Based on these findings the District Court awarded Antoninetti a total of $5,000 in damages under the CDPA.

On May 5, 2008, Antoninetti filed a Motion for Attorneys' Fees and Costs, seeking $550,651.33 in fees and expenses.[13] The District Court granted the Motion in part, finding that Antoninetti was entitled to reasonable attorneys' fees for the issues on which Antoninetti prevailed, namely the equal facilitation issue regarding the unwritten customer policy, damages for violations of California Civil Code sections 54 and 54.3, and any issues necessarily intertwined with those two

[11] ER I-5, at 32, 35, 38.
[12] ER I-5, at 31–32.
[13] ER 1-3, at 1.

issues.[14] The District Court also ordered Antoninetti to "submit a copy of his Bill of Costs so that the Court may determine a reasonable amount for attorneys' fees."[15]

On August 29, 2008, Antoninetti moved the District Court to reconsider its ruling on his motion for attorneys' fees, and, on September 10, 2008, submitted an Amended Bill of Costs for $546,151.33.[16] The District Court denied Antoninetti's motion by order dated February 6, 2009, and awarded Antoninetti attorneys' fees in the amount of $136,537.83. [17] The District Court found that Antoninetti did not meet his burden of establishing an entitlement to the award requested and that his attorney had failed to adequately document the time expended on the claims as to which Antoninetti had prevailed.[18] The District Court also found it appropriate to reduce the attorneys' fee award because of the limited success Antoninetti had achieved[19] and in part because Antoninetti's billing records made it impossible for the District Court to connect the specific hours with the unsuccessful claims.[20] The

[14] ER I-3.
[15] *Id.*
[16] ER IX-35.
[17] ER I-2, at 10.
[18] ER I-2, at 8.
[19] *Id.*
[20] *Id.*, at 8-9.

District Court exercised its discretion to refuse to award costs, and ordered that each party would bear its own costs.[21]

STATEMENT OF FACTS

Chipotle incorporates herein by reference the Statement of Facts set forth in its Opening and Response Brief in the related cross-appeal of the District Court's April 21, 2008 judgment on the merits of the case (Ninth Circuit Case Nos. 08-55867, 08-55946). In addition, Chipotle states as follows:

Antoninetti brought this action against Chipotle, alleging that the Restaurants violated the ADA, the CDPA, the Unruh Civil Rights Act, and the California Health and Safety Code.[22] Antoninetti alleged that he encountered barriers to access to the Restaurants as a result of the configuration of the tables, parking lots, restrooms and the wall in front of the food preparation counters.[23] Antoninetti also claimed that the entrances to the Pacific Beach Restaurant were inaccessible. Based on these claims, Antoninetti sought injunctive relief, declaratory relief, and up to three times the amount of actual, special, and/or statutory damages.[24] Although Antoninetti did not set out the exact amount of damages he was seeking in his Complaint, he later stated in his motion for summary judgment that he was seeking a minimum of $24,000 in statutory

[21] *Id.*, at 10.
[22] ER II-7.
[23] ER I-6.
[24] ER II-7.

damages.[25] From the very outset of this case, however, the central issue has been whether the ADA, CDPA, Unruh Act and California Building Code require Chipotle to lower the wall in front of the food preparation counters. Antoninetti's primary objective in bringing this lawsuit has been to obtain an injunction forcing Chipotle to lower the wall.

Antoninetti's principle argument in this case is that the sight-line requirements of ADAAG Section 4.33.3 are applicable to Chipotle's food preparation counters, and that the wall in front of the food preparation counters denies Antoninetti lines of sight into the Restaurants' kitchen areas that are comparable to those of standing customers. Antoninetti retained an expert witness, Steven Schraibman, to opine on the applicability of ADAAG Section 4.33.3's sight-line requirements to the wall in front of Chipotle's food preparation counters and the lines of sight of persons in wheelchairs, including Antoninetti. The majority of Mr. Schraibman's work performed in this case, as evidenced by the documents produced by Antoninetti as part of his Rule 26(a)(2) disclosures, was devoted to this argument.[26]

On April 12, 2007, Antoninetti filed a motion for summary judgment. Antoninetti's opening and reply briefs in support of his motion for summary judgment were almost entirely devoted to his argument for the application of

[25] ER I-2, at 7.
[26] Supp. ER I-2; Supp. ER I-3.

ADAAG Section 4.33.3's sight-line requirements to the wall in front of Chipotle's food preparation counters.[27] Specifically, Antoninetti argued that ADAAG Section 4.33.3 required Chipotle to provide disabled customers and non-disabled customers with comparable lines of sight to its food preparation counters, or alternatively, that the ADA's general anti-discrimination provisions require Chipotle to modify the food preparation counters.[28]

On April 16, 2007, Chipotle filed its own motion for summary judgment, in which it argued that ADAAG Section 7.2(2) applied to the food preparation counters and that its food preparation counters, including the wall in front of them, were compliant with ADAAG Section 7.2(2) because a portion of the counters, i.e. the transaction counter, meets the requirements of ADAAG Section 7.2(i) and (ii), and that Chipotle's written Customers with Disabilities Policy provides disabled customers substantially equivalent opportunities to view the food and preparation of the food.[29] Antoninetti devoted a substantial portion of his opposition to Chipotle's motion for summary judgment to arguing that ADAAG Section 7.2 did not apply to the food preparation counters and that the District Court should instead apply ADAAG Section 4.33.3.[30]

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[27] Supp. ER I-6; Supp. ER I-8.
[28] Supp. ER I-8, at 5-10.
[29] ER I-6, at 10-18.
[30] Supp. ER I-7.

On June 17, 2007, the District Court granted partial summary judgment to both parties. The District Court granted summary judgment in favor of Chipotle as to Antoninetti's ADA, CDPA and Unruh Act claims regarding the restrooms and seating areas at the Restaurants, and the entrances of the Pacific Beach Restaurant.[31] The District Court also granted summary judgment in favor of Chipotle on Antoninetti's ADA claims regarding the Restaurants' parking lots (because Chipotle had corrected the issues with its parking lots as to which Antoninetti had complained).[32] The District Court granted summary judgment in favor of Antoninetti as to his CDPA damages claim related to the Restaurants' parking lots because it found the parking lots did not comply with the ADAAG on the few occasions that Antoninetti had visited the Restaurants as a bona fide customer prior to Chipotle's alterations.[33]

The District Court denied the parties' cross-motions for summary judgment on the issue of whether the ADA, the CDPA or the Unruh Act required that the wall in front of the food preparation counters at the Restaurants be lowered.[34] In its summary judgment order, the District Court expressly rejected Antoninetti's argument that ADAAG Section 4.33.3 applied to the wall in front of the food preparation counters at the Restaurants, and instead found that ADAAG Section

[31] ER I-6, at 22-25.
[32] *Id.*, at 20-21.
[33] ER I-6, at 23-24.
[34] ER I-6, at 7-19.

7.2(2) applies.[35] Although the District Court held that the food preparation counters did not meet the requirements of ADAAG Section 7.2(2)(i) or (ii), it found that a genuine factual dispute existed as to whether Chipotle's practice and policy of accommodating customers with disabilities constituted an "equivalent facilitation" under ADAAG Section 7.2(2)(iii).[36]

The case proceeded to trial on the following issues: (1) whether Chipotle's prior unwritten practice of accommodating customers with disabilities constituted equivalent facilitation; (2) whether Chipotle's current written Customers With Disabilities Policy constituted equivalent facilitation; (3) whether Antoninetti was entitled to an injunction requiring Chipotle to lower the wall in front of the food preparation counters at the Restaurants; and (4) the amount of damages, if any, to which Antoninetti was entitled under the CDPA.[37] Shortly before trial, Antoninetti dismissed his claims under the Unruh Act and elected to seek only the statutory minimum amount of damages available under the CDPA for the alleged violations at the Restaurants.[38]

The District Court held a four-day bench trial beginning on November 27, 2007. The central issue at trial was whether Chipolte's current written Customers With Disabilities Policy constituted an equivalent facilitation, and, consequently,

[35] *Id.*, at 7-14.
[36] ER I-6, at 14-19.
[37] ER I-3, at 2.
[38] *Id.*, at 2, fn.1.

whether Chipotle would be forced to lower the walls. (Indeed, resolution of this issue was the reason the case even went to trial.) The District Court entered its Findings of Fact, Conclusions of Law, and Judgment (the "Judgment") on January 10, 2008.[39] In the Judgment, the District Court found that Chipotle's prior practice of accommodating customers with disabilities did not constitute equivalent facilitation and that Plaintiff was entitled to a total of $5,000 in damages for the occasions when he visited the Restaurants prior to the institution of the Customers With Disabilities Policy.[40] However, the District Court agreed with Chipotle that its "current Customers With Disabilities Policy provides [Antoninetti] (and other customers in wheelchairs) with equivalent facilitation under ADAAG Sections 2.2 and 7.2(2)(iii)."[41] Based on this holding, the District Court also ruled in Chipotle's favor with respect to the central issue in this case—whether Chipotle was required by law to lower the wall in front of its food preparation counters—and found that Antoninetti was not entitled to any injunctive relief.[42] Thus, Chipotle not only prevailed on the majority of the issues in this case, it prevailed on the most significant issues as well.

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[39] ER I-5.
[40] *Id.*, at 2-3, 39.
[41] *Id.*, at 32-34.
[42] *Id.*, at 32-38.

On January 22, 2008, Antoninetti filed a motion to amend the District Court's findings of fact and conclusions of law.[43] Antoninetti argued that the Judgment was in error because Chipotle's written Customers' With Disabilities Policy was not an equivalent facilitation and was otherwise defective.[44] The District Court denied Antoninetti's motion because he failed to establish that the District Court committed any manifest error of fact or law, present any new evidence not available at trial or point to any changes in the applicable law.[45] The District Court also denied Antoninetti's motion because Antoninetti's proposed additional factual findings would have had no effect on the outcome of the District Court's Judgment.[46]

On January 24, 2009, Chipotle filed its Bill of Costs, in which it sought an award of $5,084.83 based on its success on the merits of the case. On January 29, 2008, Antoninetti filed a Bill of Costs seeking a total of $9,010.73, nearly twice the amount of damages he was awarded in the Judgment for the two minor claims on which he prevailed. On May 5, 2008, Antoninetti filed a Motion for Attorneys' Fees and Costs ("Motion") seeking a total of $550,651.33—all of the alleged attorneys' fees he claims to have incurred in this case.

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[43] Supp. ER I-5.
[44] *Id.*
[45] Supp. ER I-4.
[46] *Id.*

On August 21, 2008, the District Court granted Antoninetti's motion for attorneys' fees in part and denied it in part.[47] The District Court held that Antoninetti qualified as a prevailing party because the District Court had awarded Antoninetti a judgment of $5,000 for his CDPA claims regarding the parking areas of the Restaurants and Chipotle's prior unwritten practice of accommodating customers with disabilities, and Antoninetti was entitled to enforce that judgment against Chipotle.[48] However, the District Court properly held that Antoninetti obtained only a small fraction of the monetary relief he had sought and had failed to obtain the primary relief sought in this case—an injunction requiring Chipotle to lower the wall in front of its food preparation counters.[49] The District Court also properly held that no public benefit resulted from Antoninetti's litigation because the Court had not ordered Chipotle to take any action to correct any alleged barriers to accessibility to its Restaurants.[50] Moreover, the District Court held that the claims as to which Antoninetti had prevailed were factually distinct from those as to which he had lost.[51] Based on these findings, the District Court ruled that Antoninetti was only entitled to attorneys' fees for his CDPA (and related ADA) claims regarding the parking areas of the Restaurants and Chipotle's prior

[47] ER I-3.
[48] ER I-3, at 4.
[49] *Id.*, at 5.
[50] *Id.*
[51] *Id.*, at 6-7.

unwritten practice of accommodating customers with disabilities.[52] Because Antoninetti's motion for attorneys' fees failed to identify the specific fees that were attributable to the issues as to which he had prevailed, the District Court ordered Antoninetti to submit an amended bill of costs so that it could determine an appropriate amount of attorneys' fees.[53]

On August 29, 2008, Antoninetti filed a motion for reconsideration of the District Court's ruling on Antoninetti's motion for attorneys' fees. On September 10, 2008, Antoninetti submitted his amended cost bill in which he again insisted that the District Court award him all $559,572.06 of his alleged attorneys' fees and costs.[54] In support of this assertion, Antoninetti argued that all of those fees had been incurred in connection with the CDPA claims on which he prevailed.

The District Court denied Antoninetti's motion for reconsideration by order dated February 6, 2009, holding that Antoninetti had failed to establish that the District Court committed clear error in its decision.[55] In the same order, the District Court awarded Antoninetti attorneys' fees in the amount of $136,537.83—approximately one quarter of the total amount of attorneys' fees that he had requested.[56] In so holding the District Court noted that:

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[52] *Id.*, at 7.
[53] *Id.*
[54] ER IX-35, at 2.
[55] ER I-2, at 2-5.
[56] *Id.*, at 9.

> [A] party's level of success is the most important factor to consider in determining a fee award, and particularly a comparison of the damages awarded to damages sought. A district court must consider the excellence of the overall result … but in judging the plaintiff's level of success and the reasonableness of the hours spent achieving that success, a district court should give primary consideration to the amount of damages awarded as compared to the amount sought. Furthermore, in *McGinnis v. Kentucky Fried Chicken*, the Ninth Circuit vacated an attorney fee award of $148,000 after the damages awarded to the plaintiff were reduced to $34,000, reasoning that no reasonable person would pay lawyers $148,000 to win $34,000.
>
> In this case, Plaintiff was awarded only $5,000, which represented slightly more than one-fifth of the damages he originally sought. If no reasonable person would pay lawyers $148,000 to win $34,000, surely no reasonable person would pay over $500,000 in attorneys' fees to recover only $5,000. [57]

Antoninetti appealed that decision on March 2, 2009. [58] Chipotle filed its Notice of Cross-Appeal on the decision on March 16, 2009.[59]

SUMMARY OF ARGUMENT

After failing to obtain any relief whatsoever with respect to the overwhelming majority of his claims in this lawsuit, including the central issue in this case—whether Chipotle was required by law to lower the wall in front of the food preparation counters at its Restaurants—and obtaining only a nominal award of damages at trial, Antoninetti filed a motion for attorneys' fees in which he sought over $550,000 in fees—110 times what he recovered at trial. Although the

[57] *Id.*, at 8-9 (internal quotations and citations omitted).
[58] ER I-1.
[59] Supp. ER I-1.

District Court refused to award Antoninetti the bulk of his requested fees, it nevertheless found that he was entitled to $136,537.83. By awarding Antoninetti attorneys' fees, particularly the amount of attorneys' fees that it did, the District Court abused its discretion in two respects. First, because the District Court erred in holding that Chipotle's food preparation counters did not comply with ADAAG Section 7.2(2)(i) and (ii), and that Chipotle's unwritten practice of accommodating customers with disabilities was not an equivalent facilitation, it also erred in finding that Antoninetti was entitled to any attorneys' fees. Second, even if this Court upholds the Judgment of the District Court on the merits of Antoninetti's claims, the District Court nevertheless erred in awarding Antoninetti an amount of attorneys' fees that was totally disproportionate to the minimal "success" that he achieved.

In holding that Antoninetti was a "prevailing party," and therefore entitled to an award of attorneys' fees, the District Court relied on its judgment awarding Antoninetti $5,000 in statutory damages under the CDPA. That judgment was based on the District Court's erroneous summary judgment ruling that Chipotle's food preparation counters did not comply with ADAAG Section 7.2(2)(i) or (ii) and its subsequent erroneous post-trial ruling that Chipotle's unwritten practice of accommodating customers with disabilities did not constitute an equivalent facilitation under ADAAG Section 2.2 and 7.2(2)(iii). Chipotle has appealed both

of these rulings in the consolidated cross-appeal on the merits of Antoninetti's claims (Ninth Circuit Case Nos. 08-55867, 08-55946). To the extent that this Court agrees with either of Chipotle's arguments in the consolidated cross-appeal on the merits—that its food preparation counters comply with ADAAG Section 7.2(2)(i) and (ii) or that the Customers With Disabilities Policy constitutes an equivalent facilitation—it must therefore reverse the District Court's award of attorneys' fees and instruct the District Court to enter an order denying Antoninetti any attorneys' fees.

In the alternative, if the Court upholds the District Court's January 10, 2008 Judgment, it nevertheless must reverse the District Court's award of attorneys' fees because the amount of fees awarded ($136,537.83) is grossly disproportionate to Antoninetti's minimal success in this case. The Supreme Court has held that where a plaintiff receives only nominal damages or achieves only technical success, as is the case here, but does not succeed in obtaining the primary relief sought in the lawsuit, a court may dispense with the calculation of a lodestar and simply establish a nominal amount of attorneys' fees or no fees at all. *Farrar v. Hobby*, 506 U.S. 103, 115-116, 113 S.Ct. 556, 575, 121 L.Ed.2d 494 (1992). This Court reached a similar conclusion in *McGinnis v. Kentucky Fried Chicken*, where it held that a district court abused its discretion in awarding $148,000 in attorneys' fees to a plaintiff who recovered only $34,000 in damages, because "no reasonable

person would pay lawyers $148,000 to win $34,000." *Id.* Although the District Court cited the *McGinnis* case in its February 6, 2009 Order on Antoninetti's attorneys' fees and costs, it proceeded to do exactly what the Court in *McGinnis* found to be an abuse of discretion by awarding Antoninetti attorneys' fees of nearly $140,000 for having obtained a judgment of $5,000 and nothing more. Antoninetti's lawsuit did not result in any public benefit, or even in the injunctive relief that had been Antoninetti's primary objective in this case. And the $5,000 damage award that Antoninetti obtained was the minimum allowed under the applicable statute—the CDPA—because Antoninetti could not even prove that he suffered any actual damages. Under *Farrar* and *McGinnis*, the District Court should have either denied Antoninetti any attorneys' fees or awarded him a nominal fee award that was commensurate with his minimal success in the case.

Antoninetti argues in his opening brief that the District Court abused its discretion by not awarding him more attorneys' fees than it did. (Antoninetti's argument in his Opening Brief on this cross-appeal is in large part a verbatim repetition of his arguments from the consolidated cross-appeal on the District Court's January 10, 2008 Judgment.) Essentially Antoninetti argues that he should have prevailed on all of his claims before the District Court and is therefore entitled to all of the fees he requested in his fee petition. This argument fails for all the reasons set forth in Chipotle's Opening and Response Brief and its Fourth Brief

on the consolidated cross-appeal. Furthermore, Antoninetti's remaining arguments that he should have been granted a larger fee award all fail to account for his minimal success in this case, and are therefore flatly refuted by the Supreme Court's ruling in *Farrar* and this Court's ruling in *McGinnis*.

ARGUMENT

I. Standard Of Review.

A district court's decision to award or deny attorneys' fees and/or costs is reviewed under the abuse of discretion standard. *Galen v. County of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007); *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002); *Saman v. Robbins*, 173 F.3d 1150, 1157 (9th Cir. 1999). A district court abuses its discretion when its decision is based on an inaccurate view of the law or a clearly erroneous finding of fact. *Traditional Cat Ass'n, Inc. v. Gilbreath*, 340 F.3d 829, 833 (9th Cir. 2003). Any elements of legal analysis that figure into the fee determination are subject to de novo review, and the underlying factual determinations are reviewed for clear error. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952 (9th Cir. 2007). "Review under the clearly erroneous standard is significantly deferential, requiring for reversal a definite and firm conviction that a mistake has been made." *United States v. Asagba,* 77 F.3d 324, 326 (9th Cir. 1996).

II. Standards For Determining Reasonable Attorneys' Fees.

Section 505 of the ADA provides that "in any action or administrative proceeding commenced pursuant to [the ADA], the court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. The CDPA contains a similar provision, stating that any person who is aggrieved by any violation of his rights under that statute (which, as Antoninetti notes, states that any violation of the ADA also constitutes a violation of the CDPA) may bring an action for injunctive relief and that "the prevailing party in the action shall be entitled to recover reasonable attorneys' fees." Cal. Civ. Code, § 55. Both statutes establish a two part test for determining an award of attorneys' fees.

In the first step of the inquiry, the Court must determine whether Antoninetti is eligible for an award of attorneys' fees under the statutes, that is, whether he is a "prevailing party." 42 U.S.C. § 12205; Cal. Civ. Code § 55. The Supreme Court clarified the meaning of the term "prevailing party" in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res*. In that case, the Supreme Court flatly rejected the "catalyst theory" as a basis for awarding attorneys' fees and held that:

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents

> thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 605, 121 S.Ct. 1835, 1840, 149 L.Ed.2d 855 (2001). Rather, to qualify as a "prevailing party" a litigant must achieve: (1) a material alteration of the legal relationship of the parties, (2) which alteration is "judicially sanctioned." *Carbonell v. I.N.S.*, 429 F.3d 894, 898 (9th Cir. 2005) (citing *Buckhannon*, 532 U.S. at 604-05, 121 S.Ct. 1835, 149 L.Ed.2d 855).

The second step is to apply the "lodestar" measure of fees in order to determine what fees are "reasonable." *See Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir.1987) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). The "loadstar" measure is obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate. *Id.* In evaluating what is a reasonable number of hours, the Court must review detailed time records to determine whether the hours claimed by the applicant were unnecessary, duplicative or excessive. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh'g denied, amended on other grounds*, 808 F.2d 1373 (9th Cir. 1987).

However, it is also well established that where a plaintiff prevails as to only some of the issues in the case, a reduction in the loadstar calculation is appropriate. In *Hensley v. Eckhart*, the Supreme Court held that where a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. 461 U.S. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d 40. Thus, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*, 461 U.S. at 440, 103 S.Ct. at 1943, 76 L.Ed.2d 40. Indeed, in cases where a plaintiff receives only nominal damages or achieves only technical success, but does not succeed in obtaining the primary relief sought in the lawsuit, a court may dispense with the calculation of a lodestar and simply establish a low fee or no fee at all. *Farrar v. Hobby*, 506 U.S. 103, 115-116, 113 S.Ct. 556, 575, 121 L.Ed.2d 494 (1992).

III. If The Court Finds That Chipotle's Food Preparation Counters Comply With The Requirements Of ADAAG 7.2(2)(i) Or (ii) Or That Chipotle's Unwritten Practice Of Accommodating Customers With Disabilities Constituted Equivalent Facilitation, It Must Reverse The District Court's Order Awarding Antoninetti Attorneys' Fees.

The District Court's award of attorneys' fees was based on its conclusion that Antoninetti was entitled to a total of $5,000 in damages for the five occasions that he visited the Restaurants as a bona fide customer before the implementation of the Customers With Disabilities Policy.[60] That holding, in turn, was based on the District Court's finding on summary judgment that Chipotle's food preparation counters did not comply with the technical requirements of ADAAG Section 7.2(2)(i), (ii) and its finding in its post-trial Judgment that Chipotle's unwritten practice of accommodating customers with disabilities did not constitute an equivalent facilitation under ADAAG Sections 2.2 and 7.2(2)(iii). Thus, if this Court were to reverse either of those findings in the related cross-appeal on the merits of this case, Antoninetti would not be entitled to any attorneys' fees related to any alleged denial of access to Chipotle's food preparation counters.

As set forth in detail in Chipotle's Opening/Response Brief and its Reply Brief in the related cross-appeal on the merits of this case, the food preparation counters at the Restaurants are fully compliant with ADAAG Section 7.2(2)(i) and

[60] ER I-3, at 4.

(ii)[61] and Chipotle's unwritten practice of accommodating customers with disabilities constitutes an equivalent facilitation.[62] Accordingly, the District Court erred in holding that Antoninetti was entitled to attorneys' fees for his claim that he did not receive equal facilitation on those occasions when he visited the Restaurants as a bona fide customer before Chipotle's adoption of the written Customers With Disabilities Policy.

Although Antoninetti may still claim that he nevertheless is entitled to attorneys' fees for the work related to his claim for $2,000 in damages under the CDPA based on the visits he made to the Restaurants as a bona fide customer in which he encountered barriers to the accessibility of the parking lots,[63] such *de minimis* success does not merit an award of attorneys' fees (or at most merits a

[61] *See* Appellee/Cross-Appellant's Opening/Response Brief in Ninth Circuit Case Nos. 08-55867, 08-55946, at 41-47. A counter complies with ADAAG Section 7.2(2)(i) if "a portion of the main counter" is no more than 36 inches high and is at least 36 inches long. 28 C.F.R. § 36, App. A, § 7.2(2)(i). Chipotle's food preparation counters meet this requirement because they all include "transaction stations" at the end of the counters that are 34 inches high and approximately four feet long. The transaction stations are attached to the food preparation counters, unobstructed, and capable of being used to allow Chipotle's customers to see and sample the different ingredients available to them. Similarly, a counter complies with ADAAG Section 7.2(2)(ii) if it is an auxiliary counter with a maximum height of 36 in (915 mm) that is in close proximity to the main counter. 28 C.F.R. § 36, App. A, § 7.2(2)(ii). Again, Chipotle's transaction stations meet the height requirements of this regulation and, because they are attached to the rest of the food preparation counters, are in close proximity to the main counter.

[62] *See* Appellee/Cross-Appellant's Opening/Response Brief in Ninth Circuit Case Nos. 08-55867, 08-55946, at 57-61.

[63] Chipotle has not appealed the District Court's ruling that Antoninetti is entitled to the statutory minimum amount of damages based on those visits.

nominal fee award). *Farrar*, 506 U.S. at 115-116, 113 S.Ct. at 575, 121 L.Ed.2d 494. That issue was of little consequence to this case, and was voluntarily corrected by Chipotle before the parties filed their cross motions for summary judgment in the District Court.[64] In *Farrar*, a case involving a similarly nominal "victory" by the plaintiff, the Supreme Court upheld the Fifth Circuit's decision that the plaintiff was not entitled to any attorneys' fees. *Farrar*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494. The Supreme Court noted that "when a plaintiff recovers only nominal damages … the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115, 113 S.Ct. at 575, , 121 L.Ed.2d 494. Thus, if this Court agrees with Chipotle that its food preparation counters comply with the requirements of ADAAG Section 7.2(2)(i), (ii) and/or that Chipotle's unwritten practice of accommodating customers with disabilities constituted an equivalent facilitation, it must reverse the District Court's award of attorneys' fees to Antoninetti and order that Antoninetti is not a prevailing party and thus not entitled to any attorneys' fees.

IV. Even If The Court Upholds The District Court's Decision On The Merits Of The Case, The District Court's Attorneys' Fee Award Must Be Reversed Because The District Court Abused Its Discretion In Awarding Antoninetti $136,537.83 Based On His Limited Success.

If the Court upholds the District Court's judgment in this case, it nevertheless must reverse the District Court's award of attorneys' fees, because the

[64] ER I-6, at 20-21.

award is so disproportionate to the degree of Antoninetti's success in this case that it constitutes an abuse of discretion. Indeed, under controlling precedent the District Court should have refused to award any attorneys' fees or, at most, awarded a nominal amount of fees commensurate with Antoninetti's minimal recovery in this case. *Farrar*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494; *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805, 810 (9th Cir. 1994).

A. Antoninetti Should Not Have Been Awarded Any Attorneys' Fees Because He Prevailed Only On Two Minor Issues In The Case That Resulted In No Benefit To The Public And For Which He Obtained Only The Statutory Minimum Amount Of Damages.

In determining the appropriateness of a fee award, the "most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d 40. Indeed, this Court has found that the amount of attorneys' fees must be commensurate with the amount of the plaintiff's recovery where, as is the case here, the relief obtained by the plaintiff is limited to money damages. *See McGinnis*, 51 F.3d at 810.

As set forth above, the Supreme Court has held that where a plaintiff receives only nominal damages or achieves only technical success, but does not succeed in obtaining the primary relief sought in the lawsuit, a court may dispense with the calculation of attorneys' fees using the loadstar method and simply establish a low fee or no fee at all. *Farrar*, 506 U.S. at 115-116, 113 S.Ct. at 575,

121 L.Ed.2d 494. In addition to considering the amount of money damages awarded to a plaintiff, a court must also consider "the significance of the legal issues on which the plaintiff claims to have prevailed" and whether the plaintiff's litigation has served any "public purpose." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (quoting *Farrar*, 506 U.S. at 121-122, 113 S.Ct. at 578, 121 L.Ed.2d 494). Where litigation accomplishes little beyond giving a plaintiff the moral satisfaction of knowing that a federal court concluded that his rights had been violated, a court may refuse to award any fees to the plaintiff. *Farrar*, 506 U.S. at 114-116, 113 S.Ct. at 574-575, 121 L.Ed.2d 494.

Antoninetti's purported "success" in this matter is exactly the kind of limited, technical victory that the Supreme Court found to be undeserving of an attorneys' fee award in *Farrar*. Chipotle prevailed as to the overwhelming majority of Antoninetti's claims in this case.[65] Specifically, Antoninetti raised claims for injunctive relief and damages under the ADA, the Unruh Act, the California Health and Safety Code and the CDPA regarding alleged barriers to the accessibility of Chipotle's restrooms, dining areas, and entrances - all of which were dismissed by the District Court on summary judgment.[66] Chipotle also successfully moved for summary judgment on Antoninetti's ADA claims regarding

[65] ER I-5; ER I-6.
[66] ER I-6, at 22-24.

the parking lots at the Restaurants.[67] And, at trial, Chipotle prevailed on the most significant issues in the case. It obtained an order holding that its current Customers With Disabilities Policy constitutes equivalent facilitation and denying Antoninetti's request for an injunction requiring Chipotle to lower the wall in front of its food preparation counters.[68] Ultimately Antoninetti succeeded only in obtaining the statutory minimum damages for his CDPA claims regarding the parking lots of the Restaurants and his visits to the Restaurants before the adoption of the written Customers With Disabilities Policy.[69] Antoninetti's "victory" below can only be described as pyrrhic.

The nature and substance of the relief that Antoninetti actually obtained further undermines his claim for attorneys' fees. The District Court awarded Antoninetti "$5,000.00, and no more, for [Chipotle's] failure to accommodate under the rules of the ADA and CDPA during [Antoninetti's] visits to Chipotle before the implementation of the Customers With Disabilities Policy."[70] The damage award is comprised of 5 awards of $1,000 (the statutory minimum amount of damages under the CDPA)—one for each of the 5 occasions that Antoninetti visited the Restaurants as a bona fide customer and encountered the alleged barriers to his access to the parking lots or was not accommodated. Not only did

[67] ER I-6, at 20-21.
[68] ER I-5, at 32-38.
[69] ER I-5, at 38-39.
[70] ER I-5, at 39.

the Court award Antoninetti the bare minimum for the CDPA claims as to which he prevailed, Antoninetti did not even try to prove at trial that he suffered any actual damages so that he could claim a larger award. That award of money damages is only a small fraction of the $24,000[71] in statutory minimum damages that Antoninetti initially sought.

In any event, money damages were never the primary form of relief Antoninetti sought to obtain through this lawsuit. From the outset of this case, Antoninetti made it clear that his primary goal was to obtain an injunction requiring Chipotle to correct the alleged barriers to Antoninetti's access to the Restaurants. Most importantly, Antoninetti sought an injunction requiring Chipotle to lower the 44-inch wall in front of the food preparation counters at the Restaurants.[72] As set forth above, that particular claim for injunctive relief was Antoninetti's primary goal in this litigation and has also been the central point of contention throughout this litigation.

Antoninetti attempts to "puff up" his achievements by arguing that he obtained a declaration from the District Court requiring that Chipotle add two new elements to its Customers With Disabilities Policy: (1) a requirement that managers, rather than crew members, carry out the policy, and (2) a requirement

[71] Pursuant to Section 54.3 of the California Civil Code, the District Court had the discretion to award up to $15,000 for these five visits, yet awarded only the statutory minimum.
[72] ER IV-21.

that the manager on duty at Chipotle's restaurants affirmatively inform customers with disabilities of the various accommodation options available to them without waiting for the customer to request accommodation. This argument is a disingenuous attempt to present the District Court's factual findings regarding the actions that Chipotle *already was taking* under its Written Customers With Disabilities Policy as a form of declaratory relief. Antoninetti is fabricating a legal victory where none exists, in an attempt to justify some portion of the attorneys' fees he has claimed.

Nowhere in its Judgment did the District Court impose a requirement that Chipotle's managers administer the Customers With Disabilities Policy or that the managers offer accommodations to restaurant patrons without being asked by the patron. Indeed, the District Court did not impose any specific requirements as to exactly what must be done under the Customers With Disabilities Policy for that policy to qualify as an equivalent facilitation. Rather, the District Court simply stated that Chipotle presented uncontroverted evidence at trial as to what actions it actually takes in administering its Customers With Disabilities Policy.[73] In other words, the District Court simply made factual findings and conclusions about what Chipotle was already doing under the policy.

[73] ER I-5, at 32.

Furthermore, the District Court correctly held that Antoninetti's lawsuit had not resulted in any significant benefit to the public. This Court has held that to determine whether a lawsuit has resulted in any benefit to the public, the district court should consider whether the plaintiff has affected a change in policy or a deterrent to widespread civil rights violations. *McCown v. City of Fontana*, 565 F.3d 1097, 1105 (9th Cir. 2009). Antoninetti accomplished neither in this case. Antoninetti failed to obtain any injunctive relief that would have required Chipotle to alter any of the aspects of the Restaurants that he claimed were inaccessible. Although Chipotle established its written Customers With Disabilities Policy during the course of this litigation, it did so voluntarily as part of its continuing efforts to improve its customer service.[74] The policy was not adopted by Chipotle pursuant to any court order, consent decree or settlement agreement with Antoninetti. Indeed, Antoninetti argued both in the District Court and on appeal that the policy is insufficient and violates the ADA. Similarly, while Chipotle also altered its parking lots during the course of this litigation, those alterations were made voluntarily, and were not required by any court order, consent decree or settlement. Accordingly, Antoninetti cannot rely on Chipotle's voluntary creation of its Customers With Disabilities Policy or its modifications of its parking lots to

[74] ER I-5, at 19.

support his claim for attorneys' fees. *Buckhannon*, 532 U.S. at 605, 121 S.Ct. at 1840, 149 L.Ed.2d 855.

Antoninetti asserts in his Opening Brief on this cross-appeal that his lawsuit did result in a benefit to the public because it established that unwritten, informal policies of accommodation are not equivalent facilitation. However, the District Court's holding was not nearly as broad as Antoninetti claims. The District Court did not hold that *all* "unwritten" or "informal" policies do not and cannot constitute equivalent facilitation. Rather, the District Court simply determined that Chipotle's prior unwritten practice of accommodation that was in place at the Restaurants on the occasions when Antoninetti visited them as a bona fide customer did not qualify as an equivalent facilitation.[75] Furthermore, that practice had been supplemented by the written Customers With Disabilities Policy, which the District Court found to be an equivalent facilitation, long before the District Court entered its Judgment. As such, the public did not gain any new benefits as a result of the judgment in Antoninetti's favor regarding Chipotle's unwritten practice of accommodation. All that Antoninetti accomplished by obtaining the judgment that Chipotle's unwritten practice of accommodation did not qualify as an equivalent facilitation was an award of $5,000 in statutory damages under the CDPA.

[75] ER I-5, at 19.

Additionally, while Antoninetti asserts that the District Court's ruling will have a collateral estoppel effect on similar claims raised by Antoninetti and other plaintiffs in two related class actions, he fails to cite any case law holding that the fact that a judgment may have a collateral estoppel effect is sufficient to establish that the judgment resulted in a tangible benefit to the public. The one case that he cites, *Wilcox v. City of Reno*, simply held that a district court *may consider* the collateral estoppel effect of a judgment in determining whether an attorneys' fee award is appropriate. *Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994). The court did not even mention the subject of "public benefit" in its decision. In any event, in this case the District Court's decision had a largely negative collateral estoppel effect on Antoninetti and the other plaintiffs in the related class actions. The District Court held that the Customers With Disabilities Policy constitutes an equivalent facilitation and that therefore Chipotle is not required by law to lower the wall in front of its food preparation counters. As with this case, the primary issue in the related class actions is whether Chipotle is required by law to lower the wall in front of its food preparation counters.[76] Accordingly, to the extent that the District Court's decision has a collateral estoppel effect on the related class actions, that effect will be largely unfavorable to Antoninetti and the other plaintiffs in those suits. Antoninetti therefore cannot plausibly argue that he obtained any

[76] See Appellee/Appellant's Request for Judicial Notice, Exs. A and B.

benefits for the general public as a result of the collateral estoppel effect of the District Court's judgment.

In short, Antoninetti lost on the majority of the issues in this case, failed to obtain any of the injunctive relief that he requested (the primary form of relief that he sought in this lawsuit), failed to benefit the public through his lawsuit, and succeeded only in obtaining the bare minimum of damages required by the CDPA for the five visits that he made to the Restaurants as a bona fide customer before the adoption of the Customers With Disabilities Policy. Accordingly, under *Farrar*, the District Court should have denied Antoninetti's request for attorneys' fees in its entirety based on such minimal success. In failing to do so, the District Court abused its discretion.

B. The District Court Abused Its Discretion By Awarding Antoninetti Attorneys' Fees That Grossly Exceeded His Limited Recovery.

At the very least, the District Court abused its discretion in awarding Antoninetti $136,537.83 in attorneys' fees when he recovered only $5,000 in damages. That holding is plainly contrary to well established precedent in this Circuit and other federal courts of appeals reversing or reducing awards of attorneys' fees that are grossly disproportionate to the amount of the plaintiff's success. *See, e.g.*, *Corder v. Brown*, 25 F.3d 833, 841 (9th Cir. 1994) (court remanded attorneys' fee award of $240,695 as to damages of $24,006 "to consider

the limited success issue in light of *Farrar*"); *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998) (court found that attorney fee award of $81,000 was "over six and one-half times the amount of damages awarded," and such a ratio was "simply too large to allow the fee award to stand"); *Gumbhir v. Curators of University of Missouri*, 157 F.3d 1141, 1147 (8th Cir. 1998) (where plaintiff sought "sweeping injunctive relief" but recovered only $8,846.40 in lost wages and benefits, court reduced attorneys' fee award from $110,000 to $46,750, finding that plaintiff "did not succeed on his claims for institutional equitable relief. He prevailed on only one of his personal damage claims"); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071 (9th Cir. 2003) (where plaintiff recovered only $9,000 in damages and part of the desired injunctive relief, court vacated attorneys' fee award of $57,566, holding that "the district court did not properly consider [plaintiff's] degree of success in arriving at a reasonable fee award").

Indeed, in *McGinnis v. Kentucky Fried Chicken*, this Court expressly held that a district court abused its discretion in awarding $148,000 in attorneys' fees to a plaintiff who recovered only $34,000 in damages. *McGinnis*, 51 F.3d at 810. In so holding, this Court noted that "[l]awyers might reasonably spend $148,000 worth of time to win $234,000[, b]ut no reasonable person would pay lawyers $148,000 to win $34,000." *Id.* Accordingly, this Court remanded that case to the

district court with instructions to "reduce the attorneys fee award so that it is commensurate with the extent of plaintiff's success." *Id.*

Although the District Court cited *McGinnis* in its order awarding Antoninetti his attorneys' fees, by awarding Antoninetti $136,537.83 in attorneys' fees it did exactly what this Court found to be an abuse of discretion in *McGinnis*. Indeed, if it is an abuse of discretion for a district court to award $140,000 in attorneys' fees to a plaintiff who recovers only $34,000 in damages, the same may be said with even greater force of the District Court's award of nearly $140,000 in a case where the plaintiff recovered only $5,000 in damages. Furthermore, whereas the damages recovered by the plaintiff in *McGinnis* were more significant in the overall scheme of that case because the primary relief sought by the plaintiff was money damages, the damages recovered by Antoninetti in this case were all but insignificant because the principle form of relief that he sought was an injunction requiring Chipotle to lower the wall in front of its food preparation counters. As such, the District Court's award of attorneys' fees in this case was even more excessive than the one at issue in *McGinnis.*

Therefore, if the Court upholds the District Court's judgment, it nevertheless must remand the issue of attorneys' fees to the District Court with instructions to enter an order refusing to award any attorneys' fees based on Antoninetti's lack of

success, or awarding only a nominal amount of attorneys' fees commensurate with Antoninetti's extremely limited success in this case.

V. The District Court Did Not Abuse Its Discretion By Failing To Award Antoninetti More Attorneys' Fees.

In his Opening Brief in this cross-appeal, Antoninetti raises four arguments in support of his assertion that the District Court abused its discretion by not awarding him more than $136,537.83 in attorneys' fees. First, Antoninetti asserts that the District Court erred as to its underlying decision on the merits of the case and that therefore Antoninetti should be entitled to recover all of his claimed attorneys' fees. Second, Antoninetti claims that the District Court abused its discretion by finding that Antoninetti's lawsuit did not result any significant public benefit. Third, Antoninetti claims that the District Court abused its discretion by refusing to award Antoninetti attorneys' fees for all of his claims based on his limited success with respect to his CDPA claims for damages based on the parking lots at the Restaurants and Chipotle's unwritten practice of accommodation. Fourth, Antoninetti claims that the District Court abused its discretion by holding that Antoninetti's attorney's "block-billed" time entries in her billing statements (single time entries that list more than one task with an aggregate amount of time spent for all of the tasks included in the entries) precluded the Court from identifying how much time Antoninetti's attorney spent on each individual task

and whether that amount was reasonable. These arguments lack support in law or fact.

A. Antoninetti Has Failed To Establish That The District Court Erred In Its Judgment On The Merits Of The Case And That It Abused Its Discretion By Not Awarding Him All Of His Requested Attorneys' Fees.

Antoninetti's argument that he is entitled to an award of all of his attorneys' fees because the District Court should have ruled in his favor on the merits of the case simply repeats the arguments that Antoninetti has previously asserted in his Opening and Third Brief in the consolidated cross-appeal (Ninth Circuit Case Nos. 08-55867, 08-55946). Indeed, the contents of Antoninetti's Statement of the Case, Statement of Facts, and Section A of the Argument Section of his Opening Brief in this cross-appeal (which comprise the majority of Antoninetti's Brief) are taken almost verbatim from Antoninetti's Opening and Third Briefs in the consolidated cross-appeal. Rather than simply repeat its responses to those arguments regarding the merits of the District Court's decision, Chipotle submits that those arguments must fail for the same reasons set forth in Chipotle's Opening and Response Brief and Fourth Brief on the related cross-appeal (Ninth Circuit Case Nos. 08-55867, 08-55946), which Chipotle incorporates herein by reference.

Furthermore, even if the Court were to rule in Antoninetti's favor on appeal, it must remand the issue of attorneys' fees to the District Court, to allow the

District Court to determine the amount of attorneys' fees reasonably incurred by Antoninetti. As the District Court noted in its February 6, 2009 Order awarding Antoninetti $136,537.83 in attorneys' fees, Antoninetti has the burden of "establishing his entitlement to an award [of attorneys' fees] and of documenting the appropriate hours expended and hourly rates, including maintaining billing time records in a manner that will enable a reviewing court to identify distinct claims."[77] Antoninetti has failed to meet that burden both in the proceedings below and on this appeal. Indeed, although Antoninetti spends approximately 50 pages repeating the contents of his briefs from the related cross-appeal, he does not offer any evidence or argument on appeal regarding the amount of time his attorney spent working on the issues as to which he claims he should have prevailed, the specific tasks performed in litigating those claims, the complexity of the issues involved, the skill required to perform the legal work properly, or any other information that would support his assertion on appeal that his total claimed fees are "reasonable." Having failed to raise these arguments in his opening brief, Antoninetti has waived his right to do so. *Martinez v. Ylst*, 951 F.2d 1153, 1156-

[77] ER I-2, at 8 (quoting *Hensley*, 461 U.S. at 437, 103 S.Ct. at 1941, 76 L.Ed.2d 40); *see also Carson v. Billings Police Dept.*, 470 F.3d 889, 891 (9th Cir. 2006).

57 (9th Cir. 1991) (failure to raise an issue in an initial appeal brief constitutes waiver of that issue on appeal).[78]

B. Antoninetti Has Failed To Establish That The District Court Abused Its Discretion By Finding That His Lawsuit Did Not Result In Any Significant Benefit To The Public.

As set forth above in Section IV.A., Antoninetti has failed to establish that the District Court abused its discretion in holding that his lawsuit did not result in any significant benefit to the public. Antoninetti's lawsuit did not result in any judicially sanctioned relief requiring Chipotle to change its policies. Indeed, the District Court held that Chipotle's written Customers With Disabilities Policy, as it already had been implemented by Chipotle, meets the requirements of ADAAG Sections 2.2 and 7.2(2)(iii). Antoninetti has also failed to offer any evidence that his lawsuit has served as a deterrent to widespread violations of civil rights. Accordingly, Antoninetti has failed to demonstrate that the District Court abused its discretion in holding that his lawsuit did not result in any significant public benefit. *See McCown*, 565 F.3d at 1105.

[78] Additionally, to the extent that the Court finds in Antoninetti's favor on the merits of the case, but agrees with the District Court's summary judgment rulings that neither ADAAG Section 4.33.3 nor the general anti-discrimination provisions of the ADA require Chipotle to provide comparable lines of sight at its food preparation counters, it must remand the case to the District Court with instructions that Antoninetti may not recover attorneys' fees for work performed on those issues.

C. Antoninetti Has Failed To Establish That The District Court's Holding Regarding Antoninetti's Failure To Distinguish Between Fees Related To The Claims On Which He Prevailed And Fees Related To Claims On Which He Lost Constitutes An Abuse Of Discretion.

In his Opening Brief on this cross-appeal, Antoninetti appears to argue that the District Court abused its discretion by not awarding him all of the attorneys' fees requested in his fee petition because it is not possible to distinguish between the work that Antoninetti performed on his claims regarding the unwritten practice of accommodation and the Customers With Disabilities Policy. This argument fails for two reasons. First, Antoninetti has failed to establish that the District Court committed any error, let alone abused its discretion, in holding that Antoninetti's claims regarding the unwritten practice were distinct from his claims regarding the Customers With Disabilities Policy. Second, and more importantly, Antoninetti cannot establish that it would have been reasonable for the District Court to award him over $500,000 in attorneys fees when he lost on all of the most significant issues in the case and obtained a damage award of only $5,000 (the minimum amount allowed under the CDPA).

Although Antoninetti asserts that the claims on which he prevailed were inextricably intertwined with the claims on which he lost and that he must therefore be permitted to recover all of his attorneys' fees, his assertion is unsupported by applicable case law or the facts of this case. Where a plaintiff

presents "in one lawsuit distinctly different claims for relief that are based on different facts and legal theories[,] . . . work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Hensley*, 461 U.S. at 434-435. Here, the work that Antoninetti's attorney performed on the issue of whether Chipotle's unwritten practice of accommodating individuals with disabilities was completely separate and distinct from the issues of whether Chipotle's written Customers With Disabilities Policy constituted an equivalent facilitation and whether ADAAG Section 4.33.3 or the general anti-discrimination provisions of the ADA imposed sight-line requirements on Chipotle's food preparation counters.

The unsuccessful arguments advanced by Antoninetti that the food preparation counters violated ADAAG Section 4.33.3 and the ADA's general anti-discrimination provisions because they did not offer equivalent sight-lines to wheelchair users were entirely separate and distinct from the issue of whether Chipotle's old unwritten practice of accommodation constituted equivalent facilitation under ADAAG Section 7.2(2)(iii). Whether ADAAG Section 4.33.3 applied to the food preparation counters or the ADA's general anti-discrimination provisions required that wheelchair users be afforded comparable sight lines at the food preparation counters were *legal questions*, which the District Court resolved against Antoninetti at the summary judgment stage. Those legal questions did not

require the same factual analysis as the issue of whether the old unwritten practice of accommodation constituted equivalent facilitation for persons in wheelchairs; in fact, it did not require consideration of that practice at all. Moreover, Antoninetti's arguments regarding Chipotle's unwritten practice of accommodation were based on separate provisions of the ADAAG and the ADA. Antoninetti's claims regarding the applicability of sight-line requirements to the wall in front of Chipotle's food preparation tables were based on ADAAG § 4.33.3. Antoninetti's claims regarding the unwritten practice of accommodation were analyzed under ADAAG §§ 2.2 and 7.2(2). Accordingly, the attorney and expert witness fees Antoninetti incurred in developing and litigating his unsuccessful arguments that Chipotle's food preparation counters violated ADAAG Section 4.33.3 and the ADA's general anti-discrimination provisions because they did not offer comparable sight-lines to wheelchair users were not at all intertwined with the issues on which Antoninetti prevailed.

Similarly, Antoninetti's claims regarding the prior unwritten practice are distinct from his claims regarding the Customers With Disabilities Policy. For instance, Antoninetti's claims regarding the prior unwritten practice concern the period from the date of Antoninetti's first visit to one of the Restaurants, through February 2007, when the Written Customers With Disabilities Policy was

adopted.[79] The facts pertaining to Antoninetti's claims regarding the Customers With Disabilities Policy were, in turn, limited to the events occurring from the date of the policy's release in February of 2007 through present.[80] Not only were the time periods relevant to those claims different, the specific requirements of the Customers With Disabilities Policy and the unwritten practice were markedly different, as the Court found in its January 10, 2008 order.[81] Similarly, the relief that Antoninetti sought and that was potentially available with respect to both claims was very different. On the one hand, Antoninetti could recover only money damages for his claims regarding the old practice because Chipotle was no longer operating under it. On the other hand, Antoninetti would have only been able to obtain injunctive and declaratory relief as to his claims regarding the Customers With Disabilities Policy because he had never visited either Restaurant when the Customers With Disabilities Policy was in effect. Accordingly, the District Court did not abuse its discretion in holding that the work Antoninetti performed in order to prevail on his CDPA claim for damages was not inextricably intertwined with the work he performed on his unsuccessful claims regarding Chipotle's written Customers With Disabilities Policy and his unsuccessful arguments regarding the

[79] ER I-5, at 19-20.
[80] *Id.*
[81] *Id.*, at 32-34.

application of ADAAG Section 4.33.3 and the general anti-discrimination provisions of the ADA.

More importantly, however, Antoninetti cannot establish that it would have been reasonable for the District Court to have awarded him the entire $550,651.33 in attorneys' fees that he sought in his fee petition. As the District Court noted in its decision, if it was an abuse of discretion for a district court to award $140,000 in attorneys' fees to a plaintiff who had recovered only $34,000 in damages, it would have also been an abuse of discretion for the District Court to award over $500,000 in attorneys' fees to Antoninetti where he only obtained an award of $5,000 in damages. Furthermore, under both *Farrar* and *McGinnis*, the District Court was required to ensure that Antoninetti's attorneys' fee award was commensurate with his limited success and, if necessary, reduce any award calculated using the loadstar method accordingly. *Farrar*, 506 U.S. at 115-116, 113 S.Ct. at 575, 121 L.Ed.2d 494; *McGinnis*, 51 F.3d at 810. Indeed, under *Farrar*, the District Court had the discretion to dispense with the loadstar method altogether and simply award a nominal amount of attorneys' fees or no attorneys' fees at all. 506 U.S. at 115-116, 113 S.Ct. at 575, 121 L.Ed.2d 494. Antoninetti simply cannot establish that the District Court abused its discretion by not awarding him more attorneys' fees when he lost on all of the most significant issues in this case, obtained only the statutory minimum amount of damages for the

two minor claims on which he prevailed, and failed to produce any significant benefit to the public through his litigation.

D. Antoninetti Has Failed To Establish That The District Court's Holding Regarding Antoninetti's "Block Billed" Time Entries Constitutes Reversible Error.

In his Opening Brief on this cross-appeal, Antoninetti argues that the District Court abused its discretion by allegedly reducing Anoninetti's fee award by 75% based on the fact that a substantial number of the time entries in the billing records submitted by Antoninetti contained "block billed" time entries. This argument is a red herring. The District Court did not reduce the fees awarded to Antoninetti by 75% simply because Antoninetti's attorney bock-billed her time. Rather, the District Court made the 75% across-the-board reduction in Antoninetti's requested fees based on the limited success that Antoninetti had achieved on the merits of his claims, the lack of any public benefit from his litigation and Antoninetti's failure to provide adequate documentation to allow the District Court to determine if the fees that he had requested were "reasonable."[82]

Although the District Court did rely, in part, on the substantial number of block-billed time entries in Antoninetti's attorney's billing records to support its conclusion that Antoninetti had failed to meet his burden of "documenting the appropriate hours expended" on the claims on which he prevailed, it did not abuse

[82] ER I-2, at 7-9.

its discretion in doing so. Federal courts frequently refuse to award fees for block-billed time entries or reduce the fees awarded to prevailing plaintiffs whose attorneys' time records contain block-billed time entries precisely because such entries leave the court with no way of knowing how much time was actually spent on each of these individual items in the block entries. *See, e.g.*, *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989); *Keith v. Volpe*, 644 F. Supp. 1317, 1322 (C.D. Cal. 1986).

In any event, Antoninetti cannot establish that the 75% across-the-board reduction in his requested attorneys' fees constitutes an abuse of discretion because such a reduction was required under controlling precedent. *See Farrar*, 506 U.S. at 115-116, 113 S.Ct. at 575, 121 L.Ed.2d 494; *McGinnis*, 51 F.3d at 810. Indeed, as set forth above in Section IV of this Brief, the Disctict Court abused its discretion under *Farrar* and *McGinnis* in awarding Antoninetti as much as it did.

VI. The District Court Did Not Abuse Its Discretion By Declining To Award Antonineti His Requested Costs.

Antoninetti asserts for the first time in his Opening Brief on this cross-appeal that he is entitled to all of the costs claimed in this case under California Code of Civil Procedure Section 1032. This argument is frivolous. Antoninetti sought his costs under Rule 54 of the Federal Rules of Civil Procedure, not

California Code of Civil Procedure Section 1032.[83] Under Rule 54 of the Federal Rules of Civil Procedure, the decision to award costs lies in the discretion of the trial court. *Maurice A. Garbell, Inc. v. Boeing Co.*, 546 F.2d 297, 301 (9th Cir. 1976). Antoninetti cannot rely on California procedural law to establish his entitlement to costs.[84] This case has been litigated in federal court. Accordingly, federal procedural law applies. *Vacation Village, Inc. v. Clark County, Nev.*, 497 F.3d 902, 913 (9th Cir. 2007). Because Antoninetti had prevailed on only two very minor issues and Chipotle had prevailed on the majority and most significant of the issues in the case, including the central issue of whether Chipotle was required to lower the wall in front of its food preparation counters, the District Court properly exercised its discretion in refusing to award Antoninetti costs.

Furthermore, to the extent that the Court rules in favor of Chipotle on the merits of the consolidated cross-appeal (Ninth Circuit Case Nos. 08-55867, 08-55946), it should remand the case to the District Court with instructions to grant Chipotle's bill of costs.

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[83] *See* ER VIII-31.

[84] Even under California procedural law, Antoninetti's argument that he should have been awarded costs must fail. Under California Code of Civil Procedure, section 1033, subdivision (b), where a plaintiff recovers a judgment of $5,000 or less in a "limited" civil case, where the maximum damages are $25,000 or less, the award of costs is *discretionary*. Because Antoninetti recovered only $5,000, the District Court had the discretion not to award costs under California procedural law as well.

CONCLUSION

For the foregoing reasons, Chipotle respectfully requests that this Court reverse and remand the District Court's August 21, 2008 and February 6, 2009 Orders on Antoninetti's motion for attorneys' fees, with instructions that the District Court issue an order holding that Antoninetti is not entitled to any attorneys' fees (or, alternatively, awarding Antoninetti a nominal amount of attorneys' fees commensurate with his extremely limited success) and granting Chipotle's motion for costs.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure, Appellee/Cross Appellant Chipotle Mexican Grill, Inc. requests the opportunity to present oral argument before this Court.

Date: July 17, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

On May 13, 2009, this Court granted Appellant/Cross-Appellee's motion for consolidation of Case Nos. 09-55327 and 09-55425 with Case Nos. 08-55867 and 08-55946 to extent that the aforementioned appeals shall be assigned to the same merits panel.

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

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CERTIFICATE OF COMPLIANCE
FOR CASE NOS. 09-55327 AND 09-55425

Pursuant to Rules 28.1(e)(3) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I hereby certify that the attached Second Brief on Cross-Appeal of Appellee/Cross Appellant is proportionately spaced, has a typeface of 14 points or more, and contains 11,462 words, exclusive of the Table of Contents and Table of Authorities, which is no more than 16,500 words and thus complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(B)(i).

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