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

FOURTH BRIEF ON CROSS-APPEAL

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INTRODUCTION

Antoninetti's Third Brief on Cross-Appeal consists in large part of a recitation of the same arguments that he has previously made in this cross-appeal and in the consolidated cross-appeal (Case Nos. 08-55867 and 08-55946). Having responded to those arguments in its Second Brief on Cross-Appeal and in its two briefs in the consolidated appeal, Chipotle will not repeat those arguments here.

However, it is clear from all of the papers submitted by both sides that Antoninetti is not entitled to attorneys' fees, and absolutely is not entitled to the vastly disproportionate fees he was awarded by the District Court. Chipotle presented undisputed evidence on summary judgment and at trial that the transaction stations satisfied the requirements of either ADAAG Section 7.2(2)(i) or (ii). Chipotle also presented undisputed evidence that the transaction station can be used to provide the same goods and services exchanged at the portion of the food preparation counters where the customers' entrées are prepared. Additionally, Chipotle presented undisputed evidence that its unwritten practice of accommodating customers with disabilities provided substantially equal access to the food ordering process at the Restaurants consistent with the requirements of ADAAG Section 7.2(2)(iii) and that Antoninetti unreasonably failed or refused to avail himself of the accommodations available to him.

Antoninetti fails to refute any of these arguments in his Third Brief on Cross-Appeal. Antoninetti's primary argument against Chipotle's position that its food preparation counters are compliant with ADAAG Section 7.2(2)(i) and (ii) is that ADAAG Section 4.33.3 rather than ADAAG Section 7.2(2) governs the food preparation counters. This argument, however, construes Section 4.33.3 in a manner that is inconsistent with the regulation's plain language. Antoninetti also contends that the District Court properly held that the goods and services exchanged at the portion of the food preparation counter behind the Wall cannot be provided to customers at the transaction station, as required by ADAAG Section 7.2(2)(i) and (ii). However, Antoninetti offers no factual support for this assertion, and instead relies on his own speculation. It is clear, then, that the District Court erred in denying Chipotle's motion for summary judgment and in granting judgment in favor of Antoninetti.

Even if Antoninetti properly prevailed at trial, he is nevertheless not entitled to recover as great an award of attorneys' fees as that granted by the District Court. The award below was disproportionate to the amount recovered, the relative success of Antoninetti's claims, and the negligible impact the District Court's ruling will have on the general public.

ARGUMENT

I. The District Court Erred in Awarding Antoninetti Attorneys' Fees Because Chipotle Ought To Have Prevailed Under ADAAG Section 7.2(2).

In his Third Brief on Cross-Appeal, Antoninetti argues that the District Court properly held that the transaction station cannot comply with Section 7.2(2)(i) or (ii) because wheelchair users who are served there are not provided the same lines of sight as standing customers. Third Brief on Cross-Appeal at 25-26. This is simply an attempt to raise his ADAAG Section 4.33.3 sight-line arguments under ADAAG Section 7.2(2)(i) and (ii). However, nothing in ADAAG Section 7.2(2)(i) or (ii) imposes any sight-line requirements; they simply impose maximum height and length requirements for sales and service counters.

Antoninetti also appears to argue that wheelchair users cannot see the available food ingredients or the making of their food at the transaction station and that therefore ADAAG Section 7.2(2)(i) and (ii) are inapplicable. However, Antoninetti cites no facts to support this assertion. Instead, he relies solely on his speculation as to what a wheelchair user can and cannot see from the transaction station. However, Antoninetti's arguments are flatly contradicted by the evidence presented at trial, which proved that disabled customers can have their food prepared at the transaction station (or at a table in the dining area) in a way that

permitted them to see all of the ingredients from which they could choose.[1] Furthermore, the District Court expressly found that Chipotle employees can and do use the transaction station to show customers food ingredients and the making of their food.[2]

Accordingly, the District Court erred in finding that Section 7.2(2)(i) or (ii) of the ADAAG did not apply to the transaction station on the food preparation counters because Chipotle did not provide the same benefits and services at the transaction station as it did at the portion of the food preparation counter located behind the wall.[3] Should this Court agree that Section 7.2(2)(i) or (ii) of the ADAAG applies to the transaction station on Chipotle's food preparation counters, Antoninetti's claims for damages must be reversed as to any damages awarded to him for his claims regarding Chipotle's food preparation counter. This would further limit Antoninetti's already limited recovery, and therefore support a further

[1] ER I-3, at 16-17; ER V-26, at 215-17, 229, 336-37, 343-44; ER VII-28, at 623-25.
[2] ER I-5, at 17.
[3] Antoninetti does not raise any new arguments in response to Chipotle's argument that the District Court erred in holding that Chipotle's unwritten practice of accommodation was not an equivalent facilitation under Section 7.2(2)(iii). Because Chipotle has previously addressed those arguments in its briefs, it will not do so again here, except to say that Antoninetti's arguments fail for the same reasons set forth in Chipotle's prior briefs on this cross-appeal and the consolidated cross-appeal.

significant reduction of Antoninetti's attorney fees, if not complete denial of those fees. *Hensley v. Eckhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

II. The Attorneys' Fees Awarded by the District Court Were Not Reasonable.

Even assuming that the District Court did not err in awarding Antoninetti statutory damages under ADAAG Section 7.2(2)(iii) for each visit to the Restaurants prior to the implementation of the written accommodation policy, Antoninetti was not entitled to the disproportionate award of attorneys' fees as he was granted. Under both the ADA and the CDPA, a prevailing party is entitled to an award of his *reasonable* attorneys' fees. 42 U.S.C. § 12205; Cal. Civ. Code § 55. This Court has spoken plainly as to what fees are and are not reasonable where a party's recovery is limited. *McGinnis v. Kentucky Fried Chicken*, 51 F.3d 805 (9th Cir. 1994). In such cases, a party's attorneys' fees must be measured by what a reasonable person would pay for the results achieved.

Antoninetti asserts that his award should not be reduced because all of his claims were intertwined with the limited issues on which he prevailed, citing *Dang v. Cross*, 422 F.3d 800 (9th Cir. 2005). However, this Court's holding in *Dang* was that, when setting the amount of attorneys' fees to which a prevailing party is entitled, courts must evaluate "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 813.

This is precisely what the District Court did in the instant case. However, as set forth below, the District Court did not go far enough in applying this rule.

In *McGinnis*, this Court overturned a district court's award of $148,000 in attorneys' fees to a plaintiff who recovered only $34,000 in damages, holding that the award was excessive because no reasonable client would pay such a high fee for such small recovery. Just as an award of $148,000 in attorneys' fees to a plaintiff who recovered only $34,000 in damages was held to be an abuse of discretion in *McGinnis*, so, too, must the award to Antoninetti by the District Court of $136,537.83 in attorneys' fees for recovery of a mere $5,000 in statutory damages be a clear abuse of discretion.

Antoninetti prevailed only on two minor issues in the case, for which he obtained only the statutory minimum in damages. He did not prevail on his main objective: the request for an injunction requiring Chipotle to lower its food preparation counters. The *McGinnis* analysis is particularly applicable here given Antoninetti's minimal damages and success. Antoninetti asserts that even though he declined to prove injury at trial and was awarded only the minimum statutory damages, those damages cannot be *de minimus* because they were intended to deter civil rights violations. To support this assertion, Antoninetti cites *Cummings v. Connell*, 402 F.3d 936 (9th Cir. 2005). However, that case held that nominal damages are awarded to vindicate rights, the infringement of which has not caused

actual, provable injury. *Id.* at 942. While it is true that the CDPA's minimum statutory damages provision is intended to punish current violations and deter future violations of the law, it allows a plaintiff to prove greater damages to the extent he can demonstrate that he has actually been injured. Antoninetti did not attempt to prove injury at trial. The damages that Antoninetti ultimately recovered are therefore no different from those described in *Cummings*.

Antoninetti's assertion that his lawsuit resulted in benefit to the public is similarly without merit. Antoninetti raises two arguments in support of this assertion. First, he asserts that the District Court's decision will have an estoppel effect on Chipotle's arguments regarding claims of disability discrimination at its other restaurants, including the claims of the other plaintiffs in the related class action lawsuits that Antoninetti and his attorney have filed against Chipotle. Second, he claims that the District Court imposed new requirements on how Chipotle must implement its written Customers With Disabilities Policy in its decision. Both of these arguments are without merit.

The District Court's Findings of Fact, Conclusions of Law, and Judgment clearly indicate that the Court's ruling concerns itself solely with the application of the unwritten policy to Antoninetti's visits to the Pacific Beach and Encinitas restaurants.[4] Furthermore, none of the other named plaintiffs in either of the

[4] ER I-5, at 2.

related putative class actions visited either of the restaurants at issue in this case.[5] Antoninetti's assertion that the ruling below will have an estoppel effect in related cases is therefore without merit.

Similarly, Antoninetti's claim that the District Court's Findings of Fact, Conclusions of Law, and Judgment contained a ruling requiring Chipotle to modify its written policy to include two new requirements (Third Brief on Cross-Appeal, at 34-35) is unsupported by the plain language of the District Court's ruling. The District Court did not issue any order to Chipotle directing that it modify its policy[6]; it simply made factual findings about what that policy entailed[7]. In fact, the express statement by the District Court that its ruling was limited to Antoninetti's experiences at two restaurants belies Antoninetti's argument that the court below issued any general ruling governing Chipotle's actions going forward.

Antoninetti also argues that his lawsuit provided tangible benefits to the public that "are difficult to quantify," and asserts that the limited success he obtained was more than a technical victory. The two cases upon which he relies, however, make clear that he has *not* provided a public benefit. In *Fischer v. SJB-PD, Inc.*, 214 F.3d 1115 (9th Cir. 2000), this Court noted that the plaintiff achieved the main goal of his ADA claim: to obtain an injunction forcing the defendant to

[5] See Chipotle's Request for Judicial Notice, Ex. A, at 8-9, and Ex. B, at 8, 12-13, filed concurrently with the Second Brief on Cross-Appeal.
[6] ER I-5, at 38-39; ER I-3, at 5.
[7] ER 1-5, at 19-24.

change its alleged policy and practice of denying access to people who use service dogs. *Id.* at 1120. In *National Federation of the Blind v. Target Corp.*, 2009 WL 2390261 (N.D. Cal. Aug. 3, 2009), the class plaintiffs obtained a settlement wherein the defendant agreed to modify its website to meet accessibility guidelines and establish a six million dollar settlement fund. *Id.* at *2. In both of these cases, the plaintiffs achieved their primary litigation objective—injunctive relief. Antoninetti, on the other hand, was unsuccessful in obtaining the injunctive relief that had been his primary objective.[8] Accordingly, his lawsuit did not result in any public benefit.

CONCLUSION

For the reasons set forth in its Second Brief and those set forth herein, Chipotle respectfully requests that this Court reverse and remand the District

[8] Nor can Antoninetti prevail on his implication that he is entitled to fees because his lawsuit was a catalyst for certain changes enacted by Chipotle. First, it is well-settled that an appellant in a cross-appeal may not assert new issues or assignments of error in his response and reply brief that were not raised and argued in his initial brief. *See Entm't Research Group v. Genesis Creative Group*, 122 F.3d 1211, 1217 (9th Cir. 1997) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). Second, an appellate court generally will not consider an issue that is raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); *Conn. Gen. Life Ins. Co. v. New Images*, 321 F.3d 878, 883 (9th Cir. 2003). Third, even if Antoninetti were permitted to raise this argument now, California law makes clear that, in order for a plaintiff to recover fees under the catalyst theory, a plaintiff must "reasonably attempt[] to settle the litigation before filing the lawsuit," *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 560-61, 21 Cal. Rptr. 3d 331, 336, 101 P.3d 140, 144 (2004)—something the District Court found Antoninetti made "no attempt" to do. ER I-5, at 8, 28.

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.[9]

[9] As Chipotle has addressed in previous briefs, in the event this Court overrules the Findings of Fact, Conclusions of Law, and Judgment in favor of Antoninetti, the issue of attorneys' fees should be remanded so that the District Court may exclude fees relating to Antoninetti's meritless arguments, such as Antoninetti's claim that ADAAG Section 4.33.3 applies to Chipotle's food preparation counters, and his various unfounded motions for reconsideration and motions to amend.

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 2,039 words, exclusive of the Table of Contents and Table of Authorities, which is no more than 7,000 words and thus complies with the type-volume limitations of Federal Rule of Appellate Procedure 28.1(e)(2)(C).

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