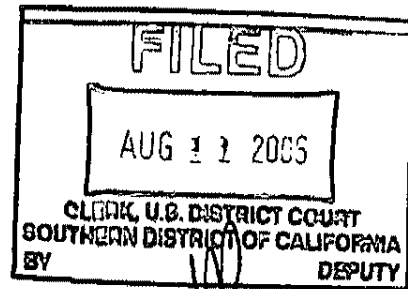


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3:05-CV-01660 ANTONINETTI V. CHIPOTLE MEXICAN  
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13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA

15 MAURIZIO ANTONINETTI,  
16 Plaintiff,  
17 vs.  
18 CHIPOTLE MEXICAN GRILL INC., and  
19 DOES 1 THROUGH 10, inclusive  
20 Defendants.

21 Case No. 05-CV-1660-J(WMc)  
22 CROSS-DEFENDANT CARL  
23 KARCHER ENTERPRISES, INC'S  
24 NOTICE OF MOTION AND MOTION  
25 FOR SUMMARY JUDGMENT;  
26 MEMORANDUM OF POINTS AND  
27 AUTHORITIES IN SUPPORT  
28 THEREOF

19 CROSS CLAIM

21 Date: October 10, 2006  
22 Time: 10:30 a.m.  
23 Ctrm: 12

24 CHIPOTLE MEXICAN GRILL INC.  
25 Cross-Complainant,  
26 vs.  
27 CARL KARCHER ENTERPRISES, INC.  
28 AND EL CAMINO PLAZA  
ASSOCIATES A CALIFORNIA JOINT  
VENTURE, and DOES 1 THROUGH 10,  
Inclusive  
Defendants.

*[Filed concurrently with Cross-Defendant's Separate Statement of Undisputed Facts; Declaration of Ree R. Ryan; and [Proposed] Order]*

Complaint Filed: August 22, 2005  
Cross-Claim Filed: January 30, 2006  
Trial Date: None Set

CP  
CALL, JENSEN &  
FERRELL  
A PROFESSIONAL  
CORPORATION

CKE01-09:212326 1-8-10-06

1 **TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:**

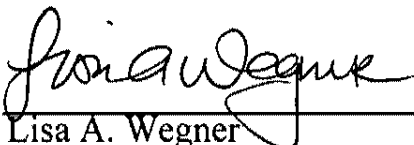
2  
3 **PLEASE TAKE NOTICE** that on October 10, 2006, at 10:30 a.m., or as soon  
4 thereafter as the matter may be heard in the above-entitled court, located at 880 Front  
5 Street, Courtroom 12, San Diego, California, Cross-defendant Carl Karcher Enterprises,  
6 Inc. ("CKE") will and hereby does move the Court for an order granting summary  
7 judgment of the Cross-claim by Chipotle Mexican Grill Inc. ("Chipotle").  
8

9 **GROUND FOR MOTION:** This motion is made on the grounds that there are  
10 no disputable material facts and judgment should be entered in CKE's favor as a matter  
11 of law. Specifically, summary judgment is appropriate because there is no evidence  
12 that CKE owes any duty to indemnify or defend Chipotle, as evidenced by the contract  
13 on which the Cross-claim is allegedly based.  
14

15 **BASIS OF MOTION:** This motion will be based on this Notice of Motion and  
16 Motion, the Statement of Uncontroverted Facts and Conclusions of Law filed herewith,  
17 the Declaration of Ree R. Ryan, the pleadings and papers on file herein, and such  
18 further arguments and papers as may be presented to the Court before or during the  
19 hearing.  
20

21 Dated: August 10, 2006

CALL, JENSEN & FERRELL  
A Professional Corporation  
SCOTT J. FERRELL  
LISA A. WEGNER

22  
23  
24 By:   
Lisa A. Wegner

25  
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Enterprises, Inc.  
27

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1 **I. INTRODUCTION**

2 The moving party, Carl Karcher Enterprises, Inc. ("CKE"), appears in this action  
3 only as a cross-defendant on a cross-claim for indemnification. Summary judgment  
4 should be granted in CKE's favor on that cross-claim because, contrary to the  
5 allegations of the cross-claim, the contract between the parties actually states that CKE  
6 cannot be looked to for indemnification.

7 The complaint in this action by Maruizio Antoninetti ("Plaintiff") against  
8 defendant and cross-claimant Chipotle Mexican Grill ("Chipotle") seeks damages and  
9 an injunction ordering Chipotle to make improvements and repairs necessary to bring its  
10 Encino, California, restaurant premises into compliance with the Americans with  
11 Disabilities Act ("ADA") and related California statutes. Chipotle then cross-claimed  
12 against CKE for indemnification and defense. Even though CKE neither owns nor  
13 controls the leased premises, Chipotle alleges that CKE is liable for ADA accessibility  
14 repairs and improvements to the common areas of the restaurant premises, based on the  
15 sublease agreement between Chipotle and CKE.

16 However, the sublease agreement does not say what Chipotle wishes it said. A  
17 simple review of the relevant contract between the parties makes it clear that Chipotle  
18 has no valid claim for indemnification from CKE. Chipotle subleased the premises "as  
19 is" and accepted responsibility to make any repairs or alterations *at its own expense*. In  
20 fact, the lease agreement specifically provides that CKE "*shall not, under this*  
21 *Sublease, be called upon to make any improvements or repairs to the Leased*  
22 *Premises.*" Separate Statement of Undisputed Material Facts ("SS") ¶4, ¶5 (emphasis  
23 added). Furthermore, the contract makes clear that the landlord of the shopping plaza—  
24 not CKE—is responsible to ensure that common areas comply with governmental  
25 requirements. It follows that CKE is not liable to indemnify Chipotle for costs  
26 associated with ADA accessibility repairs. Summary judgment should therefore be  
27 granted in favor of CKE on Chipotle's Cross-claim.

1 **II. FACTUAL BACKGROUND**

2 **A. Chipotle Accepted The Terms Of The Sublease Agreement**

3 On December 24, 1985, CKE entered a lease agreement (the "Master Lease")  
4 with landlord El Camino Plaza Associates to lease restaurant premises located at 268  
5 North El Camino Real in Encinitas (the "Premises"). Separate Statement of Undisputed  
6 Material Facts. (SS ¶1). In 1994, CKE subleased the premises to the Boston Market  
7 restaurant chain, which in turn assigned its sublease to Chipotle on May 31, 2002 (the  
8 "Assignment"). (SS ¶2).

9 As stated in the Assignment, Chipotle, as the assignee, accepted and assumed "all  
10 of the terms, covenants and conditions in the Sublease" entered into by Boston Market  
11 and CKE on June 1, 1994 (the "Sublease Agreement"). (SS ¶3). Accordingly, that  
12 Sublease Agreement sets out the contractual and legal obligations between Chipotle (as  
13 "Sublessee") and CKE (as "Sublessor").<sup>1</sup>

14 **B. Under The Sublease Agreement, Chipotle Cannot Call On CKE To**  
15 **Make Any Improvements Or Repairs**

16 Under paragraph 9 of the Sublease Agreement, Chipotle expressly took the  
17 premises "as is." (SS¶4). ("Sublessee acknowledges that it has inspected the Leased  
18 Premises and accepts the same in an "as-is" condition). Paragraph 9 further provides  
19 that "Sublessee [Chipotle] shall, at Sublessee's own expense, make any and all repairs  
20 required to be made by Sublessor, as Lessee under the Master Lease." *Id.* The Sublease  
21 Agreement also makes it expressly clear that CKE shall have no obligation to make any  
22 repairs with respect to the property: "*Sublessor shall not, under this Sublease, be*  
23 *called upon to make any improvements or repairs to the Leased Premises.*" *Id.*  
24 (emphasis added). The "as is" provisions of paragraph 9 are consistent with other  
25 provisions in the Sublease Agreement. For instance, paragraph 8 of the Sublease  
26

27 <sup>1</sup> Paragraph 13 of the Sublease Agreement provides for the recovery of "reasonable attorney's fees" by  
28 the prevailing party in an action arising out of the Sublease Agreement, and CKE intends to seek such  
fees should judgment be entered in its favor.

1 Agreement provides that any improvements to the leased premises “shall be at the sole  
2 expense of the Sublessee [Chipotle].” (SS ¶6).

3 **C. The Landlord, El Camino Plaza Associates, Is Responsible To Ensure**  
4 **That Common Areas Comply With All Governmental Requirements**

5 Paragraph 12 of the Sublease Agreement confirms that the Sublease Agreement is  
6 subject to each and all terms of the Master Lease. (SS ¶7). Included in the Master Lease  
7 is an agreement that “Lessor”—that is, El Camino Plaza Associates, the landlord of the  
8 shopping plaza in which the leased premises are located—is responsible for ensuring  
9 that the common areas of the shopping center are “in good and sanitary order, condition  
10 and repair, including making repairs where necessary, and in compliance with all  
11 governmental requirements,” such as ADA accessibility requirements. (SS ¶9). For  
12 instance, El Camino Plaza Associates is specifically responsible for repairs to the  
13 common areas such as “re-marking paved and unpaved surfaces,” and “direction and  
14 other signs.” *Id.* (SS ¶10).

15 **D. Upon Being Sued For ADA Violations, Chipotle Cross-claimed**  
16 **Against CKE And The Landlord**

17 On August 22, 2005, plaintiff Maurizio Antoninetti filed suit against Chipotle,  
18 alleging that Chipotle’s location in Encinitas—the premises subject to the Sublease  
19 Agreement and Master Lease—is not compliant with requirements of the ADA and  
20 related state law. (Complaint ¶¶ 16, 20-22 and 25). The complaint seeks an injunction  
21 requiring Chipotle to make the necessary repairs and improvements to make the  
22 premises ADA-compliant, as well as statutory damages and attorney’s fees. (Complaint  
23 Prayer for Relief at pp. 10 and 11).

24 On January 30, 2006, Chipotle filed a cross-claim against CKE and the landlord,  
25 El Camino Plaza Associates (the “Landlord”), seeking a declaration that CKE and El  
26 Camino Plaza Associates have a duty under the Sublease Agreement to indemnify  
27 Chipotle. (Cross-claim Prayer for Relief at pp. 4 and 5). Chipotle further seeks an



1 award of reasonable attorney's fees in connection with defending plaintiff's action, but  
2 only as to the common areas. (Cross-claim Prayer for Relief at pp. 4 and 5).

### 4 III. LEGAL ARGUMENT

#### 5 A. Summary Judgment Standard

6 Summary judgment is proper "if the pleadings, depositions, answers to  
7 interrogatories, and admissions on file, together with the affidavits, if any, show that  
8 there is no genuine issue as to any material fact and that the moving party is entitled to  
9 judgment as a matter of law." Fed. R. Civ. Proc. 56(c); *Celotex Corp. v. Catrett*, 477  
10 U.S. 317, 322 (1986). Specifically, Federal Rule of Civil Procedure 56(c) "mandates  
11 the entry of summary judgment . . . against a party who fails to make a showing  
12 sufficient to establish the existence of an element essential to that party's case, and on  
13 which the party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. A  
14 motion for summary judgment "pierces" the pleadings and puts the plaintiff to the test  
15 of affirmatively coming forward with sufficient evidence for its claims. *Id.* at 325. If,  
16 as here, the non-moving party on summary judgment has the burden of proof at trial, the  
17 moving party has no burden to negate the opponent's claim. *Id.* at 323. The moving  
18 party does not have the burden to produce any evidence showing the absence of a  
19 genuine issue of material fact. *Id.* at 325. "Instead, . . . the burden on the moving party  
20 may be discharged by 'showing' – that is, pointing out to the district court – that there is  
21 an absence of evidence to support the nonmoving party's case." *Id.* (citations omitted).

22 Once the moving party satisfies this initial burden, "an adverse party may not rest  
23 upon the mere allegations or denials of the adverse party's pleading. . . . [T]he adverse  
24 party's response . . . must set forth specific facts showing that there is a genuine issue  
25 for trial." Fed. R. Civ. Pro. 56(e). A "genuine issue" of material fact exists only when  
26 the nonmoving party makes a sufficient showing to establish the essential elements to  
27 that party's case, and on which that party would bear the burden of proof at trial.  
28 *Celotex*, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support

1 of the plaintiff's position will be insufficient; there must be evidence on which a  
 2 reasonable jury could reasonably find for plaintiff." *Anderson v. Liberty Lobby, Inc.*,  
 3 477 U.S. 242, 252 (1986).

4 **B. CKE Is Entitled To Summary Judgment Because It Has No Duty To**  
 5 **Indemnify Chipotle**

6 The duties between two interacting parties can be defined by contract. The  
 7 California Civil Code, for instance, defines a contract as "an agreement to do or not to  
 8 do a certain thing." Cal. Civ. Code § 1549. A contract thus gives rise to an obligation  
 9 or legal duty, and at the same time defines the scope of that duty. Cal. Civ. Code §  
 10 1427. Where an express term defines the scope of the obligation, no implied term can  
 11 be read into the contract to vary the express agreement. *Carma Developers (Calif.) v.*  
 12 *Marathon Dev. Calif.*, 2 Cal.4<sup>th</sup> 342, 374 (1992)("implied terms should never be read to  
 13 vary express terms").

14 In the context of the ADA, landlords and tenants of places of public  
 15 accommodation can use a lease or other contract to define the extent to which each will  
 16 be obligated to the other for ensuring that leased premises comply with ADA  
 17 accessibility requirements. In fact, the ADA Title III Regulation subsection titled  
 18 "Landlord and tenant responsibilities," states as follows:

19 As between ["the landlord who owns the building" and "the tenant  
 20 who owns or operates the place of public accommodation"],  
 21 allocations of responsibility for complying with the obligations of  
 22 this part may be determined by lease or other contract.

23 28 U.S.C. 36.201(b), quoting subsection (a). Thus, the question of whether and to what  
 24 extent the landlord or tenant will be liable to the other for obligations to make the leased  
 25 property ADA-compliant is a question that can be, and usually is, determined by the  
 26 terms of the lease.

27 In this action, Chipotle actually points to the Sublease Agreement as the basis for  
 28 its Cross-claim for indemnity and defense by CKE. (Cross-claim ¶¶ 8, 11). However,

1 Chipotle does not allege any specific term or provision giving rise to the alleged duty in  
2 CKE to indemnify and defend Chipotle, nor has Chipotle attached a copy of the lease to  
3 the Cross-claim to support its vague allegations.

4 In actuality, the Sublease Agreement's terms are not what Chipotle represents  
5 them to be, and in fact are quite the opposite. The terms of the Sublease Agreement  
6 unambiguously confirm that CKE does not have any duty to indemnify or defend  
7 Chipotle against claims that Chipotle must make ADA-related repairs and  
8 improvements to the Premises. Summary judgment is therefore appropriate because  
9 there is no evidence that CKE has a duty to indemnify or defend Chipotle.

10 **1. Chipotle Agreed To Take The Premises "As Is"**

11 Chipotle operates its restaurant facility on the Premises pursuant to the May 31,  
12 2002, Assignment of the Sublease Agreement from Boston Market to Chipotle. In the  
13 Assignment, Chipotle agreed to accept and assume "all of the terms, covenants and  
14 conditions" of the June 1, 1994 Sublease Agreement. (SS ¶ 3). By doing so, Chipotle  
15 accepted and assumed the term in paragraph 9 of the Sublease Agreement that the  
16 Premises be taken "as is": "Sublessee acknowledges that it has inspected the Leased  
17 Premises and accepts the same in an 'as-is' condition." (SS ¶4). Therefore, the terms  
18 of the contract agreed to by Chipotle preclude Chipotle from now holding CKE  
19 responsible to make improvement or repairs for the Premises.

20 **2. Chipotle Expressly Agreed That It Would Not Look To CKE**  
21 **For Improvements Or Repairs**

22 One of the subjects covered by the Sublease Agreement is the allocation of  
23 responsibility for improvements or repairs to the Premises. By accepting assignment of  
24 the Sublease Agreement, Chipotle agreed to the express covenant that it would not look  
25 to CKE to make any improvements or repairs, as specified in the unambiguous  
26 language, "Sublessor shall not, under this Sublease, be called upon to make any  
27 improvements or repairs to the Leased Premises." (SS ¶ 5).

1 Thus, in light of the express terms of the Sublease Agreement, there is no  
 2 question that Chipotle cannot make CKE responsible for ADA-related improvements or  
 3 repairs. The Sublease Agreement simply does not include a covenant that CKE will  
 4 indemnify and defend Chipotle against allegations that Chipotle must make the  
 5 Premises ADA-compliant.

6 **3. Chipotle Agreed To The Terms Of The Master Lease, Under**  
 7 **Which The Landlord Is Responsible To Ensure That Common**  
 8 **Areas Comply With Governmental Requirements**

9 By agreeing to the terms of the Sublease Agreement, Chipotle agreed to step into  
 10 the shoes of CKE as tenant on the Master Lease and to be subject to the terms of the  
 11 Master Lease. Paragraph 12 of the Sublease Agreement directly states that the Sublease  
 12 Agreement is “subject to each and all of the terms, conditions, and provisions of the  
 13 Master Lease,” and further states that Chipotle accepted the same obligations that CKE  
 14 had under the Master Lease: “It is understood and agreed that Sublessee [Chipotle] shall  
 15 have the same obligations of those of the Sublessor [CKE] under the Master Lease.”  
 16 (SS ¶7 and ¶8).

17 One important part of the Master Lease is the provision that the Landlord (*not*  
 18 CKE) is responsible for ensuring that common areas around the Premises comply with  
 19 governmental requirements. Specifically, paragraph 11 of the Master Lease discusses  
 20 the Landlord’s responsibility to “pay and be responsible for maintaining all  
 21 improvements on the common area of the shopping center . . . *including making*  
 22 *repairs where necessary, and in compliance with all governmental requirements.*”  
 23 (SS ¶9)(emphasis added). Paragraph 11 includes a sample, non-exclusive list of the  
 24 Landlord’s responsibilities for maintaining the common areas, and included on that list  
 25 is “maintaining, repairing, replacing, and remarking paved and unpaved surfaces, curbs,  
 26 directional and other signs, landscaping, lighting facilities, drainage, and similar items.”  
 27 (SS ¶10).

1 Thus, to the extent Chipotle seeks indemnification as to the common areas, it  
 2 must look to the Landlord, not to CKE. For instance, the Landlord is responsible to  
 3 ensure that disabled parking spaces are painted and signposted in accordance with the  
 4 ADA guidelines. Chipotle has no control over the common areas and by contract is not  
 5 responsible to ensure that the common areas are ADA-compliant. It follows that  
 6 Chipotle is not a proper defendant to Chipotle's Cross-claim for indemnification and  
 7 defense of ADA-related allegations, particularly because Chipotle seeks  
 8 indemnification and defense as to the common areas. (Cross-claim ¶¶8, 11, 14).

9 **4. To The Extent Any Repairs Or Improvements Are Not The**  
 10 **Landlord's Responsibility Under The Master Lease, Chipotle**  
 11 **Agreed To Make Such Repairs At Its Own Expense**

12 If, under the Master Lease, responsibility for any repairs or improvements fell on  
 13 CKE, that responsibility transferred to Chipotle through the Sublease Agreement, and  
 14 Chipotle agreed to make the repairs *at its own expense*. Specifically, paragraph 9 of the  
 15 Sublease Agreement provides,

16 Sublessee [Chipotle] shall, at Sublessee's own expense, make any  
 17 and all repairs required to be made by Sublessor [CKE], as Lessee  
 18 under the Master Lease.

19 (SS ¶4 and ¶5). This provision is consistent with paragraph 8 of the Sublease  
 20 Agreement, which provides that any improvements on the Premises "shall be at the sole  
 21 expense of the Sublessee [Chipotle]." (SS ¶6). It is further consistent with the express  
 22 agreement that CKE "shall not, under this Sublease, be called upon to make any  
 23 improvements or repairs to the Leased Premises." (SS ¶5).

24 Thus, the Sublease Agreement makes abundantly clear that the costs for ADA-  
 25 related repairs or improvements fall on Chipotle if not on the Landlord, but do not fall  
 26 on CKE.

1 IV. CONCLUSION

2 Consequently, there is no evidence to support Chipotle's claim for  
3 indemnification and defense by CKE, and summary judgment should be granted in  
4 CKE's favor. CKE does not own nor control the Premises. More important, Chipotle  
5 agreed by contract that it would not call upon CKE to be responsible for repairs or  
6 improvements—including repairs or improvements found necessary to make the  
7 Premises ADA-compliant. Accordingly, CKE asks this Court to grant summary  
8 judgment in favor of CKE and against Chipotle on Chipotle's Cross-claim.

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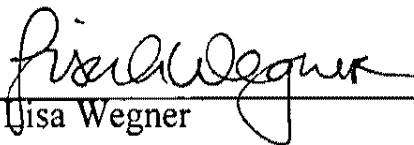
10 Dated: August 10, 2006

CALL, JENSEN & FERRELL  
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SCOTT J. FERRELL  
LISA A. WEGNER

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By:   
Lisa Wegner

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Attorneys for Cross-Defendant Carl  
Karcher Enterprises, Inc.

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