

1 GREENBERG TRAUIG, LLP
GREGORY F. HURLEY (SBN 126791)
2 E-Mail: HurleyG@gtlaw.com
JEANNE U. VU (SBN 232950)
3 E-Mail: VuJ@gtlaw.com
3161 Michelson Drive, Suite 1000
4 Irvine, CA 92612
Telephone: 949-732-6500
5 Facsimile: 949-732-6501

6 GREENBERG TRAUIG, LLP
JOHN F. SCALIA (SBN 154560)
7 E-Mail: ScaliaJ@gtlaw.com
MATTHEW H. SORENSEN (Pro Hac Vice)
8 E-Mail: SorensenM@gtlaw.com
1750 Tysons Blvd., Suite 1200
9 McLean, VA 22102
Telephone: 703-749-1380
10 Facsimile: 703-714-8380

11 Attorneys for Defendant
CHIPOTLE MEXICAN GRILL, INC.

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 MAURIZIO ANTONINETTI,
17 Plaintiff,
18
19 vs.
20 CHIPOTLE MEXICAN GRILL, INC.,
21 Defendant.
22

CASE NO.: 05-CV-1660 J (WMc)
Related to & Consolidated for Discovery With
06-CV-2671 J (WMc)
**DEFENDANT CHIPOTLE MEXICAN
GRILL, INC.'S TRIAL BRIEF**
Trial Date: November 27, 2007
Time: 8:00 a.m.
Before: Hon. Napoleon A. Jones, Jr.

1 Pursuant to the Court’s September 21, 2007 Order, Defendant Chipotle Mexican Grill, Inc.
2 (“Chipotle”), hereby submits its Trial Brief in the above captioned matter.

3 **I. STATEMENT OF THE CASE**

4 This lawsuit arises under Title III of the Americans With Disabilities Act (“ADA”) and the
5 California Disabled Persons Act (“CDPA”).¹ Plaintiff Maurizio Antoninetti (“Plaintiff”) claims that he
6 was denied full and equal access to two Chipotle-owned restaurants, one located at 268 N. El Camino
7 Real in Encinitas (the “Encinitas Restaurant”) and the other located at 1504 Garnet Avenue in San
8 Diego (the “Pacific Beach Restaurant”) (collectively the “Restaurants”). In particular, Plaintiff alleges
9 that the 44 inch high wall in front of the Restaurants’ food preparation counters at the Restaurants
10 obstruct his view of the preparation counters and thereby deny him the right to see the food ingredients
11 and customize his food order. (Plaintiff also has claimed that the men’s restrooms, seating areas and
12 parking areas of the Encinitas and Pacific Beach Restaurants were inaccessible and that the entrances to
13 the Pacific Beach restaurant were inaccessible.)

14 In April of 2007, the parties filed cross motions for summary judgment. The Court granted
15 Chipotle’s summary judgment motion as to Plaintiff’s ADA and CDPA claims regarding the restrooms
16 and seating areas of the Encinitas and Pacific Beach Restaurants and his claims regarding the entrances
17 to the Pacific Beach Restaurant. The Court also granted Chipotle’s summary judgment motion as to
18 Plaintiff’s ADA claims regarding the parking lots of the Encinitas and Pacific Beach Restaurants
19 because Chipotle altered the parking lots of those restaurants to ensure their compliance with the ADA,
20 but granted Plaintiff’s summary judgment motion as to his CDPA claim for damages based on its
21 determination that the parking lots did not comply with the ADA prior to Chipotle’s alterations.

22 The Court denied both parties’ summary judgment motions with respect to Plaintiff’s claims
23 regarding the wall in front of the food preparation counters. The Court first held that Section 4.33.3 of
24 the ADA Accessibility Guidelines (“ADAAG”), which requires that wheelchair users be afforded lines
25 of sight that are comparable to those of standing persons in fixed seating areas, was inapplicable to
26

27 ¹ Plaintiff also raised a claim under the California Unruh Civil Rights Act (“Unruh Act”). A party
28 seeking damages and other relief under the CDPA may not also seek relief under the Unruh Act. Cal.
Civ. Code § 54.3(c). Plaintiff’s counsel has informed Chipotle’s counsel that Plaintiff has abandoned
his Unruh Act claim and elected to pursue his CDPA claim.

1 Chipotle's food preparation counters. The Court found instead that Section 7.2(2) of the ADAAG
2 applies to the food preparation counters. Under Section 7.2(2), a portion of the main counter that is a
3 minimum of 36 inches in length must be provided with a maximum height of 36 inches, or an auxiliary
4 counter with a maximum height of 36 inches must be provided in close proximity to the main counter,
5 or equivalent facilitation must be provided. The Court found that the 34 inch high transaction station
6 attached to the food preparation counters, at which the cash registers are located, was not "a portion of
7 the main counter" or an "auxiliary counter" within the meaning of Subsections 7.2(2)(i) and (ii).
8 However, the Court noted that on February 23, 2007, Chipotle implemented a nationwide "Customers
9 With Disabilities" policy pursuant to which Chipotle required its employees to provide any necessary
10 accommodations to disabled restaurant patrons to ensure that they have equal access to the goods,
11 services, privileges, advantages and accommodations of Chipotle's restaurants. That policy refined and
12 improved Chipotle's always-existing unwritten policy and practice of accommodating disabled
13 customers as part of its general policy of providing great customer service. The Court held that
14 Chipotle's Customers With Disabilities Policy *may* constitute an "equivalent facilitation" under Section
15 7.2(2)(iii), but that that issue is a fact-intensive inquiry requiring an evidentiary hearing.

16 Following the Court's summary judgment rulings, the parties filed cross motions for
17 reconsideration. In Plaintiff's reconsideration motion he argued that Chipotle's Customers With
18 Disabilities Policy could not constitute an equivalent facilitation as a matter of law because it was not an
19 "alternative design or technology" within the meaning the ADAAG. The Court rejected this argument
20 in its August 23, 2007 Order denying the parties' reconsideration motions. The Court again rejected this
21 argument in its Order on Plaintiff's Motion to Amend the Pretrial Order and his first Motion in Limine
22 to exclude evidence and argument regarding the Customers With Disabilities Policy.

23 The primary issue remaining to be tried in this case is whether Chipotle's Customers with
24 Disabilities Policy is an equivalent facilitation under Section 7.2(2)(iii). The evidence presented at trial
25 will establish that the Customers With Disabilities Policy does constitute an equivalent facilitation under
26 that Section. The evidence will show that the Policy allows customers with mobility impairments or
27 other disabilities an equal opportunity to see the food ingredients available at Chipotle's restaurants, to
28

1 watch their food preparation, customize their food, and to generally enjoy all aspects of Chipotle's
2 restaurants as they so choose based on their individual needs and desires.

3 **II. STATEMENT OF FACTS**

4 Plaintiff is a paraplegic who uses a wheelchair for mobility. Plaintiff claims that his eye level,
5 when seated in his wheelchair, is approximately 45 inches from the finished floor. The average eye
6 level of persons in wheelchairs is between 43 and 51 inches from the finished floor. Plaintiff has visited
7 the Encinitas and Pacific Beach Restaurants a combined total of five to seven times.

8 Chipotle's restaurants serve burritos, tacos, and other Mexican cuisine. Customers who order
9 their food in the restaurant typically do so by entering Chipotle's food service line and proceeding down
10 the line while selecting the various ingredients they desire in, and directing the making of, their entrees.²
11 Chipotle's customers can order their food by referring to a large menu board hung above the food-
12 preparation counter that lists all of the ingredients that they may add to their entrees. Chipotle's
13 employees then prepare the entrees on counters that are approximately 35 inches high and 12 feet long.
14 At the beginning of the food preparation counters is a tortilla press station, where the tortillas are heated
15 and the customers' orders are taken. After his or her order has been taken at the tortilla station, the
16 customer proceeds down the line to the next station on the food preparation counter where the
17 customers' choice of rice, beans, peppers, and/or meat is added to the entree. From there, the customer
18 proceeds to the salsa station where his or her choice of sauces, sour cream, cheese, guacamole and
19 lettuce may be added to the entree. If the customer orders a burrito, it is generally wrapped at the salsa
20 station.³ The order is then passed down to the point of sale station of the food preparation counters,
21 where the cash registers are located.

22 ² Chipotle also allows its customers to submit their orders by internet and facsimile. Customers who
23 submit their orders by these alternative means do not have to proceed through the food serving line.
24 Also, from time to time, Chipotle customers who order their food in the restaurant, including mothers
25 with small children, elderly patrons, or disabled patrons, will request that a Chipotle employee take their
26 order at a table in the seating area of the restaurant or other similar accommodations that would allow
27 them to avoid proceeding through the food serving line. As part of its general policy of providing great
28 customer service and its current Customers With Disabilities Policy, Chipotle has accommodated and
continues to accommodate such requests.

³ As set forth in detail below, Chipotle will, at the request of its customers, accommodate requests to
have their burritos wrapped elsewhere, such as at the point of sale counter or at a table in the restaurant's
seating area.

1 The food preparation counters, with the exception of the point of sale station, separate the
2 employees from the customers by a wall that is approximately 44 inches high and 4.25 inches deep. The
3 wall serves to conceal restaurant equipment from customers and to delineate the food preparation area
4 from the area in which customers pay for their entrees. A clear glass sneeze guard is attached to the top
5 of the wall by a metal bracket that is approximately 2 inches high. Accordingly, the wall and the metal
6 bracket to which the sneeze guard is attached are a total of 46 inches in height. Depending on their
7 height, Chipotle's customers may look over the wall to see the food ingredients available, watch as their
8 entrees are created, and, if they so choose, direct the creation of their entrees.

9 Plaintiff asserts that when he first visited the Encinitas Restaurant in February 2005, he could not
10 see the ingredients offered at the restaurant or the preparation of his entree because of the height of the
11 wall in front of the food preparation counter. Plaintiff contends that he ordered his burrito off the menu
12 board but was unable to select from the various ingredients that were available because he did not know
13 what they were, and he could not see them arranged on the food preparation counter. He further
14 contends that he did not have the opportunity to customize his burrito because he could not observe the
15 assembly of his entree over the wall in front of the food preparation counter. Although it is possible that
16 Plaintiff did not in fact see the food ingredients or the preparation of his entree on that particular visit, he
17 did have the opportunity to view the food ingredients and direct the preparation of his entree, because at
18 that time it was (as it still is) Chipotle's policy and practice to accommodate all of its customers' needs
19 and desires for assistance or individualized attention.

20 Since its inception Chipotle has maintained a policy of providing great customer service.
21 Chipotle refers to this as the "WOW factor" in its internal training documents and manuals, including its
22 policy handbook "the Know." Chipotle trains each of its employees that providing the best customer
23 service requires that the employees carefully assess the wants and needs of each individual customer.
24 For instance, some customers may want the opportunity to taste samples of the food ingredients. Or,
25 some parents with small children, or some elderly customers, may want special assistance in placing
26 their order -- such as having an employee take the order at a table rather than in the food service line.
27 Similarly, some customers who are not tall enough to see over the wall in front of the food preparation
28 counter, or some customers in wheelchairs, may want to see samples of the food ingredients, which can

1 be accommodated in several ways (including holding the food items up in a serving utensil or taking the
2 food items to a table for the customer to observe). Under Chipotle's general policy of providing great
3 customer service, restaurant employees have always been trained and expected to use their judgment in
4 order to best accommodate the needs or wants of those customers. The end purpose is to ensure that
5 each customer has access to all aspects of the Chipotle experience, based his or her particular needs or
6 desires. While that experience includes enjoying the smells, sights, sounds and tastes of the restaurant,
7 the most important aspect of the Chipotle experience is the ultimate enjoyment of eating one's food.

8 Although Chipotle's general customer service policy does not expressly refer to the
9 accommodation of persons in wheelchairs, it has always been applied to ensure that such
10 accommodations are provided to customers who desire them. One important aspect of Chipotle's
11 culture is that it trains and then trusts its restaurant employees to think independently and make their
12 own decisions as to how to respond to the particular needs and wants of each customer - disabled and
13 non-disabled alike. This is one of the reasons Chipotle has traditionally maintained relatively general
14 written policies, rather than specific word-for-word guidelines for each and every situation that its
15 employees may encounter.

16 The evidence presented at trial will establish that Chipotle has always effectively accommodated
17 disabled customers' desire to see the food or watch or participate in the preparation of their entree, just
18 as it has always accommodated non-disabled customers who, for whatever reason, cannot see the food
19 or otherwise desire assistance or special attention in placing their orders. Such accommodations are not
20 given to customers as a form of "special treatment," but rather as an important and quite normal part of
21 Chipotle's overall business philosophy and of how Chipotle operates its restaurants. Indeed, in its
22 training materials and handbooks, Chipotle notes that "we concentrate on building Chipotle one burrito,
23 one customer, one employee and one restaurant at a time," and that "everything we do is focused on
24 helping our people on the front line make our customers happy." It is for this reason that Chipotle
25 encourages its employees and managers to "go beyond ... [e]xtend yourself and be different."

26 Ron Sedillo (Chipotle's Director of Training), Matthew Cieslak (the former manager of the
27 Pacific Beach Restaurant), and Josephina Garcia (the former manager of the Encinitas Restaurant)
28 testified in their depositions that customers in wheelchairs who cannot see over the wall in front of the

1 food preparation counters nevertheless have the opportunity to see the food ingredients because Chipotle
2 employees will lift up spoonfuls of the ingredients, place samples of the ingredients into soufflé cups
3 and pass the cups to the customer, or even pick up the entire bin of a particular ingredient and show it to
4 the customer. Furthermore, Chipotle will prepare the customer's entrée at the point of sale station or at
5 a separate table to allow the customer to see the preparation of his or her food. Indeed, Ron Sedillo,
6 Matthew Cieslak and Josefina Garcia testified in their depositions that they themselves have seen
7 Chipotle employees giving some or all of those accommodations (and other similar accommodations) to
8 customers. Similarly, Maritza Arriaga, the current general manager of the Encinitas Restaurant, and
9 Ben Williams, the current area manager for the Encinitas Restaurant, will testify at trial that they
10 themselves have given such accommodations to Chipotle customers or witnessed other Chipotle
11 employees giving such accommodations to customers.

12 On October 6, 2006, as part of the discovery process of this litigation, the parties conducted site
13 inspections of the Pacific Beach and Encinitas Restaurants. Plaintiff video-taped those site-inspections.
14 As Plaintiff's own video-tapes will show, during those inspections Chipotle's employees showed
15 Plaintiff food ingredients by lifting the ingredients above the wall using serving utensils and by putting
16 the ingredients in cups. Plaintiff's own video-tape demonstrates that Plaintiff had no difficulty
17 whatsoever in proceeding through Chipotle's food serving line, and that it did not take Plaintiff
18 substantially longer than other customers to proceed through the line. On that point, first time
19 customers, or customers who desire to taste samples of the ingredients, can take as long as, or longer
20 than, Plaintiff to proceed through the line. While Chipotle prides itself on providing what the media has
21 coined as "gourmet food fast," considerations of speed and throughput have always been - and remain -
22 secondary to ensuring that each and every one of its customers is fully satisfied with his or her
23 experience at the restaurant. Furthermore, to the extent that on the site inspections Plaintiff did not see
24 the assemblage or wrapping of his entree or receive any other accommodations, that was because he did
25 not ask for, and presumably did not need, any such additional accommodations.

26 Apart from Plaintiff's claims pending before this Court (and his same claims in the related class
27 action before this Court), there is no evidence that any customer in a wheelchair at the Pacific Beach or
28 Encinitas Restaurant has been unable to see the food or participate in the preparation of his or her entree.

1 On February 23, 2007, as part of its longstanding and ongoing efforts to ensure that all of its
2 customers receive excellent customer service, Chipotle implemented a nationwide “Customers With
3 Disabilities” policy (“the Policy”) that sets forth in writing that which Chipotle has always done as a
4 matter of unwritten policy and practice, *i.e.*, provide excellent customer service to all of its customers,
5 including customers with disabilities. The Policy has served to refine and improve Chipotle’s unwritten
6 policy and practice of accommodating its customers, by adding further clarity. Chipotle disseminated
7 the Policy via high priority email to its Regional Directors, Human Resources Training Directors, and
8 Operations Directors, and began formally training its employees on the Policy between March and May
9 of 2007. As part of its efforts to ensure that all of its employees are aware of and fully understand the
10 Policy, Chipotle’s Director of Training and Development, Ron Sedillo, with help from Chipotle’s
11 Human Resource Generalists and Human Resource Training Directors, has provided specific instruction
12 regarding the Policy to Chipotle’s Operations Directors, Area Managers, and Managers, who in turn
13 train their respective crews regarding the Policy. The Policy has also been incorporated into Chipotle’s
14 training and policy manual, “The Know,” as a new section: “5.5 Customers With Disabilities.” This
15 new section of “the Know” states:

16 Excellent customer service is of paramount importance at every Chipotle
17 restaurant at all times. A customer with a disability (for example, a visual or
18 mobility impairment) may benefit from some alternative means of presenting or
19 describing our food. In all such cases the restaurant staff will offer a suitable
20 accommodation based on the individual circumstances, and will be responsive to
21 the customer’s requests. Depending on the circumstances, our crew member or
22 manager may ask the customer if we can accommodate them during their visit.
23 Examples of some of the ways we accommodate individuals include:

- 24 (a) Samples of the food can be placed in soufflé cups and shown or handed to
25 the customer.
- 26 (b) Some customers may prefer an opportunity to see or even sample the food
27 at a table.
- 28 (c) Customers may simply wish to have the food or food preparation process
described to them.
- (d) Or combinations of the above accommodations with any other reasonable
accommodation requested or appropriate for the individual.

1 The point of good customer service is that it has to be personalized. It is the
2 manager and crew's responsibility to ensure that the experience a customer with a
disability has is excellent.

3 Considerations of throughput, productivity or efficiency are secondary to ensuring
4 a positive experience for disabled customers. Crew members are encouraged to
5 inform their Restaurant Manager regarding the experiences of their disabled
customers and such experiences will be considered during the performance review
6 process, both for the crew member and the manager.

7 The above example details a scenario involving only a visual or mobility impaired
8 customer. Other disabilities may exist among our customers and it is our policy at
9 Chipotle to make good faith, reasonable accommodations for all of our disabled
customers. This practice is consistent with our goal of providing excellent
customer service to all of our customers.

10 Under the Policy, when a customer with a disability enters the food serving line he or she will be
11 greeted at the tortilla press station by a management level employee. That employee will then ask the
12 customer if he or she has ever been to Chipotle and if he or she would like to see the food or receive any
13 other kind of assistance. If the customer answers in the affirmative, such assistance will be provided
14 based on the individual customer's particular needs and desires. As set forth above, Chipotle employees
15 may place samples of food ingredients in soufflé cups or hold up samples of the food with spoons or
16 tongs so that the customer can see the ingredients. The Restaurants also have accessible tables adjacent
17 to the food service lines that, if the customer so desires, can be used to view the food presented by
18 Chipotle staff. Furthermore, a customer may, in some instances, choose to have his or her entree
19 prepared at the point of sale station at the end of the food serving line. The Policy allows Chipotle's
20 managers the flexibility to make appropriate and effective accommodations based on each particular
21 situation, while ensuring that each and every customer will receive any accommodations necessary to
22 ensure that he or she has access to all aspects of the Chipotle experience.⁴

23 Since the creation of the Customers With Disabilities Policy, Chipotle has not received any
24 complaints from customers in wheelchairs claiming that they cannot see the food ingredients or that they
25 cannot see or participate in the preparation of their food at the Restaurants. With the implementation of
26

27 ⁴ To that end, Chipotle holds its employees and managers responsible for following the Policy. An
28 employee's adherence to the Policy is a factor considered in his or her twice-annual performance
evaluation, and failure to adhere to the Policy can subject an employee to discipline

1 the “Customers With Disabilities Policy” there is no cognizable danger of Plaintiff suffering any future
2 alleged disability discrimination at the Restaurants.

3 **III. LEGAL ISSUES**

4 **A. Title III of the ADA.**

5 The Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., was enacted on July
6 26, 1990. The primary purpose of the ADA is to provide a “clear and comprehensive national mandate
7 for the elimination of discrimination” with “clear, strong, consistent, enforceable standards” to address
8 such discrimination. 42 U.S.C. § 12101(b)(1), (2).

9 Plaintiff’s ADA claims in this action are based on Title III of that statute. Section 302 of Title
10 III prohibits discrimination against disabled individuals in any place of public accommodation. 42
11 U.S.C. § 12182. Restaurants, bars and other establishments serving food or drink are public
12 accommodations within the meaning of the ADA. 42 U.S.C. § 12181(7). Section 302 of Title III of the
13 ADA provides that “[n]o individual shall be discriminated against on the basis of disability in the full
14 and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any
15 place of public accommodation” 42 U.S.C. § 12182(a). To prove a Title III claim, a plaintiff must
16 prove that: (1) he has a disability; (2) defendant’s restaurant is a place of public accommodation; (3) and
17 he was denied full and equal treatment because of his disability. *Mayberry v. Von Valtier*, 843 F. Supp.
18 1160, 1166 (E.D. Mich. 1994).

19 Title III gives the Department of Justice the authority to develop regulations implementing the
20 requirements of the anti-discrimination requirements of the statute. 42 U.S.C. §§ 12183(a)(1), 12186(b).
21 Pursuant to that authority the Department of Justice has adopted the ADAAG, which set forth general
22 construction guidelines to ensure that new facilities are accessible to persons with disabilities. 28 C.F.R.
23 §§ 36.401(a)(1), (c)(1), 36.402 (a)(1), Appendix B – Preamble to Regulations on Nondiscrimination on
24 the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,546
25 (July 26, 1991), page 593. Failure of newly constructed facilities (such as the Encinitas and Pacific
26 Beach Restaurants) to abide by the construction guidelines in the ADAAG violates the ADA. *Id.*; 42
27 U.S.C. § 12183(a)(1).

1 This Court held in its June 14, 2007 summary judgment order that Section 7.2(2) of the
 2 ADAAG, which governs sales and service counters that may not have a cash register but at which goods
 3 or services are sold or distributed, applies to the wall in front of Chipotle's food preparation counters.⁵
 4 That section of the ADAAG provides:

5 At ticketing counters, teller stations in a bank, registration counters in hotels and motels,
 6 box office ticket counters, and other counters that may not have a cash register but at
 7 which goods or services are sold or distributed, either:

- 8 (i) a portion of the main counter which is a minimum of 36 in (915 mm) in length shall
 9 be provided with a maximum height of 36 in (915 mm); or
 10 (ii) an auxiliary counter with a maximum height of 36 in (915 mm) in close proximity to
 11 the main counter shall be provided; or
 12 (iii) equivalent facilitation shall be provided.

13 ADAAG § 7.2(2). The Court also found in the same order that the portion of the food service counter
 14 where the cash registers are located (the transaction station), which is approximately 35 inches high,
 15 does not satisfy the requirements of subsections (i) and (ii) of Section 7.2(2). However, the Court found
 16 that Chipotle's "Customers With Disabilities Policy" may constitute an equivalent facilitation under
 17 Section 7.2(2)(iii). This is the central issue to be decided at trial.

18 **B. CDPA Standards.**

19 The CDPA incorporates the substantive rights guaranteed under the ADA, such that a violation
 20 of the ADA also constitutes a violation of the CDPA. *Moeller v. Taco Bell Corp.*, No. C02-05849, 2007
 21 U.S. Dist. LEXIS 60714, at *20 (N.D. Cal. Aug. 8, 2007).

22 **IV. ARGUMENT.**

23 Plaintiff contends that the height of the wall in front of the food preparation counter violates the
 24 ADA and the CDPA because it does not allow customers in wheelchairs to see the food ingredients
 25 available at Chipotle's restaurants or participate in the making of their entrees, and that the Customers
 26 With Disabilities Policy is not an equivalent facilitation for the alleged barrier. Should the Court decide
 27 this issue in favor of Plaintiff, it must also consider whether Plaintiff has established that he is entitled to
 28 an injunction requiring Chipotle to lower the counters of the Pacific Beach and Encinitas Restaurants,
 and whether Plaintiff has established that he suffered any damages as a result of his visits to Chipotle's

⁵ Chipotle preserves its right to appeal that holding.

1 Restaurants. As set forth in detail below, the evidence presented at trial will establish that both
2 Chipotle’s “Customers With Disabilities Policy” and its prior unwritten practice of accommodating
3 restaurant customers with disabilities constitute an equivalent facilitation within the meaning of Section
4 7.2(2).

5 **A. Policies Like Chipotle’s “Customers With Disabilities Policy” Can Be A Form of**
6 **Equivalent Facilitation.**

7 Section 2.2 of the ADAAG defines equivalent facilitation as “departures from particular
8 technical and scoping requirements of the ADAAG by the use of other designs and technologies ...
9 [that] will provide substantially equivalent or greater access to and usability of the facility.” The
10 designer or defendant who chooses to utilize alternative methods that it believes will provide equal or
11 greater access has the burden of demonstrating that the alternative design or technology qualifies as
12 equivalent facilitation. *Ind. Living Center v. Oregon Arena*, 982 F.Supp. 698, 727 (D. Or. 1997).

13 Plaintiff has contended throughout this litigation that a policy like the “Customers With
14 Disabilities Policy” cannot meet the requirements of “equivalent facilitation” as a matter of law. Those
15 arguments have been repeatedly rejected by this Court, first in its June 14, 2007 order on the parties’
16 cross summary judgment motions (Docket No. 129), next in its August 23, 2007 order on the parties’
17 cross reconsideration motions (Docket No. 147), again in its October 4, 2007 order denying Plaintiff’s
18 motion to amend the Pretrial Order (Docket No. 173), and most recently in its November 8, 2007 order
19 on the parties’ motions in limine (Docket Nos. 202 and 203). The Court did not err in so holding.

20 Both the ADAAG and federal courts recognize that policies like Chipotle’s Customers With
21 Disabilities Policy can be forms of equivalent facilitation. Section 7.2(2)(iii) of the ADAAG expressly
22 directs that a hotel may provide equivalent facilitation for a registration counter that does not meet the
23 specific requirements of Sections 7.2(2)(i) or (ii) by establishing a policy that hotel employees use the
24 space on the side of the counter or at the concierge desk for handing materials back and forth to guests
25 with disabilities. ADAAG § 7.2(2)(iii). Similarly, in *Independent Living Resources v. Oregon Arena*,
26 the court found that a stadium’s policy of providing high quality folding companion seats rather than
27 fixed companion seats required by Section 4.33.3 of the ADAAG was a form of equivalent facilitation.
28 *Independent Living Resources*, 982 F.Supp. 698, 726-28. Furthermore, in *Access 4 All, Inc. v. The*

1 *Atlantic Hotel Condominium Association, LLC*, the court held that a defendant provided equivalent
2 facilitation for its check-in desk through its “front desk standard operating procedure whereby a disabled
3 person is directed to the couch seating area near the registration desk, and a staff person personally
4 accommodates the disabled person through the registration process.” *Access 4 All*, Case No. 04-61740,
5 2005 U.S. Dist. LEXIS 41601 (S.D. Fla., November 22, 2005). It is well-settled law that a policy such
6 as Chipotle’s Customers with Disabilities Policy can constitute a form of equivalent facilitation as a
7 matter of law.

8 **B. Chipotle’s “Customers With Disabilities Policy” And Its Prior Unwritten Policy and**
9 **Practice of Accommodating Customers With Disabilities Qualify As Equivalent**
10 **Facilitation.**

11 In analyzing whether Chipotle’s policy of accommodating customers with disabilities in fact
12 constitutes an equivalent facilitation, a distinction must be drawn between the unwritten policy and
13 practice that existed prior to February of 2007, on the one hand, and the written Customers With
14 Disabilities Policy that was created in February of 2007, on the other. Although Chipotle has always
15 had an effective policy and practice of accommodating customers with disabilities (just as it
16 accommodates any of other customer with special needs or desires), the implementation of Chipotle’s
17 written “Customers With Disabilities Policy” in the Spring of 2007 refined and improved its pre-existing
18 policy and practices in a manner that insured even more than before that Chipotle’s disabled customers
19 would receive whatever accommodations were necessary and appropriate to their individual needs and
20 desires. In any event, the evidence that will be presented at trial in this matter will establish that both
21 Chipotle’s unwritten policy of accommodating customers with disabilities and its written “Customers
22 With Disabilities Policy” provided, and continue to provide, Chipotle’s customers with disabilities with
23 equal or greater access to its food serving lines as required by Sections 2.2 and 7.2(2)(iii) of the
24 ADAAG.

25 **1. Chipotle’s Written Customers With Disabilities Policy Is A Form Of**
26 **Equivalent Facilitation.**

27 Defendant’s Customers With Disabilities Policy provides Chipotle’s customers with disabilities
28 with equal or greater access to its food serving line. Pursuant to the Policy, Chipotle’s managers and

1 employees are required to accommodate a customer with a disability based on the particular needs and
2 desires of that individual. When a customer with a disability enters the food serving line and approaches
3 the tortilla press (the first station in the food serving line), he or she is greeted by a management
4 employee of Chipotle and asked whether he or she has ever visited a Chipotle restaurant. The customer
5 is then asked if he or she would like any assistance in placing his or her order. Based on the customer's
6 answers to these questions, the management employee assisting the customer then determines what
7 accommodation, if any, is most appropriate given the needs and wants of the individual customer. In
8 some cases the employee will hand samples of food to the customer in serving cups, in other cases the
9 employee will use tongs or a serving spoon to show samples of the food to the customer, in other cases
10 the employee will orally describe the ingredients and food preparation process to the customer, and in
11 still other cases the employee will bring samples of the food ingredients to the customer at an adjacent
12 table and allow him or her to sample each of the items and/or watch as his or her entree is made.
13 Through these accommodations customers with mobility impairments or other disabilities are afforded
14 an equal or greater opportunity to see the food ingredients and watch and participate in the assembly of
15 their entree.

16 Although in some instances accommodating a particular disabled customer's desire to see or
17 sample the food or watch or participate in the preparation of his or her entree may result in the customer
18 taking slightly more time than on average to proceed through the food serving line,, the same would be
19 true of non-disabled customers who desire the same accommodations. For example, non-disabled
20 customers who are not tall enough to see over the wall in front of the food preparation counters, parents
21 with children, or even first-time customers may ask to sample food items or to see their entrees prepared
22 at an adjacent table. Both the disabled and non-disabled customers who desire such accommodations
23 may take slightly longer to be served than on average. But in either case the customer still receives
24 quick service. Indeed, the film of Plaintiff's inspections of the Encinitas and Pacific Beach Restaurants
25 in October of 2006 demonstrates that Plaintiff was able to proceed through the food service line quickly
26 and easily.

27 Any assertion by Plaintiff that he should not have to ask to see the various ingredients is without
28 merit. Chipotle has designed its Customers With Disabilities Policy to allow its managers and

1 employees the maximum amount of flexibility possible to ensure that they can tailor any
2 accommodations to the particular needs and wants of each individual customer. This allows Chipotle to
3 account for the fact that not all persons with a particular disability will want the same accommodation.
4 Some disabled customers may not care to see the ingredients or to see their entrees prepared, just as is
5 the case with many of Chipotle's non-disabled customers. It is for this reason that as soon as a customer
6 approaches the first station of the food service line Chipotle's managers and employees ask the customer
7 to provide input as to any accommodations he or she may need or want. This Policy is in keeping with
8 the ADA's general requirement that public accommodations "make decisions based on facts applicable
9 to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can
10 do." 28 C.F.R. § 36, App. B., at 622.

11 The evidence presented at trial will establish that Chipotle has thoroughly trained its managers
12 and employees about their responsibilities under the Policy. Ron Sedillo, Chipotle's Director of
13 Training and Development has, with the help of others in Chipotle's Human Resources and Training
14 departments, advised each of Chipotle's area managers and training managers as to the details of the
15 Customers With Disabilities Policy and the manner in which it should be applied at each of Chipotle's
16 restaurants. Those area managers have ensured that each of Chipotle's general managers and apprentice
17 managers have been trained on the Policy, and the general and apprentice managers have, in turn,
18 ensured that their service managers and employees are thoroughly familiar with the Policy. The
19 evidence presented at trial will also establish that Chipotle holds its managers and employees
20 responsible for following the Customers With Disabilities Policy. An employee's adherence to the
21 Policy is a factor considered in the employee's performance evaluations, and an employee's failure to
22 adhere to the Policy can subject that employee to discipline. As further evidence of the effectiveness of
23 its Customers With Disabilities Policy, Chipotle will prove at trial that it has not received any
24 complaints from customers in wheelchairs claiming that they cannot see the food ingredients or cannot
25 see or participate in the preparation of their food at the Restaurants.

26 The evidence presented at trial by Chipotle will therefore demonstrate that with the creation of
27 the written Customers With Disabilities Policy, Chipotle's customers with disabilities have substantially
28 equal or greater access to the food serving line as its non-disabled customers, and that there is no

1 cognizable danger of Plaintiff suffering any future alleged disability discrimination at the Pacific Beach
2 or Encinitas Restaurants.

3 **2. Chipotle's Unwritten Policy Also Qualifies As An Equivalent Facilitation.**

4 In determining whether Plaintiff is entitled to damages under the CDPA for any of his visits to
5 the Encinitas and Pacific Beach Restaurants prior to the implementation of Chipotle's written Customers
6 With Disabilities Policy, the Court must examine whether Chipotle's unwritten policy and practice of
7 accommodating customers with disabilities qualified as an equivalent facilitation. As set forth above,
8 Chipotle's written Customers With Disabilities Policy was implemented in the Spring of 2007. Prior to
9 that time Chipotle maintained an unwritten policy and practice of providing accommodations to disabled
10 customers to ensure that they had equal access to all aspects of the Chipotle experience as part of the
11 company's general policy of providing great customer service. This unwritten policy and practice has
12 existed since the restaurant's inception.

13 The evidence presented at trial will establish that Chipotle has always trained its employees that
14 providing the best customer service requires that the employees carefully assess the wants and needs of
15 each individual customer, and, in the case of some customers with mobility impairments, may require
16 the employee serving the customer to provide samples of the food ingredients or assemble the
17 customer's entree at an adjacent table or at the transaction station at the end of the food preparation
18 counter. The evidence presented at trial will also establish that Chipotle has always offered
19 accommodations to customers with mobility impairments to allow them to see the food or watch or
20 direct the preparation of their entree, just as it has always so accommodated non-disabled customers
21 who cannot see the food for whatever reason or who otherwise desire assistance in placing their orders.
22 While the written Customers With Disabilities Policy has refined and improved Chipotle's efforts to
23 ensure that its disabled customers receive the full Chipotle experience, the company's prior unwritten
24 policy and practice of accommodating disabled restaurant patrons was also effective in ensuring that
25 result.

26 Indeed, the evidence presented at trial will demonstrate that Plaintiff received any
27 accommodations he requested during his visits to Chipotle's restaurants in Encinitas and Pacific Beach.
28 During the site inspections of the Pacific Beach and Encinitas Restaurants, Chipotle's employees

1 showed Plaintiff samples of each of the ingredients he requested to be shown by holding those
2 ingredients above the wall using tongs and serving spoons and by placing those ingredients in small
3 plastic cups. To the extent that no further assistance was provided, that is because Plaintiff did not
4 request it and presumably did not need it. In addition, as is evident from the video-tape of the site
5 inspections, Plaintiff had no difficulty whatsoever in proceeding quickly through Chipotle's food
6 serving line with these accommodations.

7 The treatment Plaintiff received during the site inspections was not an anomaly. The Encinitas
8 Restaurant's general manager, Maritza Arriaga, will testify at trial that on the same day as the site
9 inspection at the Encinitas Restaurant, she served an elderly woman with a mobility impairment that
10 required her to use a walker; that, in accordance with her obligations to accommodate disabled
11 customers under Chipotle's general policy of providing great customer service, Ms. Arriaga approached
12 the customer and asked if she could be of assistance in any way in placing her order; and that, at the
13 customer's request, Ms. Arriaga took the customer's order at one of the tables in the seating area of the
14 restaurant and brought the food to the customer. Furthermore, Ron Sedillo (Chipotle's Director of
15 Training) will testify that he has seen Chipotle employees providing accommodations such as samples
16 of food ingredients, lifting spoonfuls of food ingredients high in the air, or making entrees at the point of
17 sale counters so that customers who cannot see over the wall in front of the food preparation counters
18 can see the food ingredients or watch their entree being assembled.

19 This evidence will establish that equivalent facilitation was provided at the Encinitas and Pacific
20 Beach Restaurants prior to the implementation of the Customers With Disabilities Policy in the Spring
21 of 2007.

22 C. Remedies.

23 1. Injunctive Relief.

24 The remedies available under Title III of the ADA are limited to injunctive relief, including
25 injunctive relief to require the defendant to alter facilities to make such facilities "readily accessible to
26 and usable by persons with disabilities," or, where appropriate, injunctive relief "requiring the provision
27 of an auxiliary aid or service, modification of a policy, or provision of alternative methods." 42 U.S.C.
28

1 § 12188(a)(2); 42 U.S.C. § 2000a-3(a). Injunctive relief is also available under the CDPA. Cal. Civ.
2 Code § 54.3(a).

3 Injunctive relief is an equitable remedy, and is not available as a matter of course. *Weinberger v.*
4 *Romero-Barcelo*, 456 U.S. 305, 311 (1982). An injunction is available only when it is essential to
5 protect property or other rights against injuries that are otherwise irreparable. *Id.* at 312. In order to
6 obtain injunctive relief, the plaintiff must show irreparable injury and the inadequacy of legal remedies.
7 *Id.* Injunctive relief should be denied unless it is the only means of ensuring compliance. *Id.* at 314.

8 The specific elements that must be proven in order to obtain injunctive relief are: (1) an
9 irreparable injury; (2) inadequacy of legal remedies; (3) a balance of hardships favoring the plaintiff;
10 and (4) advancement of the public interest. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998);
11 *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983). It is the plaintiff's burden to establish these elements.
12 *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982). One federal district court
13 has held that a plaintiff seeking injunctive relief under the ADA "must demonstrate that an injunction ...
14 is justified by the relief it will provide." *Access Now, Inc. v. South Florida Stadium Corporation*, 161
15 F.Supp.2d 1357, 1369 (S.D. Fla. 2001). That court further explained that, "whether a requested
16 alteration would be effective is relative to the impediment presented by the barrier and the associated
17 cost of removing it." *Id.*, at 1369-70.

18 Plaintiff seeks an injunction requiring Chipotle to alter or remove the wall in front of its food
19 preparation counters. As set forth above, Defendant will establish at trial that its Customers With
20 Disabilities Policy is an equivalent facilitation, and that Plaintiff is not entitled to any relief under the
21 ADA or the CDPA. However, even if the Court were to determine that the Policy is not an equivalent
22 facilitation, it nevertheless must find that the injunctive relief requested by Plaintiff is inappropriate
23 unless Plaintiff can establish that his proposed alterations to the wall in front of Chipotle's food
24 preparation counters can be made, the cost of altering the wall is justified by the relief it will provide,
25 and that the injunctive relief will be in the public interest.

26 Chipotle designed its food preparation counters in order to ensure their compliance with
27 California Uniform Retail Food Facilities Law ("CURFFL") Sections 114080(b)(2)(A) and 114080(c)
28 and Health & Safety Code Section 114080. Subsection (c) of California Health & Safety Code §

1 114080, which pertains to the storage of food, as well as the display and sale of unpackaged food,
2 provides in pertinent part:

3 (c) Unpackaged food may be displayed and sold in bulk in other than self-service
4 containers if both of the following conditions are satisfied:

5 (1) The food is served by an employee of the food establishment directly to a
6 consumer.

6 (2) The food is displayed in clean, sanitary, and covered or otherwise protected
7 containers.

7 Chipotle's food preparation counters must comply with these legal requirements. As such, Plaintiff
8 must establish that any alterations he proposes also meet these legal requirements in order to be entitled
9 to injunctive relief. Plaintiff has not yet done so. Indeed, he has not even specified precisely what
10 alterations he is seeking to have made to the wall in front of the food preparation counters.

11 2. CDPA Damages.

12 If the Court decides that Plaintiff has proved his CDPA claim against Chipotle, it may also
13 award Plaintiff damages not less than \$1,000 for each offense. Cal. Civ. Code § 54.3(a). Plaintiff's
14 attorney has represented to counsel for Chipotle that Plaintiff will not seek damages in excess of the
15 \$1,000 statutory minimum provided by Cal. Civ. Code § 54.3(a). To establish his entitlement to
16 monetary damages Plaintiff must demonstrate that he or she was denied "equal access" on a particular
17 occasion, *i.e.*, that the violation interfered with his visit to a place of public accommodation. *See*
18 *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804, 813 (Cal. Ct. App. 1990).

19 Notwithstanding any technical violation, Plaintiff cannot prove that the height of the wall in
20 front of the food preparation counter hindered his access to the Restaurants or their services. He was not
21 denied "equal access" on any of his visits because accommodations were available that would have
22 allowed him to see the food ingredients available and watch the preparation of his entree. To the extent
23 that these accommodations were not provided on any occasions, that is because no accommodation was
24 requested by Plaintiff.

25 V. CONCLUSION.

26 As set forth above, the evidence presented at trial in this matter will demonstrate that both
27 Chipotle's current Customers With Disabilities Policy and its prior unwritten policy and practice of
28 providing accommodations to disabled customers upon request provide its disabled customers with

1 substantially equivalent or greater access to Chipotle's facilities as is afforded to its non-disabled
2 customers.

3
4 DATED: November 20, 2007

GREENBERG TRAURIG, LLP

5
6 By /s/ John F. Scalia
7 Gregory F. Hurley
8 John F. Scalia
9 Matthew H. Sorensen
10 Jeanne U. Vu
11 Attorneys for Defendant CHIPOTLE MEXICAN
12 GRILL, INC.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

STATE OF VIRGINIA, COUNTY OF FAIRFAX

I am employed in the aforesaid county, State of Virginia; I am over the age of 18 years and not a party to the within action; my business address is 1750 Tysons Blvd., Suite 1200, McLean, VA 22102.

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

Amy B. Vandeveld
Law Offices of Amy B. Vandeveld
1850 Fifth Avenue, Suite 22
San Diego, CA 92101
T: (619) 231-8883
F: (619) 231-8329
Email: abvusdc@hotmail.com

Attorneys for Plaintiffs

BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM)

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

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

Executed on November 20, 2007, at McLean, Virginia.

/s/ John F. Scalia