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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MAURIZIO ANTONINETTI, JEAN
RIKER, JAMES PERKINS, KAREN
FRIEDMAN and MICHAEL RIFKIN, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

CHIPOTLE MEXICAN GRILL, INC., a
Colorado Corporation and DOES 1-10,

Defendants.

Case No. 06cv2671 BTM(WMc)

**ORDER DENYING MOTION FOR
RECONSIDERATION AND
GRANTING IN PART MOTION FOR
CLARIFICATION**

Plaintiffs have filed a motion for reconsideration and/or clarification of the Court's Order Denying Plaintiff's Motion to Certify Class, Appointment of Class Representatives and Appointment of Class Counsel ("Order") (Doc. No. 145). For the reasons discussed below, the Court denies the motion for reconsideration but grants in part Plaintiffs' motion for clarification.

DISCUSSION

A. Class Certification

Previously, the Court denied class certification. The Court held that class certification was not authorized under Rule 23(b)(2) because Plaintiffs' claims for injunctive relief and

1 corresponding declaratory relief were moot. The Court further held that certification was not
2 proper under Rule 23(b)(3) because individual issues regarding liability for damages would
3 predominate, and a class action would not be superior to other available methods for fairly
4 and efficiently adjudicating the controversy before the Court. In their motion for
5 reconsideration, Plaintiffs argue that certification with respect to the claims for declaratory
6 relief and damages is appropriate under Rule 23(b)(3), or, in the alternative, that the Court
7 should certify the class for declaratory relief only under Rule 23(c)(4).

8 In its Order, the Court reasoned that Plaintiffs' claim for injunctive relief and
9 declaratory relief were moot based on the fact that Defendant has remedied the architectural
10 barrier at issue in this litigation (a high counter wall) and the Ninth Circuit has already
11 decided that the high counter walls violated the ADA Guidelines. See Antoninetti v. Chipotle
12 Mexican Grill, Inc., 643 F.3d 1165, 1172 (9th Cir. 2010). Plaintiffs argue that declaratory
13 relief is necessary because Chipotle allegedly denies the preclusive effect of the Ninth
14 Circuit decision, and district courts have *discretion* whether to apply offensive non-mutual
15 collateral estoppel. See Appling v. State Farm Mut. Auto Ins., 340 F.3d 769, 775 (9th Cir.
16 2003).

17 The discretionary nature of offensive non-mutual collateral estoppel would lend
18 support to Plaintiffs' argument regarding the necessity of declaratory relief if the prior ruling
19 were by another district court. Here, however, the Ninth Circuit Court of Appeals issued a
20 *published decision* holding that Chipotle's 45-inch high counter walls did not comply with
21 Guideline § 7.2, and therefore violated the ADA. A published decision by the Ninth Circuit
22 Court of Appeals constitutes "binding authority which 'must be followed unless and until
23 overruled by a body competent to do so.'" Gonzalez v. Arizona, 677 F.3d 383, 390 n. 4 (9th
24 Cir 2012) (en banc) (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)). "A
25 district judge may not respectfully (or disrespectfully) disagree with his learned colleagues
26 on his own court of appeals who have ruled on a controlling legal issue" Hart, 266 F.3d
27 at 1170.

28 District courts in California are not likely to deviate from the Ninth Circuit's holding

1 that Chipotle’s high counter walls violated the Guidelines. Therefore, declaratory relief is not
2 necessary.

3 In the Order, the Court held that certification under Rule 23(b)(3) was improper
4 because individual issues regarding liability for damages would predominate. The Court
5 explained:

6 It requires each class member to establish which Chipotle restaurant he
7 visited, when he visited it, and whether he traveled the food service line – all
8 as to each particular occasion for which that class member seeks damages.
9 Moreover, the mere fact that an individual in the food service line used a
10 wheelchair for mobility does not mean that the high counter walls necessarily
11 blocked that individual’s view of the food preparation area. . . . Accordingly,
12 for each particular occasion, the class member must establish that he was
13 actually unable to see his food prepared, which in turn will require at least
14 proof of how high the counter wall was at the time of the visit (Plaintiffs have
15 alleged only that the high counter walls were “approximately” 46 inches high
16 (FAC ¶ 2)), and how high the class member sat in his wheelchair at the
17 relevant time.

18 (Order Denying Class Certification at 10:1-5.)

19 Plaintiffs argue that the Ninth Circuit has already determined that the “average eye
20 level of persons in wheelchairs is 43 to 51 inches above the restaurant floor and that, at a
21 distance of 12 inches from the wall, a person at any height within that average range cannot
22 see the food preparation counter or the food on display there.” (Mem. of P. & A. in Support
23 of Motion for Reconsideration at 11:2-5.) Therefore, Plaintiffs argue, all that would be left
24 to prove on an individual basis is whether the class member uses a wheelchair or scooter,
25 whether he visited a non-compliant location during the relevant time period, and whether the
26 wall interfered with his view of the food on display or the making of his order while normally
27 seated. (*Id.* at 11:6-10.)

28 However, the Ninth Circuit did not “determine” that the average eye level of persons
in wheelchairs is 43 to 51 inches and that at a distance of 12 inches from the wall, a person
within that range of height would not be able to see the food preparation counter or the food
on display. The Ninth Circuit stated that the parties *stipulated* to these facts. *Antoninetti*,
643 F.3d at 1170. Generally, stipulated facts, which are not actually litigated in an action,
are not given preclusive effect unless the parties have manifested an intention that the
stipulation be binding in subsequent actions. *Sekaquaptewa v. MacDonald*, 575 F.2d 239,

1 247 (9th Cir. 1978).¹

2 Even setting aside the issue of the stipulated facts, individual issues predominate for
3 the reasons set forth in the Court's Order Denying Class Certification. To establish liability
4 for damages, the individual would need to establish which Chipotle restaurant he visited, the
5 dates of the visits, that he visited to purchase food and/or have the "Chipotle experience,"
6 the counter wall was noncompliant at the time of the visit(s), that he entered the food line,
7 that he was unable to see the food arranged on the food counter or the preparation of his
8 order (whether proved by stipulated facts or otherwise), and that he would have been able
9 to see the food prepared or on display if the wall were 36 inches. Questions of law or fact
10 common to potential class members do not predominate over the factual questions affecting
11 only individual members.

12 Furthermore, as explained in the Court's Order, a class action would not be superior
13 to individual actions. Because the Unruh Act allows minimum statutory damages in the
14 amount of \$4,000 for each particular occasion in addition to attorney's fees and costs to the
15 prevailing party, plaintiffs and their attorneys have plenty of incentive to pursue individual
16 lawsuits. See, e.g., Castano v. The American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996)
17 ("The expense of litigation does not necessarily turn this case into a negative value suit, in
18 part because the prevailing party may recover attorneys' fees under many consumer
19 protection statutes."); Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576, 583 (S.D. Ohio 1993)
20 (concluding that the grant of attorney's fees for individual actions brought for rescission
21 under 15 U.S.C. § 1635 is somewhat inconsistent with Rule 23(b)(3)'s superiority
22 requirement).

23 The Court did not err in denying class certification with respect to Plaintiffs'
24 declaratory relief claim or Plaintiffs' claim for damages. Therefore, Plaintiffs' motion for
25 reconsideration is denied.

26
27 ¹ There was arguably a judicial admission to these facts as a result of Chipotle's
28 admission of the facts in a pretrial order entered in the district court case. However, judicial
admissions are not conclusive and binding in separate and subsequent litigation. State
Farm Mutual Auto. Ins. Co. v. Worthington, 405 F.2d 683, 686 (8th Cir. 1968). The Court
does not decide whether the admission would be admissible in this case.

1 **B. Motion for Clarification**

2 Plaintiffs claim that clarification is needed as to a variety of issues raised by the
3 Court's Order. The Court will address each of Plaintiffs' points in turn.

4 On page 10 of the Court's Order, the Court states, "Accordingly, for each particular
5 occasion, the class member must establish that he was actually unable to see his food
6 prepared" Plaintiffs point out that the proper test, as set forth by the Ninth Circuit, is
7 whether the individual was denied the Chipotle experience because he was "unable to see
8 *the food arranged on the food counter or* the preparation of his order, as non-wheelchair-
9 bound customers could do." Antoninetti, 643 F.3d at 1177 (emphasis added). Although the
10 Court quoted this language on page 9, the Court failed to repeat on page 10 that Chipotle
11 may be liable for damages if a high counter wall impedes the ability of an individual to see
12 the different foods arranged on the counter even if he can see his food being prepared. To
13 the extent this omission caused confusion, the Court clarifies that liability for damages may
14 be based on interference with an individual's ability to see the preparation of his order **or** see
15 the different foods arranged on the counter.

16 Plaintiffs also argue that the language used by the Court on pages 9-10 of the Order
17 can be construed as requiring a complete inability to see the food on the counter and/or the
18 preparation of the order. In using the phrase "unable to see," the Court was not and is not
19 suggesting a requirement that the plaintiff's view be completely blocked or that there is no
20 liability if the plaintiff can see by straining to lift himself out of his wheelchair or scooter.
21 However, the Court does not decide at this time how much of the view must be blocked to
22 constitute sufficient interference to establish liability for damages.

23 Plaintiffs also take issue with the Court's statement that individual plaintiffs will need
24 to prove the actual height of the counter walls and how high they sat in their wheelchairs.
25 According to Plaintiffs, if an individual could not fully and equally enjoy the 'Chipotle
26 experience' because of the presence of the wall, the wall interfered with equal access,
27 regardless of the height of the person's eyes or exactly how much higher than 36 inches the
28 wall was. It seems that questions regarding the level of Plaintiffs' eyes when seated in their

1 wheelchairs or scooters and the height of the walls at issue will likely come into play when
2 litigating the issue of whether the Plaintiffs' view of the food counter was actually impeded.
3 However, the Court did not mean to imply that establishing the height of Plaintiffs' eyes and
4 the actual height of the walls is the only way Plaintiffs can prove their case.

5 With respect to the height of walls that have been destroyed during the course of this
6 litigation, Plaintiffs argue that Defendant should be subject to an adverse inference
7 instruction as to the height of the walls as an evidentiary sanction. The Court need not reach
8 this evidentiary issue at this time.²

9 Finally, Plaintiffs request that the Court modify its Order to recognize claims for
10 deterrence damages. The Court's Order did not address the issue of deterrence damages
11 and did not rule that such damages were unavailable. Given that the issue before the Court
12 is class certification, the Court declines to delve into when deterrence damages are available
13 and what must be proved to obtain them.

14
15 **CONCLUSION**

16 For the reasons discussed above, Plaintiffs' motion for reconsideration is **DENIED**
17 and Plaintiffs' motion for clarification is **GRANTED IN PART** as set forth above. The Court
18 denies Defendant's request that the Court issue an order to show cause why Plaintiffs
19 should not be sanctioned. The trial in this case shall commence on **July 8, 2013 at 10:00**
20 **a.m.** The parties shall contact Judge McCurine's Chambers to set all remaining pretrial
21 dates.

22 **IT IS SO ORDERED.**

23 DATED: January 14, 2013

24 
25 **BARRY TED MOSKOWITZ**, Chief Judge
26 United States District Court

27 ² According to Plaintiffs, Defendant does not dispute that the high walls were all built
28 in accordance with a common design and were approximately 46 inches high. If Plaintiffs
can prove that a particular wall was built in conformity with this common design, it may not
be necessary for Plaintiffs to prove precise height to the millimeter.