

1 HAROLD J. McELHINNY (CA SBN 66781)
 2 MATTHEW I. KREEGER (CA SBN 153793)
 3 KRISTINA PASZEK (CA SBN 226351)
 HMcElhinny@mofo.com
 MKreeger@mofo.com
 4 KPaszek@mofo.com
 MORRISON & FOERSTER LLP
 425 Market Street
 5 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 6 Facsimile: (415) 268-7522

7 Attorneys for Defendant
 TARGET CORPORATION

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

13 NATIONAL FEDERATION OF THE BLIND,
 the NATIONAL FEDERATION OF THE
 14 BLIND OF CALIFORNIA, on behalf of their
 members, and Bruce F. Sexton, on behalf of
 15 himself and all others similarly situated,

16 Plaintiffs,

17 v.

18 TARGET CORPORATION,

19 Defendant.

Case No. C06-01802 MHP

**TARGET CORPORATION'S
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR BIFURCATION OF
 ISSUES AT TRIAL**

Date: April 12, 2007
 Time: 2:30 PM
 Judge: Hon. Marilyn Hall Patel

1 **INTRODUCTION**

2 In an effort to sweep the problems with their class definition and damages theories
3 under the rug, Plaintiffs seek a bifurcated trial. The motion relies on faulty assumptions
4 about what proof is required to establish class-wide liability. Plaintiffs have not shown at
5 this juncture that a bifurcated trial is warranted. Plaintiffs' motion for bifurcation should be
6 denied without prejudice. The issue of bifurcation may be revisited at a later stage, when
7 more is known about how this litigation will proceed.

8 **ARGUMENT**

9 **I. PLAINTIFFS MISCHARACTERIZE THE PROOF REQUIRED TO**
10 **ESTABLISH CLASS-WIDE LIABILITY**

11 Plaintiffs seek to bifurcate the trial of this case into two phases: a first phase for the
12 establishment of "[g]eneral liability to the class and equitable (injunctive and declaratory)
13 relief issues," followed by a second phase for the determination of class member damages.
14 (Plaintiffs' Motion for Bifurcation of Issues at Trial ("Pls.' Bifurcation Mot.") at 2.) A
15 review of Plaintiffs' motion for class certification reveals Plaintiffs' motives for seeking
16 bifurcation. There, Plaintiffs give the false impression that bifurcation would obviate the
17 need for individualized determinations of the sort that preclude class certification of claims
18 for damages.

19 As explained in Target's opposition to Plaintiffs' motion for class certification,
20 Plaintiffs' class proposal is unlawful because it fundamentally alters the burden of proof and
21 the elements needed to prove a claim under the substantive law. (Target Corporation's
22 Opposition to Plaintiff's Motion for Class Certification ("Opp. to Class Cert.") at 22-23.)
23 Moreover, Plaintiffs' proposal employs burden-shifting principles that are legally
24 inapplicable to this case. (*Id.*) Individualized inquiries are an inescapable precursor to any
25 damage award in this case. This fact remains whether or not the trial is bifurcated.

1 **II. PLAINTIFFS HAVE NOT SHOWN THAT THE RELEVANT**
2 **FACTORS FAVOR BIFURCATION**

3 **A. Complexity**

4 Plaintiffs argue that the legal and factual issues of this case make it complex. Beyond
5 the vague statement that “any means of simplifying this case would be beneficial and
6 contribute to the just resolution of this matter,” Plaintiffs fail to explain how bifurcation
7 might aid in reducing this complexity. (Pls. Bifurcation Mot. at 3.)

8 **B. Jury Misunderstanding**

9 Reducing the risk of jury confusion is perhaps the most commonly cited rationale for
10 bifurcation. *See, e.g., Hirst v. Gertzen*, 676 F.2d 1252, 1261 (9th Cir. 1982). That rationale
11 is irrelevant here because neither party has requested a jury trial.

12 **C. Disposition of Issues**

13 Plaintiffs overstate the degree to which bifurcation will facilitate disposition of the
14 issues. They suggest that if Target’s liability is established, the Court may not have to
15 confront the issue of damages because the parties may settle or agree to resolve damages in a
16 claims procedure before a special master. These scenarios are wholly speculative and are an
17 insubstantial basis on which to order a bifurcated trial at this stage in the proceedings.

18 **D. Prejudice to Parties**

19 Plaintiffs assert that neither party will be prejudiced by bifurcation. However, if a
20 bifurcated trial were to proceed as they propose, Target would most certainly be prejudiced.
21 Plaintiffs propose that class-wide liability may be established without any proof by individual
22 class members that the inaccessibility of Target’s website impeded their enjoyment of goods
23 and services offered by Target’s retail stores. As explained in greater detail in Target’s
24 opposition to Plaintiffs’ motion for class certification, Plaintiffs impermissibly seek to shift
25 the burden of proof and alter the relevant substantive law. (Opp. to Class Cert. at 22-23.)
26 Under their proposal, liability is not to be proven; it is to be presumed. It is difficult to
27 imagine a way of trying this case that would be more prejudicial to Target.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for bifurcation should be denied without prejudice. The issue of bifurcation may be revisited at a later stage, when more is known about how this litigation will proceed.

Dated: March 8, 2007

HAROLD J. McELHINNY
MATTHEW I. KREEGER
KRISTINA PASZEK
MORRISON & FOERSTER LLP

By: /s/ Matthew I. Kreeger
Matthew I. Kreeger
Attorneys for Defendant
TARGET CORPORATION