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23 UNITED STATES DISTRICT COURT
24 NORTHERN DISTRICT OF CALIFORNIA

25 NATIONAL FEDERATION OF THE
26 BLIND, the NATIONAL FEDERATION OF
27 THE BLIND OF CALIFORNIA, on behalf of
28 their members and all others similarly situated,
and BRUCE F. SEXTON, on behalf of himself
and all others similarly situated,

Plaintiffs,

v.

TARGET CORPORATION

Defendant.

Case No.: C 06-01802 MHP

CLASS ACTION

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Hearing Date: April 16, 2007

Time: 2:00 PM

Judge: The Hon. Marilyn Hall Patel

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1 **I. INTRODUCTION**

2 The record in this case is replete with evidence that target.com has contained pervasive
3 accessibility barriers which have prevented people who are blind or visually impaired from
4 accessing the website, and enjoying the goods and services of Target’s retail stores, with the
5 same or equivalent ease of use as sighted visitors. Likewise, there is substantial evidence that
6 Plaintiff Bruce Sexton has encountered many accessibility barriers during his visits to
7 target.com, and that Target’s failure to take necessary steps to make target.com accessible has
8 denied him full and equal access to target.com and the full and equal enjoyment of the goods and
9 services of Target’s retail stores. Given this evidence, Target’s motion for summary judgment
10 must fail.

11 In moving for summary judgment, Target exercises what can only be characterized as
12 selective memory, choosing to ignore the Court’s Order regarding the scope of Plaintiffs’ claims,
13 the fact that Plaintiffs’ State law claims are broader than, and not dependent solely on, their ADA
14 claim, and significant evidence which demonstrates triable issues of material fact.

15 Target also bases its motion on an overly narrow interpretation of the ADA nexus
16 requirement that is inconsistent with the standard articulated by the Court. Under Target’s
17 interpretation, Mr. Sexton can only state a claim under the ADA if he has experienced barriers
18 while physically “at” or “in” Target’s retail stores. Under the broader and more reasonable
19 standard articulated by the Court, however, there is more than enough evidence to raise a triable
20 issue of material fact that Mr. Sexton’s rights under the ADA have been violated.

21 Furthermore, Target brought the instant motion despite the fact that the Court, at Target’s
22 insistence, has ordered the parties to defer merits discovery until after the Court rules on
23 Plaintiffs’ motion for class certification. This alone would provide grounds to deny Target’s
24 motion under Fed. R. Civ. P. 56(f). Nonetheless, even the limited evidence gathered through
25 discovery thus far (albeit evidence Target chose to omit from its motion), demonstrates that
26 target.com is deeply connected to, and integrated with, Target’s retail stores, and that Mr. Sexton
27 has been denied the full and equal enjoyment of the goods and services of Target’s retail stores
28 because of accessibility barriers on the website.

1 Finally, there is overwhelming evidence that Mr. Sexton has been denied full and equal
 2 access to target.com, itself, in violation of California State law. As in its opposition to Plaintiffs'
 3 pending motion for class certification, and without citation, Target attempts to characterize
 4 Plaintiffs' State law claims as entirely "dependent on their ADA claim." See Target's Motion at
 5 p.7. Indeed, Target's motion for summary judgment rests on that characterization. Yet, the
 6 scope of a "business establishment" for purposes of the Unruh Act, and the scope of "other
 7 places to which the general public is invited" for purposes of the Disabled Persons Act, are far
 8 broader than the Ninth Circuit's narrow interpretation of the scope of the phrase "places of
 9 public accommodation" for purposes of the ADA. Based on this distinction between California
 10 and federal law, Plaintiffs have, since the beginning of this litigation, consistently alleged that
 11 the California statutes require full and equal access to target.com, itself, independent of those
 12 statutes' incorporation of the ADA, and without regard to any nexus between target.com and
 13 Target's retail stores. Understandably, Target does not argue in its motion that there is a lack of
 14 evidence that Mr. Sexton has been denied full and equal access to the website itself.

15 For all these reasons, the Court should deny Target's motion for summary judgment.

16 II. STATEMENT OF FACTS

17 A. The Close Nexus Between target.com and Target's Retail Stores.

18 Target.com and Target's retail stores are closely integrated, and are designed to interact
 19 with one another in many ways. Target.com was designed to be an online extension of Target's
 20 retail stores, and both are properly viewed as part of an integrated merchandising effort by
 21 Target. See, e.g., September 6, 2006 Order at p.25, n.4 ("It appears from a review of the website
 22 in question...that Target treats Target.com as an extension of its stores, as part of its overall
 23 integrated merchandising efforts.").

24 As a practical matter, virtually every page on target.com is connected in some way to
 25 Target's retail stores. For example, search results on target.com routinely indicate which
 26 products are available in Target's physical stores, and provide information about such products
 27 that enable customers to browse and comparison shop before going to the physical store to make
 28 a purchase. See Declaration of Daniel Brome in Support of Plaintiffs' Opposition to Defendant's

1 Motion for Summary Judgment (“Brome Decl.”) at ¶ 2, Exhibits A, B, C. This is frequently
 2 referred to as “pre-shopping.”¹ Target specifically facilitates the use of the website for pre-
 3 shopping its retail stores, by providing a feature that enables the customer to print out an “in-
 4 store shopping list” to bring with them to the store after browsing the website. *See* Brome Decl.
 5 at ¶ 3, Exhibit F. Clearly, Target encourages its customers to use target.com as a step in the
 6 overall store-shopping experience, and anticipates that customers will use the website in that
 7 way.

8 Target has stressed in this case that there are products featured on the website which are
 9 not sold in its physical stores. However, nearly half of the products featured on target.com are
 10 also sold at Target’s retail stores—making the website an enormous advantage to all customers
 11 who might wish to “pre-shop” before going to the physical stores. *See* Deposition of Patricia
 12 Ann Perry, January 10, 2007 (“Perry Depo.”), attached as Exhibit B to the Declaration of Roger
 13 Heller in Support of Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment
 14 (“Heller Decl.”), at 65:13-66:8. Ms. Perry – one of Target’s Rule 30(b)(6) designees –
 15 acknowledged that target.com web pages customarily contain information about goods and
 16 services sold at Target retail stores and other information related to the physical stores. *Id.* at
 17 95:23-96:10, 99:6-100:5. Moreover, Target’s marketing efforts for target.com and its retail
 18 stores are heavily coordinated. *Id.* at 76:2-77:8 (describing coordination to “insure[] that our
 19 brand is represented on both sides”).

20 There are many additional features on target.com that are specifically designed to
 21 operate in conjunction with Target’s retail stores, and which visitors can use to enhance their
 22 shopping experiences at Target’s retail stores. For example:

23
 24
 25 ¹ Several class members in this case have described their desire to pre-shop Target’s stores on
 26 target.com. *See, e.g.* Declaration of Janice Bailey in Support of Plaintiffs’ Motion for Class
 27 Certification, filed February 2, 2007, at ¶ 13; Declaration of Michelle Bruns in Support of
 28 Plaintiffs’ Motion for Class Certification, filed February 2, 2007, at ¶ 13; Declaration of Shannon
 Dillon in Support of Plaintiffs’ Motion for Class Certification, filed February 2, 2007, at ¶ 12;
 Declaration of Anil Lewis in Support of Plaintiffs’ Motion for Class Certification, filed February
 2, 2007, at ¶ 14.

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- 1 • Target.com has a store locator feature that allows visitors to locate the address and
2 contact information of the closest Target retail store. *See Perry Depo.* at 86:11-
3 19.
- 4 • Goods purchased on target.com can be returned to Target retail stores for a refund
5 or store credit. *See id.* at 85:16-86:10.
- 6 • Target.com contains weekly advertisements for products and services that are on
7 sale at Target retail stores. Visitors can even input their zip codes on target.com
8 to find out what goods and products are on sale at the closest Target retail store.
9 *See id.* at 77:10-78:14, 86:20-88:20.
- 10 • Target.com contains coupons that visitors can print and redeem for discounts on
11 goods and services at Target retail stores. *See id.* at 83:2-84:3.
- 12 • Visitors can browse target.com for information about goods and services that are
13 available *only* at Target retail stores (i.e, goods sold at the physical stores and not
14 sold on target.com). *See id.* at 95:23-96:20.
- 15 • Wedding and baby registry services on target.com are coordinated with such
16 services at Target retail stores. By example only: (1) someone can register for
17 goods on target.com and that information is reflected, and can be viewed by
18 customers, at Target retail stores; and (2) someone can register for goods on
19 target.com and those goods can be purchased at Target retail stores. *See id.* at
20 88:21-89:8, 90:7-13, 92:8-16.
- 21 • A visitor can apply on target.com for a Target credit card, which can be used to
22 make purchases, at a discounted rate, at Target retail stores. *See id.* at 93:3-14.
- 23 • Target.com has a feature that allows visitors to locate the nearest Target retail
24 store that provides pharmacy services. *See id.* at 80:4-9.
- 25 • Visitors can order refills of prescription drugs on target.com, and then pick them
26 up at Target retail stores. *See id.* at 79:22-80:3.
- 27 • Visitors can transfer prescriptions on target.com from one Target retail store to
28 another Target retail store. *See id.* at 81:2-82:2.

- Visitors can order photograph prints on target.com, and then pick them up at Target retail stores. *See id.* at 84:22-85:13.

B. Pervasive Barriers on target.com.

It is indisputable that when this lawsuit was filed, target.com had multiple, pervasive accessibility barriers.² Testimony from Target's Rule 30(b)(6) designee confirms that target.com has been riddled with critical accessibility barriers. *See, e.g.*, Deposition of Todd J. Nemoir, Jan. 9, 2007 ("Nemoir Depo."), attached as Exhibit A to Heller Decl., at 141:13-16, 142:2-6, 189:14-18 (tens of thousands of images lacked alt tags); 107:21-108:2, 179:14-19 (forms were not labeled); 157:7-23 (pages lacked in-page navigation headings); 156:11-21 (lack of keyboard access). This is consistent with the testimony of Dr. James Thatcher, who evaluated target.com's accessibility for blind visitors. *See, e.g.*, Thatcher Decl. at ¶¶ 25-40 (lack of alt tags), 47-51 (lack of in-page navigation headings), 52-59 (lack of form labels). It is also consistent with the experiences of blind visitors to target.com. *See, e.g.* Plaintiffs' Motion for Class Certification at p. 5 (citing testimony from 14 class member declarations filed in support of Plaintiffs' Motion for Class Certification).³

These critical barriers have impeded the ability of blind and visually impaired visitors to access many of the features, and much of the content, on target.com. *See, e.g.* Nemoir Depo. at 85:15-24 (no blind user can experience the content of an image if that image lacks alt tags)⁴; 175:4-176:3 (if forms are not labeled, then "a guest using screen access software would have trouble...understanding what the purpose of each element was."), 159:12-20, 160:10-161:8, 161:19-25 (lack of header tags makes navigation more difficult and time consuming for all blind

² *See, e.g.*, Expert Declaration of Dr. James W. Thatcher ("Thatcher Decl."), filed in support of Plaintiffs' Motion for Preliminary Injunction, resubmitted in Support of Plaintiffs' Motion for Class Certification, and attached as Exhibit H to Heller Decl.

³ Additional examples can be found in the class member declarations initially filed in support of Plaintiffs' Motion for Preliminary Injunction, and resubmitted as Exhibits G through O to the Declaration of Laurence Paradis in Support of Plaintiffs' Motion for Class Certification.

⁴ *See also* Perry Depo. at 26:5-7 ("if there are no ALT tags...the readers cannot read the webpage").

1 visitors), 154:10-155:9 (importance of keyboard access). This includes features and content that
 2 are very clearly connected to Target's retail stores. *See, e.g.*, Declaration of Bruce F. Sexton in
 3 Support of Plaintiffs' Motion for Preliminary Injunction ("Sexton PI Decl."), attached as Exhibit
 4 D to Heller Decl, at ¶¶ 16, 32; Declaration of Bruce F. Sexton in Support of Plaintiffs'
 5 Opposition to Defendant's Motion for Summary Judgment ("Sexton SJ Decl."), filed herewith, at
 6 ¶ 2. Only after Plaintiffs filed this lawsuit did Target even begin to take steps to address these
 7 barriers. *See, e.g.*, Nemoir Depo. at 138:7-148:15, 156:11-21, 179:10-19.

8 **C. Plaintiff Sexton's Experiences Attempting to Access target.com.**

9 Given the pervasive accessibility barriers on target.com, it is not surprising that Mr.
 10 Sexton has experienced great difficulty accessing the website. Mr. Sexton has been legally blind
 11 since birth. *See* Sexton PI Decl. at ¶ 2. He has used screen access software to access the internet
 12 since he was 18 years old, and spends hours each day on the internet. *See id.* at ¶¶ 13-14. Using
 13 screen access software, he has tried to access target.com on many occasions, including
 14 approximately 20 occasions in the last two years. *See id.* at ¶ 29; Deposition of Bruce F. Sexton,
 15 May 23, 2006 ("Sexton Depo."), attached as Exhibit C to Heller Decl., at 58:1-12. In all, Mr.
 16 Sexton has spent several hours visiting target.com. *See id.* at 62:24-63:6. However, because of
 17 numerous accessibility barriers on the website, Mr. Sexton has "found the entire process of
 18 attempting to access target.com to be extremely frustrating and aggravating." Sexton PI Decl. at
 19 ¶¶ 30-35. For example, the pervasive lack of alt-tags for images on target.com has prevented
 20 Mr. Sexton, like other blind and visually-impaired visitors to target.com, from accessing
 21 information and content on the website. *See id.* at ¶ 31; Sexton Depo. at 64:19-65:5. Rather than
 22 experiencing such content as a sighted visitor could, Mr. Sexton has encountered "inexplicable
 23 code and garbled text" "[f]rom the very beginning of the site and...throughout the site," Sexton
 24 Depo. at 64:19-23; *see also* Nemoir Depo. at 85:15-24 (blind users cannot experience content of
 25 images unless they are labeled), and has experienced difficulty navigating the website as a result.
 26 *See* Sexton PI Decl. at ¶ 31.

27 For Mr. Sexton, barriers on the website have made it "extremely difficult, and at times
 28 impossible, to browse for products on Target.com." *Id.* at ¶ 30. He has been unable to browse

1 for products in the same way that sighted visitors can (i.e. by following a series of links), and has
 2 been unable browse for products unless he has a specific product in mind. *See* Sexton Depo. at
 3 67:6-68:16 (“If...I don’t know what specific item I’m looking for, I cannot use the interface just
 4 to browse”); *see also id.* at 87:24-88:6. Rather, to find a product on target.com Mr. Sexton has to
 5 rely on the “search” function of the website. This process only helps when he has a specific type
 6 of product in mind, and even then, there have been times when Mr. Sexton has been unable to
 7 locate products or product information using the “search” function. *See* Sexton PI Decl. at ¶¶ 33,
 8 34; Sexton Depo. at 70:3-9.

9 Moreover, Mr. Sexton has been unable to make a purchase on target.com, despite
 10 extensive efforts to do so. *See id.* at 77:11-78:16, 81:12-22; 84:11-23.

11 **D. Plaintiff Sexton’s Experiences Attempting to Use target.com to Enhance his**
 12 **Experience as a Shopper at Target’s Retail Stores.**

13 Given his frustrating experiences trying to access target.com, and the deep connections
 14 between target.com and Target’s retail stores, it is not surprising that accessibility barriers on
 15 target.com have also significantly impeded Mr. Sexton’s enjoyment of the goods and services of
 16 Target’s retail stores. Mr. Sexton has shopped at Target stores for several years. *See* Sexton PI
 17 Decl. at ¶ 19. Mr. Sexton has tried to use target.com, as sighted visitors are able to do, to
 18 enhance his experience as a shopper at Target’s retail stores. Mr. Sexton has explained that he
 19 routinely uses retailers’ websites to locate information about goods and services for sale at
 20 physical stores, to compare the prices of such goods and services with the prices of competitors,
 21 and to make decisions about potential purchases at the physical stores. *See* Sexton PI Decl. at ¶
 22 16. In short, Mr. Sexton routinely engages in the same “pre-shopping” activities that are a key
 23 advantage provided by the retailer websites. Mr. Sexton has tried to “pre shop” Target stores on
 24 target.com, but has been denied the opportunity to do so because of various accessibility barriers
 25 on the website. *See* Sexton SJ Decl. at ¶ 2; Sexton PI Decl. at ¶ 31; Sexton Depo. at 64:19-65:5;
 26 *see also* Perry Depo. at 95:23-96:20 (target.com can be used for that purpose). There is thus
 27 evidence that Mr. Sexton has been denied a key advantage offered by Target to sighted visitors
 28

1 to target.com, which has resulted in unequal access to the goods and services of the physical
2 stores.

3 In addition, Mr. Sexton has attempted to access the weekly advertisements available on
4 target.com, which identify goods and services that are on sale at Target’s retail stores. *See*
5 Sexton PI Decl. at ¶ 32; *see also* Perry Depo. at 77:10-78:14, 86:20-88:20 (explaining the online
6 weekly ad feature). He would like to access those advertisements online, as sighted visitors can,
7 to enhance his shopping experience at Target’s retail stores. *See* Sexton PI Decl. at ¶ 32. Again,
8 however, because of accessibility barriers on target.com, he has been unable to access those
9 weekly advertisements as sighted visitors can. *See id.*⁵

10 **III. ARGUMENT**

11 In its motion for summary judgment, Target does not dispute that Mr. Sexton is entitled
12 to protection under the ADA, Unruh Act, or Disabled Persons Act. Nor does Target dispute that
13 Mr. Sexton has experienced numerous, critical accessibility barriers on target.com. Rather,
14 Target’s motion is based solely on its assertion that there is insufficient evidence that Mr. Sexton
15 was denied the full and equal enjoyment of the goods and services of Target’s retail stores as a
16 result of accessibility barriers on target.com. *See* Target’s Motion at pp. 5-7. Target’s motion is
17 misguided for two reasons.

18 First, to the extent that Plaintiffs’ claims require a nexus between target.com and Target’s
19 retail stores, there is more than sufficient evidence to raise a triable issue of material fact that
20 accessibility barriers on target.com have caused Mr. Sexton to be denied the full and equal
21 enjoyment of the goods and services of Target’s retail stores.

22 Second, Plaintiffs’ State law claims do not rely solely on there being a connection
23 between target.com and Target’s retail stores. As discussed below, Plaintiffs have consistently
24 alleged two separate theories of liability under California State law—first, that people with

25 _____
26 ⁵ As discussed below, for Target to argue that Mr. Sexton might have found some way to have
27 these weekly ads read to him by a Target employee indicates that Target does not understand the
28 concept of full and equal access. The whole point of the civil rights statutes underlying this case
is to reduce the extent to which people with disabilities are relegated to second class treatment
and dependence upon others.

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1 disabilities are entitled to full and equal access to target.com even if there were no nexus
2 between the website and Target’s physical stores; and second, that there is in fact such a nexus.
3 The first theory rests on the broad language of the California statutes at issue, which predates the
4 incorporation of the ADA into those statutes. Under that theory, Plaintiffs need only show that
5 they have been denied full and equal access to target.com, itself. With respect to Mr. Sexton,
6 there is extensive evidence to support that he has been denied full and equal access to target.com.

7 **A. Standard for Summary Judgment.**

8 Summary judgment is only proper if, upon viewing the evidence in the light most
9 favorable to the non-moving party, the Court finds that no triable issue of fact exists, and the
10 moving party is clearly entitled to prevail as a matter of law. *See Celotex Corp. v. Catrett*, 477
11 U.S. 317, 322-23 (1986); *Anguiano v. Allstate Ins. Co.*, 209 F.3d 1167, 1169 (9th Cir. 2000). The
12 moving party bears the burden of showing that there is no material factual dispute. The Court
13 must therefore regard as true the opposing party’s evidence, if supported by affidavits or other
14 evidentiary material. *See Celotex*, 477 U.S. at 324; *Eisenberg v. Insurance Co. of North*
15 *America*, 815 F.2d 1285, 1289 (9th Cir. 1987). The court must draw all reasonable inferences in
16 favor of the party against whom summary judgment is sought. *See Matsushita Elec. Indus. Co.*
17 *v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel. Corp. v. Hartford Accident and Indem.*
18 *Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). The Court must also allow the opposing party a
19 reasonable opportunity to conduct relevant discovery before granting a motion for summary
20 judgment. *See Fed. R. Civ. P. 56(f).*

21 **B. Plaintiff Sexton Raises a Triable Issue of Material Fact That He Has Been**
22 **Denied the Full and Equal Enjoyment of the Goods and Services of Target’s**
Retail Stores in Violation of the ADA and California Law.

23 To the extent that Plaintiffs’ claims require a nexus between target.com and Target’s
24 stores, Target’s motion must fail since there is sufficient evidence to raise a triable issue of
25 material fact that Mr. Sexton has been denied the full and equal enjoyment of the goods and
26 services of Target’s retail stores because of accessibility barriers on the website.

27 **1. Target’s Motion is Based on an Overly Narrow Interpretation of the**
28 **Nexus Requirement.**

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1 Target premises its motion on the idea that Mr. Sexton cannot state a claim under the
 2 ADA unless he shows that he has encountered access barriers while he is physically “at” or “in”
 3 a Target store. *See, e.g.*, Target’s Motion at 2:9-13, 3:9-11, 3:17-19, 3:25-27. That interpretation
 4 is inconsistent with the Court’s September 6, 2006 Order, which articulated the standard for
 5 establishing a nexus under the ADA as follows:

6 [T]o the extent that Plaintiffs allege that the inaccessibility of
 7 Target.com impedes full and equal enjoyment of the goods and
 8 services offered in Target stores, the plaintiffs state a claim, and
 9 the motion to dismiss is denied. To the extent that Target.com
 10 offers information and services unconnected to Target stores,
 11 which do not affect the enjoyment of goods and services offered in
 12 Target stores, the plaintiffs fail to state a claim under Title III of
 13 the ADA.

14 September 6, 2006 Order at 11:23-26; *see also id.* at 7:3-4 (“The statute applies to services of
 15 any place of public accommodation, not services *in* a place of public accommodation.”).

16 Consistent with the Court’s Order, the nexus requirement under the ADA merely requires
 17 that Mr. Sexton has experienced one or more barriers on target.com which prevented him from
 18 accessing, with equal enjoyment and ease of use, the goods and services of Target’s retail stores.
 19 *See* September 6, 2006 Order at 6:23-10:3; *see also* 42 U.S.C. § 12182(b)(1)-(2); *Rendon v.*
 20 *Valleycrest Prod. Ltd.*, 294 F.3d 1279, 1284-85 (11th Cir. 2002) (barriers to access need not be
 21 physical in nature and can instead be offsite and intangible). Mr. Sexton clearly has presented
 22 sufficient evidence showing such denial of access, so as to raise a triable issue of material fact on
 23 this issue.

24 **2. The Evidence Demonstrates That target.com and Target’s Retail
 25 Stores are Deeply Connected and Integrated.**

26 While the Court found that Plaintiffs’ ADA claim requires some nexus between
 27 target.com and Target’s retail stores, the Court noted that “a broader application of the ADA to
 28 the website may be appropriate if upon further discovery it is disclosed that the store and website
 are part of an integrated effort.” September 6, 2006 Order at p.25, n.4. Since the Court
 bifurcated discovery in this case, at Target’s insistence, discovery regarding the connection
 between target.com and Target’s stores has been limited. Nevertheless, substantial evidence,
 including testimony from Target’s Rule 30(b)(6) designee, reveals that target.com and Target’s

1 stores are deeply integrated. *See, supra*, Section II.A. Indeed, as a practical matter, virtually
 2 every page on target.com (including pages that list products that are only available online) has
 3 links connecting to information about goods and services available in the retail stores. *See Perry*
 4 *Depo.* at 95:23-96:10, 99:6-100:5; Brome Decl. at ¶¶ 2,3, and Exhibits A-F. Moreover, the
 5 extensive list of features on target.com that are specifically designed to operate in conjunction
 6 with, and which visitors can use to enhance their shopping experiences at, Target's retail stores
 7 (*see, supra*, Section II.A) supports the Court's characterization of target.com as "a means to gain
 8 access to" Target's stores. September 6, 2006 Order at p.25, n.4.

9 **3. The Evidence Demonstrates that Plaintiff Sexton Has Encountered**
 10 **Barriers on target.com Which Have Impeded His Enjoyment of the**
 11 **Goods and Services of Target's Retail Stores.**

12 Given the substantial evidence regarding the close nexus between target.com and
 13 Target's retail stores, it is not surprising that the pervasive accessibility barriers which have
 14 plagued target.com have impeded the full and equal enjoyment of the goods and services of
 15 Target's retail stores for people who are blind and visually impaired, including Mr. Sexton. The
 16 evidence to date certainly is sufficient to preclude entry of summary judgment against Mr.
 17 Sexton on this issue.

18 As discussed above, Mr. Sexton regularly shops at Target retail stores, and has tried to
 19 use target.com to enhance his experience as a shopper at Target retail stores in some of the ways
 20 that sighted visitors to target.com are able to do with ease. *See, supra*, Section II.D. In
 21 particular, Mr. Sexton has attempted to use target.com, as he does with other retailers' websites,
 22 to locate information about goods and services for sale at Target's retail stores, to compare the
 23 prices of goods and services for sale at Target's retail stores with the prices of Target's
 24 competitors, and to make decisions about potential purchases at Target's retail stores. *See*
 25 *Sexton PI Decl.* at ¶ 16; *Sexton SJ Decl.* at ¶ 2. Moreover, Mr. Sexton has attempted to access
 26 the weekly advertisements available on target.com, which identify goods and services that are on
 27 sale at Target's retail stores. *See Sexton PI Decl.* at ¶ 32. However, because of various
 28 accessibility barriers on target.com, Mr. Sexton has been unable to use target.com for these
 purposes. *See Sexton SJ Decl.* at ¶ 2; *Sexton PI Decl.* at ¶¶ 31-32; *Sexton Depo.* at 64:19-65:5.

1 The benefits of these features to retail store customers are abundantly clear. *See, supra*,
2 Section II.A; *see also* Perry Depo. at 77:10-78:14, 86:20-88:20 (online weekly ads); 95:23-96:20
3 (online information about products at Target’s stores). Moreover, there is no question that
4 accessibility barriers on target.com have prevented Mr. Sexton from fully and equally accessing
5 those features, and have, thus, impeded Mr. Sexton’s enjoyment of the goods and services of
6 Target’s retail stores. *See* September 6, 2006 Order at 11:23-26.

7 **4. Target’s Proposed Substitutes for Accessible Weekly Advertisements**
8 **on target.com Are Inadequate.**

9 Target suggests that barriers which prevented Mr. Sexton from accessing weekly
10 advertisements for goods and services on sale at Target stores did not impede his enjoyment of
11 the goods and services of Target’s stores because he could have gotten comparable information
12 by calling Target’s 1-800 number or visiting a Target store. *See* Target’s Motion at 6:23-26. For
13 Target to argue that Mr. Sexton might have found some way to have these weekly ads read to
14 him by a Target employee indicates that Target does not understand the concept of full and equal
15 access. The whole point of the civil rights statutes underlying this case is to reduce the extent to
16 which people with disabilities are relegated to second class treatment and dependence upon
17 others.

18 In any event, Target’s argument on this point, at best, raises disputed issues of material
19 facts, such that summary judgment is not warranted. The evidence does not support that either
20 option suggested by Target represents an adequate substitute for being able to access information
21 online, as sighted visitors can. The online weekly advertisements are made available to sighted
22 visitors in a way that is user friendly and convenient. By contrast, the options proposed by
23 Target would require significant additional effort by blind visitors to get comparable
24 information, and are otherwise inadequate substitutes.

25 **a. Target’s 1-800 Number.**

26 Discovery regarding Target’s 1-800 number has been limited because the Court, at
27 Target’s insistence, has bifurcated discovery. Nevertheless, the record shows that the 1-800
28 number has not been a sufficient substitute for features on target.com, including the weekly

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1 advertisements. In addition to the extra effort required to call the 1-800 number and
 2 communicate with a customer service representative, the evidence shows that the 1-800 number
 3 has not been adequately displayed on the website, and that Mr. Sexton, like so many other
 4 visitors to target.com, did not even know that it existed until he was told about it by counsel.
 5 *See, e.g.*, Reply Declaration of Bruce F. Sexton in Support of Plaintiffs' Motion for Preliminary
 6 Injunction ("Sexton Reply PI Decl."), attached as Exhibit E to Heller Decl., at ¶ 3. Indeed,
 7 Target's Rule 30(b)(6) designee candidly admitted that just locating the 1-800 number on the
 8 website has been a "common problem." Perry Depo. at 141:25-142:7, 147:15-17.

9 Moreover, the 1-800 number is an inadequate substitute for any feature on the website
 10 because it does not allow a blind visitor to independently and directly access the relevant
 11 information on the visitor's own schedule, as a sighted visitor can. *See, e.g.*, Sexton Reply PI
 12 Decl at ¶¶ 2 (1-800 number "did not enable me to browse as independently, easily or freely as I
 13 would like"), 4 (couldn't multi-task or take breaks), 7 (was "hurried along throughout the
 14 process...and was told that they could only spend a certain amount of time with me because the
 15 lines were getting busy"); *see also* Perry Depo. at 186:15-22 (lack of independence), 177:4-178:9
 16 (caller to 1-800 number can't take breaks).

17 **b. Target's Stores.**

18 By suggesting that Mr. Sexton could have asked an employee at a Target store about the
 19 weekly advertisements, Target misses the point entirely. A sighted visitor to target.com could
 20 have checked the weekly advertisements online, and then decided whether she wanted to go to a
 21 Target store based on the advertisements. Because of accessibility barriers on target.com, Mr.
 22 Sexton did not have that option. It is absurd for Target to suggest that a trip to a Target store to
 23 ask about weekly advertisements is equivalent—in terms of time, convenience, independence or
 24 any measure—to clicking on a link at target.com to get that information.

25 **C. Plaintiff Sexton Raises a Triable Issue of Material Fact That He Has Been**
 26 **Denied Full and Equal Access to target.com in Violation of California Law,**
Even if There Were No Nexus to the Physical Stores.

27 Contrary to Target's assertion, Plaintiffs' State law claims are not completely dependent
 28 on their ADA claim. Rather, Plaintiffs have consistently asserted an independent basis for their

1 claims under the Unruh Act and Disabled Persons Act, that does not rely on those statutes'
 2 incorporation of the ADA.⁶ More specifically, Plaintiffs have asserted that because Target
 3 Corporation is a "business establishment," and target.com an accommodation, advantage,
 4 privilege and service covered by the Unruh Act, and because target.com is a "place to which the
 5 general public is invited" under the Disabled Persons Act, Target's failure to make target.com
 6 accessible to people who are blind or visually impaired constitutes a violation of those statutes
 7 regardless of their incorporation of the ADA and, importantly, regardless of any connection
 8 target.com has to Target's retail stores.⁷ As set forth herein, there is more than enough evidence
 9 to raise a triable issue of material fact that Mr. Sexton has been denied full and equal access to
 10 target.com.

11 **1. The Unruh Act Independently Requires Full and Equal Access to**
 12 **target.com.**

13 **a. The Broad Reach of the Unruh Act.**

14 The Unruh Act entitles people with disabilities to the "full and equal accommodations,
 15 advantages, facilities, privileges, or services in *all business establishments of every kind*
 16 *whatsoever.*" Cal. Civ. Code § 51(b) (emphasis added). The Unruh Act applies not only to
 17 physical places of business, but also to any "permanent commercial force" which operates within
 18 California. *O'Connor v. Village Green Owners Ass'n.*, 33 Cal.3d 790, 795 (1983); *Chabner v.*
 19 *United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1050 (9th Cir. 2000); *see also Warfield v.*
 20 *Peninsula Golf & Country Club*, 10 Cal.4th 594, 621 (1995); *Presta v. Peninsula Corridor Joint*
 21 *Powers Board*, 16 F. Supp.2d 1134, 1136 (N.D. Cal. 1998) ("California courts have clearly and
 22 repeatedly held that the Unruh Act is to be interpreted 'in the broadest sense reasonably
 23 possible,' so as to achieve its purpose of combating discrimination in all its forms.") (citations

24 ⁶ See First Amended Complaint at ¶¶ 42, 50; Plaintiffs' Motion for Preliminary Injunction, at pp.
 25 7-12; Plaintiffs' Opposition to Defendant Target Corporation's Motion to Dismiss, at pp. 10-17;
 Plaintiffs' Motion for Class Certification, at 17:21-25.

26 ⁷ In its September 6, 2006 Order, the Court found that Plaintiffs stated a claim under the Unruh
 27 Act and Disabled Persons Act through those statutes' incorporation of the ADA. The Court
 28 deferred the question of whether under California law, Plaintiffs were required to show a nexus
 between Target's retail stores and target.com. See September 6, 2006 Order at pp.11-12.

1 omitted). A massive commercial operation such as Target Corporation, which is conducting
 2 millions of dollars in sales in California every day, is certainly a “permanent commercial force”
 3 and thus covered under the Unruh Act as that statute has been interpreted by the courts.

4 **b. Target Corporation is a Business Establishment.**

5 Target Corporation is a “business establishment” in the most traditional sense. A for-
 6 profit, publicly-traded corporation conducting a substantial retail business with California
 7 residents in California every day of every year, Target Corporation is a permanent commercial
 8 force and organization within California. *See Chabner*, 225 F.3d at 1050; *O'Connor*, 33 Cal. 3d
 9 at 795.

10 **c. Target.com is an Accommodation, Advantage, Privilege and**
 11 **Service Covered by the Unruh Act**

12 Target.com is an “accommodation, advantage, privilege, advantage and service” covered
 13 by the Unruh Act. Target Corporation created target.com in 1999 to offer customers an
 14 opportunity to interact with Target Corporation in an online setting. *See Perry Depo.* at 71:5-
 15 72:10. In addition to the numerous advantages and services listed above, *see, supra*, Section
 16 II.A, and among other things, visitors to target.com can secure information about job
 17 opportunities with Target Corporation as well as information about the corporation itself. If
 18 Target Corporation were to relinquish its stores tomorrow, but maintain its website, it would
 19 remain a business establishment, and the website would still be a service covered by the Unruh
 20 Act. Therefore, the Unruh Act, separate of its incorporation of the ADA, requires that Target
 21 provide full and equal access to target.com for people with disabilities.

22 **2. The Disabled Persons Act Independently Requires Full and Equal**
 23 **Access to target.com, Regardless of the Nexus to Target’s Physical**
 24 **Stores.**

25 Unlike Plaintiffs’ ADA claim, the question of whether a service needs to be connected to
 26 a physical place in order to be covered by the Disabled Persons Act is one of first impression.
 27 While the Court here has been bound to follow the Ninth Circuit’s interpretation of the ADA in
 28 *Weyer*, the Court can and should interpret the Disabled Persons Act more broadly to apply to
 target.com without regard to any nexus between target.com and Target’s stores.

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a. The Disabled Persons Act Was Intended To Provide Broad Protection Against Discrimination By Businesses Serving the General Public, and Should Not Be Limited by the Ninth Circuit’s More Narrow Interpretation of the ADA.

The Disabled Persons Act states that: “[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities . . . and privileges of . . . places of public accommodation . . . or other places to which the general public is invited.” Cal. Civ. Code §54.1(a)(1) (emphasis added).

California courts have held that the “broad language” of the Disabled Persons Act indicates a legislative intent “to afford broad protection” to persons with disabilities from discrimination by businesses serving the general public. *Hankins v. El Torito Restaurants, Inc.*, 63 Cal.App.4th 510, 523 (1998). They have also held that the Disabled Persons Act prohibits policies imposed by a business which have the effect of discriminating against disabled customers, even when the business is compliant with applicable building access standards. See *Hankins*, 63 Cal.App.4th at 523 (DPA not limited to physical access). Accordingly, the language of the Disabled Persons Act, which requires access to all “places to which the general public is invited” should be given its broadest reasonable interpretation. Cal Civ. Code 54.1(a). There is no reason to think that the California legislature intended this broad remedial civil rights statute to be limited to the types of businesses open to the public at the time the statute was first enacted. Rather, the statute can and should be interpreted as applying to websites such as target.com, which are increasingly becoming a centerpiece of daily economic life for millions of people throughout California.⁸

b. Target.com is a Place to Which the General Public is Invited.

⁸ Given the legislature’s goal of providing broad protection through the Disabled Persons Act, and the fact the U.S. Department of Justice and several federal courts outside the Ninth Circuit have interpreted “places of public accommodation” under the ADA to include pure website businesses and/or other nonphysical places, it is reasonable to adopt a broader interpretation of the Disabled Persons Act than the interpretation of the ADA under current Ninth Circuit precedent. See Brief of the United States Department of Justice as Amicus Curiae in Support of Appellant, *Hooks v. OKBridge, Inc.*, 232 F.3d 208 (5th Cir. 2000) (available at <http://www.usdoj.gov/crt/briefs/hooks.htm>); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Carparts Distribution Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994).

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1 Target.com is fairly viewed as “place[] to which the general public is invited” under the
2 Disabled Persons Act. Target.com is open to the general public, and is designed to be user-
3 friendly for the general public. See Nemoir Depo. at 62:17-63:5. Twenty-four hours a day,
4 seven days a week, Target provides information and sells goods and services to the general
5 public on target.com. Tens of millions of visitors visit target.com each month.⁹ Target quite
6 literally invites the public to visit its website. The sign-in page for target.com invites “New
7 Guests” to enter and set up an account, and asks “Returning Guests” to sign in with their account
8 number.¹⁰ Target.com is thus appropriately viewed as a “place[] to which the general public is
9 invited,” and the Disabled Persons Act, separate of its incorporation of the ADA, thus requires
10 Target to provide full and equal access to target.com for people with disabilities.¹¹

11 **3. The Extensive Evidence Demonstrates That Plaintiff Sexton Has Been**
12 **Denied Full and Equal Access to target.com**

13 As set forth above, there is more than enough evidence to raise a triable issue of material
14 fact that Mr. Sexton has been denied full and equal access to target.com. See, supra, Section
15 II.A through D.
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21 ⁹ See Exhibit F to Heller Decl. (indicating number of visitors to target.com in each of the last six
22 months).

23 ¹⁰ See <http://www.target.com> (home page) and <http://www.target.com/gp/flex/sign-in.html>,
24 attached as Exhibit G to Heller Decl.

25 ¹¹ The history of the statute provides further support to this interpretation. For example, in 1992
26 the California Legislature redefined the class of individuals protected by the Disabled Persons
27 Act to include people with mental disabilities as well physical disabilities. See Cal. Civ. Code §
28 54(a) and (b). Given that mental impairments do not preclude physical access to physical
structures, the current Disabled Persons Act is appropriately interpreted as ensuring access to
“public accommodations” and “places to which the general public is invited” even if they are not
connected to any physical place.

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IV. CONCLUSION

For the foregoing reasons, Target's motion for summary judgment should be denied.

Respectfully submitted,

Dated: March 26, 2007

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