

1 LAURENCE W. PARADIS (California Bar No. 122336)  
 2 ROGER N. HELLER (California Bar No. 215348)  
 3 DISABILITY RIGHTS ADVOCATES  
 2001 Center Street, Third Floor  
 4 Berkeley, California 94704  
 Telephone: (510) 665-8644  
 Facsimile: (510) 665-8511  
 TTY: (510) 665-8716

5 JOSHUA KONECKY (California Bar No. 182897)  
 6 RACHEL E. BRILL (California Bar No. 233294)  
 SCHNEIDER & WALLACE  
 7 180 Montgomery Street, Suite 2000  
 San Francisco, CA 94104  
 8 Telephone: (415) 421-7100  
 Fax: (415) 421-7105  
 9 TTY: (415) 421-1655

10 DANIEL F. GOLDSTEIN (*pro hac vice*)  
 BROWN, GOLDSTEIN & LEVY, LLP  
 11 120 E. Baltimore St., Suite 1700  
 Baltimore, MD 21202  
 12 Telephone: (410) 962-1030  
 Fax: (410) 385-0869

PETER BLANCK (*pro hac vice*)  
 900 S. Crouse Ave.  
 Crouse-Hinds Hall, Suite 300  
 Syracuse, NY 13244-2130  
 Telephone: (315) 443-9703  
 Fax: (315) 443-9725

DISABILITY RIGHTS ADVOCATES  
 2001 Center Street, Third Floor  
 Berkeley, CA 94704-1204  
 (510) 665-8644

13  
 14  
 15 UNITED STATES DISTRICT COURT  
 16 NORTHERN DISTRICT OF CALIFORNIA  
 17

18 NATIONAL FEDERATION OF THE  
 19 BLIND, the NATIONAL FEDERATION OF  
 THE BLIND OF CALIFORNIA, on behalf of  
 20 their members and all others similarly situated,  
 and BRUCE F. SEXTON, on behalf of himself  
 21 and all others similarly situated,

22 Plaintiffs,

23 v.

24 TARGET CORPORATION

25 Defendant.  
 26  
 27  
 28

Case No.: C 06-01802 MHP

**CLASS ACTION**

**PLAINTIFFS' REPLY BRIEF IN  
 SUPPORT OF MOTION FOR  
 BIFURCATION**

Hearing Date: May 1, 2007

Time: 2:00 PM

Judge: The Hon. Marilyn Hall Patel

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DISABILITY RIGHTS ADVOCATES  
2001 Center Street, Third Floor  
Berkeley, CA 94704-1204  
(510) 665-8644

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2001 Center Street, Third Floor  
Berkeley, CA 94704-1204  
(510) 665-8644

1 **I. INTRODUCTION**

2 Plaintiffs move for bifurcation because the issues and evidence relevant to class liability  
3 and equitable relief in a discrimination case are distinct from those that arise in the determination  
4 of damages for individual class members, once there is a finding of class liability. *See, e.g.,*  
5 *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 459 (N.D. Cal. 1994). Applying  
6 this principle, the Courts have ordered bifurcation of class liability and equitable relief from the  
7 determination of minimum statutory damages in disability discrimination cases brought pursuant  
8 to the Unruh Act and Disabled Persons Act. *Id.*; *Lieber v. Macy's, Case No. C 96-02955 MHP*  
9 (N.D. Cal.), Order of March 9, 1998, at 12:6-13:1. Target does not and cannot take issue with  
10 this basic framework for litigating and trying disability discrimination class actions.

11 Instead, Target opposes bifurcation with the argument, already presented in its  
12 Opposition to Class Certification, that the Court need not consider bifurcation because there  
13 are too many "individualized determinations" for there to be a class action in the first place. The  
14 implication, of course, is that should the Court disagree with Target's Opposition to Class  
15 Certification, then there is no argument left for opposing bifurcation. As set forth in Plaintiffs'  
16 Reply in Support of the Motion for Class Certification, Target's contentions regarding  
17 "individualized determinations" lack merit because they are based on a mischaracterization of  
18 Plaintiffs' claims, a misunderstanding of the underlying substantive law on which those claims  
19 are based, and mistaken assumptions about the evidence Plaintiffs will use to prove those  
20 claims. When those misconceptions are set aside, there is no basis to oppose class certification  
21 or bifurcation of this case.

22 **II. THE ISSUES GOING TO CLASS LIABILITY AND EQUITABLE RELIEF ARE**  
23 **WHOLLY DISTINCT FROM THE DETERMINATION OF MINIMUM**  
24 **STATUTORY DAMAGES**

25 Plaintiffs propose a bifurcated trial along the following general framework: During  
26 Phase One (the class liability and equitable relief phase), Plaintiffs will present testimony from  
27 accessibility experts and Target's own representatives, along with foundational documents and  
28 demonstrative exhibits, showing that (1) target.com was not designed to be accessible to the  
blind; (2) target.com is integrated with the retail stores; and (3) fixing the access problems is

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2001 Center Street, Third Floor  
Berkeley, CA 94704-1204  
(510) 665-8644

1 readily achievable and systemic in nature. Plaintiffs also will present testimony from a limited  
2 number of blind individuals about their experiences on target.com to illustrate and bring the  
3 systemic access problems to life.

4 If liability is established, the case would then move to a Phase Two. In this phase, the  
5 minimum statutory damages for the California subclass would be determined either through a  
6 claims process or streamlined hearings before a special master, during which class members  
7 could present a claim by affirming that they are blind and that they encountered an access barrier  
8 on target.com. This trial plan, although only skeletal at this early stage, falls squarely within the  
9 accepted procedures for Rule 23(b)(2) class actions. *See Lieber v. Macy's*, Case No. C 96-02955  
10 MHP (N.D. Cal.), Order of March 9, 1998, at 12:6-13:1; *Arnold*, 158 F.R.D. at 458-460.

11 The case is well-suited for bifurcation because the issues going to the determination of  
12 class liability and equitable relief (*e.g.*, how and the extent to which target.com is covered by the  
13 ADA, the Unruh Act, and the DPA; the scope of the nexus requirement under the ADA; the  
14 extent to which target.com is integrated with the brick and mortar stores; and whether removal of  
15 the barriers on target.com would constitute an undue burden) are wholly separate from the Phase  
16 Two questions (*i.e.*, how many times each individual in the defined class visited Target.com  
17 during the relevant time period and encountered one or more of the illegal barriers).

18 This case is quite similar analytically to *Lieber v. Macy's*. There, evidence of  
19 architectural barriers throughout the Macy's store formed the basis of a class liability finding and  
20 issuance of injunctive relief after Phase One of the trial. *See Lieber v. Macy's*, 80 F.Supp.2d  
21 1065, 1075-1077, 1081-1082 (N.D. Cal. 1999). Significantly, the class wide liability  
22 determination did not mean or require that every pathway, restroom or other architectural feature  
23 in the store be inaccessible. *Id.* at 1075-1077. Rather, as in other discrimination cases, the Court  
24 could still make a global determination regarding liability to, and equitable relief for, the class  
25 during Phase One based on the presence of multiple inaccessible features throughout the store as  
26 a whole. In turn, this global determination could provide the foundation for the resolution of the  
27 entirely distinct Phase Two questions of which class members encountered barriers and when, by  
28 providing class members with a procedure to submit sworn statements or other evidence that

1 they had mobility disabilities and encountered barriers. *Lieber v. Macy's*, Case No. C 96-02955  
 2 MHP (N.D. Cal.), Order of December 18, 2000, at 8. Bifurcation was appropriate because the  
 3 arguments and evidence going to whether the barriers violated the law (*e.g.*, whether the features  
 4 were designed to accommodate people with disabilities, whether removing barriers would be an  
 5 undue burden, etc.) were distinct from the question of how many times each particular California  
 6 subclass member encountered one or more of the illegal barriers during the class period.

7 Similarly, if the Court here determines that target.com was designed in a way that did not  
 8 allow for blind people to perceive information or communicate commands on the website, then  
 9 members of the California subclass (who are, by definition, blind) will not have had full and  
 10 equal enjoyment as required by the ADA and California law. As in *Macy's*, the members of the  
 11 California subclass could then demonstrate their eligibility for minimum statutory damages by  
 12 affirming that (1) they are blind, and (2) they encountered one or more access barriers while  
 13 attempting to use target.com during the relevant time period. As in *Macy's*, bifurcation of the  
 14 class action trial clearly serves the interests of judicial efficiency.

15 **III. THE PRINCIPLES ARTICULATED BY THE SUPREME COURT IN**  
 16 **TEAMSTERS ARE BY NO MEANS LIMITED TO EMPLOYMENT CASES**

17 Target is mistaken regarding the application of *International Brotherhood of Teamsters v.*  
 18 *United States*, 431 U.S. 324, 360-361 (1977). The *Teamsters* rationale is not limited to  
 19 employment cases. See 3 Newberg on Class Actions § 9:53 at 432-435 (noting that split trials  
 20 have been used in cases involving, *inter alia*, “patent infringement, welfare, employment  
 21 discrimination, Truth in Lending Act, mass tort, education, bankruptcy, labor, and criminal”  
 22 law). Rather, it is applicable to civil rights class actions generally, where the determination of  
 23 whether there is a pattern or practice of discrimination can be made as a global matter, followed  
 24 by subsequent proceedings to determine who in the defined class was personally subject to the  
 25 discrimination and the particular relief to which such persons are entitled. *Teamsters*, 431 U.S.  
 26 at 360-361.

27 If anything, the damages phase will be simpler here than in *Teamsters*. There, the trial  
 28 court reserved subsequent proceedings, after the liability determination, for 300 of the 334 “class

1 members,"<sup>1</sup> during which issues such as job qualifications, possible and actual experiences of  
2 discrimination, and appropriate remedial relief would need to be considered for each class  
3 member. *Id.* at 330-332, 371-372. Here, however, the damages are simply fixed minimum  
4 statutory damages of \$1,000 per offense under Civil Code § 54.3 and \$4,000 per offense under  
5 Civil Code §52(a). *See Botosan v Paul McNally Realty*, 216 F.3d 827, 835 (9<sup>th</sup> Cir. 2000)  
6 (litigant need not prove she suffered actual damages to recover the independent statutory  
7 minimum amount under § 52(a) – she need only show that she experienced the barrier at issue).  
8 Although these monetary awards are described as damages, they are certainly no more difficult  
9 to calculate than the equitable monetary awards (*e.g.*, back pay) at issue in *Teamsters*, or the  
10 compensatory and punitive damages available in other Title VII class actions. *See, e.g., Dukes v.*  
11 *Wal-Mart*, 222 F.R.D. 137 (N.D. Cal 2004), *aff'd by Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9<sup>th</sup>  
12 Cir. 2007), and *Ellis v. Costco*, --- F.R.D. ---, 2007 WL 127800 (N.D. Cal. 2007).

13 **IV. TARGET'S DISCUSSION OF JURY CONFUSION IS MISPLACED**

14 The lack of potential jury confusion or misunderstanding (Opposition at 2:8-11) in this  
15 case is irrelevant. The fact that neither party has requested a jury cannot be a reason for denying  
16 bifurcation simply because other courts, in other cases, have relied on potential jury confusion or  
17 misunderstanding as a reason to support bifurcation. If anything, the waiver of a jury trial by  
18 both parties makes this case all the more appropriate for bifurcation, since there is no risk  
19 whatsoever of a Seventh Amendment problem.

20 **V. CONCLUSION**

21 For the foregoing reasons and those discussed in Plaintiffs' opening brief, Plaintiffs  
22 respectfully request that this Court bifurcate the trial into a class liability/equitable relief phase,  
23 followed by a second phase to determine statutory damages.

24 DATED: March 29, 2007

Respectfully submitted,

25 By: \_\_\_\_\_/s/  
26 Laurence W. Paradis  
Attorney for Plaintiff

27 <sup>1</sup>Although *Teamsters* was a case brought by the Government, the decision specifically noted that the same  
28 principles apply in class actions. *Id.* at 358-359 (citing *Franks v. Bowman Transp. Co.* 424 U.S. 747); *see also Cooper v. Fed. Reserve Bank* (1984) 467 U.S. 867, 876, n.9.