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

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

16 Plaintiffs,

17 v.

18 TARGET CORPORATION,

19 Defendant.

Case No. C 06-01802 MHP

**TARGET CORPORATION'S  
 REPLY MEMORANDUM IN  
 SUPPORT OF ITS MOTION FOR  
 SUMMARY JUDGMENT**

Date: May 1, 2007  
 Time: 2:00 PM  
 Judge: Hon. Marilyn Hall Patel

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## INTRODUCTION

1  
2 Plaintiffs' opposition ignores the requirement that they supply evidence  
3 demonstrating that Mr. Sexton has a claim against Target Corporation. A plaintiff can  
4 survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) with properly  
5 articulated allegations. There is no need, at that stage, to supply evidence. A motion for  
6 summary judgment under Rule 56 is, of course, markedly different. To survive such a  
7 motion, a party must substantiate its allegations with actual, admissible evidence. *See Fed.*  
8 *R. Civ. P. 56(e)*. If that party's proof is insufficient under the relevant legal standard,  
9 summary judgment must be granted in favor of the party's opponent with respect to that  
10 claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

11 As this Court is well aware, Plaintiffs' complaint survived, in part, Target's motion to  
12 dismiss under Rule 12(b)(6). To successfully oppose Target Corporation's motion for  
13 summary judgment, however, Plaintiffs must do more than articulate a theory. They must  
14 supply proof. Mr. Sexton has submitted no fewer than three declarations in this litigation.  
15 Plaintiffs are nonetheless unable to point to facts sufficient to make a claim.<sup>1</sup> The  
16 consequences are clear. Target Corporation ("Target") is entitled to summary judgment with  
17 respect to Plaintiff Sexton.

## BACKGROUND

18  
19 The following facts concerning Plaintiff Sexton have been established beyond  
20 dispute. Plaintiff Sexton resides in Berkeley, California, and has been legally blind since  
21 birth. (Declaration of Matthew I. Kreeger in Support of Target Corporation's Motion for  
22 Summary Judgment ("Kreeger Decl."), Ex. B (Declaration of Bruce F. Sexton in Support of  
23 Plaintiffs' Motion for Preliminary Injunction ("Sexton PI Decl.)) at ¶¶ 2, 5.) He has "used  
24 the screen reading software 'JAWS' to access computers, and especially, the internet since he  
25 was 18 years old." (*Id.* at ¶ 13.)

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26  
27 <sup>1</sup> Notably, Plaintiffs have not cross-moved for summary judgment with regard to  
28 Mr. Sexton's claim.

1 Plaintiff Sexton attempted to access weekly advertisements on Target.com, but was  
2 unable to do so. (*Id.* at ¶ 32.) In the summer of 2005, he also attempted to purchase towels  
3 on Target.com. (*Id.* at ¶ 33.) He “searched Target.com for ‘towels’ and found several  
4 items,” but “the numerous results were not matched with the different product descriptions.”  
5 (*Id.*) He “became so frustrated that he did not continue to the point where [he] could even  
6 attempt to complete a transaction on Target.com” (*Id.*) Instead, he traveled to a Target store,  
7 where he purchased the towels, “along with laundry soap, hand soap, Kleenex tissue, toilet  
8 paper, shampoo, conditioner, toothpaste, and other items.” (*Id.*)

9 Plaintiff Sexton has “shopped at Target stores for several years by [him]self and with  
10 member of [his] family.” (*Id.* at ¶ 19.) While shopping at Target stores, he has sought  
11 assistance from Target personnel and has never been denied such assistance. (Kreeger Decl.,  
12 Ex. E (Deposition of Bruce F. Sexton (“Sexton Dep.”) at 48:23-49:3, 54:18-55:1.) There is  
13 no evidence that Plaintiff Sexton was ever denied full and equal enjoyment of the goods or  
14 services offered in Target stores.

15 Plaintiff Sexton’s declarations set forth numerous other facts. For purposes of this  
16 motion, Target does not dispute any of these facts. Target moves for summary judgment on  
17 the grounds that if Mr. Sexton were to testify to each of those facts at trial, he would lose.  
18 The instant motion thus turns on the parties’ differing views of the applicable law.

## 19 ARGUMENT

### 20 I. PLAINTIFF SEXTON HAS NO ADA CLAIM.

21 With respect to Mr. Sexton’s claim under the Americans with Disabilities Act  
22 (“ADA”), 42 U.S.C. §§ 12181, *et seq.*, Plaintiffs argue that summary judgment is not  
23 warranted because: (1) Target misstates the nexus requirement; (2) Mr. Sexton’s enjoyment  
24 of goods and services offered in Target stores has been impeded by access barriers on  
25 Target.com; and (3) Target.com is a “service of” Target stores. As explained below, none of  
26 these arguments has merit. Plaintiffs have failed to submit facts demonstrating that the  
27 inaccessibility of Target.com impeded Mr. Sexton’s full and equal enjoyment of goods and  
28 services offered in Target stores. Because Plaintiffs have failed to make a showing sufficient

1 to establish the existence of this essential element of Mr. Sexton's ADA claim, Target is  
2 entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

3 **A. It Is Plaintiffs that Misstate the Nexus Requirement.**

4 This Court explained in its ruling on Target's motion to dismiss that "[a]lthough a  
5 plaintiff may allege an ADA violation based on unequal access to a 'service' of a place of  
6 public accommodation, courts have held that a plaintiff must allege that there is a 'nexus'  
7 between the challenged service and the place of public accommodation." (Kreeger Decl., Ex.  
8 A (Order dated Sept. 6, 2006) at 5.) On this basis, the Court dismissed Plaintiffs' ADA claim  
9 "t[o] the extent that Target.com offers information and services unconnected to Target stores,  
10 which do not affect the enjoyment of goods and services offered in Target stores." (*Id.* at  
11 11.)

12 Although Plaintiffs argue that Target's summary judgment motion is based on an  
13 overly narrow interpretation of the nexus requirement, if any party is guilty of misstating the  
14 nexus requirement, it is Plaintiffs. For example, Plaintiffs claim that: "Consistent with the  
15 Court's Order, the nexus requirement under the ADA merely requires that Mr. Sexton has  
16 experienced one or more barriers on target.com which prevented him from accessing, with  
17 equal enjoyment and ease of use, the goods and services of Target's retail stores."

18 (Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for  
19 Summary Judgment ("Opp.") at 10 (emphasis in original).) This Court has never so held.  
20 By adding "with equal . . . ease of use," Plaintiffs revise the Court's ruling in an attempt to  
21 lower the bar to a level closer to their inadequate evidentiary showing. As the Fifth Circuit  
22 observed in *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), "it is literally possible,  
23 though strained, to construe 'full and equal enjoyment' to suggest that the disabled must be  
24 able to enjoy every good and service offered to the same and identical extent as those who  
25 are not disabled." *Id.* at 187. Such a reading, however, is "plainly unrealistic, and surely  
26 unintended, because it makes an unattainable demand." *Id.* It is well established that full  
27 and equal enjoyment "does not mean that an individual with a disability must achieve an  
28 identical result or level of achievement as persons without a disability." 28 C.F.R. app. B

1 § 36.201(a) (1992); *Dobard v. San Francisco Bay Area Rapid Transit Dist.*, No. C-92-3563-  
 2 DLJ, 1993 WL 372256, at \*3 (N.D. Cal. Sept. 7, 1993) (Jensen, J.) (quoting same); *see also*  
 3 *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 583 (S.D. Cal. 1993)  
 4 (discussing the legislative history of Title III of the ADA).

5 Target bases its motion on the standard articulated by the Court in its ruling on  
 6 Target's motion to dismiss. Plaintiffs state a claim "to the extent that plaintiffs allege that the  
 7 inaccessibility of Target.com impedes full and equal enjoyment of goods and services offered  
 8 in Target stores." (Kreeger Decl., Ex. A (Order) at 11.) In other words, Target bases its  
 9 motion on the absence of evidence that "the inaccessibility of Target.com impede[d] [Mr.  
 10 Sexton's] full and equal enjoyment of goods and services offered in Target stores."

11 **B. Plaintiff Sexton Has Not Shown that the Inaccessibility of**  
 12 **Target.Com Impeded His Full and Equal Enjoyment of the Goods**  
 13 **and Services Offered in Target Stores.**

14 Plaintiffs' contention that the inaccessibility of Target.com impeded Mr. Sexton's full  
 15 and equal enjoyment of goods and services offered in Target stores rests on two facts:  
 16 (1) that he was unable to use Target.com to "pre-shop" for products and services available at  
 17 Target stores; and (2) that he was unable to access on Target.com a weekly advertisement  
 18 that provides information about goods and services on sale at Target stores. Those are all of  
 19 the facts on which Mr. Sexton's claim is based. While Plaintiffs list possible other theories  
 20 for how the supposed inaccessibility of Target.com could have, in their view, affected  
 21 someone's full and equal enjoyment of goods and services offered in Target stores — namely  
 22 Target's gift registries, pharmacy, and photo center — these are not relevant to this motion  
 23 because Plaintiff Sexton never discusses them in his declarations or his deposition. The  
 24 undisputed facts set forth by Plaintiff Sexton are simply insufficient to give rise to a claim  
 25 under the ADA.

26 **1. There Is No Evidence that Plaintiff Sexton Was Ever**  
 27 **Unable to Purchase a Particular Good or Service Offered**  
 28 **in Target Stores on Account of His Disability.**

Plaintiff Sexton has "shopped at Target stores for several years by [him]self and with  
 member of [his] family." (Kreeger Decl., Ex. B (Sexton PI Decl.) ¶ 19.) While shopping at



1 Target stores, he has sought assistance from Target personnel and has never been denied such  
 2 assistance. (Kreeger Decl., Ex. E (Sexton Dep.) at 48:23-49:3, 54:18-55:1.) Although he  
 3 complains of an instance in which he was unable to purchase towels directly from  
 4 Target.com, he states that he nevertheless purchased those towels, along with other items,  
 5 from a Target store. (Kreeger Decl, Ex. B (Sexton PI Decl.) ¶ 33.) In fact, there is no  
 6 evidence that Plaintiff Sexton was ever unable to purchase a particular good or service  
 7 offered in Target stores on account of his disability.

8 **2. Plaintiff Sexton Does Not Have a Claim Under the ADA**  
 9 **Based on His Failed Efforts to Use Target.com to “Pre-**  
 10 **Shop.”**

11 In support of Plaintiffs’ motion for a preliminary injunction, Plaintiff Sexton  
 12 submitted two declarations that detailed his experiences using Target.com, Target.com’s  
 13 1-800 number, and Target retail stores. In response to Target’s motion for summary  
 14 judgment, Plaintiffs have submitted a third declaration on behalf of Mr. Sexton. In this  
 15 declaration, Mr. Sexton adds:

16 On numerous occasions, I have attempted to access Target.com  
 17 to research products that are available at Target retail stores,  
 18 compare the prices of goods at Target’s retail stores with the  
 19 prices of Target’s competitors, and to make decisions about  
 20 purchasing goods at Target’s retail stores. However, because  
 21 of various accessibility barriers on Target.com, I have not been  
 22 able to use Target.com for these purposes.

23 (Declaration of Bruce F. Sexton in Support of Plaintiff’s Opposition to Motion for Summary  
 24 Judgment (“Sexton Opp. Decl.”) ¶ 2.) Even if Mr. Sexton has thus been unable to “pre-  
 25 shop,” as Plaintiffs call it,<sup>2</sup> these facts do not establish a valid claim under Title III of the

26 <sup>2</sup> Mr. Sexton’s new testimony contradicts his deposition testimony, which made clear  
 27 that he was able to obtain product information on Target.com. (Kreeger Decl., Ex. E (Sexton  
 28 Dep.) at 90:9-16.) Under established Ninth Circuit law, a party cannot avoid summary  
 judgment by submitting an affidavit that contradicts his prior deposition testimony. *See, e.g.,*  
*Sea-Land Serv., Inc. v. Lozen Int’l, LLC*, 285 F.3d 808, 820 n.11 (9th Cir. 2002). For  
 purposes of this motion, however, even assuming Mr. Sexton’s testimony is accepted, and  
 drawing factual inferences in Plaintiffs’ favor, *see Matsushita Elec. Indus. Co. v. Zenith*  
*Radio Corp.*, 475 U.S. 574, 587 (1986), Mr. Sexton still has no claim based on his supposed  
 inability to “pre-shop.”

1 ADA.<sup>3</sup> To “pre-shop” is not to shop. The activity of comparing prices with competitors or  
2 otherwise comparison shopping before visiting stores is made possible by the Internet itself;  
3 it is not a service offered by Target stores. The fact that Mr. Sexton was unable to use  
4 Target.com “to enhance his experience as a shopper at Target’s retail stores” (Opp. at 7) in  
5 this way does not mean that his full and equal enjoyment of the goods and services offered in  
6 Target stores was impeded. The record is devoid of a single instance in which Mr. Sexton  
7 was unable to purchase a particular product or service offered in a Target store on account of  
8 his disability.

9 Again, *McNeil* is instructive. In that case, the Fifth Circuit declined to hold that the  
10 defendant insurer violated Title III of the ADA by offering the plaintiff, who had AIDS, an  
11 insurance policy that limited the amount of coverage for AIDS. In so ruling, the Court asked:  
12 “Practically speaking, how can an owner, etc., deny the full and equal enjoyment of the  
13 goods or services that he offers?” *McNeil*, 205 F.3d at 186. The Court answered: “By  
14 denying access to, or otherwise interfering with, the use of the goods or services that the  
15 business offers.” *Id.* Even if Mr. Sexton was unable to use Target.com to “pre-shop,” that  
16 did not deny him access to, or otherwise interfere with, his use of the goods or services  
17 offered in Target stores.

18 Plaintiffs seek to rely on a strained reading of the ADA, rejected by *McNeil* and other  
19 courts, that literally requires “equal enjoyment and ease of use.” Because a website is  
20 inherently a medium for visual communication, that standard is unattainable. Since this  
21 lawsuit was filed, Target has made changes to the Target.com website that address Plaintiffs’  
22

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23 <sup>3</sup> The facts regarding Mr. Sexton’s use of Target.com to “pre-shop” for goods and  
24 services offered in Target stores are themselves thin. While Plaintiff Sexton complains in his  
25 declaration about a search that he conducted on Target.com for towels, he makes clear that he  
26 was not pre-shopping, but rather wanted to purchase towels directly from Target.com.  
27 (Kreeger Decl., Ex. B (Sexton PI Decl.) ¶ 33.) His declarations identify a few specific items  
28 that he has purchased in a Target store, other than towels. These items — laundry soap, hand  
soap, Kleenex tissue, toilet paper, shampoo, conditioner, and toothpaste — are the sort of  
staple items that are not sold on Target.com. (*Id.*; Kreeger Decl., Ex. C (Declaration of Trish  
Perry in Support of Target’s Opposition to Class Certification (“Perry Class Cert. Decl.”)  
¶ 4.) Thus, it would be impossible to use Target.com to pre-shop for any of these items.

1 concerns. Plaintiffs have acknowledged this, and complaints about the present-day  
2 Target.com website are noticeably absent from their recent court filings. Nevertheless, even  
3 if Target made each and every modification to the Target.com website urged by Plaintiffs,  
4 Target would still be violating the ADA, as the statute is construed by Plaintiffs, because  
5 “equal enjoyment and ease of use” for all users is a standard that can never be achieved. As  
6 observed in *McNeil*, “[i]t is a flawed and unreasonable construction of any statute to read it in  
7 a manner that demands the impossible.” *Id.* at 187. Moreover, the ADA in particular is not a  
8 statute of absolutes. *See, e.g.*, 42 U.S.C. § 12182(b)(2)(A)(ii) (requiring “reasonable  
9 modifications”); *Id.* at § 12182(b)(2)(A)(iii) (providing that steps that would result in an  
10 “undue burden” need not be taken); *Id.* at § 12182(b)(2)(A)(iv) (requiring removal of  
11 architectural barriers “where readily achievable”).

12 Even if the ability to “pre-shop” is required for full and equal enjoyment of goods and  
13 services offered in Target stores, Mr. Sexton would have been able to obtain through other  
14 means, such as Target.com’s 1-800 number, information available from Target.com about  
15 goods and services offered in Target stores. (Declaration of Matthew I. Kreeger in Support  
16 of Target Corporation’s Reply Memorandum in Support of Its Motion for Summary  
17 Judgment (“Kreeger Reply Decl.”), Ex. A (Declaration of Trish Perry in Support of Target  
18 Corporation’s Opposition to Motion for Preliminary Injunction (“Perry PI Decl.”) ¶ 7.)  
19 Target.com’s 1-800 number constitutes an acceptable auxiliary aid for purposes of 42 U.S.C.  
20 § 12182(2)(A)(iii). There is no evidence that Mr. Sexton ever tried using the 1-800 number  
21 to pre-shop. Although Plaintiffs suggest that they need only prove that barriers on  
22 Target.com prevented Mr. Sexton from accessing the goods and services of Target’s retail  
23 stores “with equal enjoyment and ease of use,” once again, that is not the applicable standard.  
24 Rather:

25 [t]he auxiliary aid requirement [of the ADA] is a flexible one.  
26 A public accommodation can choose among various  
27 alternatives as long as the result is effective communication.  
28 For example, a restaurant would not be required to provide  
menus in Braille for patrons who are blind, if the waiters in the  
restaurant are made available to read the menu. Similarly, a  
clothing boutique would not be required to have Brailled price

1 tags if sales personnel provide price information orally upon  
2 request; and a bookstore would not be required to make  
3 available a sign language interpreter, because effective  
4 communication can be conducted by notepad.

5 *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial*  
6 *Facilities*, 56 Fed. Reg. 35544, 35566 (July 26, 1991). The legality of an auxiliary aid does  
7 not turn on whether it is the most technologically advanced or whether one particular  
8 individual is satisfied with it. *Dobard*, 1993 WL 372256, at \*3 (granting motion to dismiss  
9 despite plaintiff's allegations that the provided auxiliary aids were not effective for him).

10 **3. Plaintiff Sexton Does Not Have a Claim Under the ADA**  
11 **Based on His Unsuccessful Attempt to Access the Weekly**  
12 **Advertisement on Target.com.**

13 The fact that Mr. Sexton was unable to access the weekly advertisement on  
14 Target.com likewise does not give rise to a valid ADA claim. A denial of access to a  
15 retailer's advertising, as opposed to the products themselves, cannot, for purposes of a claim  
16 under Title III of the ADA, impede full and equal enjoyment of the goods and services  
17 offered in its stores. Although Plaintiffs argue to the contrary, they cite no legal authority  
18 whatsoever to support this proposition.

19 Furthermore, the information contained in the weekly advertisement is available to  
20 the blind by other means, such as from Target.com's 1-800 number or employees at Target  
21 stores. Plaintiffs complain that these alternatives are not equivalent in terms of time,  
22 convenience, and independence. Once again, the law does not require such equivalence. *See*  
23 *56 Fed. Reg. at 35566*. It might be less convenient for a blind restaurant patron to ask a  
24 waiter to read the contents of a menu than it would be for her to read a Braille menu.  
25 Likewise, it might compromise a blind shopper's sense of independence to ask a store worker  
26 for the price of an item instead of reading a Brailled price tag. In spite of this, such auxiliary  
27 aids are perfectly lawful. *See id.* Again, Target has no obligation under the ADA to provide  
28 the most technologically advanced auxiliary aid or the auxiliary aid of Mr. Sexton's  
choosing. *Dobard*, 1993 WL 372256, at \*3. Plaintiffs urge this Court to apply a legal  
standard that is both unreasonable and unprecedented.



1 Effectively conceding their lack of evidence on this topic, Plaintiffs state that  
 2 discovery on this subject has been limited, although notably, they do not make a formal  
 3 request for additional discovery under Rule 56(f) for purposes of this motion. *See Brae*  
 4 *Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) (“References in  
 5 memoranda and declarations to a need for discovery do not qualify as motions under Rule  
 6 56(f),” and the “[f]ailure to comply with the requirements of Rule 56(f) is a proper ground  
 7 for denying discovery and proceeding to summary judgment.”). Plaintiffs have presented  
 8 neither the argument nor the evidence necessary to establish that Target.com is a “service of”  
 9 Target stores.

10 **II. PLAINTIFF SEXTON DOES NOT HAVE A CLAIM UNDER STATE**  
 11 **LAW**

12 **A. Plaintiff Sexton Has No Unruh Act Claim.**

13 The Unruh Act, California Civil Code section 51, *et seq.*, provides:

14 All persons within the jurisdiction of this state are free and  
 15 equal, and no matter what their sex, race, color, religion,  
 16 ancestry, national origin, disability, medical condition, marital  
 17 status, or sexual orientation are entitled to the full and equal  
 accommodations, advantages, facilities, privileges, or services  
 in all business establishments of every kind whatsoever.

18 Cal. Civ. Code § 51(b).

19 The Unruh Act makes clear, however, that:

20 Nothing in this section shall be construed to require any  
 21 construction, alteration, repair, structural or otherwise, or  
 22 modification of any sort whatsoever, beyond that construction,  
 23 alteration, repair, or modification that is otherwise required by  
 other provisions of law, to any new or existing establishment,  
 facility, building, improvement, or any other structure . . . .

24 Cal. Civ. Code § 51(d).

25 Plaintiff Sexton’s Unruh Act claim fails because the Act does not apply to the  
 26 Internet. Section 51 only applies to establishments, facilities, buildings, improvements, and  
 27 other structures. Plaintiffs contend that the Unruh Act has a broad reach and cite several  
 28 cases to support their contention that the Act encompasses websites. But none of the cases

1 cited by Plaintiffs stands for that proposition. Indeed, each of the cited cases deals with a  
2 business enterprise that engaged in intentional discrimination resulting in the inability of the  
3 plaintiff to enjoy the benefits of some physical space. *See, e.g., O'Connor v. Village Green*  
4 *Owners Ass'n.*, 33 Cal. 3d 790, (1983) (condominium association, which had a no-children  
5 policy and attempted to evict condominium owners who, after moving in, had a child, was  
6 deemed a business enterprise under the Unruh Act); *Warfield v. Peninsula Golf & Country*  
7 *Club*, 10 Cal. 4th 594 (1995) (private social club, which barred women from being issued  
8 memberships and accessing the club unless associated a man who was a member, was  
9 deemed a business enterprise subject to the strictures of the Unruh Act); *Presta v. Peninsula*  
10 *Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134 (N.D. Cal. 1998) (Amtrak, which  
11 discriminated against the disabled plaintiff by denying her sufficient time to board and  
12 disembark the trains it operates, was considered a business enterprise subject to the Unruh  
13 Act).

14 The factual predicate in the case at bar is entirely different from the cases cited by  
15 Plaintiffs. As discussed in detail above (and in Target's opening brief), Plaintiffs have not  
16 demonstrated and cannot demonstrate a connection between the alleged inaccessibility of  
17 Target.com on the one hand and Plaintiff Sexton's enjoyment of goods and services offered  
18 in Target physical stores on the other. In fact, Plaintiffs have presented no evidence of any  
19 impediment to Mr. Sexton's enjoyment of Target's physical stores at all. The cases cited do  
20 not speak to such a scenario and Plaintiffs have pointed to no case law suggesting that the  
21 inaccessibility of a commercial website that does not hinder access to the affiliated physical  
22 store violates the Unruh Act.

23 Even if the Unruh Act could be read to encompass websites, Plaintiff Sexton's claim  
24 still fails. The California Supreme Court has long held that "a plaintiff seeking to establish a  
25 case under the Unruh Act must plead and prove intentional discrimination in public  
26 accommodations in violation of the terms of the Act." *Harris v. Capital Growth Investors*  
27 *XIV*, 52 Cal. 3d 1142, 1175 (1991) (emphasis added); *see also Viswanathan v. Leland*  
28 *Stanford Junior Univ.*, 1 Fed. Appx. 669, 672 n. 3 (9th Cir. 2001). In their Complaint,

1 Plaintiffs allege that Target intentionally discriminated against visually impaired persons,  
2 (*see* Amended Complaint at ¶ 41), but they have failed to provide any evidence of intentional  
3 discrimination on Target's part.<sup>4</sup> Thus, Plaintiff Sexton's Unruh Act claim fails.

4 Plaintiff Sexton's Unruh Act claim also fails because it is tethered to his defective  
5 ADA claim. According to section 51(d), nothing in the Unruh Act requires Target to make  
6 any "alteration, repair, or modification" to its website in order to improve access by the  
7 visually impaired beyond what is "otherwise required by other provisions of law." The  
8 ADA, here, would constitute the only "other provision[] of law" that could require Target to  
9 make such changes. As discussed above, Plaintiffs have failed to submit facts demonstrating  
10 that the inaccessibility of Target.com impeded Mr. Sexton's full and equal enjoyment of  
11 goods and services offered in Target stores; thus, he has no ADA claim. Without an ADA  
12 claim, Target has no independent obligation to alter its website under the Unruh Act.<sup>5</sup>

13 Finally, for all the same reasons that Plaintiff Sexton's ADA claim fails, Plaintiff  
14 Sexton cannot prevail on his Unruh Act claim. Like the ADA, the Unruh Act provides for  
15 "full and equal accommodations, advantages, facilities, privileges, or services." Cal Civ.  
16 Cod. § 51(b). As explained above, the facts that Plaintiff Sexton has set forth regarding his

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18 <sup>4</sup> Additionally, in their motion to bifurcate, Plaintiffs contend that "whether, and to  
19 what extent, laws protecting people with disabilities provide a right to full and equal access  
20 to the internet site of a major retailer" is a "novel issue." (*See* Plaintiffs' Motion for  
21 Bifurcation of Issues at Trial at 3:13-15.) The conceded uncertainty about Target's access  
22 obligations with respect to its website seriously undercuts any claim that the alleged  
23 accessibility problems resulted from intentional discrimination.

24 <sup>5</sup> There are some circumstances, such as in those cases cited by Plaintiffs, in which an  
25 Unruh Act claim can lie without a viable ADA claim. *See, e.g., O'Connor*, 33 Cal. 3d 790;  
26 (condominium association policy barring children may violate the Unruh Act); *Warfield*, 10  
27 Cal. 4th 594 (private social club policy prohibiting the issuance of memberships to women  
28 may violate the Unruh Act); *Chabner*, 225 F.3d 1042 (insurance company policy of charging  
higher rates for disabled persons may violate the Unruh Act). But *see Molski v. M.J. Cable, Inc.*, \_\_\_ F.3d \_\_\_, No. 05-55347, 2007 WL 865532, \*5 (9th Cir. March 23, 2007) (noting that the Unruh Act is "coextensive with the ADA"). However, the *O'Connor*, *Warfield*, and *Chabner* decisions are distinguishable from the case at bar because each involves a discriminatory policy, which is not addressed by section 51(d). In the instant case, by contrast, the issue is whether Target is required to make an "alteration, repair, or modification" of its website, an issue directly addressed, and disposed of, by section 51(d). Plaintiffs do not cite a single case in which an Unruh Act claim was found to exist in the absence of an ADA claim in analogous factual circumstances.



1 failed efforts to pre-shop and to access the weekly advertisement using Target.com do not  
2 support the conclusion that he was denied full and equal enjoyment of the goods and services  
3 offered in Target stores. (*See* Part I.B., *supra*.) Consequently, he has no claim under either  
4 the Unruh Act or the ADA.

5 **B. Plaintiff Sexton Has No Disabled Persons Act Claim.**

6 California's Disabled Persons Act ("CDPA"), California Civil Code section 54, *et*  
7 *seq.*, guarantees "full and equal access" for individuals with disabilities to all public places.  
8 Under the CDPA, such public places include: the "accommodations, advantages,  
9 facilities . . . and privileges of all common carriers, airplanes . . . private schools, hotels,  
10 lodging places, places of public accommodation, amusement, or resort, and other places to  
11 which the general public is invited . . ." Cal. Civ. Code § 54.1(a)(1). Because the statute  
12 lists only physical places as examples of covered facilities, under the doctrine of *noscitur a*  
13 *sociis*, the CDPA should be interpreted as applying only to other physical places. *Weyer v.*  
14 *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). Internet websites  
15 are not physical places. Thus, Plaintiff Sexton's CDPA claim fails.

16 Even if the CDPA were interpreted to encompass websites, however, Plaintiff  
17 Sexton's CDPA claim would still fail. "Under the CDPA, a plaintiff can show either that the  
18 ADA was violated, or that the facility in question does not comply with the California  
19 Building Code requirements for disabled access ('Title 24')." *Mannick v. Kaiser Foundation*  
20 *Health Plan, Inc.*, No. C 03-5905-PJH, 2006 WL 2168877, at \*16 (N.D. Cal. July 31, 2006)  
21 (citing Cal. Civ. Code § 54; Cal. Health & Safety Code § 19955; Cal. Code Regs. tit. 24,  
22 § 1134B.1, 2); *see also Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 446 (N.D.  
23 Cal. 1994) ("The degree of 'full and equal access' to places of public accommodation  
24 guaranteed to disabled persons under § 54.1(a) is defined by building code standards that are  
25 imposed under California Government Code § 4450.")

26 Here, to the extent that Plaintiff Sexton's CDPA claim is dependent on a claimed  
27 violation of the ADA, the CDPA claim fails as Plaintiffs have provided no evidence, as  
28 discussed above, that Mr. Sexton suffered any injury under the ADA. Plaintiffs do not allege

1 that Target.com is in violation of the California Building Code nor can they present any  
2 evidence to support such a claim; thus, Plaintiff Sexton's CDPA claim cannot survive on that  
3 basis.

4 Plaintiffs attempt to salvage their CDPA claim by citing *Hankins v. El Torito*  
5 *Restaurants, Inc.*, 63 Cal. App. 4th 510, 522 (1998). According to Plaintiffs, *Hankins* stands  
6 for the proposition that the CDPA is not limited to the inaccessibility of a physical place.  
7 But Plaintiffs are wrong. In *Hankins*, defendant El Torito prohibited disabled patrons from  
8 using the employee restroom on the restaurant's first floor even though the only restroom for  
9 customer use was on the second floor of the restaurant, which was inaccessible to disabled  
10 customers. At issue was whether the restaurant's policy to preclude access to a Building  
11 Code compliant bathroom constituted a violation of the CDPA. The court held that a  
12 discriminatory policy that precludes access to a physical place may violate the CDPA. *Id.* at  
13 522-24. The *Hankins* court did not hold that the CDPA applies to accessibility problems  
14 with websites or other non-physical spaces. Thus, *Hankins* cannot save Plaintiff Sexton's  
15 CDPA claim because Plaintiffs have not alleged, nor presented evidence to demonstrate, that  
16 Target has any discriminatory policy that prevents Mr. Sexton from accessing a physical  
17 place. Indeed, as discussed in more detail in Target's opening brief, Mr. Sexton only  
18 complains about the difficulties of using Target.com, not of any accessibility problems at  
19 Target's physical stores.

20 Finally, for the same reasons that Plaintiff Sexton's ADA and Unruh Act claims fail,  
21 Plaintiff Sexton cannot prevail on his CDPA claim. Like the ADA, the CDPA provides for  
22 "full and equal" access. Cal Civ. Code § 54.1. As discussed above, Plaintiff Sexton has not  
23 provided any evidence that his failed efforts to pre-shop and to access the weekly  
24 advertisement using Target.com denied him full and equal enjoyment of the goods and  
25 services offered in Target stores. (*See* Part I.B., *supra.*) Consequently, Mr. Sexton has no  
26 CDPA claim.

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**CONCLUSION**

For the foregoing reasons, Defendant Target’s motion for summary judgment against Plaintiff Bruce F. Sexton should be granted.

Dated: April 2, 2007

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