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UNITED STATES DISTRICT COURT  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

No. C 06-01802 MHP

**MEMORANDUM & ORDER**  
**Re: Motion for Class Certification**

Plaintiffs,

v.

TARGET CORPORATION,  
Defendant.

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Plaintiffs National Federation of the Blind (“NFB”), National Federation of the Blind of California (“NFB-CA”), Bruce Sexton, and all those similarly situated, filed this action against Target Corporation (“Target”), seeking declaratory, injunctive and monetary relief. Plaintiffs claim that Target.com is inaccessible to the blind and thereby violates federal and state laws prohibiting discrimination against the disabled. Now before the court are plaintiffs’ motion for class certification and motion for bifurcation. Having considered the parties’ arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

1 BACKGROUND<sup>1</sup>

2 I. Parties

3 Plaintiffs NFB and NFB-CA are non-profit organizations. NFB is a nationwide organization  
4 with a 50,000 strong membership, composed primarily of blind individuals. NFB-CA is the  
5 California affiliate of NFB. The purpose of NFB is to promote the general welfare of the blind by  
6 (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and (2)  
7 removing barriers and changing social attitudes, stereotypes and mistaken beliefs that sighted and  
8 blind persons hold concerning the limitations created by blindness and that result in the denial of  
9 opportunity to blind persons in virtually every sphere of life. These organizations have brought suit  
10 on their own behalf and on behalf of their members.

11 Plaintiff Sexton is a member of the NFB and the NFB of California. He is legally blind and  
12 uses JAWS screen reading software to access the internet. Sexton Apr. 12, 2006 Dec. ¶¶ 2, 13.  
13 Sexton relies on the internet for a variety of functions and frequently uses the internet in order to  
14 “research products, compare prices, and make decisions about purchasing goods in the stores’  
15 physical locations.” Id. ¶ 16. He has attempted to use Target.com with his screen reader on  
16 “numerous occasions” but has been unable to access certain features of the website. Id. at ¶ 32.

17 Defendant Target operates approximately 1,400 retail stores nationwide, including 205 stores  
18 in California. Target.com is a website owned and operated by Target. By visiting Target.com,  
19 customers can purchase many of the items available in Target stores. Target.com also allows a  
20 customer to perform functions related to Target stores. For example, through Target.com, a  
21 customer can access information on store locations and hours, refill a prescription or order photo  
22 prints for pick-up at a store, and print coupons to redeem at a store.

23  
24 II. Factual Background

25 Plaintiffs allege that Target.com is not accessible to blind individuals. According to  
26 plaintiffs, designing a website to be accessible to the blind is technologically simple and not  
27 economically prohibitive. Protocols for designing an accessible internet site rely heavily on  
28 “alternative text”: invisible code embedded beneath graphics. A blind individual can use screen

1 reader software, which vocalizes the alternative text and describes the content of the webpage.  
2 Similarly, if the screen reader can read the navigation links, then a blind individual can navigate the  
3 site with a keyboard instead of a mouse. Plaintiffs allege that Target.com lacks these features that  
4 would enable the blind to use Target.com. Since the blind cannot use Target.com, they are denied  
5 full and equal access to Target stores, according to plaintiffs.

6  
7 **III. Recent Modifications to Target.com**

8 After the filing of the present complaint, Target undertook certain modifications of its  
9 website to make it more accessible to the blind. In response to this litigation, Target began drafting  
10 Online Assistive Technology Guidelines based on plaintiffs' expert report. Nemoir Dep. at  
11 21:18–22:5.

12  
13 **IV. Procedural History**

14 On February 7, 2006 plaintiffs filed this action in Superior Court of California for the County  
15 of Alameda. On March 9, 2006 defendant removed the case to federal court and subsequently filed a  
16 motion to dismiss the complaint for failure to state a claim. In its motion, defendant claimed that  
17 each of the anti-discrimination laws protecting the disabled—the Americans with Disabilities Act,  
18 42 U.S.C. section 12182, (“ADA”), Unruh Civil Rights Act, Cal. Civ. Code section 51 (“Unruh  
19 Act”), and the Disabled Persons Act, Cal. Civ. Code section 54.1 (“DPA”)—cover access to only  
20 physical spaces. Since Target.com is not a physical space, defendant asserted that the complaint  
21 does not state a claim under these laws. On September 5, 2006, the court granted in part and denied  
22 in part defendant’s motion to dismiss. The court reasoned that the inaccessibility of Target.com  
23 impeded full and equal enjoyment of goods and services offered in Target stores pursuant to the  
24 ADA. Thus, the court dismissed plaintiffs’ claims to the extent that they are based on Target.com  
25 features that are unconnected to the stores. The court also denied the motion to dismiss plaintiffs’  
26 state law claims. At the same time, the court denied plaintiffs’ request for a preliminary injunction  
27 as premature.

28 Now before the court is plaintiffs’ motion for class certification of a nationwide ADA class

1 and a California subclass pursuant to Rules 23(a) and 23(b)(2). In response, defendant argues, inter  
2 alia, that the class definition for the proposed nationwide class is overbroad because it includes class  
3 members whose claims have been dismissed pursuant to this court's earlier order. Defendant also  
4 contends that the proposed class member declarations are insufficient because they do not  
5 demonstrate a nexus as required by the court's order. The court held a hearing on this issue on April  
6 12, 2007 and ordered supplemental briefing on several issues relating to class certification.  
7 Therefore, the court will address the issues associated with the class definition for the nationwide  
8 class at this time.

9  
10 LEGAL STANDARD

11  
12 Motion for Class Certification

13 A party seeking to certify a class must satisfy the four prerequisites enumerated in Rule  
14 23(a), as well as at least one of the requirements of Rule 23(b). Under Rule 23(a), the party seeking  
15 class certification must establish: (1) that the class is so large that joinder of all members is  
16 impracticable (i.e., numerosity); (2) that there are one or more questions of law or fact common to  
17 the class (i.e., commonality); (3) that the named parties' claims are typical of the class (i.e.,  
18 typicality); and (4) that the class representatives will fairly and adequately protect the interests of  
19 other members of the class (i.e., adequacy of representation). Fed. R. Civ. P. 23(a). In addition to  
20 satisfying these prerequisites, parties seeking class certification must show that the action is  
21 maintainable under Rule 23(b)(1), (2) or (3). See Rule 23(b); Amchem Products, Inc. v. Windsor,  
22 521 U.S. 591, 614 (1997). Rule 23(b)(2) permits class actions for declaratory or injunctive relief  
23 where the party opposing the class "has acted or refused to act on grounds generally applicable to  
24 the class." Rule 23(b)(2).

25 The party seeking class certification bears the burden of establishing that the requirements of  
26 Rules 23(a) and 23(b) have been met. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180,  
27 1188 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001); Hanon v. Dataproducts Corp., 976  
28 F.2d 497, 508 (9th Cir. 1992). However, in adjudicating a motion for class certification, the court

1 accepts the allegations in the complaint as true so long as those allegations are sufficiently specific  
2 to permit an informed assessment as to whether the requirements of Rule 23 have been satisfied.

3 See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976).

4 The merits of the class members' substantive claims are generally irrelevant to this inquiry. Eisen v.  
5 Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); Moore v. Hughes Helicopters, Inc., 708 F.2d  
6 475, 480 (9th Cir. 1983).

7  
8 DISCUSSION

9  
10 Plaintiffs seek certification of a nationwide class for claims arising under the Americans with  
11 Disabilities Act, 42 U.S.C. sections 12101 et seq. and a California sub-class for violations of the  
12 Unruh Civil Rights Act, California Civil Code sections 51 et seq. and the Disabled Persons Act,  
13 California Civil Code sections 42 et seq. The proposed class definition for the nationwide class is as  
14 follows:

15 All legally blind individuals in the United States who have attempted to access  
16 Target.com, for plaintiffs' claims arising under the Americans with Disabilities Act, 42  
U.S.C. §§ 12101, et seq.

17 At the hearing on this matter, the court requested supplemental briefing on the reach of the state  
18 statutes at issue. Accordingly, it will defer ruling on the class certification motion until after full  
19 consideration of those issues. The court will address plaintiffs' proffered definition for the  
20 proposed ADA class.

21 Target argues that two deficiencies in the proposed class definitions militate against  
22 certification. First, it argues that the proposed definition is overbroad, because it includes claims  
23 that the court dismissed in its previous order. Second, it contends that the proposed definition is not  
24 adequately defined or ascertainable. The court considers both arguments in turn.

25  
26 I. Nexus requirement

27 Target's strongest criticism of the proposed class is that the class definition contains claims  
28 which this court has dismissed. In its September 5, 2006 order, the court dismissed all ADA claims

1 premised on access to Target.com which does not affect the enjoyment of goods and services offered  
2 in Target stores. In effect, the court recognized a nexus requirement between the use of the website  
3 and the use of the retail outlets for the purposes of an ADA violation. Plaintiffs suggest that the  
4 court need not address this issue because it is a merits-based argument properly reserved for trial.  
5 While the specific contours of the nexus requirement and the requisite factual showing may go to the  
6 merits of the litigation, the court cannot avoid addressing the issue of overbreadth at this stage. The  
7 inclusion of individuals whose claims do not meet this nexus requirement and are therefore not  
8 entitled to relief would defeat class certification and present obvious standing challenges.  
9 See Amchem, 521 U.S. at 620 (observing the particular dangers of overbroad class definitions in a  
10 different context); Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 580 (N.D. Ill. 2005) (denying  
11 certification where “class definition is overly inclusive and encompasses millions of potential  
12 members without any identifiable basis for standing.”). However, an over-inclusive class definition  
13 need not defeat certification entirely. Where the court determines that the class definition is  
14 overbroad, the court has the discretion to narrow the class to bring it within the requirements of Rule  
15 23. Gibson v. Local 40, 543 F.2d 1259, 1264 (9th Cir. 1976). Placing a limitation on the class  
16 definition consistent with the nexus requirement would satisfy these concerns. Accordingly, the  
17 court limits the class definition of the nationwide class to:

18 All legally blind individuals in the United States who have attempted to access  
19 Target.com and as a result have been denied access to the enjoyment of goods and  
20 services offered in Target stores.

21 II. Adequacy of Class Definition and Declarations

22 Rule 23 includes an implicit requirement that the class be adequately defined so that the class  
23 membership is clearly ascertainable. Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives &  
24 Composites, Inc., 209 F.R.D. 159, 163 (C.D. Cal. 2002). Target’s arguments on the definition of the  
25 class are premised, in part, on the failure to include the nexus requirement in the class definition.  
26 The amendments to the class definition the court has adopted alleviate any concerns that the class  
27 definition is amorphous. This refinement should make it abundantly clear “that the proposed class  
28 members have all suffered [] statutory violations warranting some relief.” Adashunas v. Negley, 626

F.2d 600, 604 (7th Cir. 1980).

1 Throughout its submission, Target objects repeatedly to certification of this class based on  
2 its contention that plaintiffs have not presented evidence of an actionable injury incurred by the  
3 named plaintiff or any of the putative class members. Styled as a challenge to the class definition,  
4 this argument attacks the ability of Target and the court to determine who is a member of the class.  
5 The court will consider Target's challenges based on the lack of a legally cognizable injury in  
6 considering the typicality and adequacy of the named plaintiff's claims. However, an adequate class  
7 definition is sufficient to satisfy the requirement that it be ascertainable even in the absence of  
8 evidence that the named plaintiff has suffered such an injury. Courts routinely certify class actions  
9 where the class is ascertainable but the evidence submitted by the named plaintiff suffers from some  
10 defect. As long as the proposed class satisfies the requirements of Rule 23, the court may certify the  
11 class conditioned upon the substitution of another named plaintiff. See Kremens v. Bartley, 431 U.S.  
12 119, 135 (1977) (where named plaintiffs' claims were determined to be moot, ordering substitution  
13 of class representatives); Gibson v. Local 40, 543 F.2d 1259, 1263 (9th Cir. 1976) ("In any event,  
14 failure of proof as to the named plaintiffs would not bar maintenance of the class action or entry of  
15 judgment awarding relief to the members of the class.").

16 The court has carefully reviewed the declarations of putative class members submitted in  
17 connection with the motion for class certification. Despite the statements indicating that they may  
18 have been deterred from purchasing products at Target stores, the declarations make clear that these  
19 are individuals who would prefer to shop online. They consistently express the declarants' desire to  
20 shop on the Target.com website. See, e.g., Clegg Dec. ¶ 13 ("I would prefer to shop at Target.com  
21 rather than a physical Target store."); Czarnecki Dec. ¶ 13 ("I would like to shop at Target.com  
22 because it would be nice not to have to physically carry these products back home with me.");  
23 Dunnam Dec. ¶ 14 ("I want to access Target.com primarily because I want to purchase products  
24 directly from the website."). The declarations point out the difficulties in getting to the store as well  
25 as the challenges for the blind of shopping in the store. See, e.g., Peterkin Dec. ¶ 14 ("It is somewhat  
26 inconvenient for me to travel to a physical Target store. . . . Due to my disability, it is difficult for  
27 me to carry products I purchase back with me."); Morais Dec. ¶ 13 ("Since my husband and I are  
28 both blind, it is very inconvenient for me to travel to a physical Target store."). However, stating

1 that class members would prefer to shop online is not sufficient to establish a nexus with the stores  
2 for the purposes of the ADA.

3 The declarants also suggest that if Target.com were accessible, they would use the website in  
4 connection with store visits, particularly to preview the stores' products. Indeed, the recitation of  
5 this future desire appears almost as boilerplate in each of the declarations. See, e.g., Bailey Dec. ¶  
6 13 (espousing desire to use Target.com to preview products if the website were more accessible);  
7 Bruns Dec. ¶ 12 (same); Crowley Dec. ¶ 12 (same); Sanders Dec. ¶ 13 (same). However, none of  
8 the declarants has stated that the website has impeded their access to the stores. The court is  
9 concerned with whether any of these declarants satisfy the class definition. The court notes, without  
10 ruling on these issues, that this deficiency may affect standing, typicality, and adequacy of  
11 representation. If plaintiffs intend to proceed as a class action under the ADA, they must submit  
12 class member declarations that are more compelling with respect to the use of the website to access  
13 the Target stores.


14  
15 CONCLUSION

16 Based upon the foregoing, IT IS HEREBY ORDERED that the class definition for claims  
17 under the ADA is as follows:

18 All legally blind individuals in the United States who have attempted to access Target.com  
19 and as a result have been denied access to the enjoyment of goods and services offered in  
20 Target stores.

21 The court defers ruling on the class certification motion until plaintiffs submit class member  
22 declarations that meet the requirements set forth above. Plaintiffs shall file any such declarations  
23 within thirty (30) days of the filing of this order. Thereafter the court will set a further briefing  
24 schedule if necessary.

25  
26 Date: April 25, 2007

27   
28 MARILYN HALL PATEL  
United States District Judge



Northern District of California

ENDNOTES

1. Unless otherwise noted, background facts are taken from plaintiffs' First Amended Complaint ("FAC" or "Complaint").

UNITED STATES DISTRICT COURT  
For the Northern District of California

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