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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
 ADMINISTRATIVE MOTION
 REQUESTING A BRIEFING
 SCHEDULE AND FURTHER
 DEPOSITIONS**

Judge: Hon. Marilyn Hall Patel

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INTRODUCTION

Pursuant to Civil Local Rule 7-11, Target respectfully requests an order that: (1) gives Target 45 days to depose the putative class members whose declarations were filed on May 25, 2007, in response to the Order of April 25; (2) sets a briefing schedule in which Target’s supplemental brief on class certification is due fourteen days after the period for depositions is complete, and Plaintiffs’ responsive supplemental brief is due fourteen days after Target’s brief is filed; and (3) provides that the foregoing depositions do not count against the previously ordered limit of twenty depositions per side.

STATEMENT OF FACTS

In October 2006, the parties proposed, and the Court ordered, a briefing and hearing schedule on the issue of class certification. At that juncture, the Court also ordered limits on discovery. With regard to depositions, the Court accepted the parties’ joint proposal to limit the number of depositions to twenty per side, not including the depositions that had already been taken in the case. By that time, Target had already deposed the eight putative class members whose declarations had been filed in support of Plaintiffs’ motion for a preliminary injunction.

The parties conducted discovery on the issue of class certification, and on February 1, 2007, Plaintiffs filed their class certification motion. To support their motion, Plaintiffs relied on the declarations of the eight putative class members that Target had deposed, along with declarations from additional putative class members. Based on the content of Plaintiffs’ motion and the evidence submitted therewith, Target deposed several additional declarants and submitted an opposition brief.

On April 25, 2007, after a hearing, this Court issued an order regarding Plaintiffs’ motion. In that order, the Court modified the proposed class definition for claims brought under the Americans with Disabilities Act (“ADA”), 42 U.S.C., section 12101 *et seq.* (Memorandum and Order Re: Class Certification at 8 (Document No. 119), hereinafter “Order”). In addition, the Court expressed “concern[] . . . whether any of these declara[tions] [submitted by Plaintiffs in support of their motion for class certification] satisfy the class

1 definition.” (*Id.*) The Court gave Plaintiffs thirty days to submit class member declarations
2 that satisfied the class definition. (*Id.*) The order stated that “[t]hereafter the court will set a
3 further briefing schedule if necessary.” (*Id.*) In response, Plaintiffs filed on May 25, 2007,
4 34 new declarations, some from putative class members that previously submitted
5 declarations in this action and some from putative class members that were submitting
6 declarations in this action for the first time.

7 ARGUMENT

8 I. TARGET SHOULD BE GIVEN AN OPPORTUNITY TO RESPOND 9 TO PLAINTIFFS’ NEW EVIDENCE

10 The Supreme Court has held that class certification should be preceded by “rigorous
11 analysis.” *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). In its
12 opposition brief, Target identified the problems that plagued Plaintiffs’ class certification
13 motion. Target’s analysis of the deposition testimony, as well as declarations, of putative
14 class members was essential to this task. In its recent order, the Court made clear that it
15 shared Target’s concerns regarding the adequacy of the proposed definition of a nationwide
16 class and the declarations of its members. The Court modified Plaintiffs’ class definition and
17 gave Plaintiffs an additional opportunity to submit evidence of an ADA violation consistent
18 with the Court’s rulings.

19 In response, Plaintiffs have submitted 34 new declarations in a second attempt to
20 show that the requirements of Rule 23 are satisfied. Since Target filed its opposition brief in
21 early March, both the class that Plaintiffs seek to certify and the evidence on which they seek
22 to rely have completely changed. Plaintiffs’ supplemental evidentiary filing in support of its
23 motion for class certification is voluminous, consisting largely of testimony from new
24 declarants. Target should be afforded an opportunity to be heard on the propriety of class
25 certification in light of the newly defined class and new evidentiary record. Indeed, the
26 Court’s April 25 order contemplates further briefing following Plaintiffs’ submission of new
27 declarations. (Order at 8.) Target respectfully requests that, consistent with that order, the
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1 Court set a briefing schedule to allow Target to file a supplemental brief on the issue of class
2 certification.

3 **II. PRIOR TO FILING A SUPPLEMENTAL BRIEF, TARGET SHOULD**
4 **BE PERMITTED TO DEPOSE PUTATIVE CLASS MEMBERS**

5 In addition, Target should be given the opportunity, before filing its supplemental
6 brief on class certification, to depose those putative class members whose declarations were
7 filed on May 25. The Court previously provided for discovery on the issue of class
8 certification. The parties conducted such discovery, which was critical to the arguments
9 made regarding the propriety of class certification. In their briefing on the issue, both sides
10 relied on deposition testimony. This is no surprise. Courts have long recognized that a
11 defendant is entitled depose the putative class members whose declarations are submitted in
12 support of a class certification motion. *See Fitz, Inc. v. Ralph Wilson Plastics Co.*, 174
13 F.R.D. 587, 591 (D.N.J. 1997) (providing defendants with the opportunity to depose
14 declarants that had not been previously identified and thereafter file a supplemental brief on
15 the issue of class certification in order to avoid prejudice); *see also Sepulveda v. Wal-Mart*
16 *Stores, Inc.*, 237 F.R.D. 229, 234 (C.D. Cal. 2006) (noting that the Court offered the
17 defendant an opportunity to depose declarants who had not been previously disclosed, before
18 the defendant chose instead to proceed with class certification proceedings as already
19 scheduled). Depositions often reveal critical facts that form the basis for class certification
20 rulings. *See, e.g., Mick v. Ravenswood Aluminum Corp.*, 178 F.R.D. 90, 92-94 (S.D. W. Va.
21 1998) (ruling that class certification was improper because, as evidenced by deposition
22 testimony of putative class members, commonality and typicality were lacking).

23 At this stage, the opportunity to depose putative class members is particularly crucial.
24 Plaintiffs seek to rely on declarations from putative class members whom Target has never
25 before had the opportunity to depose. In addition, Plaintiffs seek to rely on declarations from
26 putative class members whose testimony has changed in response to the Court's expressed
27 concerns about the validity of their claims. Particularly under these unique circumstances,
28 the chance to question these putative class members about their new statements and test their

1 credibility is essential to a fair defense. As this Court is well aware, there are occasions
2 when deposition testimony calls into question evidence that is submitted in the form of
3 declarations. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 663 (N.D.
4 Ga. 2001) (ruling that where declarations of putative class members submitted in support of a
5 motion for class certification were contradicted by deposition testimony, the deposition
6 testimony would control); *Sundstrom v. McDonnell Douglas Corp.*, 816 F. Supp. 587, 594
7 (N.D. Cal. 1993) (Patel, J.) (striking declarations where a witness’s lack of personal
8 knowledge, which was revealed by his deposition testimony, “render[ed] his declarations
9 misleading”).

10 Finally, because this additional round of evidentiary submissions was unforeseen, any
11 depositions of putative class members who submitted declarations on May 25 should not
12 count against the twenty-deposition limit to which Target agreed last October.

13 **CONCLUSION**

14 For the foregoing reasons, the Court should issue an order that: (1) gives Target 45
15 days to depose the putative class members whose declarations were filed on May 25, 2007, in
16 response to the Order of April 25; (2) sets a briefing schedule in which Target’s supplemental
17 brief on class certification is due fourteen days after the period for depositions is complete,
18 and Plaintiffs’ responsive supplemental brief is due fourteen days after Target’s brief is filed;
19 and (3) provides that the foregoing depositions do not count against the previously ordered
20 limit of twenty depositions per side.

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22 Dated: May 29, 2007

HAROLD J. McELHINNY
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25
26 By: /s/ Matthew I. Kreeger

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ECF CERTIFICATION

Pursuant to General Order No. 45, § X.B., the filing attorney attests that she has obtained concurrence regarding the filing of this document from the signatory to this document.

/s/ Kristina Paszek
Kristina Paszek