

1 ROBERT A. NAEVE (CA SBN 106095)
 RNaeve@mofo.com
 2 MORRISON & FOERSTER LLP
 1990 MacArthur Boulevard
 3 Irvine, California 92612-2445
 Telephone: (949) 251-7500
 4 Facsimile: (949) 251-0900

5 DAVID F. MCDOWELL (CA SBN 125806)
 MICHAEL J. BOSTROM (CA SBN 211778)
 6 DMcDowell@mofo.com
 MBostrom@mofo.com
 7 MORRISON & FOERSTER LLP
 555 West Fifth Street, Suite 3500
 8 Los Angeles, California 90013-1024
 Telephone: (213) 892-5200
 9 Facsimile: (213) 892-5454

10 Attorneys for Defendant
 TARGET CORPORATION

11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

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 16 NATIONAL FEDERATION OF THE BLIND,
 the NATIONAL FEDERATION OF THE BLIND
 17 OF CALIFORNIA, on behalf of their members,
 and Bruce F. Sexton, on behalf of himself and all
 18 others similarly situated,

19 Plaintiffs,

20 v.

21 TARGET CORPORATION and DOES ONE-
 TEN,

22 Defendant.

Case No. C06-01802 MHP

**TARGET CORPORATION'S
 UNOPPOSED MOTION FOR
 ADMINISTRATIVE RELIEF FROM
 GENERAL ORDER 56 AND LEAVE
 UNDER THE COURT'S STANDING
 ORDER FOR THE LIMITED
 PURPOSE OF FILING A RULE
 12(b)(6) MOTION TO DISMISS;
 DECLARATION OF MICHAEL J.
 BOSTROM IN SUPPORT THEREOF**

[Local Rule 7-11]

1 **INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiffs National Federation of the Blind, the National Federation of the Blind of
3 California and Bruce Sexton (“NFB”) claim in this action that federal and state laws that prohibit
4 disability discrimination in *places* of public accommodations somehow apply to Internet
5 websites, even though such websites are “located in no particular geographical location but
6 available to anyone, anywhere in the world, with access to the Internet.” *E.g., Reno v. ACLU*, 521
7 U.S. 844, 851 (1997). In particular, NFB alleges in this action that Defendant Target
8 Corporation’s (“Target”) website at www.target.com violates Title III of the Americans with
9 Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (“ADA”), California’s Unruh Civil Rights Act,
10 California Civil Code section 51 *et seq.* (“Unruh Act”), and California’s Blind and Other
11 Physically Disabled Persons Act, California Civil Code section 54 *et seq.* (“Disabled Persons
12 Act”), because it is “difficult if not impossible” for blind customers to use (Compl. ¶1).

13 As we briefly explain in the paragraphs that follow, claims advanced by NFB in this
14 action are contrary to settled authority in this and other federal circuits.¹ *See e.g., Chabner v.*
15 *United of Omaha Life Ins. Co.*, 225 F.3d 1042 (9th Cir. 2000) (Title III of the ADA only applies
16 to actual physical places); *Psinet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (Commerce
17 Clause of the United States Constitution precludes state regulation of the Internet). Under these
18 circumstances, Target respectfully requests as follows:

- 19 1. *Motion to Dismiss.* The interest of the parties and judicial economy are best
20 served granting relief from General Order 56, and leave under the Court’s
21 Standing Orders for the limited purpose of allowing Target to file, and the parties
22 to thereafter brief, a dispositive motion to dismiss pursuant to Federal Rule of Civil
23 Procedure Rule 12(b)(6). Target proposes to file its dispositive motion to dismiss
24 within 10 court days after entry of the order granting such relief.

25
26 ¹ For this reason, on March 15, 2006, Target filed a Motion to Dismiss NFB’s Complaint
27 in its entirety. Since that time, this Case has been reassigned from Magistrate Judge Zimmerman
28 to this Court, and NFB has filed an amended complaint adding a claim of relief under the ADA.

1 2. *General Order 56 to Otherwise Remain in Effect.* General Order 56 places a stay
2 on judicial proceedings so that the parties can survey the alleged public
3 accommodation, and identify alleged access violations in detail. The general
4 purposes underlying General Order 56 can best be accommodated by allowing it to
5 remain in force so that the Court can decide the merits of Target's motion before
6 the parties are required to engage in time-consuming and potentially costly
7 discovery.

8 NFB has indicated that while they will oppose Target's Motion to Dismiss, they will not
9 oppose this motion for leave to file a motion to dismiss.

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 On February 7, 2006, Plaintiffs filed the action captioned above in the Superior Court of
12 California, County of Alameda. Their original complaint generally alleged that Target's website,
13 located at www.target.com, cannot be accessed by blind individuals in violation of the Unruh Act
14 and the Disabled Persons Act.

15 On March 8, 2006, Target removed this action from the Superior Court of California,
16 County of Alameda to this Court. Thereafter, on March 15, 2006, Target filed and served its
17 motion to dismiss all claims in Plaintiffs' complaint.

18 On March 24, 2006, this action was reassigned from Magistrate Judge Zimmerman to this
19 Court.

20 On March 30, 2006, Plaintiffs filed their Amended Complaint in this action. As is
21 relevant here, the Amended Complaint continues to allege that Target's website is inaccessible to
22 blind persons in violation of the Unruh Act and the Disabled Persons Act. Plaintiffs, however,
23 added a new claim for relief under Title III of the ADA, in which they allege that because
24 Target's website is inaccessible to blind persons, it also violates the ADA.

25 Now that Plaintiffs have asserted a claim for relief under the ADA, General Order 56
26 applies to this case. Paragraph 2 of General Order 56 stays all discovery and proceedings in this
27 case, except a joint inspection and initial disclosures required by Federal Rule of Civil Procedure
28 26(a), unless this Court orders otherwise. (General Order 56, ¶ 2.)

1 This Court's Standing Order No. 4 provides that "[m]otions to dismiss shall not be filed
2 before the Initial Case Management Conference except by leave of court." Pursuant to General
3 Order 56, an Initial Case Management Conference will not be set until after the parties have held
4 a joint "premises inspection," a settlement meeting following the premises inspection, and a
5 mediation session. (General Order 56, ¶¶ 3, 4, and 6.)

6 Target believes that NFB's claims fail as a matter of law. As such, on April 6, 2006,
7 Target's counsel asked NFB's counsel to stipulate that Target should be granted leave to file its
8 motion to dismiss. (Declaration of Michael J. Bostrom In Support of Target's Motion for Leave
9 ("Bostrom Decl."), ¶ 1.) This motion will raise the important threshold issues of whether (a) the
10 ADA and California's access laws apply to websites; and (b) under the Commerce Clause of the
11 United States Constitution, states may regulate Internet websites in interstate commerce.
12 Apparently recognizing the importance of resolution of these issues, NFB's counsel responded
13 that NFB would not oppose Target's motion for leave to file its motion to dismiss. (*Id.* at ¶ 4.)

14 ARGUMENT

15 **I. THE INTERESTS OF THE PARTIES AND JUDICIAL ECONOMY ARE BEST 16 SERVED GRANTING TARGET LEAVE TO FILE A MOTION TO DISMISS**

17 The Amended Complaint presents important threshold legal issues decisions on which
18 will govern whether and how this matter can or should be litigated or otherwise resolved. While
19 Target does not intend to argue its Motion to Dismiss in this brief, to assist the Court in its
20 decision here, Target offers the following abbreviated explanation of why it believes its Motion to
21 Dismiss will be dispositive in this case.

22 Target's Motion to Dismiss will demonstrate that neither the ADA nor California's access
23 laws apply to websites:

- 24 • The prohibitions of Title III are restricted to physical "*places of public*
25 accommodation," which include only "facilities," such as "buildings, structures,
26 sites, complexes, equipment, rolling stock or other conveyances, roads, walks,
27 passageways, parking lots, or other real or personal property" 28 C.F.R. §
28 36.104. Internet websites are *not* actual physical places or facilities, and fall

1 outside Title III's regulatory purview. *See e.g., Chabner v. United of Omaha Life*
2 *Ins. Co.*, 225 F.3d 1042 (9th Cir. 2000) (Title III of the ADA only applies to actual
3 physical places).

- 4 • The Unruh Act does not apply to websites either. It only applies to establishments,
5 facilities, buildings, improvements, and other structures. Cal. Civil Code § 51.
6 Moreover, the Unruh Act does not require Target to make any "alteration, repair,
7 or modification" to its website in order to improve access by the visually impaired.
8 Cal. Civ. Code § 51 (d).
- 9 • The Disabled Persons Act also does not apply to websites. It only applies to
10 physical places such as hospitals, airplanes, schools, hotels, and amusement parks.
11 Cal. Civ. Code § 54.1(a)(1). Furthermore, because the Disabled Persons Act only
12 applies to physical places, a DPA claim must be premised on a California building
13 code violation. *See, e.g., Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal. App.
14 3d 881, 892 (1976). Plaintiffs have not alleged Target's website is in violation of
15 any California building code.

16 Target's Motion to Dismiss will also demonstrate that even if the Unruh Act and the
17 Disabled Persons Act could somehow be interpreted as requiring Target to modify its website,
18 applying those statutes to Target's website would amount to a *per se* violation of the Commerce
19 Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3.

- 20 • First, by requiring Target to modify its website, California would be impermissibly
21 regulating conduct occurring entirely outside its borders because Target's website
22 is accessible to consumers all around the country, not just consumers in California.
23 *Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989).
- 24 • Second, regulation of the Internet is exclusively reserved for Congress because
25 otherwise Target, and all other Internet users, could be subjected to inconsistent
26 and contradictory state law standards. *Southern Pac. Co. v. Arizona ex rel.*
27 *Sullivan*, 325 U.S. 761 (1945).

1 If Target is not granted leave to file its Motion to Dismiss, then the parties will have to
2 wait until after they have followed the procedures set forth in General Order 56 to present its
3 motion to resolve the important threshold legal issues discussed above. In the mean time, the
4 parties will be obligated to engage in time consuming and costly pretrial disclosures, inspections,
5 conferences, and dispute resolution procedures. Target believes that these expensive pre-trial
6 litigation procedures can be avoided because its Motion to Dismiss will be dispositive of all of
7 Plaintiffs' claims for relief in this action.

8 **II. GENERAL ORDER 56 SHOULD OTHERWISE REMAIN IN EFFECT**

9 General Order 56 places a stay on judicial proceedings so that the parties can survey the
10 alleged public accommodation, and identify alleged access violations in detail. Target requests
11 relief from General Order 56 for the limited purpose of having its Motion to Dismiss heard. The
12 general purposes underlying General Order 56 can best be accommodated by allowing it to
13 remain in force so that the Court can decide the merits of Target's motion before the parties are
14 required to engage in time-consuming and potentially costly discovery.

15 **III. CONCLUSION**

16 For all the foregoing reasons, Target respectfully requests that the Court grant Target
17 administrative relief from General Order 56, and relief under the Court's Standing Order, for the
18 limited purpose of filing a Motion to Dismiss. Target also requests that it have until 10 court days
19 after entry of an order on this Motion to file its Motion to Dismiss.

20 Dated: April 11, 2006

ROBERT A. NAEVE
DAVID F. MCDOWELL
MICHAEL J. BOSTROM
MORRISON & FOERSTER LLP

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24 By: /s/ Robert A. Naeve
Robert A. Naeve

25 Attorneys for Defendant
26 TARGET CORPORATION
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DECLARATION OF MICHAEL J. BOSTROM

I, Michael J. Bostrom, declare as follows:

I am an attorney licensed to practice law in the state of California, and admitted to the United States District Court for the Northern District of California. I am an associate in the law firm of Morrison & Foerster LLP, counsel for Defendant Target Corporation in this action. I have personal knowledge of the facts set forth herein. If called as a witness, I would and could competently testify as follows:

1. On April 6, 2006, I telephoned Mazen Basrawi, counsel for NFB in this action and requested that NFB stipulate that Target should be granted leave under this Court's Standing Order, and relief under General Order 56, for the limited purpose of filing a Motion to Dismiss. Mr. Basrawi requested that I forward him a proposed stipulation.

2. On April 10, 2006, I forwarded Mr. Basrawi a proposed stipulation. Attached hereto as Exhibit A is a true and correct copy of that proposed stipulation.

3. On April 10, 2006, Mr. Basrawi sent me an e-mail stating: "We cannot agree to your draft stipulation as we disagree with your characterization of the issues presented in the case. However we will not oppose your motion." A true and correct copy of Mr. Basrawi's e-mail is attached hereto as Exhibit B.

4. On April 11, 2006, I telephoned Mr. Basrawi in attempt to further negotiate a proposed stipulation. Mr. Basrawi declined my invitation to negotiate the proposed stipulation, and stated that Target should simply provide in its Motion for Administrative Relief that NFB will not be opposing the motion.

I declare under penalty of perjury under the laws of California and the United States of America that the foregoing is true and correct, and that this declaration was executed on April 11, 2006 in Los Angeles, California.

/S/ Michael J. Bostrom

Michael J. Bostrom

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GENERAL ORDER 45 ATTESTATION

I, Robert A. Naeve, am the ECF User whose ID and password are being used to file the Declaration of Michael J. Bostrom. In compliance with General Order 45, X.B., I hereby attest that Michael J. Bostrom has concurred in this filing.

/s/ Robert A. Naeve
Robert A. Naeve