

1 HAROLD J. McELHINNY (CA SBN 66781)
 2 MATTHEW I. KREEGER (CA SBN 153793)
 3 KRISTINA PASZEK (CA SBN 226351)
 HMcElhinny@mofo.com
 MKreeger@mofo.com
 KPaszek@mofo.com
 4 MORRISON & FOERSTER LLP
 425 Market Street
 5 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 6 Facsimile: (415) 268-7522

7 Attorneys for Defendant
 TARGET CORPORATION

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
 NOTICE OF MOTION AND
 MOTION TO STRIKE THE
 SECOND AMENDED COMPLAINT
 AND DISMISS PLAINTIFFS'
 CLAIMS UNDER THE
 AMERICANS WITH DISABILITIES
 ACT; SUPPORTING
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: January 7, 2008
 Time: 2:00 PM
 Judge: Hon. Marilyn Hall Patel

1 **NOTICE OF MOTION AND MOTION TO STRIKE**
2 **THE SECOND AMENDED COMPLAINT**

3 TO PLAINTIFFS NATIONAL FEDERATION OF THE BLIND, NATIONAL
4 FEDERATION OF THE BLIND OF CALIFORNIA, BRUCE F. SEXTON, AND THEIR
5 ATTORNEYS:

6 On January 7, 2008, at 2:00 p.m., or as soon thereafter as the matter may be heard, in
7 the courtroom of the Honorable Marilyn Hall Patel at 450 Golden Gate Avenue, San
8 Francisco, California, Defendant Target Corporation (“Target”) will and hereby does move,
9 pursuant to Rule 12 of the Federal Rules of Civil Procedure, to strike the second amended
10 complaint and dismiss plaintiffs’ claims under the Americans with Disabilities Act (“ADA”).
11 This motion is based on this Notice of Motion and Motion, the supporting Memorandum of
12 Points and Authorities, and such other evidence and argument as may be presented before the
13 Court takes this motion under submission.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **ISSUE TO BE DECIDED**

16 Whether plaintiffs’ Second Amended Complaint, filed on November 1, 2007, should
17 be stricken because leave to file it was never granted, and whether plaintiffs’ ADA claims
18 should be dismissed under *Lierboe v. State Farm Mutual Automobile Insurance Co.*, 350
19 F.3d 1018 (9th Cir. 2003).

20 **INTRODUCTION**

21 Plaintiffs have filed a second amended complaint without having first obtained
22 consent or leave of court. Such a pleading is without legal effect and should be stricken. In
23 addition, because plaintiff Sexton never had a viable ADA claim and no other plaintiff was a
24 proper class representative or had standing to bring an ADA claim, the ADA claims alleged
25 in plaintiffs’ amended complaint should be dismissed at this juncture.

26 **BACKGROUND**

27 Plaintiffs first filed a complaint in this action on February 7, 2006 [Docket No. 1].
28 On March 30, 2006, they filed an amended complaint [Docket No. 13]. Target moved to

1 dismiss the amended complaint on April 27, 2006 [Docket No. 16]. On September 20, 2006,
2 after the Court issued an order granting in part and denying in part Target's motion to
3 dismiss, Target filed an answer [Docket No. 66].

4 Eventually, plaintiffs moved for class certification [Docket Nos. 86 & 136], and
5 Target moved for summary judgment on the claims of the only individual named plaintiff,
6 Bruce Sexton [Docket No. 90]. On October 2, 2007, the Court granted plaintiffs' motion for
7 class certification, and granted Target's summary judgment motion with respect to Sexton's
8 ADA claim [Docket No. 149]. The order gave plaintiffs thirty days to substitute a new class
9 representative for purposes of the ADA claims. Plaintiffs were not given leave to file an
10 amended complaint.

11 On November 1, 2007, plaintiffs filed a second amended complaint [Docket No. 151].
12 The second amended complaint names two new plaintiffs and adds factual allegations
13 regarding these plaintiffs. It also incorporates new class definitions and class
14 commencement and termination dates. Plaintiffs never sought leave of court to file the
15 second amended complaint, nor did Target consent to its filing.

16 ARGUMENT

17 I. BECAUSE LEAVE TO AMEND WAS NEVER GRANTED, THE 18 SECOND AMENDED COMPLAINT SHOULD BE STRICKEN.

19 At this stage in the proceedings, plaintiffs may amend their complaint only by first
20 obtaining either leave of court or written consent by Target. Federal Rule of Civil Procedure
21 15(a) provides:

22 A party may amend the party's pleading once as a matter of
23 course at any time before a responsive pleading is served or, if
24 the pleading is one to which no responsive pleading is
25 permitted and the action has not been placed upon the trial
26 calendar, the party may so amend it at any time within 20 days
after it is served. Otherwise a party may amend the party's
pleading only by leave of court or by written consent of the
adverse party....

27 Here, plaintiffs filed the original complaint on February 7, 2006 [Docket No. 1], and an
28 amended complaint on March 30, 2006 [Docket No. 13]. Target moved to dismiss the

1 amended complaint on April 27, 2006 [Docket No. 16]. On September 20, 2006, after the
2 Court issued an order granting in part and denying in part Target's motion to dismiss, Target
3 filed an answer [Docket No. 66]. Over a year later, on November 1, 2007, plaintiffs filed a
4 second amended complaint [Docket No. 151]. Plaintiffs never obtained leave of court to file
5 a second amended complaint, nor did Target ever consent to its filing. Plaintiffs did not
6 submit the second amended complaint with an accompanying motion seeking leave. They
7 simply filed it.

8 By filing the second amended complaint without having obtained consent or leave of
9 court, plaintiffs plainly violated Rule 15. A pleading filed in this manner is *without legal*
10 *effect*. Charles Alan Wright, Arthur R Miller, & Mary Kay Kane, 6 Federal Practice &
11 Procedure: Civil 2d § 1484 (West 2007) ("In general if an amendment that cannot be made
12 as of right is served without obtaining the court's leave or the opposing party's consent, it is
13 without legal effect and any new matter it contains will not be considered unless the
14 amendment is resubmitted for court approval."). Plaintiffs' second amended complaint
15 should be stricken under Rule 12(f). *See Serpa v. SBC Telecommunications, Inc.*, 318
16 F. Supp. 2d 865 (N.D. Cal. 2004) (Patel, J.) (granting the defendants' motion to strike an
17 amended complaint where the plaintiff did not seek leave of court until after the defendants
18 moved to strike).

19 **II. DISMISSAL, RATHER THAN SUBSTITUTION, IS REQUIRED FOR**
20 **PLAINTIFFS' ADA CLAIM.**

21 Although the parties briefed the general issue of class certification and oral argument
22 was also heard on this subject, Target has not had the opportunity to be heard on the specific
23 question that has arisen in this case: namely, what the correct course of action is when the
24 plaintiff proffered as a class representative is found not to have or have had a claim. The
25 Ninth Circuit's ruling in *Lierboe v. State Farm Mutual Automobile Insurance Co.*, 350 F.3d
26 1018 (9th Cir. 2003), makes clear that if the plaintiff that is to serve as class representative
27 does not have a claim, dismissal, rather than substitution, must follow.

1 In *Lierboe*, the defendant moved to dismiss based on an issues of state law, and the
2 plaintiff moved for class certification. The district court certified the state law issues raised
3 by the motion to dismiss to the Supreme Court of Montana. Before the Supreme Court
4 Montana issued its ruling, the district court granted the class certification motion. The
5 Supreme Court of Montana later ruled that Lierboe did not have a claim. *Id.* at 1021-22. On
6 appeal, the Ninth Circuit ruled that because Lierboe had no claim, she could not serve as the
7 class representative. The certification order was accordingly vacated. The court further
8 explained that if Lierboe had initially had a viable claim that later became moot, then the
9 “law in an appropriate case would permit substituting proper class representatives to allow
10 the suit to proceed.” *Id.* at 1023 n.6. However, “because this [wa]s not a mootness case, in
11 which substitution or intervention might have been possible,” the Ninth Circuit remanded the
12 case to the district court “with instructions to dismiss.” *Id.* at 1023.

13 Pursuant to *Lierboe*, this Court should dismiss plaintiffs’ claims under the ADA.
14 Like Lierboe, plaintiff Sexton has and had no claim under the ADA. For this reason, the
15 Court granted summary judgment against him. The remaining plaintiffs, the NFB and NFB
16 of California, were never found to be proper class representatives under Rule 23. Moreover,
17 such organizations lack standing to sue on behalf of their members when, as here, it is
18 necessary for individual members to participate in the lawsuit.¹ *See Hunt v. Washington*
19 *State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977). Given the Court’s ruling that a
20 plaintiff must be denied access to the enjoyment of goods and services offered in Target
21 stores in order to have a claim under the ADA, individual participation by class members is,
22 and has already been, required. (Memorandum & Order filed Apr. 25, 2007 [Docket No.

23 _____
24 ¹ In opposition to plaintiffs’ class certification motion, Target argued that the
25 proposed damages subclass should not be certified because the organizational plaintiffs lack
26 standing to pursue damages on behalf of their members. Although the class certification
27 order states that “[t]he parties do not dispute that the organizational plaintiffs have standing
28 to pursue the equitable relief sought by them independently and for the class,” (Memorandum
& Order filed Oct. 2, 2007 [Docket No. 149] at 8), Target has never conceded that point. As
explained herein, the participation of individual members would be required not just for the
damages claims, but for plaintiffs’ ADA claims as well.

1 119] (requesting additional evidence regarding individuals for purposes of ADA claim.)
2 Under the circumstances, none of the plaintiffs had standing to bring an ADA claim. *See*
3 *Molski v. Mandarin Touch Restaurant*, 359 F. Supp. 2d 924, 935 (C.D. Cal. 2005)
4 (individuals' participation is required, precluding organizational standing for purposes of an
5 ADA claim, when individuals must present evidence to establish their own standing).

6 **CONCLUSION**

7 For the foregoing reasons, the Second Amended Complaint should be stricken, and
8 plaintiffs' claims under the Americans with Disabilities Act should be dismissed.

9
10 Dated: November 19, 2007

HAROLD J. McELHINNY
MATTHEW I. KREEGER
KRISTINA PASZEK
MORRISON & FOERSTER LLP

11
12
13
14 By: /s/Matthew I. Kreeger
Matthew I. Kreeger
15 Attorneys for Defendant
16 TARGET CORPORATION
17
18
19
20
21
22
23
24
25
26
27
28