

1 LAURENCE W. PARADIS (California Bar No. 122336)  
 lparadis@dralegal.org  
 2 MAZEN M. BASRAWI (California Bar No. 235475)  
 mbasrawi@dralegal.org  
 3 DISABILITY RIGHTS ADVOCATES  
 2001 Center Street, Third Floor  
 4 Berkeley, California 94704  
 Telephone: (510) 665-8644  
 5 Facsimile: (510) 665-8511  
 TTY: (510) 665-8716

6 TODD M. SCHNEIDER (California Bar No. 158253)  
 tschneider@schneiderwallace.com  
 7 JOSHUA KONECKY (California Bar No. 182897)  
 jkonecky@schneiderwallace.com  
 8 SCHNEIDER & WALLACE  
 180 Montgomery Street, Suite 2000  
 San Francisco, CA 94104  
 10 Telephone: (415) 421-7100  
 Fax: (415) 421-7105  
 11 TTY: (415) 421-1655

12 DANIEL F. GOLDSTEIN (*pro hac vice*)  
 dfg@browngold.com  
 13 BROWN, GOLDSTEIN & LEVY, LLP  
 120 E. Baltimore St., Suite 1700  
 14 Baltimore, MD 21202  
 Telephone: (410) 962-1030  
 15 Fax: (410) 385-0869

16 **UNITED STATES DISTRICT COURT**  
 17 **NORTHERN DISTRICT OF CALIFORNIA**  
 18 **SAN FRANCISCO DIVISION**

19 NATIONAL FEDERATION OF THE  
 20 BLIND, the NATIONAL FEDERATION OF  
 21 THE BLIND OF CALIFORNIA, on behalf of  
 22 their members, and Bruce F. Sexton, on behalf  
 of himself and all others similarly situated,

23 Plaintiffs,

24 v.

25 TARGET CORPORATION,

26 Defendant.

Case No.: C 06-01802 MHP

**CLASS ACTION**

**PLAINTIFFS' NOTICE OF MOTION  
 AND MOTION FOR PRELIMINARY  
 INJUNCTION; MEMORANDUM OF  
 POINTS AND AUTHORITIES**

Hearing Date: June 12, 2006  
 Time: 2:00 p.m.  
 Judge: The Honorable Marilyn Hall  
 Patel

DISABILITY RIGHTS ADVOCATES  
 2001 CENTER STREET, THIRD FLOOR  
 BERKELEY, CALIFORNIA 94704-1204  
 510.665.8644

27  
 28

**TABLE OF CONTENTS**

1

2 I. INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

3 II. FACTS ..... 2

4 A. The Parties ..... 2

5 B. Making Websites Accessible To Blind Individuals Is Not Difficult. .... 4

6 C. Target Refuses To Make Its Website Accessible. .... 5

7 D. NFB Attempted To Convince Target To Make Its Website Accessible..... 6

8 III. LEGAL STANDARD..... 7

9 IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS ..... 7

10 A. Plaintiffs’ Unruh Act Claim Will Succeed Because Target Corporation Is A

11 Covered Entity That Unlawfully Discriminates Against The Blind. .... 7

12 1. Target Corporation Is A Business Establishment Within The

13 Contemplation Of The Unruh Act. .... 7

14 2. Target.com Is A Service, Privilege, Facility, Advantage Or

15 Accommodation Of Target Corporation. .... 8

16 3. Target.com Is Inaccessible And Thus Denies The Blind Full And Equal

17 Access To Target’s Facilities, Privileges And Services. .... 9

18 4. If Intentional Discrimination Is An Element Of An Unruh Act Claim,

19 Target’s Knowing Refusal To Remove Barriers Demonstrates Intent. .... 9

20 B. Plaintiffs’ Disabled Persons Act Claim Will Succeed Because Target.com Is An

21 Accommodation, Advantage, Facility Or Privilege Of Target Stores. .... 10

22 1. Target.com Is An Accommodation, Advantage, Facility Or Privilege Of

23 Target Stores. .... 11

24 2. Failing To Provide Blind Customers Full And Equal Access To

25 Target.com Violates The DPA..... 12

26 C. Plaintiffs’ ADA Claim Will Succeed Because Target.com Is A Service, Facility,

27 Privilege, Advantage Or Accommodation Of Target Stores. .... 12

28 1. Title III Applies to Target.com Because It Is A Service, Facility, Privilege,

Advantage Or Accommodation Of Target Corporation’s Stores. .... 13

2. Target Discriminates Against The Blind In Creating, Maintaining And

Operating Target.com In An Inaccessible Manner. .... 15

D. Target Has Violated All Three Statutes. .... 15

V. THE FAILURE TO MAKE TARGET.COM ACCESSIBLE TO THE BLIND CAUSES

IRREPARABLE HARM ..... 17

DISABILITY RIGHTS ADVOCATES  
 2001 CENTER STREET, THIRD FLOOR  
 BERKELEY, CALIFORNIA 94704-1204  
 510.665.8644

**TABLE OF CONTENTS**  
**(continued)**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VI.	THE BALANCE OF HARDSHIPS TIPS HEAVILY IN PLAINTIFFS’ FAVOR .....	18
VII.	THE INJUNCTION PLAINTIFFS SEEK IS REASONABLE.....	18
VIII.	AN INJUNCTION IS IN THE PUBLIC INTEREST .....	19
IX.	THE COURT SHOULD WAIVE THE BOND REQUIREMENT OR ORDER A NOMINAL BOND .....	20
X.	CONCLUSION.....	21

DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY, CALIFORNIA 94704-1204  
510.665.8644

**TABLE OF AUTHORITIES**

**CASES**

1

2

3 *American Motorcyclist Ass'n v. Watt,*

4       714 F.2d 962 (9th Cir. 1983) ..... 19

5 *Anderson v. United States,*

6       612 F.2d 1112 (9th Cir. 1979) ..... 7

7 *Burks v. Poppy Const. Co.,*

8       57 Cal. 2d 463 (1962) ..... 8

9 *Burlington Northern R. Co. v. Department of Revenue of State of Wash.,*

10       934 F.2d 1064 (9th Cir. 1991) ..... 17

11 *Chabner v. United of Omaha Life Ins. Co.,*

12       225 F.3d 1042 (9th Cir. 2000) ..... 8

13 *Connecticut General Life Ins. Co. v. New Images of Beverly Hills,*

14       321 F.3d 878 (9th Cir. 2003) ..... 20

15 *Cupolo v. Bay Area Rapid Transit,*

16       5 F. Supp. 2d 1078 (N.D. Cal. 1997) ..... 17, 20

17 *Doctor's Associates Inc. v. Stuart,*

18       85 F.3d 975 (2nd Cir. 1996)..... 20

19 *Gorbach v. Reno,*

20       219 F.3d 1087 (9th Cir.2000) ..... 20

21 *Gresham v. Windrush Partners, Ltd.,*

22       730 F.2d 1417 (11th Cir.1984) ..... 17

23 *Hankins v. El Torito Restaurants, Inc.,*

24       63 Cal. App. 4th 510 (1998) ..... 10, 11

25 *Harris v. Capital Growth Investors XIV,*

26       52 Cal. 3d 1142 (1991) ..... 10

27 *Isbister v. Boys' Club of Santa Cruz,*

28       40 Cal. 3d 72 (1985) ..... 9

*Keirnan v. Utah Transit Authority,*

      339 F.3d 1217 (10th Cir. 2003) ..... 17

*Lentini v. California Center for the Arts,*

      370 F.3d 837 (9th Cir. 2004) ..... 9, 10

*O'Connor v. Village Green Owners Ass'n,*

      33 Cal. 3d 790 (1983) ..... 8

*Pathways Psychosocial v. Town of Leonardtown, Md.,*

      223 F. Supp. 2d 699 (D. Md. 2002) ..... 17

DISABILITY RIGHTS ADVOCATES  
 2001 CENTER STREET, THIRD FLOOR  
 BERKELEY, CALIFORNIA 94704-1204  
 510.665.8644

**TABLE OF AUTHORITIES**  
(continued)

1

2

3 *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency,*  
766 F.2d 1319 (9th Cir. 1985) ..... 20

4 *Presta v. Peninsula Corridor Joint Powers Bd.*  
16 F. Supp. 2d 1134 (N.D. Cal. 1998) ..... 9, 10, 19

5 *Regents of the University of California v. Dakocytomation California, Inc.,*  
6 Slip Copy, 2006 WL 618769, 3 (N.D. Cal., March 10, 2006)..... 7

7 *Rendon v. Valleycrest Productions, Ltd.,*  
294 F.3d 1279 (11th Cir. 2004) ..... 12, 14, 15

8 *Scherr v. Volpe,*  
9 466 F.2d 1027 (7th Cir. 1972) ..... 20

10 *Silver Sage Partners, Ltd. v. City of Desert Hot Springs,*  
251 F.3d 814 (9th Cir. 2001) ..... 17

11 *Smallwood v. National Can Co.,*  
12 583 F.2d 419 (9th Cir. 1978) ..... 17

13 *Sullivan By and Through Sullivan v. Vallejo City Unified School Dist.,*  
731 F. Supp. 947 (E.D. Cal. 1990)..... 17

14 *United States by Mitchell v. Hayes Int'l Corp.,*  
15 415 F.2d 1038 (5th Cir. 1969) ..... 17

16 *Warfield v. Peninsula Golf & Country Club,*  
10 Cal. 4th 594 (1995) ..... 8

**STATUTES**

19 42 U.S.C. § 12101(b)(1). ..... 19

20 42 U.S.C. § 12181 ..... 2

21 42 U.S.C. § 12182(a) ..... 12

22 42 U.S.C. § 12182(b) ..... 12

23 42 U.S.C. § 12182(b)(2)(A)(ii) ..... 13

24 42 U.S.C. § 12182(b)(2)(A)(iii) ..... 13

25 42 U.S.C. § 12182(b)(2)(A)(iv) ..... 13

26 42 U.S.C. § 12182(7)(e) ..... 13

27 42 U.S.C. § 12188(a) ..... 17

28 Cal. Civ. Code § 51 ..... 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

Cal. Civ. Code § 51(b) .....	1, 7, 8
Cal. Civ. Code § 52.1(b) .....	17
Cal. Civ. Code § 54.1(a)(1).....	2, 11
Cal. Civ. Code § 55.....	17

**OTHER AUTHORITIES**

11A Charles Allen Wright, Arthur A. Miller, & Mary Kay Kane, <i>Federal Practice and Procedure</i> § 2948.4 (2nd ed. 1995) .....	19
---	----

DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY, CALIFORNIA 94704-1204  
510.665.8644

**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 12, 2006 at 2:00 p.m., or as soon thereafter as the matter may be heard by the above-entitled court located at 450 Golden Gate Avenue, San Francisco, California 94102, Courtroom 15, Plaintiffs National Federation of the Blind (“NFB”), NFB of California and Bruce Sexton will and hereby do move the Court for a preliminary injunction requiring Target Corporation (“Target”) to make its website, target.com, readily accessible to and useable by blind persons who use screen-reading software. This motion is brought on the grounds that Target, by failing and refusing to make target.com accessible, is in violation of California’s Unruh Civil Rights Act (California Civil Code §§ 51, *et seq.*), California’s Disabled Person’s Act (California Civil Code §§ 54, *et seq.*) and Title III of the Americans With Disabilities Act (42 U.S.C. §§ 12181, *et seq.*) and on the basis that these violations have and are causing irreparable injuries to the blind. This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities and declarations filed herewith, and on such further written and oral argument as may be presented at or before the time the Court takes this motion under submission.

DATED: May 8, 2006

DISABILITY RIGHTS ADVOCATES  
LAURENCE W. PARADIS  
MAZEN M. BASRAWI

SCHNEIDER & WALLACE  
TODD M. SCHNEIDER  
JOSHUA KONECKY

BROWN, GOLDSTEIN & LEVY, LLP  
DANIEL F. GOLDSTEIN (*pro hac vice*)

By: /s/ Laurence W. Paradis  
Laurence W. Paradis  
Attorneys for Plaintiffs

DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY, CALIFORNIA 94704-1204  
510.665.8644

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiffs move for a preliminary injunction to prevent Target Corporation (“Target”) from continuing to deny blind individuals full and equal access to one of its major services – “target.com.” Target.com is a website that links the public to a wide array of household goods, clothing, pharmaceutical services, pricing discounts, product information and employment opportunities that are available in Target’s retail stores. Despite Target’s substantial revenues (fifty-two billion dollars in 2005), Target does not incorporate basic, readily available technology commonly used by businesses to make their websites accessible to blind individuals. As evidenced by Target’s recently filed Motion to Dismiss (which misstates both plaintiffs’ allegations and the substantive legal requirements), Target refuses to acknowledge its obligation to make its website accessible to people with disabilities. Plaintiffs seek preliminary injunctive relief to prevent Target from continuing to deny blind persons full and equal access to one of its major services – “target.com.”

As shown below, plaintiffs meet both tests for issuance of a preliminary injunction. With respect to the need to demonstrate “likelihood of success” on the merits, plaintiffs do so on each of their statutory claims, although a strong case on only one would suffice. Plaintiffs succeed on their claim under the California Unruh Civil Rights Act<sup>1</sup> because (1) Target is a “business establishment” subject to the Act; (2) target.com is one of Target’s “accommodations, advantages, facilities, privileges or services;” and (3) Target does not make target.com available to the blind on a “full and equal” basis to non-disabled persons.<sup>2</sup> Plaintiffs have a substantial likelihood of success under both the California Disabled Persons Act and Title III of the ADA because (1) Target’s retail stores are places of public accommodation; (2) target.com is one of the “accommodations, advantages, facilities, privileges or services” of the retail stores; and (3) blind individuals do not have “full and equal access, as other members of the general public” to

<sup>1</sup> Cal. Civ. Code §§ 51, *et seq.*

<sup>2</sup> See Cal. Civ. Code § 51(b); Section IV.A., *infra.*

DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY, CALIFORNIA 94704-1204  
510.665.8644



1 this accommodation, advantage, facility, privilege, and/or service.<sup>3</sup> The merits of the motion for  
2 preliminary injunction do not turn on whether target.com is itself a “place of public  
3 accommodation.” That issue, while alleged as an alternative theory of liability in the Amended  
4 Complaint, need not be addressed or resolved at this time for plaintiffs to have a substantial  
5 likelihood of success on any of their other claims.

6 As to the remaining considerations for issuance of a preliminary injunction, the  
7 California statutes at issue and the ADA all specifically authorize injunctive relief. It is well-  
8 established that harm caused by ongoing discrimination is irreparable.<sup>4</sup> Moreover, the balance of  
9 hardships and public interest tip sharply in plaintiffs’ favor: (1) meaningful access to the World  
10 Wide Web is an indispensable component of independent living for the blind in today’s  
11 technology-dependent world; (2) the laws at issue permit the use of injunctions to eradicate  
12 ongoing discrimination; (3) Target has extensive resources to make target.com accessible; (4)  
13 established guidelines and readily available protocols exist to make websites accessible; (5) the  
14 Court can craft an order allowing Target to use such guidelines and protocols to make target.com  
15 readily accessible and usable by blind people within a reasonably defined period of time (*e.g.*, 90  
16 days); and (6) the injunction can provide Target an opportunity to resolve particularly identified  
17 difficulties that arise (if any) by conferring with plaintiffs.

18 For all these reasons, plaintiffs request that the Court grant their motion for a preliminary  
19 injunction as set forth herein.

20 **II. FACTS**

21 **A. The Parties**

22 Bruce Sexton, a blind student at the University of California Berkeley, employs screen  
23 access software to use the internet for a variety of daily activities, including banking, research,  
24 online shopping, e-mail and instant messaging.<sup>5</sup> Target.com’s many barriers, however, prevent  
25

26  
27 <sup>3</sup> See Cal. Civ. Code § 54.1(a)(1); Section IV.B., *infra*; see 42 U.S.C. §§ 12181 *et seq.*; Section  
IV.C., *infra*.

28 <sup>4</sup> See Section V, *infra*.

<sup>5</sup> Declaration of Bruce F. Sexton, Jr. (“Sexton Decl.”) at ¶¶2, 4, 14-17.

1 him from navigating that site.<sup>6</sup> Its inaccessibility, in turn, diminishes Mr. Sexton’s use of Target  
 2 stores.<sup>7</sup> The inaccessible features on target.com include product information on in store items,  
 3 including brand, model, features and price; information concerning weekly specials at individual  
 4 stores; coupons for store redemption; and other store-related services which Mr. Sexton would  
 5 choose to use if they were accessible.<sup>8</sup> Moreover, while sighted persons can browse, purchase  
 6 and receive special discounts to Target’s merchandise from the comfort of their home computer,  
 7 Mr. Sexton must travel to a Target store.<sup>9</sup> These inequalities unfairly burden Mr. Sexton.<sup>10</sup>

8 The National Federation of the Blind (“NFB”) is the oldest and largest national advocacy  
 9 organization of blind persons. The vast majority of its approximately 50,000 members are blind.  
 10 The NFB is widely recognized by the public, Congress, executive agencies of government and  
 11 the courts as a collective and representative voice on behalf of blind Americans and their  
 12 families. Its purpose is to promote the general welfare of the blind by (1) assisting the blind in  
 13 their efforts to integrate themselves into society on equal terms and (2) removing barriers and  
 14 changing social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold  
 15 concerning the limitations created by blindness and that result in the denial of opportunity to  
 16 blind persons in virtually every sphere of life.<sup>11</sup> The NFB has brought this suit on behalf of its  
 17 members and a proposed class of all blind persons throughout the United States who have and  
 18 are being denied access due to the barriers on target.com.<sup>12</sup>

19 Access to the World Wide Web and the wealth of services and information it offers has  
 20 become a significant concern to the NFB. Increasingly, the Web has become an essential means  
 21 to deliver information, conduct business and interact socially. If the blind are to live and work  
 22 independently in today’s technology-dependent world, meaningful access to the Web is  
 23 indispensable. To make the Web fully accessible, the NFB and many of its members have been

24 \_\_\_\_\_  
 25 <sup>6</sup> *Id.* at ¶¶29-35.

26 <sup>7</sup> *Id.*

27 <sup>8</sup> *Id.*

28 <sup>9</sup> *Id.* at ¶¶22-25, 28.

<sup>10</sup> *Id.* at ¶¶28, 33-37.

<sup>11</sup> Declaration of Marc Maurer (“Maurer Decl.”), President of the NFB, at ¶5.

<sup>12</sup> Amended Complaint at ¶¶8, 12.

1 actively developing and promoting adaptive technology for the blind, including screen readers,  
2 and basic improvements in web design.<sup>13</sup>

3 Target Corporation (“Target”) is a leading national retailer that offers household goods  
4 and clothing, an in-store pharmacy and other services. Target’s gross revenues exceeded forty-  
5 six billion dollars in 2004 and leapt to fifty-two billion dollars in 2005.<sup>14</sup> More than 200 of its  
6 1400 stores are in California.<sup>15</sup> Through target.com, Target maintains an online business that  
7 provides a multitude of services, including online shopping of items also available in Target  
8 stores; web-exclusive merchandise; special offers, coupons and programs; a store locator  
9 allowing persons who wish to shop at Target to learn its locations, hours and phone numbers;  
10 online orders of prescriptions for pickup at certain Target stores; online placement of deli party  
11 orders for pickup at certain Target stores; online photo shops wherein photos can be ordered for  
12 pickup at a Target store; and wedding and baby registries linked to Target’s in-store  
13 merchandise. The website also includes extensive information about Target’s employment  
14 opportunities, investor relations and company policies.<sup>16</sup> All these features are provided on  
15 target.com to be useful to sighted customers; they would be equally valuable to blind  
16 customers.<sup>17</sup>

17 **B. Making Websites Accessible To Blind Individuals Is Not Difficult.**

18 To use websites, the blind rely on screen access software that reads the code behind the  
19 computer screen and text-to-speech software that vocalizes that information. (To best illustrate

20  
21 <sup>13</sup> Declaration of Anne Taylor (“Taylor Decl.”), Co-Director of the NFB International Braille and  
Technology Center for the Blind, at ¶¶6; Maurer Decl. at ¶6.

22 <sup>14</sup> Press Release, Target Corporation, “Target Corporation Fourth Quarter Earnings Per Share  
From Continuing Operations \$1.06” (February 16, 2006) (on file with author and at  
23 <http://investors.target.com>).

24 <sup>15</sup> Target Corporation, “Company Overview”,  
<http://investors.target.com/phoenix.zhtml?c=65828&p=irol-homeProfile> (last visited May 4,  
25 2006).

26 <sup>16</sup> See Target website, <http://www.target.com> (last visited May, 4, 2006).

27 <sup>17</sup> See Sexton Decl. at ¶32; Declaration of Bob Ayala (“Ayala Decl.”) at ¶¶16-19; Declaration of  
Tim Elder (“Elder Decl.”) at ¶¶10, 14-15; Declaration of Tina Thomas (“Thomas Decl.”) at  
28 ¶¶13, 17; Declaration of Ken Volonte (“Volonte Decl.”) at ¶¶16-17; Declaration of Terri  
Uttermohlen (“Uttermohlen Decl.”) at ¶¶15, 21; Declaration of Steve Jacobson (“Jacobson  
Decl.”) at ¶¶14, 20; Declaration of Robert Stigile (“Stigile Decl.”) at ¶¶14, 18.

1 how screen access software functions, the elements of web accessibility and the inaccessibility of  
 2 target.com, plaintiffs are prepared to present their web access expert, Dr. James W. Thatcher,  
 3 during the hearing on this Motion for Preliminary Injunction to testify and present an in-court  
 4 demonstration on web-accessibility and/or provide a videotape of such a presentation, at the  
 5 Court's discretion.)<sup>18</sup> The use of screen access software by the blind is widespread.<sup>19</sup> However,  
 6 websites must be designed to allow adaptive software to work. Accordingly, long-accepted,  
 7 comprehensive guidelines outline the design requirements for accessible websites. The most  
 8 prominent set of guidelines are those of the Web Accessibility Initiative (WAI), a project of the  
 9 World Wide Web Consortium (W3C), the Web's leading standards organization.<sup>20</sup>

10 The basic components of accessibility are (1) using invisible labels for graphics (called  
 11 "alt tags" by web designers) that can be read by screen access software; (2) ensuring that all  
 12 functions can be performed with a keyboard and not just a mouse; (3) ensuring that forms are  
 13 labeled in ways the screen access software can recognize; and (4) adding invisible headings to  
 14 links so that blind people can easily navigate the site.<sup>21</sup> This technology has existed for years,  
 15 does not affect the operation or appearance of the website for sighted people, and has been  
 16 adopted not only by various federal, state and local governments to make their websites  
 17 accessible, but also by many business and organizations both nationally and internationally.<sup>22</sup>

18 **C. Target Refuses To Make Its Website Accessible.**

19 Defendant Target Corporation is a multi-billion dollar retail business with over 1400  
 20 retail stores and locations, selling its product line and offering a variety of special discounts and  
 21

22  
 23 <sup>18</sup> Dr. Thatcher is a prominent expert in the field of web accessibility. *See* Expert Declaration of  
 24 James W. Thatcher ("Thatcher Decl.") at ¶¶2-14. Dr. Thatcher has worked in the field of  
 25 assistive technology for more than twenty years and served as Vice Chairman of the Advisory  
 26 Committee that proposed Web Accessibility Standards for the U.S. Access Board. *Id.* Plaintiffs  
 will await further guidance from the Court as to whether to have Dr. Thatcher prepare a live  
 and/or video demonstration for the purposes of this hearing.

<sup>19</sup> Taylor Decl. at ¶¶8, 10.

<sup>20</sup> *See* Web Accessibility Initiative, [www.w3.org/WAI](http://www.w3.org/WAI) (last visited May 4, 2006).

<sup>21</sup> Thatcher Decl. at ¶¶13 (alt text requirement), 41-42 (keyboard access), 47-51 (website  
 navigation) and 52-59 (labeling forms); *see* [www.w3.org/WAI](http://www.w3.org/WAI) (last visited May 4, 2006).

<sup>22</sup> Taylor Decl. at ¶6.

1 services through its online site, target.com.<sup>23</sup> In spite of its considerable resources, and the  
 2 availability of technology and widely accepted procedures for achieving web accessibility,  
 3 Target has failed to make its website accessible to the blind.<sup>24</sup> Target's refusal prevents the blind  
 4 from having access to the wide array of basic goods and services on target.com that Target  
 5 makes available to sighted people.

6 Target.com lacks the most basic requirements for accessibility. What the blind encounter  
 7 at target.com is inexplicable code, garbled text, and unidentifiable product images.<sup>25</sup> As  
 8 explained by Dr. Thatcher in his expert declaration:

9 There are many thousands of images on Target.com that lack text equivalents to  
 10 make them available to people using screen readers...None of the form controls  
 11 on Target.com have proper labeling and there is no accommodation to facilitate  
 12 keyboard navigation throughout Target.com pages. I have described four types of  
 13 barriers that are easiest to explain and that are especially important for screen  
 14 readers. There are other components of Web Accessibility for people with visual  
 15 disabilities. As of April 12, 2006 the website of the Target Corporation is  
 16 virtually unusable by a visitor who is blind.<sup>26</sup>

17 **D. NFB Attempted To Convince Target To Make Its Website Accessible.**

18 Before filing this case, NFB notified Target of the website's many unlawful accessibility  
 19 barriers.<sup>27</sup> Although the NFB entered into a structured negotiation and tolling agreement with  
 20 Target Corporation and agreed to extend it twice, negotiations proved fruitless and the agreement  
 21 was allowed to expire.<sup>28</sup> The website remains inaccessible.<sup>29</sup> Accordingly, plaintiffs filed their  
 22 complaint on February 6, 2006, in Alameda County Superior Court of California alleging  
 23 violations of the Unruh Civil Rights Act and the California Disabled Persons Act. When Target

24 <sup>23</sup> Press Release, Target Corporation, "Target Corporation Fourth Quarter Earnings Per Share  
 25 From Continuing Operations \$1.06" (February 16, 2006) (on the web at  
 26 <http://investors.target.com>); see also Target Corporation, "Company Overview",  
 27 <http://investors.target.com/phoenix.zhtml?c=65828&p=irol-homeProfile> (last visited May 4,  
 28 2006); see also Target website, [www.target.com](http://www.target.com) (last visited May 4, 2006).

<sup>24</sup> Thatcher Decl. at ¶60.

<sup>25</sup> See Sexton Decl. at ¶¶29-33; Ayala Decl. at ¶¶13-18; Elder Decl. at ¶¶11-13; Thomas Decl. at  
 ¶¶14-16; Volonte Decl. at ¶¶13-15; Uttermohlen Decl. at ¶¶16-20; Jacobson Decl. at ¶¶15-19;  
 Stigile Decl. at ¶¶15-17.

<sup>26</sup> Thatcher Decl. at ¶60.

<sup>27</sup> Maurer Decl. at ¶7.

<sup>28</sup> *Id.*

<sup>29</sup> Thatcher Decl. at ¶60.

1 filed a notice of removal, the case was assigned to the San Francisco Division of the Northern  
2 District of California on March 24, 2006. On March 30, 2006, plaintiffs filed an Amended  
3 Complaint with an additional claim alleging violation of Title III of the ADA.

4 **III. LEGAL STANDARD**

5 This Court has often articulated the legal standard for the issuance of a preliminary  
6 injunction:

7 a plaintiff seeking preliminary injunctive relief must demonstrate either: “(1) a  
8 likelihood of success on the merits and the possibility of irreparable injury; or (2)  
9 that serious questions going to the merits [have been] raised and the balance of  
10 hardships tips sharply in [the plaintiff's] favor.” The components of these two  
11 tests, together with the added consideration of the public interest, operate on a  
12 sliding scale or “continuum.”<sup>30</sup>

13 Whether the sought-after injunction is deemed "mandatory" or "prohibitive," relief will issue  
14 "where the injury complained of is [not] capable of compensation in damages."<sup>31</sup> As  
15 demonstrated below, plaintiffs fully satisfy these standards for preliminary relief.

16 **IV. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

17 **A. Plaintiffs’ Unruh Act Claim Will Succeed Because Target Corporation Is A**  
18 **Covered Entity That Unlawfully Discriminates Against The Blind.**

19 As a business that operates in California, Target Corporation is required to abide by  
20 California civil rights laws. The Unruh Act states in pertinent part:

21 All persons within the jurisdiction of this state are free and equal, and no matter  
22 what their ... disability ... are entitled to the full and equal accommodations,  
23 advantages, facilities, privileges, or services in all business establishments of  
24 every kind whatsoever.<sup>32</sup>

25 To succeed on this claim, plaintiffs need only show that (1) Target Corporation is a business  
26 establishment; (2) target.com is one of the “accommodations, advantages, facilities, privileges, or  
27 services” of Target Corporation; and (3) the blind lack “full and equal” access to target.com.

28 **1. Target Corporation Is A Business Establishment Within The**  
**Contemplation Of The Unruh Act.**

The California Supreme Court has repeatedly held that the Unruh Act should be liberally

<sup>30</sup> *Regents of the University of California v. Dakocytomation California, Inc.*, Slip Copy, 2006  
WL 618769, at \*3 (N.D. Cal., March 10, 2006) (internal citations omitted).

<sup>31</sup> *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (citations omitted).

<sup>32</sup> Cal. Civ. Code §51(b).

1 construed to apply to the full gamut of business entities.<sup>33</sup> For example, in *O'Connor v. Village*  
 2 *Green Owners Association*, the Supreme Court reasoned:

3 The Legislature used the words “all” and “of every kind whatsoever” in referring  
 4 to business establishments covered by the Unruh Act (Cal. Civ. Code § 51), and  
 5 the inclusion of these words without any exception and without specification of  
 6 particular kinds of enterprises, leaves no doubt that the term “business  
 7 establishments” was used in the broadest sense reasonably possible... The word  
 “establishment,” as broadly defined, includes not only a fixed location, such as  
 the “place where one is permanently fixed for residence or business,” but also a  
 permanent “commercial force or organization” or “a permanent settled position as  
 in life or business.”<sup>34</sup>

8 In affirming an order of this Court, the Ninth Circuit reached the same conclusion.<sup>35</sup>

9 Target Corporation is a business establishment in the most traditional sense. Target not  
 10 only has 205 stores in California,<sup>36</sup> but owns target.com, an online site where it sells merchandise  
 11 to California residents and provides information to California investors and prospective  
 12 employees.<sup>37</sup> As a for-profit, publicly traded corporation conducting an immense amount of  
 13 retail business in California every day of every year, Target Corporation is clearly a permanent  
 14 commercial force and organization within California.

## 15 2. Target.com Is A Service, Privilege, Facility, Advantage Or 16 Accommodation Of Target Corporation.

17 The Unruh Act’s guarantee of full and equal access extends to a business establishment’s  
 18 “accommodations, advantages, facilities, privileges, and services.”<sup>38</sup> Target.com falls squarely  
 19 within a number of those categories. Target.com is a “service” of Target Corporation in that it is,  
 20 by its nature, a service, and is certainly not a service of any other business establishment.  
 21 Moreover, just as a store is a “facility” of a retail company, so, too, target.com is a venue or

22 <sup>33</sup> See *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463, 468-469 (1962); *Warfield v. Peninsula Golf &*  
 23 *Country Club*, 10 Cal. 4th 594, 621 (1995); *O'Connor v. Village Green Owners Ass’n*, 33 Cal. 3d  
 790, 795 (1983).

24 <sup>34</sup> *O'Connor*, 33 Cal. 3d at 795 (quoting *Burks*, 57 Cal. 2d at 468).

25 <sup>35</sup> See *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1050 (9th Cir. 2000) (holding  
 that an insurance company is a business establishment within the meaning of the Unruh Act).

26 <sup>36</sup> Target Corporation, “Company Overview”,  
 27 <http://investors.target.com/phoenix.zhtml?c=65828&p=irol-homeProfile> (last visited May 4,  
 2006).

28 <sup>37</sup> Thatcher Decl. at ¶20.

<sup>38</sup> Cal. Civ. Code 51(b).

1 means that provides an opportunity to buy goods offered for sale by Target. Finally, target.com  
 2 is an advantage, privilege, service and/or accommodation offered by Target because it contains  
 3 employment information, investment information, product information and information  
 4 concerning in-store specials and price discounts and other in-store-related features.

5 **3. Target.com Is Inaccessible And Thus Denies The Blind Full And**  
 6 **Equal Access To Target's Facilities, Privileges And Services.**

7 Target does not provide the blind full and equal access to target.com. Target.com  
 8 contains thousands of accessibility barriers, including active images that do not have text  
 9 equivalents and form fields which do not have proper labels.<sup>39</sup> These barriers deny the blind  
 10 access to target.com just as surely as staircases, narrow doorways and blocked aisles would deny  
 11 wheelchair users access to physical stores. Such barriers violate both the plain text and sweeping  
 12 intent of the Unruh Act's "full and equal" access mandate.

13 **4. If Intentional Discrimination Is An Element Of An Unruh Act Claim,**  
 14 **Target's Knowing Refusal To Remove Barriers Demonstrates Intent.**

15 In *Presta v. Peninsula Corridor Joint Powers Bd.*, Judge Henderson of this District held  
 16 that a plaintiff "need not demonstrate that defendants harbored discriminatory intent as an  
 17 element of her claim of disability discrimination under the Unruh Civil Rights Act."<sup>40</sup> The Ninth  
 18 Circuit has also rejected the suggestion that intentional discrimination is an element of all Unruh  
 19 Act claims.<sup>41</sup> As Judge Henderson reasoned in *Presta*,

20 [O]ften the most damaging instances in which rights of persons with disabilities are  
 21 denied come not as the result of malice or discriminatory intent, but rather from  
 22 benevolent inaction when action is required. Such discrimination may only be fought by  
 23 a statute that prescribes liability without reference to an actor's intent.<sup>42</sup>

24 <sup>39</sup> Thatcher Decl. at ¶¶24-60.

25 <sup>40</sup> *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998).

26 <sup>41</sup> *Lentini v. California Center for the Arts*, 370 F.3d 837, 847 (9th Cir. 2004) ("We find that...  
 27 no showing of intentional discrimination is required where the Unruh Act violation is premised  
 28 on an ADA violation").

<sup>42</sup> *Presta*, 16 F. Supp. 2d at 1136. Judge Henderson also reasoned that the Unruh Act's  
 incorporation of the ADA as a floor for liability belies any construction of the statute which  
 would require an intent to discriminate, given that the ADA does not require such intent. *Id.* at  
 1135-1136. This is further confirmed by the fact that the "California courts have clearly and  
 repeatedly held that the Unruh Act is to be interpreted 'in the broadest sense reasonably  
 possible,' so as to achieve its purpose of combating discrimination in all its forms." *Id.* (citing  
*Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 76 (1985)).



1 It may be that the Act requires intentional conduct in most cases that do not involve disability  
2 discrimination.<sup>43</sup> Nonetheless, as explained in *Presta* and *Lentini*, not all Unruh Act claims  
3 require proof of intentional conduct.<sup>44</sup>

4 Even if the Unruh Act requires showing that Target acted intentionally, plaintiffs easily  
5 meet their burden. Intentional discrimination under California law simply means that the  
6 defendant has unlawfully engaged in wrongful and discriminatory conduct with “knowledge of  
7 the effect [its conduct] was having on [] disabled persons.”<sup>45</sup> Plaintiffs notified Target on May 5,  
8 2005, that its website was inaccessible to the blind and that the site’s access barriers  
9 discriminated against and excluded the blind from the benefits of that service.<sup>46</sup> Plaintiffs  
10 unsuccessfully attempted to convince Target through structured negotiations to make its website  
11 accessible.<sup>47</sup> The site remains largely inaccessible.<sup>48</sup> As stated in plaintiffs’ Amended  
12 Complaint, “Target has constructed a website that is inaccessible to class members; maintains the  
13 website in this inaccessible form; and has failed to take action to correct these barriers even after  
14 being notified of the discrimination that such barriers cause.”<sup>49</sup> This certainly suffices to prove  
15 intent under California law – if such a showing were necessary.

16 In sum, plaintiffs are clearly likely to prevail on the merits of their Unruh Act claim.

17 **B. Plaintiffs’ Disabled Persons Act Claim Will Succeed Because Target.com Is**  
18 **An Accommodation, Advantage, Facility Or Privilege Of Target Stores.**

19 The Disabled Persons Act (“DPA”) states that,

20 Individuals with disabilities shall be entitled to full and equal access, as other  
members of the general public, to accommodations, advantages, facilities . . . and

21 <sup>43</sup> *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1175 (1991) (upholding dismissal of  
22 sex discrimination claim pled under disparate impact theory and holding that plaintiffs would  
have needed to plead intent to state Unruh Act claim).

23 <sup>44</sup> *See Presta*, 16 F. Supp. 2d at 1135-1136; *Lentini*, 370 F.3d at 847.

24 <sup>45</sup> *Cf. Hankins v. El Torito Restaurants, Inc.*, 63 Cal. App. 4th 510, 518 (1998) (finding of  
25 intentional discrimination where plaintiff alleged that the defendant had “‘wrongfully and  
unlawfully denied accessible restroom facilities to physically handicapped persons,’ that it acted  
26 with ‘knowledge of the effect [its conduct] was having on physically disabled persons,’ and that  
[the plaintiff] was ‘discriminated against on the sole basis that he was physically disabled and on  
crutches.’”).

27 <sup>46</sup> Maurer Decl. at ¶7.

28 <sup>47</sup> *Id.*

<sup>48</sup> Thatcher Decl. at ¶ 60.

<sup>49</sup> First Amended Complaint, filed March 30, 2006, at ¶41.

1 privileges of . . . places of public accommodation . . . or other places to which the  
2 general public is invited.<sup>50</sup>

3 Plaintiffs are also highly likely to prevail on this claim since Target's retail stores in  
4 California are denying blind persons an accommodation, advantage, facility or privilege of those  
5 stores – to wit, target.com. The language of Section 54.1(a) *et seq.* reflects, "...a legislative  
6 intent to afford broad protection,"<sup>51</sup> forbidding covered entities from maintaining policies or  
7 practices "unrelated to any structural impediment, which results in a denial of full and equal  
8 access by a disabled individual to a public accommodation."<sup>52</sup> This statute clearly prohibits  
9 policies and practices that have the effect of denying equal access to customers with disabilities  
10 even in the absence of an intent to discriminate.<sup>53</sup>

11 **1. Target.com Is An Accommodation, Advantage, Facility Or Privilege  
12 Of Target Stores.**

13 Target stores are unquestionably places of public accommodation under the DPA, and  
14 target.com is related to and integrated with these physical stores. Customers are able to browse  
15 target.com for products for later purchase in Target stores,<sup>54</sup> select products at Target stores for  
16 use in conjunction with the online wedding and baby registries for purchase either online or at  
17 the stores,<sup>55</sup> place party orders for pickup at the store,<sup>56</sup> and find and print out coupons for use in  
18 Target stores.<sup>57</sup> All of these features of target.com are clearly advantages and benefits only to  
19 sighted users of Target's stores and Target's website. As Bruce Sexton has explained, "I often  
20 use the product listings and descriptions on retail stores' websites in order to research products,  
21 compare prices, and make decisions about purchasing goods in the stores physical locations," but

22 <sup>50</sup> Cal. Civ. Code §54.1(a)(1).

23 <sup>51</sup> *Hankins*, 63 Cal. App. 4th at 523.

24 <sup>52</sup> *Id.*

25 <sup>53</sup> *Id.* at 519.

26 <sup>54</sup> Thatcher Decl. at ¶20.

27 <sup>55</sup> Target Corporation, "Target Club Wedd", <http://www.target.com/gp/registry/wedding.html>  
28 (last visited May 4, 2006); Target Corporation, "Target Baby",  
<http://www.target.com/gp/registry/babyreg.html> (last visited May 4, 2006).

29 <sup>56</sup> Target Corporation, "Order Party Food",  
<http://sites.target.com/site/en/supertarget/page.jsp;jsessionid=ELXR4CMKRXWKBLARAAVP>  
[X5Y?title=supertarget\\_order\\_party](http://sites.target.com/site/en/supertarget/page.jsp;jsessionid=ELXR4CMKRXWKBLARAAVP) (last visited May 4, 2006).

30 <sup>57</sup> Target Corporation, "Target Weekly Ad", <http://weeklyad.target.com> (last visited May 4,  
31 2006).

1 “[u]pon accessing target.com on several occasions, I have become frustrated with inexplicable  
2 code and garbled text that has prevented me from continuing to navigate through the site.”<sup>58</sup>

3 **2. Failing To Provide Blind Customers Full And Equal Access To**  
4 **Target.com Violates The DPA.**

5 Target’s maintenance of an inaccessible website violates the DPA because it denies full  
6 and equal access to Target stores’ services. Maintaining target.com in its inaccessible state  
7 constitutes a policy and practice that has the direct effect of denying blind persons access to  
8 Target stores’ services. Moreover, Target can readily ensure full and equal access simply by  
9 adopting and implementing the clear and simple web accessibility guidelines that are already  
10 widely accepted and used by other businesses nationwide.<sup>59</sup> Target’s failure to provide full and  
11 equal access to the services offered by target.com clearly denies the blind equal access to the  
12 advantages of shopping at Target stores, and thereby violates the DPA.

13 **C. Plaintiffs’ ADA Claim Will Succeed Because Target.com Is A Service,**  
14 **Facility, Privilege, Advantage Or Accommodation Of Target Stores.**

15 Title III of the ADA forbids places of public accommodation from discriminating against  
16 people with disabilities in the provision of goods, services, facilities, privileges and advantages.<sup>60</sup>  
17 A public accommodation which denies blind customers full and equal access to whatever  
18 “goods,” “services,” “facilities,” “privileges,” and/or “advantages” that it provides to sighted  
19 customers is thus discriminating in violation of Title III.<sup>61</sup> The courts have held that Title III  
20 forbids intangible as well as tangible barriers to access by persons with disabilities.<sup>62</sup> Thus, to  
21 prevail on the merits of their ADA claim, plaintiffs need only establish that Target stores are  
22 places of public accommodation and that target.com is a service, facility, privilege or advantage  
23 of those stores to which Target denies plaintiffs access, in whole or in part. For the reasons  
24 discussed below, plaintiffs are highly likely to prevail on this basis.

25 <sup>58</sup> Sexton Decl. at ¶¶16, 31. For similar examples of the barriers which the blind routinely  
26 experience in trying to use target.com, *see* Ayala Decl., Elder Decl., Jacobson Decl., Sexton  
27 Decl., Stigile Decl., Thomas Decl., Uttermohlen Decl., Volonte Decl.

28 <sup>59</sup> Thatcher Decl. at ¶61.

<sup>60</sup> 42 U.S.C. §12182(a).

<sup>61</sup> 42 U.S.C. §12182(b).

<sup>62</sup> *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002).

1 Defendant also violates several additional provisions of Title III of the ADA. Target has  
 2 failed to remove communication barriers from target.com, even though such removal is readily  
 3 achievable.<sup>63</sup> Moreover, Target has failed to make reasonable modifications to its policy and  
 4 practice of maintaining an inaccessible website, even though such modifications are necessary  
 5 and even though Target cannot show that such modifications would fundamentally alter  
 6 target.com's nature by making it something other than a website.<sup>64</sup> Finally, Target has failed to  
 7 provide auxiliary aids or services where the absence of those aids or services excludes the blind,  
 8 even though this would not fundamentally alter the nature of the website nor result in an undue  
 9 burden.<sup>65</sup> Each of these violations alone is enough to subject Target to liability under the ADA.

10 **1. Title III Applies to Target.com Because It Is A Service, Facility,  
 11 Privilege, Advantage Or Accommodation Of Target Corporation's  
 Stores.**

12 Target stores are sales establishments. As such, each is unquestionably a place of  
 13 public accommodation within the meaning of Title III.<sup>66</sup> Target.com is a service provided  
 14 by Target that is related to and highly integrated with Target's brick-and-mortar stores.

15 Examples of these store-related features include:

- 16 • a store locator, allowing persons who wish to shop at a Target store to learn its location,  
 17 hours, and phone numbers;<sup>67</sup>
- 18 • an online pharmacy, allowing a customer to order a prescription refill online for pickup at  
 19 those Target stores which have pharmacies;<sup>68</sup>
- 20 • an online photo shop, allowing a customer to order photo prints for pickup at a Target  
 21 store;<sup>69</sup>
- 22 • weekly ads, allowing a customer to know what items are on sale at a particular Target  
 23

24 <sup>63</sup> See 42 U.S.C. § 12182(b)(2)(A)(iv).

25 <sup>64</sup> See 42 U.S.C. § 12182(b)(2)(A)(ii).

26 <sup>65</sup> See 42 U.S.C. § 12182(b)(2)(A)(iii).

27 <sup>66</sup> See 42 U.S.C. § 12182(7)(e).

28 <sup>67</sup> Target Corporation, "Store Locator", <http://target.com/storelocator> (last visited May 4, 2006).

<sup>68</sup> Target Corporation, "Target Pharmacy", [http://sites.target.com/site/en/spot/page.jsp?title=pharmacy\\_home](http://sites.target.com/site/en/spot/page.jsp?title=pharmacy_home) (last visited May 4, 2006).

<sup>69</sup> Target Corporation, "Target Photo Center", [http://target.com/target\\_group/stores\\_services/photo\\_center.jhtml](http://target.com/target_group/stores_services/photo_center.jhtml) (last visited May 4, 2006).

1 store location;<sup>70</sup>

- 2 • coupons for groceries, eyeglasses and portrait photos, among others, that customers may  
3 redeem at Target stores;<sup>71</sup>
- 4 • online wedding and baby registries linked to Target's in-store merchandise which allow  
5 customers of a Target store to purchase a gift for a target.com user;<sup>72</sup> and
- 6 • a party function, allowing customers to order deli products online for pickup at a local  
7 Target "superstore."<sup>73</sup>

8 In addition, sighted Target customers can browse target.com to obtain product information about  
9 a wide assortment of in-store items before going to the store to make a purchase, an advantage  
10 denied to blind customers because of the inaccessibility of the website. All of these services are  
11 clearly intended to enhance a consumer's use of Target stores, adding benefits of convenience,  
12 information and costs savings.

13 Courts have applied Title III to remove intangible barriers to a service that has a nexus  
14 with a physical place of public accommodation. In *Rendon v. Valleycrest Productions*,<sup>74</sup> the  
15 barrier to a televised game show consisted of an automated telephone contestant selection  
16 process, which the court determined was a screening device. The telephone contest,  
17 however, was not fully accessible. Because the telephone contest had a nexus to the public  
18 accommodation (a game show at a public studio), it was required to be accessible. The  
19 court explained that,

20 [A] reading of the plain and unambiguous statutory language at issue reveals  
21 that the definition of discrimination provided in Title III covers both tangible  
22 barriers, that is, physical and architectural barriers that would prevent a

22 <sup>70</sup> Target Corporation, "Target Weekly Ad", <http://weeklyad.target.com> (last visited May 4,  
23 2006).

24 <sup>71</sup> Target Corporation, "Supertarget",  
[http://sites.target.com/site/en/supertarget/page.jsp?title=supertarget\\_home](http://sites.target.com/site/en/supertarget/page.jsp?title=supertarget_home) (last visited May 4,  
25 2006).

26 <sup>72</sup> Target Corporation, "Target Club Wedd", <http://www.target.com/gp/registry/wedding.html>  
(last visited May 4, 2006); Target Corporation, "Target Baby",  
<http://www.target.com/gp/registry/babyreg.html> (last visited May 4, 2006).

27 <sup>73</sup> Target Corporation, "Order Party Food",  
<http://sites.target.com/site/en/supertarget/page.jsp;jsessionid=ELXR4CMKRXWKBLARAAVP>  
28 [X5Y?title=supertarget\\_order\\_party](http://sites.target.com/site/en/supertarget/page.jsp;jsessionid=ELXR4CMKRXWKBLARAAVP) (last visited May 4, 2006).

<sup>74</sup> *Rendon*, 294 F.3d at 1280.

1 disabled person from entering an accommodation's facilities and accessing its  
 2 goods, services and privileges, and intangible barriers, such as eligibility  
 3 requirements and screening rules or discriminatory policies and procedures  
 that restrict a disabled person's ability to enjoy the defendant entity's goods,  
 services and privileges.<sup>75</sup>

4 Moreover, a place of public accommodation cannot discriminate against persons with  
 5 disabilities simply because, as with a website, the discrimination occurs off-site.<sup>76</sup> Like the  
 6 inaccessible telephone system in *Rendon* that denied persons with disabilities an equal  
 7 opportunity to participate in the televised game show, the inaccessibility of target.com  
 8 denies blind persons an equal opportunity to receive and participate in many of the services  
 9 and advantages provided to sighted customers of Target stores through Target's website.

10 **2. Target Discriminates Against The Blind In Creating, Maintaining  
 11 And Operating Target.com In An Inaccessible Manner.**

12 The variety of barriers on target.com – such as the numerous graphics which do not have  
 13 text equivalents, the lack of html headings needed by blind persons using screen access software  
 14 to navigate through target.com, and the lack of proper labeling of form fields – make the website  
 15 virtually unusable by the blind.<sup>77</sup> As Dr. Thatcher explains in his declaration, removing these  
 16 communication barriers is not difficult.<sup>78</sup> To the extent that making the website accessible will  
 17 require Target to modify its practices and procedures, such modifications would be reasonable  
 18 and would not fundamentally alter the nature of target.com. Indeed, for sighted users, target.com  
 19 would look and operate precisely as it does now.<sup>79</sup> With respect to the provision of auxiliary aids  
 20 and services, removing the accessibility barriers would, again, not constitute a fundamental  
 21 alteration of the website, as it would only make the existing website accessible to the blind.  
 22 Moreover, the cost of making target.com accessible could not be an undue burden for a company  
 23 whose annual revenue exceeds fifty-two billion dollars.

24 **D. Target Has Violated All Three Statutes.**

25 The analysis for each of the three specific claims set forth above rests on a common core

26 <sup>75</sup> *Id.* at 1283 (internal citations omitted).

27 <sup>76</sup> *Id.* at 1284-1285.

28 <sup>77</sup> Thatcher Decl. at ¶60.

<sup>78</sup> *Id.* at ¶¶12-13, 25, 61.

<sup>79</sup> *Id.* at ¶13.

1 of established legal principles and documented facts:

- 2 • Plaintiffs are a protected class under the applicable statutes.<sup>80</sup>
- 3 • Target.com is a service, privilege and advantage offered to customers of Target
- 4 Corporation for the purchase of products and services sold by Target.
- 5 • Target.com also is a service, privilege and advantage of Target stores in that it offers
- 6 information and features that provide many benefits to individuals seeking to locate and
- 7 attain the various goods, products, medicines and opportunities available in the stores
- 8 themselves.
- 9 • Blind individuals do not have full and equal access to target.com or the multiple benefits
- 10 connected to target.com because of the access barriers on the site.<sup>81</sup>

11 While the precise analysis varies somewhat with each statute, all end with the same

12 outcome. In the context of the Unruh Act, (1) Target Corporation is a “business establishment”

13 that (2) has failed and refused to ensure that blind individuals have “full and equal” access to one

14 of its “accommodations, advantages, facilities, privileges or services” – to wit, target.com. As to

15 the Disabled Persons Act and the ADA: (1) Target stores are “public accommodations;” (2)

16 target.com is a service, accommodation, advantage, facility and/or privilege of those stores; (3)

17 target.com has a nexus to and enhances the use of those stores; but (4) target.com is nonetheless

18 inaccessible to the blind.<sup>82</sup>

19 Given the established legal standards and facts, plaintiffs are likely to succeed on the

20 merits of all of their claims. A preliminary injunction is thus warranted to prevent Target from

21 continuing to deny blind persons full and equal access to target.com.

22

23

24

---

25 <sup>80</sup> Maurer Decl. at ¶¶5-6; Sexton Decl. at ¶¶2, 6.

26 <sup>81</sup> Thatcher Decl. at ¶60-61.

27 <sup>82</sup> Plaintiffs also allege in their Amended Complaint that target.com is itself a public

28 accommodation within the reach of both the ADA and the Disabled Persons Act. Whether a website may be a place of public accommodation would be a matter of first impression as to the ADA in the Ninth Circuit and as to the Disabled Persons Act. However, the court need not resolve that question to grant a preliminary injunction in this case. Accordingly, Plaintiffs have not addressed that theory as a basis for preliminary relief.

DISABILITY RIGHTS ADVOCATES  
 2001 CENTER STREET, THIRD FLOOR  
 BERKELEY, CALIFORNIA 94704-1204  
 510.665.8644

1 **V. THE FAILURE TO MAKE TARGET.COM ACCESSIBLE TO THE BLIND**  
 2 **CAUSES IRREPARABLE HARM**

3 Irreparable harm is presumed where a defendant engages in acts or practices prohibited  
 4 by a statute that provides for injunctive relief.<sup>83</sup> The Unruh Act, Disabled Persons Act and ADA  
 5 all explicitly provide for injunctive relief.<sup>84</sup> Accordingly, federal courts have recognized that  
 6 violations of the disability access laws constitute irreparable injury per se.<sup>85</sup> More generally,  
 7 “injuries to individual dignity and deprivations of civil rights constitute irreparable injury.”<sup>86</sup>  
 8 Irreparable injury occurs when the unlawful acts have diminished a party’s “ability to function as  
 9 an independent person, according to her [or his] own self-definition.”<sup>87</sup> Thus, Target’s violations  
 10 of statutes authorizing injunctions and its acts of discrimination both create a presumption of  
 11 irreparable injury to plaintiffs.

12 Plaintiffs have suffered and will continue to suffer significant irreparable harm  
 13 throughout this litigation, absent a preliminary injunction. No remedy at law can provide

---

14 <sup>83</sup> See, e.g., *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir.  
 15 2001) (violation of Fair Housing Act); *Smallwood v. National Can Co.*, 583 F.2d 419, 420 (9th  
 16 Cir. 1978) (“this is an injunction issued in response to a statutory provision, and irreparable harm  
 17 is presumed from the fact of the violation of the Act.”); *Burlington Northern R. Co. v.*  
 18 *Department of Revenue of State of Wash.*, 934 F.2d 1064, 1074 (9th Cir. 1991) (“When the  
 19 evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices  
 20 prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable  
 21 harm to the plaintiffs need not be shown”) (internal citations omitted); *United States by Mitchell*  
 22 *v. Hayes Int’l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969) (Civil Rights Act; “irreparable injury  
 23 should be presumed from the very fact that the statute has been violated”); *Gresham v. Windrush*  
 24 *Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir.1984) (“irreparable injury may be presumed from  
 25 the fact of discrimination and violation of fair housing statutes”).

26 <sup>84</sup> Cal. Civ. Code § 52.1(b) (Unruh Act); Cal. Civ. Code § 55 (Disabled Persons Act); 42 U.S.C.  
 27 § 12188(a) (ADA’s incorporation of the remedies and procedures set forth in the Civil Rights  
 28 Act of 1964).

<sup>85</sup> See, e.g., *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1084 (N.D. Cal. 1997);  
*Pathways Psychosocial v. Town of Leonardtown, Md.*, 223 F. Supp. 2d 699, 717 (D. Md. 2002).

<sup>86</sup> *Cupolo*, 5 F. Supp. 2d at 1084

<sup>87</sup> *Sullivan By and Through Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 961  
 (E.D. Cal. 1990) (preliminary injunction issued ordering school district to allow disabled student  
 to bring her service dog to school after Plaintiff showed that “she will likely suffer grave and  
 irreparable injury if a preliminary injunction does not issue.” Court held that “neither an award of  
 damages nor a permanent injunction following the conclusion of this litigation could possibly  
 restore to plaintiff the loss of independence she is likely to suffer in the interim as a result of  
 defendants’ conduct.”); see also *Keirnan v. Utah Transit Authority*, 339 F.3d 1217, 1220 (10th  
 Cir. 2003) (irreparable harm where Defendant’s conduct affects Plaintiffs ability to live their  
 lives in an independent fashion).



1 plaintiffs with the ability to access target.com and the myriad of goods, services and information  
 2 that Target makes available only to its sighted customers.<sup>88</sup> The lack of access to Target's  
 3 website contributes to the exclusion and marginalization of blind people from the commercial  
 4 life of this country, an exclusion which prevents them from obtaining full and independent  
 5 participation in today's technology-based society.<sup>89</sup> Unless and until an injunction issues  
 6 requiring that target.com become accessible to the blind, Target will continue to treat plaintiffs as  
 7 second-class citizens, despite its vast resources and the relative ease of the fix.

#### 8 **VI. THE BALANCE OF HARDSHIPS TIPS HEAVILY IN PLAINTIFFS' FAVOR**

9 As noted, Target's deprivation of plaintiffs' right to be free from discrimination,  
 10 guaranteed by federal and state law, constitutes an irreparable injury which would be mitigated  
 11 by the issuance of a preliminary injunction. By contrast, the harm that an injunction would cause  
 12 Target is negligible. Target is one of the world's largest retail companies. With over fifty billion  
 13 dollars in annual revenue, the amount Target will need to spend to remove accessibility barriers  
 14 from target.com is comparatively miniscule, and will not impede Target's ability to operate as a  
 15 business. Indeed, once Target is fully accessible, it will likely recover the costs of barrier  
 16 removal with the resulting revenue from the sale of products and services that are currently  
 17 inaccessible to the blind.

#### 18 **VII. THE INJUNCTION PLAINTIFFS SEEK IS REASONABLE**

19 Plaintiffs request that Target be ordered to make target.com readily accessible to and  
 20 usable by blind people who use screen access software, within ninety (90) days. There are  
 21 several readily achievable ways Target can accomplish this. As just one example, Target can  
 22 implement the relevant provisions described in Priorities One and Two of the Web Accessibility  
 23 Initiative Guidelines of the World Wide Web Consortium ("W3C").<sup>90</sup> As described above, the  
 24 W3C is the leading standards organization of the World Wide Web. Given Target's vast

25  
 26 <sup>88</sup> Sexton Decl. at ¶¶30; Ayala Decl. at ¶¶ 14, 18; Elder Decl. at ¶12; Thomas Decl. at ¶¶15-16;  
 27 Volonte Decl. at ¶¶14-15; Uttermohlen Decl. at ¶¶17-20; Jacobson Decl. at ¶¶15-16; Stigile  
 Decl. at ¶13.

28 <sup>89</sup> Sexton Decl. at ¶¶37; Ayala Decl. at ¶22; Elder Decl. at ¶18; Thomas Decl. at ¶20; Volonte  
 Decl. at ¶¶20-21; Uttermohlen Decl. at ¶24; Jacobson Decl. at ¶¶14, 23; Stigile Decl. at ¶22.

<sup>90</sup> Thatcher Decl. at ¶15.

1 resources, there is no reason why it cannot easily comply with such standards. Indeed, in 2004,  
 2 the Attorney General of New York State entered into public settlement agreements with both  
 3 Priceline.com and Ramada Hotels requiring these major commercial entities to make their  
 4 websites accessible to the blind and visually impaired.<sup>91</sup> Moreover, if Target encounters a  
 5 problem with any particular access issue, this Court's injunction could allow Target an  
 6 opportunity to raise and resolve such particularized concerns through a meet and confer process  
 7 with plaintiffs. Thus, the injunction plaintiffs seek is reasonable and appropriate given the facts  
 8 and circumstances of this case.

### 9 **VIII. AN INJUNCTION IS IN THE PUBLIC INTEREST**

10 A district court "must always consider whether the public interest would be advanced or  
 11 impaired by issuance of an injunction in any action in which the public interest is affected."<sup>92</sup>  
 12 Vindicating state and federally guaranteed rights against discrimination is indisputably in the  
 13 public interest.<sup>93</sup> "California courts have clearly and repeatedly held that the Unruh Act is to be  
 14 interpreted 'in the broadest sense reasonably possible,' so as to achieve its purpose of combating  
 15 discrimination in all its forms."<sup>94</sup> Similarly, Congress has made clear in enacting the ADA that  
 16 the public interest lies in the eradication of discrimination against persons with disabilities,  
 17 declaring that the ADA's purpose is "to provide a clear and comprehensive national mandate for  
 18 the elimination of discrimination against individuals with disabilities."<sup>95</sup> The injunctive relief  
 19 plaintiffs seek, as described below, is clearly necessary to achieve these anti-discrimination

20  
 21 <sup>91</sup> Press Release, Office of the New York State Attorney General, "Spitzer Agreement To Make  
 22 Web Sites Accessible To The Blind And Visually Impaired" (August 19, 2004) (at  
 23 [http://www.oag.state.ny.us/press/2004/aug/aug19a\\_04.html](http://www.oag.state.ny.us/press/2004/aug/aug19a_04.html) (last visited May 4, 2006)); Attorney  
 24 General of the State of New York Internet Bureau, "In the Matter of Ramada Franchise Systems  
 25 – Assurance of Discontinuance" (August 12, 2004),  
 26 <http://www.icdri.org/News/Ramada%20AOD.pdf>; Attorney General of the State of New York  
 27 Internet Bureau, "In the Matter of Priceline.com, Incorporated – Assurance of Discontinuance"  
 28 (April 8, 2004), <http://www.icdri.org/News/Priceline%20AOD.pdf>.

<sup>92</sup> *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 967 (9th Cir. 1983).

<sup>93</sup> See 11A Charles Allen Wright, Arthur A. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4 at 207 (2nd ed. 1995) (where Congress has enacted a statute declaring the public interest, ordering compliance with the statute benefits the public interest).

<sup>94</sup> *Presta*, 16 F. Supp. 2d at 1136 (citations omitted).

<sup>95</sup> 42 U.S.C. § 12101(b)(1).

1 mandates.

2 **IX. THE COURT SHOULD WAIVE THE BOND REQUIREMENT OR ORDER A**  
 3 **NOMINAL BOND**

4 The Court should waive the bond requirement for preliminary injunctions. A court may  
 5 dispense with the bond requirement set out in Rule 65(c) of the Federal Rules of Civil Procedure  
 6 or only order a nominal bond when (1) there is little or no realistic likelihood of harm to the  
 7 defendant;<sup>96</sup> (2) the balance of the potential hardships each party will suffer as a result of a  
 8 preliminary injunction “weighs overwhelmingly in favor of the party seeking the injunction;”<sup>97</sup>  
 9 or (3) the moving party has demonstrated an overwhelmingly strong likelihood of success on the  
 10 merits.<sup>98</sup>

11 In the case at hand, there is little or no likelihood of harm to the defendant and the  
 12 balance of equities falls squarely in plaintiffs’ favor. Indeed, Target would likely benefit by  
 13 making the website accessible to more customers.<sup>99</sup> Furthermore as in *Cupolo v. Bay Area*  
 14 *Rapid Transit*, “any additional costs that [Target] may incur will advance the public policy  
 15 established by the ADA of enhancing the accessibility of [public accommodations] to individuals  
 16 with disabilities.”<sup>100</sup> Plaintiffs, as demonstrated by this record, have suffered and are likely to

17  
 18 <sup>96</sup> See, e.g., *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878,  
 19 882-883 (9th Cir. 2003) (“bond amount may be zero if there is no evidence the party will suffer  
 20 damages from the injunction”) (citing *Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000));  
 21 *Doctor’s Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2nd Cir. 1996) (affirming district court’s  
 22 waiver of bond where Defendants did not show that they would suffer any harm absent the  
 23 posting of a bond).

24 <sup>97</sup> *Cupolo*, 5 F. Supp. 2d at 1086 (ordering bond of \$100 in a disability access class action  
 25 concerning access to an entire mass transit agency’s facilities). The Court in *Cupolo* held that a  
 26 court “may waive Rule 65(c)’s bond requirement when the balance of the equities weighs  
 27 overwhelmingly in favor of the party seeking the injunction.”

28 <sup>98</sup> See, e.g., *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*,  
 766 F.2d 1319, 1325-1326 (9th Cir. 1985) (“The court has discretion to dispense with the  
 security requirement...[where] the likelihood of success on the merits, as found by the district  
 court, tips in favor of a minimal bond or no bond at all.”) (internal citations omitted); *Scherr v.*  
*Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (finding no abuse of discretion in waiving bond  
 requirement because “the amount of the security rests within the discretion of the district  
 judge...[and the plaintiffs demonstrated a] strong likelihood of success on the merits[.]”).

<sup>99</sup> See, e.g., Ayala Decl. at ¶21; Elder Decl. at ¶¶ 15, 17; Volonte Decl. at ¶16,19; Uttermohlen  
 Decl at ¶24; Jacobson Decl. at ¶ 22; Stigile Decl. at ¶¶ 14,19, 21.

<sup>100</sup> *Cupolo*, 5 F.Supp.2d at 1086.

1 continue to suffer irreparable harm as a result of Target’s neglect and refusal to act.<sup>101</sup> Unless  
2 Target is ordered to make its website accessible, plaintiffs will continue to be denied access to a  
3 whole host of services which Target currently makes available only to sighted customers.  
4 Finally, as demonstrated in Section IV, *supra*, there is a very high likelihood of success on the  
5 merits in this case. Accordingly, waiver of the bond requirement is appropriate.

6 **X. CONCLUSION**

7 For all the foregoing reasons, plaintiffs request that the Court issue a preliminary  
8 injunction ordering that, within ninety (90) days, Target ensure that target.com is readily  
9 accessible to and usable by blind people who use screen access software.

11 DATED: May 8, 2006

DISABILITY RIGHTS ADVOCATES  
LAURENCE W. PARADIS  
MAZEN M. BASRAWI

SCHNEIDER & WALLACE  
TODD M. SCHNEIDER  
JOSHUA KONECKY

BROWN, GOLDSTEIN & LEVY, LLP  
DANIEL F. GOLDSTEIN (*pro hac vice*)

By: /s/ Laurence W. Paradis  
Laurence W. Paradis  
Attorneys for Plaintiffs

DISABILITY RIGHTS ADVOCATES  
2001 CENTER STREET, THIRD FLOOR  
BERKELEY, CALIFORNIA 94704-1204  
510.665.8644

101 See Section V, *supra*.