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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

TARGET CORPORATION,

Defendant.

Case No. C-06-01802 MHP

CLASS ACTION

**PLAINTIFFS' MOTION FOR
ADMINISTRATIVE RELIEF FROM
GENERAL ORDER NO. 56**

Judge: The Honorable Marilyn Hall Patel

PLAINTIFFS' MOTION FOR ADMINISTRATIVE RELIEF FROM GENERAL ORDER NO.56

Plaintiffs hereby move this Court for Administrative Relief from the Northern District of California's General Order No. 56 (Americans with Disabilities Act Access Litigation) for the purpose of setting a Case Management Conference and commencing formal discovery.

INTRODUCTION

This case is brought under California civil rights laws and the Americans with Disabilities Act (ADA) to challenge Defendant Target Corporation's alleged failure to incorporate the basic technology necessary to make its website, target.com, readily accessible to and usable by the blind. As previously discussed in the context of Target's pending motion to dismiss, Plaintiffs allege that Target's website is a service, privilege, advantage and accommodation of both: (1) the Target Corporation (a business establishment under California's Unruh Act), as well as (2) the Target stores (places of public accommodations under the ADA and California's Disabled Person Act). Plaintiffs allege that the lack of "alternative text" on multiple pages of target.com, as well as other barriers described in Plaintiffs' pending Motion for Preliminary Injunction, have the effect of denying blind users "full and equal enjoyment" of this service, privilege, advantage and accommodation.

This case is not like a typical single site architectural barrier case for which General Order 56 was designed. Rather, this is a nationwide class action covering Defendant's entire internet website service and raising multiple contested legal and factual issues. General Order No. 56 is not well suited to such a case.

Moreover, to the extent General Order No 56 should apply, Plaintiffs have more than satisfied the intent and purpose of the order. In fact, prior to filing this case, Plaintiffs engaged in several months of structured settlement negotiations with Target. *See* Declaration of Laurence Paradis ("Paradis Decl.") at ¶¶2-3. The case now has been pending in Court for seven months, during which time the subject of settlement has again been discussed between counsel without any resolution. *Id.* at ¶4. Plaintiffs' Motion for Preliminary Injunction and Target's Motion to Dismiss underscore the existence of a substantial legal dispute between the parties, and indicate

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1 that further prosecution of this action is necessary in order to put the parties in a position where
 2 they might reach a negotiated resolution. Given the length of time since the dispute began and
 3 since the case was filed, as well as the unsuccessful previous efforts to settle the case, any more
 4 delay in discovery and case management only serves to unnecessarily prolong the litigation.
 5 Accordingly, Plaintiffs now seek relief from General Order 56 to allow the parties to obtain a
 6 trial schedule and commence discovery.

7 BACKGROUND

8 This case began over a year ago, when Plaintiffs wrote Target Corporation on May 5,
 9 2005, to notify the company that its website, target.com was inaccessible to blind persons using
 10 screen access software, in violation of applicable law. At that time, Plaintiffs offered and Target
 11 agreed to enter into structured negotiations pursuant to a litigation standstill and tolling
 12 agreement executed on September 1, 2005. The parties then engaged in negotiations for several
 13 months, but were not able to reach an agreement resolving the website access dispute. Plaintiffs
 14 brought this case to remedy the ongoing discrimination only after these pre-litigation settlement
 15 efforts failed. *See* Paradis Decl. at ¶2.

16 The case was originally filed as a statewide class action in the California Superior Court,
 17 County of Alameda on February 7, 2006, and was removed to the United States District Court,
 18 Northern District of California on March 8, 2006. The parties were served the Scheduling Order
 19 For Cases Asserting Denial Of Right Of Access Under Americans With Disabilities Act Title III
 20 (42 U.S.C. §§ 12181- 89). The Order assigned the case to the Honorable Magistrate Judge
 21 Bernard Zimmerman and the Order's incorporated case schedule indicated that the parties were
 22 to comply with General Order No. 56 "Americans with Disabilities Act Access Litigation."

23 On March 15, 2006, Defendant Target filed a Motion to Dismiss pursuant to Rule
 24 12(b)(6) of the Federal Rules of Civil Procedure, along with an objection to the assignment to the
 25 Magistrate Judge. On March 24, 2006, the case was reassigned to the Honorable Judge Marilyn
 26 Hall Patel, and the hearing date on the pending motion was vacated. Plaintiffs filed an Amended
 27 Complaint as a matter of right pursuant to Rule 15(a) of the Federal Rules of Civil Procedure on
 28 March 30, 2006, and added a nationwide federal ADA claim in addition to their original state

1 law claims. On April 11, 2006, Defendant filed a Motion for Relief from General Order No. 56
 2 in order for it to re-notice its Motion to Dismiss prior to the Case Management Conference. At
 3 that time, Plaintiffs agreed not to oppose Defendant's Motion for Relief from the General Order,
 4 which was subsequently granted on April 13, 2006.

5 At the same time, Plaintiffs also asked Target to stipulate to general relief from General
 6 Order No. 56 since the parties had already engaged in extensive pre-litigation settlement
 7 negotiations without success, and there was no reason to further delay the litigation. Target
 8 declined to agree to such general relief, and further declined to stipulate to limited relief for the
 9 purpose of Plaintiffs' filing a preliminary injunction motion. Plaintiffs then filed a Motion for
 10 Relief from General Order No. 56 for the Limited Purpose of Filing a Motion for Preliminary
 11 Injunction. That motion was granted on May 2, 2006 and Plaintiffs filed their Motion for
 12 Preliminary Injunction on May 8, 2006.

13 Both Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Dismiss
 14 were heard by this Court on July 24, 2006. In the meantime, because of General Order 56 the
 15 parties have been unable to pursue formal discovery and no trial schedule has been set.
 16 Furthermore, although the subject of settlement has been discussed on several occasions since
 17 the filing of the case, it does not appear to Plaintiffs' counsel that a negotiated resolution will be
 18 possible without further prosecution of this action. *See* Paradis Decl. at ¶¶4-5.¹

19 Plaintiffs have thus requested again that Defendant stipulate to relief from the remaining
 20 requirements of General Order 56. Defendant has again declined to stipulate. *See* Paradis Decl.
 21 at ¶7. Defendant asserts that the parties should continue deferring discovery and trial setting and
 22 instead pursue further settlement negotiations. See letter from counsel for Defendant setting
 23 forth Target's position attached as Exhibit A to Paradis Decl. Plaintiffs have informed
 24 Defendant that Plaintiffs would be willing to engage in further settlement negotiations along side

25
 26 ¹ Pursuant to the General Order, the parties exchanged initial disclosures. Also, some
 27 limited discovery was undertaken relative to the Motion for Preliminary Injunction. But no other
 28 discovery has been allowed since the July 24th hearing and no trial date has been set because
 portions of General Order 56 still remain in place. Essentially, the case has been on hold with no
 progress towards resolution since the hearing. *See* Paradis Decl. at ¶4.

1 the commencement of discovery and trial setting (a two track approach), but Defendant has
2 declined that option. Paradis Decl. at ¶8.

3 Plaintiffs are concerned that this case may need to go to trial in order to be resolved,
4 given the failure of previous settlement efforts. To avoid further irreparable injury to the class,
5 Plaintiffs believe that it is appropriate to commence discovery and set an early trial date. There
6 is no reason why settlement negotiations cannot be pursued while the parties prepare the case for
7 trial. In fact, such progress towards a trial date may be necessary in order for the case to be
8 settled. Paradis Decl. at ¶5.

9 ARGUMENT

10 A. General Order No. 56

11 General Order No. 56 was adopted by the Northern District of California on June 21,
12 2005. It establishes a framework designed to encourage the early settlement of access litigation
13 for alleged violations of the Americans with Disabilities Act and California's disability access
14 laws.

15 Under General Order No. 56, the parties are directed, no later than 100 days after the
16 filing of the complaint, to meet in person at the subject premises at issue. General Order No. 56,
17 at ¶3. Initial disclosures required by Federal Rule of Civil Procedure 26(a) are to be completed
18 no later than seven days prior to this joint inspection. *Id.* at ¶2. At the joint inspection or within
19 10 business days thereafter, the parties are to meet and confer in person to discuss all claimed
20 violations, the possibility of remediation, and damages. *Id.* at ¶¶4, 5. If the parties cannot settle
21 the case within 45 days of the site inspection, Plaintiff is to file a "Notice for Need for
22 Mediation," and the parties are referred to the Court's ADR department. *Id.* at ¶6. If mediation is
23 unsuccessful, Plaintiff must file a Motion for Administrative Relief, requesting an initial Case
24 Management Conference. *Id.* at ¶7.

25 General Order No. 56 specifies that "Any party who wishes to be relieved of any
26 requirement of this order may file a Motion for Administrative Relief pursuant to L.R. 7-11
27 requesting a Case Management Conference." *Id.* at ¶8. The Court has already granted both sides
28 partial relief from General Order No. 56. Plaintiffs now seek relief from the remaining

1 mediation requirement of the General Order and request that the Court schedule a Case
2 Management Conference and permit discovery to commence.

3 **B. Pre-Litigation Settlement Attempts**

4 As discussed above, Plaintiff National Federation of the Blind notified Target of the
5 alleged unlawful accessibility barriers on its website on May 5, 2005, over a year ago. The
6 Parties entered into structured negotiations pursuant to a litigation standstill/tolling agreement
7 executed on September 1, 2005. In spite of these extensive efforts, the Parties were unable to
8 resolve the matter in negotiations. This lawsuit was only filed after these extensive pre-litigation
9 settlement attempts failed. *See* Paradis Decl. at ¶¶2-3

10 **C. Current Status of the Case**

11 This case is not the typical access case involving a single premises with an inaccessible
12 ramp, restroom or other physical barriers- the kind of case contemplated by General Order No.
13 56. Nonetheless, Plaintiffs have embraced the aim and spirit of the General Order by meeting
14 and conferring to attempt to settle the case even before the litigation was filed, and continuing to
15 meet and confer regarding the possibility, however remote, of settlement. Paradis Decl. at ¶¶2-
16 4. The parties have already addressed all the items required under General Order No. 56 in their
17 settlement efforts. *Id.* at ¶¶3-4. However, these efforts have been unsuccessful to date. The
18 parties remain far apart on a number of issues, as shown in the briefing and oral arguments
19 around the parties' respective Motions. On the one hand, Plaintiffs have moved for preliminary
20 injunctive relief in order to prevent Target from continuing to deny blind individuals the "full
21 and equal enjoyment" of Target's website, one of "the goods, services, facilities, privileges,
22 advantages, or accommodations," of both the Target stores (thereby covered under the ADA and
23 Disabled Persons Act) and the Target Corporation (thereby covered by the Unruh Act). On the
24 other hand, Defendant maintains that it is under no legal obligation to make the website
25 accessible.

26 The combination of these early litigation efforts on behalf of both parties, and the
27 briefing and oral arguments on the motions, demonstrates that the parties have a real and
28 substantial dispute not likely to be resolved without further prosecution of this action.

1 Furthermore, the violations were brought to Target's attention more than a year ago and the case
 2 was filed almost seven months ago. Considerable time has passed, but most discovery has yet
 3 to begin.

4 Additionally, if the court declines to issue preliminary relief, Plaintiffs will request an
 5 early trial date due to the prospect of ongoing injury to the Plaintiff Class in the absence of an
 6 injunction. Accordingly, it is important for discovery to proceed so that both parties can be
 7 prepared for an early trial date, should that be ordered. *Id.* at ¶6.

8 At this point, the requirements of General Order 56 will only serve to unnecessarily
 9 prolong this litigation. There is no reason why the parties could not conduct further settlement
 10 discussions contemporaneously with the litigation. However, given the above circumstances and
 11 the many unsuccessful attempts to settle this case before and after the complaint was filed, the
 12 most efficient way to proceed with this case is outside of the confines of General Order 56.

13 CONCLUSION

14 For the reasons set forth above, Plaintiffs request administrative relief from the remaining
 15 requirements under General Order No. 56 and ask that the Court: (i) set a Case Management
 16 Conference as early as possible and (ii) permit discovery to proceed.

17
 18 DATED: September 1, 2006

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 21 By: 

22 Laurence Paradis
 23 Attorney for Plaintiffs
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