

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

5 DAVID F. MCDOWELL (CA SBN 125806)
 SARVENAZ BAHAR (CA SBN 171556)
 6 DMcDowell@mofo.com
 SBahar@mofo.com
 7 MORRISON & FOERSTER LLP
 555 West Fifth Street, Suite 3500
 8 Los Angeles, California 90013-1024
 Telephone: (213) 892-5200
 9 Facsimile: (213) 892-5454

10 STUART C. PLUNKETT (CA SBN 187971)
 SPlunkett@mofo.com
 11 MORRISON & FOERSTER LLP
 425 Market Street
 12 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 13 Facsimile: (415) 268-7522

14 Attorneys for Defendant
 TARGET CORPORATION

15
 16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN FRANCISCO DIVISION

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

23 Plaintiffs,

24 v.

25 TARGET CORPORATION,

26 Defendant.

Case No. C06-01802 MHP

**TARGET CORPORATION'S
 OPPOSITION TO MOTION FOR
 ADMINISTRATIVE RELIEF FROM
 GENERAL ORDER**

Judge: Hon. Marilyn Hall Patel

INTRODUCTION

At 3:00 p.m. on the Friday afternoon before the Labor Day weekend, the National Federation of the Blind (along with the other plaintiffs in this action, “NFB”) filed its Motion for Administrative Relief from the mediation requirements of General Order 56. In the main, NFB suggests that General Order 56 mediation is *not* appropriate in this case because: (1) “[t]his is not the typical access case” that involves a single architectural barrier or building (*e.g.*, Motion at 1:18-19; 5:11-13 & 13-15); (2) the parties somehow have satisfied the “intent,” “aim” or “spirit” of Rule 56’s mediation requirement by engaging in settlement discussions prior to filing this lawsuit (*e.g.*, Motion at 1:22-34; 5:4-9); and (3) the parties’ substantive positions are far apart.

Defendant Target Corporation (“Target”) briefly responds to these points below.

DISCUSSION

I. GENERAL ORDER 56 APPLIES TO ALL CASES IN WHICH PLAINTIFFS ALLEGE A VIOLATION OF TITLE III OF THE ADA.

This Court need not spend much time on NFB’s first suggestion, that General Order 56’s mediation requirement should be ignored because “this isn’t a typical ADA case.” As the Court can see from the introductory paragraph of the Order itself, General Order 56 applies to *all* cases arising under Title III of the ADA:

GENERAL ORDER No. 56
AMERICANS WITH DISABILITIES ACT ACCESS LITIGATION

In any action which asserts denial of a right of access protected by Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-89, the Court ORDERS, pursuant to Federal Rule of Civil Procedure 16, that the following shall apply:

Target acknowledges that General Order 56 typically is invoked in single-site retail store cases arising under Title III of the ADA. However, that fact alone does *not* provide sufficient justification to avoid the Order’s mediation requirement. Indeed, the opposite is true: It is precisely because this case *is* unusual that the parties should be encouraged to mediate this matter *before* being required to engage in costly and time-consuming discovery.

1 **II. THE PARTIES HAVE NOT SATISFIED EITHER THE LETTER OR THE SPIRIT**
2 **OF GENERAL ORDER 56’s MEDIATION REQUIREMENTS.**

3 As is relevant here, General Order 56 embodies two basic requirements. *First*, the
4 General Order obligates parties to participate in face-to-face remediation discussions in which the
5 plaintiff must “specify *all* claimed premises violations and the desired remediation,” and the
6 defendant must specify whether it is “willing to remediate and whether defendant agrees with
7 plaintiff’s proposed remediation” General Order 56, ¶¶ 3 & 4.¹ *Second*, if the parties cannot
8 reach agreement on remediation, paragraph 6 of General Order 56 *requires* the parties to
9 participate in mediation:

10
11 6. If within 45 days from the joint site inspection, the parties cannot reach an agreement on
12 remediation, or cannot settle the damages and fees claims, plaintiff shall file a "Notice of
13 Need for Mediation" in the form set forth on the Court's ADR Internet site
14 www.adr.cand.uscourts.gov and on the ECF Website www.ecf.cand.uscourts.gov. The
15 matter will then be automatically referred to mediation and the ADR Department will
16 schedule a mediation as soon as possible. The mediator shall have the authority to preside
17 over settlement negotiations that address all issues presented by this matter, including
18 requests for injunctive relief and attorney’s fees. Should a settlement be reached, the
19 mediator shall ensure that the parties make a written or audio record of the essential terms
20 of the settlement sufficient to permit any party to move to enforce the settlement should it
21 not be consummated according to its terms. Should any settlement be conditioned upon
22 future conduct such as remediation, the assigned judge will retain jurisdiction to enforce
23 that component of the settlement.

22 In light of these provisions, it is a little much for NFB to claim that it has complied with
23 the “intent,” “aim” or “spirit” of Rule 56’s mediation requirements for two reasons.

24
25
26 ¹ Target notes that Paragraph 5 of General Order 56 further provides that, in the
27 event the parties agree on remediation, the plaintiff must provide the defendant with a statement
28 of alleged damages. For reasons explained above, NFB’s obligation to comply with this
paragraph has not yet been triggered.

1 First, while it is true that the parties have exchanged written settlement proposals, the
2 parties have *not* met and conferred *in person* as required by paragraphs 3 and 4 of General Order
3 56. As explained in the accompanying Declaration of Robert A. Naeve, Target suggested in a
4 June 26, 2006 telephone call that the parties should participate in a face-to-face meeting to
5 discuss settlement of this action before Target's motion to dismiss, and NFB's motion for
6 preliminary injunction were to be heard. Target renewed its request in a June 2, 2006 email.
7 Unfortunately, the meeting never took place. (Naeve Decl. ¶ 3 & 4.)²

8 Second, and perhaps more importantly, the parties have *not* initiated, let alone participated
9 in, the mediation process contemplated by paragraph 6 of General Order 56. As explained in the
10 accompanying Declaration of Robert A. Naeve, in a letter dated August 17, 2006, NFB asked
11 Target to stipulate to "complete relief" from General Order 56. During an August 24, 2006
12 telephone conference initiated to discuss NFB's August 17, 2006 letter, the following points
13 emerged:

- 14 • Target explained that the parties' best interests were served by referring this matter
15 to mediation pursuant to General Order 56.
- 16 • Target acknowledged that, given the complexities inherent in a case of this type, it
17 might be best to refer this matter to a private mediator who had more time to work
18 with the parties to bring this matter to a full and final resolution. Target asked if
19 NFB had any suggestions as to a private mediator.
- 20 • NFB suggested that former Magistrate Judge Edward Infante of JAMS would be
21 an appropriate mediator. However, NFB suggested that it would consider referring
22 this matter to Judge Infante *only* if Target stipulated to full relief from General
23 Order 56.
- 24 • The parties outlined their respective views on the substantive topics to be covered
25 in the proposed mediation.

26 _____
27 ² Target submits this memorandum solely to demonstrate that the parties have *not*
28 yet complied with General Order 56, and not as evidence or an admission of liability or
wrongdoing of any type.

1 • Each party agreed to consider the other's request.³

2 (Naeve Decl. ¶ 5.)

3 Target initiated a follow-up telephone conference with NFB on August 30, 2006. During
4 that telephone call, Target explained as follows:

- 5 • The parties have not yet complied with the mediation requirements of General
6 Order 56, paragraph 6.
- 7 • Target is willing to refer this matter to mediation before Judge Infante.
- 8 • Target had already communicated one good-faith settlement proposal to NFB, and
9 places *no* pre-conditions or limitations on the topics to be discussed during the
10 mediation.
- 11 • Target seeks to avoid engaging in costly and time-consuming discovery and
12 related litigation unless it became clear that the matter would not settle.⁴

13 (Naeve Decl. ¶ 6.)

14 In response, NFB indicated that, while it was not adverse to mediation, it would not do so
15 without first obtaining complete relief from General Order 56. (Naeve Decl. ¶ 7.)

16 These facts simply do not support the proposition that the parties have satisfied the
17 "intent," "aim" or "spirit" of General Order 56's mediation requirements. Instead, the fact is that
18 Target remains ready, willing and able to comply with the General Order's mediation
19 requirement, and places no pre-conditions on the topics to be discussed. NFB, on the other hand,
20 appears to be more interested in forcing Target to spend time and money engaging in as-of-yet
21 unidentified discovery and other proceedings that will not advance the settlement ball one iota.
22 NFB's motion for administrative relief should be denied accordingly, and the parties should be
23 ordered to comply with General Order 56 within a reasonable period of time.

24

25

26 ³ Target confirmed the gist of this conversation in an August 25, 2006 letter attached
as Exhibit "A" to the Declaration of Robert A. Naeve.

27 ⁴ Target confirmed the gist of this conversation in an August 30, 2006 letter attached
as Exhibit "B" to the Declaration of Robert A. Naeve.

28

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

III. NFB’s PESSIMISM ABOUT THE POSSIBILITY OF SETTLEMENT DOES NOT PROVIDE SUFFICIENT JUSTIFICATION TO IGNORE GENERAL ORDER 56’S MEDIATION REQUIREMENT.

NFB places the cart well ahead of the horse by suggesting that General Order 56’s mediation requirement should be ignored because “the parties remain far apart on a number of issues” and because the disputes “are not likely to be resolved without further prosecution of this action.” Target is not so pessimistic about the possibility of settlement, so long as NFB proceeds in good faith. Indeed, it is precisely because this case raises novel and difficult issues that Target is willing to work with Judge Infante – or any other mediator with similar qualifications and experience – to resolve this matter with dispatch.

CONCLUSION

For the reasons stated in this Opposition, Target respectfully requests as follows:

1. NFB’s motion for administrative relief, from the mediation requirements of General Oder 56 be denied;
2. This Court order the parties to comply with paragraph 6 of General Order 56 within a reasonable period of time; and
3. This Court schedule a post-mediation status conference to discuss NFB’s request for relief from General Order 56, and to discuss a discovery plan in this action.

Dated: September 5, 2006.

ROBERT A. NAEVE
DAVID F. MCDOWELL
STUART C. PLUNKETT
MORRISON & FOERSTER LLP



By: _____
Robert A. Naeve
Attorneys for Defendant
TARGET CORPORATION