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8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

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

16 Plaintiffs,

17 v.

18 TARGET CORPORATION,

19 Defendant.

Case No. C 06-01802 MHP

**TARGET CORPORATION'S
 NOTICE OF MOTION AND
 MOTION FOR SUMMARY
 JUDGMENT; SUPPORTING
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: April 16, 2007
 Time: 2:00 PM
 Judge: Hon. Marilyn Hall Patel

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
2 TO PLAINTIFFS NATIONAL FEDERATION OF THE BLIND, NATIONAL
3 FEDERATION OF THE BLIND OF CALIFORNIA, BRUCE F. SEXTON, AND THEIR
4 ATTORNEYS:

5 On April 16, at 2:00 p.m.,¹ or as soon thereafter as the matter may be heard, in the
6 courtroom of the Honorable Marilyn Hall Patel at 450 Golden Gate Avenue, San Francisco,
7 California, Defendant Target Corporation (“Target”) will and hereby does move, pursuant to
8 Rule 56 of the Federal Rules of Civil Procedure, for summary judgment against Plaintiff
9 Bruce F. Sexton on the grounds that the facts beyond genuine dispute demonstrate that Mr.
10 Sexton’s access to goods or services offered at Target’s retail stores has not been impeded in
11 any way by the alleged inaccessibility of Target.com. This motion is based on this Notice of
12 Motion and Motion; the supporting Memorandum of Points and Authorities; the
13 accompanying Declaration of Matthew I. Kreeger; and such other evidence and argument as
14 may be presented before the Court takes this motion under submission.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **ISSUE TO BE DECIDED**

17 Whether Plaintiff Bruce F. Sexton’s claims against Target should be dismissed
18 because facts beyond genuine dispute show that Mr. Sexton cannot prevail.

19 **INTRODUCTION**

20 On February 7, 2006, Plaintiffs filed the instant action, alleging that the Target.com
21 website was inaccessible to visually impaired persons, in violation of the Americans with
22 Disabilities Act (“ADA”) and California state law. In the time that has elapsed since, the
23 Court granted in part Target’s motion to dismiss, substantially narrowing Plaintiffs’ claims.
24 Specifically, the Court ruled that Plaintiffs’ claims could proceed only to the extent “the

25 _____
26 ¹ Defendant Target has concurrently filed a motion to shorten time, requesting that the
27 Court hear the instant motion for summary judgment on Thursday, April 12, 2007, at 2:30
28 pm, the date and time specially set aside for the hearing on Plaintiffs’ motion for class
 certification.

1 inaccessibility of Target.com impedes full and equal enjoyment of the goods and services
2 offered in Target stores” (Declaration of Matthew I. Kreeger (“Kreeger Decl.”), Ex. A
3 (“Order”) at 11:21-23.) The Court expressly dismissed Plaintiffs’ claims to the extent they
4 are based on allegations “unconnected to Target stores, which do not affect the enjoyment of
5 goods and services offered in Target stores.” (*Id.* at 11:24-25.)

6 Plaintiffs have not shown and cannot show that Plaintiff Bruce F. Sexton has suffered
7 the kind of injury that survived the motion to dismiss. In his declarations, submitted by
8 Plaintiffs in support of their motion for preliminary injunction and resubmitted in support of
9 their motion for class certification, and in his deposition testimony, Mr. Sexton describes
10 particular problems he has encountered with the Target.com website. None of these
11 problems, however, impeded Mr. Sexton’s ability to enjoy the goods or services in Target’s
12 retail stores. The undisputed evidence therefore shows that Mr. Sexton has not suffered any
13 legally cognizable harm and that his claims cannot survive the Court’s previous ruling.

14 BACKGROUND

15 I. BRUCE F. SEXTON

16 Mr. Sexton resides in Berkeley, California, and has been legally blind since birth.
17 (*See* Kreeger Decl., Ex. B (Declaration of Bruce F. Sexton in Support of Plaintiffs’ Motion
18 for Preliminary Injunction (“Sexton Decl.”) ¶ 2.) In his first declaration, Mr. Sexton states
19 that he “would like to shop at Target.com because having to hire a driver and find someone
20 to travel to the physical retail location with [him] necessitates a significant expense of time,
21 energy, and money.” (*Id.* ¶ 28.) Mr. Sexton explains that he found the website difficult to
22 use, and, as a result, had to travel to the physical store instead. (*Id.* ¶¶ 29-33.) He does not
23 contend that he encountered any difficulties in finding or purchasing items at any of the
24 physical stores.

25 Mr. Sexton describes a specific incident, occurring in the summer of 2005, when he
26 attempted to purchase towels from Target.com. (*Id.* ¶ 33.) Because his search results “were
27 not matched with the different product descriptions,” Mr. Sexton explained: “I could not
28 determine which product I wanted to purchase. I became so frustrated that I did not continue

1 to the point where I could even attempt to complete a transaction on Target.com.” (*Id.*) As a
2 result, Mr. Sexton purchased his desired items at a Target retail store without incident:
3 “Even though I could not complete the transaction online, I purchased the towels I needed
4 along with laundry soap, hand soap, Kleenex tissue, toilet paper, shampoo, conditioner,
5 toothpaste, and other items at one of Target’s physical locations.” (*Id.*)

6 Mr. Sexton states: “I have been told that there are many useful store-related features
7 on the Target.com website, including weekly advertisements, which I would like to use.
8 When I attempted to access the weekly ads, I was unable to do so because the web page is
9 inaccessible.” (*Id.* ¶ 32.) Mr. Sexton does not, however, identify any problem he
10 encountered at a Target retail store that resulted from his inability to access the weekly
11 advertisement online. Moreover, Target retail store employees, if asked, would verbally
12 describe the contents of a weekly advertisement posted on Target.com, as would
13 Target.com’s 1-800 number representative. (Kreeger Decl., Ex. C (Declaration of Trish
14 Perry in Support of Target’s Opposition to Plaintiffs’ Motion for Class Certification (“Perry
15 Decl.”)) ¶ 6.) Mr. Sexton makes no mention of any effort to access the weekly advertisement
16 by these other available means.

17 Mr. Sexton’s second declaration similarly lacks any facts demonstrating that his
18 problems with the Target website have impeded his access to the goods or services at Target
19 retail stores. (*See* Kreeger Decl., Ex. D (Reply Declaration of Bruce F. Sexton in Support of
20 Plaintiffs’ Motion for Preliminary Injunction (“Sexton Reply Decl.”).) Instead, the second
21 declaration focuses exclusively on Target’s 1-800 customer service line.

22 In his deposition, Mr. Sexton described several trips to Target’s brick and mortar
23 stores, including a specific trip in August 2005. (Kreeger Decl., Ex. E (Transcript of
24 Deposition of Bruce F. Sexton (“Sexton Dep. Tr.”) at 48:6-56:5.) Like his declarations,
25 absent from Mr. Sexton’s deposition testimony are any facts demonstrating that the problems
26 he experienced using Target.com impeded his ability to obtain goods or services from
27 Target’s physical stores.

1 concerning an essential element of the nonmoving party's case necessarily renders all other
2 facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W. Elec.*
3 *Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the
4 nonmoving party may not rely on the pleadings but must present significant probative
5 evidence supporting the claim); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a
6 dispute about a material fact is genuine "if the evidence is such that a reasonable jury could
7 return a verdict for the nonmoving party").

8 **II. PLAINTIFF SEXTON HAS SUFFERED NO LEGALLY**
9 **COGNIZABLE INJURY.**

10 **A. Plaintiff Sexton Has No ADA Claim.**

11 Title III of the Americans with Disabilities Act dictates that "[n]o individual shall be
12 discriminated against on the basis of disability in the full and equal enjoyment of the goods,
13 services, facilities, privileges, advantages, or accommodations of any *place of public*
14 *accommodation . . .*" 42 U.S.C. § 12182(a) (emphasis added). "[P]lace[s] of public
15 accommodation" are, according to the Ninth Circuit, "actual, physical places." *Weyer v.*
16 *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *see also Torres v.*
17 *AT&T Broadband, LLC*, 158 F. Supp. 2d 1035 (N.D. Cal. 2001) (finding that the defendant
18 cable company's failure to make their channel menu more accessible to the visually impaired
19 was not a violation of Title III of the ADA because a digital cable system is not a place of
20 accommodation). The Ninth Circuit requires that "some connection between the good or
21 service complained of and an actual physical place is required." *Id.* Plaintiffs have conceded
22 that this connection must be shown. (Plaintiffs' Motion for Class Certification at 13.)

23 In the instant case, the Court adhered to the *Weyer* ruling and granted Target's motion
24 to dismiss in part, finding that Plaintiffs' ADA claim only survived to the extent that the
25 Plaintiffs alleged a connection between the inaccessibility of Target.com on the one hand and
26 Plaintiffs' enjoyment of goods and services offered in Target stores on the other. Thus, only
27 one type of injury remains at issue in this case: whether the inaccessibility of Target.com
28

1 impeded any individual's enjoyment of the goods and services offered in Target stores.
2 (Kreeger Decl., Ex. A (Order) at 11:21-26.)

3 Plaintiffs have not shown that Mr. Sexton has suffered any injury of the type that
4 survived the motion to dismiss. Mr. Sexton does not complain that the inaccessibility of
5 Target.com impeded his access to the goods and services offered at Target retail stores.
6 Rather, he complains about the difficulties he encountered when attempting to make
7 purchases directly from the website. (Kreeger Decl., Ex. B (Sexton Decl.) ¶¶ 30, 31 & Ex. E
8 (Sexton Dep. Tr.) at 63:7-78:16, 86:21-90:16.) In fact, Mr. Sexton specifically explains that
9 he prefers to shop at Target.com so that he can *avoid* traveling to a retail store. (Kreeger
10 Decl., Ex. B (Sexton Decl.) ¶ 28 ("I would like to shop at Target.com because having to hire
11 a driver and find someone to travel to the physical retail location with me necessitates a
12 significant expense of time, energy, and money.")) Significantly absent from Mr. Sexton's
13 declarations and from his deposition testimony are any facts demonstrating that his difficulty
14 accessing Target.com somehow impeded his ability to access or enjoy the goods or services
15 at Target's physical stores. In fact, Mr. Sexton testified that he has visited Target stores
16 numerous times. (Kreeger Decl., Ex. B (Sexton Decl.) ¶ 19 & Ex. E (Sexton Dep. Tr.) at
17 50:15-20.) He testified about one particular occasion, in the summer of 2005, when he was
18 unable to purchase towels from Target.com and instead successfully purchased them, along
19 with several other items, at one of Target's retail stores. (Kreeger Decl., Ex. B (Sexton
20 Decl.) ¶ 33.) Mr. Sexton's difficulties with Target's website clearly did not impede his
21 access to Target's physical store. Indeed, going to the retail store was his *solution* to
22 problems encountered on the website.

23 Mr. Sexton further reported that he was unable to access the local weekly
24 advertisement on Target.com. (Kreeger Decl., Ex. B (Sexton Decl.) ¶ 32.) However, Target
25 retail store employees, if asked, would verbally describe the contents of a weekly
26 advertisement posted on Target.com, as would Target.com's 1-800 number representative.
27 (Kreeger Decl., Ex. C (Perry Decl.) ¶ 6.) Mr. Sexton makes no mention of any effort to
28 access the weekly advertisement by these other available means nor does he contend that he

1 was somehow impeded from accessing goods or services at the retail stores due to his
2 inability to access the website ads. Indeed, there is no evidence to support such a claim.
3 Accordingly, Mr. Sexton has no legally cognizable claim under the ADA and summary
4 judgment should be granted against him in Target's favor.

5 **B. Plaintiff Sexton's State Law Claims Also Must Fail.**

6 As articulated thus far, Plaintiffs' Unruh Act and Disabled Persons Act claims are
7 dependent on their ADA claim. Because, as discussed above, Plaintiffs have not
8 demonstrated and cannot demonstrate that Plaintiff Sexton has suffered any cognizable injury
9 under Title III of the ADA, Mr. Sexton's state law claims must also fail.

10 **CONCLUSION**

11 For the foregoing reasons, Defendant Target's motion for summary judgment against
12 Plaintiff Bruce F. Sexton should be granted.

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14 Dated: March 8, 2007

HAROLD J. McELHINNY
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17
18 By: /s/ Matthew I. Kreeger
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19 Attorneys for Defendant
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