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

16 Plaintiffs,

17 v.

18 TARGET CORPORATION,

19 Defendant.

Case No. C06-01802 MHP

**TARGET CORPORATION'S
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR CLASS
 CERTIFICATION**

Date: April 12, 2007
 Time: 2:30 PM
 Judge: Hon. Marilyn Hall Patel

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INTRODUCTION

1
2 Over a year ago, Plaintiffs filed the instant action, alleging that the Target.com
3 website was inaccessible. In the time that has elapsed since, two events substantially
4 changed the complexion of this action. First, this Court granted Target's motion to dismiss
5 in part, substantially narrowing Plaintiffs' claims. In particular, the Court ruled that Plaintiffs
6 could go forward with their claims only to the extent based on allegations that "the
7 inaccessibility of Target.com impedes full and equal enjoyment of the goods and services
8 offered in Target stores." The Court dismissed Plaintiffs' claims to the extent they are based
9 on allegations "unconnected to Target stores, which do not affect the enjoyment of goods and
10 services offered in Target stores." Second, since the filing of this lawsuit, Target.com has
11 substantially modified its website, making the site even more accessible, and removing the
12 supposed "access barriers" that Plaintiffs have identified.

13 Plaintiffs' motion for class certification simply ignores these developments.
14 Plaintiffs' proposed class definition — "all legally blind individuals in the United States (or
15 California) who have attempted to access Target.com" — avoids the Court's ruling,
16 sweeping within its bounds individuals that accessed the website without being denied any
17 goods or services offered at Target's retail stores. In addition, Plaintiffs make no attempt to
18 show that there is a numerous class of individuals that has suffered the limited kind of injury
19 that survived the motion to dismiss. Plaintiffs rely solely on declarations — many of which
20 were signed before this Court granted in part the motion to dismiss — from individuals who
21 offer generalized complaints about problems using the Target.com website, without offering
22 any facts to show that these individuals were denied *any* goods or services in Target's retail
23 stores. Indeed, the evidence shows that the only individual plaintiff, Plaintiff Bruce Sexton,
24 has not suffered any legally cognizable harm and that his claims cannot survive this Court's
25 previous ruling.¹

26
27 ¹ Target has filed a motion for summary judgment along with this opposition, seeking
28 dismissal of Mr. Sexton's claims against Target because facts beyond genuine dispute show
that Mr. Sexton cannot prevail.

1 **II. THE MEMBERS OF THE PUTATIVE CLASS AND THE NATURE OF**
2 **THEIR CLAIMS**

3 In support of their motion for class certification, Plaintiffs have submitted twenty-two
4 declarations of putative class members.² Significantly absent from these declarations are
5 facts showing that these individuals' experience with Target.com impeded their enjoyment of
6 goods and services offered in Target's retail stores.

7 Plaintiffs have conceded that they are required to show a "nexus" between
8 Target.com and Target retail stores. (Plaintiffs' Motion for Class Certification ("Pls.' Mot.")
9 at 13.) Yet, they focus not on the accessibility of Target's retail stores, but on the
10 accessibility of the Target.com website. (*Id.* at 16.) (stating that "this lawsuit challenges the
11 accessibility of one website" and the principal barriers at issue are "website barriers").

12 **A. The Named Plaintiffs**

13 **1. Bruce Sexton**

14 Bruce Sexton is the only individual named plaintiff. Mr. Sexton's testimony does not
15 establish that any inaccessibility of Target.com ever impeded his full and equal enjoyment of
16 the goods and services offered in Target retail stores. In fact, his testimony proves that
17 nothing about his experience of Target.com impeded access to goods and services at Target
18 retail stores.

19 Mr. Sexton resides in Berkeley, California, and has been legally blind since birth.
20 (Declaration of Lawrence Paradis in Support of Plaintiffs' Motion for Class Certification
21 ("Paradis Decl."), Ex. G (Sexton Decl.) ¶ 2.) Mr. Sexton's declaration states that he "would
22 like to shop at Target.com because having to hire a driver and find someone to travel to the
23 physical retail location with me necessitates a significant expense of time, energy, and
24 money." (*Id.* at ¶ 28.) As of April 2006 he found the website difficult to use, and as a result
25

26

27 ² Some of the declarations were previously submitted in support of Plaintiffs' motion
28 for a preliminary injunction. Plaintiffs have simply resubmitted them without acknowledging
 that this Court previously dismissed the claims they allege.

1 had to travel to the physical store instead. (*Id.* at ¶¶ 29-33.) He does not contend that he
2 encountered any difficulties in finding or purchasing items at any of the physical retail stores.

3 Mr. Sexton describes a specific incident from the summer of 2005 when he attempted
4 to purchase towels from Target.com. (*Id.* at ¶ 33.) Because the search results on the website
5 “were not matched with the different product descriptions,” Mr. Sexton explained: “I could
6 not determine which product I wanted to purchase. I became so frustrated that I did not
7 continue to the point where I could even attempt to complete a transaction on Target.com.”
8 (*Id.*) As a result, Mr. Sexton purchased his desired items at a Target retail store without
9 incident: “Even though I could not complete the transaction online, I purchased the towels I
10 needed along with laundry soap, hand soap, Kleenex tissue, toilet paper, shampoo,
11 conditioner, toothpaste, and other items at one of Target’s physical locations.” (*Id.*)

12 Mr. Sexton also states: “I have been told that there are many useful store-related
13 features on the Target.com website, including weekly advertisements, which I would like to
14 use.” (*Id.* at ¶ 32.) “When I attempted to access the weekly ads, I was unable to do so
15 because the web page is inaccessible.” (*Id.*) Mr. Sexton does not identify, however, any
16 problem he encountered at a Target retail store that resulted from his inability to access the
17 weekly advertisement online. Moreover, personnel staffing Target’s 1-800 number and
18 Target retail stores are available to describe the contents of the weekly advertisement to those
19 who inquire. (Declaration of Trish Perry in Support of Target Corporation’s Opposition to
20 Plaintiffs’ Motion for Class Certification (“Perry Decl.”) ¶ 6.) Mr. Sexton does not claim
21 that he tried to access the content of the weekly advertisement by these other means.

22 2. NFB and NFB California

23 The National Federation of the Blind (“NFB”) is a national advocacy organization of
24 blind persons in the United States. (Paradis Decl., Ex. E (Maurer Decl.) ¶ 5.) Its purpose is
25 “to promote the general welfare of the blind by (1) assisting the blind in their efforts to
26 integrate themselves into society on equal terms and (2) removing barriers and changing
27 social attitudes, stereotypes, and mistaken beliefs that sighted and blind persons hold
28 concerning the limitations created by blindness and that result in the denial of opportunity to

1 blind persons in virtually every sphere of life.” (*Id.*) The National Federation of the Blind of
 2 California (“NFB California”) is a state affiliate of the NFB that carries out the NFB’s
 3 objectives at the state level. (Declaration of Robert Stigile in Support of Plaintiffs’ Motion
 4 for Class Certification (“Stigile Decl.”) ¶ 6.) NFB California has approximately 300-400
 5 members, the vast majority of whom are blind persons. (*Id.* at ¶ 7.)

6 Because NFB and NFB California are not individuals, they are not members of the
 7 putative class, as defined by Plaintiffs. Plaintiffs nonetheless argue that NFB and NFB
 8 California “can sue on their own behalf because of a drain in their financial and
 9 administrative resources resulting from Target’s actions and inactions,” (Pls.’ Mot. at 20
 10 n.75), although they submit no evidence of any such drain on their resources. Plaintiffs also
 11 assert that NFB can sue on behalf of its members, some of whose declarations have been
 12 submitted in support of Plaintiffs’ motion.

13 **B. The Remaining Putative Class Members**

14 In addition to the declaration of Mr. Sexton, Plaintiffs resubmitted seven declarations
 15 originally filed in support of Plaintiffs’ motion for a preliminary injunction, and submitted
 16 fourteen new declarations from additional putative class members.

17 **1. The Putative Class Members Complain that they Cannot** 18 **Purchase Items Directly from Target.com**

19 None of the declarants states that the inaccessibility of Target.com impedes their
 20 access to the goods and services offered at Target retail stores.³ Instead, the declarants
 21 complain that they cannot purchase items directly from Target.com. (App, Ex. C (Dunham
 22 Decl.) ¶ 14 (“I want to access Target.com primarily because I want to purchase items directly

23 _____
 24 ³ To the contrary, the evidence shows that the goods and services offered at Target
 25 retail stores are accessible. Target’s customer service and the shopping aides at its retail
 26 stores have been praised by putative class members, many of whom shop at the retail stores
 27 regularly. (Appendix of Additional Class Members (“App.”), Ex. B (Bruns Decl.) ¶ 10, Ex.
 28 M (Sanders Decl.) ¶ 11; Declaration of Matthew I. Kreeger in Support of Target
 Corporation’s Opposition to Plaintiffs’ Motion for Class Certification (“Kreeger” Decl.”),
 Ex. A (Deposition of Michelle Bruns (“Bruns Dep.”)) 11:5-10; Kreeger Decl., Ex. B
 (Deposition of Steven Jacobson) 61:20-62:14; Kreeger Decl., Ex. C (Deposition of Christine
 Thomas) at 41:21-42:9; Kreeger Decl., Ex. D (Deposition of Ken Volonte) 35:23-36:4.)

1 from the website.”); App., Ex. G (Clegg Decl.) ¶ 13 (“I would prefer to shop at Target.com
2 rather than a physical Target store.”); App., Ex. K (Morais Decl.) ¶ 13 (“I would like to shop
3 at Target.com because we do not have a local Target store.”).) The putative class members
4 express a preference for shopping on-line and explain that shopping at Target retail stores is
5 inconvenient. (App., Ex. F (Dillon Decl.) ¶¶ 11-12 (“I find it inconvenient to travel to a
6 physical Target store,” and “I find shopping online to be faster and more convenient than
7 shopping in a physical store.”); App., Ex. A (Bailey Decl.) ¶¶ 12, 14. (“If I am given the
8 opportunity to shop online, I do,” and “it “is inconvenient for me to travel to a physical
9 Target store.”); App., Ex. E, (Czarnecki Decl.) ¶ 13 (“I would like to shop at Target.com
10 because it would be nice not to have to physically carry these products home with me.”).)

11 In a similar vein, the testimony regarding difficulties encountered at Target.com
12 largely focuses on the difficulties of making purchases directly from the website. (App., Ex.
13 H (Lewis Decl.) ¶¶ 17-21 (describing difficulties in purchasing from Target.com a DVD set
14 that he knew was available at Target retail stores); App., Ex. D (Crowley Decl.) ¶ 15
15 (describing failed attempt to purchase golf balls from Target.com); App., Ex. F (Dillon
16 Decl.) ¶ 19 (describing failed attempt to purchase garbage bin from Target.com). Declarants
17 also discuss their desire to purchase directly from Target.com items that are not even
18 available for sale at Target retail stores. App., Ex. J (McNally Decl.) ¶ 13 (explaining that
19 she would like to use Target.com to purchase “Keebler Danish Wedding Cookies”); App.,
20 Ex. N (Sanders Decl.) ¶ 15 (stating that she “wanted to use Target.com to buy food
21 products); Perry Decl. ¶ 4 (explaining that, unlike Target retail stores, Target.com does not
22 sell food items (with the limited exception of certain gourmet foods, candy, and gift baskets),
23 and Target.com does not sell Keebler Danish Wedding Cookies).)

24 The complaint of these declarants is not that their enjoyment of goods and services of
25 Target’s retail stores has been impeded by the inaccessibility of Target.com. Rather, they
26 want to shop at Target.com *instead of* shopping at Target’s retail stores.

2. Declarants' Attempts to Use Gift Registries

1
2 Plaintiffs have not demonstrated that any putative class member was denied full
3 enjoyment of the gift registry services available at Target retail stores. Several declarants
4 members testified that they were interested in using the wedding and baby registry features of
5 Target.com. Mr. Ayala and Mr. Elder each testified to having attempted unsuccessfully to
6 use Target.com to purchase a gift from a wedding registry. (Paradis Decl., Ex. H (Ayala
7 Decl.) ¶ 16, Ex. I (Elder Decl.) ¶ 15.) Ms. Bruns, Ms. Dillon, and Ms. Morais testified that
8 they knew friends with gift registries at Target.com. Ms. Bruns stated: "My friends have
9 used Target.com to coordinate their baby showers and gift registries. I was disappointed to
10 discover that I could not purchase gifts for these events due to the inaccessibility of
11 Target.com." (App., Ex. B (Bruns Decl.) ¶ 17.) Ms. Dillon explained: "When my friend
12 used Target.com to set up her wedding registry, I avoided using the site because I believed
13 that I would be unable to purchase gifts through it." (App., Ex. F (Dillon Decl.) ¶ 18.) Ms.
14 Marais testified: "[M]any people I know have had their baby shower registries through
15 Target.com, and I would like to purchase gifts through the site" and "I found that I could not
16 access the Baby Shower registry on Target.com." (App., Ex. K (Morais Decl.) ¶¶ 13, 15.)

17 These individuals do not, however, say that they were impeded in any way from
18 making gift registry purchases at retail stores. When questioned at her deposition, Ms. Dillon
19 testified that she never tried to purchase a gift from the wedding registry from a Target retail
20 stores. (Kreeger Decl., Ex. E (Deposition of Shannon Dillon) 13:10-17.) In fact, there is no
21 barrier preventing anyone from purchasing gifts at Target retail stores that are listed on the
22 gift registries. (Perry Decl. ¶ 5.) Indeed, Ms. Bruns admitted to this, testifying that on the
23 occasions when she was unable to purchase registry gifts available from Target.com, she
24 instead purchased them at a Target retail store. (Kreeger Decl., Ex. A (Bruns Dep.) 8:12-
25 10:4.) Mr. Ayala testified that because he found Target.com to be inaccessible, he "had to
26 find time to go to the physical store in person" in order to purchase a wedding gift listed on
27 the registry. (Paradis Decl., Ex. H (Ayala Decl.) ¶ 16.)
28

1 **5. Putative Class Members' Attempts to Use the On-line**
2 **Pharmacy**

3 Some putative class members testify that they would be interested in using Target's
4 on-line pharmacy. (Paradis Decl., Ex. J (Jacobson Decl.) ¶ 20, Ex. M (Uttermohlen
5 Decl.) ¶ 21, Ex. N (Volonte Decl.) ¶ 17) The online pharmacy allows one to use Target.com
6 to request that a prescription be transferred or refilled. (Perry Decl. ¶ 7.) No putative class
7 member testified that she was unable to refill a prescription because of difficulties with the
8 website. In fact, requests to refill or transfer a prescription can be made by phone or in
9 person at Target's retail stores. (*Id.*)

10 **6. Putative Class Members' Attempts to Use Upload Digital**
11 **Photo Files for Printing**

12 Some putative class members testify that they would be interested in using
13 Target.com's photo printing service. A partnership between Target and Yahoo! Photo allows
14 guests of Target.com to upload digital photo files and pick up prints of these photos at Target
15 retail stores. (Perry Decl. ¶ 8.) No putative class member testified she was impeded from
16 obtaining photo prints because of a problem with the Target.com website. In fact, digital
17 photo printing is fully available at Target retail stores to those who bring in digital photo files
18 on CD or other storage media. (*Id.*)

19 **III. POST-FILING MODIFICATIONS TO TARGET.COM**

20 Since this action was filed, Target.com has been substantially modified, and the
21 issues identified by the plaintiffs have been eliminated. For this reason, Plaintiffs carefully
22 avoid any discussion of the current state of the website. Instead, Plaintiffs' motion states that
23 they "filed this class action lawsuit on February 6, 2006," and "[a]t that time, target.com was
24 riddled with access barriers." (Pls.' Mot. at 5 (emphasis added).) Indeed, Plaintiffs'
25 discussion in its motion for class certification of the alleged inaccessibility of Target.com
26 relies on an expert report of James Thatcher completed in July 2005. (*Id.* at 6-9.) In a
27 declaration dated July 6, 2006, Dr. Thatcher admitted that since he completed that report,
28 Target.com has become more accessible to the blind:

1 In July of 2005 it was impossible to complete a transaction
2 using only the keyboard. As I stated in my declaration, there
3 was a change in the Target.com web site that I detected on
4 April 6, 2006. After that change it seems to be *possible* that a
5 blind person could complete a transaction although it is still
6 highly unlikely. There have been more changes since April 6
7 and I think it is more likely that a blind user could complete a
8 transaction.

9 (Paradis Decl., Ex. P (Thatcher Decl. ¶ 3, July 7, 2006).)

10 Email correspondence produced by NFB in discovery also evidences the significant
11 improvements to Target.com. In an email dated December 6, 2006, an NFB spokesman
12 wrote:

13 You will definitely want to check out the Target Web Site. I
14 see now why you asked me if I had been there recently. I
15 wouldn't have believed it, but they have indeed made some
16 rather drastic improvements. I was able to purchase a compact
17 disk, completing the checkout process with no major problems.
18 Even the home page is quite different. The unlabeled
19 navigation links are gone, replaced with either text or alt-text.
20 There are still a few unlabeled links here and there, but *overall*
21 *I'd have to say the site is usable by a blind person . . .* [Also,]
22 the heading function in JAWS now works with the site.

23 (Kreeger Decl., Ex. H (Email, Dec. 2, 2006) (emphasis added).)

24 As explained below, the dynamic character of Target.com complicates this putative
25 class action in ways wholly unacknowledged by Plaintiffs. For proof of damages, it
26 necessitates an inquiry into the timing of each attempted visit to Target.com. The
27 acknowledgement that Target.com is now accessible also refutes Plaintiffs' statement, in
28 support of certification of a subclass, that their primary objective is injunctive and
29 declaratory relief.

30 ARGUMENT

31 Plaintiffs bear the burden of demonstrating that this class action satisfies all four
32 requirements of Federal Rule of Civil Procedure 23(a), and at least one of the alternatives
33 under Federal Rule of Civil Procedure 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d
34 1180, 1186 (9th Cir. 2001). Because Plaintiffs have not carried their burden here, this

1 putative class action should not be certified. *See Burkhalter Travel Agency v. MacFarms*
2 *Int'l, Inc.*, 141 F.R.D. 144, 152 (N.D. Cal. 1991).

3 **I. PLAINTIFFS' CLASS DEFINITION PRECLUDES CERTIFICATION**

4 **A. Plaintiffs Seek Certification of a Class Composed of**
5 **Individuals Whose Claims Have Been Dismissed**

6 Plaintiffs seek to certify a class defined as "all legally blind individuals in the United
7 States who have attempted to access Target.com." Plaintiffs also propose to certify a
8 damages subclass limited to members of the larger putative class that resides in California.

9 The proposed primary class and subclass are based on Plaintiffs' original theory of
10 the case, encompassing every blind person who made any attempt to access the Target.com
11 website. Plaintiffs have thus ignored the Court's ruling on the motion to dismiss, which
12 makes clear that under Ninth Circuit law, a "place of public accommodation" for purposes of
13 Title III of the ADA is a physical place. (Order at 5, Sept. 6, 2006.) Thus, the amended
14 complaint states a claim only "to the extent that Plaintiffs allege that the inaccessibility of
15 Target.com impedes full and equal enjoyment of the goods and services offered in Target
16 stores." (*Id.* at 11.) Plaintiffs make no effort to account for this in their expansive class
17 definition.

18 The proposed class in this case thus differs markedly from the class that the Court
19 certified in *Lieber v. Macy's West Inc.* (Paradis Decl., Ex. Q (Order, March 9, 1998).) In
20 *Lieber*, the Court did not certify a class consisting of every disabled person who ever visited
21 the Macy's stores at issue. Instead, the Court limited the class to individuals with certain
22 disabilities "*who have been denied access to Macy's goods and services at Macy's Main*
23 *store at Union Square.*" (*Id.* at 5 (emphasis added).)

24 Included in Plaintiffs' class definition are the twenty-two putative class members on
25 whose declarations Plaintiffs rely. As discussed above, however, none of these individuals
26 has testified to facts showing that any inaccessibility of Target.com impeded her enjoyment
27 of goods and services offered in Target stores.

1 Indeed, Plaintiff’s class definition includes all blind individuals who have attempted
2 to access Target.com, even if they accessed the website with no intention of using the goods
3 or services of Target’s retail stores. For example, an individual named “Malcolm” emailed
4 an individual at NFB in April 2006 to report: “I reviewed the Target web-site but got
5 nowhere. I wonder, however, should I contact the Disability Rights law firm? I am quite
6 new at JAWS with the Internet. Moreover, I really didn’t want to purchase anything from
7 them.” (Kreeger Decl., Ex. I (Email, April 29, 2006).) Based on this email, and the Court’s
8 ruling on Target’s motion to dismiss, Malcolm does not have a valid claim against Target.
9 (See Order at 11, Sept. 6, 2006.) Nevertheless, assuming that he his legally blind, Malcom is
10 a putative class member.

11 Plaintiffs’ expansive class definition likewise includes putative class members who
12 have been able to access and use Target.com successfully. In opposition to Plaintiffs’ motion
13 for a preliminary injunction, Target submitted evidence that at least four putative class
14 members using screen reading software could successfully navigate and purchase products
15 from Target.com in May 2006. (Kreeger Decl., Ex. J (Declaration of Dawn Wilkinson in
16 Support of Target Corporation’s Opposition to Motion for Preliminary Injunction), Ex. K
17 (Declaration of Dave Wilkinson in Support of Target Corporation’s Opposition to Motion
18 for Preliminary Injunction), Ex. L (Declaration of Suzanne Tritten in Support of Target
19 Corporation’s Opposition to Motion for Preliminary Injunction), Ex. M (Declaration of Chris
20 Polk in Support of Target Corporation’s Opposition to Motion for Preliminary Injunction).)
21 In December 2006, an NFB spokesman reported that he was able to use the checkout process
22 and purchase a compact disc from Target.com. “[O]verall,” he concluded, “I’d have to say
23 that the site is usable by a blind person.” (Kreeger Decl., Ex. H (Email).) Clearly, there are
24 blind individuals who have succeeded in using Target.com for whatever they set out to do.
25 These individuals have not been denied full enjoyment of goods and services offered by
26 Target stores, and accordingly, they do not have a claim against Target for purposes of this
27 action. Nevertheless, these individuals remain putative class members.
28

1 **B. The Putative Class Is Not Adequately Defined and**
2 **Clearly Ascertainable**

3 “It is elementary that in order to maintain a class action, the class sought to be
4 represented must be adequately defined and clearly ascertainable.” *De Bremaecker v. Short*,
5 433 F.2d 733, 734 (5th Cir. 1970); *Hagen v. City of Winnemucca*, 108 F.R.D. 61, 63 (D. Nev.
6 1985). A precise class definition is critical because it “allows the Court to determine *who*
7 *would be entitled to relief*, who would be bound by a judgment, and who is entitled to notice
8 of the action.” *Garrish v. United Auto., Aerospace, & Agricultural Implement Workers of*
9 *America*, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001) (emphasis added) (citing 5 James Wm.
10 Moore et al., *Moore’s Federal Practice* ¶ 23.213 (3d ed. 1998)); *see also, e.g., In re Urethane*
11 *Antitrust Litig.*, 237 F.R.D. 440, 444 (D. Kan. 2006) (quoting *Manual for Complex Litigation*
12 § 21.222 at 270 (4th ed. 2005)).

13 A class is not adequately defined or clearly ascertainable if it includes individuals
14 who are not entitled to relief or who lack identifiable basis for standing. *See, e.g.,*
15 *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (affirming denial of motion for class
16 certification where the proposed class “was so amorphous and diverse” that it was not
17 “reasonably clear that the proposed class members have all suffered a constitutional or
18 statutory violation warranting some relief”); *Gustafson v. Polk County*, 226 F.R.D. 601, 607
19 (W.D. Wis. 2005) (denying motion for class certification because the class definition
20 included individuals not entitled to relief); *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 580
21 (N.D. Ill. 2005) (denying motion for class certification where the class definition was “overly
22 inclusive and encompass[e]d millions of potential members without any identifiable basis for
23 standing”).

24 Here, for the reasons set out above, we have no plaintiff or declarant who
25 demonstrates actionable injury under the standard enunciated by the Court. In the absence of
26 any “prototypical” plaintiff, there is simply no way that the Court (or Target) can apply the
27 Rule 23 requirements; there is no way to define the class; there is no way to determine if
28

1 “numerous” others are similarly situated; and, critically, there is no way to determine if the
2 claims of the “representative” are typical of those of other members of the class.⁴

3 **II. PLAINTIFFS HAVE NOT SHOWN THAT THEIR CLAIMS ARE**
4 **TYPICAL**

5 Rule 23(a) further requires Plaintiffs to show that “the claims or defense of the
6 representative parties are typical of the claims or defense of the class.” Fed. R. Civ. P. 23(a).
7 “Typicality requires that named plaintiffs be members of the class they represent and
8 ‘possess the same interest and suffer the same injury’ as class members.” *Bates v. United*
9 *Parcel Service*, 204 F.R.D. 440, 446 (N.D. Cal. 2001) (quoting *General Tel. Co. v. Falcon*,
10 457 U.S. 147, 156 (1982)); *see also East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431
11 U.S. 395, 403-04 (1977) (plaintiffs who “could have suffered no injury . . . [a]re, therefore
12 simply not eligible to represent a class of persons who did allegedly suffer injury”);
13 *La Mar v. H&B Novelty & Loan Co. v. Allegheny Airlines*, 489 F.2d 461 465 (9th Cir. 1973)
14 (“Obviously, this requirement [of typicality under Rule 23(a)] is not met when the
15 ‘representative’ plaintiff never had a claim of any type against any defendant.”). Plaintiffs
16 have failed to establish this essential prerequisite to certification.

17 **A. The Named Plaintiffs Have Demonstrated**
18 **No Legally Cognizable Injury**

19 Plaintiffs have not shown that Mr. Sexton has suffered any legally cognizable injury.
20 Mr. Sexton testified to a single instance in the summer of 2005 when he was unable to
21 purchase towels from Target.com and instead purchased them, along with several other
22 items, at one of Target’s retail stores. (Paradis Decl., Ex. G (Sexton Decl.) ¶ 33.) Mr. Sexton
23 further reported that he was unable to access the local weekly advertisement on Target.com.
24 (*Id.* ¶ 32.) However, personnel staffing Target’s 1-800 number and Target retail stores are
25

26 ⁴ For the same reasons, this problem cannot be solved by unilaterally narrowing the
27 class to “persons who have been denied access,” as the Court did in *Lieber*. Here, there is no
28 evidence that any such person exists. Moreover, there is no factual showing of how the
denial occurred or in what form it may have taken.

1 available to describe the contents of the weekly advertisement to those who inquire about it.
2 (Perry Decl. ¶ 6.) Mr. Sexton makes no mention of any effort to learn the contents of the
3 weekly advertisement by these other available means. Nor does he identify any problem he
4 encountered at a Target retail store that resulted from his inability to access the weekly
5 advertisement online.

6 Plaintiffs have likewise failed to submit any evidence that NFB or NFB California
7 has suffered any legally cognizable harm. Although Plaintiffs refer to “a drain in their
8 financial and administrative resources” of these organizations “resulting from Target’s
9 actions and inactions,” they point to no evidence. (Pls.’ Mot. at 20 n.75.) Similarly,
10 although NFB and NFB California also seek to sue on behalf of their members, Plaintiffs
11 have failed to identify a single member of either organization who has suffered any legally
12 cognizable harm.

13 Only one type of injury remains at issue in this case: whether the claimed
14 inaccessibility of Target.com impeded any individual’s enjoyment of the goods and services
15 offered in Target stores. Plaintiffs have failed to submit any evidence whatsoever that Mr.
16 Sexton, NFB, NFB California, or any members of NFB or NFB California suffered this
17 injury. Typicality has not been shown.

18 **B. The Putative Class Is Diverse**

19 Furthermore, the assertion that the named Plaintiffs’ claims are typical ignores the
20 diversity of Plaintiffs’ broadly defined class. Unlike Mr. Sexton, other putative class
21 members have succeeded in navigating and purchasing products from Target.com. (Kreeger
22 Decl., Exs. J-M (Decl. of Dawn Wilkinson; Decl. of Dave Wilkinson; Decl. of Suzanne
23 Tritten, Decl. of Chris Polk).) In December 2006, an NFB spokesman reported that the
24 Target.com had undergone “some rather drastic improvements and was now in fact “usable
25 by a blind person.” (Kreeger Decl., Ex. H (Email).)

26 Putative class members have had different levels of success in using Target.com as a
27 result of a multitude of factors. These include: the class members’ skill level and experience
28 using the internet; whether assistive technology was being used, and if so, which kind; which

1 version of software was being used; which functions were enabled or disabled during the
2 visit; which feature of the website was the class member attempting to use; and when did the
3 class member visit the website. Moreover, the reason why each putative class member
4 attempted to access Target.com affects the validity of each claim. One putative class
5 member may have attempted to access Target.com in order to learn more about a product
6 available at a Target retail store. Another may have attempted to access Target.com in order
7 to learn about a product available at Target.com, but not available at Target's retail stores. A
8 third may have attempted to access Target.com as an experiment for this litigation, with no
9 interest in the goods and services provided by the website or the retail stores. Given the
10 breadth of the putative class and the undeniable diversity of its members, the named
11 Plaintiffs' claims (or lack thereof) cannot fairly be characterized as "typical."

12 **III. PLAINTIFFS CANNOT ADEQUATELY PROTECT THE INTERESTS** 13 **OF THE CLASS**

14 Rule 23(a) requires Plaintiffs to show that the class representatives "fairly and
15 adequately protect the interests of the class." Fed. R. Civ. P. 23(a). As explained above,
16 Plaintiffs have failed to submit any evidence that Mr. Sexton, NFB, NFB California, or any
17 members of NFB or NFB California suffered a legally cognizable injury. Because of this,
18 the named Plaintiffs cannot be relied upon to protect the interest of absent class members,
19 particularly those who may have actually been injured. *See Amchem Prods., Inc. v. Windsor*,
20 521 U.S. 591, 625 (1997) (explaining that the adequacy requirement "serves to uncover
21 conflicts of interest between the named parties and the class they seek to represent" and class
22 representatives must therefore "be part of the class and 'possess the same interest and suffer
23 the same injury' as the class members"). Plaintiffs have failed to show that the named
24 Plaintiffs will adequately protect the interests of the class.

25 **IV. NUMEROSITY HAS NOT BEEN ESTABLISHED**

26 Another essential prerequisite of a class action is that "the class is so numerous that
27 joinder of all members is impracticable." Fed. R. Civ. P. 23(a). Plaintiffs have not
28 demonstrated that this prerequisite has been satisfied.

1 Plaintiffs make no effort to show that there is a significant number of individuals
2 whose enjoyment of goods and services at Target's retail stores has been impeded by
3 problems with the Target.com website. Indeed, plaintiffs have not offered *a single*
4 *declaration* from any individual who meets this standard. Plaintiffs knew this was a
5 problem. Internal documents from the NFB indicate that the plaintiffs believed they needed
6 thirty declarations to show numerosity. (Kreeger Decl., Ex. N (Deposition of Marc Maurer
7 ("Maurer Dep.") Ex. 2).) The NFB posted multiple pleas to an internet "listserv" seeking
8 putative class members. The first listserv posting asked for individuals who had experienced
9 problems with Target.com. (Kreeger Decl., Ex. O (Maurer Dep. Ex. 1).) When that did not
10 generate enough responses, NFB posted a second plea, this time asking visually impaired
11 individuals to go visit Target.com and report back about the problems they found. (Kreeger
12 Decl., Ex. N (Maurer Dep. Ex. 2).) In addition, to an audience of an estimated 1500 at a
13 national meeting of the National Federation of the Blind, an announcement was made
14 encouraging putative class members to speak with the assembled counsel about their
15 experiences with the website. (Kreeger Decl., Ex. P (Maurer Dep. 15:1-15, 33:17-34:2).)
16 Despite these efforts, Plaintiffs only found fourteen new declarants, none of whom has
17 testified to encountering problems with the website that impeded enjoyment of the goods and
18 services of Target physical stores.

19 Having failed to locate anyone with a legally cognizable claim, Plaintiffs attempt to
20 satisfy the numerosity requirement of Rule 23(a) by relying on a broad class definition. They
21 point to statistics regarding the number of disabled persons in the United States, the number
22 of blind persons in the United States, and the number of disabled persons in California, and
23 then conclude that there can be "no serious dispute" that the numerosity requirement has
24 been satisfied. (Pls.' Mot. at 15.)

25 Even this analysis skips numerous critical steps. Plaintiffs have presented no
26 evidence regarding the number of blind individuals in the United States or in California who
27 use the internet. Plaintiffs merely report that a "substantial portion of those blind people use
28 screen access software, such as screen readers and screen enlargement software," basing this

1 on the vague conclusion of an NFB declarant that “the use by the blind of screen access
2 software has become widespread.” (Pls.’ Mot. at 15 (citing Taylor Decl. ¶ 8).)⁵ Beyond this,
3 Plaintiffs make no effort whatsoever to show that the number of blind individuals in the
4 United States and in California who have attempted to access the single website here at issue,
5 Target.com, is sufficient. Even if Plaintiffs’ vastly overbroad class definition were accepted,
6 their evidentiary showing fails.

7 Again, this case is very different from *Lieber*. There, the plaintiffs were able to
8 demonstrate the number of individuals who used wheelchairs. The fact that disabled
9 shoppers use commercial stores was confirmed by express statutory requirements that
10 commercial stores be made physically accessible. In this case, however, there is no similar
11 statutory prescription concerning websites, supported by congressional findings. Thus, based
12 on the current record, the Court is simply being asked to presume that numerous blind people
13 use the internet, and to presume that more than a handful of blind internet users have ever
14 tried to shop at Target.com. There is simply no factual basis in the record to support either
15 presumption.

16 The fact remains that Plaintiffs have not located a single putative class member with a
17 claim that can survive this Court’s ruling on the motion to dismiss. For purposes of Rule
18 23(a), numerosity has not been shown.

19 **V. PLAINTIFFS’ DAMAGES SUBCLASS CANNOT BE CERTIFIED**
20 **UNDER RULE 23(B)(2)**

21 Even if the Court were to determine that certification for injunctive and declaratory
22 relief under Rule 23(b)(2) is warranted, the Court should not certify the proposed damages
23 subclass.

24
25
26 ⁵ The conclusion by Ms. Taylor that “the use by the blind of screen access software
27 has become widespread” is apparently based on the number of telephonic inquiries received
28 by the International Braille and Technology Center and the number of individuals trained to
teach others the use of screen access software. (Paradis Decl., Ex. F, (Taylor Decl.) ¶ 8.)

1 **A. NFB and NFB California Lack Standing**
2 **to Assert Claims for Damages**

3 The Supreme Court has set forth the three requirements for an association to have
4 standing to sue on behalf of its members: “(a) its members would otherwise have standing to
5 sue in their own right; (b) the interests it seeks to protect are germane to the organization’s
6 purpose; and (c) *neither the claim asserted nor the relief requested requires the participation*
7 *of individual members in the lawsuit.”* *Hunt v. Washington State Apple Adver. Comm’n*, 432
8 U.S. 333, 343 (1977) (emphasis added). As many courts have held, individual members
9 must participate in a damages claim. Thus, associations have not been permitted to pursue
10 claims for damages on behalf their members. *See Warth v. Seldin*, 422 U.S. 490, 515-516
11 (1975); *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (“We know of no
12 Supreme Court or federal court of appeals ruling that an association has standing to pursue
13 damages on behalf of its members.”); *Alaska Fish & Wildlife Fed. & Outdoor Council,*
14 *Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) (holding that an association had standing to
15 bring a suit on behalf of its members because it was seeking “declaratory and prospective
16 relief rather than money damages, [and therefore] its members need not participate directly in
17 the litigation”). This rule applies with equal force when an association brings a class action
18 lawsuit on behalf of its members. *See, e.g., Bano*, 361 F.3d at 715.

19 The law on this point is clear. Neither NFB nor NFB California has standing to assert
20 a claim for damages on behalf of its members in this action. Certification of a damages
21 subclass represented by NFB and NFB California would be improper.⁶

22 **B. Damages Are the Predominant Form of Relief Sought by the**
23 **California Subclass**

24 Claims for damages may be certified under Rule 23(b)(2) only when they do not
25 predominate. *Molski v. Gleich*, 318 F.3d 937, 949 (9th Cir. 2003). The ADA does not

26 _____
27 ⁶ If the Court grants Target’s Motion for Summary Judgment as to Mr. Sexton,
28 concurrently filed with this opposition, NFB and NFB California will be the only class
representatives remaining in this action.

1 provide for damages for the violations alleged in this case. *See* 42 U.S.C. § 12188. Damages
2 are only available for Plaintiffs' state law claims. *See* Cal. Civ. Code §§ 52, 54.3. Plaintiffs
3 ask the Court to certify under Rule 23(b)(2) a separate subclass defined as "all legally blind
4 individuals in California who have attempted to access Target.com." Damages are the very
5 *raison d'être* of this subclass.

6 Plaintiffs nevertheless insist that "declaratory and injunctive relief is the primary form
7 of relief sought by the class here," and Plaintiffs' "primary objective in filing this lawsuit was
8 to ensure that Target.com be made accessible to the blind." (Pls.' Mot. at 24-25.) An NFB
9 spokesman has admitted, however, that "drastic improvements" have been made to
10 Target.com, making the website "usable by a blind person." (Kreeger Decl, Ex. E (Email).)
11 NFB's admission that the website is "usable by a blind person" demonstrates that Plaintiffs
12 are now predominantly seeking damages. As this Court observed in *Lieber*, "the fact is that
13 the parties have resolved the majority of issues which would require injunctive relief and at
14 this point in the litigation, plaintiffs are in fact primarily seeking money damages – which
15 makes class certification under 23(b)(2) inappropriate." (Paradis Decl., Ex. R. (Order, Dec.
16 18, 2000) at 5.)

17 **C. The Calculation of Statutory Damages Would Require Complex,**
18 **Individualized Inquiries**

19 As a matter of case management, the damages claims will predominate due to the
20 complicated individualized inquiries required to determine whether each class member is
21 eligible for statutory damages. For this reason, too, certification of the proposed subclass
22 under Rule 23(b)(2) is improper. *See Molski*, 318 F.3d at 949; *Arnold v. United Artists*
23 *Theater Circuit, Inc.*, 158 F.R.D. 439, 451 (N.D. Cal. 1994) ("The hallmark of the (b)(2)
24 action is homogeneity.") As in *Lieber v. Macy's California*, Plaintiffs' request for damages
25 in this case is "not nearly so straightforward as they blithely assert." (Paradis Decl., Ex. R
26 (Order, Dec. 18, 2000) at 5.)

27 Plaintiffs are not currently seeking certification under Rule 23(b)(3). Plaintiffs
28 contend that their claims for statutory damages under state law on behalf of the proposed

1 California subclass “will flow directly from the Court’s liability determination with respect to
2 injunctive and declaratory relief.” (Pls.’ Mot. at 13.) They assert that “if the Court
3 determines that the common barriers on Target.com resulted in a website that has not
4 comported with applicable law, the amount of damages for each class member would be
5 determined by a mathematical calculation, without any need to re-litigate any of the more
6 complex and time consuming issues going to liability and equitable relief.” (*Id.*) Plaintiffs
7 are mistaken.

8 If, however, the Court were to certify the proposed class and later find for the
9 Plaintiffs on liability, determining eligibility for statutory damages would be an arduous
10 affair. Because Plaintiffs’ class definition is so vast, the putative class would necessarily
11 contain individuals who have suffered no legally cognizable harm and are entitled to no
12 relief. The Court would need to make belated liability determinations as to each and every
13 individual class member: What was the purpose of their visit to the website? Did it involve
14 seeking to enjoy goods and services offered in Target’s retail stores? When was the attempt
15 made? Was the attempt made with assistive technology? If it was software, what type?
16 What were the settings within the program (e.g., was “JavaScript” enabled)? What was the
17 program proficiency level of the class member? What was the result of their visit to the
18 website? If they claim to have been denied a good or service via the website, could the class
19 member have obtained such good or service by visiting a Target retail store? Or, could the
20 class member have obtained such good or service from an alternative source, such as
21 utilizing the Target.com 1-800 number? This is but a glimpse of the numerous
22 individualized inquiries that would be necessary to begin to sort out which class members
23 might be eligible for statutory damages.⁷

24
25 ⁷ The claims in the instant case resemble the “access to merchandise” damages claims
26 in *Lieber*, which this Court found could not be certified under either Rule 23(b)(2) or Rule
27 23(b)(3). (Paradis Decl., Ex. R (Order at 4-8, Dec. 18, 2000).) Here, as in *Lieber*, “statutory
28 damages could not be granted automatically,” but rather “would require . . . individualized
showing[s].” (*Id.* at 8.) As in *Lieber*, “[t]he need for separate inquiries as to these claims
makes the class structure inappropriate.” (*Id.*)

1 Plaintiffs attempt to sweep these problems under the rug by suggesting that
2 bifurcation will somehow obviate the need for the individualized determinations required by
3 the substantive law under which they seek damages. Under Plaintiffs' proposal, Plaintiffs
4 would never have to prove that anyone was unable to access Target.com or that a visit to the
5 website impeded anyone's enjoyment of particular goods and services offered in Target retail
6 stores. (*See* Order at 11, Sept. 6, 2006 .) In other words, every class members would simply
7 enjoy a presumption of liability.

8 Plaintiffs' proposal is manifestly unlawful. A Court cannot alter the burden of proof
9 and the elements required to prove a claim in order to facilitate administration of a class
10 action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 613, 620 (1997) (the principle
11 behind the Rules Enabling Act "that rules of procedure 'shall not abridge, enlarge or modify
12 any substantive right,'" applies without limitation to Rule 23). Plaintiffs' reliance on the
13 burden-shifting principles of *International Brotherhood of Teamsters v. United States*, 431
14 U.S. 324, 359 n. 45 (1977) is utterly misplaced. *Teamsters* is inapplicable here for the same
15 reasons cited by the Eleventh Circuit when it reversed the grant of a class certification
16 motion in *Rutstein v. Avis-Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1236-1240 (11th Cir. 2000).
17 First, the instant case is not an employment discrimination action. *See id.* at 1236-39
18 (explaining that the *Teamsters* rationale is uniquely suited to the context of employment
19 discrimination, where burden shifting principles have been authorized by *McDonnell-*
20 *Douglas Corp. v. Green*, 411 U.S. 792 (1973)). "Second, and more important, the relief to
21 which individual plaintiffs were entitled after a finding of a pattern or practice of
22 discrimination in *Teamsters* (and in all subsequent cases employing the *Teamsters* rationale)
23 was *equitable* in nature." *Rutstein*, 211 F.3d at 1239. Here, by contrast, Plaintiffs argue that
24 the *Teamsters* framework may be applied for purposes of proving damages. *Teamsters*
25 simply does not stand for this. Here, as in *Rutstein*, "[t]o establish that they are entitled to
26 compensation," individual class members would "have to prove that they actually suffered
27 some injury." *Id.* "The idea that individual injury could be settled on a class-wide basis is
28

1 preposterous.” *Id.* Bifurcation will not obviate the need for the individualized inquiries
2 required to seek damages.

3 **D. Plaintiffs Have Not Shown that the Rule 23(a) Prerequisites for**
4 **Certification Have Been Separately Satisfied for the Damages**
5 **Subclass**

6 Plaintiffs must show that the requirements of Rule 23(a) have been met for each
7 subclass to be certified. *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th
8 Cir. 1981). As explained above, Plaintiffs have not shown that the requirements of
9 numerosity, typicality, and adequacy of representation have been met even as to the national
10 class, much less the smaller California subclass. In the absence of a representative claim, no
11 class can be certified.

12 **VI. THE LIMITATIONS ON A REPLY BRIEF**

13 Certifying a class action is a significant act that has substantial consequences. This
14 Court will undoubtedly examine the evidentiary showing with care. *See General Tel. Co. v.*
15 *Falcon*, 457 U.S. 147, 161 (1982) (A class action “may only be certified if the trial court is
16 satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”).
17 The movants, as potential class representatives, have a serious burden to provide the Court
18 with a carefully crafted class definition and *evidence* that compels the conclusion that the
19 requirements of Rule 23 have been met. *See id.* at 160-161; *Ellis v. Costco Wholesale Corp.*,
20 No. C04-03341-MHP, ___ F.R.D. ___, 2007 WL 127800, at *4 (N.D. Cal. Jan. 11, 2007) . In
21 this case, however, Plaintiffs have simply “mailed in” their showing.

22 Plaintiffs’ predictable response will be to try to fix the critical issues in their reply.
23 Given that every declaration submitted to date was drafted by counsel (Kreeger Decl., Ex. J
24 (Maurer Dep. Ex. 2)), we can expect to see reply declarations trying to establish cognizable
25 injuries, and attempts by NFB to prove a financial drain on its resources.

26 The problem, however, as numerous courts have recognized, is that presenting new
27 factual declarations for the first time on reply will deny Target the opportunity to take
28 necessary discovery and respond. *See, e.g., Sweet v. Pfizer*, 232 F.R.D. 360, 364 n.7 (C.D.
Cal. 2005); *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 309 n.5 (N.D. Cal. 2005). Thus,

1 Plaintiffs' evidentiary failure should be deemed fatal to this motion without regard to any
2 "new" facts Plaintiffs may offer for the first time in reply.

3 **VII. THE CERTIFICATION DECISION MAY BE DEFERRED UNTIL**
4 **AFTER A TEST CASE**

5 For the reasons set forth herein, the proposed class should not be certified. If,
6 however, the Court is concerned that there may actually be a class lurking here somewhere, it
7 should defer the decision regarding certification until after one or more test cases has been
8 tried. As Plaintiffs themselves have admitted, the questions raised on the merits in this
9 litigation are "novel." (Plaintiffs' Motion for Bifurcation of Issues at Trial at 3, Feb. 1,
10 2007.) As a matter of case management, therefore, it is difficult to envision how exactly a
11 trial in this case would proceed. Trial of one or more test cases would give the Court a much
12 clearer idea as to the nature of the claims, the typicality of the claims, and the manner in
13 which this litigation might be best administered. *See Katz v. Carte Blanche Corp.*, 496 F.2d
14 747 (3d Cir. 1974) (deferring decision on class certification until after liability is determined
15 using a test case); *Broadcast Music, Inc. v. Moor-Law, Inc.*, No. 77-325, 1980 WL 1986 (D.
16 Del. Oct. 17, 1980) (same); *Corum v. Fifth Third Bank of Kentucky, Inc.*, No. Civ. A.
17 3:99CV-268-H, 2004 WL 594996 (W.D. Ky. Mar. 3, 2004) (discussing benefits of trying test
18 case before deciding issue of class certification); 3 *Newberg on Class Actions* § 9.8 (4th ed.)
19 (discussing availability of pilot and test cases as a case management option).

20 Having tried one or more test cases, the Court could make a more informed decision
21 as to whether a class action is superior to other methods of adjudication, or whether the
22 diversity of claims renders class certification improper. *See Sweet*, 232 F.R.D. at 374
23 ("[C]ourts have held that even though Rule 23(b)(2), unlike Rule 23(b)(3), does not
24 specifically contain predominance and superiority requirements, a class under Rule 23(b)(2)
25 must not be overrun with individual issues."). The court might conclude at that time that the
26 dictates of Rule 23 cannot be satisfied in light of the need for individualized inquiries, such
27 as each class member's skill and experience level, whether assistive technology was used
28 (and if so, what kind), which software functions were enabled during the website visit, what

1 website functions the class member was trying to use, and when and for what reason the class
2 member visited the website. Or, the Court might ultimately decide to proceed with class
3 certification, in which case it would have the benefit of greater insight as to how the class
4 might best be defined.

5 Instead of granting Plaintiffs' class certification motion in the face of significant
6 uncertainty, the Court should force Plaintiffs to make some showing of the kind of alleged
7 injury that they are seeking to redress.

8 **CONCLUSION**

9 For the foregoing reasons, Plaintiffs' motion for class certification should be denied.

10
11 Dated: March 8, 2007

HAROLD J. McELHINNY
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