UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, ***et al.,*** Plaintiffs, *v.* **E*TRADE ACCESS, INC., *et al.,*** Defendants.	**CASE NO. 03 11206 MEL**

MEMORANDUM IN SUPPORT OF DEFENDANTS' RULE 12(b)(7) MOTION TO JOIN NECESSARY PARTIES

E*TRADE ACCESS, INC. and
E*TRADE BANK,
By their attorneys,

Joseph L. Kociubes BBO # 276360
Jenny K. Cooper BBO # 646860
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Douglas P. Lobel
David A. Vogel
ARNOLD & PORTER LLP
1600 Tysons Boulevard
Suite 900
McLean, Virginia 22102
(703) 720-7000

Dated: April 16, 2004

TABLE OF CONTENTS

INTRODUCTION

This lawsuit contends that certain automated teller machines ("ATMs") are inaccessible to blind persons in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181 *et seq*. Plaintiffs seek an injunction requiring Defendants to physically change or retrofit over 11,000 Merchant-owned ATMs nationwide that Plaintiffs admit Defendants ***do not own, and that are located on the property of third parties.*** Plaintiffs want Defendants ordered to add ports and install computerized voice instructions to ATMs owned by these independent merchants so that consumers may use headsets to operate the ATMs. In some instances, where the ATMs cannot be retrofitted, Plaintiffs seek to have Defendants replace older Merchant-Owned ATMs with newer upgraded machines. Despite the obvious impact to the merchants' property, the Plaintiffs have included none of the merchants as defendants in this lawsuit, not even those located in Massachusetts.

This lawsuit should not proceed until Plaintiffs join the merchants as necessary parties pursuant to Fed. R. Civ. P. 19(a). By law and contract, the merchants' interests are ***directly*** affected by this lawsuit. The injunctive relief Plaintiffs seek will physically alter the merchants' property, and will directly affect their property interests. While E*TRADE's interests in the Merchant-Owned ATMs are established by its contracts with the merchants, none of these contracts place on E*TRADE the obligation to ensure the Merchant-Owned ATMs comply with the ADA. Rather:

- The merchants have full responsibility for any upgrades to or replacement of the ATMs to make them compliant with the ADA;
- E*TRADE has no right under the contracts to upgrade or replace the Merchant-Owned ATMs to make them compliant with the ADA; and

- Any upgrades "required by law or regulations" are deemed "additional services" under the contracts, which the merchants must separately request from E*TRADE and for which the merchants must reimburse E*TRADE.

The merchants' property and contract interests in this lawsuit satisfy each of the three independent grounds under Rule 19(a), any one of which ***requires*** that the Plaintiffs add the merchants to this lawsuit. ***First***, the proposed injunction would directly impair the merchants' property rights in their ATMs. ***Second***, the proposed injunction, if granted, could not afford "complete relief;" the merchants could undermine the injunction, for example, by refusing to cooperate or by denying E*TRADE access to the premises, thereby impairing E*TRADE's ability to perform any injunction. ***Third***, the proposed injunction would undoubtedly spawn subsequent litigation between E*TRADE and the merchants on numerous issues. Rule 19(a) is not discretionary; because the merchants meet the requirements in Rule 19(a), this lawsuit cannot proceed unless the Plaintiff adds them as parties. *Pujol v. Shearson American Express, Inc.*, 877 F.2d 132, 134 (1st Cir. 1989).

A 2003 case from this District entirely supports E*TRADE's Motion. In *Frotton v. Barkan*, 219 F.R.D. 31 (D. Mass. 2003), the plaintiff sued a shopping mall owner under the ADA, alleging that certain mall stores were inaccessible to disabled persons. This Court held that even though the mall owner might be liable for the alleged inaccessibility, the merchants were necessary parties and Rule 19(a) ***required*** that they be added to the lawsuit. The merchants "***surely have an interest*** in the question of whether the barriers violate the ADA" and the merchants' contracts with the mall owner at a minimum created a dispute as to who was responsible for the retrofits. Rule 19(a) *Id.* at 32. The analysis and conclusion of *Frotton* is substantively indistinguishable from this lawsuit, or dismiss the lawsuit if they do not.

For these reasons, the Court should order the Plaintiffs to file and serve an amended complaint naming as co-defendants all the merchants that own ATMs implicated in this lawsuit, or dismiss the lawsuit if they do not.

BACKGROUND

E*TRADE supports its factual predicate with a declaration from the President of E*TRADE Access, Inc., Dale Dentlinger. *See* Exhibit 1 hereto.

I. NON-PARTY MERCHANTS OWN TITLE TO THE AUTOMATED TELLER MACHINES AT ISSUE[1]

The lawsuit concerns over 11,000 Merchant-owned ATMs located throughout the 50 states and the District of Columbia. Approximately 700 of these ATMs are located in Massachusetts. Dentlinger Decl. ¶ 5. These ATMs are located in retail establishments such as convenience stores, gas stations and grocery stores, generally called "merchants." Dentlinger Decl. ¶ 5. The Plaintiffs' allege that the Merchant-Owned ATMs are not accessible to blind people and therefore do not comply with the accessibility requirements of the Americans with Disabilities Act ("ADA"), Complaint ¶ 1, *citing* 42 U.S.C. §§ 12182–12183.

This Court has acknowledged in its March 29, 2004 Order that E*TRADE does ***not*** hold title to the Merchant-Owned ATMs at issue. Rather, those ATMs are "***owned . . . by third-party merchants***." *See* March 29, 2004 Order, p. 3.[2]

---

[1] There are a number of other ATMs for which Access holds title to, but those ATMs are not at issue in the case. *See* March 29, 2004 Order at 3 ("The present lawsuit concerns the Merchant-Owned ATMs.").

[2] Plaintiffs freely admit that the merchants, not E*TRADE, hold legal title to ATMs. For example, Plaintiff Commonwealth of Massachusetts admits in its responses to E*TRADE's discovery that "merchants . . . own the ATMs at issue." Commonwealth's Responses to Defendant E*TRADE Access, Inc.'s First Set of Interrogatories to Plaintiff Commonwealth of Massachusetts, Response to Interrogatory No. 11, attached hereto as Exhibit 2.

II. E*TRADE'S RIGHTS REGARDING THE ATMS ARE DEFINED IN CONTRACTS WITH THE MERCHANTS

Plaintiffs' basis for asserting E*TRADE Access is liable under the ADA is that, by entering into ***contracts*** with the merchants that own the ATMs, E*TRADE has thereby allegedly become an "operator" of the ATMs. *Id.*; *see also* Complaint ¶¶ 16, 33, *citing* 42 U.S.C. § 12182(a).

These contracts fall into two broad categories. Under "Site License Agreements" ("SLAs"), merchants acquire from E*TRADE (1) the right to use E*TRADE's service marks and logos on the ATMs, and (2) data processing services, in which ATMs exchange electronic data over dedicated telephone lines with E*TRADE during each transaction. Dentlinger Decl. ¶ 7. In addition to the SLAs, merchants can choose to enter Equipment Maintenance Agreements ("EMAs") with E*TRADE, in which the merchants can acquire repair and maintenance services for the ATMs for prepaid monthly charges. *Id.* ¶ 8.

The SLAs provide that ***each merchant***, not E*TRADE, has the ultimate obligation to ensure that an ATM complies with the ADA's accessibility requirements. E*TRADE has used standard form SLAs, which vary slightly from time to time and from which E*TRADE has modified for a subset of the merchants, but the language applicable to this lawsuit is identical in all of the contracts. *See id.* ¶ 10. The SLAs in use since October 2000 -- which represent the vast majority of E*TRADE's current contracts with merchants -- expressly disclaim E*TRADE's liability for any ADA violations:

> Company [E*TRADE] shall in no event be responsible . . . for failure to comply with the Americans with Disabilities Act or any similar law.

Dentlinger Decl. ¶ 11.[3] Many of the SLAs go on to state expressly what the foregoing disclaimer implies, namely that because E*TRADE is not liable, the merchant is potentially liable:

> Location [merchant] will be solely responsible for ensuring that its ATMs and the surrounding area comply with the Americans with Disabilities Act or any similar law.

Id. ¶ 12.

The contracts do not give E*TRADE the unilateral right to change or replace an ATM at E*TRADE's discretion due to an alleged violation of the ADA. *Id.* ¶ 15. To the contrary, through EMAs the merchants have the option to purchase repair and maintenance services from E*TRADE. These services ***do not include*** upgrades or replacements of ATMs regarding compliance with the ADA. Instead, any upgrades "required by law or regulations" are deemed "additional services" under the EMAs which the merchants must separately request from E*TRADE, and for which the merchants must reimburse E*TRADE. *See id.* ¶ 13. Therefore, any changes to the ATMs to implement the capabilities Plaintiffs seek in this lawsuit will ultimately be the legal, contractual and financial obligation of the merchants.

III. PLAINTIFFS SEEK AN INJUNCTION REQUIRING E*TRADE TO MODIFY THE ATMS SO THAT THEY ARE ACCESSIBLE

Plaintiffs' lawsuit demands an injunction requiring the Court to order E*TRADE to modify all the ATMs in its nationwide network to make them accessible to blind people. Complaint ¶ 1. Specifically, Plaintiffs request "voice enabled" technology (commonly called

---

[3] Notwithstanding that some of the older SLAs vary in language, and some of the SLAs permit Access to enter the merchant's premises to perform standard maintenance and repair, ***none*** of the SLAs give Access the right to enter a merchants' premises to upgrade or replace Merchant-Owned ATMs to cure an ADA violation, and ***none*** state that E*TRADE will be liable for the failure of a Merchant-Owned ATM to comply with the ADA or similar laws. Dentlinger Decl. ¶¶ 14 & 15.

"talking ATMs"), which allows a blind person to plug earphones into a port on the ATM so that its pre-programmed audio instructions can walk the blind customer through a transaction. Complaint ¶ 27.

To retrofit an ATM with voice-enabled technology, the Merchant-Owned ATMs must be physically altered. This would require, among other things: opening the ATM; drilling one or more holes on the face of the ATM; installing the "ports" for headsets; wiring the ports to the electrical system within the ATM; wiring the ports to the computer system in the ATM; and changing the computer programming in the ATM. Dentlinger Decl. ¶ 17.

In addition, some ATMs will need to be replaced entirely. Older models of ATMs simply do not have the electrical and/or computer systems that would permit a port to be added; thus, the only way to make these ATMs "voice enabled" is to replace them with entirely new and more modern ATMs. Dentlinger Decl. ¶ 18.

Replacing an ATM is no simple matter. For security reasons, ATMs -- which can contain up to $5,000-$10,000 in their cash vault -- are typically physically embedded in walls or floors so that they cannot be easily removed. Thus, old ATMs would have to be detached (usually at some effort) from the walls or floor, and new ATMs, which vary significantly in size depending on the model employed, physically installed in their place. Furthermore, ATMs are hard-wired into a stores' electrical system and telephone lines; thus replacing ATMs may well require significant rewiring of a merchants' electrical or telephone lines. Dentlinger Decl. ¶ 20.

ARGUMENT

Rule 19 requires the Court to join "necessary parties" to the lawsuit, or to dismiss the lawsuit if these parties are not or cannot be joined. Rule 19(a) identifies three independent

grounds which establish whether a non-party to a lawsuit is a "necessary party" which must be joined to the lawsuit:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if:
>
> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> (i) as a practical matter impair or impede the person's ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). The Rule is not discretionary; ***if a party meets any one of these three factors***, the party ***must*** be joined to the lawsuit. *Pujol,* 877 F.2d at 134. Each factor must be examined "pragmatically," given the "context of the particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12 & 118 (1968).

Here, an evaluation of any one of the three factors above requires Plaintiffs to join the merchants as parties. Because the merchants that own the ATMs are "necessary parties" under Rule 19(a), the Court should order the Plaintiffs to file an amended complaint naming the merchants as co-defendants. *Cf. Frotton*, 219 F.R.D. at 32 (D. Mass. 2003) (granting motion under Rule 19(a), ordering plaintiffs to amend complaint); *Lambergs v. Total Health Sys., Inc.*,

No. 88-0670-Z, 1989 WL 63243, at *3 (D. Mass. June 5, 1989) (setting deadline for plaintiffs to amend complaint to join necessary parties or else case would be dismissed).[4]

I. THE MERCHANTS' OWNERSHIP INTERESTS AND CONTRACTS WITH E*TRADE REQUIRE THEIR PRESENCE IN THE LAWSUIT

The Plaintiffs seek an injunction ordering E*TRADE to make physical changes to, or to even replace, Merchant-Owned ATMs, for which the merchants are solely responsible for ADA compliance. Under these circumstances, the merchants are "necessary parties" under Rule 19(a)(2)(i).

The injunctive relief the Plaintiffs seek unquestionably "impairs" or "impedes" the merchants' rights (1) as the owners of the ATMs and, (2) as the owner of the stores in which the ATMs are located. Because the merchants own or lease this physical property, their property rights will be potentially impaired by the physical changes to their ATMs that would be required under any injunction. Moreover, the merchants' business operations will be potentially disrupted and impaired.

Under their contracts with E*TRADE, the merchants are solely responsible for ATM retrofits. The SLAs state that E*TRADE is not liable for any noncompliance with the ADA, and the EMAs require the merchants to request and pay for any "upgrades" to the ATMs "required by law."

A District of Massachusetts court decided a remarkably similar case under the ADA late last year. In *Frotton*, 219 F.R.D. at 31, a plaintiff sued a shopping mall owner (but not

---

[4] If any necessary party is not subject to service of process in this Court, the Court should dismiss claims affecting that party. Fed. R. Civ. P. 19(b); *see, e.g., Tell v. Trustees of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998) (dismissing action where court could not join necessary parties).

the merchants) under the ADA for the alleged inaccessibility of three retail stores in the mall. The mall owner argued that the three merchants were necessary parties because the relief the plaintiff sought (retrofitting the store access) would impair the merchants' property interests. There, like here, the mall owners' contracts with the merchants imposed responsibility for the retrofits on the merchants. *Id.* at 32. The Court held that because the merchants had a property interest affected by the case, ***both parties to the contract were required to be defendants in the lawsuit***:

> Plaintiffs complain of barriers within these three retail establishments; while it remains to be seen whether, as a matter of contract, they or [defendant] have control over these alleged barriers, the three retail merchants ***surely have an interest*** in the question of whether the barriers violate the ADA . . .

Id. at 32 (emphasis added).

Here, even if E*TRADE were subject to the ADA as an "operator" of the ATMs, the merchants are unquestionably subject to the ADA as "owners" of the ATMs, *see* 42 U.S.C. § 12182(a) ("owners" of place of public accommodation responsible for accessibility), and the merchants (in their contracts with E*TRADE) have retained their right to make and pay for ADA modifications. For the exact same reasons that both sides to the contracts in *Frotton* were necessary to resolve that ADA dispute, the merchants are necessary parties to this lawsuit.

The result in *Frotton* is but one example of many in which courts do not permit lawsuits affecting property owners' interests to proceed without joining the property owners. *Maritimes & NE Pipeline, LLC v. 16.66 Acres of Land, More or Less, In The City of Brewer & Towns of Eddington & Bradley, County of Penobscot, State of Me.*, 190 F.R.D. 15, 19 (D. Me. 1999) (landowners were necessary parties to action for easement condemnation); *Giambelluca v. Dravo Basic Mat'l Co., Inc.*, 131 F.R.D. 475, 477 (E.D. La. 1990) (owner of property was

necessary in action to prevent lessee's trucks from driving on property: "This proceeding to enjoin [defendant], absent [the owners'] participation, would deprive him of the opportunity to protect his interest in generating revenue via the road of which he is a part owner"); *National Coal Ass'n v. Clark*, 603 F. Supp. 668, 672 (D.D.C. 1984) (in suit concerning use of land for coal production, defendant with "fee interest" in land was necessary because "disposition of these actions in favor of the plaintiffs would impede [the partys'] ability to defend its fee interest in the land"); *Morelli v. Morelli*, No. C2-00-988, 2001 WL 1681119, at *4 (S.D. Ohio Sept. 27, 2001) (owner of five properties was necessary to action for equitable title; lawsuits had "potential to deprive the [owner] of its property without affording it an opportunity to assert its claim to the property").

Plaintiffs cannot escape the ramifications of the relief they seek. This is not a garden-variety issue of indemnification or joint liability, although even that could be enough to justify joinder. *Cf. H.D. Corp. of P.R. v. Ford Motor Co.*, 791 F.2d 987, 993 (1st Cir. 1986) (ordering joinder of absent party that was jointly and severally liable with defendant; "highly impractical" to require separate lawsuit between defendant and absent party). As the cases above demonstrate, the lawsuit raises significant practical considerations because the Plaintiffs desire injunctive relief to change or replace ATMs owned by the merchants. To obtain that relief, the merchants are necessary parties by operation of Rule 19(a)(2)(i).

II. THE PLAINTIFFS CANNOT OBTAIN COMPLETE RELIEF WITHOUT THE MERCHANTS BEING MADE PARTIES TO THIS LAWSUIT

Completely separate from the foregoing analysis, the merchants are also necessary parties under Rule 19(a)(1) because the Plaintiffs cannot obtain ***complete*** relief

without the merchants being joined to this lawsuit.[5]

An injunction directed solely at E*TRADE would be incomplete because the merchants, as the ATM owners and parties contracting with E*TRADE, could avoid the injunction by refusing to let E*TRADE make changes to or replace the ATMs. E*TRADE's rights to take any action with respect to the ATMs are defined solely by the contracts between E*TRADE and the merchants. The non-party merchants would not be bound by the proposed injunction. Merchants could easily avoid the effect of this Court's injunction simply by terminating E*TRADE's contract and using one of E*TRADE's competitors for the data processing services that E*TRADE currently provides. Lacking any further contractual right to retrofit the merchants' ATMs, the injunction against E*TRADE loses all viability — the ATMs would continue to operate without the accessibility changes the Plaintiffs seek. The possibility that the merchants could avoid the Court's order makes the merchants necessary parties under Rule 19(a)(1).

Plaintiffs cannot avoid the practical reality that if the merchants are not parties to this lawsuit, the merchant owners are not bound by any judgment or injunction. *Flynn v. Hubbard*, 782 F.2d 1084, 1089 n.2 (1st Cir. 1986) ("It is black letter law that those not a party to an action are not bound by an adverse judgment against the named defendant."); *Lopez v.*

---

[5] Relief is "incomplete" if an absent third party has rights or interests that, left unresolved by the lawsuit, put the plaintiff in no better position than when the lawsuit started. *E.g., Cross Timbers Oil Co. v. Rosel Energy, Inc.*, 167 F.R.D. 457 (D. Kan. 1996) (relief would not be complete because plaintiff could not get full resolution of dispute concerning subsurface oil rights without joining all owners of the property); *Shell Western E&P Inc. v. DuPont*, 152 F.R.D. 82 (M.D. La. 1993) (action for declaration concerning mineral lease rights would be incomplete because it would not be binding on absent co-owners of property).

Arraras, 606 F.2d 347, 352 (1st Cir. 1979) ("It is elementary that only those who are parties to a suit will be bound by the court's judgment."). In particular, injunctions only bind those that are parties to a lawsuit. *Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 436 (1934) (court cannot enjoin person not a party to the suit); *United Pharmacal Corp., et al., v. United States*, 306 F.2d 515, 518 (1st Cir. 1962) (non-party cannot be held to violate an injunction, even if the non-party is doing exactly what the injunction prohibits).

Because injunctions are not binding on non-parties, courts repeatedly find that property owners are "necessary parties" to actions seeking injunctions concerning activities on -- or changes to -- their property. *E.g., Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1014-15 (3d Cir. 1987) (in action seeking to prohibit lessee of a factory from shutting down operations, owner of factory was necessary party because owner "could readily undermine" any injunction by replacing defendant with another lessee); *Jaguar Cars Ltd. v. Manufactures Des Montres Jaguar, S.A.*, 196 F.R.D. 306, 309 (E.D. Mich. 2000) (in action to enjoin distributor from importing watches bearing trademark similar to plaintiff's mark, the absent owner of the watches was a necessary party because there was "nothing to prevent [the owner of the watches] from utilizing another distributor"); *Giambelluca*, 131 F.R.D. at 479 (in action to enjoin lessee gravel company from driving its large trucks over property contiguous to the plaintiff's land, absent property owner was a necessary party because owner could avoid injunction by hiring another company to replace defendant).

No relief the Court could fashion without the merchants as parties can solve this problem, which makes the merchants necessary parties under Rule 19(a)(1). E*TRADE does not have the right under either the SLAs or the EMAs to make any changes to the Merchant-owned ATMs.

III. E*TRADE COULD BE SUBJECTED TO INCONSISTENT OBLIGATIONS BETWEEN THE PLAINTIFFS AND THE MERCHANTS

Finally, if the merchants are not defendants in this lawsuit, E*TRADE could well face inconsistent obligations and piecemeal litigation is unavoidable. This alone is a reason to find the merchants are necessary parties under Rule 19(a)(2)(ii).

For example, in *Klein v. Marriott Int'l, Inc.*, 34 F. Supp. 2d 176 (S.D.N.Y. 1999), the court held that the owner of a hotel property was a necessary party in a tort action against a hotel operator concerning alleged personal injury at the hotel. The named defendant/hotel operator had a "significant interest in avoiding multiple litigation and inconsistent judgments with respect to the events at issue." *See also Shell Western E&P*, 152 F.R.D. at 85 (court was "even more concerned with the substantial risk of exposing the present parties to inconsistent obligations from the disposal of this matter without the joinder of the absent co-owners"); *Morelli*, 2001 WL 1681119 (in action for equitable title to five properties, absence of properties' co-owner presented possibility of inconsistent obligations between defendant and absent party).

Any injunction requiring E*TRADE to retrofit or replace ATMs puts E*TRADE squarely between its obligations to this Court and to the merchants. Merchants that object to E*TRADE's compliance with the injunction could institute separate actions against E*TRADE, arguing that (1) this injunction was improperly granted, (2) that E*TRADE's retrofit or replacement of an ATM constitutes a breach of E*TRADE's contract with the merchants, or (3) that the ADA does not require them to upgrade their ATMs because doing so would impose a substantial burden on them. If any merchants were to prevail, E*TRADE would face mutually exclusive obligations; the Court should require the merchants to be joined to this lawsuit so that E*TRADE does not face this possibility.

Furthermore, either repairing or replacing all the Merchant-owned ATMs will be extremely expensive. E*TRADE's contracts with the merchants unequivocally state that the merchants must bear these costs; but for E*TRADE to enforce these provisions, it is highly likely that some amount of future litigation is unavoidable. The prospect of further litigation of these financial issues is another reason to require that the merchants be joined as necessary parties. *Cf. Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 764 (6th Cir. 1999) ("the likelihood that either party [defendant or absent party] would have sought further legal recourse in this case is not speculative inasmuch as [the absent party] was a signatory to the contract"); *Lambergs*, 1989 WL 63243 at *4 ("a resolution of this case without [the absent parties] may leave the existing parties subject to multiple litigation and inconsistent obligations as defendants would likely sue [the absent parties] for contribution should plaintiff prevail").

CONCLUSION

For these reasons, the Court should grant E*TRADE's motion and order Plaintiffs to amend their Complaint within a reasonable time to name as co-defendants the merchants that hold title to each of the ATMs at issue in the case, or dismiss the lawsuit if plaintiffs fail to do so.

Respectfully submitted,

E*TRADE ACCESS, INC. and
E*TRADE BANK,
By their attorneys,

Joseph L. Kociubes BBO # 276360
Jenny K. Cooper BBO # 646860
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Douglas P. Lobel
David A. Vogel
ARNOLD & PORTER LLP
1600 Tysons Boulevard
Suite 900
McLean, Virginia 22102
(703) 720-7000

Dated: April 16, 2004

CERTIFICATE OF SERVICE

I, Jenny K. Cooper, hereby certify that on this 16th day of April, 2004, I served the foregoing document by mailing a copy of same, postage prepaid, to the following counsel of record:

Patricia Correa, Esquire
Assistant Attorney General
Director, Disability Rights Project
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
patty.correa@ago.state.ma.us
Attorney for Plaintiff
Commonwealth of Massachusetts

Anthony M. Doniger, Esquire
Christine M. Netski, Esquire
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street
Boston, MA 02114-4737
doniger@srbc.com
netski@srbc.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

Daniel F. Goldstein, Esquire
Sharon Krevor-Weisbaum, Esquire
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, MD 21202
dfg@browngold.com
skw@browngold.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

Douglas P. Lobel, Esquire
David Vogel, Esquire
Arnold & Porter
1600 Tysons Boulevard
Suite 1200
McLean, VA 22102
Douglas_Lobel@aporter.com
David_Vogel@aporter.com
Attorneys for Defendants, E*Trade Access, Inc. and E*Trade Bank

Jenny K. Cooper