UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, et al.	
	C.A. No.: 03-11206-MEL
Plaintiffs,	
v.	
E*TRADE ACCESS, INC. et al.,	
Defendants.	

OPPOSITION OF THE PRIVATE PLAINTIFFS TO DEFENDANTS' MOTION TO JOIN NECESSARY PARTIES

The private Plaintiffs[1] respectfully submit this memorandum in opposition to the Defendants' Rule 12(b)(7) Motion to Join Necessary Parties.

Preliminary Statement

In the spirit of Jonathan Swift's "modest proposal,"[2] Defendants suggest that the Court direct Plaintiffs to add as parties defendant more than 11,000 merchants at whose sites throughout the United States E*TRADE ATMs are located, many of whom undoubtedly would not be subject to either personal jurisdiction or venue in this District (or any other single District) -- all under the purported authority of Rule 19 of the Federal Rules of Civil Procedure. If these parties cannot be joined, Defendants insist, the Court is required to dismiss. The obvious

[1] NFB, NFB-Massachusetts, Adrienne Asch, Theresa Jeraldi, Philip Oliver and Jennifer Bose.

[2] Swift, Jonathan, "A Modest Proposal for Preventing the Children of Poor People in Ireland, from being a Burden on their Parents or Country, and for Making them Beneficial to the Publick."(1729).

consequence of such dismissal would be that Plaintiffs would have no single venue in which they could seek relief; rather, Plaintiffs would face the impossible prospect of trying separate actions against E*TRADE Access and some of the merchants that house E*TRADE ATMs in each of 89 federal districts (E*TRADE appears not to have ATMs in Guam or Puerto Rico). The law, however, requires no such absurd result.

Defendants' position rests upon a misapprehension of the law governing necessary parties. These merchants are not necessary parties under Rule 19(a)(1), as complete relief can be afforded among those already parties. Indeed, an injunction against E*TRADE Bank prohibiting it from discriminating in the provision of banking services does not implicate the merchants in any fashion whatsoever. As for relief against E*TRADE Access, the Site Location Agreements provide E*TRADE Access with ample contractual authority to make any changes to the ATMs that the Court might require; accordingly, the Court can afford full relief in the absence of the merchants. While Access makes much of its contractual right to be indemnified by the merchants for the cost of compliance with the ADA, it is well settled that joint and several tortfeasors and indemnitors are not parties whose interests make them necessary under Rule 19 (a)(2), and the possibility that separate actions by Access against its retailers might yield inconsistent results is a possibility that is clearly tolerated under federal law.

Defendants' contention, that if the merchants are necessary parties and cannot be joined, the case must be dismissed is also contrary to well-established law. Under such circumstances this Court must determine whether "in equity and good conscience" the case should proceed without the absent parties. FED R. CIV. P. 19(b). Where, as here, there is no adequate alternate forum, that fact alone weighs conclusively against dismissal. Indeed, if the merchants were

deemed to be necessary parties, the Court would have a variety of techniques at its disposal that could ameliorate their absence, including providing notice to the merchants of their right to intervene, having Access implead representative merchants within the personal jurisdiction of the Court who have an identity of interest with the absent parties or having Access sue a defense class of merchants under Rule 23.

The guiding principle behind Rule 19 is to avoid needlessly multiplicitous litigation by seeking to resolve disputes within a single forum. Defendants' motion seeks the opposite–to avoid resolving this dispute in a single forum and forcing instead the same suit to be litigated repeatedly throughout the country. As set forth below, Defendants' motion is without merit and should be denied.

Procedural Context

Defendants incorrectly style their motion as brought pursuant to Rule 12(b)(7) of the Federal Rule of Civil Procedures, when it is a Rule 56 motion raising a Rule 19 claim of an absence of necessary parties. In either case, the Defendants carry the burden of persuasion. While a motion to join necessary parties under Rule 19, or in the alternative to dismiss, may indeed be brought as a Rule 12(b)(7) motion, the time for doing so has passed for both Defendants.[3] Because Defendants have attached exhibits, their motion is not one for judgment on the pleadings, but for summary judgment. FED. R. CIV. P. 12(c).

[3] A motion raising any Rule 12(b) defense "shall be made before pleading if a further pleading is permitted." FED. R. CIV. P. 12(b). E*TRADE Access ("Access") answered the Amended Complaint, without asserting an affirmative defense that Plaintiffs had failed to join necessary parties. E*TRADE Bank ("Bank") filed a Motion to Dismiss under Rule 12(b)(6), but did not consolidate the motion at bar with that earlier motion, as required by Rule 12(g). Its Answer raised as its Eighth Defense that Plaintiffs had failed to name necessary and indispensable parties.

A party raising a Rule 19 defense has the burden to show that the unjoined parties are needed for a just adjudication. *See Nations v. Nations*, 670 F. Supp. 1432, 1437 (D. Ark. 1987); 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1609. Because the issue arises on summary judgment, Defendants must also establish the absence of disputed material facts with respect to their right to relief. *See Geissal v. Moore Medical Corp.,* 927 F. Supp. 352, 356 (E.D. Mo. 1996).

At a very basic level, Defendants have failed to meet their burden. A party raising a Rule 19 issue has a duty to identify the potential necessary parties by name. *Raytheon Co. v. Continental Cas. Co.,* 123 F. Supp.2d 22, 28-29 (D. Mass. 2000). As E*TRADE insists that the identities of these parties are protectible trade secrets, it cannot simultaneously demand that Plaintiffs sue these unidentified (and to Plaintiffs, unknown) parties. As in *Raytheon*, Defendants' failure to identify the absent parties is enough to warrant denying Defendants' motion without prejudice.

Statement of Facts

Defendants fail to address many factual issues that could bear on the disposition of their Rule 19 claim.[4] At the same time, Plaintiffs have yet to receive any documentary discovery. Although Plaintiffs served a Request for Production of Documents on Access in December 2003, and the private Plaintiffs forwarded a proposed stipulated protective order to Access on April 9, 2004, that they believed addressed all of Defendants' concerns, Plaintiffs have not yet received

[4] Also, Mr. Dentlinger's Declaration does not satisfy the personal knowledge requirement of Rule 56(e), perhaps because the Defendants did not have Rule 56 in mind.

any documents in discovery.[5] Thus, the information that may bear on the instant motion, other than what Defendants attached to their Motion, continues to be in the exclusive possession of the Defendants.

For example, the Site Location Agreements ("SLAs") refer to "related documents" such as "Sales Agreements" between Access and the "locations" pertaining to the ATMs, Defs. Exhs. 1-A through 1-D, ¶¶ 5, 22, and state that, in the event Sales Agreements exist, the SLA's do not constitute the "entire agreement" but must be considered together with the Sales Agreements and any equipment maintenance agreements. *Id.*, ¶ 21. Defendants have not attached any copies of the Sales Agreements to the motion. The terms of these agreements are entirely unknown, including whether Access makes any representations and warranties that bear on the machines' conformance to ADA requirements or promises of performance if they do not conform.

Defendants attach to their motion four versions of SLAs dated October 2000, November 2000, September 2001, and July 2003 (the same month and year that the Plaintiffs commenced this action). Access claims these SLAs are representative of the vast majority of its contracts with "locations" that house ATMs that are part of the E*TRADE Access network. Def. Exhs. 1A-1D. Although there are potentially significant differences among the SLAs Access attaches, Access does not volunteer how many "locations" are subject to each SLA, and in which jurisdictions the "locations" subject to a particular SLA can be found. Nothing is known about the SLAs that govern the remaining locations.

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[5] Because the Commonwealth and the Defendants have not been able to agree about the impact of the Massachusetts Public Records Act on any Protective Order, the private Plaintiffs proposed to enter into a separate protective order to permit discovery to go forward while the Commonwealth and the Defendants litigated or resolved their issues.

The first three SLAs contain language that unequivocally grant Access the right to enter upon the property of the "location" without fear of committing trespass and, at its sole discretion, upgrade or replace the ATM for one of equal or greater value. Def. Exhs. 1-A, 1-B, and 1-C, ¶ 5

> Company will have the right at any reasonable time and at all times during business hours to enter into and upon the Premises for the purpose of . . . upgrading the ATM . . . . Company, at its sole discretion and expense, will have the right to upgrade the functionality of Location's ATM, including the right to exchange an ATM for a comparable ATM of equal or greater value.

Mr. Dentlinger's contention in his declaration that this contractual authority is inadequate to permit Access to take actions that will bring the ATMs into compliance with the ADA because the language does not specify that the "upgrades" and "replacements" might be done explicitly for ADA-compliance purposes is incorrect. The SLAs do not limit Access's right to enter the premises only for certain kinds of upgrades nor do they limit the reasons for making a replacement. Thus, Access has by contract preserved all the authority it needs to take the actions Plaintiffs seek. Indeed, the Equipment Maintenance Agreement forbids anyone other than Access to work on the ATMs. Def. Exhs. 1E-F, ¶ 6.1.

The locations have no right to prevent Access from entering onto their premises during business and at other reasonable hours, and, once Access is on the premises, they have no authority to prevent Access from altering the ATMs in connection with upgrading or replacing them (for ATMs of equal or greater value) to make them ADA compliant. *Id.* at ¶ 5. Indeed, they may not, without Access's prior written consent, bring the ATMs into compliance with the ADA on their own, since the SLAs do not permit anyone other than Access, without Access's prior written consent, to 1) service or repair the ATM, *id.* at ¶ 5; 2) replace the ATM with an ADA-compliant ATM, *id.* at ¶ 10; or 3) change data processing service providers.

After the Plaintiffs had filed a complaint against the Defendants at the Massachusetts Commission Against Discrimination and had or were about to file their federal complaint, Access again amended its SLA. Def. Exh. 1-D. While, again, the Defendants do not volunteer to which "locations" this SLA applies and in which jurisdiction(s) they are located, the July 2003 SLA removes the language contained in Paragraph 5 of the other three SLAs affording Access an unlimited right to upgrade or replace the ATMs. Instead, it adds language that grants Access a right "at any reasonable time and at all times during business hours to enter into and upon the Premises for the purposes of . . . enabling the ATM to provide . . . Advanced Functions." Def. Exh. 1-D, ¶ 7. As with the earlier SLAs, the location cannot service or replace the ATM without Access's prior written approval, or change data-processing services. *Id.* at ¶ 5, 10.[6]

Not only do the SLAs afford Access an absolute right to upgrade or replace the ATMs at issue to make them accessible to blind people, for technological reasons, it is only Access that can make the machines accessible. This is because the software changes that need to be made to the network and programmed at the individual ATMs can only be written by or on behalf of Access. Declaration of Curtis Chong, Pl. Exh. 1.

The Defendants place great weight on certain disclaimers contained in the SLAs. However, two versions provide only that the location is responsible for "ensuring that the area surrounding the ATM complies with the Americans with Disabilities Act or any similar law," and say nothing about the ATMs themselves. Def. Exhs. 1-B, 1-C, ¶ 5. (emphasis added).

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[6] That the Equipment Maintenance Agreements allow Access to charge a fee for any upgrades does not diminish its authority to upgrade or replace the ATMs to make them ADA compliant under the attached SLAs.

In addition, all versions grant Access only a limited disclaimer of liability for monetary damages flowing from the location's failure to comply with the ADA. Def. Exhs. 1-A through 1-D, ¶ 19. This language does not inhibit Access's right to upgrade the ATMs to bring them into ADA compliance, if ordered to do so by the court.

Mr. Dentlinger asserts that to make all ATMs ADA compliant, an unspecified number at unspecified locations would need to be replaced, some unspecified number of which would entail "significant rewiring of a merchant's electrical and telephone lines and altering the merchant's actual physical structure." Dentlinger Dec., ¶¶ 18- 21. Mr. Dentlinger's statements concede, in effect, that Access can bring many, perhaps even most, of the ATMs into compliance with the ADA without the need to alter the locations' physical structure. If, after discovery, it appears that some ATM replacements would require greater access than that provided by the SLAs, the Court may fashion its relief to address those situations.

For the reasons stated below, Defendants' arguments lack merit as a matter of law, and the relief they seek should be denied. However, to the extent that the court believes that there are facts presented by Defendants that would militate toward giving the relief they seek, it may be appropriate, both under Rules 19 and 56, to defer the resolution of this issue until further discovery has taken place. *See American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001) (explaining that adjudicating Rule 19 issues is a fact-intensive and flexible inquiry.); 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1609; FED. R. CIV. P. 56(f); Pl. Exh. 2 (Goldstein Declaration).

Argument

A claim that a non-party is necessary and must be joined is subject to a two-part inquiry. First, the court determines whether the non-party is necessary under Rule 19(a). If so, and if the non-party cannot be joined, the court decides, pursuant to Rule 19(b), whether to proceed nonetheless or to dismiss for want of an indispensable party. *United States v. San Juan Bay Marina*, 239 F.3d 400, 405 (1st Cir. 2001); *Southern Co. Energy Mktg, L.P. v. VEPCO*, 190 F.R.D. 182, 185 (E.D. Va. 1999). That latter decision involves "four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." *Provident Tradesmens Bank & Trust Co, v. Patterson*, 390 U.S. 102, 109 (1968). In a strikingly wrong and misleading statement, Defendants advise the Court without qualification that if a non-party is necessary under Rule 19(a) and is not subject to service of process, "the Court should dismiss." Def. Mem. at 8 n.4.

The more widely shared view of Rule 19(b) is set out as follows:

> Should the moving party satisfy the criteria required by 19(a), Rule 19(b) leaves the district court with substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations. . . . The phrase "good conscience" in 19(b), contemplates that very few cases should be terminated due to the absence of [non-parties] unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible. . . . Thus, as a general rule in determining whether a party is indispensable, the preference is for non-dismissal.

Rose v. Simms, 1995 U.S. Dist. LEXIS 17686, at *7-8 (S.D.N.Y. 1995)[citations omitted].

The merchants are not necessary parties under Rule 19(a) and, if they were and could not be joined, the factors noted in Rule 19(b) would militate against dismissal.

I. E*TRADE Bank Is the Only Necessary and Indispensable Party As to the Claims Against It, and Is Present Before the Court.

Rule 19 poses absolutely no bar to injunctive relief against E*TRADE Bank. Effective injunctive relief against the Bank does not require any machines to be made accessible and therefore requires no action on the part of the merchants; the Court may simply enjoin the Bank from discriminating against the blind in the provision of banking services. The Bank could comply with that injunction by ceasing to offer free banking services through inaccessible ATMs. Of course, it would be permitted to offer fee-free banking services to its customers through the Access-owned ATMs that Access has already agreed to make accessible to the blind, and if this were insufficient for its business purposes, it could build or acquire brick-and-mortar branch banks, contract with entities that own or operate accessible ATMs or, for that matter, ask Access to negotiate with the merchants who have inaccessible E*TRADE ATMs (if indeed E*TRADE is correct that the merchants have some say) for permission to upgrade or replace their ATMs to make them accessible. The merchants, perforce, are not a necessary party to such relief, because a prohibitory injunction against E*TRADE Bank requires no action by the merchants and does not bind them.[7]

The availability of this partial relief is enough to defeat E*TRADE Bank's argument for joinder or, in the alternative, dismissal under Rule 19(a)(1).[8]

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[7] If such an injunction had an effect on the merchants, and it does not, *see infra note 8,* the effect would not create an issue under Rule 19(a)(1). Under Rule 19(a)(1), the effect a decision may have on an absent party is not material. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,* 11 F.3d 399, 405 (3rd Cir. 1993).

[8] Such an injunction would also raise no issues under Rule 19(a)(2). The merchants receive the same fee from Access for transactions for which the ATMs charge a fee and for which, at Access's request, no fee is charged. Exhibits 1A-1D, ¶ 4. Thus, such an order does not impair the merchants' economic interests, much less legally protected ones. Nor would

> The requirement under Rule 19(a)(1) that complete relief be available does not mean that every type of relief sought must be available, only that meaningful relief be available. 3A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice para. 19.07-1[1] (2d ed. 1989).

Henne v. Wright, 904 F.2d 1208, 1212 n.4 (8th Cir. 1990) (finding that plaintiffs, if meritorious, could get a declaration of unconstitutionality and enjoin the enforcement of a statute limiting a mother's right to change a child's surname without joining the father as a necessary party, but could not secure an injunction changing the child's surname without joining the father); *See Brewery Dist. Soc. v. FHA,* 996 F. Supp. 750, 756 (S.D. Ohio 1998) (holding that, where plaintiffs hoped to stop the demolition of a property by the City of Columbus, the city was not a necessary party to an order enjoining the FHA and EPA from assisting it with the approvals necessary for demolition); *Jaguar Cars Ltd., v. Mfr. Des Montres Jaguar,* 196 F.R.D. 306 at 309-10 (E.D. Mich. 2000) (dismissing some claims as to which a party over which the court had no personal jurisdiction was indispensable, but not others as to which the absent party was not); *M.C. v. Voluntown Bd. of Educ.,* 178 F.R.D. 367, 369 (D. Conn. 1998) ("While an absent party may be considered a necessary party in order to avoid having a court render a hollow judgment among the extant parties, Rule 19(a)(1) does not require joinder for the universal resolution of all related claims").

For this reason, E*TRADE Bank's Rule 19 request to join necessary parties should be denied.[9]

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either E*Trade entity be subject to inconsistent obligations to the merchants as a result. E*Trade Bank, it would appear from the record to date, has no privity or contractual arrangement with the merchants.

[9] For the same reasons, failure to join the merchants poses no bar to declaratory relief as to E*TRADE Access.

II. The Merchants Are Not Necessary Parties to the Claims Against Access Pursuant to Rule 19(a).

Rule 19(a) provides in pertinent part, as follows:

> 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.

A. Complete Relief Can be Accorded Among those Already Parties in the Absence of the Merchants Under Rule 19(a)(1).

Defendants argue conclusorily that complete relief cannot be afforded in the merchants' absence because the merchants who own the ATMs at issue might not permit Access to exercise its rights under the SLAs to make the ATMs accessible, or because the merchants could terminate the SLAs and switch to another data processing company. These arguments ignore the analysis courts employ when ascertaining whether complete relief can be afforded by a court in the absence of the allegedly necessary party.

The only question under Rule 19(a)(1) is whether the relief requested is "complete" "as between the persons already parties, and not as between a party and the absent person whose joinder is sought. . . . [J]oinder is [not] necessary where, although certain forms of relief are unavailable due to a party's absence, meaningful relief can still be provided." *Sindia, Inc. v. Wrecked & Abandoned Vessel,* etc., 895 F.2d 116, 121 (3d Cir. 1990) (quoting 3A Moore's Federal Practice ¶ 19.07-1[1] at 93-98 (2d ed. 1989)).

The relevant question in ascertaining whether "meaningful relief" can be afforded against the party present in the lawsuit is whether, where injunctive relief is sought, that party can be ordered to take action that it has the right to take, vis-a-vis the absent party. So, in *Fernandes v. Limmer*, 663 F.2d 619, 636 (5th Cir. 1981), the question was whether the airlines that leased airline terminals from an airport authority were necessary parties in a lawsuit brought by members of the Hare Krishna against the airport authority for allegedly violating their First Amendment rights to solicit at the terminals. The court held that the lessee airlines were not necessary parties because the lease terms gave the airport authority the right to allow third parties such as the plaintiffs into the terminals, and so the airport authority could be ordered by the court to, in effect, exercise that right contained in the lease.

In *Central Delaware Branch, NAACP v. City of Dover*, 110 F.R.D. 239, 241 (D. Del. 1985), the plaintiffs sued a municipality over provisions of the city charter – which under state law was subject to approval by the state legislature – that the plaintiffs contended violated their rights under the Fourteenth Amendment and the Voting Rights Act. The municipality claimed that the State was a necessary party since, while the municipality could be ordered by the court to establish a new charter, the State could deny approval of any new charter the City submitted. The court rejected that argument, stating that notwithstanding the absence of the State, the court had several methods of affording the plaintiffs relief, with or without the State's cooperation.

Here, three of the four SLAs grant Access the right to enter upon the locations' premises and change or replace the ATMs and make them ADA-compliant (Def. Exh. 1-A through 1-C), and the fourth grants Access the right to enter upon the locations' premises and upgrade the

ATMs to provide "advanced functions." Def. Exh. 1-D.[10] Thus, as to the vast majority, apparently, of Access's ATMs, *see* Def. Exh. 1 ¶ 11, the court may order Access to exercise its contractual rights in making the ATMs accessible to blind consumers. The speculation that the "locations" might ultimately violate their SLAs by interfering with Access's contract rights should not be a consideration here, as the existence of that possibility was not a consideration in *Fernandes*.[11] The number of parties who might unlawfully interfere with Access's performance of a court order are infinite and the mere possibility of such action does not warrant their inclusion in the suit.

To the extent that making some ATMs compliant might require actions beyond the rights of Access under the SLAs that have been provided to the Court to date – such as, arguably, replacing an embedded ATM that would require altering the premises – determining whether those location owners are necessary requires more discovery, such as an opportunity to review the SLAs and related documents applicable to those locations, the gathering of information as to what, exactly, would be needed to bring the particular ATMs into compliance with the ADA, and a determination of whether the "locations" are beyond the Court's jurisdiction for purposes of service of process. *See Jaguar Cars Ltd.,* 196 F.R.D. at 309-10 (dismissing some trademark

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[10] The presence of the merchants is not necessary for the court to construe the SLAs. "The assertion of affirmative defenses which may turn upon, and even require adjudication of, the actions or rights of non-parties does not require joinder of those parties." *Equimed, Inc. v. Genstler*, 170 F.R.D. 175 (D. Kan. 1996) (adjudicating injunctive relief does not require joining all corporate parties to an agreement whom the relief would affect).

[11] The makeweight nature of this argument is illustrated by Access forgoing the inclusion of the owners of premises housing Access-owned ATMs in reaching a settlement agreement covering those machines, even though presumably, those owners could also interfere with Access's ability to retrofit those ATMs by somehow claiming a trespass.

claims due to absence of owner who was indispensable party, but allowing other trademark claims to go forward).

Defendants cite *Chase National Bank v. City of Norwalk, Ohio,* 291 U.S. 431 (1934), and *United Pharmacal Corp. v. United States,* 306 F.2d 515 (1st Cir. 1962), which stand for the familiar proposition that an injunction cannot, as in *City of Norwalk*, purport to enjoin "all persons to whom notice of the order of the injunction should come," or otherwise subject to contempt non-parties who are not in privity with or agents of a defendant. 291 U.S. at 436. Defendants have cited no case decided under Rule 19 that holds that the speculative possibility that a non-party might frustrate an injunction against a party makes the absentee a necessary party under Rule 19. By contrast, *Fernandes*, *Central Delaware Branch, NAACP*, and *United States v. Sabine Shell, Inc.,* 674 F.2d 480 (5th Cir. 1982) (absent landowner not necessary party where relief would require defendants to enter upon absentee's land) are all cases in which the possibility of noncooperation by a non-party posed no bar to the court proceeding to adjudicate the case without the absentee.

In addition, Defendants cite *Steel Valley Auth. v. Union Switch & Signal Div.,* 809 F.2d 1006 (3rd Cir. 1987); *Jaguar Cars Ltd v. Manufactures Des Montres Jaguar, S.A.,* 196 F.R.D. 396 (E.D. Mich. 196 F.R.D. 306 (E.D.Mich. 2000) and *Giambelluca v. Dravo Basic Materials Co., Inc.,* 131 F.R.D. 475 (E.D. La. 1990), for the proposition that property owners are always necessary parties. Those cases do not stand for that general proposition, but are limited to their

facts. In none of those cases did the absent property owners cede to a party contractual authority to alter or replace the owners' property, as the merchants have to Access.[12]

The 1966 amendments to Rule 19 were intended to discourage the courts from relying on the mechanistic analysis proposed by the defendants. *Provident Tradesmen Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118 (1968) (approving the Advisory Committee's criticism of prior cases that showed "undue preoccupation with abstract classifications of rights or obligations"); 7 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d §1601. For the foregoing reasons, and in light of the language of the SLAs proffered by the Defendants, the court should reject the Defendants' suggestion that complete relief cannot be afforded absent the merchants.

B. The Merchants' Absence Will Not As A Practical Matter Impair Or Impede Their Ability To Protect Their Interest under Rule 19(a)(2)(i).

Defendants argue that retrofitting or replacing the ATMs at issue would impair the merchants' property interests under Rule 19(a)(2)(i). The controlling inquiry under Rule 19(a)(2)(i) is whether any legally cognizable interests of the absent party will be prejudiced if the case were to proceed in its absence. *United States v. San Juan Bay Marina,* 239 F.3d 400, 406

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[12] Courts repeatedly find that property owners are **not** "necessary parties" to actions seeking injunctions concerning activities on (or changes to) their property. *United States v. San Juan Bay Marina,* 239 F.3d 400, 406 (1st Cir. 2001); *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002); *Sindia Expedition, Inc. v. The Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116, 122 (3rd Cir. 1990) (state not a necessary party in suit to determine title to ship, even though state asserted ownership-"the possibility that a successful party may have to defend its right to the [vessel] in a subsequent suit brought by the State does not make [the state] a necessary party."); *Sabine Shell*, 674 F.2d at 482; *Altmann v. Republic of Austria,* 142 F. Supp.2d 1187, 1211 (C.D. Cal. 2001) (other heirs not necessary parties in suit to recover paintings from defendant under Rule 19(a)(1); *see Fernandes*, 663 F.2d at 636 (lessee not necessary where lessor named); *see also United States v. First Nat'l City Bank*, 568 F.2d 853, 859 (2nd Cir. 1977) (owner of safe deposit box need not be joined to suit by United States to seize contents of the box from the bank in which the box resides).

(1st Cir. 2001) (reversionary property interests were not legally cognizable); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (central inquiry is whether there will be prejudice to a legally protected interest relating to the subject matter of the action). Here, under the terms of the SLAs presented to the Court, the merchants have no legally cognizable right to exclude Access from the premises and to prevent it from upgrading or replacing the ATMs. Thus, they have no legally cognizable interest to be free from any such actions by Access that may be ordered by the Court.

In any event, an absent party's interests are not impaired when they are adequately represented by existing parties. That is the case when "(1) the interests of the existing parties are such that they would undoubtedly make all of the non-party's arguments; (2) the existing parties are capable of and willing to make such arguments; and (3) the non-party would offer no necessary element to the proceeding that existing parties would neglect." *Southwest Center for Biological Diversity v. Babbitt,* 150 F.3d 1152, 1153-54 (9th Cir. 1998); *Altmann,* 142 F. Supp.2d 1212; *Demeter, Inc. v. Werries,* 676 F. Supp. 882, 888 (C.D. Ill. 1988). *Pujol v. Shearson American Express*, 877 F.2d at 132, 135 (1st Cir. 1989); *cf. Tell v. Trustees of Dartmouth College,* 145 F.3d 417 (1st Cir. 1998) (counseling caution where identity of interests is not perfect). Here, Access is ably represented by two law firms with national reputations. It has demonstrated that it will pursue all arguments available to it on procedural and substantive grounds to defeat the Plaintiffs' prayer for an injunction requiring it to make the ATMs it operates (and that the merchants purportedly own) accessible to blind people. It is hard to conceive of any divergence of interests between the merchants and Access in this case that might warrant a conclusion that the merchants' interests are not adequately represented by Access.

Moreover, many courts – the First Circuit among them – hold that where a party has knowledge of the litigation and refrains from intervening or otherwise participating, the court can safely assume that the absent party has concluded either that its interests are not impaired, or that its interests are adequately represented by parties who are present. *San Juan Bay Marina,* 239 F.3d at 406-07; *Ferrofluidics Corp., v. Advanced Vacuum Components, Inc.,* 968 F.2d 1463, 1472 (1st Cir. 1992); *Thunder Basin Coal Co. v. Southwestern Public Service Co.,* 104 F.3d 1205, 1211-12 (10th Cir. 1997) (the absent party must claim an interest); *ConnTech Development Co. v. Univ. of Conn. Educ. Prop., Inc.,* 102 F.3d 677, 683 (2nd Cir. 1996) (same); *Peregrine Myanmar Ltd v. Segal,* 89 F.3d 41, 49 (2nd Cir. 1996) (same); *Janney Montgomery Scott v. Shepard Niles, Inc.,* 11 F.3d 399, 410 (3rd Cir. 1993) (same); *Sindia Expedition, Inc.,* 895 F2d 122. Indeed, the Advisory Committee notes that

> [i]n some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Access could certainly provide such notice to all or a representative portion of the merchants to afford them the ability to participate in the unlikely event that they believe that their interests would be adversely affected by an order requiring Access to retrofit or replace the ATMs to make them useable to blind people, a portion of the market not reached by the inaccessible ATMs at issue.[13]

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[13] "[T]here is no obstacle to the absentee [intervening] when joinder is not feasible because of a defect in personal jurisdiction or venue, both of which can be waived. . . ." 7 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d §1608.

Access argues that "[u]nder 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.'" Def. Mem. at 8. First, Defendants overstate the scope of the SLAs disclaimers; several of them make the "location" responsible only for ADA compliance with respect to the areas around the ATMs, Def. Exh. 1B-C ¶ 5, not for the ADA compliance of the ATM themselves, and they provide only that the "locations" are responsible for any lost profits or other damages resulting from failure to comply with the ADA or similar laws. *Id.* at ¶ 19.

Second, that there may exist EMAs with certain merchants that would require the merchants to pay for the work to bring the merchants' ATMs into ADA compliance would not mean that their interests are prejudiced by Access being ordered to perform the work. Access has its own obligations under the ADA to afford access to consumers with disabilities at ATMs it operates, irrespective of any obligations by the merchants by contract or under the law. *See Botosan v. Paul McNally Realty,* 216 F.3d 827, 832 (9th Cir. 2000) (concluding that, irrespective of how parties allocated ADA responsibilities under lease, either or both landlord and tenant could be held liable for ADA non-compliance of leased property).

To the extent that the parties allocated financial responsibility to the merchants under the contract, Access can simply seek indemnification at a later time from the merchants for the costs of complying with any order by the Court requiring Access to bring the ATMs it operates into compliance with the ADA. *Id.* The merchants do not thereby become necessary parties for purposes of Rule 19. *See Secretary of Labor v. Crown Central Petroleum Corp.,* 90 F.R.D. 99

(E.D.N.Y. 1981) (holding that "employer" delegation of certain statutory duties to other entities who might thereby have become joint employers did not render such entities necessary parties to the litigation).

An absent joint tortfeasor is not a necessary party. *Temple v. Synthes Corp., Ltd.,* 498 U.S. 5 (1990); *Pujol v. Shearson American Express, Inc.,* 877 F.2d 132, 137 (1st Cir. 1989); *Flynn v. Hubbard,* 782 F.2d 1084, 1089 (1st Cir. 1986). So, too, an absent third party is not a necessary party. *Thunder Basin Coal Co. v. Southwestern Public Service Co.,* 104 F.3d 1205, 1211 (10th Cir. 1997) (potential indemnitors who may be impleaded under Fed. R. Civ. P. 14 are not necessary parties); *Boone v. General Motors Acceptance Corp.,* 682 F.2d 552, 553-54 (5th Cir. 1982); *Pasco Int'l (London) Ltd. v. Stenograph Corp.,* 637 F.2d 496, 503 (7th Cir. 1980).

Defendants point to *Frotton v. Barkan,* 219 F.R.D.31 (D. Mass. 2003), in support of their contention that a property owner of non-ADA compliant property is a necessary party under Rule 19 because, if not joined, its "interests" will be prejudiced. In that case, the plaintiff sued the landlord of a mall for inaccessibility, but did not name the three tenants whose shops were inaccessible. The landlord argued that the three tenants were necessary parties and the court decided, in essence, that the matter would be better sorted out with all parties before the court. The court engaged in a minimum of legal reasoning – there was little reason to do so on those facts, where the tenants were within the jurisdiction of the court and could be easily joined. However, the Court did apparently rely on the mall owner's representation that "it has no control over the interior premises of the plaza which it leases to the three retail merchants," presumably as a matter of lease construction. *Id.* at 31. Thus, *Frotton* is easily distinguishable from this case,

where the SLAs afford Access and not the merchants the control of the ATMs needed to bring them into ADA compliance.

C. The Merchants' Absence Will Not Leave The Defendants At Substantial Risk Of Incurring Multiple Or Inconsistent Obligations Under Rule 19(a)(ii).

Rule 19(a)(ii) does not address inconsistent adjudications, only inconsistent obligations. *Delgado v. Plaza Las Americas, Inc.,* 139 F.3d 1, 3 (1st Cir. 1998). One consequence of joint and several tortfeasors and indemnitors not being deemed necessary parties under Rule 19, as explained in the preceding section, is that a defendant will always be exposed to the possibility that it will be held liable in the initial litigation and then lose its contribution action on inconsistent grounds. An indemnity suit raises different issues and is not the sort of mulitiplicitous litigation with which Rule 19(a) (ii) is concerned. *United States v. Nye County,* 951 F. Supp. 1502, 1514 (D. Nev. 1996). That the resolution of the present litigation might cause further litigation between the retailers and Access to resolve any ambiguities over the responsibility to pay does not invoke Rule 19(a)(2)(ii)–the ambiguity is not the product of the merchants' absence. *Southwest Center,* 150 F.3d at 1155.

It is disingenuous for Access to suggest that this case should be dismissed as spawning multiplicitous litigation. If the merchants are necessary parties and the litigation cannot proceed in their absence, the Plaintiffs can only vindicate their right to relief by suing Access and the various merchants in almost every federal district.[14] The basic objective of the rule is "complete

[14] Access is a necessary party to all injunctive relief in all cases, because only Access has the right under the contracts to perform work on the ATMs, Exh. 1A-D ¶ 5, and because accessibility requires modifications to the software of the Access network. Pl. Exh. 1 (Chong Dec.).

justice with as little litigation as possible." *Pujol,* 877 F.2d 134. Indeed, the judicial response to a defendant who asserts that liable third parties are necessary parties has been that the defendant should implead the absent parties. *See, e.g., Brown v. Chaffee,* 612 F.2d 497, 503 (10th Cir. 1979) (holding that defendant can avoid inconsistent results by impleading absentee).

Access's cases are not on point. *Klein v. Marriott Int'l, Inc.,* 34 F. Supp. 2d 176 (S.D.N.Y. 1999), does not address whether the party whose presence would destroy diversity jurisdiction is a necessary party under Rule 19(a); it assumes it, and moves directly to the analysis of whether dismissal is the appropriate remedy under Rule 19(b). *Shell Western E&P v. DuPont,* 152 F.R.D. 82 (M.D. La. 1993) is a suit to construe a lease brought by the lessee against one of the 51 lessors. *Shell Western E&P* is part of a body of cases that generally require parties to a contract to be parties to a suit when the construction of the contract is at issue. By contrast, the Plaintiffs in this case are not parties to any agreement with the Defendants and are certainly not seeking to have a court declare their rights under some agreement.

The merchants, at the end of the day are not necessary parties under any branch of Rule 19(a) and the Defendants' motion should be denied.

III. If the Merchants Are Necessary Parties, Rule 19(b) Mandates Against Dismissal.

Although Defendants claim that if the merchants are necessary parties under Rule 19(a), dismissal is required, Def. Mem. n.4, p.8, the law is to the contrary.[15] *Provident Tradesmen Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). Indeed, the preference is for nondismissal. *Rose,*

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[15] The single sentence of note 4 in Defendants' Memorandum is the entirety of its argument concerning Rule 19(b). Although Plaintiffs have consented to Defendants' request to file a Reply Brief, they should not there address this issue for the first time. See *Ace Novelty Co., Inc. v. Vijuk Equipment, Inc.,* No. 90 C 3116, 1991 WL 150191 at * 4 (N.D. Ill. July 31, 1991) (striking reply brief that included arguments not raised in opening brief).

1995 U.S. Dist. LEXIS 17686 at *8; *Drankwater v. Miller,* 830 F. Supp. 188, 191 (S.D.N.Y. 1993).

Rule 19(b) provides as follows:

> If a person as described in subdivision a(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The rule does not indicate the weight to be given each factor. However, when there is no adequate alternative forum, the last factor is "the most important of the four." *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.,* 94 F.3d 1407, 1413 (10th Cir. 1996). While the availability of an alternative forum may be given little weight, "the absence of an alternative forum would weigh heavily, if not conclusively against dismissal." *Pasco Int'l Ltd. v. Stenograph Corp.,* 637 F.2d 496 (7th Cir. 1980).

Here, too, the fourth factor is critical. If the case is dismissed, issues of personal jurisdiction and venue relating to the merchants would require plaintiffs to sue the E*TRADE entities and the merchants particular to each area in as many as 89 separate federal courts. A rule intended to promote judicial efficiency and the resolution of all disputes in a single forum would have been turned on its head.

When no adequate single alternative forum exists, the courts regularly refuse to dismiss and instead proceed in the absence of necessary parties. *Rishell,* 94 F.3d 1412-13; *Fetzer v. Cities Service Oil Co.,* 572 F.2d 1250 (8th Cir. 1978); *Prescription Plan Service Corp. v. Franco,*

552 F.2d 493, 497-98 (2nd Cir. 1977); *Kroese v. Gen'l Steel Castings Corp.*, 179 F.2d 760 (3rd Cir. 1950); *Klockner Stadler Hurter, Ltd. v. Insurance Co. of Pennsylvania,* 785 F. Supp. 1130, 1133 (S.D.N.Y. 1990); *National Wildlife Fed'n v. Burford,* 676 F. Supp. 271 (D.D.C. 1985); *Wisconsin v. Baker,* 464 F. Supp. 1377, 1383-84 (W.D. Wis. 1978) (absentees invited to intervene); *National Resources Defence Council v. Tennessee Valley Authority,* 340 F. Supp. 400 (S.D.N.Y. 1971), (*reversed on other grounds* 459 F.2d 255 (2nd Cir. 1972)); *Gulf Ins. Co. v. Lane,* 53 F.R.D. 107 (W.D. Okla. 1971); *Owatonna Mfg. Co. v. Melroe Co.*, 301 F. Supp. 1296, 1306 (D. Minn. 1969); *Smith v. American Fed'n of Musicians,* 47 F.R.D. 152 (S.D.N.Y. 1969) (absentee invited to intervene); *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967) (absentee invited to intervene); *Rippey v. Denver United States Nat'l Bank,* 260 F. Supp. 704 (D. Colo. 1966).

Nat'l Wildlife Fed'n v. Burford, is instructive. Plaintiff desired to enjoin the government from lifting mining restrictions on 170 million acres of federal lands. The court was fully cognizant that the owners and lessees of mining claims were on those facts necessary parties and that if plaintiff prevailed in their absence, the impact on the absentees was real. Moreover, the court had doubts that the existing parties could fully represent the absentees. Nonetheless, the court determined to proceed, holding that

> dismissal for failure to join would deny plaintiff an adequate forum in which ever to prosecute its claim. The availability of an alternative forum represents a "critical consideration" in deciding joinder questions. *Pasco Int'l Ltd. v. Stenograph Corp.*, 637 F.2d 496, 500 (7th Cir. 1980). The lands involved in this case lie in seventeen different states. The absent parties probably cover an even broader geographical range. Because of problems of jurisdiction and venue, plaintiff could never join all defendants in one forum. Requiring it to bring seventeen separate lawsuits or even to combine actions through the device of multidistrict litigation would create enormous administrative disorder and delay.

> Dismissal, therefore, would effectively discourage and, for all practical purposes, put an end to this litigation.

Id. at 276. Also, because the suit was to enforce "public rights" as is also true of the case at bar, the court ruled that it vitiated the application of Rule 19, relying in that regard on *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 363 (1940).

Access, however, complains that the Court may not be able to effectively order relief against it in the absence of the merchants. This question arose in *Kroese v. Gen'l Steel Castings Corp.*, 179 F.2d 760 (3rd Cir. 1950), in which the plaintiff sought to compel directors to declare dividends, but there was no single state or federal court in which a majority of the board (much less the entire board) could be served. In an oft-cited opinion, the court declared that, despite the absence of necessary parties (9 of the 12 board members), the case should go forward, noting that if the unserved parties had breached their duty and were called upon by the court to act, they would not be exercising any discretion. And while the absent board members could not be lawfully enjoined, the court was certain that a means could be found, stating "But how can the chancellor's action be made effective? To doubt its effectiveness is to doubt the power of a court of equity when wielded by a chancellor with legal imagination." *Id.* at 764. And on the question of prejudice to the absent parties, the court set forth a faultless syllogism:

> If, on the facts, [plaintiff] cannot prove that he is right, the inconvenience to the corporation will be no more than that of any other litigant who successfully defends a lawsuit. If, on the other hand, the plaintiff proves his case he is only getting what the law says he is entitled to have. It would be most unjust if he could not prove that claim for the lack of a proper forum.

Id. at 765-66.

There are here a number of steps that the Court can take to ameliorate any prejudice. When it appears that absent parties may be prejudiced, they are often invited to intervene, as

suggested by the Advisory Committee Notes to the 1966 Amendment to Rule 19. ("The absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis . . . ."). Alternatively, Access could be directed or permitted to file Rule 14 claims against representative merchants within the personal jurisdiction of the Court (representing the range of versions of Site Location Agreements entered into).[16] This would create an identity of interests between the named merchants and the absent merchants, thus assuring that their claims would be heard and argued. *See Bank One Texas, N.A. v. Leaseway Transp. Corp.*, 137 F.R.D. 631 (D. Mass.1991) (denying joinder of co-lenders because the lead lender would adequately represent their interests). Alternatively, Access could be directed or permitted to file a third-party claim against a "defendant class" under Rule 23, an approach that would be particularly appropriate in this case given the large number of merchants involved and the commonality of the legal and factual issues at stake. Finally, as noted by our co-plaintiff, the Commonwealth of Massachusetts, it seeks relief only with respect to merchants in its State, thereby raising no issue of personal jurisdiction and Access may file a Rule 14 claim against the 700 merchants who house E*TRADE machines within the State.

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[16] Plaintiffs have no complaint at this time with the merchants. The issues that have been raised by Defendants concerning the merchants center on the relationship between Access and the merchants, such as who controls entry into the retail establishments for upgrading machines, who controls entry into the workings of the ATM itself and who may have to pay for accessibility as between Access and the merchants.

CONCLUSION

Because there are no absent parties with respect to the claims against E*TRADE Bank, because the absent merchants are not necessary parties under Rule 19(a) with respect to the claims against E*TRADE Access and because, even if they were, dismissal is inappropriate under Rule 19(b), Plaintiffs respectfully request that Defendants' motion to join necessary parties or in the alternative dismiss, be denied.

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Dated: May 12, 2004

CERTIFICATE OF SERVICE

I, Christine M. Netski, hereby certify that on the 12th day of May, 2004, I served the within document via e-mail and first-class mail, postage prepaid on the following counsel of record:

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