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**

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

Plaintiffs' Oppositions to Defendants E*TRADE Access, Inc. and E*TRADE Bank's (collectively "E*TRADE") motion to join necessary parties essentially ask this Court to trample on the property rights of thousands of small businesses in violation of Rule 19, so that Plaintiffs can have the administrative convenience of pursuing a single lawsuit against two corporate affiliates. Numerous practical reasons prevent this Court from affording meaningful relief in this lawsuit without affecting the interests of the merchants that actually own the ATMs at issue:

- Plaintiffs misconstrue the language of E*TRADE's contracts with the merchants, which put responsibility for ADA compliance ***solely*** on the merchants.
- Plaintiffs cannot articulate any formulation of injunctive relief that would not directly affect the merchants.
- Plaintiffs incorrectly argue that the merchants' financial interests in this litigation are irrelevant to Rule 19. Under the ADA, if the change to the ATMs that the Plaintiffs seek would impose an "undue burden" on the finances of the merchants (which have the ultimate financial obligation to pay for the change), then the ADA ***does not require*** the change in the first place.
- Finally, Plaintiffs cannot satisfy Rule 19's requirements that joinder be made by service of process by simply mailing letters to the merchants' last known addresses.

For the reasons identified in this Court's recent decision in *Frotton v. Barkan*, 219 F.R.D. 31 (D. Mass. 2003), this Court should not allow this lawsuit to proceed without requiring the Plaintiffs to add the merchants as additional defendants. The fact that there are many of these merchants scattered throughout the country is no reason to avoid Rule 19; the Plaintiffs have no greater right to injunctive relief for multiple stores than they would have if their lawsuit concerned only three stores, as in *Frotton*.[1]

I. E*TRADE'S CONTRACTS WITH THE MERCHANTS GIVE THE MERCHANTS SOLE RESPONSIBILITY FOR ADA COMPLIANCE.

Plaintiffs state that they "have no complaint at this time with the merchants." NFB Opp. at 26 n.16. Instead, Plaintiffs contend that E*TRADE alone has responsibility and authority to make the changes to the ATMs that Plaintiffs seek.

The only reason E*TRADE has any relationship to these ATMs is that the merchants agreed by contract to hire E*TRADE to undertake certain data-processing and maintenance services. Any rights E*TRADE has in the ATMs is derivative of the merchant's ownership rights, and is provided exclusively by the merchants through the contracts. As a result, Plaintiffs' contention that they have "no complaint" with the merchants is mere sophistry.

The contracts do not transfer any responsibility under the ADA from the merchants to E*TRADE. The single dispositive language relevant here is in the Site License Agreements, the basic contract between the merchants and E*TRADE, which state:

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[1] Plaintiffs misleadingly suggest that E*TRADE was required to raise this issue before filing its Answer, and that the Court must treat E*TRADE's motion as one for summary judgment. NFB Opp. at 3-4. Plaintiffs are wrong. This is not a motion under Rule 12(b)(6); a motion to join necessary parties under Rule 19, brought pursuant to Rule 12(b)(7), can be made at ***any*** time, even during trial. Fed. R. Civ. P. 12(h)(2). Accordingly, the Court can take evidence and resolve factual matters in resolving E*TRADE's motion. *Raytheon v. Continental Casualty Co.*, 123 F. Supp. 2d 22, 32 (D. Mass. 2000) (stating that to meet its burden of proof under Rule 12(b)(7), the moving party may present, and the court may consider, evidence outside of the pleadings); *Rivera Rojas v. Loewen Group Int'l, Inc.*, 178 F.R.D. 356, 360 ("A court on a 12(b)(7) motion may consider evidence outside the pleadings").

> **COMPANY [E*TRADE] IN NO EVENT SHALL BE RESPONSIBLE . . . FOR FAILURE TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT OR ANY SIMILAR LAW.**

See, e.g., Declaration of Dale Dentlinger (filed April 16, 2004), at Exhibit 1-A, ¶ 19.[2] This provision is specific to the claims at issue in this lawsuit and Plaintiffs cannot avoid it. E*TRADE simply ***did not acquire*** any responsibilities under the ADA from the merchants, so all responsibilities to ensure that the ATMs comply with the ADA remain with the merchants.

Plaintiffs try to avoid the plain meaning of the contracts by citing to various other provisions, but none of them negate the express ADA provision. For instance, the Plaintiffs claim that some of the contracts give E*TRADE the right to enter premises and "upgrade" ATMs at E*TRADE's "sole expense." NFB Opp. at 6. These rights, set forth in provisions entitled "Maintenance/Repair," are general in nature. The more specific ADA provision, quoted above, is necessarily an exemption from this general rule. If not, the disclaimer about ADA responsibilities would be rendered meaningless and superfluous. It is a basic tenet of contract interpretation that the Court cannot read a general provision of a contract so broad as to render a specific provision meaningless. *Cf. Lawson v. F.D.I.C.*, 3 F.3d 11, 17 (1st Cir. 1993) ("it is a familiar precept of contract interpretation that the specific controls the general"); *DeLuca v. Bear Sterns & Co.*, 175 F. Supp. 2d. 102, 109 (D. Mass. 2001) ("the basic tenet of contract interpretation [is] that a contract shall not be construed to have a meaningless clause").[3]

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2 Plaintiffs incorrectly argue that this clause is limited to claims under the ADA for "indirect" damages or "lost profits." NFB Opp. at 19. The contention is specious. The disclaimer regarding ADA liability is set out separately from the disclaimer for lost profits or indirect damages: the SLA says E*TRADE is not liable for lost profits or incidental damages "***or***" for liability under the ADA. Furthermore, because the ADA does not provide for monetary damages, Plaintiffs' interpretation would render the provision meaningless.

3 The Plaintiffs similarly try to argue that some of the contracts expressly say that the merchants shall be "solely responsible" for ADA compliance regarding only the "area" around the ATMs. NFB Opp. at 7. This language cannot mean that E*TRADE has responsibility for the ATM itself, because otherwise again the specific disclaimer would be meaningless.

E*TRADE's maintenance service contracts reach the same result. An upgrade to the ATM for ADA compliance meets these contracts' definition of "Additional Services." *See, e.g.*, Dentlinger Decl. at Exh. 1-E, ¶ 4.3. E*TRADE does not provide Additional Services to merchants except upon request by the merchants and if the merchants pay for the upgrades, so the maintenance contracts do not give E*TRADE the obligation to upgrade the ATMs to comply with the ADA. *Id.* ¶ 4.3 & 7.4. Because the maintenance contracts must be read together with the SLAs, *see id.* ¶ 9.1, it would render the SLAs' disclaimer language meaningless if the maintenance contracts required E*TRADE to upgrade the ATMs for ADA purposes at E*TRADE's expense.

Plaintiffs also argue that E*TRADE is the only party that can make the changes because, allegedly, E*TRADE would have to provide software to make the changes workable. NFB Opp. at 7. Even if it were true, this point is irrelevant; it is similar to arguing that the manufacturer of the new ports for the upgraded ATMs would also be a "necessary party" because the manufacturer supplies those critical parts. Even stating the proposition shows its lack of merit. The fact that the merchants must obtain software or parts from other companies to retrofit, allegedly including E*TRADE, does not change the conclusion that the merchants are necessary parties because they are ***responsible*** for making and paying for the changes on their premises.

Finally, Plaintiffs complain that E*TRADE has not yet identified the merchants by name, and the Plaintiffs have not seen the actual executed contracts between E*TRADE and the merchants, because they are proprietary to E*TRADE. NFB Opp. at 4-5. That issue is now resolved – E*TRADE has produced to Plaintiffs all requested documents, including documents sufficient to identify all merchants by name.

II. ANY INJUNCTIVE RELIEF WOULD BE INADEQUATE UNLESS THE MERCHANTS ARE PRESENT AS DEFENDANTS

A. Plaintiffs' Proposed Injunction On E*TRADE Is Wildly Overbroad But Still Directly Affects The Merchants.

To create the appearance that the merchants would be unaffected by an injunction against E*TRADE, Plaintiffs argue that the injunction they seek merely would restrict E*TRADE from making its banking services available at ATMs that are not accessible to the blind. NFB Opp. at 10-11. This proposed injunctive relief is so overbroad that Plaintiffs clearly would never be entitled to it; and in any event, it would ***still*** directly affect the merchants.

It is axiomatic that the court must consider not only an injunction's impact on the defendant, but also on the general public. *Aponte v. Calderon*, 284 F.3d 184, 191 (1st Cir. 2002) (injunction may not "adversely affect" the public's interest). Plaintiffs apparently want the Court to cause massive inconvenience to the general public and to completely restructure E*TRADE's entire line of business. If Plaintiffs obtain an injunction prohibiting E*TRADE from offering its services at the merchants' ATMs, ***no one*** would be able to use these ATMs, simply because a small portion of the population allegedly needs assistance to use them. *See* Complaint, ¶ 24 (visually-impaired people can use existing ATMs with assistance from others).[4] Furthermore, Plaintiffs would modestly require E*TRADE to completely change its entire business strategy, converting from an online banking operation to a traditional bank with "brick-and-mortar" branches. NFB Opp. at 10. Plaintiffs make the offer flippantly, as if E*TRADE would be more able to start leasing and constructing 11,000 branches nationwide instead of replacing 11,000 ATMs, which alone is too costly for E*TRADE to do. Simply stated, the proposed injunction is

[4] Indeed, even if Plaintiffs get the relief they want — placing jacks on the ATMs for headset plugs — visually-impaired people ***still*** would need assistance from other people to find the locations of the ATMs.

wildly overbroad, would cause far more harm to E*TRADE and the public than it would seek to solve, and the Plaintiffs are not entitled to any such relief.[5]

But even if the Plaintiffs could obtain such an overbroad injunction, the relief ***still*** directly affects the merchants. If E*TRADE were forced to cease offering its banking services at these particular ATMs, then the merchants would lose the revenue stream and other related commerce generated by use of the ATMs. In short, the ATMs would become largely worthless. Plaintiffs cannot ignore the direct effect such an injunction would have on the merchants. This direct effect is precisely the reason that the merchants have direct property interests at stake in this lawsuit. *See, e.g., Steel Valley Authority v. Union Switch & Signal Div.*, 809 F.2d 1006, 1014 (3d Cir. 1987) (property owner was necessary party because injunction would "necessarily affect the alienability of [the] property") ; *Giambelluca v. Bravo Basic Materials Co., Inc.*, 131 F.R.D. 475 (E.D. La. 1990) (property owner was necessary party because proposed injunction would have "preclusive effect" on owner's use of land).

B. Any Meaningful Relief Necessarily Will Affect The Merchants' Interests.

Because the Plaintiffs are not entitled to wildly overbroad injunctive relief, the Court must fashion relief specific to the alleged problem — that the ATMs do not have audio-enabled ports. Plaintiffs do not dispute that to fix this problem, the ATMs must either be changed or replaced entirely. It is inconceivable that this remedy could be done without any effect on the property rights of the merchants that own the ATMs. As explained above, the contracts squarely and solely put all responsibility to comply with the ADA on the merchants, not on E*TRADE. If the Court requires these upgrades, then the

5 *Cf. City of Waltham v. U.S. Postal Service*, 11 F.3d 235, 239 (1st Cir. 1993) (denying injunction that would prohibit Postal Service from proceeding with construction because injunction would not serve the overall public interest in seeing project move forward); *City of Cambridge v. Meserve*, 693 F.2d 4 (1st Cir. 1982) (affirming lower court's conclusion that injunction would harm public interests).

merchants not only would have the ultimate burden of paying for the upgrades, but the merchants necessarily would lose their right under the contract to control the decision of whether to upgrade the ATMs to meet ADA liability (as opposed to, for example, discontinuing use of the ATMs if the merchant subjectively decides that an upgrade is too costly).

The recent *Frotton* case from this District is directly on point but carefully avoided by Plaintiffs. *See* E*TRADE Mem., at 8-9. There, the Court found contracts unclear as to whether the defendant shopping mall owner or nonparty merchants actually "controlled" the alleged inaccessibility of the merchants' stores. For that reason, the Court held that the merchants had to be joined pursuant to Rule 19. The exact same reasoning applies here; the facts are so parallel as to leave no room for dispute. Plaintiffs necessarily give *Frotton* short shrift, characterizing it as having a "minimum of legal reasoning." NFB Opp. at 20. The decision's logic speaks for itself. Plaintiffs also try to distinguish *Frotton* by wrongly claiming that the defendant had "no control" over the stores, which Plaintiffs argue is different from E*TRADE's alleged "control" over these ATMs. *Id.* Plaintiffs are simply wrong; in *Frotton* the Court specifically said "it remains to be seen whether, as a matter of contract, [merchants] or [defendant] have control over these alleged barriers." *Frotton*, 219 F.R.D. at 32.

Plaintiffs try to distinguish numerous cases E*TRADE cited where absent parties were necessary under Rule 19 because they were signatories to contracts giving rise to the disputes at issue in the lawsuit. Plaintiffs argue these cases do not apply because here the court is not "declar[ing] rights under some agreement." NFB Opp. at 22. This argument ignores the virtual entirety of the Plaintiffs' brief. To resolve Plaintiffs' claims, the Court necessarily must declare E*TRADE's rights under the contracts with the merchants. Not only do the contracts determine whether the merchants are necessary parties, but they also demonstrate that E*TRADE is not an "operator" of the ATMs and therefore is not subject to the ADA with respect to the ATMs. *See Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1067-69 (5th

Cir. 1995) (party "operates" a place of public accommodation under the ADA if it has been given "control" of place pursuant to contracts; thus defendant franchiser was not "operator" because it only had "supervisory authority" over franchisee). To resolve both of these issues, the Court is going to have to adjudicate the respective rights of E*TRADE and the merchants under E*TRADE's contracts in order to decide the merits of this lawsuit -- precisely the reason in *Frotton* that the merchants were necessary parties.

III. E*TRADE CANNOT ADEQUATELY REPRESENT THE MERCHANTS' INTERESTS.

Plaintiffs argue that E*TRADE will raise all of the arguments that the merchants would have made if they were present here. NFB Opp. at 17. Indeed, Plaintiffs opine that it is "hard to conceive of any divergence of interests" between E*TRADE and the merchants. *Id.* That misstates the issue; the question is whether E*TRADE can "adequately represent" the interests of the merchants, and for that question, E*TRADE must have a "perfect identity" of interests with the merchants. *Tell v. Trustees of Delaware Coll.*, 145 F.3d 417, 419 (1st Cir. 1998) (existing party must have "same" interests as absent party; "without a ***perfect identity*** of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party" (emphasis added)).

In fact, E*TRADE is in no position to raise or litigate defenses under the ADA that are unique to each and every merchant. Consequently, Plaintiffs cannot avoid joining the merchants to this lawsuit by claiming that E*TRADE could adequately protect their interests.

A. The Financial Impact On The Merchants Is Directly Relevant To The Merits Of Plaintiffs' Claims Under The ADA.

The ADA states that accommodations need not be made for disabled persons if the accommodations impose an "undue burden." Under the Department of Justice's implementing regulations, whether an accommodation is an "undue burden" depends on whether the party that must undertake the accommodation would experience "significant difficulty or expense." 28 C.F.R. § 36.104

(defining "undue burden"). The regulations require that one consider the "overall financial resources" of the person, including its size and income. *Id.* This analysis necessarily is specific to the circumstances of each person subject to the ADA. *Cf. Morton .v United Parcel Serv., Inc.*, 272 F.3d 1249, 1262 (9th Cir. 2001) (analysis of "undue burden" requires "particularized inquiry" regarding the particular litigants).

Plaintiffs acknowledge that the issue of "undue burden" is highly fact specific. In response to E*TRADE's interrogatories, Plaintiffs articulated that they believe the accommodations they seek are not "undue burdens" because the value of ATMs to E*TRADE's entire business justifies the cost of the accommodations. *See, e.g,* NFB's Responses to E*TRADE's First Set of Interrogatories, No. 13, attached hereto as Exhibit 1.

The question of whether E*TRADE can afford the accommodations is entirely different than whether the accommodations impose "undue burdens" on the ***small business merchants*** that have the ultimate financial obligation to finance the accommodations the Plaintiffs seek. For example, if a particular ATM retrofit costs several thousand dollars, the question of whether E*TRADE can or should afford that cost is totally different when looking at the value of an ATM to a specific "7-Eleven" store in a small town in rural Massachusetts.

E*TRADE is in no position to raise these issues specific to each and every merchant. Each merchant, not E*TRADE, knows the "value" of its ATM to its business and only the merchant, not E*TRADE, can describe whether the proposed accommodation is an "undue burden" to the merchant. E*TRADE in no way can make these arguments for the merchants and therefore E*TRADE is inadequate to represent the merchants' interests.

B. The Merchants' Interests Are Not Merely Those Of Indemnification Or Contribution.

Plaintiffs wrongly dismiss the fact that the merchants ultimately will have to pay for these accommodations as merely "indemnification" issues or questions of "joint tortfeasors." NFB Opp. at 19-

20. But this lawsuit presents far more than issues of indemnification or joint tortfeasors. Unlike a generic tort or breach of contract case, the ADA makes the financial condition of the person paying for the accommodation ***directly relevant*** to the merits of whether the accommodation is required in the first place. The issue of the financial impact on the merchants cannot be brushed aside as a question of "indemnification." Plaintiffs simply have no cause of action in the first place if the relief they seek imposes an "undue burden" on any particular merchant that has the obligation to pay for the upgrade.

For this same reason, the Commonwealth's suggestion that E*TRADE can bring third-party complaints against the merchants under Rule 14 is incorrect. Commonwealth Opp. at 2. Rule 14 is a "narrow device" limited to indemnification or contribution actions by the defendant against third parties, to collect money that the defendants might be judged to owe the plaintiffs. *DeHass v. Empire Petroleum, Inc.*, 286 F. Supp. 809, 815 (D. Colo. 1968) (Rule 14 is "narrow device" to assert indemnification claims, and "cannot be used as a method of bringing into controversy other matters which happen to have some relationship to the original action"); *see also* Moore's Fed. Prac., § 14.04 (Rule is "narrower" than Rule 19; purpose of Rule 14 is merely to ensure defendant does not suffer inconsistent judgment on an indemnification or contribution claim against third party); Wright & Miller, Fed. Prac. & Proc. § 1446 (Rule 14 only applies where third party is "secondarily liable" to defendant if defendant loses action to plaintiff). For the reasons explained above, the merchants' role is far beyond that of an indemnifier or joint tortfeasor. Consequently, Rule 14 does not apply. One cannot conceive what kind of third-party complaint E*TRADE could bring against the merchants if the Plaintiffs prevail in obtaining ***injunctive*** relief against E*TRADE; Rule 14 does not establish any kind of procedure where a defendant can pass off to third parties an obligation to perform an injunction. The cases Plaintiffs' cite are inapposite because they involve mere indemnification actions by defendants against third parties.

IV. PROVIDING NOTICE TO MERCHANTS OF THIS LAWSUIT IS INSUFFICIENT TO SATISFY RULE 19 REQUIREMENTS.

Plaintiffs invite the Court to ignore Rule 19's mandatory requirements by permitting the merchants to be given "notice" of the lawsuit and allowing them to intervene pursuant to Rule 24. NFB Opp. at 18; Commonwealth's Opp. at 2. The invitation is specious because it is black-letter law that the Court cannot use intervention procedures under Rule 24 to avoid the mandate of Rule 19.

Rule 19(a) mandates that the Court "shall join" necessary parties. By contrast, Rule 24 does not provide any such thing as "compulsive" intervention. The Supreme Court has made it clear that if a party's interest is affected by a lawsuit, the Court ***must resort*** to joinder under Rule 19 and ***may not*** force that party to intervene under Rule 24 to protect its interests. *Martin v. Wilks*, 490 U.S. 755, 756 (1989) ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree"). If this Court were to deny E*TRADE's Rule 19 motion on the grounds that the merchants could intervene if they choose, then the Court would be reading Rule 19 out of existence. For instance, the Court would be replacing strict service of process rules under Rule 4 with a procedure where a letter is mailed to a last known address. Courts therefore cannot permit an absent party's purported ability to intervene as a replacement for the Rule 19 analysis. *Traveler's Indem. Co. v. Dingwell*, 884 F.2d 629, 636 (1st Cir. 1989) ("[A]bility to intervene cannot control the indispensability determination, which examines whether a party is an essential part of the controversy before the court").

None of Plaintiffs' citations stand for a different proposition. Plaintiffs cite a number of cases where parties ***aligned with plaintiffs*** chose not to intervene, and courts therefore held they were not necessary parties. *See* NFB Opp. at 18. That situation – where a party was not even known to be asserting the claims at issue in the litigation – is inapposite to the case here, where merchants would be aligned with E*TRADE as defendants and forced to defend themselves. *Martin*, 490 U.S. at 759 (no such thing as "compulsory intervention" for absent parties to be aligned as defendants).

Plaintiffs take out of context a quote from the Advisory Committee's Notes under Rule 19. NFB Opp. at 18. The Advisory Committee suggests that letters might be sent to absent parties, but nowhere does it say that mailing letters serves as a replacement for joinder by service of process. Instead, the quoted provision relates to ***Rule 19(c)***, which concerns situations (not applicable here) where a plaintiffs pleads that it is unable to name necessary parties. Nowhere does authority exist that Rule 19(c) replaces Rules 19(a) and (b).

Practical problems run amok with this proposed procedure. What is the Court to make of a decision by a small business, located in a distant corner of Massachusetts if not a completely different state, not to intervene in this lawsuit? Plaintiffs want the Court to draw the uniform conclusion that every such merchant must not care about the litigation. NFB Opp. at 18. But numerous reasons might exist why merchants do not affirmatively intervene, including: lack of actual notice, for example a failure of the notice effort; lack of an understanding of the significance of the lawsuit; lack of resources; and, most importantly, a calculated decision to avoid any injunction in the lawsuit by not becoming a named party. *See, e.g., Martin*, 490 U.S. at 762 (cannot conclude a party was uninterested merely because it chose not to intervene).

Because the merchants' interests are directly affected by this lawsuit and E*TRADE does not and cannot adequately represent them, Rule 19(a) ***mandates*** that the Court "shall" join the merchants as necessary parties, an action which must be accomplished by serving process on the merchants pursuant to

Rule 4. Plaintiffs cannot avoid this mandatory rule by asking for a mass mailing of letters to last-known addresses.[6]

V. NO PURPOSE WOULD BE SERVED IN PROCEEDING WITH THIS LAWSUIT.

Finally, Plaintiffs invoke Rule 19(b)(4), arguing that because the merchants are necessary parties but most are not subject to service of process in this District, Plaintiffs would be forced to file lawsuits in different states. NFB Opp. at 23-25. The premise of their argument, of course, is that this lawsuit against E*TRADE alone provides some kind of meaningful relief, and Plaintiffs thus do not want to be inconvenienced with having to file additional lawsuits.[7]

In determining whether to dismiss a lawsuit because necessary parties cannot be joined, Rule 19(b) sets forth four factors that the Court must balance; no one factor is always deciding. *Traveler's Indem.*, 884 F.2d at 634 (Rule 19(b) analysis requires "balancing" of facts for each specific case); *accord Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1124 (2d Cir. 1990) (Rule 19(b) does not assign relative weights but allows courts to balance them in each lawsuit). These factors are:

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[6] Similarly, without any analysis whatsoever, the NFB asks the Court to have a "defendant class." NFB Opp. at 26. First, the First Circuit recently held that Rule 23 ***does not contemplate*** defendant classes. *Tilley v. TJX Companies, Inc.*, 345 F.3d 34 (1st Cir. 2003). Second, even if it did, NFB has not come close to meeting Rule 23, which requires that the NFB assert claims against a typical class representative and that the NFB show the conditions of Rule 23(b) are present.

[7] Plaintiffs nonsensically ask the Court not to let E*TRADE brief this issue on Reply because, as Plaintiffs put it, a Reply brief cannot address an issue "for the first time." NFB Opp. at 22. But the "first time" the issue was raised was in Plaintiffs' Opposition, not this Reply.

> [F]irst, 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.

Plaintiffs completely ignore the first three factors and focus entirely on the fourth.

The first three factors fall squarely in E*TRADE's favor. First, proceeding in the absence of the indispensable merchants severely prejudices the merchants' property interests in the ATMs they own. Second and third, complete relief is not possible without avoiding prejudice to the merchants' ownership interests. No injunction is possible that simultaneously would cause a physical change to the merchants' ATMs but at the same time have no impact on the merchants' property rights in these ATMs. *Cf. Steel Valley*, 809 F.2d at 1014 ("We cannot envisage how such prejudice could be lessened or avoided if an injunction, no matter how shaped, were to issue"); *Kansas City Royalty Co., L.L.C. v. Thoroughbread Assocs., L.L.C.*, 215 F.R.D. 628, 635 (D. Kan. 2003) ("the Court cannot envision how it could award plaintiffs the requested relief without taking a portion of an interest of a non-party . . ."); *Cross Timbers Oil Co. v. Rosel Energy, Inc.*, 167 F.R.D. 457, 460 (D. Kan. 1996) ("[I]n light of plaintiffs' claim for injunctive relief, we can see no way to fashion an order enjoining future production so as to protect the interests of the absent joint venturers").

With regard to the final factor, no question exists that the Plaintiffs have available remedies – just, it appears, not in one forum. Plaintiffs would have this Court ignore the first three factors entirely and maintain this lawsuit merely for that reason. Courts will not proceed with a lawsuit that cannot provide complete relief and that severely injures rights of absent parties, simply because multiple lawsuits might be required. *Cf Maritimes & Northeast Pipeline, L.L.C. v. 16.66 Acres of Land, More or Less, In The City of Brewer and Towns of Eddington and Bradley, County of Penobscot, State of Maine*, 190

F.R.D. 15, 20 (D. Maine 1999) (conclusion that Rule 19 required dismissal of case "not altered" by fact that claim would have to be taken to "multiple state courts").

Cases cited by the Plaintiffs, *see* NFB Opp. at 24-25, did not present such a stark situation; in each case, relief against the named defendant was adequate to some extent and therefore no reason existed to require lawsuits in different states. But because an injunction against E*TRADE alone is inadequate, for all of the reasons described above, no purpose is served in proceeding with this lawsuit as it is currently constituted. *Cf. Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1293 (10th Cir. 2003) (lack of available forum was outweighed by other three factors, which favored dismissal of action to avoid prejudice to absent party).

Finally, filing of multiple lawsuits does not mean there must be a multiplicity of proceedings. Plaintiffs or defendants easily could invoke the multidistrict litigation procedures under 28 U.S.C. § 1407 and have all cases transferred to a ***single*** court for uniform discovery and other pre-trial procedures, including motions for summary judgment.

CONCLUSION

For these reasons, as well as those in E*TRADE's initial Memorandum, E*TRADE respectfully requests that the Court grant its motion and order the Plaintiffs to amend their complaint to join the merchants as necessary parties, or dismiss this lawsuit if Plaintiffs do not join the merchants within a reasonable time.

Respectfully submitted,

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Dated: July 29, 2004

CERTIFICATE OF SERVICE

I, Rachael Splaine Rollins, hereby certify that on July 29, 2004, I caused a copy of the foregoing document to be served, via electronic and first class mail, upon the following counsel of record:

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Re: Commonwealth of Massachusetts, et al. v. E* Trade Access, Inc., et al.; Civil Action No. 03 11206 MEL

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter, please find the original, together with a copy marked "Chambers Copy," of Defendants' Reply Brief.

Please stamp the enclosed additional marked "Copy" with the date and fact of filing and return it in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter.

Very truly yours,

Raquel J. Webster

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