UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PRIVATE PLAINTIFFS' COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON COUNTS II, III, IV AND V DUE TO LACK OF STANDING

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Defendant Cardtronics operates over 25,000 ATMs -- what it proclaims to be "the largest network of ATMs in the United States"[1] -- but makes at most ten percent of those machines accessible to blind people.[2] Cardtronics systematically denies blind people its most important service: convenient access to cash. The Individual Plaintiffs in this lawsuit -- blind ATM users -- have all been injured by and continue to be injured by this systematic lack of access and thus have standing to challenge it. The National Federation of the Blind ("NFB") has associational standing because these inaccessible ATMs have injured many of its members, because ensuring independent access to public accommodations such as ATMs is central to the NFB's mission, and because the systematic inaccessibility can be remedied by an injunction that does not require individual NFB members to participate. Moreover, as the declarations of NFB members make

[1] Private Plaintiffs' Response to Statement Of Material Facts in Support of Defendants' Motions for Summary Judgment Due to Lack of Standing ("PRSMF") ¶ 4.

[2] *Id.* ¶¶ 6-7.

clear, they have been injured -- and thus the NFB has had standing -- since well before the first complaint was filed in 2003.[3]

For these reasons, explained in greater detail below, the Private Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing ("Count III-IV-V Motion") and Defendants' Motion for Summary Judgment on Count II Due to Lack of Standing ("Count II Motion") (collectively, "Defendants' Standing Motions").

Defendants' Standing Motions do not challenge the NFB's Article III standing to pursue this litigation. Defendants concede that "a subset of the NFB's overall membership will meet all of [the] factual prerequisites to have individual standing in this lawsuit,"[4] the key element in the NFB's associational standing. Rather, Defendants challenge the NFB's standing "to pursue a nationwide injunction."[5] The breadth of the remedy to which a plaintiff is entitled, however, is not a question of Article III standing.[6] Because there is no question -- even under Defendants' theories -- that the NFB has Article III standing to bring this case, the case will go forward with

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[3] *See, e.g.*, PRSMF ¶¶ 32-34, 89, 91, 106-07, 130, 139, 152-53, 165, 175, 177, 206, 215, 228, 236, 288, 302, 312, 321, 336, 349 (setting forth the testimony of individuals who were NFB members and were injured by the inaccessibility of Defendants' ATMs before June, 2003).

[4] Count III-IV-V Motion at 16.

[5] *Id.* at 20; *see also id.* at 1, 8. Although several of Defendants' intermediate argument headings suggest they are arguing that the NFB has no associational standing whatsoever, even in that context Defendants concede that some NFB members have standing. *Id.* at 16. Ultimately, in their conclusion, the holding they request of this Court is limited to lack of standing to pursue a nationwide injunction. *Id.* at 20. In addition, Defendants do not move on all counts of Plaintiffs' complaint. *See infra* at 7.

[6] *See Wilson v. Pier I*, 413 F. Supp 2d 1130, 1135 (E.D. Cal. 2006); *see also infra* Section IV(B).

the NFB as an associational plaintiff, and the Court necessarily will have to address the pending motion for certification of a nationwide class.

FACTS[7]

Automatic teller machines permit bank customers to have access to cash withdrawals and other banking services at locations remote from the bank's physical offices and at times that those offices are closed. Cardtronics's goal, as explained by its Executive Vice President, is to give financial institutions opportunities to "provide enhanced convenience to their customers."[8] Thus, Washington Mutual explained a recent co-branding deal with Cardtronics by saying, "providing our customers with easy access to their money, any time, anywhere is critical."[9] Defendant E*TRADE Bank touts its services with the claim: "No ATM Fees - any machine, any bank, anywhere."[10]

Defendants sell convenience: the ability to get money quickly and simply, virtually anywhere one shops, dines, wanders, or travels, without the need for prior planning. Because the vast majority of Defendants' ATMs are not independently useable by blind people, Defendants deny blind people their most important product: convenient and ubiquitous access to cash.

When ATMs provide only visual instructions, blind users must ask for assistance to use the machines. A sighted person must explain the layout of the machine and read aloud

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[7] Private Plaintiffs also incorporate by reference the introduction and background sections of the Commonwealth's Opposition to Defendants' Motion For Summary Judgment on Count II Due to Lack of Standing, filed simultaneously herewith. *See id.* at 1-7.

[8] PRSMF ¶ 2.

[9] *Id.*

[10] *Id.* ¶ 3.

information as it appears on the screen.[11] It is often necessary for a blind ATM user to give his sighted helper highly confidential information, such as the "personal identification number" or PIN that provides security to the account holder.[12] In situations where a blind ATM user is traveling or shopping alone, he may have to rely on strangers to assist and, again, may have to share confidential information.[13] That can make blind ATM users feel uncomfortable, vulnerable, and dependent -- not to mention putting them at risk for fraud or identity theft.[14] Because of this, many blind people bypass inaccessible ATMs and travel extra distances to use inconvenient machines, wait for regular banking hours, or simply go without a needed cash withdrawal rather than undertake a transaction that exposes them to financial risk.[15] Even when a blind ATM-user seeks sighted assistance, the process can be frustrating, inefficient, and time-consuming.[16]

Bank customers can generally use their own bank's ATMs without incurring a fee, while they are often charged a fee when using an ATM that is not operated by their bank. This was the case with E*TRADE Bank when this litigation commenced: it permitted customers to conduct fee-free transactions at E*TRADE ATMs, while customers were generally charged a fee when they used non-E*TRADE machines. Because most E*TRADE ATMs were inaccessible, this penalized blind E*TRADE customers -- and deterred other blind people from becoming

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[11] *See, e.g.*, PRSMF ¶¶ 16, 27, 48-49, 51, 54-61, 81, 222, 236, 309, 358.

[12] *See, e.g.*, PRSMF ¶¶ 110, 145, 173, 298, 319, 356.

[13] *See, e.g.*, PRSMF ¶¶ 16, 81, 145, 173, 223, 247, 271, 273, 309, 318, 356.

[14] *See, e.g.*, PRSMF ¶¶ 24, 64, 88, 128, 145, 234, 247, 271, 309.

[15] *See, e.g.*, PRSMF ¶¶ 14, 16, 23, 24, 28, 97, 105, 109, 125, 135, 144, 160, 170, 181, 185, 202, 210, 213, 223, 233, 234, 245, 258, 269, 278, 314, 327, 341, 344, 357.

[16] *See, e.g.*, PRSMF ¶¶ 48-49, 51, 54-61, 240, 345-48.

E*TRADE customers -- because they were charged a fee for conducting transactions at the only ATMs they could use independently.

This policy has since changed. E*TRADE Bank now permits customers who meet certain financial criteria to make fee-free transactions at any ATM, whether or not it's an E*TRADE ATM.[17] Customers who do not meet these criteria, however, must pay whatever fees are imposed for transactions at non-E*TRADE ATMs. This puts blind E*TRADE customers who do not meet these new criteria in the same boat as they were under the old policy: they are required to pay a fee to conduct transactions at accessible ATMs.

In their Count II Motion, Defendants appear to argue that the Visa Check Card is a complete alternative to accessible ATMs because it permits blind customers to get "cash back" when making a purchase by using a store's point-of-sale machine.[18] In other words, E*TRADE Bank argues that the Visa Check Card makes ATMs (and thus, presumably, Cardtronics) superfluous for sighted and blind alike. The Visa Check Card, in fact, does not come close to substituting for accessible ATMs: (1) unlike an ATM, it requires the user to make a purchase in order to receive cash back;[19] (2) many point-of-sale machines are inaccessible to blind people;[20] (3) only about 25% of the stores that accept the Visa Check Card permit such "cash back" transactions;[21] and (4) the Visa Check Card is useless when accepting stores are closed.

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[17] Statement of Material Facts in Support of Defendants' Motion for Summary Judgment on Count II Due to Lack of Standing ("Defs.' Count II SMF") ¶ 1.

[18] Count II Motion at 5.

[19] Defs.' Count II SMF ¶ 3.

[20] *See, e.g.*, PRSMF ¶¶ 26, 27, 67, 86, 95, 104, 319.

[21] PRSMF ¶ 1.

Plaintiffs Adrienne Asch, Bryan Bashin, Jennifer Bose, Norma Crosby, Bob Crowley, Dwight Sayer, Terri Uttermohlen, and Raymond Wayne (the "Individual Plaintiffs") are all legally blind.[22] The Individual Plaintiffs reside in various states, lead active and full lives, and use ATMs to access cash.[23] They all have been injured (and continue to be injured) by Cardtronics's inaccessible ATMs.[24] Finally, E*TRADE Bank's violations have injured Plaintiffs Asch, Bashin, Crosby, Crowley and Sayer and deter them from becoming E*TRADE Bank customers or, in the case of Bryan Bashin, injure him by requiring him to to maintain a $5,000 balance or pay fees to use accessible machines.[25]

The NFB, a nationwide organization of blind people, has affiliates in all 50 states, Washington, D.C. and Puerto Rico. The vast majority of the NFB's approximately 50,000 members are blind people. The purpose of the NFB is to promote the general welfare of the blind by, among other things, assisting the blind in their efforts to integrate themselves into society on terms of equality and independence.[26]

LEGAL CONTEXT

The Americans with Disabilities Act ("ADA") was enacted in 1990, recognizing that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[27] The First Circuit has held that "[t]he ADA is a 'broad remedial statute.' It is a 'familiar canon of

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22 PRSMF ¶¶ 11, 20, 41, 62, 75, 82, 92, 101.

23 *See generally* PRSMF ¶¶ 11-107.

24 PRSMF ¶¶ 17-18, 31-34, 43-61, 69-73, 79-81, 87, 89-91, 97, 99, 100, 106.

25 PRSMF ¶¶ 17, 19, 39, 40, 65, 78, 85.

26 PRSMF ¶ 10.

27 42 U.S.C. § 12101(a)(8).

statutory construction that remedial legislation,' such as the ADA, 'should be construed broadly to effectuate its purposes.'"[28]

Plaintiffs bring suit under Title III of the ADA ("Title III"), which prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ."[29]

Defendants have challenged Plaintiffs' standing as to Counts II, III, IV and V of the Third Amended Complaint. In Plaintiffs' proposed Fourth Amended and Supplemental Class Action Complaint ("Fourth Complaint"),[30] Plaintiffs have withdrawn Count IV. The other three counts at issue in Defendants' Standing Motions are summarized briefly below. Defendants have not challenged Plaintiffs' standing to bring Count I, which alleges a claim under 42 U.S.C. § 12182(a) -- Title III's general anti-discrimination provision -- or Counts VI or VII, brought under Massachusetts law.

Through Counts III and V[31] of the Third Amended Complaint, Plaintiffs seek an injunction requiring Defendants to make their ATMs accessible to and independently useable by blind people. Count III seeks compliance with 42 U.S.C. § 12182(b)(2)(A)(iii), which requires places of public accommodation to provide "auxiliary aids and services" to ensure that blind people such as the Individual Plaintiffs are not "excluded, denied services, segregated or otherwise treated differently than other individuals." Count V seeks compliance with 42 U.S.C. § 12183(a), which

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[28] *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); other citations omitted), *cited in Dudley v. Hannaford Bros. Co.* 333 F.3d 299, 307 (1st Cir. 2003).

[29] 42 U.S.C. § 12182(a).

[30] Mem. of Private Pls. in Supp. of Their Revised and Substituted Mot. for Leave to File a Fourth Am. and Supplemental Class Action Compl. ("Motion to Amend"), Paper No. 220, Ex. 1.

[31] This claim is renumbered Count IV in the Fourth Complaint.

requires newly constructed and altered facilities to comply with the Department of Justice Standards for Accessible Design ("Standards").[32] Section 4.34.5 of the Standards requires that ATMs be "accessible to and independently useable by persons with vision impairments."

Count II -- against Defendant E*TRADE Bank only -- is based on 42 U.S.C. § 12182(b)(2)(A)(ii), which requires "reasonable modifications" in bank policies when necessary to make the bank's services available to people with disabilities. Because many of E*TRADE Bank's ATMs -- which customers can use fee-free -- are not independently useable by blind people, the reasonable modification Plaintiffs have requested is a policy that allows blind E*TRADE Bank customers to use accessible non-E*TRADE Bank ATMs fee-free.

PROCEDURAL STATUS[33]

This case was filed in June, 2003, against E*TRADE Bank, Inc. ("E*TRADE Bank") and E*TRADE Access, Inc. ("Access"). On February 22, 2005, following the acquisition of Access by Cardtronics, LP, this Court allowed Plaintiffs' motion to amend their complaint to add Cardtronics, LP, and Cardtronics, Inc. (collectively "Cardtronics") as Defendants. By order dated February 21, 2006, this Court denied both parties' cross motions for summary judgment.[34]

Throughout the litigation -- from its inception up to the filing of the Defendants' Standing Motions -- both parties had treated this case as nationwide in scope. Indeed, as Plaintiffs have previously set forth in detail, Defendants worked hard at the outset of this case to ensure that any injunction would reach its entire fleet of ATMs, and represented to another federal district court

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[32] 28 C.F.R. pt. 36, app. A; *see* 28 C.F.R. § 36.406(a) (requiring compliance with the Standards).

[33] Private Plaintiffs recited the procedural history of this litigation in some detail in their Motion to Amend, pages three through seven of which are incorporated herein by reference.

[34] Paper No. 172.

that any other approach "could have . . . a devastating financial effect" on its business.[35] Many of Defendants' pleadings have described this case as extending to all of their ATMs and Defendants moved this Court to force Plaintiffs to add as parties all of the more than 11,000 merchants Defendants claimed owned title to ATMs in its nationwide network.[36]

Approximately six weeks after this Court denied Defendants' motion for summary judgment, Defendants filed the first of their Standing Motions, conceding the NFB's standing[37] but, for the first time -- and contrary to their own previous efforts -- seeking to limit the NFB's ability to obtain an injunction that addresses all of Defendants' ATMs nationwide. The second of Defendants' Standing Motions came approximately two weeks later.

In response, Plaintiffs took action to ensure that the procedural status of the case fully reflected the way it had been litigated by both parties for three years. The NFB had known full well -- given the breadth of its membership and the large number of Defendants' ATMs in use around the country -- that many of its members had been injured by the inaccessibility of those ATMs. Since both parties had -- prior to the filing of the Standing Motions -- treated the case as nationwide in scope, there had been no reason to obtain sworn testimony as to individual member experiences beyond those of the original individual Plaintiffs. Following Defendants' sudden reversal of position on the scope of the litigation, the NFB -- through counsel -- took the opportunity at its 2006 convention to inquire into its members' experiences with Defendants'

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35 Pl. E*TRADE Access, Inc.'s Opp'n to Def.'s Mot. to Dismiss at 5, *E*TRADE Access, Inc. v. Nat'l Fed. of the Blind, Inc.*, No. 03-743-A (E.D. Va. 2003) (Exhibit 3 to Motion to Amend). *See also generally* Motion to Amend at 3-6.

36 Mem. in Support of Defs.' Rule 12(b)(7) Mot. to Join Necessary Parties, Paper No. 44 at 3, 10-13; *see also* Cmplt. for Declaratory J. ¶ 12, *E*TRADE Access, Inc. v. Nat'l Fed. of the Blind, Inc.*, No. 03-743-A (E.D. Va. 2003) (Exhibit 2 to Motion to Amend) (E*TRADE's pre-emptive suit in the Eastern District of Virginia concerned its "nationwide network").

37 *See supra* at 2.

ATMs. This effort yielded six individuals who were interested in becoming plaintiffs in the litigation, and 23 additional NFB members ("NFB Member Declarants") who provided declarations describing the discrimination they had encountered.[38] With this new information -- and information produced by Defendants showing the location and extent of violations among its ATMs -- Plaintiffs moved to amend their complaint and for certification of a nationwide class. Those motions -- which would restore the case to the procedural posture espoused by both parties in two courts for three years -- are currently pending before this Court.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment can be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[39] As the moving parties, Defendants have the burden of showing that no genuine issues of material fact exist; "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."[40]

The First Circuit has held that, in addressing a motion for summary judgment based on lack of standing to sue under Title III of the ADA, "[g]iven the remedial purpose underlying the ADA, courts should resolve doubts about such questions in favor of disabled individuals."[41]

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[38] *See generally* Private Pls.' Mot. for Certification of Class and Subclass ("Motion for Class Certification"), Paper No. 222, Exs. A-I & R-GG; PRSMF Exs. H-M.

[39] Fed. R. Civ. P. 56(c).

[40] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[41] *Dudley*, 333 F.3d at 307.

II. THE ORDER IN WHICH TO CONSIDER PENDING ISSUES AND MOTIONS.

Plaintiffs respectfully submit that it is proper for the Court to consider the pending issues and motions in this order:

1. Does Private Plaintiffs' Motion to Amend have merit?

2. Do the Individual Plaintiffs and the NFB have standing to bring ADA claims against Defendants? If the Court grants the Motion to Amend, this question must be addressed based on the parties to and allegations in the Fourth Complaint.

3. Does Private Plaintiffs' Motion for Class Certification have merit?

4. Following development of evidence concerning Defendants' ADA violations or, at the earliest, following resolution of the Motion for Class Certification, what is the proper scope of relief?

Private Plaintiffs have previously explained that it is proper to address an attempted challenge to standing by amending and/or supplementing their complaint.[42] For this reason, the Motion to Amend should be considered first.

It is appropriate for this Court to consider next the question whether the NFB and Individual Plaintiffs have Article III standing to bring a claim against Defendants under the ADA, and to do so before considering Plaintiffs' Motion for Class Certification. The question of Plaintiffs' standing to obtain a nationwide injunction, however, should be addressed after this Court has decided Plaintiffs' Motion for Class Certification.

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[42] *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (describing the decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952)); *Mathews v. Diaz*, 426 U.S. 67, 75 (1976); *see generally* Motion to Amend at 10-16 and cases cited therein.

The Supreme Court has held that where "class certification issues are . . . 'logically antecedent'" to standing concerns, class certification should be treated first.[43] That is, where the question is Article III standing to bring the lawsuit in the first place, that question should be considered first; where the standing question relates to the standing of the class, certification must be addressed first.

Another court in this District has provided a good example of how this works. In the *Relafen Antitrust* case, representative plaintiffs with claims against the defendant arising under the laws of two states were attempting to certify a class of parties with claims arising under the laws of 16 other states.[44] The defendant argued that the representative plaintiffs did not have standing to bring claims of class members arising in other states. The court disagreed, noting that the defendant

> did not challenge the representatives' standing to assert personal claims under the laws of states in which they resided or purchased medication. . . . Rather, [the defendant] challenged only their standing to "represent a class . . . in the other 16 . . . jurisdictions." Accordingly, the Court applies the *Ortiz* exception to defer consideration of [the defendant's] standing challenge and to address the remaining issues of certification first.[45]

A plaintiff's standing to bring the claims he personally asserts -- in *Relafen*, each plaintiff's personal claim under his state's law; here, each Plaintiff's individual ADA claim -- must be resolved before addressing class certification. However, the breadth of the claims that may be asserted by the class -- in *Relafen*, claims under the laws of 16 other states; here, claims addressing Defendants' ATMs nationwide -- must be addressed after resolving class certification. This approach "rest[s] on the long-standing rule that, once a class is properly certified, statutory

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43 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

44 *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 269-70 (D. Mass. 2004).

45 *Id.* at 269-70.

and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs."[46]

Once the Private Plaintiffs establish -- as they do below -- that both the NFB and the Individual Plaintiffs have Article III standing to sue Defendants, the question of standing to obtain a nationwide injunction should be postponed until after consideration of class certification. Plaintiffs further demonstrate below that, should the class be certified as requested, it will have standing to seek a nationwide injunction.[47]

III. THE NFB HAS STANDING TO SUE.

Under the Supreme Court's long-standing test in *Hunt v. Washington State Apple Advertising Commission*, an association has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[48] The NFB easily meets each requirement. First, as established by declarations -- and conceded by Defendants[49] -- NFB members have standing to sue. Second, the interests the NFB seeks to protect here are the rights of blind people to independent use of -- and therefore full and equal enjoyment of -- Defendants' ATMs and banking services. These interests are central to the NFB's purpose.

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[46] *Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002); *see also Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001) ("when a class is properly certified, the injury asserted by the named plaintiffs at the standing stage of our inquiry is asserted on behalf of all members of the class"); *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 (D.N.J. 2003) (quoting *Ortiz*); *Wilson*, 413 F. Supp 2d at 1135 (in non-class context, holding that Article III standing is a separate question from scope of remedies).

[47] *See infra* at 3-4.

[48] *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

[49] *See supra* at 2.

Finally, the NFB seeks an injunction requiring Cardtronics to make its ATMs accessible to blind people and requiring E*TRADE Bank to make its fee-free privileges available to blind people on a nondiscriminatory basis. Because either injunction will be uniform company-wide, it will not require the participation of individual NFB members.

The Supreme Court has stated that

> the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others. "The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all."[50]

The First Circuit has called this a "strong endorsement of the associational standing doctrine."[51] In this case, the NFB is the vehicle for vindicating the interests of blind people throughout the country in enjoying the convenience of Defendants' any time, anywhere ATM service.[52]

A. Individual Plaintiffs and other NFB Members Have Standing to Sue in their Own Right.

To establish standing, an individual must establish (1) that he suffered an injury in fact (2) that was caused by the defendant's conduct and (3) that will be redressed by a favorable

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[50] *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 187 (1951)).

[51] *Camel Hair and Cashmere Inst. of Am., Inc. v. Associated Dry Good Corp.*, 799 F.2d 6, 11 (1st Cir. 1986).

[52] The NFB asserts only associational standing. Associational standing -- also called "representational standing" -- is distinct from "organizational standing." Under the doctrine of associational standing, an entity such as the NFB can base its standing on the harm to -- and thus standing of -- its members. Under the doctrine of organizational standing, the entity would base its standing on an allegation that the entity itself was harmed. Because the NFB asserts standing only under the former -- associational standing -- theory, Defendants' argument that the NFB lacks standing to sue in its own right (Count III-IV-V Standing Motion at 1, 5-7) is not relevant.

decision.[53] In their Standing Motions, Defendants appear to challenge only the "injury in fact" prong, but not causation or redressability. And, as noted above, Defendants' Count III-IV-V Motion appears to concede that at least some NFB members have standing.[54]

The First Circuit has established a this standard for the first prong of the *Lujan* test in the context of Title III of the ADA:

> "[A] disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA" and "who is threatened with harm in the future because of existing or imminently threatened noncompliance with the ADA" suffers actual or imminent harm sufficient to confer standing.[55]

Each of the Individual Plaintiffs and many other NFB members meet this standard.

1. The Individual Plaintiffs and NFB Members Have Suffered Injuries-in-Fact Sufficient to Establish Standing to Challenge Cardtronics's Inaccessible ATMs.

The Individual Plaintiffs and a number of NFB members (the "NFB Member Declarants") have standing to challenge Cardtronics's inaccessible ATMs. They have demonstrated that they have attempted to patronize Defendants' ATMs and have been unable to do so because the machines were not accessible to and independently useable by them.[56] Plaintiffs and NFB Member Declarants have also testified that they would like to use and would be likely to use those

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[53] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

[54] *See* Count III-IV-V Motion at 16 ("only a subset of the NFB's overall membership will meet all of these factual prerequisites to have individual standing in this lawsuit.").

[55] *Disabled Ams. for Equal Access, Inc. v. Ferries del Caribe*, 405 F.3d 60, 64 (1st Cir. 2005) (quoting *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002)).

[56] PRSMF ¶¶ 17, 32, 33, 43 -61, 69-73, 79-81, 89-91, 96, 98, 106, 112-115, 119-120, 129, 137, 140, 148, 149, 154, 164, 174, 175, 186, 188, 190, 192, 194, 203, 214, 217, 224, 227, 236, 248, 250, 252, 259 261, 263, 272-74, 279, 280, 287-93, 300, 301, 310, 321, 330, 332, 334, 345, 348, 349, 350, 352, 359, 360, 361, 362.

ATMs in the future but cannot because they are inaccessible.[57] This satisfies the First Circuit test for Title III standing.

a. Given the Nature and Intended Use of ATMs, Individual Plaintiffs and NFB Members have Demonstrated Sufficient Certainty of Future Use.

Defendants assert that "Plaintiffs must show that they have an actual intention of visiting each ATM at issue," and that, for example, Ms. Asch's statement that she cannot predict when she will have occasion to use an ATM is insufficiently definite to establish standing.[58] While the question of how many ATMs an eventual injunction should cover will be addressed below, it is clear that Individual Plaintiffs and NFB Member Declarants -- including Ms. Asch -- have shown sufficient certainty of future use of Defendants' ATMs to establish Article III standing to pursue this litigation. A number of Individual Plaintiffs and NFB Member Declarants have testified to specific ATMs that they have attempted to use and/or been deterred from using and have testified further that they would use those specific ATMs -- and others -- should they be made independently accessible to and useable by blind people.[59]

Under the law of this Circuit, each of these individuals has standing because he or she is "currently deterred from patronizing" Defendants' ATMs and is "threatened with harm in the future because of existing . . . . noncompliance with the ADA."[60] The First Circuit has made clear that the Individual Plaintiffs and NFB Member Declarants do not have to "subject [themselves] to

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[57] PRSMF ¶¶ 18, 33-35, 71, 72, 79-81, 84, 89-91, 96-100, 106-07, 112-116, 121, 130, 138, 139, 141, 150, 156, 165, 166, 176, 187, 189, 193, 195, 205, 206, 215, 216, 228, 238-40, 249, 253, 262, 264, 274, 275, 281, 294, 304, 311, 312, 322, 331, 333, 335, 336, 351-52, 359-62.

[58] Count III-IV-V Motion at 9.

[59] *See supra* notes 56 & 57.

[60] *Disabled Ams.*, 405 F.3d at 64.

repeated instances of discrimination in order to invoke the remedial framework of Title III of the ADA."[61] Indeed, "[l]imiting Title III relief to instances in which a future violation appears certain to occur would create a standard far more demanding than that contemplated by the congressional objectives that influenced the ADA."[62]

An ATM is not the type of public accommodation for which patrons generally schedule their use far in advance. As noted above, Defendants describe their own service as providing access to cash "any time anywhere."[63] Under these circumstances, Plaintiffs simply need to demonstrate an intent to patronize Defendants' ATMs when they become accessible, and do not need to state a date certain on which that will occur.[64]

Defendants assert that Plaintiffs must show certain "factual indicia" -- above and beyond the basic requirements of *Lujan* -- to establish standing.[65] While Plaintiffs disagree that this is required, the testimony of many Individual Plaintiffs and NFB Member Declarants provides

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61 *Dudley*, 333 F.3d at 305.

62 *Id.* at 307.

63 *See supra* at 3.

64 *See Colorado Cross Disability Coalition v. Hermanson Family Ltd. P'ship*, No. 96-WY-2490-AJ, 1997 WL 33471623, at *4 (D. Colo. 1997) (denying summary judgment as to standing to challenge the accessibility of a retail store under Title III, stating "[t]here simply is no requirement in the ADA that a person desiring entrance into a place of public accommodation have a specific desire to make a purchase at that particular business . . ."); *see also Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1079 (D. Haw. 2000) (holding that plaintiff had standing to challenge barriers at a fast food restaurant under Title III in part because "[v]isiting a fast food restaurant, as opposed to a hotel or professional office, is not the sort of event that requires advance planning or the need for a reservation. . . . Fast food patrons visit such restaurants at the spur of the moment. Once a person determines that he or she likes a fast food restaurant, that person's return is on impulse."); *Clark v. McDonald's*, 213 F.R.D. at 228-29 (holding that plaintiff had standing to challenge barriers at fast food restaurants where he expressed an intent to return when the barriers are removed).

65 Count III-IV-V Motion at 10.

evidence of such indicia, including proximity of the individuals' homes to the businesses they seek to patronize, past patronage and plans to return, and frequency of travel to the places where the business are located.[66]

b. Plaintiffs Present Evidence of 18 NFB Members Who Had Standing When the Original Complaint Was Filed and an Additional 13 Members When the Fourth Complaint was Filed.

Plaintiffs have presented evidence of 18 NFB members who attempted unsuccessfully to use Defendants' ATMs before the present suit was filed in June, 2003.[67] This satisfies the standard enunciated by Defendants.[68] In addition, Plaintiffs have moved this Court for leave to file an amended and supplemental complaint.[69] Even assuming *arguendo* that Plaintiffs were not able adequately to support standing under the original complaint, Plaintiffs cure this with their supplemental complaint[70] and evidence of an additional 13 NFB Members who were injured prior to the filing of that Complaint.[71]

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[66] *See, e.g.*, PRSMF ¶¶ 17, 32, 34, 68-73, 79-81, 89-91, 96-99, 106-07, 112-115, 130, 138, 139, 141, 147-56, 166, 176, 177, 187, 189, 191, 193, 195, 206, 215, 226, 228, 238-40, 249, 253, 262-64, 275, 281, 287-92, 302, 304, 312, 321, 336, 351, 359-62.

[67] PRSMF ¶¶ 32-34, 89, 91, 106-07, 130, 139, 152-53, 165, 175, 177, 206, 215, 228, 236, 288, 302, 312, 321, 336, 349.

[68] *See* Count III-IV-V Motion at 8-9.

[69] *See generally* Motion to Amend.

[70] *See, e.g., Clark v. McDonald's*, 213 F.R.D. at 227 (holding that the plaintiff could have "obtain[ed] leave to serve and file a supplemental complaint that cured defective allegations as to standing by pleading facts occurring subsequent to Plaintiffs' original filing"). *See also* Motion to Amend at 10-16.

[71] PRSMF ¶¶ 17, 43-61, 70, 71, 79-81, 96, 99, 111, 119-20, 186-96, 248, 250-52, 259, 263, 272, 279, 359-69.

Defendants also argue that the NFB does not have associational standing because it does not have information on all of its members.[72] This is not required to support associational standing. The *Hunt* test "requir[es] an organization suing as representative to include *at least one member* with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association."[73] "The Supreme Court has never required that *every* member of an association have standing before it can sue on behalf of its members. 'The association must allege that its members, *or any one of them*,'" has standing.[74] Indeed, the Fourth Circuit recently sustained associational standing where only one member of the association had standing.[75] Here, Private Plaintiffs have identified more than 30 NFB members with standing, easily satisfying this standard.[76] Indeed, Defendants concede that "a subset of the NFB's overall membership will meet all of these factual prerequisites to have individual standing in this lawsuit."[77]

c. The Individual Plaintiffs' and NFB Member Declarants' Dual Status as Potential Patrons and Civil Rights Testers Also Confers Standing.

The Supreme Court has long recognized that "testers" -- those who put themselves in a position to experience discrimination in order to test and enforce the law -- have standing to

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72 *See* Count III-IV-V Motion at 15-16.

73 *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996) (emphasis added).

74 *Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R.*,906 F.2d 25, 34 (1st Cir. 1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)) (emphasis in *Playboy Enters.*).

75 *Retail Indus. Leaders Ass'n. v. Fielder*, --- F.3d ---, Nos. 06-1840, 06-1901, 2007 WL 102157, at *3-5 (4th Cir. Jan. 17, 2007).

76 PRSMF ¶¶ 12, 21, 42, 63, 76, 83, 94, 102, 108, 117, 123, 132, 143, 158, 168, 179, 199, 208, 219, 230, 242, 255, 266, 277, 283, 296, 306, 316, 325, 339, 354 (establishing NFB membership of Individual Plaintiffs and NFB Member Declarants).

77 Count III-IV-V Motion at 16.

challenge that discrimination in court. In the *Havens Realty* case, the Court held that an African-American tester had standing under the Fair Housing Act[78] when he inquired concerning the availability of rental housing with no intent to rent but rather to test for discrimination.[79] A number of courts have recognized the standing of individuals who test for disability discrimination under the ADA, in particular under circumstances -- such as the present case -- in which the tester is also a potential patron.[80] For example, in a case in which the plaintiff had not attempted to patronize the defendant stores prior to the events giving rise to the litigation and admittedly went to the stores to test access, the court upheld standing, explaining that the

> [p]laintiff ha[d] suffered, and will suffer in the future if the discrimination on the basis of disability is not redressed, an injury-in-fact that is not hypothetical or speculative. Plaintiff, although arguably a tester in October of 1996, will still confront the architectural barriers that preclude him from gaining access to the public accommodations at issue. . . .The presence of the stairs demonstrates that the buildings are not readily accessible to those in wheelchairs, a group that includes plaintiff all of the time in all circumstances. The Court finds that the legislative purposes underlying the enactment of the ADA will be fulfilled if the plaintiff is permitted to pursue this cause of action.[81]

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78 42 U.S.C. § 3604(d).

79 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982); *see also Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (holding that African-American plaintiff who rode segregated bus for the purpose of instituting litigation had standing); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993) (holding that testers who read newspapers to check for discriminatory advertising had standing); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("It would be difficult indeed to prove discrimination in housing without this means of gathering evidence.").

80 *See, e.g., Clark v. McDonald's*, 213 F.R.D. at 228 (upholding standing under Title III of plaintiff who had "dual motivation of availing himself of goods and services *and* verifying ADA compliance." (Emphasis in original)); *see also infra* note 82

81 *Colorado Cross Disability Coalition*, 1997 WL 33471623, at *6. *See also Tandy v. City of Wichita*, 380 F.3d 1277, 1286-87 (10th Cir. 2004) (recognizing tester standing under Title II of the ADA); *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1102-04 (9th Cir. 2004) (noting testers' "long and important role in fair housing enforcement" and holding tester had standing under the provisions of the Fair Housing Act requiring accessibility for individuals with

(continued...)

The plaintiff's motivation for attempting to patronize an inaccessible public accommodation is irrelevant when he has otherwise satisfied the Supreme Court's three-part test for standing.[82]

In the present case, many of the Private Plaintiffs and NFB Member Declarants played a similar dual role. They are regular patrons of ATMs and of the public accommodations in which Defendants' ATMs are found, and they also tested the accessibility of Defendants' ATMs.[83] They have testified that they would like to be able to use these ATMs and, like the stores at issue in *Colorado Cross Disability Coalition*, Defendants' ATMs are not readily accessible to blind people, a group that includes the Private Plaintiffs and NFB Member Declarants "all of the time in all circumstances." Similarly, "the legislative purposes underlying the enactment of the ADA will be fulfilled if . . . [Plaintiffs are] permitted to pursue this cause of action."[84]

2. Several Individual Plaintiffs and NFB Members Have Standing to Sue E*TRADE Bank.

Plaintiffs Asch, Bashin, Crosby, Crowley, and Sayer -- as well as a number of NFB Member Declarants -- have standing to sue E*TRADE Bank. Each establishes that he or she has been injured by E*TRADE bank, and is currently being injured by that Defendant, either by being

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[81](...continued)
disabilities).

[82] *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947-48 (C.D. Cal. 2005) (holding that the reasons for the visit to the defendant's public accommodation were irrelevant if plaintiff otherwise satisfied requirements for standing); *Molski v. Price*, 224 F.R.D. 479, 484 (C.D. Cal. 2004) (holding that motivation for patronage was irrelevant; upholding standing under Title III of plaintiffs whose expressed an intent to return "to check on the [defendant's] ADA compliance, and to use the restroom if it was accessible.").

[83] PRSMF ¶¶ 13, 17, 38, 43-61, 66, 69, 71, 72, 79 -81, 89-91, 96-99, 103, 106, 108, 111, 112, 113, 118, 124, 129, 130, 133, 138, 139, 141, 144, 152, 153, 159, 165, 169, 175-77,180, 187, 189, 191, 193, 195, 200, 204-06, 209, 215, 220, 224-28, 231, 238, 243, 248-52, 256, 257, 259, 262-64, 267, 273-75, 280, 288-92, 297, 302, 307, 311, 312, 317, 321, 326, 330, 332, 334, 336, 340, 349, 350, 355, 359-69.

[84] *See Colorado Cross Disability Coalition*, 1997 WL 33471623, at *6.

deterred from becoming an E*TRADE Bank customer or, in the case of Bryan Bashin, by having to maintain a balance of at least $5,000 or pay fees to use accessible ATMs.[85] This satisfies the First Circuit's standard.[86]

a. Plaintiffs have Alleged a Cognizable Injury under Count II.

Defendants assert that Plaintiffs lack standing because the requested modification is not necessary.[87] This is both incorrect and, because it goes to the merits, premature.

"The standing inquiry does not focus on the merits of the dispute. It focuses only on 'whether the litigant is entitled to have the court decide the merits of the dispute.'"[88] Here, Defendants concede that their "necessity" argument is an "affirmative defense."[89] It is premature to decide that affirmative defense; rather, it is sufficient for Plaintiffs to demonstrate that they have suffered an injury to their interest in accessible ATM and banking services; this they have done.

Nevertheless, it is clear that the requested modification is necessary. Many E*TRADE ATMs are inaccessible to blind people. It is thus necessary for blind E*TRADE Bank customers to use non-E*TRADE Bank ATMs if they are to have access to their cash equal to that available to sighted E*TRADE Bank customers. Under the current policy, blind E*TRADE Bank

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85 *See supra* note 25.

86 *Disabled Ams.*, 405 F.3d at 64.

87 Count II Motion at 8.

88 *City of Hope Nat'l Med. Ctr. v. HealthPlus, Inc.*, 156 F.3d 223, 228 (1st Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see also Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 17 (D.D.C. 2006) (Title III case holding "courts have rejected attempts . . . to require plaintiffs to show that their claims are legally meritorious in order to demonstrate that they have standing.").

89 Count II Motion at 4.

customers who do not meet certain financial conditions[90] -- unlike similarly-situated sighted E*TRADE Bank customers -- are forced to incur fees if they want to have independent access to their cash. This surcharge on accessibility is illegal.[91]

Defendants assert that the Supreme Court held in *PGA Tour, Inc. v. Martin* that modifications are not necessary where they are "merely seeking a convenience or improvement."[92] The Court said no such thing. Rather, it stated that modifications may not be available to individuals "with less serious afflictions" that make the absence of the modification "uncomfortable or difficult, but not beyond their capacity."[93] For individuals who are legally blind -- hardly a "less serious affliction" -- using an inaccessible ATM is not merely "uncomfortable or difficult," it is physically impossible -- that is, "beyond their capacity" -- without assistance, and often dangerously insecure with assistance. In any event, Department of Justice ("DOJ") regulations make clear that reasonable modifications may be required to achieve an equality of convenience.[94]

Defendants assert that the Visa Check Card -- which permits cardholders to get cash back on purchases at participating stores -- can substitute for accessible ATMs or the requested fee-free

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[90] Defs.' Count II SMF ¶ 1 & Ex. 1. Even those who do meet the financial criteria and therefore get fee-free transactions at any ATM, are essentially incurring opportunity costs for that privilege, including tying up $5,000 in an E*TRADE Bank account, tying up $50,000 in an E*TRADE Securities commodities trading account, or making more than 30 trades a year in a trading account, each of which costs $6.99 to $9.99. *See* PRSMF ¶ 5.

[91] *See* 28 C.F.R. § 36.301(c) (illegal to impose surcharge on reasonable modifications, auxiliary aids or alternatives to barrier removal).

[92] Count II Standing Motion at 9.

[93] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682 (2001).

[94] 28 C.F.R. § 36.302(d) (explaining that store checkout aisle policies may need to be modified "to ensure that an equivalent level of convenient service is provided to individuals with disabilities as is provided to others").

use of non-E*TRADE Bank ATMs, making the latter unnecessary. This is not so for several reasons. By definition, the Visa Check Card requires a purchase;[95] when a person simply wants cash, he must buy something, essentially imposing a fee that is likely to be even higher than the ATM fee. It requires the customer to have access to a participating store that permits cash back transactions -- only about 25% of the total locations[96] -- and the store to be open. Finally, it requires an accessible point of sale machine, or this system simply replicates the problems encountered with ATMs. Many point of sale machines are in fact inaccessible.[97] Defendants state: "The store's sales clerk necessarily will be present to lend any assistance if a blind customer needs help."[98] Putting aside the conclusory nature of this assertion -- Defendants provide no support for their confidence in the sales help of the various participating locations -- a system that relies on sales clerk assistance is not "independently useable by persons with vision impairments."[99]

For these reasons, the Visa Check Card is not "particularly useful for blind customers."[100] Ultimately, if the Visa Check Card could substitute for access to E*TRADE's ATMs, it is curious that E*TRADE Bank has not eliminated the latter machines for its sighted customers as well, so that they, too, can enjoy the particular utility of the check card.

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95 Defs.' Count II SMF ¶ 3.

96 PRSMF ¶ 1. Commentary to the DOJ regulations makes clear that accommodation is required where an accessible ATM is closed during hours that an inaccessible ATM is available. *Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 C.F.R. pt. 36, app B (2005) at 700.

97 *See supra* note 20.

98 Defs.' Count II SMF ¶ 4.

99 *See* 28 C.F.R. pt 36, app A, § 4.34.5.

100 Count II Motion at 5.

Finally, the requested modification will not provide blind patrons with a "better deal" than non-disabled E*TRADE Bank customers obtain, as Defendants argue.[101] Rather, it will finally put them on equal footing with sighted customers: both groups will have fee-free independent access to cash, without the requirement of sharing private financial information with others, finding an open and participating Visa check card location, or making a purchase from which to get cash back. While it is true that achieving this equal footing requires modifying policies for blind people in a way that they are not modified for sighted people, the Supreme Court has recognized that this is entirely appropriate. In response to the argument that "reasonable accommodations" under Title I of the ADA[102] -- which applies to employment -- did not require "preferences," the Court explained:

> While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.[103]

b. Plaintiffs are Not Required to Show that Inaccessible ATMs are the Sole Reason they Are not E*TRADE Bank Customers.

Defendants assert that Plaintiffs must show that they are not E*TRADE Bank customers "***solely because*** Defendants' ATMs are inaccessible" and cite page 64 of the First Circuit's decision in *Disabled Americans for Equal Access, Inc. v. Ferries del Caribe.*[104] The First Circuit says no such thing, either on that page or elsewhere. In fact, on that very page, the Court held that deterrence is sufficient to confer standing and that the plaintiff had standing based on his

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101 Count II Motion at 13-14.

102 42 U.S.C. § 12111 *et seq*.

103 *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis in original).

104 Count II Motion at 6 (bold and italics in original).

allegation that "barriers to accessibility 'have effectively denied and/or diminished Plaintiff's ability to visit and/or use the property . . . .'"[105] The testimony cited above establishes that E*TRADE Bank's inaccessible ATMs and refusal to make reasonable modifications injure and deter these individuals and effectively diminish their ability to use E*TRADE Bank's services.

c. Plaintiffs Do Not Need to Show They Were Aware of the Requested Remedial Policy at the Time of Their Injury.

Defendants also assert without support that Plaintiffs must show that they knew of and/or were injured by the lack of the specific policy they seek to remedy the inaccessibility of E*TRADE Bank's ATMs.[106] This is not so. Under the Supreme Court's test for standing,[107] it is sufficient that Plaintiffs demonstrate

1. that they suffered and will continue to suffer injuries in fact -- inability to use E*TRADE's Bank's ATMs and deterrence from becoming an E*TRADE Bank customer;

2. that their injuries were caused by E*TRADE Bank -- a fact Defendants do not challenge; and

3. that their injuries will be redressed by a favorable decision -- ideally, by an injunction requiring all of Defendants' ATMs to be accessible; lacking that (or pending its implementation) by an injunction requiring E*TRADE Bank to extend its fee-free service to all ATMs for its blind customers, thereby permitting those customers the fee-free, independent access to cash that sighted customers now enjoy. Nothing in this well-established test requires Plaintiffs to have been aware of all of the precise forms of relief available to redress their injuries at the time of those injuries and Defendants offer no cases to support their position.

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105 *Disabled Ams.*, 405 F.3d at 64.

106 Count II Motion at 8, 10.

107 *See Lujan*, 504 U.S. at 560.

B. The Interests the NFB Seeks to Protect Through this Litigation are Germane to its Purpose.

The second prong of the Supreme Court's test for associational standing is that "the interests [the organization] seeks to protect are germane to the organization's purpose."[108] Defendants do not appear to challenge this prong. It is, in any event, clear that by seeking to secure independent access to ATMs, the NFB is protecting an interest germane to its purpose, which includes, among many other things, "assisting the blind in their efforts to integrate themselves into society on terms of independence and equality."[109]

C. Neither the Claim Asserted Nor the Relief Requested Requires the Participation of Individual NFB Members.

The third prong of the *Hunt* test is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[110] The Supreme Court has held that this prong is prudential in nature, that is, it is not required to establish standing under Article III.[111] As the Supreme Court has also explained, "*Hunt* held that 'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members."[112] In the present case, prudential considerations mitigate strongly in favor of associational standing, and the type of relief requested -- a uniform injunction requiring Defendants to make their ATMs accessible to blind people or (at the very least and in the meantime) requiring E*TRADE Bank to

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108 *Hunt*, 432 U.S. at 343.

109 PRSMF ¶ 10.

110 *Hunt*, 432 U.S. at 343.

111 *United Food & Commercial Workers*, 517 U.S. at 557 ("the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution."); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 314 (1st Cir. 2005).

112 *United Food & Commercial Workers Union*, 517 U.S. at 546.

make uniform reasonable modifications to policies -- will not require individual participation by NFB members. A number of courts have held that organizations have associational standing to seek injunctive relief remedying inaccessible facilities and policies under Title III of the ADA.[113]

1. Prudential Considerations, If Considered at All, Dictate that the NFB Should have Standing.

Because the third prong is prudential rather than constitutional, several courts have recognized associational standing under Title III of the ADA without evaluating this prong.[114] Plaintiffs urge that it is similarly unnecessary to evaluate this prong in the present case.

Should the Court consider this third prong, it is clear that recognizing the NFB's associational standing serves the prudential goals of "administrative convenience and efficiency."[115] In addition to the considerations discussed in Section III(C)(2) below, it will permit the Court -- in one proceeding -- to evaluate Defendants' ATMs and order a uniform rather than piecemeal solution. The alternative is for individual blind people to bring individual actions around the country challenging individual ATMs, a result Defendants themselves have argued against.[116]

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[113] *Guckenberger v. Boston Univ.*, 957 F.Supp. 306, 321 (D. Mass. 1997); *see also Org. for the Advancement of Minorities with Disabilities v. Brick Oven Rest.*, 406 F. Supp. 2d 1120, 1127-28 (S.D. Cal. 2005); *Mid-South Chapter of Paralyzed Veterans of Am. v. New Memphis Pub. Bldg. Auth. of Memphis & Shelby County*, No. 04-2353 Ml/V, 2005 WL 948370, at *7-8 (W.D.Tenn. Mar. 1, 2005); *Bacon v. City of Richmond*, 386 F. Supp. 2d 700, 705 (E.D. Va. 2005); *Disabled Patriots of Am., Inc. v. Lane Toledo, Inc.*, 325 F. Supp. 2d 837, 840-41 (N.D. Ohio 2004); *Wein v. Am. Huts, Inc.*, 313 F. Supp. 2d 1356, 1359-60 (S.D. Fla. 2004); *Matta v. Lam*, No. Civ.A. 503CV087C, 2003 WL 21448942, at *2 (N.D.Tex. June 18, 2003).

[114] *See, e.g., Mid-South Chapter of Paralyzed Veterans*, 2005 WL 948370, at *7 n.14 (W.D.Tenn. Mar. 1, 2005); *Matta*, 2003 WL 21448942, at * 2-3.

[115] *United Food & Commercial Workers Union*, 517 U.S. at 557 .

[116] *See supra* notes 33-36.

2. Neither the Claim Nor the Relief Requested Will Require Individual Participation.

The NFB seeks only injunctive relief, making individual participation unnecessary.[117] The First Circuit has also directed that the court consider whether adjudication of the merits will require a "fact-intensive-individual inquiry."[118] No such inquiry will be required here.

As explained above, Plaintiffs allege that Defendants' ATMs are inaccessible to blind people and request an injunction requiring them to be made accessible. This will require evidence of the inaccessibility of Defendants' ATMs -- largely already provided by Defendants[119] -- as well as expert testimony and limited -- essentially generic -- individual evidence concerning how blind people use ATMs.[120] Because the NFB requests a uniform remedy rather than one tailored to each member's needs, the case will not require any sort of individualized inquiry into the circumstances of individual members. Another court in this District recognized associational standing of a group of disabled law students challenging the accommodations policies at Boston University under Title III. Although student accommodations are often individual in nature, the court held that "the primary forms of relief sought -- injunctive and declaratory relief against

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117 *United Food & Commercial Workers*, 517 U.S. at 546 (stating that "*Hunt* held that 'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members . . .").

118 *N.H. Motor Transp. v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006).

119 *See* PRSMF ¶¶ 6, 7.

120 *See Pharm. Care Mgmt.*, 429 F.3d at 314 (associational standing appropriate where "limited" proof presented by individual members); *Camel Hair*, 799 F.2d at 12 (no individual participation necessary where "[t]he nub of the plaintiff's claim . . . depends on the plaintiff's expert evidence, not on evidence that differs from member to member."). *See also Clark v. McDonald's*, 213 F.R.D. at 214 (holding that although fact-intensive inquiry necessary to assess ADA violations at multiple fast-food restaurants, the necessary evidence "could be established by the testimony of the Defendants' employees, or even third parties," including "non-member witnesses well-versed in [the] standards." (Emphasis in original).).

BU's implementation of its new accommodations policy -- do not require the individual participation of [the association's] members."[121]

Defendants assert that the present case will require a "'fact-intensive individual inquiry' concerning thousands of [NFB] members" as to whether each one can or cannot use an ATM.[122] This statement is based on a misunderstanding either of the relief that the NFB requests, of the Supreme Court's requirements for associational standing, or both. Again, the NFB does not seek remedies tailored to each individual member, so such testimony will not be necessary to fashion relief. And, as demonstrated above, the NFB is not required to show that all of its members are unable to use ATMs, that is, that all of them have standing. It is sufficient that at least one member -- the NFB has provided evidence of at least 30 -- is unable to see an ATM screen and thus has standing to challenge Defendants' inaccessible ATMs.[123] It is irrelevant how many other NFB members are unable to use an ATM, or what each member's level of vision is.

This case is distinguishable from the First Circuit case on which Defendants rely most heavily. In *Pharmaceutical Care,* the organizational plaintiff was challenging -- under the Takings Clause -- a statute requiring certain pharmaceutical sales middlemen to disclose conflicts of interest.[124] The First Circuit concluded that the "individual takings claims could in principle be significantly strengthened or weakened by the particularized circumstances of each individual

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121 *Guckenberger*, 957 F.Supp. at 321.

122 Count III-IV-V Motion at 18.

123 PRSMF ¶¶ 11, 20, 41, 62, 64, 75, 82, 92, 101, 108, 117, 123, 132, 143, 158, 168, 179, 199, 208, 219, 230, 242, 255, 266, 277, 283, 296, 306, 316, 325, 339, 354.

124 *Pharm. Care Mgmt.*, 429 F.3d at 299.

member."[125] In other words, the question of liability -- whether the Takings Clause prevented enforcement of the disclosure law -- was specific to each member. Here, in contrast, the question of liability is uniform: if the ATMs at issue are not independently useable by blind people, they are in violation of the ADA.[126] This conclusion does not require evaluation of each member's ability to use a given machine.

Defendant also relies on *Concorde Gaming*, in which a court in the Southern District of Florida asserted that "'any finding of ADA violations requires proof as to each individual claimant'"[127] and thus held that there can be no associational standing under Title III of the ADA. This is simply wrong -- and thus far from the majority view. As noted above, many courts have held organizational plaintiffs to have associational standing under Title III.[128] Indeed, another judge in the same district considered and rejected the reasoning of *Concorde Gaming* after analyzing the law and reviewing the large number of associational standing cases in his district, concluding that recognizing associational standing in such cases was both correct and the far more widely adopted approach.[129] He also demonstrated that the quote on which Defendants rely originated in a damages case -- in which individualized proof generally is required -- and was adopted without discussion in *Concorde Gaming*.[130] *Concorde Gaming* is what the late federal

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125 *Id.* at 314.

126 *See* 28 C.F.R. pt. 36, app A, § 4.34.5.

127 Count III-IV-V Motion at 1, 18 (quoting *Ass'n for Disabled Ams., Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1364 (S.D. Fla. 2001)).

128 *See supra* note 113.

129 *Ass'n for Disabled Ams., Inc. v. Key Largo Beach, LLC*, 407 F. Supp. 2d 1321, 1330-32 (S.D. Fla. 2005) (noting approximately 95 ADA cases in which associational standing has been either explicitly or implicitly recognized).

130 *See Ass'n for Disabled Ams.*, 407 F. Supp. 2d at 1335-36.

judge Roszel Thomsen characterized as a "mule" case -- one without pride of ancestry or hope of progeny.

Defendants also point to several Title III cases in which associational standing was denied; each is distinguishable. The court in *Access 123* held that the organization had satisfied the Article III requirements for standing but refused to grant associational standing because the organization's claim -- concerning Title III violations at a single restaurant -- was completely duplicative of the claim of the single member-plaintiff.[131] In contrast, Plaintiffs here challenge the accessibility of multiple ATMs and have presented evidence of multiple plaintiffs and other NFB members who have been injured by the inaccessibility of various different ATMs. The NFB's claims in no way duplicate those of any one member or individual plaintiff.[132] The organizational plaintiff in *Claypool Holdings* could not point to any members with standing,[133] again, in contrast to the at least 30 members to which the NFB can point here.

Finally, Defendants cite *Clark v. McDonald's* for the proposition that "the purpose of the ADA would be 'frustrated'" if the NFB had standing here.[134] Flying as this does in the face of 30 years of Supreme Court associational standing cases, not to mention the First Circuit's acknowledgment of the Supreme Court's "strong endorsement" of such standing, it is not surprising to learn that Defendants' assertion mischaracterizes the case. In fact, the discussion from which Defendants extracted the word "frustrated" concerned organizational standing, that is,

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131 *Access 123, Inc. v. Markey's Lobster Pool, Inc.*, No. CIV 00-382-JD, 2001 WL 920051, at * 4 (D.N.H. Aug. 14, 2001), *cited in* Count III-IV-V Motion at 16.

132 *See also Wein*, 313 F. Supp. 2d at 1360 (distinguishing *Access 123* on these same grounds and holding organization had associational standing).

133 *Ass'n for Disabled Ams., Inc. v. Claypool Holdings, LLC*, No. IP00-0344-C-T/G, 2001 WL 1112109, at *19-20 (S.D. Ind. Aug. 6, 2001), *cited in* Count III-IV-V Motion at 10.

134 III-IV-V Standing Motion at 19 (citing *Clark v. McDonald's*, 213 F.R.D. at 210 n.9).

injury to the organization itself, rather than standing to sue in a representative capacity.[135] It is thus not relevant here.[136]

IV. The Requested Class of Blind Plaintiffs Would Have Standing to Challenge All of Defendants' Inaccessible ATMs Nationwide; The Question of the Scope of Available Relief is Otherwise Premature.

Defendants argue that the NFB does not have standing to seek a nationwide injunction addressing all of Defendants' inaccessible ATMs. Defendants filed this motion before Plaintiffs moved to certify a nationwide class. As explained above, it is appropriate for this Court to resolve the pending Motion for Class Certification before addressing this question.[137] Should this Court certify the requested class, that class would have standing to challenge all of Defendants' inaccessible ATMs nationwide. In the absence of such a class, it is premature -- in advance of review of all of the evidence of noncompliance -- for this Court to circumscribe the possible relief available to Plaintiffs.

A. The Requested Class Will have Standing to Seek a Nationwide Injunction.

"Once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs."[138] Plaintiffs have requested certification of a class defined as:

> All blind people who, during a time period to be determined by this Court, were denied, or are currently being denied, on the basis of disability, full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any ATM owned, operated, controlled, and/or leased by Defendant Cardtronics anywhere in the United States.

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135 *Clark v. McDonald's*, 213 F.R.D. at 207 (heading of section from which Defendants' quote is drawn is "Access Today Lacks Organizational Standing").

136 *See supra* note 54.

137 *See supra* Section II.

138 *Payton*, 308 F.3d at 680; *see also Armstrong*, 275 F.3d at 870-71.

This class, because it is defined to include individuals who have been injured by Defendants' inaccessible ATMs "anywhere in the United States," will have standing to seek a nationwide injunction to remedy those ATMs. "The scope of injunctive relief [will be] dictated by the extent of the violation established."[139] If -- as Defendants' own documents have already established[140] -- the Court concludes that the violations are essentially systemic, system-wide relief will be appropriate.

This is a complete answer to Defendants' challenge to the scope of an injunction in this case and completely distinguishes the cases on which they rely, none of which involved certified classes.[141] Indeed, in two of the Title III cases in which courts have refused to permit a single plaintiff to challenge violations in multiple locations, the court has specifically noted that the matter was not a class action.[142]

B. Should This Court Deny Plaintiffs' Motion for Class Certification, It would be Premature to Address the Scope of An Eventual Injunction.

If this Court denies Plaintiffs' motion for class certification, the NFB may still be entitled to a nationwide injunction. Because that determination will depend on the nature and extent of evidence presented at trial, it is premature to reject such a possibility categorically.

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139 *Armstrong,* 275 F.3d at 870 (quoting *Lewis v. Casey,* 518 U.S. 343, 359 (1996)).

140 *See* PRSMF ¶¶ 6, 7.

141 *Conservation Law Found. of New England, Inc. v. Reilly*, 950 F.2d 38 (1st Cir. 1991) (not a class action); *Small v. Gen'l Nutrition Cos.*, 388 F. Supp. 2d 83, 100 (E.D.N.Y. 2005) (standing based only on individual plaintiffs; class certification decision deferred).

142 *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116, 1117 (C.D. Cal. 2000) ("This is not a class action."); *Tyler v. Kansas Lottery,* 14 F. Supp. 2d 1220, 1224 (D. Kan. 1998) ("Plaintiff is not bringing this case as a class action").

As the First Circuit has noted, the injunctive provisions of Title III are based on Title II of the Civil Rights Act of 1964.[143] "In enacting the latter statute, Congress evinced its understanding 'that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance.'"[144]

In light of this broad mandate, once a plaintiff has standing under Title III, the proper question is how to remedy the barriers he identifies. One recent Title III case addressed a defense argument that a plaintiff lacked standing to obtain an injunction as to barriers that he had identified but that had not injured him. The court correctly recognized that this was not a question of standing, but rather of the proper scope of relief and concluded that "any reasonable construction of the ADA must recognize that Congress intended to permit suits for injunction to reach any existing barriers, and as long as Article III standing exists, nothing prevents it from doing so."[145] As that court explained, "it is difficult to believe that a statute with the broad remedial purpose of ending discrimination against the disabled, should be construed as permitting discrimination to persist after its existence has been discovered."[146] Similarly, it is difficult to believe in this case that the ADA can be construed to permit the long list of noncompliant ATMs -- already identified by Defendants[147] -- to persist.

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143 42 U.S.C. § 12188 (incorporating by reference 42 U.S.C. § 2000a-3(a)); *see Dudley*, 333 F.3d at 307.

144 *Dudley*, 333 F.3d at 307 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968)).

145 *Wilson v. Pier 1*, 413 F. Supp. 2d 1130, 1135 (E.D. Cal. 2006).

146 *Id.* at 1133.

147 PRSMF ¶¶ 6, 7.

Defendants rely heavily on the First Circuit case of *Conservation Law Foundation of New England v. Reilly*, which held that two New England-based environmental organizations did not have standing to seek an injunction relating to 840 hazardous waste sites around the country.[148] However, there is no evidence from that opinion that the plaintiffs alleged -- or that there existed -- any pattern or practice or indeed any physical or remedial element common to all of the sites. In contrast, the ATMs at issue here are similar types of equipment that demonstrate a clear pattern and practice of noncompliance. In *Clark v. Burger King Corp.*, the court addressed whether a single plaintiff had standing to challenge barriers in restaurants he had not visited.[149] The court concluded that, absent an allegation "commonality of construction" or "a corporate policy violative of the ADA," the individual did not have such standing.[150]

> If, on the other hand, there existed an allegation that all Burger King restaurants are similar, in that they possess commonality of architecture, or that they implement a corporate policy violative of the ADA, Clark may have standing as to restaurants he has yet to visit.[151]

Despite Defendants' repeated requests to stay and limit discovery, the evidence in this case to date already provides ample support for a commonality among Defendants' ATMs and a corporate policy -- refusal to make those ATMs independently useable by blind people -- violative of the ADA. Rather than curtailing the possibility of an injunction that achieves the broad remedial purpose of the ADA with respect to all of Defendants' ATMs -- as Defendants request at this juncture -- Plaintiffs respectfully request that Defendants' motion for summary judgment with

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148 950 F.2d 38 (1st Cir. 1991), *cited in* Count III-IV-V Motion at 11, 19.

149 255 F. Supp. 2d 334 (D.N.J. 2003)

150 *Id.* at 343.

151 *Id.* at 343 n.11.

respect to a nationwide injunction be denied to permit Plaintiffs to develop further the evidence supporting such an injunction.

CONCLUSION

For the reasons set forth above, Private Plaintiffs respectfully request that this Court deny Defendants' Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing and Defendants' Motion for Summary Judgment on Count II Due to Lack of Standing.

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Dated: March 2, 2007

CERTIFICATE OF SERVICE

I, Daniel F. Goldstein, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants.

/s/ Daniel F. Goldstein

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Daniel F. Goldstein