UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 03 11206 MEL
E*TRADE ACCESS, INC. *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
ON COUNTS III, IV AND V DUE TO LACK OF STANDING

Respectfully submitted,

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

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

Counsel for Defendants
E*TRADE Access, Inc., E*TRADE Bank,
Cardtronics, Inc. and Cardtronics, LP

Dated: May 4, 2006

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Plaintiffs' recent discovery responses reveal a fundamental defect in their lawsuit: the Plaintiffs lack standing to pursue their nationwide claims (Counts III, IV and V of the Third Amended Complaint) against Defendants' fleet of over 25,000 ATMs.

Title III of the ADA imposes a "basic requirement that the need of a disabled person be evaluated on an individual basis." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). To establish standing under this "basic requirement," the Court must "scrutinize[ ] the likelihood that a plaintiff, absent the barrier, would have frequented the public accommodation in the future." *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305 (1st Cir. 2003). Both "jurisdiction[al] principles and the terms of the statute" require that this analysis must be "site-specific." *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116, 1117 (C.D. Cal. 2000). When claims are raised for multiple individuals, "any finding of ADA violations requires proof as to each individual claimant." *Association for Disabled Ams., Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1363-64 (S.D. Fla. 2001). "The ADA does not permit private plaintiffs to bring claims as private attorneys general to vindicate other people's injuries." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 69 (1st Cir. 2003) ("*McInnis*").

Under these rules, none of the Plaintiffs have standing for a nationwide injunction:

The NFB Lacks "Organizational Standing." The private organizational Plaintiffs, National Federation of the Blind and its Massachusetts chapter (jointly, "the NFB"), have no standing of their own. Title III restricts lawsuits to persons "being subjected to discrimination." 42 U.S.C. § 12188. The NFB is not the victim of alleged discrimination, and prudential standing rules bar the NFB from raising claims of the alleged victims. *Small v. Gen. Nutrition Cos., Inc.*, 388 F. Supp. 2d 83 (E.D.N.Y. 2005); *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003); *see also McInnis*, 319 F.3d at 69 (prudential standing limitations apply to Title III claims).

Individual Plaintiffs Lack Standing for a Nationwide Injunction. The three individual Plaintiffs only have standing to challenge Defendants' specific ATMs of which (1) Plaintiffs had "actual knowledge" of alleged inaccessibility when this suit was filed, ***and*** (2) Plaintiffs are "reasonably likely" to use if Plaintiffs prevail. *See* Part II(A), *infra*. But the three Plaintiffs admit they "cannot say" whether they have ever tried to use Defendants' ATMs, so they cannot prove actual knowledge of alleged inaccessibility. More importantly, the three collectively identify only ***one*** ATM they might use. They admit they cannot predict which, if any, of Defendants' other ATMs they might use. Indeed, no one or three persons can claim that they are reasonably likely to use over 25,000 ATMs nationwide. These three individuals lack standing to seek a nationwide injunction.

The NFB Lacks "Representational Standing." The considerations that deprive the three individual Plaintiffs of standing also deprive the NFB of "representational" standing on behalf of its members. The NFB cannot present claims of its members unless (1) the NFB has proof the members individually have standing, and (2) the litigation cannot require the "substantial participation" of the members. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The NFB cannot meet either. It admits it "does not . . . maintain" a database of its members' names and addresses, it "does not have . . . information" about which ATMs its members use or want to use, and it "***cannot predict which [of Defendants'] ATMs will likely be used by which NFB member or how often***." *See* Part II(C)(1), *infra*. The NFB, instead, is merely speculating that some unknown number of its members might at some unknown times want to use some unknown subset of Defendants' ATMs. Courts universally reject representational standing on such speculative grounds. *See id*. Furthermore, if the NFB attempted to prove these factors through the massive participation of thousands of its members, it

would lack representational standing for that reason alone. *See Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313-14 (1st Cir. 2005) ("*Pharm. Care*").

Because Plaintiffs cannot meet their burden of proof on the threshold issue of standing, the Court should grant summary judgment to Defendants on the claims regarding Defendants' nationwide fleet of ATMs. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment for defendants appropriate where plaintiffs fail to establish all of their burdens).[1]

STANDARD OF REVIEW

Standing is a threshold issue for the Court. *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) ("The rules of standing . . . are threshold determinants of the propriety of judicial intervention."). Plaintiffs have the burden of establishing their standing. *City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983). Plaintiffs must prove they had standing at the moment the lawsuit was filed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-70 n.4 (1992).

Because the lack of standing deprives the Court of subject-matter jurisdiction, the Court can address Plaintiffs' standing at ***any point*** of the proceedings, even many years into the litigation. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). A standing defect cannot be waived by the parties or ignored for any reasons. *United States v. Hays*, 515 U.S. 737, 742 (1995). If the Court determines Plaintiffs lack standing, then the Court has no jurisdiction and "the court ***shall*** dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added).

Plaintiffs must survive two tiers of standing. ***First***, standing presents a Constitutional inquiry. The "irreducible Constitutional minimum" of a "case or controversy" under Article III

[1] Defendants understand that the Commonwealth of Massachusetts is not seeking an injunction against the nationwide fleet of ATMs but only the ATMs located in Massachusetts. Defendants will address at a later time the Commonwealth's lack of standing under the ADA even for this type of injunction. Stated briefly, the individualized nature of claims under Title III would bar *parens patriae* standing that the Commonwealth asserts here.

requires that Plaintiffs possess a "concrete and particularized" injury that is "actual or imminent, not 'conjectural' or 'hypothetical,'" and that is directly "redressable" by the relief they seek. *Lujan*, 504 U.S. at 560-61. ***Second***, courts have developed "prudential" standing requirements. Three of the "well-established" prudential requirements are that:

- "[T]he complaint must 'fall within the zone of interests protected by the law invoked'";
- "[T]he plaintiff . . . 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'"; and
- "[T]he suit must present more than 'abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches.'"

New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996) (citations omitted). Congress can eliminate these prudential concerns for causes of action in a specific statute, *Warth*, 422 U.S. at 501, but Congress is presumed to legislate against the "backdrop" of prudential standing doctrine so these limitations apply to any statute "unless expressly negated by Congress," *Bennett v. Spear*, 520 U.S. 154, 163-65 (1997).

The Court can resolve Plaintiffs' standing on summary judgment if the material facts are not in genuine dispute. *E.g., National Fed'n of the Blind of Mo. v. Cross*, 184 F.3d 973, 983 (8th Cir. 1999) (affirming summary judgment for defendants because the NFB lacked standing).

ARGUMENT

The facts proving Plaintiffs lack standing are short and understandable only in the context of the legal argument. Therefore, Defendants proceed to the argument with the facts intermingled. Defendants are simultaneously filing a "Statement of Material Facts" ("SMF") that sets forth the relevant facts and supporting evidence.

I. THE NFB DOES NOT HAVE ORGANIZATIONAL STANDING

The NFB first claims it has standing on its own due to harm directly inflicted on it by Defendants, so-called "organizational" standing. *See* SMF ¶ 13. But because the NFB is not a person "being subject to discrimination" under Title III of the ADA, prudential standing limitations bar the NFB from having standing on its own.

A. The NFB Does Not Allege That Defendants Are Discriminating Against The NFB Itself

Defendants' discovery requested the NFB to describe the facts supporting its alleged organizational standing. The NFB responded that, as a result of having to dispute and then litigate Defendants' policies and ATM design, it has had to divert resources from its other missions and projects. SMF ¶ 13. The NFB claims it has spent nearly $130,000 before filing the lawsuit to negotiate with Defendants, and nearly $730,000 in litigation expenses since then. *Id.* ¶¶ 14 & 15. The NFB says that, as a result of these costs and the time of its staff to deal with Defendants' alleged transgressions, it has missed other opportunities and suffered a decline of its ability to deliver services to its clientele and the public. *Id*. ¶ 13.

B. The NFB Cannot Raise A Claim Under ADA Title III Because It Is Not "Being Subjected To Discrimination," As ADA § 12188 Requires

The NFB's alleged organizational standing is barred by Title III's express terms. Section 12188 of the ADA (42 U.S.C. § 12188) sets forth the remedies for violations of Title III of the ADA. Congress expressly limited causes of action under ADA Title III to only persons who are "being subjected to discrimination":

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter [Title III] provides to ***any person who is being subjected to discrimination*** on the basis of disability in violation of this subchapter [Title III] . . . .

42 U.S.C. §12188(a)(1). Title III's enforcement provision is markedly narrower than its counterparts in ADA Titles I or II, which permit "any person ***alleging*** discrimination" to bring a suit, without requiring that the she be suffering it herself. *Cf.* 42 U.S.C. §§ 12117(a) & 12133.

The NFB does not (and cannot) have a claim that it is "being subjected to discrimination" by Defendants. The only provision of the ADA that concerns direct discrimination of organizations is in § 12182(b)(1)(E), which bars discrimination against an "individual or entity" that is denied goods or services on the basis of that individual's or entity's "relationship or association" with a disabled individual. The NFB has never stated a cause of action under this provision, because Defendants have never deprived the NFB as an organization of any of Defendants' services. SMF ¶ 17. The NFB does not fall within the scope of persons who can assert claims under Title III set forth in § 12188.

Two cases are ***directly on point***. In both *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003) and *Small v. Gen. Nutrition Cos., Inc.*, 388 F. Supp. 2d 83 (E.D.N.Y. 2005), organizations sought standing to assert claims under Title III of the ADA that defendants' stores were not accessible to wheel chairs. Both courts concluded that the organizations were not themselves persons "being subjected" to the alleged discrimination. *Clark*, 213 F.R.D. at 209-211; *Small*, 388 F. Supp. 2d at 92 (following *Clark*, concluding, "The enforcement provision of Title III clearly envisions that a plaintiff himself must currently be suffering or be about to suffer discrimination."). Thus, both courts held that the organizations did not have standing to assert their own claims under Title III. The exact same conclusion applies to the NFB.[2]

[2] *Accord W.G. Nicols, Inc. v. Ferguson*, No. 01 Civ. A 834, 2002 WL 1335118, at *15-16 (E.D. Pa. June 7, 2002) (organizational standing under Title III was limited to entities that had suffered direct discrimination as a result of their known association with disabled persons); *Micek v. City of Chicago*, No. 98 Civ. 6757, 1999 WL 966970, at *3 (N.D. Ill. Oct. 4, 1999) (plaintiff did not have standing to bring Title III claim where plaintiff himself was not "discriminated against or singled out in a discriminatory way").

C. Prudential Standing Considerations Bar The NFB From Raising Claims Of Blind Individuals

The NFB is really asserting claims that third-party blind people are "being subjected to discrimination." One of the most "well-established" prudential limitations on standing is that the NFB cannot "rest [its] claim to relief on the legal rights or interests of third parties." *New Hampshire Right to Life*, 99 F.3d at 15. The First Circuit has held that the "normal background prudential standing limitations" apply to claims under Title III of the ADA. *McInnis*, 319 F.3d at 69. The *Clark* and *Small* cases reached exactly the same conclusion. *Clark*, 213 F.R.D. at 210-11 & n.9; *Small*, 388 F. Supp. 2d. at 92-93. So have numerous other decisions nationwide. *Small*, 388 F. Supp. 2d at 93-94 (collecting authorities). These decisions all note that, while Congress eliminated prudential limitations for claims under Titles I and II of the ADA, the remedial section for Title III (§ 12188) is much narrower in scope.

This prudential limitation deprives the NFB of standing to assert claims of third-party blind people. *Clark*, 213 F.R.D. at 210 n.9; *Small*, 388 F. Supp. 2d at 93; *cf. Benjamin v. Aroostook Med. Ctr.*, 57 F.3d 101, 105 (1st Cir. 1995) (no standing because plaintiffs' claims fell outside scope of statute and thus were asserting third-party rights, which is barred by prudential considerations). Separately, the NFB claims it has "representational" standing to assert claims of its blind ***members***, which Defendants analyze below (*see* Part III.C, *infra*).

This is an easy decision. The NFB has no standing of its own under Title III.[3]

[3] The NFB's description of the grounds of its standing, *see* Part I(A) *supra*, demonstrates that the NFB is relying entirely on inapplicable case law. Diversion of an organization's resources to combat alleged discrimination has afforded direct standing to an organization under ADA Titles I and II, as well as other statutes like the Fair Housing Act ("FHA") and the Rehabilitation Act. *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). But none of these cases face the limiting language of § 12188 in Title III of the ADA. Furthermore, although some courts appear to reach a different conclusion while reviewing Title III claims, none of these other courts analyzed the narrower language of § 12188 and thus their conclusions are both contrary to the binding First Circuit law in *McInnis* and, in any event, simply are not persuasive. *See Clark*, 213 F.R.D. at 210 n.8 (refusing to follow such cases).

II. PLAINTIFFS LACK STANDING TO PURSUE A NATIONWIDE INJUNCTION

Constitutional requirements bar the individual Plaintiffs and the NFB from seeking a nationwide injunction against 25,000-plus ATMs. Plaintiffs have not come close to satisfying their enormous evidentiary burden of proving injury-in-fact for each of the thousands of ATMs.

A. Under The ADA, Plaintiffs Must Prove They Intend To Use Each Of The Specific ATMs At Issue

The "irreducible constitutional minimum of standing" requires that Plaintiffs have an "injury in fact" that is "actual or imminent." *Lujan*, 504 U.S. at 560. The First Circuit explained that, applied to the ADA, "a plaintiff generally must 'show a real and immediate threat that a particular (illegal) barrier will cause future harm.'" *Disabled Ams. For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64 (1st Cir. 2005) ("*Disabled Ams.*"), *quoting Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305 (1st Cir. 2003). "'[A] disabled person who is currently deterred from patronizing a public accommodation . . .' ***and*** 'who is threatened with harm in the future because of existing . . . noncompliance with the ADA' suffers actual or imminent harm sufficient to confer standing." *Disabled Ams.*, 405 F.3d at 64 (citation omitted). This standard has a number of important ramifications to Plaintiffs' standing here.

1. Plaintiffs Must Show They Had "Actual" Knowledge Of Alleged Inaccessibility At The Time They Filed The Lawsuit

A Title III plaintiff must have "actual knowledge" of the alleged inaccessibility in order to have standing. 42 U.S.C. § 12188(a)(1). That means that the Plaintiffs either have attempted unsuccessfully to use Defendants' ATMs or have first-hand knowledge that the ATMs are inaccessible. *Access Now, Inc. v. South Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1365 (S.D. Fla. 2001) (plaintiff lacked standing to challenge certain alleged inaccessibilities that admitted he did not know about at time complaint was filed). This knowledge cannot be obtained by learning about the inaccessibility from other people or literature. *E.g., Resnick v. Magical Cruise Co.*,

Ltd., 148 F. Supp. 2d 1298, 1301-03 (M.D. Fla. 2001) (plaintiff's review of defendant's website was insufficient to provide "actual knowledge" of inaccessibility of defendant's cruise boat).

Furthermore, Plaintiffs must establish they possessed this "actual" knowledge at the moment they filed their lawsuit, which is the moment standing is determined. *Lujan*, 504 U.S. at 569-70. Courts routinely hold that plaintiffs lack standing under Title III where they could not prove they knew of the alleged inaccessibilities at the time the lawsuit began. *E.g.*, *D'Lil v. Best Western Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1054 (C.D. Cal. 2006) (plaintiff could not prove she knew of inaccessibility at time lawsuit began); *Brother v. Tiger Partners LLC*, 331 F. Supp. 2d 1368, 1373 (M.D. Fla. 2004) (same); *Clark*, 213 F.R.D. at 227 (plaintiff lacked standing for restaurants he did not visit until after filing complaint).

2. Plaintiffs Must Show They Actually Intend To Use Each ATM If Plaintiffs Prevail

Plaintiffs also must show that they have ***an actual intention of visiting each ATM at issue*** if the lawsuit is successful. *Dudley*, 333 F.3d at 305 (surveying cases, concluding, "the court scrutinizes the likelihood that a plaintiff, absent the barrier, would have frequented the public accommodation in the future").[4] For example, one of the cases Plaintiffs frequently cited in the last round of summary judgment briefings, *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004), spent much time exploring whether the plaintiff would actually use the movie theatre in question in the future in assessing the plaintiff's standing. *Id.* at 1081-82.

[4] *See also Pickern*, 293 F.3d at 1138 ("injury in fact" for Article III purposes occurs if plaintiff has visited accommodation in past ***and*** wishes to visit it in the future); *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) (general standard for typical ADA Title III plaintiff is that he or she "would visit the building in the imminent future but for those barriers"); *Moreno*, 88 F. Supp. 2d at 1117-18 (plaintiff must at least prove he would visit defendants' gas stations "in imminent future" if stations were made accessible).

Plaintiffs do not have standing just because they speculate that they may visit the defendant's business "some day" in the future. *Lujan*, 504 U.S. at 564 ("Such 'some day' intentions -- without any description of concrete plans, or indeed even any speculation of *when* the some day will be -- do not support a finding of 'actual or imminent' injury that our cases require.") (emphasis added). While Plaintiffs need not prove absolute certainty of use, *see Dudley*, 333 F.3d at 306, they cannot merely speculate that use of the business is theoretically possible, *see Association for Disabled Ams., Inc. v. Claypool Holdings LLC*, No. IP00-0344, 2001 WL 1112109, at *18 (S.D. Ind. Aug. 6, 2001) ("*Claypool*") (collecting cases regarding level of proof to demonstrate future use of facility). Where something is used or visited without much advance planning, like fast-food restaurants, courts attempt to measure the reasonable likelihood of future use by looking at various factual indicia. *See, e.g.*, *D'Lil*, 415 F. Supp. 2d at 1053-54 (surveying cases, concluding courts look at proximity of plaintiff's home to defendant's business; past patronage; plans to return; and frequency of travel to area in which business is located); *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003) (looking at history of use of particular store, and use of defendants' other stores). Applying these standards, numerous courts reject plaintiffs' standing under Title III of the ADA where the plaintiffs could not demonstrate future use was anything other than generally possible or speculative.[5]

[5] *E.g.*, *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001) (plaintiff did not have standing because he did not prove an intent to return to defendant's allegedly inaccessible facility); *Freydel v. N.Y. Hosp.*, No. 00-7108, 242 F.3d 365 (table), 2000 WL 1836755, at *6 (2d Cir. Dec. 13, 2000) (plaintiff lacked standing to sue under Title III because she failed to demonstrate likelihood that she would suffer future injury); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343 (D.N.J. 2003) (wheelchair user lacked standing to bring claim against restaurants for which he could articulate only a generic plan to visit "some day"); *Rosenkrantz*, 254 F. Supp. 2d at 1253 (plaintiff lacked standing because he offered only "some day" future travel plans to suggest he might use defendant's hotel, which was hundreds of miles from his house and in an area he visited only infrequently at best); *Deck v. Am. Haw. Cruises, Inc.*, 121 F. Supp. 2d 1292, 1299 (D. Haw. 2000) (plaintiff's plans to "look into" taking a cruise in the future merely constituted "speculative and conditional intention" which was insufficient to sustain standing); *Cortez v. NBA*, 960 F. Supp. 113, 117-18 (W.D. Tex. 1997) (no evidence plaintiff would return to defendants' events).

3. Where Plaintiffs Challenge Numerous ATMs, They Have Standing Only For Those ATMs They Actually Would Use

The standing rules also limit the ***number*** of locations, such as ATMs, about which a specific individual plaintiff can sue. Where an individual plaintiff challenges multiple locations as being noncompliant with the ADA, the plaintiff only has standing for the locations that the plaintiff proves he or she is likely to visit in the future; as to all other locations, the individual plaintiff lacks standing. *E.g.*, *Small*, 388 F. Supp. 2d at 88-90 (plaintiff lacked standing regarding all but one of defendant's stores, where evidence was insufficient to conclude he was reasonably likely to actually visit them); *Moreno*, 88 F Supp. 2d at 1117-18 (plaintiff who encountered barrier at one gas station did not have standing to challenge same barrier at 82 other gas stations he had not visited and did not show intent to visit). In *Conservation Law Found. of New Eng., Inc. v. Reilly*, 950 F.2d 38 (1st Cir. 1991), the plaintiffs had evidence regarding injury-in-fact with respect to 10 of 840 facilities at issue, and thus lacked standing for a nationwide injunction regarding the other 830 facilities. *Id.* at 41-43.

Although arising out of the Constitutional considerations, this result also squares with the prudential standing limitations that a plaintiff cannot assert "legal rights and interests" of third parties. *See* Part I(C), *supra*. For any ATM where Plaintiffs cannot prove they have a reasonable likelihood of using in the imminent future, Plaintiffs are effectively asserting ADA claims of other individuals who might use that ATM. That is strictly prohibited. *McInnis*, 319 F.3d at 69.

B. None Of The Three Individual Plaintiffs Has Standing

Applying these rules here, the three individual Plaintiffs lack standing to bring a ***nationwide*** Title III claim against Defendants. These three Plaintiffs offer classic speculation

that violates the mandatory Constitutional standing requirements and in no way provides standing to seek a massive injunction for changes to over 25,000 ATMs.

1. The Three Individual Plaintiffs Admit They Had No First-Hand "Actual Knowledge" Of Defendants' ATMs At The Time They Filed The Lawsuit

First, the three admit they did not have standing at the time the lawsuit was filed. When asked to describe their first-hand knowledge of the alleged inaccessibility of Defendants' ATMs, the three Plaintiffs all repeated the exact same answer: Each says she "***cannot say***" and "***do[es] not know whether I have attempted to use***" one of Defendants' ATMs. SMF ¶¶ 2, 6 & 10.[6]

Their admissions are singularly dispositive of their lack of standing. They admit they cannot say they have "actual knowledge" of an alleged inaccessibility with Defendants' ATMs, so they could only have acquired such "knowledge" through what their lawyers have told them. That cannot be sufficient, because otherwise none of the cases cited above (*see* Part II(A)(1)) would have denied standing where plaintiffs lacked first-hand knowledge. Plaintiffs are merely relying on speculation to fulfill their mandatory standing obligations, and this is impermissible.

2. The Three Plaintiffs Do Not Intend To Use Every One Of Defendants' ATMs -- And In Fact Can Identify Only One ATM They Would Use

But even more problematic for Ms. Asch, Ms. Bose and Ms. Jeraldi, each lacks standing to pursue a ***nationwide*** injunction for Defendants' 25,000-plus ATMs. This Court would have to break new ground, with no case support, to allow Plaintiffs' nationwide claim to go forward.

When asked which of Defendants' ATMs she expects to use if she prevails in the lawsuit, each Plaintiff responded that she has ***no idea*** which of Defendants ATMs she actually intends to use. Instead, each Plaintiff offers only rote speculation and the most generic conjecture:

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[6] Plaintiff Bose previously submitted an affidavit to this Court describing her visits to Defendants' ATMs ***subsequent*** to filing the lawsuit. But because standing is determined ***as of the time the lawsuit is filed***, Bose cannot backfill her lack of standing at the time the suit was filed by visiting ATMs later. *See* Part II.A.1, *infra*.

- ***Ms. Asch*** says she is "unable to predict" which Defendants' ATMs I "may have occasion to use." SMF ¶ 3. She says she might use ATMs "located in various parts of New York City, where I currently live and work, and in various cities around the country while on both business and pleasure travel," but provides no information about where in New York, what other cities, or anything other than sheer speculation and conjecture. *Id.* ¶ 3. She admits, "I cannot predict now, where I may travel and when I will have an occasion to need to use an ATM." *Id.* ¶ 4.

- ***Ms. Bose*** admits she "cannot predict" which ATMs she "may have occasion to use," and "cannot predict now, where I will be and when I will have occasion to use an ATM." *Id.* ¶¶ 6 & 7. She only says she would use any ATMs "close to my place of business in downtown Boston" or "in various cities across the country while on both business and pleasure travel," but presents no details of where in Boston or what other cities. *Id.* ¶ 7.

- ***Ms. Jeraldi*** expresses an intention to use only one particular ATM: "I do believe that I would be likely to use [Defendants'] ATMs located at retail establishments such as the Costco store located in Waltham, Massachusetts, where I currently shop." *Id.* ¶ 11. She identifies no other specific ATM. She only says, "I also believe that I would be likely to use [Defendants'] ATMs while traveling," but gives no details about where or when she expects to be traveling. *Id.*

Plaintiffs cannot demand a nationwide injunction based on abject speculation. The metaphysically possibility of Plaintiffs using an ATM in the future falls far short of mandatory injury-in-fact. They thus have not provided evidence to support their standing for the nationwide injunction of Defendants' 25,000-plus ATMs. *Moreno*, 88 F. Supp. 2d at 1117-18 (no standing regarding 82 gas stations plaintiff never visited and was not likely to visit); *Small*, 388 F. Supp. 2d at 88-89 (plaintiff lacked standing regarding stores he did not have imminent intent to visit); *Clark*, 213 F.R.D. at 230 (same); *see also supra* note 5 at 10, (citing authorities). No one or three humans could credibly expect to use over 25,000 ATMs. *Cf. Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1046 (C.D. Cal. 2005) (finding plaintiff was not reasonably likely to visit defendants' 400 locations); *Brother*, 331 F. Supp. 2d at 1374-75 ("very implausible" plaintiff would visit defendant's 54 locations). Plaintiffs do not even provide a sufficient basis for standing for ATMs located in their home cities, except perhaps the one in Waltham. *Small*, 388 F. Supp. 2d at 89-90 (living in "close proximity" to defendant's store is not enough to confer standing; must show an actual "reasonable likelihood" of using the store).

A very analogous case is *Tyler v. Kan. Lottery*, 14 F. Supp. 2d 1220 (D. Kan. 1998) in which a plaintiff sought an injunction to make accessible to his disability every store in Kansas that sold lottery tickets. The court held the plaintiff lacked standing for a statewide injunction because he could not show that he would visit every store. *Id.* at 1225. In addition, Tyler moved to Wisconsin, which diminished the likelihood he would use many Kansas stores. *Id.* Here, the three Plaintiffs live in New York or Massachusetts, but seek changes to ATMs in all 50 states, while admitting they "cannot predict" where they might travel. This is entirely inadequate.

All that the three Plaintiffs offer is a "general desire to patronize [defendant's] stores," which is insufficient to confer standing. *Small*, 388 F. Supp. 2d at 89. The three individual Plaintiffs really are acting as "private attorneys general" to vindicate all blind people's rights under Title III by attempting to modify over 25,000 ATMs nationwide. The ADA prohibits such lawsuits. *McInnis*, 319 F.3d at 69; *Blake v. Southcoast Health Sys., Inc.*, 145 F. Supp. 2d 126, 134 (D. Mass. 2001) (Young, C.J.) (Title III plaintiff "cannot derive standing by alleging that other disabled individuals may suffer injuries from discrimination by these defendants in the future"). Plaintiffs' blunt acknowledgement that they cannot identify the Defendants' ATMs they are likely to use means the three individual Plaintiffs lack standing, and even if they had identified a handful of ATMs they are likely to use, they could not possibly demonstrate a reasonable likelihood of using every single one of Defendants' 25,000-plus ATMs nationwide.

C. Because The NFB Cannot Demonstrate That Any Of Its Members Have Standing, It Lacks Derivative "Representational" Standing

The analysis now turns back to the NFB. As discussed in Part I above, the NFB lacks standing of its own to assert any claim under Title III. Thus, the only way this case could proceed is if the NFB has "representational" standing, which is derivative standing of an

organization to assert claims of its individual members. *United States v. AVX Corp.*, 962 F.2d 108, 113 n.5 (1st Cir. 1992).

Representational standing arises if three conditions are all present:

1. One or more members of the organization has standing individually to raise a valid claim against the defendant; ***and***

2. The lawsuit protects an interest "germane" to the organization's general purpose; ***and***

3. The litigation would not involve the "substantial participation" of the individual members.

Hunt, 432 U.S. at 343.

The NFB fails the first test, and NFB could not rectify the problem without immediately failing the third test. Either way, the NFB lacks "representational" standing.

1. The NFB Admits It Cannot Prove Its Individual Members Have Standing

The NFB lacks standing to represent the claims of its individual members because it has no evidence that any of its members individually have standing.

In contrast to the three individual named Plaintiffs who offer speculation about their standing for a nationwide injunction, the NFB has ***zero*** information about its members whose claims the NFB purports to represent. The NFB admits that it does not even have the names and addresses of its members; that information is kept only by the NFB's local chapters. SMF ¶ 19. The NFB thus cannot say which of its members live or work near any of Defendants' ATMs. The NFB also admitted it does not track its members' use of ATMs. *Id.* ¶ 23 (the NFB "does not have this information"). The NFB also has no information about which of its members are even blind (sighted people may be NFB members), whether their blindness prevents their use of ATMs (*e.g.*, if they are legally blind but can still read an ATM screen), and most importantly, whether they intend or are reasonably likely to use any of Defendants' ATMs. *Id.* ¶¶ 20, 21 &

26. Thus, the NFB is not even in a position to guess how many of its members have standing; only a subset of the NFB's overall membership will meet all of these factual prerequisites to have individual standing in this lawsuit. As the NFB bluntly admits, it "***cannot predict which [of Defendants'] ATMs will likely be used by which NFB member or how often.***" *Id.* ¶ 26.

Yet, the NFB claims it has representational standing as the aggregate of its members' standing. The NFB is speculating that some unknown number of its members might want to use some unknown number of Defendants' 25,000-plus ATMs at unknown times. The argument is folly; standing cannot be conferred by this kind of sheer speculation. *Small*, 388 F. Supp. 2d at 97-98 (no representational standing where plaintiff "ha[s] not identified a single . . . member whose interests would confer associational standing"); *Access 123, Inc. v. Markey's Lobster Pool, Inc.*, No. CIV. 00-382-JD, 2001 WL 920051, *4 (D.N.H. Aug. 14, 2001) (no representational standing in Title III claim for unidentified members); *Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach*, 884 F. Supp. 487, 489 (S.D. Fla. 1994) (no standing for Title III claims; "The plaintiff cannot, however, shoehorn an unknown number of supposed, but unknown, victims into their case of action by the mechanism of associational standing."). As one Court held:

> Plaintiffs . . . do not point to any evidence that other such members would stay at the hotel in the near future. . . . [T]he desire of such members to visit the hotel at some unspecified time in the future is insufficient to confer standing on any such members. . . . Therefore, Plaintiffs have not carried their burden of showing the Association's representational standing.

Claypool, 2001 WL 1113109, at *20.

The NFB can proceed with representational standing ***only*** by actually ***proving*** that its individual members have standing. In particular, the NFB must prove that one or more of its members have a reasonable likelihood of using ***each one*** of Defendants' 25,000-plus ATMs.

E.g., *Small*, 388 F. Supp. 2d at 97-98 (entity would have standing only if it identified specific members who intended to visit ***each one*** of defendant's facilities); *Clark*, 213 F.R.D. at 215 (for "***each***" restaurant at issue, the plaintiff "will have to come forward with evidence" that at least one member "would visit that restaurant"); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 345 (D.N.J. 2003) (entity needed to identify each member that had individual standing, including evidence that each member intended to visit defendants' facilities).

Because the NFB admits it cannot prove which members are reasonably likely to use each of Defendants' ATMs, the NFB lacks representational standing for a nationwide injunction.

2. The NFB Cannot Obtain Necessary Evidence From Thousands Of Its Members Without Violating Prudential Standing Prohibitions

The NFB cannot remedy its lack of evidence concerning its members' intentions to use Defendants' ATMs because it would violate the third prong of the *Hunt* test.

An organization cannot have representational standing if the "substantial participation" of its members is required to conduct the litigation. *Hunt*, 432 U.S. at 343; *AVX*, 962 F.2d at 116. Explaining this requirement further in *Pharm. Care*, 429 F.3d at 313-14,[7] the First Circuit noted that representational standing is allowable so long as "proof as to member circumstances were 'limited,'" but "'it would be improper for claims requiring a fact-intensive-individual inquiry.'" *Id.* at 314 (citation omitted). The First Circuit affirmed the district court's conclusion that the plaintiff lacked representational standing, because "there appears to be considerable variation in each member company's particular circumstances." *Id.* The court supported its conclusion by noting that "plenty of injunction cases have been dismissed because of the need for individualized proof." *Id.* & n.10.

[7] The *Pharm. Care* test is set forth in the Concurring Opinion of Chief Judge Boudin, which the Panel adopted as the Opinion of the Court with regard to, *inter alia*, the representational standing issue. *Id.* at 297.

Here, the NFB cannot establish its standing without a "fact-intensive-individual inquiry" concerning thousands of its members. First, each member would have to prove that she suffers from a type of blindness that renders her unable to use ATMs. Since 80% of blind people still have "useful vision" (whereas only 10% are totally blind), the mere fact that an NFB member is "legally blind" does not *ipso facto* mean that person cannot see an ATM's screen. SMF ¶ 21. Determining whether a blind NFB member can use an ATM is an individual, fact-intensive inquiry. Second, each member would have to prove which of Defendants' ATMs she is reasonably likely to use, which also would be highly fact-specific for each member. Literally, this lawsuit will require mini-trials for each NFB member. No court anywhere has permitted representational standing requiring such massive member participation in the litigation. *Cf. Concorde Gaming*, 158 F. Supp. 2d at 1363-64 (entity lacked representational standing for individual members because "any finding of ADA violations requires proof as to each individual claimant"). Under the binding *Pharm. Care* standard, the NFB lacks representational standing.

3. Ruling That The NFB Lacks Standing Furthers The Purposes Of The ADA

The NFB surely will complain, as it has in the past, that it faces a "Catch 22." It either has no evidence of its individual members or it cannot obtain that evidence without their participation *en masse*, so either way it cannot have representational standing. The NFB will conclude that the purpose of this lawsuit would be vitiated if the Court follows the *Hunt* test.

But the Supreme Court and the First Circuit have rejected exactly similar pleas to avoid standing requirements. In *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), the Supreme Court noted that the purpose of standing doctrine ("put[ting] the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome") "would be undermined

were we to construe [a standing provision] to authorize judicial review at the behest of organizations . . . who seek to do no more than vindicate their own value preferences through the judicial process." Following this conclusion, the First Circuit rejected the plea by an organization that it should not have to prove its members' standing separately for over 840 facilities. *Conservation Law Found.*, 950 F.2d at 43. Because the ADA does not authorize "private attorneys general" lawsuits, *McInnis*, 319 F.3d at 69, no reason exists that the NFB ***should*** be allowed to pursue its claims without evidence of its members' intentions to use Defendants' ATMs. *Clark*, 213 F.R.D. at 210 n.9 (the purpose of the ADA would be "frustrated" if organization could file lawsuit instead of the individuals who are suffering the alleged discrimination).

That standing requirements can impose harsh results is not a relevant consideration. Chief Judge Young once held, clearly against his wishes, that a plaintiff lacked standing under Title III because the alleged discrimination at the defendant's facility was so severe that she ***died*** as a result of it -- so no possibility of future harm existed. *Blake*, 145 F. Supp. at 130-37.

Furthermore, the NFB is improperly trying to use this lawsuit to usurp the ongoing rulemaking proceedings. If the NFB could demand a nationwide, every-ATM injunction based on the speculation of use of each ATM, in theory the NFB could sue every major ATM operator and demand changes to their ATMs at the NFB's whim. The NFB effectively would moot the Department of Justice's time-consuming efforts, involving comments from thousands of interested parties, to effectuate industry-wide rules. The standing rules of Title III prevent exactly this type of rulemaking by litigation.

As the late astronomer Carl Sagan famously penned, "[E]xtraordinary claims require extraordinary proof."[8] Here, the NFB is asking for an extraordinary remedy of physical changes to 25,000 ATMs. The NFB thus imposed upon itself the enormous burden of proffering admissible evidence that the changes at each one of the ATMs is going to benefit the life of one or more of the NFB's blind members. Holding that the NFB lacks standing in the absence of this enormous quantity of required evidence powerfully affirms the purposes and design of the ADA.

CONCLUSION

For these reasons, Defendants E*TRADE Access, Inc., E*TRADE Bank, Cardtronics, Inc. and Cardtronics, LP, respectfully request that the Court grant Defendants' motion and enter summary judgment in Defendants' favor on Counts III, IV and V of the Third Amended Complaint on the grounds that (1) the NFB lacks organizational standing under § 12188, (2) the individual Plaintiffs Asch, Bose and Jeraldi lack standing, and (3) the NFB lacks representational standing to pursue a nationwide injunction.

Respectfully submitted,

/s/ Douglas P. Lobel

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

[8] Carl Sagan, Broca's Brain: Reflecting on the Romance of Science, p. 62 (Ballantine 1974).

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

Counsel for Defendants
E*TRADE Access, Inc., E*TRADE Bank,
Cardtronics, Inc. and Cardtronics, LP

Dated: May 4, 2006