

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS,

et al.,

Plaintiffs,

V.

E*TRADE ACCESS, INC., *et al.*,

Defendants.

Case No. 03 11206 MEL

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON COUNT II DUE TO LACK OF STANDING**

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Defendants recently argued that the Plaintiffs do not have standing for a nationwide injunction regarding Defendants' 25,000-plus ATMs under Counts III, IV and V of the Third Amended Complaint. *See* Defendants' Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing. For similar reasons, Plaintiffs do not have standing to demand modifications to Defendant E*TRADE Bank's policies concerning ATM transaction fees as Plaintiffs now demand in Count II (asserting a claim under ADA § 12182(b)(2)(A)(ii)).

Plaintiffs do not allege E*TRADE Bank's policies on their face are discriminatory. Instead, Plaintiffs demand that E*TRADE Bank's policies be modified as a proposed solution to the alleged inaccessibility of Defendants' ATMs. In order to have standing to make this claim, the Plaintiffs must show that they *would* become E*TRADE Bank customers *but for* the alleged inaccessibilities of the ATMs. *Disabled Ams. for Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64 (1st Cir. 2005) ("*Disabled Ams.*") (plaintiff must be "deterred" from using the public accommodation "because of" the alleged inaccessibility). Plaintiffs have not come close to making this showing, for many of the same reasons that they lack standing to challenge the Defendants' ATMs themselves:

Individual Plaintiffs. The three individual Plaintiffs effectively admit that they cannot establish standing. One cannot say that she intends to become an E*TRADE Bank customer; the others have no knowledge of where the Defendants' ATMs are located or show any intention of using specific ATMs of the Defendants. As a result, there is no evidence that the "but for" reason they are not E*TRADE Bank customers is the alleged inaccessibility of the Defendants' ATMs. Instead, the individual Plaintiffs' admissions prove they are not E*TRADE Bank customers because the Defendants' ATMs are not convenient to places they regularly visit. Furthermore, these three Plaintiffs ignore that E*TRADE Bank *already* has *two* policies in place

that allow them to achieve their alleged goals of fee-free cash withdrawals from an E*TRADE Bank account without using Defendants' ATMs. Plaintiffs are seeking relief that would give them *superior* service to other customers, a remedy the ADA prohibits.

The NFB. The private organizational Plaintiffs, the National Federation of the Blind and its Massachusetts chapter (jointly, "the NFB"), lack standing for the reasons discussed in Defendants' Motion on Counts III, IV and V. The NFB has no standing of its own under Title III of the ADA. At best, the NFB can only assert claims of its actual members, so-called "representational" standing. But the NFB admits it has no evidence that any of its actual members individually have standing, so the NFB cannot make the required showing to prove its representational standing.

Commonwealth of Massachusetts. Finally, the Commonwealth of Massachusetts ("Commonwealth") lacks *parens patriae* standing under Title III of the ADA. Unlike other civil rights acts, Title III is intended to remedy "individual" claims, which must be proven individually. The statute has a narrow remedial provision that excludes enforcement by state governments. These unique aspects of Title III deprive a state government from usurping the authority of the federal Attorney General to enforce Title III provisions prophylactically. Even if a state theoretically could have *parens patriae* standing under Title III, here the Commonwealth lacks evidence that even a single Massachusetts citizen has an actual need for the relief the Commonwealth demands. No court anywhere has found *parens patriae* standing on the basis of pure speculation, which is all the Commonwealth presents here.

For these reasons, the Court should enter judgment for Defendants on Count II. Because both the facts and the law governing Plaintiffs' Count II is derivative of their claims against Defendants' nationwide ATM fleet (Counts III, IV and V), Defendants respectfully request that

the Court first read and consider the standing motion on Counts III, IV and V before proceeding with this motion on Count II.

PROCEDURAL POSTURE OF COUNT II

In Count II, Plaintiffs assert a claim under ADA § 12182(b)(2)(A)(ii), which requires a defendant to make any “reasonable modifications” to its “practices, policies or procedures” *if* the modification is “necessary” to “afford” its services to disabled persons, *and if* the modification would not “fundamentally alter” the “nature” of the service. 42 U.S.C. § 12182(b)(2)(A)(ii).

Defendants moved for summary judgment on Count II, pointing out that Plaintiffs had never articulated the precise “reasonable modification” of E*TRADE Bank’s policies that they sought.¹ In response, Plaintiffs proposed that E*TRADE Bank modify its policy to allow E*TRADE Bank’s blind customers to use any non-E*TRADE ATM without paying a fee. This represents a change from current policy, as discussed below.

Like most banks, E*TRADE Bank does not charge its customers to use ATMs that are branded with its logo (“Defendants’ ATMs”). Customers can access their E*TRADE Bank account through non-Defendant ATMs, but both E*TRADE Bank and the operator of that other ATM assess the customer a small service fee for the transaction. Plaintiffs contend that, because Defendants’ ATMs are inaccessible to blind people, blind customers of E*TRADE Bank are disadvantaged: sighted customers receive fee-free access to (allegedly inaccessible) Defendants’ ATMs, but blind customers are effectively forced to use “accessible,” non-Defendant ATMs to access their account, thereby incurring transaction fees. Thus, Plaintiffs argue, E*TRADE

¹ The Plaintiffs had at one time argued that E*TRADE Bank, which provides purely electronic banking services, should “modify” its services to build “brick and mortar” offices around the country. Of course, that request is both facially unreasonable and would “fundamentally alter” the “nature” of E*TRADE Bank’s purely electronic services. Plaintiffs cannot credibly still be pursuing this argument, although they have never directly acknowledged that they have abandoned it. The Court rightly ignored this earlier argument and Defendants shall ignore it here too.

Bank's blind customers incur a higher cost than sighted customers for using banking services. Plaintiffs reason that if E*TRADE Bank's blind customers can use non-Defendant ATMs for free, they can receive the same free access to their E*TRADE accounts as sighted customers.

In its February 21, 2006, Order, the Court held that the burden has now shifted to Defendants to show that Plaintiffs' proposed modification would "fundamentally alter" the nature of E*TRADE Bank's services. The plain language of the statute also gives Defendants an affirmative defense that the modification is not "necessary" to "afford" its service to blind customers. The Court has never analyzed whether any or all of the Plaintiffs have standing for this claim.

STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

The following material facts are not in genuine dispute, and are set forth in detail with supporting evidence in the Statement of Material Facts as required by Local Rule 56.1 (hereinafter "SMF (II)").²

E*TRADE Bank allows its qualifying customers an *unlimited* number of transactions at non-Defendant ATMs if the customers have at least \$5,000 in their E*TRADE account. SMF (II) ¶ 1. If a customer incurs fees for using a non-Defendant ATM, E*TRADE Bank reimburses those fees. *Id.*

Instead of obtaining a standard ATM card, any customer of E*TRADE Bank may obtain an "E*TRADE Bank ATM Check Card by Visa®" (the "Visa® Check Card"). SMF (II) ¶ 2. The Visa® Check Card can be used at any ATM just like a regular ATM card, either at one of Defendants' ATMs or any other ATM. *Id.* In addition, the Visa® Check Card can be used at

² This is a different Statement than the one filed with Defendants' previous Motion on Counts III, IV and V ("SMF (I)").

over 18 million locations worldwide that accept the Visa® credit card in place of cash. *Id.*

E*TRADE Bank offers the Visa® Check Card free at no extra cost. *Id.*

One of the features of the Visa® Check Card is that an E*TRADE Bank customer can obtain “cash back” from a store when making a purchase with the Visa® Check Card -- known as the “point of sale.” When using the Visa® Check Card for a purchase, many stores allow the consumer to obtain cash in addition to whatever good or service she is purchasing. SMF (II) ¶ 3. This “cash back” is a direct withdrawal from the person’s account at E*TRADE Bank -- but it does not use an ATM and the customer is not assessed any fee. *Id.* ***An E*TRADE Bank customer thus can make an unlimited number of cash withdrawals -- and can withdraw an unlimited amount of -- cash from her account in this manner without ever paying a transaction fee.***

The use of a Visa® Check Card at a point of sale to make a “cash back” withdrawal from an E*TRADE Bank is particularly useful for blind customers. It only requires the customer to swipe the card through a magnetic reader at the store’s register and then enter a Personal Identification Number (“PIN”) on a standard nine-digit keypad. SMF (II) ¶ 4.

STANDARD OF REVIEW

As the thorough analysis of ADA standing precedent makes clear, *see* Memorandum in Support of Defendants’ Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing (“Def. Mem.”) at 5-7, Plaintiffs only have standing if an alleged inaccessibility directly injures them, and if the relief they seek in the lawsuit will remedy their alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Applied to the ADA, the Plaintiffs must show that they actually intend to use E*TRADE Bank’s services to obtain the relief they seek. *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305 (1st Cir. 2003); Def. Mem. at 8-11. Plaintiffs

also must show that the alleged inaccessibility at issue (here, at the ATMs) is the “but for” reason they do not use E*TRADE Bank’s services. *Disabled Ams.*, 405 F.3d at 64 (plaintiff must be “deterred” from using the public accommodation “because of” the alleged inaccessibility).

Plaintiffs have the burden of establishing standing. *Lujan*, 504 U.S. at 569-70 & n.4. At summary judgment, Plaintiffs must come forward with admissible evidence to establish their standing, or else Defendants are entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment for defendants appropriate where plaintiffs fail to establish all of their burdens); *National Fed’n of the Blind of Mo. v. Cross*, 184 F.3d 973 (8th Cir. 1999) (affirming summary judgment for defendants because the NFB lacked standing).

ARGUMENT

Applying the well-settled ADA standing rules to Plaintiffs’ Count II, the individual Plaintiffs could have standing to assert Plaintiffs’ claim only under a very narrow set of circumstances, none of which exist before the Court. The NFB lacks standing under Count II for the same reasons it lacks standing under Counts III, IV and V. The Commonwealth of Massachusetts claims it has *parens patriae* standing on behalf of Massachusetts citizens, but that does not exist under Title III of the ADA.

I. ONLY A VERY NARROW NUMBER OF PLAINTIFFS COULD HAVE STANDING TO ASSERT THE CLAIM FOR UNLIMITED FEE-FREE TRANSACTIONS

A plaintiff could only have standing to assert the claim in Count II if she could prove *eight* specific facts, some of which are so implausible that no person likely can satisfy them all.

A. The Plaintiff Must Not Be An E*TRADE Bank Customer Due To The Alleged Inaccessibility Of Defendants’ ATMs

A plaintiff who had standing under Count II would need to contend that she is not currently an E*TRADE Bank customer *solely because* Defendants’ ATMs are inaccessible. If

the alleged inaccessibility of the ATMs was not the sole reason, that person has not been injured by the alleged inaccessibility. *See Disabled Ams.*, 405 F.3d at 64. The Court can see that this factual issue overlaps with the entire factual dispute in Counts III, IV and V for several separate reasons.

First, if Defendants ultimately prevail on Counts III, IV and V and prove that the ATMs are all legally accessible as required by the ADA, then no plaintiff could legally assert a claim under Count II either -- there would be no “inaccessibility” that causes the plaintiff to be unable to enjoy E*TRADE Bank’s services. For this reason, Count II is factually dependent upon, and subject to, the factual resolution of Counts III, IV and V.³

Second, a plaintiff would have to prove that her blindness renders her unable to use an ATM. As Defendants discuss in their Motion regarding Counts III, IV and V, there are many types of blindness, and 80 percent of legally blind people still have “useful” vision -- only 10 percent are totally blind. *See* Def. Mem. at 18. So merely being “legally blind” does not mean a person cannot use an ATM.

Third -- and most critical -- the plaintiff would have to prove that she is physically located near Defendants’ ATM. Otherwise, she could not reasonably assert that the alleged *inaccessibility* of those ATMs is the *sole* reason she is not a customer of E*TRADE Bank; instead, the *inconvenient location* of the ATMs could be a major reason she is not an E*TRADE Bank customer. If Defendants’ ATMs were not convenient to her, she would be paying

³ In their March 3, 2006, letter to the Court, Plaintiffs indicated that they intended to move quickly on summary judgment on Count II. That, of course, would be impossible because Plaintiffs would have to prove no genuine dispute existed that Defendants’ ATM are not accessible, a question of mixed fact and law that Defendants vehemently contest.

transaction fees anyway -- whether sighted or blind -- because she would have to use non-Defendant ATMs.

Finally, the plaintiff would have to prove that she had “actual knowledge” of her claim at the time she filed the lawsuit. *See* Def. Mem. at 8-9. This would include, for Count II, actual knowledge of the alleged inaccessibility of the ATMs, as well as knowledge of E*TRADE Bank’s terms of services for ATM use.

These four issues overlap with the standing issue on Counts III, IV and V that Defendants have separately briefed. Thus, the only plaintiffs who could have standing under Count II are those who also have standing under Counts III, IV and V.

**B. The Plaintiff Must Need The Requested Policy Change
In Order To Become An E*TRADE Bank Customer**

In order to have standing under Count II, a plaintiff must have more than just standing under Counts III, IV and V. The plaintiff also must show that E*TRADE Bank’s current policies “injure” her, and that the relief she seeks would remedy that injury. *Lujan*, 504 U.S. at 560. Under the unique facts here, it will be *impossible* for someone to meet that standard.

To be “injured” by E*TRADE Bank’s current policies, a plaintiff first must show that she would not qualify for unlimited fee-free ATM transactions. Such a plaintiff would have to prove that she is not reasonably likely to have an E*TRADE Bank account containing \$5,000 in it. SMF (II) ¶ 1. This condition will eliminate some number of blind persons whom Plaintiffs contend would have standing.

But even if a plaintiff could prove she would not “qualify” for unlimited ATM transactions, she would have to prove *she cannot use E*TRADE Bank’s services at all* under E*TRADE Bank’s current policies. The ADA requires a policy modification only if it is

“necessary” for a person to obtain a public accommodation. 42 U.S.C. § 12182(b)(2)(A)(ii).

The Supreme Court clarified that “necessary” means that the person cannot use the public accommodation at all, as distinct from being able to use it some, but just not as much as the person would like. When a disabled golfer requested the use of a golf cart to compete in the defendant’s golf tournaments, the Supreme Court distinguished why the request was “necessary” as opposed to merely seeking a convenience or improvement:

Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin’s claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, [the requested policy change] might be reasonable but not necessary.

PGA Tours, Inc. v. Martin, 532 U.S. 661, 682 (2001) (“*Martin*”).

It is hard to conceive that any person could meet this standard here. Any customer can obtain unlimited cash withdrawals by way of “cash back” in purchases using their Visa® Check Cards when making purchases.⁴ That gives a customer unrestricted, *free* access to all their cash. A person might -- like in the *Martin* case -- contend that fee-free ATM transactions would be *convenient or helpful*, but it is inconceivable that such a change would be “necessary” for that person to be an E*TRADE Bank customer.

C. The Plaintiff Must Intend To Become An E*TRADE Bank Customer

Finally, a plaintiff would have to prove that she would actually become a customer of E*TRADE Bank if she obtains the relief she seeks. Having no intent to use E*TRADE Bank’s

⁴ Indeed, the Visa® Check Card’s acceptance at 18 million stores worldwide in great part dispenses with the need to even *have* cash in the first place. For a blind person, the Visa® Check Card is much more secure than cash. Paper currency is indistinguishable by feel; a blind person would need another person’s assistance to identify what bills she has in her wallet or purse. Using the Visa® Check Card eliminates this problem. Furthermore, unlike cash, if a blind person’s wallet or purse is stolen, no money is lost -- the card can be cancelled and replaced.

services in the future would mean she has no standing under Title III. *See* Def. Mem. at 9-11 (citing numerous cases for that proposition).

D. These Requirements Impose Eight Specific Facts The Plaintiff Must Allege To Have Standing Under Count II

In summary, to prove standing under Count II, a plaintiff would have to present proof of *all* of the following facts:

1. Her blindness is of the type that does not permit her to read an ATM's screen.
2. She had actual knowledge of E*TRADE Bank's policies concerning fee-free transactions at the time the lawsuit was filed.
3. She is not currently an E*TRADE Bank customer.
4. The reason she is not a Bank customer is solely because of the alleged inaccessibility of Defendants' ATMs.
5. Defendants' ATMs are located immediately near her home or place of work or at places she actually frequents and shops.
6. She intends to become an E*TRADE Bank customer if she prevails on Count II.
7. She would not qualify for unlimited "fee-free" transactions under E*TRADE Bank's terms of service.
8. She *cannot use* E*TRADE Bank's services *at all*, even with unlimited cash back withdrawals in purchases using a Visa® Check Card.

II. THE INDIVIDUAL PLAINTIFFS LACK STANDING

Given the multiple unusual facts that a person would have to allege to have standing under Count II, and based on the admissions in their discovery responses, the three named Plaintiffs -- Theresa Jeraldi, Jennifer Bose and Adrienne Asch -- all lack standing to request a modification of E*TRADE Bank's policies.

A. Plaintiffs' Admissions In Discovery Responses Concede They Lack Standing

Ms. Jeraldi outright admits she does not have a present intention of becoming an E*TRADE Bank customer. When asked if she intended to use E*TRADE Bank's services, she candidly responded that, "it is impossible to predict whether, at some unknown point in the

future, I will be likely to use unidentified services of E*TRADE Bank.” SMF (II) ¶ 5. Her admission violates the Constitutional requirement that there be at least a reasonable likelihood that she would become a Bank customer if she wins. Def. Mem. at 11-14. This kind of “some day” scenario does not meet her Constitutional obligation. *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.”). Def. Mem. at 10. She cannot possibly fix her answer now, because standing is measured at the time the lawsuit is filed, so her change of mind years into the litigation cannot backfill her lack of standing.

Ms. Bose lacks standing because she admitted the alleged lack of inaccessibility at the ATMs is *not* the “but for” reason she is not an E*TRADE Bank customer. When asked which of Defendants’ ATMs she would use if the ATMs were changed, Ms. Bose could not identify a single specific ATM she would use. Instead, she answered that her use of Defendants’ ATMs essentially was unpredictable, based on a potential need to withdraw cash from time to time as she travels about. SMF (II) ¶ 6. This random use of unknown ATMs stands in stark contrast to an intention to use Defendants’ ATMs in order to be an E*TRADE Bank customer. If Ms. Bose intended on being an E*TRADE Bank customer, she would have identified specific Defendants’ ATMs close to her home or business that would provide convenient places for her to access E*TRADE Bank’s services.

Ms. Bose provides no evidence that would support the Constitutional requirement that the alleged inaccessibility of the ATMs is the “but for” reason she is not a Bank customer. Instead, she simply has never considered being an E*TRADE Bank customer. Ms. Bose admitted she “do[es] not know the terms and conditions of E*TRADE’s banking services.” SMF (II) ¶ 7.

Ms. Bose has no standing to demand changes to E*TRADE Bank's policies when she cannot assert that (1) the alleged inaccessibility of the ATMs is the sole reason she is not a Bank customer now, or (2) there is a reasonable likelihood she would use E*TRADE Bank's services in the future if she prevails.

Finally, *Ms. Asch* lacks standing for the same reason as Ms. Bose. She does not identify a single specific ATM of Defendants' that she would use if it were modified to her liking. SMF (II) ¶ 8. Instead she admits that she is "unable to predict" which Defendants' ATMs I "may have occasion to use." *Id.* 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. Critically important, she admits, "***I cannot predict now . . . when I will have an occasion to need to use an ATM.***" *Id.* ¶ 9. This proves she has no intention of being an E*TRADE Bank customer; if she did have such an intention, she would have been able to "predict now" that the "occasions" of using Defendants' ATMs would include accessing E*TRADE Bank's services.

Ms. Asch does offer the conclusory statement, without any details, that she is "likely to use" E*TRADE Bank's services because she is "continually looking for accessible banking services and currently [is] looking for a bank that offers a large fleet of independently accessible ATMs." SMF (II) ¶ 10. This conclusion is insufficient to avoid summary judgment because she offers no evidence to support her assertion. To determine if she has Constitutional standing, the Court should consider all available evidence that would help predict if she would use E*TRADE Bank's services in the future, including her past use, the availability of Defendants' ATMs near places she actually frequents, and so forth. *See* Def. Mem. at 11-14. But Ms. Asch's admissions

establish that (1) she cannot say she has ever used one of Defendants' ATMs, (2) she cannot say which specific ATM she intends to use, and (3) she "cannot predict" why she would use any of Defendants' ATMs. Nothing about her past history and/or the proximity of Defendants' ATMs near places she visits proves that she would in fact become a customer of E*TRADE Bank.⁵

B. Plaintiffs Cannot Prove The Policy Modification They Seek Is "Necessary"

In addition to these problems, none of the individual Plaintiffs has satisfied the *additional* prerequisites to have standing under Count II. None has shown that she would not qualify for unlimited fee-free ATM transactions, or that the use of a free Visa® Check Card is insufficient to meet her needs. Indeed, no evidence exists that the individual Plaintiffs have even thought about or know the existence of these solutions.

Indeed, not only is the policy modification Plaintiffs seek not "necessary," it is actually barred by the ADA. It is well settled that in seeking a "reasonable modification" to a policy, a disabled person cannot obtain a *better deal* than other non-disabled customers because obtaining a better deal would constitute a "fundamental alteration" of the service no matter how trivial the modification might be. *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996) (policy modification was not required by ADA because it would have given plaintiff a right that non-disabled persons did not have); *Hartnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 576 (S.D.N.Y. 2005) (requested modification was really just a "personal preference" over others and thus not required); *see also Martin*, 532 U.S. at 682 (minor modification giving disabled an

⁵ Ms. Asch's statement about her looking for a bank with a "large fleet" of ATMs is on its face not plausible. Ms. Asch admits that she has used several Bank of America ATMs. SMF (II) ¶ 10. Bank of America's website states that it has over 7,000 "talking" ATMs currently deployed, which surely constitutes a "large fleet." Yet Ms. Asch provides no reason why she is not currently a Bank of America customer. If indeed the lack of accessible ATMs was the "but for" reason she is not currently an E*TRADE Bank customer, then Ms. Asch surely would be a Bank of America customer or the current customer of some equally large bank with numerous "talking" ATMs. Her own words proves that her assertion about her "intent" to be an E*TRADE Bank customer is simply not credible.

“advantage” over others is not required by ADA); *Dudley*, 333 F.3d at 307-08 (recognizing that rule in *Martin*).

This rule is fatal to Plaintiffs’ claim. Unlimited fee-free use of all ATMs has become something of a “holy grail” in the banking industry. Defendants’ repeated search of bank websites reveals that **no** bank offers unlimited, fee-free use at any ATMs without at least a minimum deposit requirement (such as, for example, E*TRADE’s \$5,000 minimum) or some kind of other qualifying condition. Plaintiffs themselves admit that they know of no bank anywhere that gives blind customers unlimited fee-free transactions. SMF (II) ¶ 11. Thus, if Plaintiffs did not qualify for unlimited fee-free ATM use under E*TRADE’s current policy, the proposed modification would result in not merely equal but in fact far **better** service than other E*TRADE customers -- the use of any ATM anywhere even with a modest account balance. This relief is not within the scope of the ADA.

Defendants are entitled to summary judgment on Count II with respect to the claims of the three individual Plaintiffs.

III. THE NATIONAL FEDERATION OF THE BLIND LACKS ORGANIZATIONAL AND REPRESENTATIONAL STANDING

First, the NFB lacks “organizational” standing under Count II for precisely the same reasons it lacks organizational standing under Counts III, IV and V. *See* Def. Mem. at 5-6. The NFB itself is not a person “being subjected to discrimination,” so it is not a person authorized to bring a claim under Title III. 42 U.S.C. § 12188(a).

Second, the NFB lacks “representational” standing. The NFB has no evidence that any of its actual members meet **all** of the factual prerequisites for standing under Count II -- and, indeed, the NFB has almost no evidence about its members. *See* Def. Mem. at 14-19. The NFB

cannot pursue a claim involving E*TRADE Bank's services without admissible evidence that at least one or more of its members meets all eight of the factors required to establish standing under Count II. *Id.* Title III does not authorize the NFB to bring a suit as a "private attorney general." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 69 (1st Cir. 2003).

IV. THE COMMONWEALTH OF MASSACHUSETTS LACKS PARENS PATRIAE STANDING

Finally, the Commonwealth lacks standing under Count II. In discovery responses, the Commonwealth alleged its standing under *parens patriae* doctrine. However, such standing does not exist under Title III of the ADA.⁶

Determining whether a state has *parens patriae* standing must be analyzed under the specific federal statute that the state seeks to enforce. *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 341 (1st Cir. 2000) ("*DeCoster*"); *Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 120 (2d Cir. 2002) ("*Physicians Health*"). Courts routinely deny *parens patriae* standing where a statute does not evince a Congressional intent to allow a state an enforcement role. *E.g.*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264-65 (1972) (language and legislative history of § 4 of Clayton Act did not permit state to bring *parens patriae* action for damages); *Physicians Health*, 287 F.3d at 121 (no *parens patriae* standing under ERISA); *Illinois v. Life of Mid-Am. Ins. Co.*, 805 F.2d 763, 766 (7th Cir. 1986) (Congress did not evince intent to allow state to file *parens patriae* claim under RICO).

Title III of the ADA does not evince any intention to allow state enforcement. Lawsuits for injunctions are restricted to persons "being subjected to discrimination." 42 U.S.C.

⁶ This argument equally deprives the Commonwealth of standing under Counts III, IV and V for even an injunction governing Massachusetts-only ATMs.

§ 12188(a)(1); *see* Def. Mem. at 5-6 (entities that are not being subjected to discrimination cannot sue under Title III). Governmental enforcement is expressly provided only to the U.S. Attorney General in a lengthy and carefully-crafted provision. 42 U.S.C. § 12188(b). This careful Congressional wording indicates that states were deliberately excluded from having an enforcement role. *Cf. Physicians Health*, 287 F.3d at 121 (“carefully drafted” enforcement provisions of ERISA did not mention role for states); *see also DeCoster*, 229 F.3d at 339 (“it remains questionable whether [Supreme Court precedent] would permit a State to seek *parens patriae* standing . . . because States are not assigned a special role in the enforcement” of the statute at issue).

By contrast, states do have *parens patriae* standing under federal civil rights laws that have **broad** enforcement provisions, particularly those permitting lawsuits by any person who is “aggrieved” or who “alleges” discrimination. *Physicians Health*, 287 F.3d at 121 (citing authorities). The enforcement provision of Title III of the ADA, however, is demonstrably not such a broadly worded statute. It limits claims to the persons actually “being subject to discrimination.” By comparison, Titles I and II of the ADA permit a lawsuit by any person “alleging discrimination,” which courts hold is far broader than Title III, and allow suits by persons or entities other than just the victims of the alleged discrimination. *See* Def. Mem. at 5-6 (citing authorities). Title III of the ADA simply does not have the “broad” enforcement provisions of typical civil rights statutes that give rise to *parens patriae* standing.

The Commonwealth’s assertion of *parens patriae* standing contravenes the specific purposes of the statute at issue. Title III of the ADA imposes a “basic requirement that the need of a disabled person be evaluated on an individual basis.” *Martin*, 532 U.S. at 690. 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) (emphasis added).

Contrary to the highly individualized fact-finding and relief required by Title III, the Commonwealth raises claims without citing ***even a single Massachusetts citizen*** who requires the relief it seeks in Count II.⁷ The Commonwealth thus impermissibly replaces highly individualized fact-finding with sheer speculation about the potential benefits of this litigation. *Lujan*, 504 U.S. at 560-61 (injury must be “‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical’”). Indeed, Defendants have not found a single *parens patriae* decision nationwide where a State proceeded (as the Commonwealth wishes to do here) without evidence of at least a single citizen who would have a valid claim.⁸

Therefore, the Commonwealth lacks *parens patriae* standing to bring a claim under Title III, which means it does not have standing either to assert the claim in Count II.

⁷ Two of the individual Plaintiffs (Ms. Bose and Ms. Jeraldi) are Massachusetts citizens, but because neither of them has proven standing to have a claim here, the Commonwealth cannot derive *parens patriae* standing from them either.

⁸ Defendants are aware of only a single authority affording *parens patriae* standing under ADA Title III. *Vacco v. Mid Hudson Med. Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995). The *Vacco* decision, however, does not address Title III’s narrow enforcement provision of § 12188, compared to the much broader provisions of Titles I and II, and its loose conclusion is inconsistent with the First Circuit’s analyses in *McInnis-Misenor*, 319 F.3d at 69 (Title III claims are limited to persons who are the actual victims of discrimination), as well as *DeCoster*. Furthermore, in *Vacco* the state identified specific citizens who had a valid claim, whereas here the Commonwealth cannot identify a single citizen for whom the requested modification is “necessary.” It offers only pure speculation as to its standing.

CONCLUSION

For these reasons, the Court should grant Defendants' motion and enter judgment for Defendants on Count II due to all Plaintiffs' lack of standing.

Respectfully submitted,

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