

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

. COMMONWEALTH OF MASSACHUSETTS, et al. <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> E*TRADE ACCESS, INC., et al. <p style="text-align: center;">Defendants.</p>	C.A. No.: 03 11206-MEL
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**COMMONWEALTH’S OPPOSITION TO DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT ON COUNT II DUE TO LACK OF STANDING**

Defendants seek to challenge the Commonwealth of Massachusetts’s *parens patriae* standing on just one out of the seven counts of Plaintiffs’ Third Amended Complaint: Count II, alleging that the policy of E*TRADE Bank to charge blind consumers for their use of accessible non-Bank ATMs, when its own ATMs are inaccessible, violates the reasonable modification of policy mandate of Title III of the Americans With Disabilities Act (“ADA”).¹

Defendants ignore the vigorous *parens patriae* jurisprudence that the United States Supreme Court and the lower federal courts have developed affording States the right to seek, on behalf of their residents, the protections of federal civil rights statutes such as Title III of the ADA to “stop [discrimination] in its tracks.”²

¹ Defendants’ Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing attacked only the standing of the organizational and individual plaintiffs, not that of the Commonwealth. *See* Memorandum in Support of Defendants’ Motion for Summary Judgment on Counts III, IV and V at 3 n.1. That motion was followed by this motion, which attacks the standing of all Plaintiffs as to Count II only.

² *Massachusetts v. Bull HN Info. Sys.*, 16 F. Supp. 2d 90, 98 (D. Mass. 1998) (Older Worker Benefit Protection Act (“OWBPA”) and Age Discrimination in Employment Act (“ADEA”).

Defendants also rely on a misreading of the statutory language of Title III. While they assert that Title III's terms prohibit States from seeking its protections on behalf of their residents, in fact, Title III provides as expansive a remedy to States as any of the many other federal laws under which courts have permitted States to vindicate their residents' civil rights.

As explained in detail below, when the Commonwealth filed this action jointly with the National Federation for the Blind ("NFB") and a number of blind individuals in 2003, E*TRADE Bank was an outlier among banks with a significant ATM presence in Massachusetts. While the other major banks in the region had already made, or were poised to make, their ATMs independently useable to blind consumers, E*TRADE Bank was working hard to increase its fleet of *inaccessible* ATMs and gain market share over the "brick and mortar" banks, while maintaining a policy of charging customers (including blind customers) for the use of other banks' ATMs (including accessible ATMs) and waiving fees for use of its own ATMs, which blind consumers could not independently use (the "Fee Policy").³ In light of the inaccessibility of the Bank's ATM fleet, the Bank's Fee Policy has a deterrent effect on blind consumers that effectively eliminates E*TRADE Bank as a personal banking option for blind consumers.

The Commonwealth filed this lawsuit in the public interest, in an attempt to force the Bank to offer to blind consumers an opportunity to enjoy the Bank's services that is equal to that it offers to sighted consumers. Because the Commonwealth has *parens patriae* standing to bring this action, the Court should deny Defendants' motion.

³ The Defendants describe the Bank's Fee Policy in their Memorandum in Support of Defendants' Motion for Summary Judgment on Count II Due to Lack of Standing ("Defendants' Memorandum") at 3.

I. BACKGROUND

A. E*TRADE Bank's History and Presence in Massachusetts In the Years Leading Up to This Lawsuit

In or about January 2000, E*TRADE Group, Inc., acquired Telebank, then the largest “cyberbank” in the United States.⁴

In or about March 2000, E*TRADE Group acquired the ATM fleet of Card Capture Services, Inc. (“CCS”), then the largest independent network of ATMs in the United States, with 8,500 ATMs located in 48 states and three countries at hotels, shopping malls, grocery stores, convenience stores, gas stations, entertainment complexes, and other convenient “off premise” (non-bank) locations where consumers may be in need of cash.⁵ E*TRADE Group’s goal in acquiring the CCS fleet was to “provid[e] branded physical touch-points for services without an investment in traditional ‘brick and mortar,’” and to pass along those savings to consumers.⁶

On April 4, 2000, E*TRADE Group announced the launch of E*TRADE Bank, “the first all-electronic bank to offer consumers” both electronic banking services and electronic brokerage services through one portal.⁷ E*TRADE Group boasted that the Bank offers “‘high touch’ and

⁴ See January 12, 2000 E*TRADE Financial Press Release entitled “E*TRADE and Telebank Close Merger,” Declaration of Bethany H. Brown (“Brown Dec.”), ¶ 3 and *Exhibit 1*.

⁵ See March 13, 2000 E*TRADE Financial Press Release entitled “E*TRADE To Acquire Nation’s Largest Independent ATM Network,” Brown Dec., ¶ 4 and *Exhibit 2*.

⁶ See May 8, 2000, E*TRADE Financial Press Release entitled “E*TRADE Completes Acquisition of Nation’s Largest Independent ATM Network,” Brown Dec., ¶ 5 and *Exhibit 3*; July 19, 2000, E*TRADE Financial Press Release entitled “E*TRADE Surpasses \$1 Billion In Revenues For First Nine Months of Fiscal 2000, Achieves Break-even Results From Ongoing Operations,” Brown Dec., ¶ 6 and *Exhibit 4*.

⁷ See April 4, 2000, E*TRADE Financial Press Release entitled “E*TRADE Launches E*TRADE Bank Creates First All-electronic Banking/brokerage Portal,” Brown Dec., ¶ 7 and *Exhibit 5*.

‘high tech’ benefits,” that is, electronic banking combined with an extensive ATM fleet.⁸

Recognizing that its large “ATM network is one of the most compelling customer benefits that E*TRADE has launched to date,” it pledged to “move aggressively to deploy a national network of branded ATMs that rewards [consumers] with free cash withdrawals and other no-fee transactions.”⁹

Between E*TRADE Group’s acquisition of the CCS ATMs in the Spring of 2000 and the June 2003 filing of this lawsuit, the Bank’s entire ATM fleet grew from approximately 8,500 to more than 11,000 ATMs. In a website advertisement the Bank posted before the Commonwealth filed its lawsuit, the Bank heralded to consumers that, with more than 11,000 ATMs, E*TRADE Bank offers “free unlimited ATM transactions” at the “nation’s third-largest ATM network.”¹⁰

During this same period of time, the Bank also worked hard to increase the size of its Massachusetts ATM fleet, which grew from between 100 and 200 ATMs to approximately 600 ATMs.¹¹ The vast majority of the Bank’s ATMs during this period of time were inaccessible to blind people.¹²

⁸ *Id.*

⁹ See Brown Dec., ¶ 5 and *Exhibit 3*.

¹⁰ See Brown Dec., ¶ 8 and *Exhibit 6*.

¹¹ See Declaration of Jenny R. Rossman (“Rossman Dec.”), ¶¶ 4-5.

¹² See *id.*

B. Efforts by Other Major Banks in Massachusetts To Make Their ATM Fleets Independently Useable to Blind Consumers

During the years leading up to this lawsuit, while E*TRADE Bank's inaccessible ATMs were proliferating, the major "brick and mortar" banks in Massachusetts had begun, or were soon to begin, offering blind consumers voice-guided ATMs at all of their banking locations.

In February 2001, Fleet Bank agreed to equip approximately 1,400 Fleet ATM locations in the New England region (including Massachusetts) with voice-guided ATMs.¹³ In June 2003, Fleet entered into a Supplement to that Agreement in which it agreed to make a "talking" ATM available at any remaining banking locations, with limited exceptions.¹⁴ After Bank of America acquired Fleet, Bank of America formally agreed to honor the terms of these agreements.¹⁵ Today, there are approximately 888 talking Bank of America ATMs in Massachusetts.¹⁶

In November 2002, Sovereign Bank agreed to equip all of its ATM locations with a talking ATM.¹⁷ Today, there are approximately 408 talking Sovereign Bank ATMs in Massachusetts.¹⁸

¹³ See Declaration of Stanley J. Eichner ("Eichner Dec."), ¶ 4 and *Exhibit A*.

¹⁴ See *id.*, ¶ 5 and *Exhibit B*. The exceptions were ATMs that became part of Fleet's ATM fleet as the result of a "Bulk ATM Acquisition, which remained subject to a specific provision of the original 2001 Agreement.

¹⁵ See *id.*, ¶ 6 and *Exhibit C*.

¹⁶ See Commonwealth's Response to Interrogatory No. 16 of Commonwealth's Responses to Defendant Cardtronics's First Set of Interrogatories to Plaintiff Commonwealth of Massachusetts ("Commonwealth's Response to Interrogatory No. 16"), attached as *Exhibit 1* to Defendants' Submission of Supplemental Evidence in Support of Defendants' Cross-Motion for Summary Judgment (Docket No. 169).

¹⁷ See Eichner Dec., ¶ 7 and *Exhibit D*.

Finally, in August 2004, Citizens Bank agreed to equip all of its ATM locations with a talking ATM.¹⁹ Today, there are approximately 250 talking Citizens Bank ATMs in Massachusetts.²⁰

In contrast, prior to the filing of this lawsuit in 2003, Defendants agreed to provide access for blind consumers at only 17 ATMs in Massachusetts, out of a fleet of Massachusetts ATMs then numbering approximately 600.²¹

C. The Bank's Current Fleet and Discriminatory Fee Policy

E*TRADE Bank's entire fleet currently consists of approximately 15,000 ATMs.²² With approximately 620 ATMs in Massachusetts today,²³ the number of ATM locations maintained by the Bank ranks second only to the number of Massachusetts ATM locations maintained by Bank of America, and rivals the number of ATM locations maintained by Sovereign Bank and Citizens Bank together.²⁴ Yet while the three major "brick and mortar" banks in Massachusetts now offer accessible ATM banking services at all or virtually all of their ATM locations, E*TRADE

¹⁸ See Commonwealth's Response to Interrogatory No. 16 (*see n. 16 supra*).

¹⁹ See Eichner Dec., ¶ 8 and *Exhibit E*.

²⁰ See Commonwealth's Response to Interrogatory No. 16 (*see n. 16 supra*).

²¹ See Third Amended Complaint, ¶ 17; nn.11-12 *supra*.

²² See Rossman Dec., ¶ 7.

²³ See *id.*

²⁴ It appears that the number of ATM locations of Bank of America, Sovereign Bank, and Citizens Bank with voice-guided ATMs (*see* Section I(B) *supra*) can be used as a rough proxy for the number of total ATM locations maintained by each, since, under their various settlement agreements with the complainants in those matters, they were required to equip all (or, in the case of Bank of America, virtually all) bank locations with a "talking" ATM.

Bank's fleet remains largely inaccessible.²⁵ Nonetheless, the Bank maintains its policy of charging all consumers (including consumers who cannot see) to use the accessible ATMs maintained by other banks. At the same time, it waives fees for consumers who use the Bank's own ATMs, which for the most part blind consumers cannot independently use.

As a result, a blind person wishing to become a Bank customer could do so only if that person were willing to either a) enlist the assistance of a sighted person to use a Bank ATM fee-free, with the accompanying burdens (most critically, the need to share a confidential personal identification number ("PIN") with the sighted assistant), b) use the accessible ATM of another bank, for a fee, or c) forego any use of the Bank's extensive network of ATMs. Sighted customers do not experience these burdens. Nor do blind customers who do business with banks that have accessible ATMs.²⁶

Blind consumers confirm the deterrent effect of the Fee Policy.²⁷

²⁵ See Rossman Dec., ¶ 6.

²⁶ The Bank suggests that the service it offers to blind consumers is not inferior to that it offers to sighted persons for two reasons. First, a blind customer could maintain a minimum account balance of \$5,000, since the Bank reimburses fees incurred through use of non-Bank ATMs to customers with that minimum balance. Defendants' Memorandum at 4. Second, a blind customer could obtain "cash back" from a point-of-sale ("POS") machine by making a purchase using a Visa Check Card. *Id.* at 4-5. Even if true, these methods do not cure the discriminatory nature of the Bank's Fee Policy. Sighted customers can independently use the Bank's ATMs even without maintaining a \$5,000 minimum account balance. And sighted customers are not required to make a purchase in order to obtain fee-free cash from their Bank accounts, can gain access to their accounts from *any* Bank ATM (not just from those located in stores equipped with POS machines affording cash-back transactions), and do not depend on the vagaries of any individual merchant's "cash back" policy to gain access to their ATM account. Moreover, most POS machines are not independently useable by people who are blind. Private Plaintiffs' Combined Memorandum in Opposition to Defendants' Motions for Summary Judgment on Counts II, III, IV and V Due to Lack of Standing ("Private Plaintiffs' Opposition") at n.20.

²⁷ Declaration of Amy Ruell ("Ruell Dec."), ¶ 24; Private Plaintiffs' Opposition at n.25.

II. ARGUMENT

A. The Commonwealth Has *Parens Patriae* Standing To Seek, On Behalf Of Massachusetts's Blind Residents, Fulfillment Of The ADA's Promise Of Equal Opportunity To Enjoy Banking Services.

1. The Broad Enforcement Provisions Of Title III Permit Massachusetts To Vindicate The Civil Rights Of Its Blind Residents.

Defendants make a number of arguments based on supposed limitations on the scope of Title III's enforcement provisions that they contend bar a State from seeking Title III's protections on behalf of its residents. Defendants contend that Title III's enforcement provision is drawn more narrowly than the "broad" enforcement provisions of other federal civil rights laws under which courts have permitted States to maintain actions. They also argue that the Commonwealth may not pursue this action because Title III does not specifically mention States as potential litigants and because it expressly provides enforcement authority only to the United States Attorney General.²⁸

In fact, there are no substantive differences between the broad enforcement provision of Title III and those of other federal statutes under which courts have permitted States to bring suit *parens patriae*. Title III's enforcement provision permits suit by "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter."²⁹ This language is virtually identical to the language of the enforcement provisions of the many civil rights statutes under which courts have permitted States to bring such suits, which provide for suit by "persons" "aggrieved" or "injured" by the conduct prohibited by the statutes' substantive

²⁸ Defendants' Memorandum at 15-16.

²⁹ 42 U.S.C. § 12188(a)(1).

provisions.³⁰ Indeed, at least one district court has specifically found Title III's enforcement provision to be sufficiently broad to afford States *parens patriae* standing.³¹ Even the Second Circuit decision Defendants cite for a catalogue of cases approving of statutes with "broad" enforcement provisions merely cites the lower court's decision in that case, which in turn recognized Title III to be a perfect example of a civil rights statute with a "broad" enforcement provision lending itself to a *parens patriae* suit.³²

Moreover, like Title III, *none* of the other civil rights statutes under which courts have allowed States to proceed name States as potential plaintiffs, and many are like Title III in

³⁰ See *Alfred L. Snapp & Sons, Inc. v. Puerto Rico* ["Snapp"], 458 U.S. 592 (1982) (Puerto Rico permitted to sue under Wagner-Peyser Act, 29 U.S.C. § 49, which is silent as to whom can sue); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) (Georgia permitted to sue under the Clayton Act, 15 U.S.C. § 16 (providing for suits by "persons" injured or threatened with injury and contemplating civil and criminal actions by the United States)); *New York v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (New York permitted to sue under Title II of the ADA, 42 U.S.C. § 12133 (providing for suits by "any person alleging discrimination on the basis of disability in violation of section 12132") and the Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee-4 (providing for suits by a "person who is personally aggrieved by ... noncompliance" with polling site access requirements, and by United States Attorney General)); *New York v. Peter & John's Pump House*, 914 F. Supp. 809 (N.D.N.Y. 1996) (New York permitted to sue under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (providing for suits by "persons aggrieved" by "any act or practice prohibited by Section 2000a-2," and intervention by United States Attorney General)); *Support Ministries v. Village of Waterford*, 799 F. Supp. 272 (N.D.N.Y. 1992) (New York permitted to sue under Fair Housing Amendments Act, 42 U.S.C. § 3613 (providing for suits by "an aggrieved person" within two years of "alleged discriminatory housing practice," and suit or intervention by United States Attorney General)).

³¹ *New York v. Mid Hudson Med. Group*, 877 F. Supp. 143, 147 (S.D.N.Y. 1995).

³² See Defendants' Memorandum at 16, citing *Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 121 (2nd Cir. 2002); see also *Connecticut v. Physicians Health Servs. of Conn.* 103 F. Supp. 2d 495, 509 (D. Conn. 2000) (describing Title III's enforcement provision, which allows for suit by "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter," as example of broad enforcement provision under which States may sue *parens patriae*) (emphasis in original).

specifying that the United States Attorney General may sue under their provisions.³³

Defendants' contentions have no basis and the Court should reject them.³⁴

2. The Commonwealth Has Quasi-Sovereign Interests In Seeking Redress For A Bank Policy That Discriminates Against Blind Massachusetts Residents.³⁵

In its leading decision on *parens patriae* standing, the Supreme Court held that a State has *parens patriae* standing where it can identify "quasi-sovereign interests" that it seeks to protect through a lawsuit it brings under federal legislation.³⁶

³³ See *Mid Hudson Med. Group*, 877 F. Supp. at 146 (rejecting argument that because Title III of the ADA and Section 504 of the Rehabilitation Act of 1973 did not specifically provide for enforcement by state attorneys general, New York could not bring suit under those laws); see also cases cited in n.30 *supra*.

³⁴ Defendants cite *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), a case in which Hawaii sought to sue under the Clayton Act, for the proposition that courts deny *parens patriae* standing to a state where the statute "does not evince a Congressional intent to allow a state an enforcement role." Defendants' Memorandum at 15. Defendants misstate the holding of *Standard Oil Co.* There, the Court denied standing because Hawaii sought money damages (not injunctive relief) for general harm to its economy, which the Court stated was no more than the harm to individual consumers and could have led to a duplicative recovery against the defendant were individuals to also bring suit. The Court was unwilling to allow the possibility of a duplicative recovery absent a clear expression from Congress that it envisioned that result. *Standard Oil Co.*, 260-65.

³⁵ The Bank's Fee Policy, which relegates to blind consumers lesser services than those offered to sighted ones, is discriminatory as a matter of law. See *Fortyone v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081-82 (9th Cir. 2004) (movie theater policy of declining to require, at sold-out showings, that a customer vacate a seat designated as companion seating was discriminatory, because it "denies [disabled customers] an opportunity to sit with [a] companion equal to that enjoyed by ambulatory patrons."); 42 U.S.C. § 12101(a)(5) (citing as purpose for ADA the elimination of the "discriminatory effects of ... failure to make modifications to existing ... practices ... and relegation to lesser services ... or other opportunities"). See also 56 Fed. Reg. 35565 (DOJ commentary stating that ADA would prohibit bank from offering accessible ATM services to blind ATM users only at accessible ATM installed in lobby locked at night, where sighted customers had opportunity for around-the-clock access to drive-in ATM).

³⁶ *Snapp*, 458 U.S. at 592.

In *Snapp*, Puerto Rico sued three Virginia agricultural growers under the Wagner-Peyser Act on behalf of approximately 700 Puerto Rican workers the growers had rejected in favor of foreign workers. The Puerto Rican workers included a) workers deterred in the first instance from seeking employment by the growers after it became known that the growers refused to hire Puerto Rican workers, b) workers the growers subjected to discriminatory working conditions, and c) workers the growers terminated based on their national origin.³⁷

In ruling that Puerto Rico had standing to sue on behalf of these workers, the Supreme Court explained that a state's *parens patriae* standing is established where it has a "quasi-sovereign interest" in the matter, consisting of either a quasi-sovereign interest in the "health and well-being – both physical and economic – of its residents in general," or a quasi-sovereign interest in "not being discriminatorily denied its rightful status within the federal system."³⁸ In *Snapp*, the Court had little difficulty determining that Puerto Rico's interest in protecting its workers from discrimination – including workers who were *deterred* by discriminatory policies and practices from seeking employment in the first instance – amounted to a quasi-sovereign interest in the health and well-being of its residents.³⁹ The Court also found that Puerto Rico had a quasi-sovereign interest in assuring that the protections of the federal system flow to its residents, entitling it to bring

³⁷ *Id.* at 597-98.

³⁸ *Id.* at 607.

³⁹ *Id.* at 609 ("This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.").

an enforcement action under the Wagner-Peyser Act – a federal law – in the public interest.⁴⁰

Applying the reasoning of *Snapp*, a number of courts – including a New York court in an action under Title III of the ADA and a Massachusetts federal court in a case involving another federal civil right statute -- have upheld the *parens patriae* standing of States to secure for their residents, under a variety of federal civil rights laws, an equal opportunity to enjoy the goods and services of public accommodations, and equal opportunity in employment, housing, and government services.⁴¹ In *Mid Hudson Med. Group*, for example, New York sued a medical

⁴⁰ *Id.* at 609-10 (“[U]nemployment among Puerto Rican residents is surely a legitimate object of the Commonwealth’s concern,” and just as Puerto Rico can address it through legislation of its own, it can also “seek to assure its residents that they will have the full benefit of federal laws designed to address this problem.”).

⁴¹ *Mid Hudson Med. Group*, 877 F. Supp. at 147 (in public accommodations discrimination case brought under Title III of the ADA and Section 504 of the federal Rehabilitation Act of 1973, 42 U.S.C. § 794a, New York had *parens patriae* standing to sue on behalf of deaf patients who were, and might in the future be, denied interpreter services); *Bull HN Info. Sys.*, 16 F. Supp. 2d at 98 (in employment discrimination case brought under the federal Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, and Older Worker Benefit Protection Act (“OWBPA”), 29 U.S.C. § 626(f), Massachusetts had *parens patriae* standing to sue on behalf of its older work force); *Peter & John’s Pump House*, 914 F. Supp. at 813 (in public accommodations discrimination case brought under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, New York had *parens patriae* standing to litigate “generalized discrimination” claim on behalf of past and “potential nightclub patrons”); *New York v. 11 Cornwell Co.*, 695 F.2d 34, 38 (1982) (in fair housing action brought under 42 U.S.C. § 1985(3), New York had *parens patriae* standing to sue neighbors for their interference with efforts by group home for mentally retarded to purchase house), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983); *Puerto Rico Pub. Housing Adm. v. United States Dept. of Housing and Urban Dev.*, 59 F. Supp. 2d 310 (D.P.R. 1999) (in case brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Puerto Rican agency had *parens patriae* standing to sue HUD on behalf of its Hispanic residents based on HUD policies and practices that disparately treated and had disparate impact on Puerto Rican low income tenants); *Support Ministries*, 799 F. Supp. at 276-80 (in fair housing case brought under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and 42 U.S.C. § 1983, New York had *parens patriae* standing to challenge municipal zoning ordinance and municipality’s denial of special use permit intended to exclude group home for people with AIDS); *County of Delaware*, 82 F. Supp. 2d at 12 & n.1 (in voting rights case brought under Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and the Voting Accessibility for the Elderly and Handicapped Act, 42

practice under Title III based on the practice's policy of insisting that its deaf patients communicate with the practice's personnel through the exchange of written notes and through lip-reading, rather than undertake to retain sign language interpreters. New York alleged that the practice discriminated against consumers with hearing disabilities in violation of Title III by "rigidly adher[ing] to a policy rejecting the provision of sign language interpreters."⁴² The court ruled that New York could proceed with its lawsuit seeking relief on behalf of all of New York's present and future deaf residents.⁴³

Under this authority, Massachusetts unquestionably has a quasi-sovereign interest in vindicating the right of approximately 38,000 blind Massachusetts residents⁴⁴ under Title III of the ADA to an equal opportunity to enjoy E*TRADE Bank's services. The Commonwealth has a clear health and safety-related quasi-sovereign interest in the ability of its blind residents to live productive, independent, satisfying lives free of discrimination. Indeed, Massachusetts views the right of people with disabilities not to be excluded from the state's commercial and civic life to be so profoundly important that it has framed that right as an Article of an Amendment to the

U.S.C. § 1973 *et seq.*, New York had standing to sue county for architectural inaccessibility of county's polling places).

⁴² *Mid Hudson Med. Group*, 877 F. Supp. at 145.

⁴³ *Id.*, 877 F. Supp. at 146-47.

⁴⁴ See the Central Registry link found on the website for the Massachusetts Commission for the Blind, www.mass.gov/mcb. The Report of the Register 2003 available at that link records 37,919 blind people living in Massachusetts as of 2003. The prevalence of blindness and low vision is expected to increase markedly in the next twenty (20) years as the population ages. See The Eye Diseases Prevalence Research Group, Causes and Prevalence of Visual Impairment Among Adults in the United States, 122 Archives of Ophthalmology 477, 481, 483 (2004).

state's Constitution.⁴⁵ Moreover, in its public accommodations law, Massachusetts bans discriminatory practices by businesses with provisions that are both criminally and civilly enforceable.⁴⁶ Just as the Commonwealth can avail (and has, in this case, availed) itself of these state laws to protect people with disabilities, so too does it have standing to protect the well-being of Massachusetts's blind residents through resort to Title III's federal scheme, to ensure that people who are blind have an equal opportunity to enjoy the services the Bank offers in Massachusetts at a large and conveniently located fleet of ATMs; that the Bank's ATMs are independently useable by blind people to the extent required by ADAAG; and that Defendants supply any auxiliary aids and services necessary in order for blind people to be able to effectively gain access to all of the products and services that the Defendants offer, including the Bank's ATM services.⁴⁷ This is particularly true given the unique niche that the Bank created and occupies in the Massachusetts banking marketplace (by virtue of its establishment of an extensive network of ATMs at "off premise" locations and creation of a website designed to provide one "portal" to both personal banking and brokerage services),⁴⁸ and where the Bank

⁴⁵ See Mass. Const. amend. CXIV. The Massachusetts General Court established a private right of action for violation of Article 114 in Mass. Gen. Laws ch. 93, § 103. That statute forms the basis for Count VII of the Third Amended Complaint. See also *Mid Hudson Med. Group*, 877 F. Supp. at 147 (New York's interest in "the nondiscriminatory treatment of its citizens" was clear from its enactment of state civil rights statutes under which it brought its pendant state claims).

⁴⁶ See Mass. Gen. Laws ch. 272, §§ 92A, 98. The Plaintiffs include a claim under this statute in Count VI of the Third Amended Complaint.

⁴⁷ See *Snapp*, 458 U.S. at 607, 609-10 ("[F]ederal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents.").

⁴⁸ See Section I(A) *supra*.

was alone among banks with a large Massachusetts ATM network in refusing to make its ATM services accessible.⁴⁹

Equal access to financial services, including personal banking services, is integral to a person's ability to participate fully in society and live independently.⁵⁰ In light of the inaccessibility of the Bank's ATMs, the Bank's Fee Policy serves to shut the Bank's "cyber" doors to the tens of thousands of blind people in Massachusetts. Accordingly, the Commonwealth has a quasi-sovereign interest in ensuring that blind people in Massachusetts have an equal opportunity to benefit now and in the future from the Bank's services.⁵¹

3. The Commonwealth's *Parens Patriae* Standing Does Not Depend On Any "Individualized Fact-Finding" Or On The Standing Of Any Specific Individuals.

Defendants characterize Plaintiffs' claim seeking modification of the Bank's Policy for customers who are blind and cannot use the Bank's inaccessible ATMs as one seeking "highly individualized fact-finding" by the Court. They cite in support of that contention cases that deal

⁴⁹ See Section I(B) *supra*.

⁵⁰ See 42 U.S.C. §12101(a)(8) ("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").

⁵¹ See *Snapp*, 458 U.S. at 607 (directing courts to consider direct and indirect effects of discrimination); *Bull HN Info. Sys.*, 16 F. Supp. 2d at 101 (courts must consider "what might arise if the defendant's conduct is left unchallenged by the state"); *11 Cornwell Co.*, 695 F.2d at 39-40 (considering the effect of discriminatory practice on "similar people in years to come"); *Mid Hudson Med. Group*, 877 F. Supp. at 147 (in assessing indirect effects of alleged discrimination against deaf patients in lawsuit against health care provider for failure to supply interpreter services, considering fact that approximately 7% of the New York state population is deaf); *Support Ministries*, 799 F. Supp. at 277-78 (in fair housing case involving efforts to exclude group home for people with AIDS, considering number of New York residents with AIDS and who are projected to contract AIDS in future).

not with the *merits* of reasonable modification claims, but with the standing of specific individuals under the standing case law applicable to individuals.⁵²

That case law is not applicable to whether a State has *parens patriae* standing to protect the civil rights of its residents. On the contrary, courts repeatedly find a state's *parens patriae* standing to be supported where there exist obstacles to the ability of private individuals to establish individual standing.⁵³

⁵² Defendants' Memorandum at 16-17 & n. 8 (citing *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305 (1st Cir. 2003) (assessing individual's standing); *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116, 1117 (C.D. Cal. 2000) (same); *Association for Disabled Ams., Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1363-64 (S.D. Fla. 2001) (discussing standing requirements for two individual plaintiffs)). Defendants also cite *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001), where the Court suggested that the needs of a disabled person be evaluated on an individual basis. That case raised the issue of whether allowing a disabled golfer to use a golf cart would fundamentally alter the nature of golf. The Court considered that the purpose of the rule barring use of golf carts was to fatigue players, and that the plaintiff in that case would be fatigued even *with* use of a golf cart, in light of his specific condition. In contrast to *Martin*, here, no such individualized inquiry is required in order for the Court to determine the merits of Commonwealth's "reasonable modification of policy" claim against the Bank, as the Commonwealth explains further below. Finally, Defendants cite *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 69 (1st Cir. 2003), for the proposition that "Title III claims are limited to persons who are the actual victims of discrimination." Defendants' Memorandum at 17 n.8. Defendants distort the holding of that case, which was simply that a woman who sued a hospital based on architectural barriers she found when she gave birth at the hospital did not have a ripe claim under Title III where she merely claimed she hoped to become pregnant again.

⁵³ See, e.g., *Puerto Rico Public Housing Adm'n*, 59 F. Supp. 2d at 14 (fact that public housing resident would have "slim chances .. to find standing" supported finding of *parens patriae* standing of state agency). See also *11 Cornwell Co.*, 695 F.2d at 40 (allowing New York to maintain *parens patriae* action for exclusionary housing practices, given requirement that for individuals to maintain such action they must "allege specific facts demonstrating personal harm and tangible benefit from the court's intervention"); *Pennsylvania v. Porter*, 659 F.2d at 315 (in allowing Pennsylvania to go forward with Section 1983 action seeking injunction to stop police abuse, court noted that "individual victims may be unable to show the likelihood of future violations of their rights"). Indeed, the individual standing requirements Defendants purport to recite are far more onerous than those established by courts where, as here, discriminatory conditions deter disabled individuals from patronizing a business. See *Dudley*, 333 F.3d at 306 (individual had shown "a real and immediate threat of ongoing harm" to establish standing where discriminatory policy "remains firmly in place"); *Pickern v. Holiday Quality Foods, Inc.*, 298 F.3d 1133, 1138 (9th Cir. 2002) (individual who is "currently deterred from patronizing a public

Nor would any “individualized fact-finding” pose any bar to Massachusetts’s *parens patriae* standing, contrary to Defendants’ arguments. Plaintiffs have requested a simple policy change by the Bank that would reimburse blind consumers for charges they incur from using the accessible ATMs of other banks, just as the Bank now does for Bank customers with bank account balances of more than \$5,000.⁵⁴ This Court has already held that the “suggested modification ... is generally reasonable.”⁵⁵ The burden now shifts to Defendants to show that the requested change would fundamentally alter its services.⁵⁶ There is no individual-specific inquiry required by the Court to determine these questions.⁵⁷

Finally, Defendants seem to suggest that the Commonwealth must identify Massachusetts citizens requiring the relief it seeks in Count II in order to establish its standing.⁵⁸ That is not the case where a business deters people with disabilities from availing themselves of the business’s product or service, for example, as where a bank institutes a fee policy that chills any interest blind consumers might otherwise have in its services (that is, if they were to be made available on terms equally advantageous to those offered to sighted consumers, and to those blind

accommodation due to a defendant’s failure to comply with the ADA has suffered ‘actual injury.’”). *See also* Private Plaintiffs’ Opposition, Argument III(A)(2).

⁵⁴ Statement of Material Facts in Support of Defendants’ Motion For Summary Judgment on Count II Due To Lack of Standing, ¶ 1.

⁵⁵ Memorandum and Order dated 2/21/06 at 11.

⁵⁶ *Id.* at 12.

⁵⁷ *See Bull HN Info. Sys.*, 16 F. Supp. at 103-04 (rejecting challenge to Massachusetts’s standing to bring OWBPA lawsuit based on contention that merits involved victim-specific analysis; only question was whether terms of ADEA waivers satisfied OWBPA waiver requirements).

⁵⁸ Defendants’ Memorandum at 17.

consumers can obtain from banks that do not discriminate).⁵⁹ Indeed, Defendants do not cite a single case – and the Commonwealth is not aware of any – requiring a State to name specific injured individuals in order to support *parens patriae* standing, and the cases suggest the contrary.⁶⁰

Conclusion

For these reasons, Massachusetts respectfully asks the Court to deny the Bank's motion for summary judgment on Count II as against the Commonwealth.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS,
By its Attorneys,

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⁵⁹ See *Snapp*, 458 U.S. at 597-98 (Puerto Rico could maintain *parens patriae* standing to sue on behalf of workers deterred from seeking employment by defendants' discriminatory policies and practices); *County of Delaware*, 82 F. Supp. 2d at 12 n.1 (New York had *parens patriae* to seek preliminary injunction under ADA and Voting Accessibility for the Elderly and Handicapped Act against county that used polling places with architectural barriers in light of the *anticipated* discriminatory effect on the County's disabled population).

⁶⁰ See, e.g., *County of Delaware*, 82 F. Supp. 2d at 12 & n.1 (New York permitted to sue for architectural barriers at polling places because of anticipated discriminatory effect on voters with disabilities); see also cases cited in n. 40 *supra*. In any event, there are specific Massachusetts blind residents who are deterred by the Bank's fee policy from any consideration of using the Bank's services. See, e.g., Ruell Dec., ¶ 24.

CERTIFICATE OF SERVICE

I, Patricia Correa, 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/ Patricia Correa

Patricia Correa