UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

**MEMORANDUM OF PRIVATE PLAINTIFFS IN SUPPORT OF THEIR REVISED AND SUBSTITUTE MOTION FOR LEAVE TO FILE A FOURTH AMENDED AND SUPPLEMENTAL CLASS ACTION COMPLAINT**

Pursuant to Rules 15 and 21 of the Federal Rules of Civil Procedure, Plaintiffs, National Federation of the Blind ("NFB"), Adrienne Asch, Jennifer Bose and Theresa Jeraldi (collectively, "Private Plaintiffs"), submit this memorandum in support of their Motion for Leave to File a Fourth Amended and Supplemental Class Action Complaint ("Fourth Complaint").[1] Private Plaintiffs also request this Court to rule on this motion, as well as the companion motion for class certification, before addressing Defendants' motions for partial summary judgment challenging Private Plaintiffs' standing to pursue a nationwide injunction.[2] Whether or not the pleadings are addressed in the order

[1] The proposed Fourth Complaint is attached as Exhibit 1 to Private Plaintiffs' Revised and Substitute Motion for Leave to File a Fourth Amended and Supplemental Class Action Complaint. Unless otherwise noted, all further references to exhibits will be to the exhibits attached to that motion.

[2] In accordance with this Court's September 27, 2006, Order, Private Plaintiffs are also filing herewith their Motion for Certification of a Class and Subclass. As discussed in more detail in that motion, where, as here, certification issues are "logically antecedent"

requested by Private Plaintiffs, it ultimately will be appropriate to grant Private Plaintiffs' motions to amend and supplement their complaint and to certify a class, and to deny Defendants' motions for summary judgment based on standing.

The Supreme Court has expressly recognized that it is proper and desirable to avoid deciding a standing challenge by granting a plaintiff's motion to add as parties persons who indisputably have standing.[3] Indeed, even when subject matter jurisdiction clearly has been lacking at the inception of a case, the Supreme Court has approved supplemental pleadings to reflect subsequent events that cure the jurisdictional defect.[4] In this case, the addition of several new parties and reference to events occurring after the filing of the original complaint, as well as the proposed class action allegations, will obviate the need to address Defendants' most recent motions for partial summary judgment and will provide an efficient and cost-effective vehicle for remedying Defendants' systematic violations of federal law. Moreover, because the proposed complaint asserts identical claims to those already being litigated in this case and because no discovery schedule or trial date has been set, Defendants will not be prejudiced if the amendment is permitted. Finally, because the Plaintiffs in the Fourth Complaint all have standing and because the proposed class action meets all of the requirements for certification under Rule 23 of the Federal Rules of Civil Procedure, the Private Plaintiffs' motion to amend and supplement clearly is not futile.

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to standing concerns, the issue of Rule 23 certification should be treated before the issue of standing. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999). *See also In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 267-70 (D. Mass. 2004) (following *Ortiz*).

[3] *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (describing the decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952)).

[4] *Mathews v. Diaz*, 426 U.S. 67, 75 (1976).

## DESCRIPTION OF THE PROPOSED COMPLAINT

The purpose of the proposed Fourth Complaint is to preserve the nature of the case as the parties and the Court have treated it for three years and thus to ensure that blind people throughout the country will be able to use Defendants' ATMs independently. To that end, the proposed complaint adds six individual plaintiffs from various states around the country, incorporates incidents of discrimination that have occurred since the commencement of this action, and requests certification of a class and a sub-class. The class consists of blind people who have suffered discrimination at the Cardtronics Defendants' ATMs; the sub-class consists of blind people who have suffered discrimination by denial of Defendant E*TRADE Bank, Inc.'s services. Because both the class and sub-class are of nationwide scope and because the named plaintiffs do not seek certification of a Massachusetts sub-class, NFB-Massachusetts is dropped as a plaintiff.[5] Finally, the claims asserted by the named Plaintiffs in the new complaint are the same as those currently pending before this Court.

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs[6] filed this lawsuit on June 25, 2003, alleging that Defendants, E*TRADE Bank, Inc. ("E*TRADE Bank") and E*TRADE Access, Inc. ("Access"), have violated the Americans with Disabilities Act ("ADA"),[7] as well as Massachusetts statutory law, by virtue of E*TRADE Bank's failure to offer its banking services through ATMs that are accessible to blind people and by virtue of Access's ownership, operation,

[5] Additionally, Theresa Jeraldi's health is such that she will no longer continue as a plaintiff.
[6] Plaintiffs include the Commonwealth of Massachusetts, which seeks state-wide relief in this case.
[7] 42 U.S.C. §§ 12182 and 12183.

control and/or leasing of ATMs that are inaccessible to the blind.[8] In their original complaint, Private Plaintiffs sought, among other relief, an injunction to immediately make the ATMs Defendants owned, operated, controlled and/or leased throughout the United States accessible to and independently useable by the blind.[9] On February 22, 2005, following the acquisition of Access by Cardtronics, LP, this Court allowed Plaintiffs' motion to amend their complaint to add Cardtronics, LP, and Cardtronics, Inc. (collectively "Cardtronics") as Defendants, thereby expanding the reach of Private Plaintiffs' proposed nationwide injunction to over 25,000 ATMs.[10]

Not only have Private Plaintiffs made clear from the inception of this lawsuit that they seek nationwide injunctive relief, but Defendants have also affirmatively sought a determination of their legal obligations that would govern their entire fleet of ATMs. Access, the Court will recall, filed a pre-emptive action against the NFB in the Eastern District of Virginia with respect to its "nationwide network"[11] at a time when the NFB had bound itself not to sue the E*TRADE Defendants. By the time that Private Plaintiffs sought to dismiss Access's suit, they had filed their complaint with the Massachusetts Commission Against Discrimination ("MCAD") – a necessary step to exhausting administrative remedies on their state claims – and Access told the Virginia court that it filed the Virginia action out of concern that "any proceeding before MCAD (1) could only address the small Massachusetts portion of the nationwide network; and (2) would provide no guidance on or certainty about Access' liability for the remainder of its

[8] Complaint, Paper No. 1.
[9] Paper No. 1, p. 14.
[10] Order, Paper No. 114; Third Amended Complaint, Paper No. 115.
[11] Complaint for Declaratory Judgment at ¶ 12, *E*TRADE Access, Inc. v. Nat'l Fed. of the Blind, Inc.*, No. 03-743-A (E.D. Va. 2003) (Exhibit 2).

network."[12] Access even represented that "[c]ontinued uncertainty as to Access' liability under the ADA for the Merchant-Owned ATMs in its network could have . . . a devastating financial effect on Access' business."[13]

Once it was determined that the issue of Access's obligations under the ADA would be resolved in Massachusetts, the parties continued to litigate this dispute as a nationwide case. In April of 2004, Defendants filed a Rule 12(b)(7) motion seeking to require Plaintiffs to join the more than 11,000 merchants who Defendants claimed owned title to ATMs within its nationwide network. Defendants described the case by stating, "[t]his lawsuit concerns over 11,000 Merchant-owned ATMs located throughout the 50 states and the District of Columbia," and asserted, as grounds for their motion, that Defendants would face the risk of "inconsistent obligations and piecemeal litigation" if the merchants throughout the country were not joined as necessary parties.[14] Thus, far from suggesting that Plaintiffs lacked standing to obtain nationwide relief, Defendants sought to ensure that any such nationwide injunction would afford "complete relief" by binding not only the Defendants, but also the merchants located throughout the country.[15]

Defendants never challenged the nationwide scope of the case – on standing or on other grounds – at any time during the briefing of Defendants' motion for judgment on the pleadings or either party's motion for summary judgment. In response to Plaintiffs' motion for summary judgment on Count V of their Third Amended Complaint,

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[12] Plaintiff E*TRADE Access, Inc.'s Opposition to Defendant's Motion to Dismiss at 5, *E*TRADE Access, Inc. v. Nat'l Fed. of the Blind, Inc.*, No. 03-743-A (E.D. Va. 2003) (Exhibit 3).
[13] Exhibit 3, p. 5.
[14] Memorandum in Support of Defendants' Rule 12(b)(7) Motion to Join Necessary Parties, Paper No. 44, pp. 3, 13.
[15] Paper No. 44, p. 10-12.

Defendants argued that Plaintiffs' proposed nationwide injunction was impermissibly vague and unenforceable and that Plaintiffs had not presented a sufficient factual basis justifying summary judgment with respect to Defendants' 25,000 ATMs nationwide.[16]

In its February 21, 2006 Memorandum and Order, the Court declined to enter summary judgment in favor of Plaintiffs on Count V pending a "more comprehensive showing that documents the specific types of accessibility problems or design defects encountered in a larger sample of ATMs nationwide," but expressly suggested that such a showing "may be secured by the relatively simple devices of requests for admissions or interrogatories addressed to Defendants."[17] Thus, the Court, like the parties, understood the scope of this case to be Cardtronics's national fleet of ATMs.

In accordance with the Court's suggestion, on March 2, 2006, Plaintiffs served an interrogatory requesting Defendants to list "all Cardtronics ATMs as to which any information or instructions for use are available only visually" and to provide certain identifying information with respect to those ATMs, including the name and address of their retail location.[18] Defendants did not respond to that interrogatory, but rather, in May, 2006, filed motions for summary judgment based upon an alleged lack of nationwide standing and simultaneously sought a stay of all pending discovery. Thus, it was only when it appeared likely that Defendants finally would be forced to reveal information exposing the systemic inaccessibility of their ATMs and, as a result, that Plaintiffs would prevail as a matter of law on Count V, that Defendants determined that it

[16] Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Paper No. 142.
[17] Memorandum and Order, Paper No. 172, p. 4.
[18] Plaintiffs' Supplemental Interrogatory to Defendant Cardtronics, Inc. and Cardtronics, LP (Exhibit 4).

would be to their advantage to do a complete about-face and attempt to scale back the nationwide scope that they had so vigorously sought in the Eastern District of Virginia and that had formed the basis for this litigation for both the parties and the Court since it was filed over three years ago.

On May 4, 2006, Defendants filed their Motion for Summary Judgment on Counts III, IV and V Due to Lack of Standing and, on May 16, 2006, a Motion for Summary Judgment on Count II Due to Lack of Standing.[19] As the titles of these recent motions make clear, however, Defendants do not seek summary judgment on Count I, which alleges a violation of the ADA's full and equal enjoyment of services mandate, or Counts VI and VII, which allege violations of Massachusetts statutory law. Nor do they challenge the Commonwealth's standing other than with respect to Count II. Thus, Defendants' most recent effort to avoid its obligations under the law and to further delay this litigation will not, under any circumstances, resolve the whole case. Moreover, if Defendants succeeded in narrowing the scope of potential relief in this case, the claims of the vast number of blind individuals across the country who have encountered discrimination by virtue of being unable to independently use Defendants' ATMs would remain unresolved and would thus require the filing of a class action just like the proposed amendment.

Under these circumstances, in order to provide for the efficient resolution of the claims alleged in the proposed Fourth Complaint, as well as those of other unnamed class members, Private Plaintiffs seek to join these claims in the present action.

[19] Paper Nos. 177 and 182.

## ARGUMENT

The Federal Rules of Civil Procedure provide abundant authority permitting the type of amended and supplemental pleading proposed by Private Plaintiffs in this case. First, Rule 15(a) of the Federal Rules of Civil Procedure provides that, after receipt of a responsive pleading, a party may amend its pleading with leave of court and, further, that such "leave shall be freely given when justice so requires."[20] In *Foman v. Davis,* the Supreme Court made clear that "this mandate is to be heeded."[21]

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies in amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave should, as the rules require, be "freely given."[22]

The Court of Appeals for the First Circuit has "often described" the standard set forth in *Foman* as "reflecting the 'liberal' amendment policy underlying Rule 15."[23]

Rule 21 focuses specifically on amendments to add parties and provides, in pertinent part, that "[p]arties may be . . . added by order of the court on motion of any party . . . at any stage of the action and on such terms as are just."[24] The standards for adding a party pursuant to Rule 21 and for amending pleadings to add a party pursuant to Rule 15(a) are the same after the opposing party has filed a responsive pleading.[25]

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[20] Fed. R. Civ. P. 15(a).
[21] *Foman v. Davis*, 371 U.S. 178, 182 (1962).
[22] *Id.*
[23] *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154 (1st Cir. 2004).
[24] Fed. R. Civ. P. 21.
[25] *See* 3 *Moore's Federal Practice* § 15.16[1] at 15-55 (3d ed. 1997). *See also Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993) ("Where the motion to amend comes after responsive pleadings have been served, the standard for

Rule 15(d) addresses supplemental pleadings and authorizes a court to permit "a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense."[26] Like Rules 15(a) and 21, Rule 15(d) permits amendments to add parties. The Supreme Court has stated that "[s]uch amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice."[27] Thus, supplemental pleadings are particularly favored when they will permit the entire controversy to be resolved in a single case and where the additional allegations involve the same issues, subject matter or facts.[28] As Judge Caffrey of this Court explained,

> [a] motion to supplement the pleadings under Rule 15(d) is addressed to sound discretion of the Court, and should be granted when doing so will promote the justiciable disposition of the case, will not cause undue prejudice or delay or trial inconvenience and will not prejudice the rights of any parties to the action. . . . Liberality is the rule in permitting supplemental pleadings.[29]

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adding a party is the same whether the motion is made under Rule 15 or Rule 21 . . . .").

[26] Fed. R. Civ. P. 15(d).

[27] *Griffin v. County School Bd.*, 377 U.S. 218, 227 (1964).

[28] *See* 6A Wright, Miller & Kane, Federal Practice & Procedure Civil 2d ¶1506 at pp. 196-97 (2d ed. 1990).

[29] *Structural Sys., Inc. v. Sulfaro*, 692 F. Supp. 34, 36 (D. Mass. 1988)(citations omitted). The judicial economy that may be achieved by permitting the entire dispute between the parties to be resolved is a significant consideration with respect to supplemental pleadings. *See, e.g., New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28 (4th Cir. 1963); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 668 F. Supp. 906, 922-23 (D. Del. 1987); *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 602 (S.D.N.Y. 1982).

Finally, in accordance with the mandate of Rule 1, all of these rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[30]

**A. Amended And Supplemental Pleadings To Address Questions Of Subject Matter Jurisdiction Are Encouraged By The Courts.**

As mentioned, Defendants have filed motions for summary judgment alleging that Private Plaintiffs lack standing. While Private Plaintiffs believe those motions are ill-founded, courts routinely allow amended and supplemental pleadings to cure any defects in subject matter jurisdiction. For example, the Supreme Court has recognized the propriety of "avoid[ing] deciding [a] standing issue by granting the [plaintiff's] motion to add as parties" persons who clearly have standing.[31] In *Mullaney v. Anderson*,[32] while the case was pending before the Supreme Court, the defendant challenged the plaintiff union's standing to maintain suit on behalf of its nonresident members. "To remove the matter from controversy," the Court granted the union's motion to add as parties two of its nonresident members.[33] Relying on the language of Rule 21 authorizing a court to add parties "at any stage of the proceeding and on such terms as are just,"[34] the Court granted the plaintiff's motion, even though subject matter jurisdiction may have been lacking previously. The Court reasoned that the earlier joinder of these parties would not have affected the course of the litigation and emphasized further that "[t]o dismiss the present

[30] Fed. R. Civ. P. 1.
[31] *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 833 (1989) (describing the decision in *Mullaney v. Anderson*, 342 U.S. 415 (1952).
[32] 342 U.S. 415 (1952).
[33] *Id.* at 429-30.
[34] *Id.* at 430.

petition and require the plaintiffs to start over in District Court would entail needless waste and runs counter to effective judicial administration . . . ."[35]

Similarly, in *Newman-Green, Inc. v. Alfonzo-Larrain*,[36] the Court held that the lower appellate court was authorized to dismiss a nondiverse dispensable party in order to remedy a lack of subject matter jurisdiction, noting that "cases holding that appellate courts are powerless to remedy such jurisdictional defects are few and far between."[37] Once again, the Court was undeterred by the initial lack of subject matter jurisdiction, noting that in *Mullaney* the Court solved a similar dilemma by adding parties "necessary to establish the existence of a justiciable case."[38] The Court in *Newman-Green* also noted that it was particularly appropriate to correct the jurisdictional defect under the circumstances before it because "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention."[39] Thus, in both *Mullaney* and *Newman-Green*, "the appellate court [was] bringing the proper parties before it to cure a jurisdictional defect and [did] so to prevent needless judicial proceedings without any resulting prejudice to the remaining parties."[40]

The First Circuit Court of Appeals, following the teaching of *Mullaney* and *Newman-Green*, has permitted dismissal of nondiverse dispensable parties to restore

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[35] *Id*.
[36] 490 U.S. 826 (1989).
[37] *Id*. at 834, n.8.
[38] *Id*. at 843, n.7.
[39] *Id*. at 836.
[40] *California Credit Union League v. City of Anaheim*, 190 F.3d 997, 1001 (9th Cir. 1999) (permitting the addition of the United States as a plaintiff, retroactively curing lack of subject matter jurisdiction).

jurisdiction retroactively.[41] It has also made clear that a federal court's authority to cure jurisdictional defects is not limited to dismissing a nondiverse party, but extends to permitting amendments of all kinds. Thus, in *Mills v. Maine*,[42] the Court ruled that it had discretion to grant a plaintiff's request under Rule 15(a) to add a defendant in an effort to revive a claim that was barred by the Eleventh Amendment. Ultimately, the court's decision to deny the request was based in part on the plaintiffs' failure to seek to amend in the district court after the defendant had moved for summary judgment, "even though they had "every reason to 'suspect[ ] a jurisdictional difficulty' with their case . . . .".[43] *Mills* essentially instructs future plaintiffs to do what Private Plaintiffs here propose to do – address any potential jurisdictional questions raised in a motion for summary judgment by seeking to amend their complaint in the district court. Indeed, *Clark v.*

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[41] *See Casas Office Mach., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 675 (1st Cir. 1995) ("In *Newman-Green*, . . . the Supreme Court held that federal courts of appeals have the authority – like that given to the district courts in Fed. R. Civ. P. 21 – to dismiss *dispensable*, nondiverse parties to cure defects in diversity jurisdiction."). *See also Gorfinkle v. U.S. Airways, Inc.*, 431 F.3d 19, 22 (1st Cir. 2005) ("If the nondiverse party is dispensable, . . . an appellate court can preserve jurisdiction by dismissing the nondiverse party from the action."); *Sweeney v. Westvaco Co.*, 926 F.2d 29, 41 (1st Cir. 1991) ("The Supreme Court has made clear that appellate courts possess power analogous to the power of the district courts under Fed. R. Civ. P. 21 to dismiss nondiverse parties in order to maintain jurisdiction.")

[42] 118 F.3d 37 (1st Cir. 1997).

[43] *Id.* at 53. The First Circuit also refused to permit the amendment because it sought to rescue a claim from dismissal under the Eleventh Amendment by adding an individual plaintiff under *Ex Parte Young*, 209 U.S. 123 (1908), although the plaintiffs did not in fact seek the injunctive relief required to invoke that doctrine. The proposed amendment was thus futile. *Mills*, 118 F.3d at 54. Contrary to Defendants' representation to this Court, the decision in *Mills* does not stand for the proposition that the "First Circuit strictly follows an 'unequivocal' rule that a jurisdictional defect cannot be cured by adding new parties into the case through amendment." Recommendations for Scheduling Order and Defendants' Case Management Proposal, Paper No. 210, p. 4. While the Court in *Mills* did hold that 28 U.S.C. § 1653 only permits amendments to cure defective *allegations* of jurisdiction, it proceeded to consider the propriety of the proposed amendment, expressly recognizing that it had the power to permit an amendment to add a party to cure a jurisdictional defect under *Newman-Green* and Rule 15(a).

*McDonald's Corp.*,[44] a case cited repeatedly by Defendants, made a similar recommendation. The defendant challenged the plaintiffs' standing on the same grounds raised by Defendants here – that the plaintiffs had not suffered injury prior to the filing of the complaint. In granting the defendant's motion, the court noted that "[a]nother remedy unpursued [by plaintiffs] would have been to obtain leave to serve and file a supplemental complaint that cured defective allegations as to standing by pleading facts occurring subsequent to Plaintiffs' original filing."[45]

The use of supplemental pleadings to resolve jurisdictional questions was approved by the Supreme Court in *Mathews v. Diaz.*[46] There, the plaintiff failed to exhaust administrative remedies before filing suit – "a nonwaivable condition of jurisdiction"[47] – but exhausted those remedies while suit was pending. The Court, after noting that a supplemental complaint in the district court would have eliminated the jurisdictional issue, treated the case as though a supplemental complaint had been filed.[48] So too, in *Dan-Dee Imports, Inc. v. Well-Made Toy Mfg. Corp.*, the court granted the plaintiff leave to file a supplemental complaint, explaining that "[t]here is no question that leave to serve a supplemental pleading should be granted if it cures a jurisdictional defect."[49]

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[44] 213 F.R.D. 198 (D.N.J. 2003), cited in Mem. in Support of Defts.' Mot. for Summ. J. on Counts III, IV and V due to Lack of Standing at 3, 8, 9 & n.3, 11, 12 n.5, 15, 19, & 21.
[45] *Id.* at 227.
[46] 426 U.S. 67 (1976).
[47] *Id.* at 75.
[48] *Id.* at 76. *Mathews* did not make new law. In *Security Ins. Co. v. United States*, 338 F.2d 444 (1964), the Ninth Circuit not only permitted a supplemental complaint to allege subsequent events giving rise to subject matter jurisdiction, where none had existed before, but determined that the supplemental complaint, filed after the limitations period would have expired, related back to the date of the original complaint.
[49] *Dan-Dee Imports, Inc. v. Well-Made Toy Mfg. Corp.*, 524 F. Supp. 615, 619 (E.D.N.Y.

Pleadings may also be amended to claims to cure a jurisdictional defect. In *Eisler v. Stritzler*,[50] faced with a belated challenge to diversity jurisdiction, the First Circuit, *sua sponte*, amended a claim of breach of fiduciary duty under state law to assert, instead, a claim under federal securities law and then held that jurisdiction remained over that claim.[51] In addition, because Rule 15(d) contemplates the addition of parties who have participated in events occurring after suit has been filed, courts often permit plaintiffs to be added for the purpose of addressing standing challenges.[52]

Although Defendants have argued that subject matter jurisdiction must always be determined as of the filing of the case, the courts have repeatedly rejected such inflexibility in favor of an approach that permits justiciable claims to proceed without

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1981). *See also Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 174 F. Supp.2d 388, 395 (D. Md. 2001); *D.C. Precision, Inc. v. United States*, 73 F. Supp. 2d 338 (S.D.N.Y. 1999); *Ben Venue Lab., Inc. v. Novartis Pharm. Corp.*, 10 F. Supp. 2d 446, 452 (D.N.J. 1998); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1541 (S.D.N.Y. 1991); *Skor-Mor Prod., Inc. v. Sears, Roebuck & Co.*, 1982 WL 1264 at *1 (S.D.N.Y. May 12, 1982).

[50] 535 F.2d 148 (1st Cir. 1976). *See also U.S. Environmental Prod., Inc. v. Infilco Degremont, Inc.*, 611 F. Supp. 371 (N.D. Ill. 1985)(citing *Mathews v. Diaz* and permitting supplemental pleading which added subsequent event and cured venue defect).

[51] *Eisler*, 535 F.2d at 154. Substance and equity have long prevailed over formalism in the federal courts. In *Missouri, Kansas & Texas Railway Co. v. Wulf*, 226 U.S. 570 (1913), the plaintiff filed a state claim alleging diversity jurisdiction that was pre-empted by a federal statute. The Supreme Court permitted the plaintiff to file an amended and supplemental complaint asserting the federal claim and alleging that she had since obtained the capacity to pursue that claim. The Court did so even though the limitations period otherwise would have run on the federal claim, noting that "aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions." *Id.* at 575.

[52] *See, e.g.*, *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 244 F.3d 1365, 1373 (Fed. Cir. 2001) (allowing licensee to amend to join licensor as a party after the standing issue was raised *sua sponte* on appeal); *Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 669 n.38 (C.D. Cal. 2004) (and cases collected therein) ("Even if none of the presently named plaintiffs has standing to pursue such a claim, however, plaintiffs may seek to add new named plaintiffs in order to assert the claim."); *Health Research Group v. Kennedy*, 82 F.R.D. 21, 30 (D.D.C. 1979).

unnecessary waste of judicial or party resources. As Judge Clark explained shortly after the adoption of the Federal Rules of Civil Procedure, "Defendants' claim that one cannot amend a nonexistent action is purely formal, in light of the wide and flexible content given to the concept of action under the new rules."[53] Accordingly, the Court permitted the addition of a plaintiff whose claim, unlike those of the original plaintiffs, would satisfy the amount in controversy required for diversity jurisdiction.[54] The death blow to Defendants' argument that subject matter jurisdiction, if initially lacking, creates an uncorrectable nullity, came in *Caterpillar, Inc. v. Lewis.*[55] There the trial court erroneously failed to remand a case for lack of subject matter jurisdiction at the time the suit was removed to federal court; nonetheless, a unanimous Supreme Court affirmed a judgment on the merits because, by the time of trial, jurisdiction existed.

Dismissal of this case, after years of litigation in which all parties and the Court have treated its scope as nationwide, would result in "needless waste" and would run "counter to effective judicial administration."[56] As discussed in Section C, this is particularly so where there are a large number of blind individuals throughout the United States who have been subjected to discrimination by Defendants and who are entitled to seek redress in one or more new actions if this case is dismissed. The instant motion – requesting leave to amend and supplement the complaint – will avoid such waste, permit the case to proceed as it has since its inception, provide Defendants the nationwide

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[53] *Hackner v. Guaranty Trust Co. of New York,*117 F.2d 95, 98 (2d Cir. 1941). *See also Henss v. Schneider,* 132 F. Supp. 64, 65 (S.D.N.Y. 1955) (rejecting the Thomistic argument that a supplemental claim would "supplement a non-existent action").

[54] Similarly, in *Davidson v. Leadingham,* 294 F. Supp. 155 (E.D. Ky 1968), the court permitted the plaintiff to add a count which sought damages satisfying the amount in controversy required for subject matter jurisdiction.

[55] 519 U.S. 61 (1996).

[56] *Mullaney*, 342 U.S. at 430.

certainty they have long sought, and avoid piecemeal resolution of the claims of a large class of blind people to uniform, predictable and independent use of Defendants' ATMs.

**B. Defendants Will Suffer No Prejudice By The Proposed Pleading.**

Among the factors articulated by the Supreme Court in *Foman*,[57] prejudice to the defendant is the most important. Indeed, "[i]f no prejudice is found, then leave will normally be granted."[58] Moreover, "[t]ransforming an individual action into a class action does not, in and of itself, create the type of prejudice sufficient to deny a motion to amend."[59] For example, in *Presser v. Key Food Stores Co-op, Inc.*,[60] the court rejected the defendant's argument that a 21-month delay in seeking to amend to add class action allegations justified denying the plaintiff's Rule 15(a) motion, reasoning as follows:

> Defendant cites several cases in which leave to amend was denied for reason of delay . . . .In all of these cases, however, discovery had closed and the moving parties were seeking to add new claims or defenses to their complaints. Here, although over twenty-one months has elapsed since Plaintiff filed this lawsuit, discovery has not yet begun and no trial date is set. Furthermore, Plaintiff does not seek to add a new cause of action, but to add a class of plaintiffs on a claim already in the complaint. . . . For these reasons, Defendant will not be significantly prejudiced if Plaintiff is allowed to amend her complaint.[61]

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[57] 371 U.S. 178 (1962).

[58] 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1484 at 600 (2d ed. 1990 and 1997 Supp.).

[59] *Bertrand v. Sava*, 535 F. Supp. 1020, 1023 (S.D.N.Y.), *rev'd on other grounds*, 684 F.2d 204 (2d Cir. 1982).

[60] 218 F.R.D. 53, 56 (E.D.N.Y. 2003) (citations omitted).

[61] *See also Bernstein v. Nat'l Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976) ("Even though plaintiff's motion to add class action allegations . . . [was] not filed until almost eight months after the filing of the original complaint, absent a showing of prejudice to defendant, a mere delay in seeking certification is not a ground for denying the motion . . . ."); *cf. Souza v. Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974) (noting that, "as a general rule, delay in seeking certification is not grounds for denial"), rev'd on other grounds, 563 F.2d 385 (9th Cir. 1977).

Here, Defendants will not be prejudiced if the requested amendment is permitted. First, and perhaps most important, the proposed class allegations and corresponding claims for relief are virtually identical to those which were asserted by Plaintiffs at the outset of this case and, thus, do not create any unfair surprise to Defendants. Indeed, as mentioned earlier, Defendants previously took the position that they would suffer severe prejudice if only the state law claims were adjudicated in Massachusetts and, as a result, they would not receive guidance as to their entire network of ATMs.

Second, although this case has been pending for more than three years, the Court has not issued a scheduling order, has not imposed any discovery deadlines and has not set dates for either a pretrial conference or the trial. Instead, the progress of the case has been thwarted by the numerous, seriatim motions filed by Defendants. In addition, although Plaintiffs have repeatedly sought to proceed with meaningful discovery, Defendants have stonewalled these efforts.[62] Essentially no deposition discovery has yet been permitted in the case and, until recently ordered by the Court to answer one of Private Plaintiffs' interrogatories, Cardtronics had not produced any detailed information concerning its fleet of ATMs. Thus, Plaintiffs' proposed amendment will not create the significant prejudice that is required to justify denial of a motion to amend.[63]

For these same reasons, that Defendants have filed partial summary judgment motions challenging Private Plaintiffs' standing to seek nationwide relief does not alter the applicability of the liberal amendment policy mandated by the Supreme Court in

[62] *See* Affidavit of Daniel F. Goldstein, Esq. Pursuant to Fed. R. Civ. P. 56(f), Exhibit 1 to Paper No. 156.

[63] *See, e.g., Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004) ("Particularly disfavored are motions to amend whose timing prejudices the opposing party by 'requiring a re-opening of discovery with additional costs, a significant postponement of the trial and a likely major alteration in trial tactics and strategy' . . . .").

*Foman*. While the courts in this circuit have sometimes required a plaintiff who seeks to amend after the defendant has moved for summary judgment to demonstrate that the proposed amendment is supported by substantial and convincing evidence, they have done so only where the pending motion might dispose of the entire case and where the procedural posture of the case is so advanced that there is little question that the defendant will suffer serious prejudice.[64] In contrast, in this case, the pending motions will not dispose of the entire case, the claims asserted by the class are identical to those asserted by the existing plaintiffs and the parameters of discovery will not be altered significantly as a result of the proposed amendment. If necessary, however, as discussed in more detail in Section C below, Private Plaintiffs can readily establish that their proposed amendment is supported by substantial and convincing evidence.

**C. Private Plaintiffs' Motion is Not Futile.**

**1. Plaintiffs in the Fourth Complaint Have Standing.**

Each individual Plaintiff in the Fourth Complaint has standing: each suffered an injury in fact, caused by Defendants' failure to make their ATMs accessible to the blind, which can be redressed by an order requiring those ATMs to comply with the ADA.[65]

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[64] *See, e.g., Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 231 (1st Cir. 2005) (affirming denial of motion to amend where plaintiff sought to add entirely new legal theory after summary judgment had been entered against plaintiff on several counts of the existing complaint and the parties had fully briefed summary judgments on the remaining counts); *Steir*, 383 F.3d at 11-12 (upholding denial of motion to amend to "inject a new theory of relief into the litigation" after the close of discovery).

[65] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *See also* Declarations of Adrienne Asch, Bryan Bashin, Jennifer Bose, Norma Crosby, Robert Crowley, Dwight Sayer, Terri Uttermohlen and Raymond Wayne, attached as Exhibits B through I to Private Plaintiffs' Motion for Certification of a Class and Subclass, filed herewith.

The NFB has standing to bring suit on behalf of its members because it satisfies the three-part test in *Hunt v. Washington State Apple Advertising Comm'n*: its members would have standing to sue in their own right; the interests it seeks to protect in this lawsuit are germane to its purpose; and neither the claim asserted nor the relief requested requires the participation of individual NFB members. [66] The first prong is established through the declarations cited in footnote 65 above. In addition, the goal of the present lawsuit – to ensure that blind people can independently use Defendants' ATMs – directly serves the mission of the NFB.[67] Finally, the relief requested – that all of Defendants' ATMs be made accessible to and independently useable by blind people – does not require any individual participation, either for liability or relief.[68]

**2. The Proposed Class Is Appropriate for Certification Under Rule 23.**

The proposed complaint preserves the current scope of the case through the vehicle of a class action that presses the right of all blind people in the United States to use Cardtronics ATMs independently. Clearly, it is not futile.[69] Classes of plaintiffs with disabilities challenging barriers under Title III of the ADA are routinely certified.[70] "To

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[66] 432 U.S. 333 , 343 (1977).

[67] Declaration of Marc Maurer, attached as Exhibit A to Private Plaintiffs' Motion for Certfication of a Class and Subclass, ¶4.

[68] Private Plaintiffs will address standing at greater length on November 10, 2006 in their response to Defendants' Motions for Summary Judgment. *See* Order, Paper No. 213.

[69] Private Plaintiffs' Memorandum in Support of their Motion for Certification of a Class and Subclass, filed herewith, sets forth this matter in greater detail.

[70] *See, e.g.*, *Lucas v. Kmart Corp.*, Civil Action No. 99-cv-1923-JLK, 2005 WL 1648182 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging barriers and policies at over 1,400 retail stores); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2004) (certifying statewide class of people who use wheelchairs challenging barriers and policies at approximately 220 restaurants); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla. 2000) (certifying nationwide class of individuals with disabilities challenging barriers and policies at healthcare facilities); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184

obtain certification, plaintiff must establish the four elements of Rule 23(a) and one of several elements of Rule 23(b). The Rule 23(a) elements are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation."[71] Private Plaintiffs seek certification under Rule 23(b)(2) because Defendants have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[72]

Plaintiffs will be able to satisfy the numerosity prong. Defendants operate over 25,000 ATMs nationwide. The number of potential blind users of these machines is in the hundreds of thousands, making joinder impracticable. "'Federal trial courts are quite willing to accept common assumptions in order to support a finding of numerosity.'"[73]

In analyzing class certification, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge."[74] Named plaintiffs in the proposed Fourth Complaint have claims typical of those of the class: the experience of suffering discrimination on the basis of their blindness while attempting or desiring to use Defendants' ATMs. These common experiences raise common factual and legal questions, for example, whether Defendants' ATMs are in compliance with Title III. "A number of courts have held that where people who use wheelchairs encounter the same types of barriers at a number of

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F.R.D. 354, 363 (D. Colo. 1999) (certifying statewide class of people who use wheelchairs challenging barriers at approximately 42 restaurants); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 452 (N.D. Cal.), *modified*, 158 F.R.D. 439, 460 (1994) (certifying a statewide class of people who use wheelchairs challenging barriers at the defendant's movie theaters).

[71] *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003) (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 613-14 (1997)).

[72] Fed. R. Civ. P. 23(b)(2).

[73] *Grace v. Perception Tech. Corp.*, 128 F.R.D. 165, 167 (D. Mass. 1989) (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1039 (5th Cir.1981)).

[74] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

commonly-owned or affiliated public accommodations, commonality is established and class certification is appropriate."[75] There is no reason to think there is any less commonality (or typicality) when individuals who are blind encounter similar barriers than among individuals with mobility impairments who encounter similar barriers.

The adequacy prong "requires that Plaintiff demonstrate that her interests will not conflict with those of class members and that her counsel is qualified, experienced and able to vigorously conduct the proposed litigation."[76] The named plaintiffs and proposed class counsel will adequately represent the interests of the class. There are no conflicts between the named plaintiffs and the class, and proposed class counsel who are experienced in class action litigation. Indeed, Amy Robertson and Timothy Fox, the attorneys certified as class counsel in the *Lucas*, *Moeller*, and *Colorado Cross-Disability Coalition* cases, have joined the Private Plaintiffs' litigation team.

Finally, this case is precisely the type of case for which Rule 23(b)(2) was intended. "[S]ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area," in large part because "the class suit is a uniquely appropriate procedure in civil rights cases, which generally involve an allegation of discrimination against a group as well as the violation of rights of particular individuals."[77] The Supreme Court has found that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2)

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[75] *Moeller*, 220 F.R.D. at 609 (citing cases).
[76] *Mack v. Suffolk County*, 191 F.R.D. 16, 23 (D. Mass. 2000) (citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985)).
[77] 7A Charles Alan Wright *et al*., *Federal Practice and Procedure* § 1775-76 (2d ed. 1986).

classes[78] and one judge, in certifying a class challenging barriers under Title III, noted that it "provide[d] a paradigm for class certification under Rule 23(b)(2)."[79]

Private Plaintiffs' requested amendment will provide for the efficient resolution of the claims alleged in the Fourth Complaint. Ongoing investigation has revealed a large number of blind individuals who have been subjected to discrimination as a result of being unable to use Defendants' ATMs independently and as a result of being denied access to E*TRADE Bank's banking services.[80] These violations of the ADA are identical to those alleged by the current plaintiffs. Each of these individuals has a viable claim against Defendants, which he or she is entitled to bring in his or her home jurisdiction. For the same reasons that underlie Rule 23 of the Federal Rules of Civil Procedure, it will be more efficient to resolve all of these claims – and those of other unnamed class members – in a single proceeding, rather than allowing for multiple cases in multiple jurisdictions, with the resulting potential for the application of different or conflicting legal standards. For these reasons as well, the requested amendment properly alleges a class action and thus is not futile.

## CONCLUSION

For all of these reasons, Private Plaintiffs respectfully request this Court to grant their motion for leave to file the attached Fourth Amended and Supplemental Class Action Complaint.

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[78] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

[79] *Lucas*, 2005 WL 1648182, at *2. *See also Mack*, 191 F.R.D. at 24 ("This section of Rule 23 was designed to accommodate civil rights class actions in which the members of the class may be difficult to enumerate." (Citing *Advisory Committee's Note To 1966 Amendment to Rule 23*)).

[80] *See* Declarations attached as Exhibits B through I and R through HH to Private Plaintiffs' Motion for Certification of a Class and Subclass.

Assented to:

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DATED: October 18, 2006

CERTIFICATE OF SERVICE

I, Christine M. Netski, 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/ Christine M. Netski*

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