

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF
MASSACHUSETTS, *et al.*,

Plaintiffs

v.

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

Defendants

CIVIL ACTION NO. 03-11206-MEL

**MEMORANDUM OF PRIVATE PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR
CERTIFICATION OF A CLASS AND SUBCLASS**

Pursuant to Fed. R. Civ. P. 23 (“Rule 23”), Plaintiffs the National Federation of the Blind, Inc., Adrienne Asch, Bryan Bashin, Jennifer Bose, Norma Crosby, Dwight Sayer, Bob Crowley, Raymond Wayne, and Terri Uttermohlen (collectively the “Representative Plaintiffs”), hereby submit this memorandum in support of their motion to certify the following classes, defined in detail below: (a) a nationwide class of blind people who have encountered discrimination when desiring or attempting to use ATMs that Defendant Cardtronics owns, operates, controls and/or leases (the “Cardtronics Class” or “Class”); and (b) a sub-class consisting of all members of the Cardtronics Class who have experienced discrimination as a result of Defendant E*TRADE Bank’s failure to make reasonable modifications to its policies and/or procedures to ensure that members of the Sub-Class have full and equal access to the banking services that it provides through ATMs (the “E*TRADE Sub-Class” or “Sub-Class”). Both the Cardtronics Class and the E*TRADE Sub-Class seek nationwide injunctive relief.

This case epitomizes the type of case for which class action treatment -- and certification under Rule 23(b)(2) in particular -- is appropriate, as the inaccessibility of Defendants’ ATMs, and

the discriminatory policies and/or practices at issue, affect the Representative Plaintiffs and Class and Sub-Class members in the same manner and are appropriate targets for final injunctive relief.

BACKGROUND

I. The Parties.

A. The Representative Plaintiffs.

The National Federation of the Blind, Inc. (the “NFB” or the “Federation”), a non-profit corporation, is the leading national organization of blind persons, with affiliates in all 50 states, Washington, DC and Puerto Rico. The vast majority of the Federation’s approximately 50,000 members are blind persons. The NFB is widely recognized by the public, Congress, executive agencies of government and the courts as a collective and representative voice on behalf of blind Americans and their families. The purpose of the NFB is to promote the general welfare of the blind by (1) assisting the blind in their efforts to integrate themselves into society on terms of equality and independence, and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs sighted and blind persons hold concerning the limitations created by blindness that result in the denial of opportunity to blind persons in virtually every sphere of life.¹

Adrienne Asch, Bryan Bashin, Jennifer Bose, Norma Crosby, Bob Crowley, Dwight Sayer, Raymond Wayne, and Terri Uttermohlen (the “Individual Plaintiffs”) are all legally blind persons.²

The Individual Plaintiffs reside in various states and lead active and full lives.

¹ See generally Ex. A at ¶¶ 3-9 (Decl. of Dr. Marc Maurer). As used in this Memorandum, reference to exhibits are to the exhibits attached to the Private Plaintiffs’ Motion for Certification of a Class and Subclass.

² Ex. B at ¶ 3 (Decl. of A. Asch); Ex. C at ¶ 3 (Decl. of B. Bashin); Ex. D at ¶ 3 (Decl. of J. Bose); Ex. E at ¶ 2 (Decl. of N. Crosby); Ex. F at ¶ 3 (Decl. of B. Crowley); Ex. G at ¶ 6 (Decl. of D. Sayer); Ex. H at ¶ 3 (Decl. of T. Uttermohlen); Ex. I at ¶ 3 (Decl. of R. Wayne).

Ms. Asch, Mr. Crowley, and Mr. Wayne all live in New York. Ms. Asch is the Edward and Robin Milstein Professor of Bioethics at the Wurzweiler School of Social Work and Professor of Epidemiology and Population Health at the Albert Einstein College of Medicine at Yeshiva University. Mr. Crowley is a full-time student at Binghamton University, and Mr. Wayne is the Assistant Managing Attorney for the Law Enforcement Bureau of the New York City Commission on Human Rights and is Secretary of the National Association of Blind Lawyers.³

Mr. Bashin lives in California and is a consultant. Ms. Bose is a Massachusetts resident. Ms. Crosby is a resident of Texas and Louisiana and owns and operates two coffee shops with her husband, who is also legally blind. Mr. Sayer lives in Florida, is actively involved in the blind community of Florida, and, in 2005, was appointed by Governor Jeb Bush to the Florida Rehabilitation Council for the Blind. Ms. Uttermohlen lives in Maryland and is an instructor at Virginia Commonwealth University.⁴

B. The Defendants.

Defendant E*TRADE Bank is a federally chartered savings bank that offers banking services. E*TRADE Bank offers various banking services -- including the withdrawal of funds, the making of deposits, and the verification of deposits -- through ATMs located across the United States.⁵

³ Ex. B at ¶¶ 2, 5; Ex. F at ¶¶ 2, 5; Ex. I at ¶¶ 2, 4.

⁴ Ex. C at ¶¶ 2, 4; Ex. D at ¶ 2; Ex. E at ¶¶ 4-5; Ex. G at ¶¶ 2-5; Ex. H at ¶¶ 2, 4.

⁵ See Ex. J (Selected Page from E*TRADE's Website); see also Ex. O at ¶ 15 (Decl. of T. Fox).

Prior to June 2004, E*TRADE Bank, through its subsidiary E*TRADE Access, Inc. (“E*TRADE Access”), owned and/or operated a network of approximately 13,000 ATMs under the E*TRADE name (these 13,000 ATMs will be referred to as the “E*TRADE ATMs”).⁶

In June 2004, Defendant Cardtronics, which operates the largest network of ATMs in the United States, purchased E*TRADE Access and its network of ATMs.⁷ In addition to the E*TRADE ATMs, Cardtronics has an additional approximately 12,000 ATMs operating in the United States (these 12,000 ATMS will be referred to as the “Cardtronics ATMs”).⁸ For the year ended December 31, 2005, Cardtronics and E*TRADE ATMs, which operate in all 50 states, dispensed over \$9.7 billion in cash and processed more than 163.2 million transactions.⁹

E*TRADE Bank continues to offer banking services through ATMs although, as set forth in the next section, it does so pursuant to policies that discriminate against members of the Sub-Class.

II. Defendants’ Inaccessible ATMs and Discriminatory Policies.

A. Inaccessible ATMs Discriminate Against Members of the Class.

E*TRADE and Cardtronics ATMs use computer screen text prompts to guide customers through banking transactions. These computer screen text prompts are undetectable to blind

⁶ See Ex. K at 2 (Selected pages from Prospectus of Cardtronics, Inc. (Sept. 20, 2006)); see also Ex. O at ¶ 16.

⁷ Ex. K at 1-2.

⁸ See *id.* at 1.

⁹ *Id.* at 1.

people. Thus unless these computer screen text prompts are translated into a medium accessible to the blind, such as through audio output, the ATMs are not accessible to blind persons.

If a blind person enters the wrong personal identification number (“PIN”) into an inaccessible ATM, the ATM may retain his or her card. Also, a blind person who presses an incorrect function key on an inaccessible ATM has no way of knowing that he or she has made a mistake in the transaction. Blind people who wish to use an inaccessible E*TRADE or Cardtronics ATM have no choice but to reveal repeatedly their private PINs to others.

As a result of this inaccessibility, blind people, including the Individual Plaintiffs and members of the NFB, are not able to independently use E*TRADE or Cardtronics ATMs, unlike sighted people, and are not able to maintain the security of their private PINS, unlike sighted people.¹⁰

The vast majority of the Cardtronics and E*TRADE ATMs are not accessible to people who are blind. Defendants produced a spreadsheet with information concerning 25,107 Cardtronics and E*TRADE ATMs.¹¹ This spreadsheet identifies only 503 ATMs that have “Voice Guidance On,” and only 3,712 ATMs that are “Compliant.”¹²

Using a separate analysis, Plaintiffs obtained similar numbers. On its website, Cardtronics identifies the Cardtronics and E*TRADE ATMs that purportedly are “audio accessible” and thus accessible to persons who are blind. Using this information, Plaintiffs commissioned a study to

¹⁰ Ex. B at ¶¶ 6-11; Ex. C at ¶¶ 6-19; Ex. D, generally at exs. A & B thereto; Ex. E at ¶¶ 6-17; Ex. F at ¶¶ 6-13; Ex. G at ¶¶ 8-22; Ex. H at ¶¶ 6-16; Ex. I at ¶¶ 9-17; *see also generally* Exs. R - HH (declarations of other blind persons).

¹¹ Ex. L at ¶ 5 (Decl. of D. Altobelli).

¹² *Id.* at ¶ 8.

determine the number of Cardtronics and E*TRADE ATMs that Cardtronics asserts are audio accessible. This study determined that of approximately 25,000 total Cardtronics and E*TRADE ATMs, only approximately 2,560 ATMs purportedly are audio accessible.¹³

Title III of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12181 et seq., prohibits discrimination on the basis of disability by entities that own, operate, lease, lease to and/or control places of public accommodation. On behalf of the Cardtronics Class, the Representative Plaintiffs allege that Defendant Cardtronics has violated the ADA by: (i) failing to make its ATM banking services fully accessible and independently usable by individuals who are blind; (ii) failing to provide auxiliary aids and services necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals; and (iii) violating the requirement under the Department of Justice Standards for Accessible Design that instructions and all information for use in ATMs shall be made accessible to and independently usable by persons with vision impairments.¹⁴

B. Policies Discriminating Against Members of the Sub-Class.

E*TRADE Bank customers who satisfy certain criteria -- for example, by maintaining a designated minimum balance in their checking account -- may use any ATM in the United States without being charged a fee.¹⁵ E*TRADE Bank customers who do not meet these criteria, however, can only obtain a fee-free transaction at an E*TRADE ATM -- if they use any other

¹³ Ex. M at ¶ 12 (Decl. of T. DeGerlia).

¹⁴ See Fourth Amended and Supplemental Class Action Complaint, Counts I, III and IV respectively.

¹⁵ See Ex. J.

ATM, they are charged a fee.¹⁶ Among these customers, blind persons are treated less favorably than sighted persons. This results from the fact that a blind customer who encounters an inaccessible E*TRADE ATM and as a result must use an accessible, non-E*TRADE ATM will incur a fee, whereas a sighted person can use the inaccessible E*TRADE ATM and avoid the fee.

Members of the NFB, along with Messrs. Bashin, Crowley and Sayer, and Ms. Asch and Ms. Crosby, would consider banking with E*TRADE Bank if they were not assessed a fee for using accessible ATMs when they are unable to use inaccessible E*TRADE ATMs.¹⁷ These Representative Plaintiffs, on behalf of the E*TRADE Sub-Class, allege that Defendant E*TRADE Bank is in violation of the ADA by failing to make reasonable modifications in its policies, practices and procedures to ensure that members of the Sub-Class have full and equal access to the banking services that it provides through ATMs.¹⁸

III. The Classes Sought To Be Certified.

All Representative Plaintiffs seek to certify the following Cardtronics Class:

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

Representative Plaintiffs the NFB, Asch, Bashin, Crosby, Crowley and Sayer seek to certify the following E*TRADE Sub-Class:

All members of the Cardtronics Class who, during a time period to be determined by this Court, were denied, or are currently being denied full and equal enjoyment of the goods,

¹⁶ *See id.*

¹⁷ *See* Ex. B at ¶ 14; Ex. C at ¶ 20-22; Ex. E at ¶ 18; Ex. F at ¶ 15; Ex. G at ¶ 23.

¹⁸ *See* Fourth Amended and Supplemental Class Action Complaint, at Count II.

services, facilities, privileges, advantages, or accommodations of E*TRADE Bank due to the denial, on the basis of disability, of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any ATM through which the services of E*TRADE Bank may be accessed.

ARGUMENT

I. Introduction.

In considering a motion to certify a class, the Court must determine whether the proposed class satisfies the four prerequisites of Rule 23(a), as well as one of the three subsections of Rule 23(b).¹⁹ Doubts should be resolved in favor of certification, particularly in early stages of the litigation.²⁰ It is inappropriate to pass on the merits of the claims at the class certification stage.²¹

Representative Plaintiffs seek certification of both the Cardtronics Class and the E*TRADE Sub-Class pursuant to 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.”²² Representative Plaintiffs will analyze each of the requirements of Rule 23(a) and Rule 23(b)(2) separately below. As an overview, however, numerous courts have certified classes of individuals with disabilities challenging inaccessible architectural elements, equipment, and/or facilities, and/or failures to make reasonable modifications in policies and procedures.²³

¹⁹ *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003).

²⁰ *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003).

²¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974).

²² Fed. R. Civ. P. 23(b)(2).

²³ *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001) (affirming certification of class of individuals with varying disabilities challenging barriers and policies at

II. The Proposed Class and Sub-Class Meet the Requirements of Rule 23(a).

A. **The Proposed Class and Sub-Class Are So Numerous That Joinder Is Impracticable.**

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. Plaintiffs do not need to state the exact number of potential class members.²⁴

“Where the exact size of the class is unknown but general knowledge and common sense indicate

prison facilities in California); *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of blind and mobility-impaired individuals challenging accessibility of polling places); *Lucas v. Kmart Corp.*, Civil Action No. 99-cv-1923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging barriers and policies at 1,500 retail stores); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004) (certifying statewide class of people who use wheelchairs challenging barriers and policies at approximately 220 restaurants); *Nat’l Org. on Disability v. Tartaglione*, No. Civ. A. 01-1923, 2001 WL 1258089, at *5 (E.D.Pa. Oct. 22, 2001) (certifying class of blind and mobility-impaired individuals and organizations representing same challenging accessibility of voting machines and polling places); *Access Now, Inc. v. AHM CGH, Inc.*, Case Number: 98-3004 CIV, 2000 WL 1809979, at *6 (S.D. Fla. Jul. 12, 2000) (certifying a class of individuals with all disabilities challenging barriers at a chain of health care facilities); *Access Now, Inc. v. Ambulatory Surgery Ctr. Group, Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla. 2000) (same); *Siddiqi v. Regents of the Univ. of Calif.*, No. C 99-0790 SI, 2000 WL 33190435, at *11 (N.D. Cal. Sept. 6, 2000) (Certifying classes of deaf and hard of hearing students for alleged violations of federal law, including the ADA and Rehabilitation Act); *Colo. Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of people who use wheelchairs challenging barriers at approximately 42 restaurants); *Civic Ass’n of the Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996) (certifying class of deaf individuals challenging accessibility of municipal 911 and street alarm box system); *Bacal v. Southeastern Pa. Transp. Auth.*, Civil Action No. 94-6497, 1995 WL 299029, at * 6 (E.D. Pa. May 16, 1995) (certifying class of individuals who use paratransit services challenging discrimination in the provision of such services); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D. Cal. 1994) (certifying statewide class of people who use wheelchairs challenging barriers at a chain of movie theaters); *McKay v. County Election Comm’rs For Pulaski County, Ark.*, 158 F.R.D. 620, 626 (E.D. Ark. 1994) (certifying a class of elderly and/or disabled voters challenging failure to provide reasonable accommodations in voting).

²⁴ *In re Screws Antitrust Litig.*, 91 F.R.D. 52, 55 (D. Mass. 1981).

that it is large, the numerosity requirement is satisfied.”²⁵ “Census data are frequently relied on by courts in determining the size of proposed classes.”²⁶ “In addition, the fact that a class is geographically dispersed, and that class members are difficult to identify, supports class certification.”²⁷

As a matter of common sense, the numerosity requirement is met here because there are a large number of blind people in the country, all of whom are potential class members, and because there are a large number of allegedly inaccessible ATMs processing a huge number of transactions. Several courts have relied on these factors – the number of potential class members, and the number of transactions involving the allegedly inaccessible elements – to find that the numerosity requirement is satisfied.

For example, both the *Colorado Cross-Disability Coalition* and *Moeller* cases were state-wide class actions brought by classes consisting of persons who use wheelchairs or scooters for mobility who challenged the accessibility of Taco Bell restaurants in Colorado and California, respectively. In both cases, the courts relied on census data concerning the number of potential class members, *i.e.*, the number of persons who used wheelchairs or scooters in the state, as well as

²⁵ 1 Robert Newberg, *Newberg on Class Actions*, § 3:3 at 225 (4th ed. 2002) (hereinafter “*Newberg*”); *see also Grace v. Perception Tech.*, 128 F.R.D. 165, 167 (D.Mass. 1989) (“Federal trial courts are quite willing to accept common assumptions in order to support a finding of numerosity.” (Citation omitted.))

²⁶ 1 *Newberg* § 3:3 at 226.

²⁷ *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 608 (N.D. Cal. 2004) (quoting 1 *Newberg* § 3:6).

data on the number of transactions at the restaurants at issue, to hold that the numerosity requirement was met.²⁸

These factors are even stronger in this case. For example, in *Colorado Cross-Disability Coalition*, census data showed that there were about 15,000 potential class members, and in *Moeller*, approximately 150,000 potential class members.²⁹ By contrast, in this case, there are more than 1.8 million persons, age 15 or older, in the United States who are blind and are thus potential class members.³⁰

Further, in *Colorado Cross-Disability Coalition*, there were 12 million transactions per year in the Colorado restaurants at issue, and in *Moeller*, about 50 million transactions.³¹ Here, the Cardtronics and E*TRADE ATMs processed over 160 million transactions in 2005. Thus “the only way that this class is not numerous is if virtually none of Defendant's [160 million] transactions involved persons who [are blind]. This is an unreasonable assumption. As a matter of common sense, the class in this case is large.”³² Even assuming the E*TRADE Sub-Class has approximately half the machines and half the transactions, the Sub-Class is still too numerous for joinder to be practicable.

²⁸ See *Colo. Cross-Disability Coalition*, 184 F.R.D. at 358; *Moeller*, 220 F.R.D. at 608.

²⁹ *Colo. Cross-Disability Coalition*, 184 F.R.D. at 358; *Moeller*, 220 F.R.D. at 608.

³⁰ Ex. N (Table A, “Selected Disability Measures: 2002,” United States Census Bureau, Housing and Household Economic Statistics Division, available at <http://www.census.gov/hhes/www/disability/sipp/disab02/ds02ta.html>); see also Ex. O at ¶ 17.

³¹ *Colo. Cross-Disability Coalition*, 184 F.R.D. at 358; *Moeller*, 220 F.R.D. at 608.

³² *Moeller*, 220 F.R.D. at 608.

Other factors also support a finding of numerosity. Because class members and inaccessible ATMs are located in all 50 states, the classes are geographically dispersed. Finally, joinder is impracticable because class members are difficult to identify.

B. There Are Questions of Law and Fact Common to the Proposed Class and Sub-Class.

Rule 23(a)(2) requires that there be questions of law or fact that are common to the class. “The threshold of “commonality” is not high. . . . The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases.”³³

1. The Cardtronics Class Involves Numerous Common Questions.

The Cardtronics Class challenges the accessibility of the Cardtronics and E*TRADE ATMs. Numerous courts have held that where a class of persons challenge the accessibility of one or more architectural elements at a number of commonly-owned or affiliated public accommodations, commonality is established and class certification is appropriate.³⁴

In this case, the members of the Cardtronics Class share a number of common legal and factual questions, including:

- Whether Cardtronics owns, operates, leases, leases to and/or controls places of public accommodation under 42 U.S.C. §§ 12181(7) & 12182(a);
- Whether the Cardtronics and E*TRADE ATMs are accessible to and independently useable by blind people; and

³³ *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 78 (D. Mass. 2005) (citations omitted); *see also Payne*, 216 F.R.D. at 25 (Holding that “the commonality requirement ordinarily is easily met.”).

³⁴ *See, e.g., Moeller*, 220 F.R.D. at 608-9; *Colo. Cross-Disability Coalition*, 184 F.R.D. at 359-60; *Ambulatory Surgery*, 197 F.R.D. at 526; *Arnold*, 158 F.R.D. at 449.

- What steps Cardtronics is required to take to make its ATMs accessible to and independently useable by blind people.

2. The E*TRADE Sub-Class Involves Numerous Common Questions.

The E*TRADE Sub-Class challenges the policies and practices of E*TRADE Bank.

Courts in a variety of situations have held that questions concerning allegedly discriminatory policies³⁵ or the lack of required policies³⁶ present factual and legal questions that meet the commonality requirement.

The members of the Sub-Class share a number of common legal and factual questions, including:

- Whether E*TRADE Bank owns, operates, leases, leases to and/or controls places of public accommodation under 42 U.S.C. §§ 12181(7) & 12182(a);
- Whether the services that E*TRADE Bank makes available through its ATMs are accessible to and independently useable by blind people;
- What E*TRADE Bank is required to modify its policies and/or practices.

³⁵ See, e.g., 1 *Newberg* § 3:10 at 283 (“Common issues in actions charging discrimination on the basis of race or sex are the presence of a discriminatory rule or practice and a general policy of discrimination.”); see also *Armstrong*, 275 F.3d at 868 (“We have previously held, in a civil-rights suit, that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.”); *Bates v. United Postal Serv.*, 204 F.R.D. 440, 445-46 (N.D. Cal. 2001) (holding that commonality was met where the class challenged the employer’s policy requiring all employees to pass certain hearing standards.)

³⁶ See, e.g., *Lightbourn*, 118 F.3d 421; *Tartaglione*, 2001 WL 1258089. In *Lightbourn* and *Tartaglione*, both of which involved challenges by classes of individuals with disabilities to inaccessible polling places, the commonality requirement was met because the defendants did not have policies in place “direct[ing] local election officials to comply with [29 U.S.C. § 794] and the ADA” by making polling places accessible. *Lightbourn*, 118 F.3d at 426; see also *Tartaglione*, 2001 WL 1258089, at *3 (allegation that defendant failed to have policies ensuring that voters with mobility impairments had access to neighborhood polling places was an allegation that defendant “engaged in a common course of conduct on a classwide . . . basis”).

C. The Representative Plaintiffs' Claims Are Typical of the Claims of the Class and Sub-Class.

Rule 23(a)(3) requires that the claims of the Representative Plaintiffs be typical of those of the class. “‘The typicality requirement is not highly demanding’ because ‘the claims only need to share the same essential characteristics, and need not be identical.’”³⁷ Rule 23(a)(3) does not require perfect identity, “‘but merely that the claims be based on the same legal or remedial theory’ and that no conflicting interests appear between representatives and absentee class members.”³⁸ This standard is easily met here.

“[I]n a public accommodations suit . . . where disabled persons challenge the legal permissibility of architectural design features, the interests, injuries, and claims of the class members are, in truth, identical such that any class member could satisfy the typicality requirement for class representation.”³⁹

The claims of the Individual Plaintiffs are typical of the claims of the members of the Class and Sub-Class. The Individual Plaintiffs and NFB members are all blind people who have been injured by the fact that one or more of the ATMs at issue here was not accessible to and/or independently useable by them. Individual Plaintiffs Asch, Bashin, Crosby, Sayer and Crowley are all blind people who have been injured by the fact that they do not have the choice to become an E*TRADE Bank account holder on a nondiscriminatory basis. Because of this, each of the Individual Plaintiffs brings a claim against each Defendant seeking injunctive relief for violations of

³⁷ *Payne*, 216 F.R.D. at 26 (citation omitted).

³⁸ *In re Screws Antitrust Litig.*, 91 F.R.D. at 56 (citation omitted).

³⁹ *Arnold*, 158 F.R.D. at 450 (emphasis in original).

the ADA, which claims are typical of those of the Class and (in the case of Individual Plaintiffs Asch, Bashin, Crosby, Sayer and Crowley) of the Sub-Class. Similarly, the vast majority of NFB's 50,000 members are blind people from around the United States who are members of the proposed Class and Sub-Class, many of whom have claims typical of those of the Class and Sub-Class.

D. The Class Representatives and Class Counsel Will Fairly and Adequately Protect the Interests of the Class and Sub-Class.

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.”⁴⁰ Following the passage of the Class Action Fairness Act, Rule 23(g) -- rather than Rule 23(a)(4) -- now “guide[s] the court in assessing proposed class counsel as part of the certification decision.”⁴¹

1. The Interests of the Representative Plaintiffs Do not Conflict with Those of the Class or Sub-Class.

The adequate representation requirement overlaps with both the commonality and typicality prongs.⁴² Accordingly, several courts in this District have found that a lack of conflict -- discussed in the context of commonality -- suffices for the adequate representation prong.⁴³

⁴⁰ *Mack v. Suffolk County*, 191 F.R.D. 16, 23 (D. Mass. 2000) (citation omitted).

⁴¹ Fed. R. Civ. P. 23, Advisory Committee Notes, 2003 Amendments.

⁴² *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (“The commonality and typicality requirements of Rule 23(a) tend to merge. . . . Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.”).

⁴³ *See Mack*, 191 F.R.D. at 23 (holding, in analyzing adequacy, “I have already determined that Plaintiff’s claims do not conflict with those of the proposed class members but rather state common injuries and legal theories.”); *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass.

As demonstrated above, the proposed Class and Sub-Class representatives have claims that are both common to and typical of those of the Class and Sub-Class. The Representative Plaintiffs -- like the Class -- seek an injunction requiring Defendants to make their ATMs accessible to and independently useable by those Plaintiffs, and the Sub-Class Representatives -- like the proposed Sub-Class -- seek injunctive relief requiring Defendant E*TRADE Bank to provide reasonable modifications to permit blind customers to use accessible ATMs fee-free. The relief sought by the Class and Sub-Class Representatives thus does not conflict with that sought by the Class or Sub-Class.

2. Class Counsel Are Qualified, Experienced and Able to Vigorously Conduct the Proposed Litigation and Satisfy Rule 23(g).

In appointing class counsel, the court should consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class.⁴⁴

The Court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," and may direct class counsel to provide pertinent information or propose terms for attorneys' fees and nontaxable costs.⁴⁵ Proposed class counsel in

2000) (same).

⁴⁴ Rule 23(g)(1)(C)(i).

⁴⁵ Rule 23(g)(1)(C)(ii) & (iii).

this case easily satisfy the requirements of Rule 23(g)(1)(C)(I) and stand ready to provide any additional information the Court may order. Proposed class counsel respectfully suggest that it is premature to provide information concerning attorneys' fees and nontaxable costs.

Counsel's work in identifying or investigating potential claims: Before instituting the present case, attorneys from the firm of Brown, Goldstein & Levy ("BGL"), joined by attorneys from Sugarman, Rogers, Barshak & Cohen ("SRBC") engaged in settlement negotiations with Defendants E*TRADE Access and E*TRADE Bank to achieve a partial settlement. Throughout, BGL and SRBC have investigated claims of NFB members -- who are putative class members -- and pursued the vindication of those claims through the past three years of litigation.

Counsel's experience with class actions, other complex litigation and civil rights claims: Attorneys from the Denver law firm of Fox & Robertson ("F&R") have recently joined the Plaintiffs' legal team. F&R has extensive experience handling class actions under Title III of the ADA, including certification as class counsel in a number of class action cases under that statute.⁴⁶ BGL's Daniel Goldstein has extensive experience with complex litigation and has represented the NFB and other blind plaintiffs in many cases under the ADA.⁴⁷ SRBC's Christine Netski also has

⁴⁶ See generally Ex. O. The cases in which F&R has been certified as class counsel include: *Lucas v. Kmart*, 99-cv-01923-JLK, 2005 WL 1648182 (D. Colo. Jul. 13, 2005) (certifying nationwide injunctive class addressing ADA violations in over 1,400 Kmart stores) & 2006 WL 722163 (D. Colo. Mar. 22, 2006) (certifying damages subclasses in seven states); *Moeller*, 220 F.R.D. 613-14 (addressing ADA violations at over 220 Taco Bell restaurants in California); *Colo. Cross-Disability Coalition*, 184 F.R.D. at 363 (addressing ADA violations at over 40 Taco Bell restaurants in Colorado); *Farrar-Kuhn v. Conoco, Inc.*, Civil Action No. 99-MK-2086 (D. Colo.) (addressing ADA violations at approximately 120 service stations in approximately six states); *Colo. Cross-Disability Coalition v. Fey Concert Company*, Civil Action No. 97-Z-1586 (D. Colo.) (addressing ADA violations at a Denver concert venue).

⁴⁷ See generally Ex. P (Decl. of D. Goldstein).

extensive experience in complex litigation, as well as litigation of all varieties before the District of Massachusetts and the First Circuit.⁴⁸

Counsel's knowledge of the applicable law: BGL and SRBC have amply demonstrated their command of the applicable law through the many pleadings filed in the case to date. The focus of F&R's practice is on disability rights under the ADA, among other statutes. F&R's Timothy Fox and Amy Robertson have litigated many cases under Title III of the ADA and have published and spoken on the topic as well.

The resources counsel will commit to representing the class: BGL and SRBC have already demonstrated, over the past three years, that they are willing to commit the time and resources necessary to vindicate the rights of blind people to independently use the Cardtronics and E*TRADE ATMs. They -- and F&R -- stand ready to commit the resources necessary to pursue these claims on behalf of the proposed Class and Sub-Class.

Based on the above, BGL, SRBC and F&R satisfy the requirements of Rule 23(g)(1)(C)(I).⁴⁹

III. The Proposed Class and Sub-Class Meet the Requirements of Rule 23(b)(2).

Once a class has satisfied all four of the prerequisites of Rule 23(a), it must satisfy one of the subsections of Rule 23(b). The Class and Sub-Class proposed herein satisfy Rule 23(b)(2) if the

⁴⁸ See generally Ex. Q (Decl. of C. Netski).

⁴⁹ See, e.g., *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 355 (N.D. Cal. 2005) (holding counsel satisfied Rule 23(g) where it had extensive experience in antitrust, class action and other complex litigation; worked together to identify, investigate, and prosecute the claims; reviewed documents, worked with experts, analyzed data, and negotiated with opposing counsel; “devoted considerable attorney resources to this case and . . . associated with other counsel, experienced in class actions, who have assisted in the matter”).

Defendants “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 . . .” and the representatives are seeking “final injunctive relief or corresponding declaratory relief.”

“[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.”⁵⁰ Indeed, 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) classes,⁵¹ 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).”⁵²

“A class action in which all members of the class complain of the identical architectural barrier necessarily involves acts that are generally applicable to the class.”⁵³

⁵⁰ 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1775-76 (2d ed. 1986).

⁵¹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 697).

⁵² *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*)).

⁵³ *Colo. Cross-Disability Coalition*, 184 F.R.D. at 361 (citations omitted); *see also Ambulatory Surgery*, 197 F.R.D. at 529 (Holding that “plaintiffs’ complaint about the same categories of architectural barriers necessarily involves acts that are generally applicable to the class and therefore appropriate for 23(b)(2) treatment . . .”).

Here, Defendants' inaccessible ATMs and discriminatory policies and practices apply to, and affect, class members in the same way: Class members are unable independently to use the ATMs, and Sub-Class members are unable to use accessible ATMs fee-free. Certification under Rule 23(b)(2) is proper because Defendants have acted in a manner applicable to the entire class, making appropriate final declaratory and injunctive relief.⁵⁴

CONCLUSION

For the reasons set forth above, Representative Plaintiffs respectfully request certification of the Cardtronics Class and the E*TRADE Sub-Class.

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⁵⁴ See *Boulet*, 107 F. Supp. 2d at 81 (“As the First Circuit has explained, if injunctive or declaratory relief is appropriate with respect to the whole class, certification [under Rule 23(b)(2)] is proper.” (Citation omitted.)).

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

Christine M. Netski