UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

MEMORANDUM OF LAW IN SUPPORT OF E*TRADE BANK'S RULE 12(B)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The Commonwealth of Massachusetts and National Federation of the Blind, Inc. have a legal dispute with E*TRADE Access, Inc. ("Access"), which maintains a nationwide network of automated teller machines ("ATMs"). The parties disagree about whether the Americans with Disabilities Act ("ADA") requires Access to provide speech capability for blind persons at ATMs that it does not own or operate, but which merely participate in Access' ATM network. Access is today filing an Answer denying all material allegations in the Amended Complaint.

Plaintiffs have also named a second defendant, E*TRADE Bank, the corporate parent of Access. However, absent unusual circumstances – which Plaintiffs nowhere allege – the corporate relationship between E*TRADE Bank and Access provides no basis to impose liability on E*TRADE Bank. Equally important, the ADA places duties only on entities that "own, operate or lease" a place of public accommodation; E*TRADE Bank does not own, operate or lease the ATMs at issue – all of which are owned and operated by third-party merchants that participate in the network.

Plaintiffs contend that E*TRADE Bank should be liable because its customers can use the ATMs. That theory contravenes the plain language of the statute, and would mean that every bank in the United States would be equally liable in this case, because all of their customers can use ATMs in Access' network as well.

Accordingly, the Court should dismiss the Amended Complaint against E*TRADE Bank under Fed. R. Civ. P. 12(b)(6) because it fails to state a claim on which relief can be granted.

BACKGROUND

I. THE DISPUTE

Consumers use ATMs to access bank accounts and make financial transactions remotely. ATMs typically are located in malls, stores, gas stations and other commercial establishments. Access maintains a network in which approximately 15,000 ATMs participate nationwide. Amended Complaint ¶ 14.

Two types of ATMs participate in Access's network: (1) "Access-Owned ATMs," a limited number of ATMs that Access has title to and operates; and (2) "Merchant-Owned ATMs," a much larger number of ATMs that are owned and operated by the third-party merchant where the ATM is located. These independent merchants are responsible for all operations of the Merchant-Owned ATMs. Amended Complaint ¶¶ 15-16.

In November 2002, Plaintiffs sent a demand letter asserting that the ATMs that participate in the Access network "are inaccessible to the blind" under the ADA and Massachusetts law. Plaintiffs threatened litigation unless Access agreed to make all the ATMs participating in the network accessible by providing speech capability within two years. *See* Exhibit 1 hereto.

After a period of negotiations, the parties then reached a partial settlement in June 2003 ***regarding the Access-Owned ATMs only.*** Access agreed to retrofit all Access-Owned ATMs over a period of time to provide voice capability at those ATMs. Amended Complaint ¶ 15. No agreement was reached with respect to Merchant-Owned ATMs, leading to this lawsuit.

II. E*TRADE ACCESS AND E*TRADE BANK

E*TRADE Bank is a federally-chartered savings bank that is a subsidiary of E*TRADE Group, Inc. E*TRADE Bank is considered a branchless bank. It offers all the customary banking services to its customers, such as checking accounts, savings accounts, money market accounts, and certificates of deposit; the only difference between E*TRADE Bank and other banks is that customers send in funds by wire or the mail, instead of visiting a branch. E*TRADE Bank's deposit accounts are "insured by Federal Depositors Insurance Corporation to customers nationwide." *See* E*TRADE Group, Inc. Form 10-K for fiscal year ending December 31, 2002 at 72 (relevant portions attached as Exhibit 2 and available as http://www.sec.gov).[1]

In May 2000, E*TRADE Group, Inc. acquired an Oregon corporation known as Capture Card Services, Inc. After the acquisition, the company was renamed E*TRADE Access, Inc. Access is a subsidiary of E*TRADE Bank, but it is not a bank nor does it provide banking services. Rather, Access maintains an "ATM business" and maintains a "nationwide network of

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1 This Court can consider public records, such as state and federal agency filings, without converting this Rule 12 motion into a motion for summary judgment. *See In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 19 (1st Cir. 2003); *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 6 n.2 (1st Cir. 1999).

over 11,000 ATMs" throughout the United States. *See* State of Oregon Business Registry Database Search (attached as Exhibit 3 and available at http://sos-venus.state.or.us); E*TRADE Group, Inc. Form 10-K for fiscal year ending December 31, 2001 at 5, 11 & 101 (relevant portions attached as Exhibit 4 and available at http://www.sec.gov).

III. THIS ACTION

Plaintiffs filed this action on June 25, 2003, and filed an Amended Complaint on July 22, 2003. They assert that Access is violating the ADA by failing to provide speech capability at Merchant-Owned ATMs.[2] Access is today filing an Answer to the Amended Complaint denying each material allegation.

Plaintiffs did not only sue Access. Rather, Plaintiffs have also named E*TRADE Bank as a defendant, even though it does not own, operate or lease any ATMs. Plaintiffs allege that E*TRADE Bank "offers its banking services" through ATMs that participate in Access' network. Amended Complaint ¶ 17.

ARGUMENT

I. E*TRADE BANK DOES NOT OWN, LEASE OR OPERATE ATMS

Plaintiffs attempt to impose liability on E*TRADE Bank by asserting that it "offers its banking services" at ATMs that participate in the Access network. Amended Complaint ¶ 17. That allegation is insufficient to state a claim against E*TRADE Bank under the ADA.

The ADA imposes certain duties with respect to "a place of public accommodation." 42 U.S.C. § 12182. However, the statute does not place liability on every person or entity that has some relationship to the place of public accommodation. Rather, the

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2 Plaintiffs also assert two claims under Massachusetts law.

ADA applies only to a person or entity that "owns, leases (or leases to), or operates" a place of public accommodation. *Id.* § 12182(a).

Because the ATMs at issue are owned or leased by independent merchants, Plaintiffs are contending that E*TRADE Bank somehow "operates" ATMs in the Access network because its customers can use their E*TRADE Bank ATM cards to make transactions at those ATMs. The ADA does not define the term "operate," and therefore the "ordinary and natural meaning" of the word governs. *Smith v. United States*, 508 U.S. 223, 228 (1993).

Applying *Smith*, courts have defined "operate" to require a high degree of direct, daily control over the place of public accommodation:

- "to put or keep in operation" or "[t]o conduct the affairs of" or "manage," *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995);
- "to control or direct the functioning of and to conduct the affairs of," *Emerson v. Thiel College*, 296 F.3d 184, 189 (3d Cir. 2002);
- "to put or keep in operation"; "to control or direct the functioning of," *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 322 (D. Mass. 1997);
- "control over the operations of the licensee in any day-to-day fashion," *Dahlenberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1102-03 (D. Colo. 2000).

E*TRADE Bank does not "operate" ATMs within the ordinary meaning of the word. E*TRADE Bank does not "put into operation" any ATMs. It does not "conduct the affairs" of any ATMs. It does not "manage" any ATMs. The individual merchants where the ATMs are located perform these daily functions – and the Amended Complaint does not allege otherwise. E*TRADE Bank is not an "operator" of the ATMs under the ADA. *See Emerson*, 296 F.3d at 188-89 (individual defendants did not direct the functioning of university); *Neff*, 58 F.3d at 1066 (individual franchisee operated individual Dairy Queen stores, not national franchisor corporation); *Guckenberger*, 957 F. Supp. at 322-23 (assistant to president of the university did not exercise "authority, control, or discretion" necessary "to be deemed an operator of a place of public accommodation" under the ADA).

Plaintiffs' assert that each ATM that participates in the Access network "displays the E*TRADE logo." Amended Complaint ¶ 18. That Access shares the same brand name as its parent is not unusual, and it does not change the ADA analysis. As discussed above, liability under the ADA turns on actual daily control over the operations of the public accommodation at issue. For that reason, Dairy Queen was not liable under the ADA in *Neff* for acts occurring at franchisee stores, even though store employees were required to wear Dairy Queen uniforms, and even though the stores were required to display Dairy Queen trademarks, because those facts did not show that Dairy Queen "controls modifications to the [franchisee's] stores" to make them ADA-complaint. 58 F.3d at 1067. Similarly here, use of the E*TRADE logo on ATM's in the Access network does not make E*TRADE Bank liable as a defendant under the ADA because the logo has no bearing whatsoever on actual operation and control of the ATMs themselves. *Cf. Gonzales v. Walgreens Co.*, 878 F.2d 560, 562 (1st Cir. 1989) (subsidiary's use of common logo shared with parent did not make parent liable for injuries caused by subsidiary).

Plaintiffs' argument – that E*TRADE Bank is liable because it allows its customers to make transactions at the ATMs – not only finds no support in the statute but also makes no practical sense. ***Hundreds*** of banks participate in the ATM network that Access maintains. Any account holder at one of those banks can use an Access ATM to conduct a financial transaction, just as E*TRADE Bank customers can. Under Plaintiffs' theory, however, every one of these banks are liable under the ADA for conditions at the ATMs that participate in Access's network – and at every other ATM network where their customers make transactions –

because those banks "offer banking services" at the ATMs. No basis exists, in the statute, under the cases, or by plain logic, for such an expansive theory of liability.

II. PLAINTIFFS' OWN ACTIONS CONFIRM THAT E*TRADE BANK DOES NOT "OPERATE" ATMS UNDER THE ADA

Plaintiffs' attempt to impose liability on E*TRADE Bank violates basic principles of corporate law and the plain language of the ADA. Plaintiffs' own actions before litigation began confirm that they do not believe E*TRADE Bank has liability here.

As discussed above, the current dispute began in November 2002, when Plaintiffs sent a demand letter threatening litigation. Plaintiffs sent their letter to both Access and to E*TRADE Bank, asserting that Access and E*TRADE Bank "own and operate" thousands of ATMs nationwide. *See* Exhibit 1.

The parties settled their dispute as to Access-Owned ATMs in June 2003. However, despite their original demand to sue E*TRADE Bank, Plaintiffs did not require that E*TRADE Bank sign the parties' Settlement Agreement. *See* Exhibit 5 hereto.[3] Moreover, Plaintiffs acknowledged that E*TRADE Bank is not an owner, operator or lessor of the ATMs. In Recital C, they "assert that the ATMs are operated and/or leased ***by Access***." *Id.* at p. 1 (emphasis added). Plaintiffs had no obligation to include the Bank in the settlement agreement, but if they believed that E*TRADE Bank was subject to and violating the ADA, they surely should have done so.

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[3] The Court can consider the Settlement Agreement in connection with this Motion because Plaintiffs discussed it in their Amended Complaint (at ¶ 15), but failed to attach the document. *In re Colonial Mortgage*, 324 F.3d at 15.

III. PLAINTIFFS CANNOT SUE E*TRADE BANK SIMPLY BECAUSE IT IS THE PARENT OF ACCESS

Plaintiffs also cannot hold E*TRADE Bank liable on any other theory, such as its relationship with Access. E*TRADE Bank is a bank that provides traditional banking services; Access is a separate company that maintains the ATM network about which the parties have a legal dispute. The corporate relationship between the two companies provides no basis to impose liability on the parent.

It is well-settled that "limited liability is a cornerstone of corporate law." *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 879 (1st Cir. 1987). Corporations are free to structure their operations into separate entities, and liability may not pass from a subsidiary to its parent so long as both maintain proper corporate formalities. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries") (internal quotations omitted); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772-73 (1984) ("[A] corporation may adopt the subsidiary form of organization for valid management and related purposes . . . . a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors").

To pierce the corporate veil, Plaintiffs would need to allege and show: (1) lack of corporate independence; (2) fraudulent intent; and (3) manifest injustice. *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992). However, the Amended Complaint nowhere alleges – nor could it – that any of these stringent factors exists here. No basis exists to impute the alleged actions of Access to its parent, E*TRADE Bank. *See, e.g., Resolution Trust Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993) (dismissing complaint against parent because no facts alleged to support alter ego theory).

CONCLUSION

For these reasons, E*TRADE Bank respectfully requests that the Court grant its Rule 12 Motion and dismiss the Amended Complaint against E*TRADE Bank with prejudice.

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Dated: September 12, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL ~~(BY HAND)~~ ON 9/12/03