UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *et al.*

Plaintiffs,

v.

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

Defendants.

C.A. No.: 03-11206-MEL

CONSOLIDATED OPPOSITION OF PLAINTIFFS TO E*TRADE BANK'S MOTION TO DISMISS[1]

INTRODUCTION

As to E*TRADE Bank ("the Bank"),[2] the Amended Complaint ("Complaint" or "Am. Compl.") alleges well-pleaded facts clearly sufficient to support three different theories of liability:

(1) E*TRADE Bank is a public accommodation that offers banking services that discriminate on the basis of disability in violation of the Americans with Disabilities Act ("ADA") and the Massachusetts Public Accommodations Act;

(2) E*TRADE Bank's services, including those offered at Automated Teller Machines ("ATM's"), are programs or activities of E*TRADE Bank within the Commonwealth

[1] Plaintiff Commonwealth of Massachusetts is represented by the Attorney General. Plaintiffs National Federation of the Blind, its Massachusetts affiliate and four individual blind persons have separate representation. Where, as here, the interests of the Plaintiffs are identical and the challenge is to a pleading authored jointly by the Plaintiffs, Plaintiffs will ordinarily file consolidated pleadings and responses.

[2] E*TRADE Access, Inc. ("Access" or "E*TRADE Access"), the other Defendant, has filed an Answer to the Amended Complaint.

that are offered on a discriminatory basis in violation of Article 114 of the Amendments to the Massachusetts Constitution and the Massachusetts Equal Rights Act; and

(3) E*TRADE Bank discriminatorily "owns, operates or leases" ATM's that are themselves public accommodations under the ADA and the Massachusetts Public Accommodations Act.

E*TRADE Bank fails to address the first two theories of liability, utterly forgoing any argument that the allegations underlying those theories fail to state claims upon which relief may be granted. On that basis alone the Court should deny E*TRADE Bank's motion. As to the third theory of liability, E*TRADE Bank blithely invites the Court to find, contrary to the allegations of the Complaint, that it does not own, operate or lease the ATM's bearing the E*TRADE logo. Long-established and familiar federal jurisprudence governing motions to dismiss provides that "[i]n ruling upon a 12(b)(6) motion, the Court must accept all well-pleaded facts alleged in the Complaint as true and draw all reasonable inferences in favor of the plaintiff." *Day v. Fallon Cmty. Health Plan, Inc.*, 917 F. Supp. 72, 75 (D. Mass. 1996). Because Plaintiffs allege facts which, if proven, could lead to a finding of liability against E*TRADE Bank, the motion to dismiss should be denied. *See Kling v. Fidelity Mgmt. Trust Co.*, 270 F. Supp. 2d 121 (D. Mass. 2003).

ARGUMENT

A. E*TRADE Bank is a Public Accommodation that Discriminates in the Offering of Banking Services in Violation of the ADA.

E*TRADE Bank is a federally chartered bank that offers banking services. Am. Compl. ¶12. E*TRADE Bank offers certain banking services without fees to its account holders only through ATM's that display the E*TRADE logo. These services include the withdrawal of funds and the making and verification of deposits. Am. Compl. ¶¶12, 17-18. As explained in Defendant's Exhibit 4,[3] E*TRADE Bank

> is the nation's largest Internet bank and offers a full suite of consumer banking products and services. The Bank delivers these products and services through non-traditional means—the Internet, telephone and ATMs—and thus eliminates many of the costs associated with brick-and-mortar branches.

ATM's aside, E*TRADE Bank is indeed a "branchless bank." Mem. of Law in Supp. of E*TRADE Bank's Rule 12(b)(6) Mot. to Dismiss for Failure to State a Claim ("Def. Mem.") at 3. But even though these ATM's constitute E*TRADE Bank's only physical presence, they are not independently accessible to the blind. Am. Compl. ¶16. Thus, blind persons who become E*TRADE Bank account holders may not avail themselves of E*TRADE Bank's banking services as sighted customers may—through the independent use of E*TRADE ATM's.

By alleging that E*TRADE Bank offers banking services to its sighted account holders that are inaccessible to blind account holders, the Plaintiffs have pled sufficient facts to support a claim under Title III of the Americans with Disabilities Act. Under Title III of the ADA, E*TRADE Bank is itself a public accommodation, 42 U.S.C. §12181(7)(F), and the Complaint clearly identifies E*TRADE Bank as a public accommodation offering banking services. *See, e.g.,* Am. Compl. ¶¶12, 17, 20, 33, 40, 42, 43 and 45. As such, E*TRADE Bank may not deny someone its banking services on the basis of that person's disability. *See* 42 U.S.C. §12182(b)(1)(A)(i). That same statutory provision makes clear that the Bank is not relieved of liability simply because it provides those services through contractual, licensing or other

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[3] E*TRADE Bank has attached five exhibits to its Motion to Dismiss, including some Form 10K's filed with the SEC by a nonparty--E*TRADE Group, Inc. E*TRADE Bank asserts that the Court may consider these exhibits without its motion being converted to a Motion for Summary Judgment. Generally, on a motion to dismiss, a court should not consider documents unless they are incorporated into the complaint, although under some circumstances a court may consider a document (1) whose authenticity is undisputed, (2) that is a public record, (3) that is central to the claim, or (4) that is sufficiently described in the complaint. *See Kling,* 270 F. Supp. 2d at 127-28. Plaintiffs have no way of knowing, without the benefit of having taken discovery, whether the information contained in the Form 10K's is truthful and accurate. Nonetheless, Plaintiffs do not object to the Court considering those exhibits in

arrangements. *Id.* Thus, even if E*TRADE Bank does not own, lease or operate the E*TRADE ATM's through which it provides those services, but instead contracts or has other arrangements with E*TRADE Access to provide those services, E*TRADE Bank does not thereby escape culpability. The statute clearly imposes on a public accommodation a nondelegable duty to offer its services without discrimination. Because the Complaint alleges facts sufficient to support a cognizable legal theory, E*Trade Bank's motion to dismiss must be denied. *See 5A Wright & Miller, Federal Practice & Procedure: Civil 2d §1357* at 340 (Supp. 2003).

E*TRADE Bank does not dispute its status as a public accommodation and, indeed, addresses its liability under this theory in only a glancing fashion. Specifically, it asserts that account holders with hundreds of banks may use E*TRADE Access ATM's without fees and that, under Plaintiffs' theory, all of these banks are potentially liable under the ADA. Def. Mem. at 6. Not only does E*TRADE Bank fail to cite any legal authority supporting its contention that such liability would be unduly "expansive," but the factual premise underlying this argument is not contained in the Complaint, is not supported by any of the Exhibits submitted by E*TRADE Bank and, therefore, cannot properly be considered by the Court. In any event, the potential liability of actors other than E*TRADE Bank is irrelevant to the issue before the Court. Because the Plaintiffs have alleged that E*TRADE Bank offers its customers the opportunity to withdraw money from E*TRADE Bank accounts and engage in other banking transactions at E*TRADE ATM's without fees – services that are unavailable to blind customers – they have stated a claim against E*TRADE Bank under the ADA, whether or not E*TRADE Bank is alone in its wrongdoing.

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the context of this motion to dismiss, but they reserve their right to challenge the truthfulness of their contents at later stages of the case.

B. E*TRADE Bank Offers a Discriminatory Program or Activity in Violation of the Massachusetts Equal Rights Act.

Although E*TRADE Bank acknowledges that it has been sued under the Massachusetts Equal Rights Act ("MERA"), Mass. Gen. Laws ch. 93, § 103, *see* Def. Mem. at 4, n.2, it has not argued – nor could it – that Plaintiffs have failed to state a claim for relief under this statute. Count VII of the Complaint alleges that blind people are excluded from participation in and the benefits of the banking services offered by E* TRADE Bank at E*TRADE ATM's, in violation of Article 114 of the Amendments to the Massachusetts Constitution. Article 114, which is incorporated into MERA, provides:

> No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

Mass. Const. Art. Amend. 114. Neither MERA nor Article 114 is limited to the activities of public accommodations and their reach is decidedly broader than that of the ADA.[4] *See Guckenberger v. Boston Univ.*, 957 F.Supp. 306, 324 (D. Mass. 1997) (noting that Article 114 "appears to sweep broadly, securing the right of handicapped persons against discrimination . . . perpetrated by any private person or entity") (citations and internal quotations omitted). Thus, even assuming that E*TRADE Bank's argument that it does not own, operate or lease E*TRADE ATM's could warrant the dismissal of the Plaintiffs' ADA claims, there is no question that Count VII of the Complaint states a claim under MERA.[5]

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[4] That the resolution of issues under the ADA would not determine the claim under the Massachusetts Equal Rights Act was brought to the Defendants' attention in their unsuccessful attempt to sue for declaratory relief in the Eastern District of Virginia. *See* Reply to Plaintiff's Opposition to Defendant's Mot. to Dismiss (without exhibits), at Consolidated Opp. of Plaintiffs to E*TRADE Bank's Mot. to Dismiss ("Opp.") Ex. 1 at 8.

[5] If E*TRADE Bank had an argument for the dismissal of Count VII, it should have made that argument in support of its Motion to Dismiss. It should not address it in the Reply Brief for the first time. "The purpose of the reply

C. E*TRADE Bank May Not, on a Motion to Dismiss, Controvert Plaintiff's Well-Pleaded Allegations that it "Owns, Operates or Leases" E*TRADE ATM's.

ATM's are also themselves public accommodations. Those who own, operate or lease ATM's or lease ATM's to public accommodations are liable under the ADA if those with disabilities are denied the full and equal enjoyment of the ATM's. 42 U.S.C. §12182(a). The Complaint not only clearly alleges that E*TRADE Bank operates the E*TRADE ATM's, but gives a source for that allegation, noting that E*TRADE Bank proudly trumpets on its website, "We operate the second largest network of ATMs in the United States." Am. Compl. ¶17; *see also* Opp. Ex. 2.[6]

In the First Circuit, as elsewhere, the Court must "take the factual averments contained in the complaint as true, indulging every reasonable inference helpful to the plaintiff's cause." *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992). The Court is neither to weigh the evidence nor to rule on the merits. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994). A plaintiff need not even state a *prima facie* claim; rather, the complaint survives a motion to dismiss if it gives the defendant fair notice of what the claim consists and the facts on which it relies. *See* Swierkiewicz *v. Sorema, N.A.*, 534 U.S. 506, 512 (2002).

Defendant's sole ground for moving to dismiss, however, is the assertion that, contrary to the allegations of the Complaint (and its own claim to the world on its web site), E*TRADE Bank does not own, lease or operate the ATM's. Def. Mem. at 4-7. With high passion, but also with no record basis, it declares that it does not "'operate' ATM's within the ordinary meaning

brief is to respond directly to matters raised in the response brief and not to introduce new factual or legal arguments." *Ace Novelty Co., Inc. v. Vijuk Equipment, Inc.*, No. 90 C 3116, 1991 WL 150191 at * 4 (N.D. Ill. July 31, 1991) (striking reply brief that included arguments not raised in opening brief).

[6] As noted by E*TRADE Bank, documents referred to in the Plaintiffs' Complaint may be considered by the Court on a Motion to Dismiss. Def. Mem. at n.1; *Kling*, 270 F.Supp. 2d at 127-28.

of the word." Def. Mem. at 5. Interestingly, E*TRADE Bank does not assert that in using the word "operate" on its web site it intended it to be understood in any way other than its ordinary meaning, nor does it assert that its web page makes a false representation. Seemingly, it just ignores the web site quoted in the Complaint. Most of all, E*TRADE Bank does not address why its motion is consuming the time and energy of the parties and the Court when few things are clearer in federal practice than that it is improper to premise a Rule 12(b)(6) motion on a claim that the allegations of the Complaint are false. *See Day*, 917 F. Supp. at 75.

To add insult to Plaintiffs' injury in having to respond to an unfounded motion, E*TRADE Bank asserts that "Plaintiffs' own actions before litigation began confirm that they do not believe E*TRADE Bank has liability here." Def. Mem. at 7. The basis for this serious charge turns out to be nothing more than that E*TRADE Bank was not a party to the settlement agreement governing the machines owned outright by E*TRADE Access. *Id.* E*TRADE Bank cannot make such a charge and then complain when it is answered. So the Court should now know what E*TRADE Bank well knows: the Plaintiffs sought to include E*TRADE Bank in the settlement and were rebuffed. *See* Opp. Ex. 3.

It is axiomatic that in a negotiation neither party gets all it wants. In this instance, it is not clear that Plaintiffs could have persuaded E*TRADE Bank to join the settlement, and, if so, at what price, nor is it apparent what Plaintiffs, by insisting that E*TRADE Bank join the settlement, would have accomplished that they did not achieve without its participation. To use such a thin reed on which to rest the weighty charge that Plaintiffs knowingly made false allegations bodes ill for the course Defendants will choose to follow in litigating this case.

Plaintiffs allege that E*TRADE Bank owns, operates and/or leases the E*TRADE ATM's. They have a solid and demonstrably good faith basis for so alleging, and on a motion to dismiss, the Court must take the allegations of the Complaint as true. Thus, on the one theory in the Complaint as to which E*TRADE Bank articulates a challenge, its challenge must fail.[7]

D. Plaintiffs Oppose E*TRADE Bank's Request for a Hearing and Ask for a Prompt Decision and Scheduling Conference.

E*TRADE Bank has requested a hearing on its Motion to Dismiss, a motion premised entirely on its factually unsupported claim that it is untrue that the Bank "operates" the E*TRADE ATM's. Yet even as this pleading is filed, E*TRADE Bank continues to announce to the world through its web site what it denies to this Court -- that it operates the second largest ATM fleet in America. Dismissal would require this Court to jettison basic Rule 12(b)(6) jurisprudence, since E*TRADE Bank's request simply cannot be reconciled with well-established legal standards. Moreover, E*TRADE Bank ignores entirely the additional bases for liability articulated in the Complaint. Under these circumstances, it is difficult to imagine what there is about the Motion and the Plaintiffs' Opposition that calls for further clarification at oral argument, but it is clear that a hearing would only occasion further undue delay.

The Plaintiffs filed this case on June 25, 2003. The Defendants declined to file a responsive pleading to the Amended Complaint under Rule 12 while they pursued a declaratory judgment action in the Eastern District of Virginia that was ultimately dismissed as a "textbook example of forum shopping." Opp. Ex. 4 at 11-12. Once discovery does begin in this case, review of the volume of documents necessary to the proof of this claim will no doubt consume many hours. Plaintiffs respectfully request that the Court avoid further delay, decide the motion to dismiss on the pleadings and promptly convene a scheduling conference.

[7] E*TRADE Bank also reviews at some length the case law applicable to piercing the corporate veil to hold a parent liable for the actions of its subsidiary. Plaintiffs have made specific allegations against E*TRADE Bank; they have not yet discovered nor have they alleged in the Complaint any facts that address a theory of vicarious liability.

CONCLUSION

Wherefore, Plaintiffs respectfully request that the Motion to Dismiss be denied.

Respectfully submitted,

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Dated: September 30, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2003, I served the within document by mailing a copy of same, postage prepaid to the following counsel of record:

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