IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

REPLY BRIEF IN SUPPORT OF
E*TRADE BANK'S MOTION TO DISMISS

In its Motion to Dismiss, E*TRADE Bank attached public SEC filings showing that E*TRADE Bank does not own, operate or lease any of the ATMs at issue in this lawsuit, a fundamental requirement under the Americans with Disabilities Act ("ADA"). E*TRADE Bank also explained that Plaintiff may not impose liability on E*TRADE Bank based on actions of its subsidiary, defendant E*TRADE Access, Inc.[1]

Plaintiffs cannot challenge either assertion, but instead advance a series of flawed arguments to keep E*TRADE Bank in the case. Each argument is not supportable, as discussed below.

I.

Plaintiffs first assert that this Court "must accept" the allegations of the Amended Complaint, which states that E*TRADE Bank owns, operates and leases ATMs. Opposition at 2. Plaintiff are incorrect. As their own authority makes clear, however, this Court need only accept

[1] E*TRADE Access, Inc. filed an Answer on September 12, 2003.

"***well-pleaded*** facts" in a complaint in deciding a Rule 12 Motion. *Day v. Fallon Community Health Plan, Inc.*, 917 F. Supp. 72, 75 (D. Mass. 1996) (emphasis added). The Court cannot and should not accept "bald assertions," *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 142 F.3d 26, 40 (1st Cir. 1998), nor "unsupportable conclusions." *McDonald v. Commonwealth of Mass.*, 901 F. Supp. 471, 476-77 (D. Mass. 1995).

Plaintiffs' conclusory allegation that E*TRADE Bank owns, operates and leases ATMs is a classic example of an allegation that is ***not*** well pleaded. Public SEC filings explain that E*TRADE Access, Inc. -- not E*TRADE Bank -- offers services through the ATM network at issue in this case, and Plaintiffs concede that the Court can consider these public filings in deciding this Motion. Opposition at pp. 3 n.3 & 6 n.6. Under these circumstances, the case law makes clear that Plaintiffs cannot bring a lawsuit against E*TRADE Bank based on allegations that are demonstrably incorrect. *Chief Justice Cushing Highway Corp. v. Limbacher*, 145 F. Supp. 2d 108, 110 (D. Mass. 2001) (public documents control over inconsistent allegations); *In re Peritus Software Serv., Inc. Sec. Litig.*, 52 F. Supp. 2d 211 (D. Mass. 1999) (dismissing case based on SEC filings); *Olkey v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 9 (2d Cir. 1996) (SEC filings contradicted plaintiffs' allegations); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n.9 (3d Cir. 1993) (same).[2]

II.

Next, Plaintiffs try to impose liability as follows: "E*TRADE Bank proudly trumpets on its website, 'We operate the second largest network of ATMs in the United States.'"

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2 *See also Sedighim v. Donaldson, Lufkin & Jenrette, Inc.*, 167 F. Supp. 2d 639, 646 (S.D.N.Y. 2001) (if allegations conflict with plain language of public documents, "the disclosure documents control"); *Collier v. Township of Cicero*, No. 98 C 8071, 1999 WL 1046414, *3 (N.D. Ill. Nov. 10, 1999) (dismissing lawsuit because public records trump allegations of complaint).

Opposition at 6. The page that Plaintiffs attach does not support the statement in their brief, however. It ***nowhere*** identifies the E*TRADE entity that offers ATM network services, but rather refers to "E*TRADE Financial," the parent company of both E*TRADE Bank and E*TRADE Access, Inc.

Furthermore, Plaintiffs fail to provide the Court with the key section of the E*TRADE website. *See* Exhibit 1 attached hereto. This page –

- describes the different E*TRADE entities in the E*TRADE Financial group;
- explains that E*TRADE Bank is an "Internet bank" that accepts federally-insured deposits;
- states that E*TRADE Access, Inc. provides services to "a nationwide branded ATM network in 48 states" and is "the nation's largest off-premise ATM network providing a turnkey solution for a growing number of consumer-based businesses"; and
- informs the reader that "[b]y simply entering a zip code, users are provided with the location of the nearest ***E*TRADE Access*** ATM.".[3]

E*TRADE's website reflects the company's SEC filings, and further shows that, if Plaintiffs have a case at all, it is against E*TRADE Access, Inc., not E*TRADE Bank.

III.

Without citing any authority, Plaintiffs also attempt to hold E*TRADE Bank liable by alleging that "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 ATMs." Opposition at 3. This argument distorts the plain language of the ADA and confuses two statutory terms.

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[3] Because Plaintiffs attached one page of the E*TRADE website to their Opposition, the Court may consider other pages from the site without converting this Rule 12 Motion into a Motion for Summary Judgment. *See Cogan v. Phoenix Life Ins. Co.*, 310 F.3d 238, 241 n.4 (1st Cir. 2002).

The ADA defines a list of various types of businesses, such as hotels, banks and stores, that constitute a "public accommodation." 42 U.S.C. § 12181(7)(f). However, an entity is ***not*** liable under the ADA merely because it is a "public accommodation." Rather, the ADA imposes liability only if a defendant "owns, leases . . . or operates" a "***place*** of public accommodation" at issue. 42 U.S.C. § 12182(a) (emphasis added). *See also Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 321-23 (D. Mass. 1997) (ADA liability depends on whether the defendant "owns, leases . . . or operates" the place of public accommodation); *Sanchez v. ACAA*, 247 F. Supp. 2d 61, 67 (D.P.R. 2003) (necessary element of ADA claim is that the defendant be "a private entity that owns, leases, or operates a place of public accommodation").

The ***places*** of public accommodation at issue in this case are ***ATMs***, not E*TRADE Bank. Plaintiffs seek to "make accessible the ***existing and newly installed ATMs***" throughout the United States. Amended Complaint ¶ 1. *See also* Amended Complaint ¶¶ 7, 28 (plaintiff Adrienne Asch "would like ***to use the ATMs***"; "The only effective means to make E*TRADE-operated ***ATMs*** accessible is through voice guidance technology"). Thus, the appropriate defendant in this case must "own, lease . . . or operate" the "place of public accommodation" at issue – here, the ATMs that Plaintiffs allege must be made accessible to the blind. Because E*TRADE Bank does not (as described above) own, operate or lease those ATMs, it cannot be held liable for conditions at the ATMs under the ADA.

IV.

Finally, Plaintiffs argue that they can maintain a claim against E*TRADE Bank under the Massachusetts Equal Rights Act ("MERA"), which prohibits discrimination against handicapped persons. However, the interpretation of state disability law goes "hand in hand" with interpretation of federal disability laws. *Lesley v. Chie*, 81 F. Supp. 2d 217, 226 (D. Mass.

2000). The MERA, just like the ADA, does not impose unbounded liability on any entity that may be related to a dispute in some tangential fashion. Rather, only a party "continuing or carrying out" the discriminatory conduct is potentially liable for a violation of MERA. *See Guckenberger*, 957 F. Supp. at 324 (University officials liable because they set and enforced the discriminatory policy).

Plaintiffs fail to meet this basic, commonsense requirement. The Amended Complaint nowhere alleges that E*TRADE Bank had any role in deciding whether to provide speech capability at ATMs, or continued that policy. Plaintiffs' pre-litigation conduct is fully consistent: when they resolved one portion of this dispute, they signed a Settlement Agreement with E*TRADE Access, Inc. alone, and omitted E*TRADE Bank. Motion to Dismiss at 7. In short, no MERA claim is possible because E*TRADE Bank did not continue or carry out in any way the conduct that Plaintiffs challenge in this lawsuit.

CONCLUSION

For these reasons, and those set forth in its Motion to Dismiss, E*TRADE Bank respectfully requests that the Court dismiss the Amended Complaint against E*TRADE Bank under Rule 12(b)(6) for failure to state a claim on which relief can be granted.

REQUEST FOR ORAL ARGUMENT

E*TRADE Bank respectfully renews its request for oral argument contained in its Motion to Dismiss.

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E*TRADE Access, Inc. and
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Dated: October 10, 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~~ and e-mail on Oct. 10, 2003