UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT
DISTRICT OF MASS

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

DEFENDANT E*TRADE BANK'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Pursuant to the Court's December 16, 2003 request, E*TRADE Bank (the "Bank") respectfully submits this supplemental brief concerning the two issues the Court identified: (1) the applicability of *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994) ("*Carparts*"); and (2) "whether liability under Title III of the ADA may attach to E*TRADE Bank, Inc. itself, apart from any ownership, operation, or leasing of the ATMs at issue in this action."

I. *CARPARTS* IS INAPPLICABLE BECAUSE IT DOES NOT ADDRESS THE PLAINTIFFS' THEORY OF LIABILITY

Carparts does not address the ADA violation Plaintiffs allege: a nondiscriminatory service offered through an allegedly discriminatory third-party "medium." Rather, *Carparts* holds that the ADA prohibits discriminatory services even if they are provided through mediums like telephones or messenger services. *Carparts* is inapplicable to Plaintiffs' claim because the Bank's services themselves are not discriminatory; for example, the Bank does not have different interest rates or fees for blind customers. The Plaintiffs argue that the Bank nonetheless violates the ADA because customers obtain the Bank's services by using an allegedly discriminatory medium (ATMs) that a ***third party*** controls. Nothing in *Carparts* addresses a defendant's liability for third-party discrimination, but other courts recognize that the ADA does not impose liability on entities like the Bank that "merely contract with someone who ultimately may be subject to Title III." *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 480, 481 (D. N.J. 1998).

A. *Carparts* Merely Holds That The ADA Prohibits Discriminatory Services That Are Not Provided At A Physical Location

In *Carparts*, the First Circuit held that Title III covers a complaint alleging that the defendant's insurance services were discriminatory because they limited insurance benefits for AIDS-infected customers. Whereas other customers had $1 million in annual insurance benefits, the insurance company capped annual AIDS-related benefits at $25,000.

The First Circuit held that the defendant's insurance services qualified as a "public accommodation" because that term in Title III includes services provided not only at physical facilities, but also "by mail and phone" or "through telephone lines, messengers or ***some other medium***." *Carparts*, 37 F.3d at 19-20 (emphasis added). The complaint stated a valid ADA claim because it alleged that the ***terms*** of the insurance services discriminated against AIDS patients. However, *Carparts* did ***not*** say that services are themselves discriminatory under the ADA where the discrimination is caused by the inaccessible medium used to provide the services — such as a post office, telephone, or messenger service. For example, *Carparts* does not say that the insurance company would be liable under the ADA if a messenger delivering insurance documents, such as FedEx, refused to enter an AIDS patient's home.

B. *Carparts* Does Not Apply Because Plaintiffs Allege Discrimination At A Third-Party "Medium" Through Which One Obtains Banking Services

Unlike in *Carparts*, the Plaintiffs here are not alleging that the Bank itself imposed conditions on its service offerings — for example, higher rates, fees or charges — that discriminated against blind customers. Instead, the Plaintiffs are alleging that the discrimination is caused by the "medium" (an ATM) through which blind customers could obtain the Bank's services. This alleged discrimination is caused solely by practices of a third party — allegedly, E*TRADE Access — that the Bank does not control and for whom the Bank is not directly responsible.[1] No matter how Plaintiffs describe their case, the unavoidable thrust of their Complaint is that the ***ATMs themselves*** are not accessible to blind people. Plaintiffs cannot describe any facet of the Bank's services that are discriminatory without mentioning the alleged defect in ATMs; any allegedly disparate impact of the Bank's services on blind people would result solely from the alleged inaccessibility of third parties' ATMs. Because the ATMs are not in any way controlled by the Bank and the Plaintiffs have not raised any claims about alleged discrimination in "banking services," no part of the *Carparts* analysis applies to this lawsuit.

Carparts in no way alters the fundamental rule that a defendant like the Bank cannot be liable for the discriminatory acts of the entity providing the medium to the defendant's services, because the ADA does not impose liability on entities that "merely contract with someone who ultimately may be subject to Title III." *Bowers*, 9 F. Supp. at 481. In *Bowers*, the court refused to hold certain defendants liable under the ADA where they merely provided services to the plaintiff through contractual arrangements with the plaintiff's university.

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1 The fact that the Bank is the parent of Access is legally irrelevant, as the Plaintiffs effectively have conceded, because the Plaintiffs have not raised any claim that would permit the Court to unify the separate corporate identities of the two companies.

Plaintiffs have not cited ***any case*** holding a defendant liable in circumstances analogous to the Bank's situation.

C. Carparts Is Probably No Longer Valid Law

Finally, it is worth mentioning that *Carparts* has been consistently criticized by other federal circuit courts and is likely superceded by a recent Supreme Court decision.

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Supreme Court set forth the structure for analyzing allegations of discrimination under Title III of the ADA. A disabled professional golfer alleged that a golf tour violated the ADA by refusing to allow him to use a golf cart to accommodate his disability. The Supreme Court began its analysis by citing the statutory requirement in 42 U.S.C. § 12182(a) that the ADA imposes liability only if the alleged discrimination occurs at a physical "place." *Id.* at 676-77. It held that this initial requirement was satisfied because the parties had conceded that the alleged discrimination occurred at a physical place — a golf course. *Id.* at 677-78. *Carparts* would not survive this analysis because the insurance services were not rendered in a physical "place." The Connecticut Supreme Court recently agreed, stating that, in light of *Martin*, it "ha[d] [its] doubts about the continued validity of the analysis" in *Carparts*. *Webster Bank v. Oakley*, 830 A.2d 139, 162 n.38 (Conn. 2003).

Even prior to *Martin*, numerous federal courts severely criticized *Carparts* and reached the opposite conclusion — that the ADA governs only discrimination occurring at physical facilities and not through "mediums" like the phone or by mail. *E.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1113-15 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613-14 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1013 (6th Cir. 1997). Declining to follow *Carparts*, Judge Brieant of the Southern District of New York stated that *Carparts* "flies in the face of the plain meaning of Title III and is not supported by the legislative history." *Leonard v. Israel Discount Bank of New York*, 967 F. Supp. 802, 804 (S.D.N.Y. 1997), *vacated on other grounds*, 199 F.3d 99 (2d Cir. 1999).

II. E*TRADE BANK CANNOT BE LIABLE UNDER THE ADA BECAUSE IT DOES NOT OWN, OPERATE OR LEASE ATMS

Trying to avoid the impact of the Bank not owning or operating ATMs, Plaintiffs argued at the Hearing that "***two*** places of public accommodation" are at issue in this case: (1) the ATMs and (2) the nonphysical "place" wherever the Bank provides banking services. Plaintiffs further argue that E*TRADE Bank can be liable under Title III of the ADA even if it does not "own, lease or operate" any "place" of a public accommodation. *See* Pl. Opp., at 3-4, *citing* 42 U.S.C. § 12182(b). As proof that the ADA governs the Bank, Plaintiffs note that the ADA expressly lists "banking" services as a type of service governed by the ADA. *Id.* at 3, *citing* 42 U.S.C. § 12181(7)(F).

However, the clear language of the ADA rebuts Plaintiff's argument. The statute itself limits its scope to entities that "own, lease or operate" the specific place of public accommodation at which the alleged discrimination occurred. That "banking services" are also a type of service governed by the ADA is a red herring — the issue is not whether the Bank's banking services generally qualify as a "place of public accommodation" under the ADA, but whether the Bank is legally responsible for alleged discrimination at a third-party ATM. Finally, the absurd results arising from Plaintiffs' position demonstrate its lack of merit.

A. The ADA By Its Terms Governs Only The Entity That Owns, Leases Or Operates The Particular "Place Of Public Accommodation" At Issue

The structure of Title III of the ADA shows that liability arises ***only if*** an entity "owns, leases or operates" the place of public accommodation at which the alleged discrimination occurred. Section 12182 of the ADA provides the "general rule" in subpart (a) and then "construes" the general rule with both general and specific prohibitions listed in subpart (b). Plaintiffs' argument that the Bank is liable even if it does not own, lease or operate an ATM is flawed because it would improperly delete subpart (a) from the statute entirely.

> Subsection 12182(a) states the "general rule":
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Subsection 12182(b), entitled "Construction," provides general and specific prohibitions encompassed by the "general rule" in subsection 12182(a):

- Paragraph (b)(1) provide the "general" prohibitions — these are (i) "denial of the opportunity" to disabled persons, (ii) affording benefits that are "not equal to" benefits afforded to others, or (iii) providing a service that is "different or separate." *See* 42 U.S.C. § 12182(b)(1)(A)(i) – (iii). Importantly, however, paragraph (b)(1) ***limits the scope of these general prohibitions to activities of entities that own, lease or operate the place of public accommodations***. *See id.* § 12182(b)(1)(A)(iv).

- Similarly, paragraph (b)(2) provides "specific prohibitions," *see* 42 U.S.C. § 12182(b)(2)(A)(i) – (v), but these specific prohibitions are provided "for purposes of [construction of] subsection (a) of this section." *Id.* § 12182(b)(2)(A).

In other words, liability cannot arise under the general prohibitions in paragraph (b)(1) or the specific prohibitions in paragraph (b)(2) unless the discrimination occurs at the place of the public accommodation owned, operated or leased by the defendant, as required by the general rule in subsection (a). Any conclusion that the Bank is liable under Title III even though it does not own, lease or operate the ATM would make the general rule in subsection (a) superfluous. Courts must read the ADA to give meaning to every provision and not to render any provision meaningless — particularly one entitled the "general rule." *E.g., Herman v. Hector I. Nieves Transp., Inc.*, 244 F.3d 32, 36 (1st Cir. 2001) ("A primary canon of statutory construction is that a statute should be construed so as not to render any of its phrases superfluous").

The *Bowers* court squarely rejected both arguments the Plaintiffs raise here. First, the Bank is not liable under the ADA for any alleged discrimination at ATMs allegedly operated by a third party merely because the Bank has a contract with that third party:

> The language of the ADA does not support this extension of liability to those who merely contract with someone who ultimately may be subject to Title III. It is true that the ADA's prohibitions extend to discrimination "on the basis of a disability . . . directly or through contractual, licensing, or other arrangements." 42 U.S.C. § 12182(b)(1)(A)(i). This language does not, however, extend potential liability beyond that provided for in section 12182(a) . . . . ***Not only would such an interpretation render the statute internally contradictory — by making the "general prohibition[s]" in subsection 12182(b) far broader than the "general rule" of subsection 12182(a) — but such an interpretation would also contravene the language of section 12812(b)(1)(A)(iv).*** That subsection provides that those protected by section 12182(b) are "clients or customers of the *covered public accommodation that enters into the contractual, licensing, or other arrangements*." 47 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added); *see also* H.R. Rep. No. 101-485(II), at 101 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 384.

9 F. Supp. 2d at 481 (emphasis added). Second, the Bank is not liable for discrimination at these ATMs merely because the Bank provides banking services that generally fall within the scope of the ADA:

> [Plaintiff's] other argument . . . is that [defendant] ACT is covered by the ADA because it is "a national testing service that leases facilities to administer college achievement test[s]." . . . The allegations of the First Amended Complaint do not suggest that [plaintiff] was denied the enjoyment of those (unspecified) testing facilities. Rather, Bowers' claim relates to . . . Bowers' enjoyment of, among other things, intercollegiate football. Thus, Bowers still does not allege that ACT . . . own, lease (or lease to), or operate a place of public accommodation in such a way that they could modify ***that*** place of public accommodation to grant Bowers the enjoyment he alleges he was denied. [Citations omitted.]
>
> Stated another way, to the extent ACT actually does own, lease or operate a place of public accommodation in connection with a national testing service, ACT . . . [is] subject to the ADA's anti-discrimination principles only in the operation of ***that*** place of

> public accommodation. Mere operation of one place of public accommodation does not by itself subject every other aspect of the operator's business to Title III [of the ADA].
>
> This is abundantly clear from both the Department of Justice's regulations and commentary thereon, as well as case law . . . . [Quotations and footnotes omitted.]

Id. at 482. Despite Plaintiffs' suggestion at the hearing that the *Bowers* case has been discredited, no subsequent decision in that case nor any other federal case challenges this relevant portion of the *Bowers* decision. This analysis is squarely on point and demonstrates that Plaintiffs cannot state a valid claim against the Bank.

B. <u>Plaintiffs' Interpretation Of The ADA Leads To Absurd Results</u>

Finally, by ignoring the statute, the Plaintiffs' argument results in a ridiculous extension of liability that Congress could not have intended. E*TRADE Bank permits account holders to interact with the Bank not only through ATMs, but also over the phone, by mail, or over the Internet. Under Plaintiffs' theory, E*TRADE Bank would be equally liable for discrimination if for some reason blind people could not use a particular telephone, or could not access a post office or computer attached to the Internet. Courts do not endorse such absurd constructions of the ADA. *See, e.g., Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321-22 (S.D. Fla. 2002) (ADA did not impose liability where company's website on the Internet allegedly was inaccessible by blind people); *Torres v. AT&T Broadband, LLC*, 158 F. Supp. 2d 1035, 1037-38 (N.D. Cal. 2001) (ADA did not impose liability where digital cable service that listed TV channels over TV screens allegedly was not viewable by blind people).

Furthermore, the Plaintiffs' argument would expand ADA liability for alleged discrimination problems by these particular ATMs to ***every other bank in the country***. ATMs are so popular because a consumer can use almost any ATM to interact with just about any bank. The ATMs at issue in this lawsuit — ATMs bearing the "E*TRADE" logo — permit consumers to interact with other financial institutions besides E*TRADE Bank, such as Fleet, Citibank, Chase Manhattan, Wachovia, Bank of America, and so forth. Under Plaintiffs' theory, the alleged discrimination by ATMs bearing an "E*TRADE" logo permit Plaintiffs to allege an ADA violation against each of these banks, because blind people are disadvantaged in using the "services" of each of these banks if someone tries to interact with any of these banks from these particular "E*TRADE"-branded ATMs. Taken to its logical conclusion, every bank in the country becomes liable for every inaccessibility at every ATM anywhere — regardless of who owns, operates or leases that ATM.[2]

These conclusions — that E*TRADE is liable for every accessibility problem with every telephone, mail box, and computer, and that every bank is liable for an accessibility problem with any specific ATM — are obviously absurd, but arise directly from the Plaintiffs' position. Congress surely did not pass the ADA with the intention of creating such far-reaching and unknowable liabilities. The fallacy with the Plaintiffs' argument is that it ignores the ADA's "general rule," which imposes liability ***only*** on entities that actually "own, operate or lease" the ATMs, mail boxes or post offices, and computers. The Bank's reading of the general rule provides reasonable limits, clarity and sensibility to the ADA.

For these reasons, the Bank cannot be liable under Title III of the ADA unless it owns, leases or operates the "place" of a public accommodation where the discrimination is alleged to have occurred, and the "place" of the public accommodation here is unquestionably and solely the ATMs, for which the Bank is not responsible.

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2 Plaintiffs have alluded to the fact that the Bank might be distinguishable from other banks on the grounds that the Bank allegedly has built its business around the E*TRADE-branded ATMs and allegedly encourages customers to use these particular ATMs. But even if so, the situation is no different than a business that is built around the use of overnight courier services and encourages customers to use FedEx instead of UPS, and then an allegation of discrimination is brought against FedEx. If a business is liable for ADA violations by its preferred vendors, the ADA would create the perverse incentive for the business to stop having preferred vendors altogether.

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Dated: January 15, 2004

CERTIFICATE OF SERVICE

I, Jenny K. Cooper, hereby certify that on January 15, 2004, I caused a copy of the foregoing document to be served, via electronic and first class mail, upon the following counsel of record:

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