UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, NATIONAL FEDERATION OF THE BLIND, INC., NATIONAL FEDERATION OF THE BLIND OF MASSACHUSETTS, INC., ADRIENNE ASCH, RICHARD DOWNS, THERESA JERALDI and PHILIP OLIVER,
Plaintiffs

v.

E*TRADE ACCESS, INC. and E*TRADE BANK,
Defendants

CIVIL ACTION NO. 03-11206-MEL

PLAINTIFFS' SUPPLEMENTAL BRIEFING ON DEFENDANT E*TRADE BANK'S MOTION TO DISMISS

Pursuant to the Court's Order of December 16, 2003, the Plaintiffs file this Supplemental Brief addressing the applicability of the First Circuit's decision in *Carparts Distrib. Ctr. Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F. 3d 12 (1st Cir. 1994), to the question of whether liability under Title III of the ADA attaches to E*TRADE Bank, Inc., separate and apart from any ownership, operation, or leasing of the ATMs at issue in this action. The Plaintiffs allege in their Amended Complaint that E*TRADE Bank, as a public accommodation, is liable for the provision of services through inaccessible ATMs whether or not (1) the ATMs themselves are public accommodations or (2) it or any other E*TRADE entity owns, operates, or leases the ATMs. *See, e.g.,* Amended Compl. ¶¶12, 17, 33, 34, 40.

Carparts mandates the conclusion that the banking services offered by E*TRADE Bank are a public accommodation within the ambit of Title III, whether the means for providing those services is in a building, through a wire connection or some other mechanism. After all, the provider of the service determines the means by which it makes the service available to the public. Here, E*TRADE Bank chooses to provide banking services through a network of ATMs which are inaccessible to the blind, and is therefore subject to the non-discrimination provisions of Title III.

ARGUMENT

The First Circuit in *Carparts* held that an entity that satisfies the statutory definition of "public accommodation" set forth in 42 U.S.C. § 12181(7)(F) is subject to the non-discrimination provisions of 42 U.S.C. § 12182, whether or not it offers services to the public at a physical location. Id at 19. In *Carparts,* the entities at issue were a provider and an administrator of an employer-sponsored health insurance plan which did not offer their services through physical structures. In analyzing whether these service providers were "public accommodations," the court first looked to the language of Section 12181(7)(F), which sets forth the categories of entities considered "public accommodations." The court observed that the categories included such entities as "travel agencies," which typically do business by telephone or through the mail. Additionally, the definition of "public accommodation" set forth in Section 12181(7)(F) includes a catch-all category of "other service establishments." In light of this, the court concluded that it was unnecessary for a business serving the public to do so from a physical place to be considered a "public accommodation" subject to Title III obligations; it was enough that the *services* provided were of the type enumerated in Section 12181(7)(F). *Id.* ("'[S]ervice establishments' include *providers of services* which do not require a person to physically enter an actual physical structure.") (emphasis supplied). The court reasoned that this result was consistent with the primary policy underlying Title III: "to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced and reasonable manner." *Id.* Indeed, "it would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Id.*

In this case, banks are among the "service establishments" explicitly included within Section 12181 as satisfying the definition of "public accommodation." *See* 42 U.S.C. § 12181(7)(F). E*TRADE Bank is a federally chartered bank that offers banking services. Amended Compl. ¶ 12. Although 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 deposits . . . ." Memorandum of Law In Support of E*TRADE Bank's Rule 12(b)(6) Motion to Dismiss at 3. Thus, under the First Circuit's holding in *Carparts*, the banking business owned by E*TRADE Bank is a public accommodation, despite the absence of a physical structure, and E*TRADE Bank is subject to the non-discrimination provisions of Title III simply by virtue of providing banking services. *See also Doukas v. Metropolitan Life Ins. Co.*, 950 F.

Supp. 422, 425-26 (D.N.H. 1996) (Title III non-discrimination provisions apply to insurance company that does business without resort to a physical place).

Carparts teaches that, as a matter of statutory construction and in furtherance of the ADA's goals, the terms "place of public accommodation" and "public accommodation" should be read as the same with respect to liability for discrimination under Title III of the ADA. As the court in *Carparts* noted, the language of the ADA does not require that persons enter physical structures to obtain goods and services for Title III to apply. Accordingly, *Carparts* concludes that Title III reaches public accommodations and places of public accommodation alike, and that the statute's reach is not limited to discrimination connected to a physical structure. It is important to note that technological advances have expanded the way in which various "services" covered by the ADA are made available to the public, and "cyberbanking" is an excellent example.

It also follows that when a public accommodation discriminates in the provision of its services, liability attaches to the owner of that public accommodation regardless of whether other entities with whom the public accommodation has arranged to provide those services may also be liable under Title III. This result is common sense. If, for example, a dentist's office is physically inaccessible, the owners of both the building and the dental practice, pursuant to 42 U.S.C. § 12182(a), would have potential liability. However, if the dentist refuses to treat AIDS patients, it makes no sense, even in those Circuits that do not follow *Carparts*, to say that the owner of the building—the place of public accommodation—is a potential defendant. Rather, it is the owner of the dental practice—a public accommodation—that is potentially liable, be it a limited liability company, a partnership or a sole proprietorship. *Carparts,* by recognizing that liability attaches to owners of "public accommodations" under Title III of the ADA (and not just owners of "places" of public accommodation), establishes that neither the owner of the dental practice nor the owner of banking services may discriminate.

E*TRADE Bank's corporate decision to partner with other E*TRADE entities, or with any other entity for that matter, to provide its banking services through inaccessible ATMs does not insulate E*TRADE Bank from liability under Title III. *See, e.g.,* 42 U.S.C. § 12182(b)(1)(A)(i) (prohibiting the denial to people with disabilities, either "directly, or through contractual, licensing, or other arrangements, ... to participate in or benefit from the ... services, privileges, [or] advantages ... of an entity"); 42 U.S.C. § 12182(b)(1)(A)(ii) (prohibiting the affording to people with disabilities, "either directly, or through contractual, licensing or other arrangements," of an unequal benefit of "services, ...privileges, or advantages"); 42 U.S.C. § 12182(b)(1)(A)(iii) (prohibiting the provision to people with disabilities, "either "directly, or through contractual, licensing, or other arrangements, with a ... service, privilege, or advantage ... that is different ... from that provided to other individuals").

CONCLUSION

Under the analytical framework set forth in *Carparts*, Title III liability may properly extend to E*TRADE Bank as the owner of a public accommodation. E*TRADE Bank's operations affect commerce and the banking business owned by E*TRADE Bank is specifically included in the definitions of "public accommodation" set forth in 42 U.S.C. §

CERTIFICATE OF SERVICE

I, Christine M. Netski, hereby certify that on the above date I served the within document by electronic mail on the following counsel of record:

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Re: *Commonwealth of Massachusetts, et al. v. E*Trade Access, Inc., et al.*
Civil Action No. 03-11206-MEL

Dear Sir/Madam:

Enclosed please find for filing in the above-entitled matter, Plaintiffs' Supplemental Briefing on Defendant E*Trade Bank's Motion to Dismiss.

Thank you.

Very truly yours,

Christine M. Netski

CMN/smm
Enclosure

cc: w/copy of enclosure
via first-class mail and via e-mail

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