UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| 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. | ) | 03-CV-11206-MEL |
| E*TRADE ACCESS, INC. and E*TRADE BANK, | ) | |
| Defendants. | ) | |

MEMORANDUM AND ORDER

LASKER, D.J.

The Commonwealth of Massachusetts, along with the National Federation of the Blind and a number of blind Massachusetts residents, brings this action against E*TRADE Bank (the "Bank") and its wholly-owned subsidiary, E*TRADE Access, Inc. ("Access") alleging discrimination against the blind. The complaint alleges violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12182 and 12183 and the regulations promulgated thereunder, 28 C.F.R. Part 36.101 et

seq. (Counts I - V);[1] violation of the Massachusetts Public Accommodations Act, M.G.L. ch. 272, §§ 92A and 98 (Count VI); and violation of the Massachusetts Equal Rights Act ("MERA"), M.G.L. ch. 9, § 103 (Count VII). The Plaintiffs seek an injunction requiring the defendants to make E*Trade Automated Teller Machines ("ATMs") accessible to blind people through voice-aided technology.

The Bank moves to dismiss all claims against it.

## I. Background

E*TRADE Bank is a federally-chartered savings bank that is a subsidiary of E*TRADE Group, Inc. ("E*TRADE Group"). It offers customary banking services to its customers but has no branch offices; instead, transactions are carried out through a website, ATMs, and regular mail and wire transactions. In May 2000, E*TRADE Group acquired an Oregon company called Capture Card Services, Inc., which owns a nationwide network of ATMs, and renamed the company E*TRADE

[1] The ADA allegations are as follows: Violation of the ADA's Full and Equal Enjoyment of Services Mandate, 42 U.S.C. § 12182(a) (Count I); Violation of the ADA's Reasonable Modification Mandate, 42 U.S.C. § 12182(b)(2)(A)(ii) (Count II); Violation of the ADA's Auxiliary Aids and Services Mandate, 42 U.S.C. § 12182(b)(2)(A)(iii) (Count III); Violation of the ADA's Communication Barrier Removal Mandate, 42 U.S.C. § 12182(b)(2)(A)(iv) (Count IV); and Violation of the ADA's New Construction Mandate, 42 U.S.C. § 12183 (Count V).

Access. Access' network consists of two types of ATMs: a limited number that it has title to ("Access-Owned ATMs"), and a larger number that are owned and operated by third-party merchants ("Merchant-Owned ATMs"). In June 2003, Access reached a settlement with the Plaintiffs in which it agreed to retrofit all Access-Owned ATMs with voice technology. The present lawsuit concerns the Merchant-Owned ATMs.

## II. Motion to Dismiss

The Bank moves to dismiss on the grounds that it does not own, lease or operate the ATMs in question and thus is not liable under 42 U.S.C. § 12182(a).[2] The Bank cites a number of cases in which courts have interpreted "operate" to require daily control over the place of public accommodation. See, e.g., Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1066 (5th Cir. 1995) (affirming summary judgment in favor of defendant franchisor, where individual franchisee rather than national franchisor was found to operate individual stores). It argues that it does not conduct the affairs of any of the

[2] "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 lease to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

ATMs in question, and that the merchants who own the machines perform the essential daily functions. In support of this contention, the Bank attaches a number of SEC filings, including a Form 10-K stating that E*Trade Group's Banking division is comprised of:

> the Bank, which offers a wide range of FDIC insured and other banking products, and the former Card Capture Services, Inc., now E*TRADE Access Inc., which operates a nationwide network of over 11,000 ATMs.

Exh. 4 to Def.'s Mem. in Support of Motion to Dismiss.

The Bank contends that the presence of the E*Trade logo on the ATMs is immaterial, because liability under the ADA turns on actual daily control. It notes that in Neff, the court granted summary judgment in favor of the franchisor even though the stores were filled with Dairy Queen trademarks and employees wore Dairy Queen uniforms. It further notes that hundreds of banks participate in the ATM network that Access maintains, and that anyone who holds an account at one of those banks can complete a transaction at one of these ATMs.

The Bank argues additionally that liability may not attach to it through its association with Access. See 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 and citations omitted). The Bank further notes that Plaintiffs have not alleged any of the factors that would be required to pierce the corporate veil: (1) lack of corporate independence; (2) fraudulent intent; and (3) manifest injustice. United Elec., Radio & Machine Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1093 (1st Cir. 1992).

In opposition, Plaintiffs argue that their complaint alleges well-pleaded facts sufficient to support three distinct theories of liability: (1) that the Bank is a public accommodation which offers banking services that violate the ADA; (2) that the Bank's services are programs or activities of the Bank that violate Massachusetts state law; and (3) that the Bank discriminatorily owns, operates or leases ATMs that are themselves public accommodations under federal and Massachusetts law.[3] According to Plaintiffs, the Bank has, at best, only addressed the third theory.

As to the first theory, Plaintiffs note that because E*TRADE Bank is a "branchless bank," the ATMs are the Bank's

[3] The two theories of ADA liability are expressed in ¶ 33 of the Amended Complaint: "E*Trade Bank is a public accommodation, and each Defendant operates or operates and leases, and operates within, a place of public accommodation as defined by Title III of the ADA, 42 U.S.C. § 12181(7)(F)."

only physical presence and the blind are thus unable to avail themselves of the Bank's services. Plaintiffs argue that, as a public accommodation, the Bank may not deny someone its services based on disability:

> It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(1). Thus, they contend, the allegations in the complaint are sufficient to support liability under the ADA whether or not the Bank owns, operates, or leases the ATMs in question.

As to the second theory (liability under the Massachusetts Equal Rights Act, which provides a private right of action to enforce Art. 114 of the Amendments to the Massachusetts Constitution), Plaintiffs argue that the scope of MERA is not limited to the activities of public accommodations and is thus broader than that of the ADA. See Guckenberger v. Boston Univ., 957 F. Supp. 306, 324 (D. Mass. 1997) (noting that Art. 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, they contend, even if the Bank's arguments did warrant dismissal of the ADA claims, the MERA claim would remain.

As to the third theory of liability (owning, leasing or operating a place of public accommodation), Plaintiffs contend that the Bank's arguments are factual in nature and therefore inappropriate for consideration on a Rule 12(b)(6) motion. They also note that the Complaint quotes the following statement from E*TRADE's website: "With more than 15,000 ATMs, we operate the second largest network of ATMS in the United States." Amended Complaint, ¶ 18. Thus, they argue, the complaint survives the liberal pleading requirements of Rule 8.

In a Reply brief, the Bank argues that this Court need only accept well-pleaded facts in the complaint, not "bald assertions," Massachusetts School of Law at Andover, Inc., v. American Bar Assoc., 142 F.3d 26, 40 (1st Cir. 1998), or "unsupportable conclusions," McDonald v. Commonwealth of Massachusetts, 901 F. Supp. 471, 476-77 (D. Mass. 1995). It contends that the public SEC filings attached to the motion to dismiss make clear that the Bank does not own, operate, or lease the ATMs, and that Plaintiffs cannot bring a suit based

on allegations that are demonstrably incorrect. Furthermore, the Bank argues, the quoted matter from the website is misleading in that the reference is to E*Trade Group as a whole rather than to the Bank itself. It attaches another web page which describes Access – rather than the Bank – as the company with the ATM network.

Finally, the Bank disputes Plaintiffs' argument that Massachusetts law is broader than federal law in its prohibition of discrimination based on disability. It cites in support Lesley v. Chie, 81 F. Supp. 2d 217, 226 (D. Mass. 2000), which held that interpretation of state disability law goes "hand in hand" with interpretation of federal disability laws. The Bank also disputes Plaintiffs' reading of Guckenberger, noting that it held that MERA liability attached only if a party was "continuing or carrying out" the discriminatory conduct. 957 F. Supp. at 324.

## III. Analysis

### A. Liability under the ADA for owning, leasing or operating the ATMs

Whether the Bank owns, leases or operates the ATMs is a question of fact. In ruling on a motion to dismiss, a court may not consider any documents that are not incorporated into or made an exhibit to the complaint, unless the motion is

converted to one for summary judgment. Alternative Energy v. St. Paul Fire and Marine, 267 F.3d 30, 33 (1st Cir. 2001) (citation omitted). An exception may be made "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to Plaintiffs' claim; or for documents sufficiently referred to in the complaint." Id. (quoting Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). Here, the SEC filings relied upon by the Bank are not referenced in the Complaint and they are not central to the Plaintiffs' claims. While Plaintiffs do not appear to dispute the authenticity of the documents, neither have they conceded the veracity of the information contained within them. Hence, these documents may not be considered in connection with the present motion.[4] Even if the SEC filings were appropriate for consideration on a motion to dismiss,

[4] The Bank cites a number of cases in which courts have considered documents such as SEC filings on a motion to dismiss: Chief Justice Cushing Highway Corp. v. Limbacher, 145 F. Supp. 2d 108, 110 (D. Mass. 2001); In re Peritus Software Serv., Inc. Sec. Litig., 52 F. Supp. 2d 211 (D. Mass. 1999); Olkey v. Hyperion 199 Term Trust, Inc., 98 F.3d 2, 9 (2d Cir. 1996); and In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.9 (3d Cir. 1993). All of these cases are distinguishable. In Cushing Highway, the extraneous document was a court order in a related case. In the other cases cited by Defendants, the respective courts considered SEC filings in connection with allegations of securities fraud; the statements were considered not for their factual accuracy but as evidence that defendants had properly disclosed potential risks to investors.

they relate only to ownership and operation of the ATMs, and thus would not be sufficient to dispose of claims that the Bank "owns, leases . . . or operates" the machines.

Accordingly, the motion is DENIED as to this theory of liability.

B. Liability under the ADA as a Public Accommodation

Banks are explicitly included in the ADA's definition of "public accommodation." 42 U.S.C. § 12181(7)(F). The fact that E*Trade Bank is a "branchless bank" rather than a traditional bricks-and-mortar establishment does not alter the conclusion that it is a public accommodation. See Carparts Distribution Center v. Automotive Wholesaler's, 37 F.3d 12, 19 (1st Cir. 1994) ("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."). See also Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279 (11th Cir. 2002) (holding that ADA covers not only physical and architectural barriers but also intangible barriers, such as those relating to communication, that prevent disabled persons from accessing

goods, services and privileges).

As a public accommodation, the Bank is barred from:

> subject[ing] an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added). As explained in the Section-by-Section Analysis of the ADA that accompanies the implementing regulations, "[t]he intent of the contractual prohibitions of these paragraphs is to prohibit a public accommodation from doing indirectly, through a contractual relationship, what it may not do directly." 28 C.F.R. Pt. 36, App. B. The commentary makes clear that a public accommodation can be held liable on the basis of such a contractual arrangement only where reasonable: "[The contractual prohibitions are] not intended to encompass the clients or customers of other entities. A public accommodation, therefore, is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers." Id.

The decisive question, then, is not whether

Plaintiffs have pierced the corporate veil between the Bank and Access, but whether the Bank is party to a "contractual, licensing, or other arrangement[]" – with Access or any other entity that may operate the ATMs – sufficient to render the Bank liable for whatever denial of services the ATMs may effect.

Accordingly, the motion is DENIED as to this theory of liability.

C. Massachusetts Public Accommodations Act

Lesley v. Chie, relied upon by the Bank, holds that interpretation of the Public Accommodations Act goes "hand in hand" with interpretation of federal disability laws, 81 F. Supp. 2d 217, 226 (D. Mass. 2000), and Count VI of the complaint specifically alleges that each defendant "operates and controls, and operates within, a place of public accommodation." Hence, as with the ADA counts, a factual question arises regarding the relationship of the Bank to the ATMs. As noted above, this question is not appropriate for consideration on a motion to dismiss.

Accordingly, the motion is DENIED as to Count VI.

D. Massachusetts Equal Rights Act

MERA is considerably broader in its scope than the ADA. As the court noted in Guckenberger, Article 114 of the Massachusetts Constitution (for which MERA creates a private right of action) imposes a "seemingly unlimited anti-discrimination obligation" that extends to private actors as well as public accommodations. 957 F. Supp. at 324. The Bank points out that the court in Guckenberger made note of the fact that the individual defendants at issue had participated in "continuing and carrying out" the institution's allegedly discriminatory policies. Id. However, this requirement is distinct from the ADA's statutory requirement that a defendant "own, lease . . . or operate" a public accommodation, and the Complaint has alleged facts to state a claim that the Bank "carried out" such discrimination. Hence, Count VII survives independently of whether the ADA claims are dismissed.

In summary, the motion is DENIED as to all counts.

It is so ordered.

Dated: March 29, 2004
Boston, Massachusetts

/s/ Morris E. Lasker
U.S.D.J.