UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

Respectfully submitted,

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Current regulations implementing the Americans with Disabilities Act ("ADA") specifically bar the injunctive relief Plaintiffs' demand: "talking" automated teller machines ("ATMs") with headphone jacks. Plaintiffs claim that the ATMs at issue in this litigation violate the ADA unless they are retrofitted with "voice-guidance" technology (headphone jacks) through which blind users can receive audio instructions. Amended Complaint, filed July 22, 2003 ("Complaint"), ¶ 28 ("The ***only effective means*** to make [these] ATMs accessible to blind people is through voice guidance technology. Voice guidance technology allows a blind person to plug a personal headphone into a universal audio jack and hear the step-by-step instructions as they appear on the ATM screen.").

However, the agencies that Congress directed to interpret and enforce the ADA — the Department of Justice ("DOJ") and the Architectural and Transportation Barriers Compliance Board ("Access Board") — ***expressly rejected*** a mandatory requirement for "talking ATMs" with headphone jacks. That is the law today. The only federal court to confront this issue concluded that "talking ATM's are not even required by the [regulations]." *Association for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 475 (S.D. Fla. 2002).

Plaintiffs cannot impose obligations on ATMs under the ADA that the DOJ and Access Board themselves expressly rejected. In a decision directly on point, *United States v. National Amusements, Inc.*, 180 F. Supp. 2d 251 (D. Mass. 2001), Chief Judge Young held that the DOJ's regulations (adopting the Access Board's Guidelines) establish the limits of ADA liability, and no ADA claim exists beyond the agencies' standards.

Plaintiffs are not claiming that the ATMs lack ***any*** accommodations for blind people. Instead, Plaintiffs are asserting that the ATMs lack the ***specific*** accommodation of headphone jacks — a claim the existing regulations preclude. Therefore, pursuant to Fed. R. Civ. P. 12(c)

the Court should dismiss Plaintiffs' claim that the ADA requires talking ATMs with headphone jacks. Because Massachusetts state law does not impose any additional obligations, the Court also should dismiss the Plaintiffs' state-law claims.

REGULATORY BACKGROUND

I. THE 1991 ADAAG'S "GENERAL PERFORMANCE" REQUIREMENT FOR ATMS.

A. The 1991 ADAAG.

The DOJ's current regulations for ATMs were first specified in the 1991 guidelines from the Access Board, called the "ADA Accessibility Guidelines for Buildings and Facilities" (commonly known as the "ADAAG"). *See* 56 Fed. Reg. 35,408 (1991), relevant parts attached hereto as Exhibit 1.[1] The DOJ adopted the 1991 ADAAG into federal regulations, without changes. 56 Fed. Reg. 35,544 (1991), *codified at* 28 C.F.R. pt. 36 App. A, relevant parts attached hereto as Exhibit 2; *National Amusements*, 180 F. Supp. 2d at 255 (DOJ adopted 1991 ADAAG "in their entirety").

One of the ADAAG's specific provisions sets forth accessibility requirements for ATMs. *See* 1991 ADAAG, Part 4.34, at Exh. 1; 28 C.F.R. Pt. 36 App. A § 4.34, at Exh. 2. It includes the following requirement concerning use of ATMs by blind people:

> **Equipment for Persons with Vision Impairments.** Instructions and all information for use shall be made accessible to and independently usable by persons with vision impairments.

1991 ADAAG Part 4.34.4, at Exh. 1; 28 C.F.R. Pt. 36 App. A § 4.34.5, at Exh. 2.[2]

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[1] The Access Board is a federal agency created by the Rehabilitation Act, 29 U.S.C. § 792, that "focuses on the elimination of architectural, transportation, communication, and attitudinal barriers confronting people with disabilities." *Caruso v. Blockbuster-Sony Music Entert. Ctr.*, 193 F.3d 730, 731 n.2 (1999).

[2] The number of this provision changed from 4.34.4 to 4.34.5 in 1992. The Board and DOJ inserted additional requirements about the physical dimensions of ATMs, in response to various comments from industry. *See* 57 Fed. Reg. 41,006, 41,012 (1992). The "independently usable" provision did not change in this process. *Id.*

In the comments accompanying its final adoption of the 1991 ADAAG, the Access Board provided a lengthy explanation of the key phrase "independently usable." 56 Fed. Reg. 35,408 (1991), relevant pages attached hereto as Exhibit 3. The Access Board had "over 50 different suggestions" for making ATMs more useful to blind people, including "a 'talking machine'" and "using a consumer electronics bus or universal interface bus for output accessibility." *Id.* at 35,441, at Exh. 3. But the Access Board ***rejected*** these suggestions, and instead opted for the regulations to have a "flexible" performance requirement:

> In light of the evolving technology in this area and ***to allow flexibility in design***, the Board has stated the requirement for accessibility for persons with vision impairments ***in general performance terms***. No changes were made to this section from the proposed rule which provides that instructions and all information for use of ATMs shall be made accessible to and independently usable by persons with vision impairments. . . . ***[T]he Board has chosen to maintain its position of flexibility in this area.***

Id. (emphasis added).

B. <u>Proposal For Headphone Jacks</u>.

In addressing how to make ATMs more accessible to the disabled, the Access Board solicited suggestions for increasing the security of ATMs to the disabled. Among the suggestions it received was the proposal that ATMs "***provid[e] . . . jacks so personal headphones can be plugged into an ATM.***" *Id.* at 35,442. The Board ***expressly refused*** to require these headphone jacks, observing:

> Based on the response that the Board received concerning these areas [of security], it is apparent that security and privacy are issues of general concern which apply to all ATM users and not just to individuals with disabilities and are issues which the industry must address. Until such time as additional research can be conducted into the issues of security and privacy at ATMs, the

> Board ***does not propose to include requirements for such measures.***

Id.

C. Braille Permitted.

Although not specifically required, the Access Board suggested that ATMs could comply with the ADA by having Braille or "large print" instructions:

> While not stated specifically in the rule, braille [*sic*] and large print instructions . . . when used in conjunction with tactually marked keys or other means of identification, do serve as one source of accommodation for persons with vision impairments.

Id. at 35,441. By contrast, Plaintiffs have told this Court numerous times (and alleged in their Complaint) that Braille is an inadequate accommodation for most blind persons.

II. THE 2004 ADAAG'S DESIGN REQUIREMENT FOR TALKING ATMS.

On July 23, 2004, the Access Board issued its first substantial revision to the 1991 ADAAG (the "2004 ADAAG"). 69 Fed. Reg. 44,084 (July 23, 2004), relevant portions attached hereto as Exhibit 4. The 2004 ADAAG would require that ATMs have jacks for headphones: ATMs "shall be speech enabled," which "shall be delivered through a mechanism that is readily available to users, including but not limited to, an industry standard connector or a telephone handset." 2004 ADAAG Part 707.5, at Exh. 4.

Significantly, however, the new regulations do not apply to existing ATMs. The Board explained that it "does not generally have jurisdiction over requirements for existing facilities that are otherwise not being altered." 69 Fed. Reg. at 44,136. Specifically with respect to the question of whether the new headphone jack requirement will be applied to existing ATMs, the Board observed,

> How, and to what extent, the Board's guidelines are used for purposes of retrofit . . . is wholly within the purview of DOJ. It is

> the Board's understanding that DOJ is aware of the concern as raised by various commenters generally and that DOJ plans to address these concerns in its rulemaking to revise its ADA standards pursuant to the Board's final rule.

Id.; *accord* 2004 ADAAG, Part 101.2, at Exh. 4.

III. THE DOJ'S SEPTEMBER 2004 ANPRM AND FORTHCOMING ADOPTION OF THE 2004 ADAAG.

The DOJ has already initiated the rulemaking proceeding to conclusively adopt the 2004 ADAAG into its regulations and to determine whether existing ATMs should be retrofitted with headphone jacks. On September 30, 2004, the DOJ released an Advance Notice of Proposed Rulemaking ("ANPRM"), 69 Fed. Reg. 58,768 (Sept. 30, 2004), attached hereto as Exhibit 5, stating DOJ's intention to adopt the 2004 ADAAG into regulation, and soliciting public comments about this decision. *Id.* at 58,768, 58,787.

Specifically, the DOJ sought comments on whether the new requirements in the 2004 ADAAG, including the requirement for "talking ATMs" and headphone jacks, should apply to "existing facilities." The DOJ voiced concern that "the incremental changes in ADAAG may place significant cost burdens on businesses that have already complied with the ADA Standards in their existing facilities." *Id.* at 58,771. To determine if retrofitting of existing ATMs will be required, the DOJ seeks comments on various options, including grandfathering existing ATMs into the 1991 ADAAG's requirements, and reducing or exempting the scope of the changes in the new regulations for existing ATMs. *Id.* at 58,771-72.

RELEVANT FACTUAL BACKGROUND

I. PLAINTIFFS ALLEGE THAT ATMS VIOLATE THE ADA BECAUSE THEY ARE NOT TALKING ATMS AND LACK HEADPHONE JACKS.

The Court is familiar with claims in this lawsuit. Plaintiffs allege that certain ATMs owned, leased or operated by Defendants E*TRADE Bank ("E*TRADE"), E*TRADE Access,

Inc. ("Access"), and now Cardtronics LP ("Cardtronics") (jointly "Defendants"), do not comply with the ADA because, allegedly, the ATMs are not accessible to blind people.

The Plaintiffs' ***sole*** allegation is that these ATMs ***do not have headphone jacks***. At some length, the Complaint describes the Plaintiffs' belief that an ATM is not accessible to blind people unless it is a "talking ATM" that provides audio instructions over headphones: Plaintiffs allege that ATMs lacking any talking capability are not accessible to blind people:

> E*TRADE-operated ATMs are inaccessible because they use computer screen text prompts that are undetectable to blind people to guide customers through banking transactions. These computer screen text prompts are not translated into a medium accessible to the blind, such as audio output.
>
> As a result of this inaccessibility, [blind people], unlike persons without visual impairments, are not able to independently use [these] ATMs.

Complaint ¶¶ 22 & 24. Plaintiffs leave no question as to their interpretation of the ADA's requirements. Plaintiffs allege that an ATM can comply with the ADA ***only*** if it is a talking ATM with headphone jacks:

> The ***only effective means*** to make [these] ATMs accessible to blind people is through voice-guidance technology. Voice guidance technology allows a blind person to ***plug a personal headphone into a universal audio jack*** and hear the step-by-step instructions as they appear on the ATM screen.

Id. ¶ 28. Plaintiffs confirm this position when — in conflict with the Access Board — they allege that ATMs with Braille instructions are not, in their view, compliant with the ADA:

> Although some [of these] ATMs have Braille keypads and labels, this feature is not an effective accommodation under the ADA:
>
> a. Not all persons who are blind read Braille. In fact, current national figures estimate a Braille literacy rate of only 15% among persons who are blind; and

b. Braille keypads and labels are static and do not provide sequential computer screen instructions or any information about the contents of any given screen.

Id. ¶ 27.

II. PLAINTIFFS DEMAND AN INJUNCTION REQUIRING DEFENDANTS TO RETROFIT ATMS WITH HEADPHONE JACKS.

Plaintiffs allege three causes of action under the ADA, alleging violations of various sections of Title III of the ADA. *Id.* ¶¶ 31-51, *citing* 42 U.S.C. §§ 12182(a), (b)(2)(A)(ii) & (iii). For each of the three causes of action, Plaintiffs state that the alleged violations cause the ATMs not to be "independently usable" by blind people. *Id.* ¶¶ 34, 37 & 40. Plaintiffs demand an injunction ordering Defendants "to make the necessary modifications to the ATMs . . . so that blind people may have access to and independently use these ATMs." *Id.* at 14.

Based on Plaintiffs' statement in Complaint ¶ 28 that the "only effective means to make [these] ATMs accessible to blind people is through voice guidance technology," and describes that technology as the use of headphone jacks to provide "step-by-step instructions" to blind people using the ATMs, it is clear that the injunctive relief Plaintiffs' demand is for an order requiring Defendants to change the ATMs into talking ATMs with headphone jacks.

STANDARD OF REVIEW

The standard for review of this motion for judgment on the pleadings is identical to the standard to review a Fed. R. Civ. P. 12(b)(6) motion to dismiss: the Court must dismiss a claim if no set of facts alleged by the Plaintiffs would entitle the Plaintiffs to relief. *Collier v. City of Chicopee*, 158 F.3d 601, 602 (1st Cir. 1998). The well-pleaded factual allegations of the complaint must be taken as true, but the ultimate issue under Rule 12(c) is whether the complaint, so read, sets forth facts sufficient to allow recovery on a cognizable legal theory. *TAG/ICIB Servs., Inc. v. Pan Am. Grain Co.*, 215 F.3d 172, 175 (1st Cir. 2000).

ARGUMENT

Forthcoming regulations will change the law and will require talking ATMs for ***new*** ATMs, but no basis exists for this lawsuit to continue with regard to ***existing*** ATMs.[3]

I. PLAINTIFFS' INTERPRETATION OF THE ADA IS CONTRARY TO THE EXISTING REGULATIONS.

Merely comparing the Plaintiffs' complaint to the 1991 ADAAG disposes of Plaintiffs' interpretation of the ADA. Plaintiffs want this Court to rule that the ADA requires talking ATMs with headphone jacks. The 1991 ADAAG's terse requirement (in Part 4.34.5) that ATMs be "independently usable" by blind people would superficially appear to support Plaintiffs' interpretation. However, the Access Board's explanation of this language rebuts Plaintiffs' interpretation and is fatal to Plaintiffs' lawsuit: the Access Board expressly refused to mandate headphone jacks. Naturally, the only federal court to address this issue concluded that the regulations do not require talking ATMs with headphone jacks. *Association For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 475 (S.D. Fla. 2002) ("[T]alking ATMs are not even required by the ADA accessibility guidelines").

The Access Board's comments with the 2004 ADAAG further demonstrate that the 1991 regulations do not require headphone jacks. When commenters complained that the new 2004 ADAAG would impose costs on companies to retrofit ATMs, the Access Board said that the decision whether to "retrofit" existing ATMs was within the sole discretion of the Department of Justice. 69 Fed. Reg. at 44,136. This statement only makes sense if the existing regulations do not require headphone jacks; if the current regulations already required headphone jacks, then no issue would exist concerning whether to "retrofit" ATMs.

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[3] Defendants' argument in this Motion has nothing to do with whether any of the Defendants are "owners," "lessors" or "operators" of ATMs — which has been the principle factual dispute between the parties to date. Solely for the purposes of this motion, the Court can assume that the Defendants are operators of ATMs.

II. THE PLAINTIFFS HAVE NO VALID CAUSE OF ACTION UNDER THE ADA.

Plaintiffs' lawsuit fails for two independent reasons. First, the ADA prohibits any claims to enlarge the DOJ's implementing regulations. *National Amusements*, 181 F. Supp. 2d at 255, 257 & 262. Second, the lawsuit is a premature attempt to prejudge the forthcoming regulations that the DOJ will soon issue to implement the new 2004 ADAAG requirements.

A. Congress Directed That The DOJ's Adoption Of The ADAAG Solely Determines ADA Obligations.

It is the 1991 regulations, ***not*** the more general statutory provisions of the ADA itself, that that establish accessibility obligations. In *National Amusements*, this Court rejected a plaintiff's attempt to enlarge the requirements in the 1991 regulations (regarding accessibility of movie theatres to wheelchairs) by trying to state an independent cause of action under the ADA's statutory requirements. The Court dismissed the cause of action under the ADA and held that the ADA does not impose any obligations other than those provided in the DOJ's 1991 regulations, explaining, "Congress unambiguously intended compliance with the specific regulations of the Attorney General and the Access Board to be sufficient to satisfy the requirements under Title III of the ADA." 180 F. Supp. 2d at 257.

The Court's decision rests on four separate grounds. ***First,*** "[b]oth the statutory language and structure of the ADA" supports the conclusion that the ADA is enforced exclusively through "a complex regulatory scheme." *Id.* at 257. The ADA "reveals Congress's intent at all times to have regulations set forth standards that, if met would satisfy Title III obligations." *Id.* at 258.[4]

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[4] Congress explicitly required both promulgation of the ADAAG and the DOJ's adoption of regulations based on the ADAAG. First, the ADA required the Access Board to issue by March 1991 "minimum guidelines" that establish compliance with Title III of the ADA (under which Plaintiffs assert their causes of action). 42 U.S.C. § 12204(a). Second, the ADA required the DOJ to issue by July 1991 regulations "to carry out the provisions" of the ADA "that include standards applicable to facilities and vehicles covered under section 12182 of this title." 42 U.S.C. § 12186(b). Congress required that the DOJ's regulatory standards must be "consistent" with the Access Board's guidelines. *Id.* § 12186(c). Congress deliberately wrote general standards in the ADA and expected the DOJ to fill in the details. *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 707 (D. Or.

Second, both the ADAAG and DOJ's regulations themselves stated that "compliance with the regulations . . . is alone sufficient to satisfy Title III obligations." *Id.* at 258-59. ***Third***, as a matter of policy, it would "place the judiciary in the uncomfortable position of having to fashion complex, technical rules of design under the guise of statutory interpretation." *Id.* at 260-61. ***Fourth***, the statute remained vital because it continued to prohibit discriminatory activities, such as refusal to admit disabled people into theatres — but any claim about inaccessible design was limited by the language of the regulations. *Id.* at 261-62.

The First Circuit supported Chief Judge Young's dismissal of the ADA claim. *United States v. Hoyt Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004). The appeal concerned plaintiffs' claim under the regulations themselves, not under the ADA's statutory requirements. The First Circuit agreed with Chief Judge Young's decision that ADA liability was limited to the requirements specified in the regulations, observing that:

> [I]t makes more sense to focus upon a somewhat uncertain regulation directed to the very problem at hand rather than an even vaguer set of statutory provisions framed in more general terms.

Id. at 565-66. Other courts similarly hold that the ADA itself does not impose any separate compliance obligations for matters covered by the ADAAG. *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1298 n.3 (D. Ore. 2001) ("compliance with ADAAG . . . is compliance with the ADA itself"), *rev'd on other grounds*, 339 F.3d 1126 (9th Cir. 2003); *Independent Living Resources*, 982 F. Supp. at 746-47 ("Congress intended that compliance with the design standards enacted by the Access Board and DOJ . . . would be deemed to satisfy the Title III obligations").

1997) ("In drafting Title III of the ADA, Congress painted with a broad brush and then directed the Attorney General to promulgate regulations to implement the law").

It is undisputable that the 1991 ADAAG and DOJ's regulations do not require headphone jacks. Therefore, Plaintiffs cannot state a claim under the ADA and the Court should dismiss the first three counts in the Complaint.

B. The DOJ's Adoption Of The New 2004 ADAAG Will Be Dispositive And Will Moot This Lawsuit.

While the existing regulations alone dispose of Plaintiffs' claims, the DOJ's forthcoming adoption of the new 2004 ADAAG provides another reason. Whatever regulations the DOJ adopts will be dispositive of Plaintiffs' claims and will moot this lawsuit.

Plaintiffs are seeking a ***premature*** and ***retroactive*** implementation of the 2004 ADAAG. The proposed 2004 ADAAG would impose the same voice-enabled technologies that the Plaintiffs demand in their lawsuit, but it is ***not yet*** the law. 69 Fed. Reg. at 58,770, at Exh. 5 (considering options of making 2004 ADAAG effective in 6, 12, or 18 months). The 2004 ADAAG on their face do not apply to existing ATMs. 2004 ADAAG, § 101.2. at Exh. 4; 69 Fed. Reg. at 58,771, at Exh. 5. The DOJ has exclusive authority to determine whether the 2004 ADAAG should apply retroactively to existing ATMs and thereby require "retrofits." 2004 ADAAG, § 101.2, at Exh. 3; 69 Fed. Reg. at 58,771, at Exh. 5.

To resolve the merits of Plaintiffs' claims that the new headphone-jack requirements should apply to existing ATMs, the Court should defer to the DOJ's policy-making authority by dismissing this lawsuit or, at a minimum, staying the lawsuit until the DOJ issues its final regulations. The doctrine of "primary jurisdiction" authorizes the Court to dismiss or stay this lawsuit pending action by the DOJ on a matter within the agency's particular expertise. *See, e.g., United States Public Interest Research Group v. Atlantic Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) ("In a nutshell, the primary jurisdiction doctrine permits and occasionally requires

a court to stay its hand while allowing an agency to address issues within its ken"); *Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envir. Prot.*, 196 F.3d 302, 304 (1st Cir. 1999) (the primary jurisdiction doctrine "is a prudential doctrine developed by the federal courts to promote accurate decisionmaking and regulatory consistency in areas of agency expertise").

Whatever regulations the DOJ adopts will be dispositive of the Plaintiffs' federal claims in this case. If, as Defendants believe, the DOJ decides not to apply the new requirements requiring headphone jacks to existing ATMs, Plaintiffs will have no ADA claims at all. If the DOJ decides that existing ATMs should comply with the new requirements and be retrofitted with headphone jacks, the DOJ will specify which ATMs must be retrofitted or by when these ATMs must be retrofitted. *See id.* at 58,770-71. Whatever the DOJ decides for the industry, Plaintiffs will not be entitled to any different relief from these particular Defendants. The Court should defer to the DOJ's policy-making authority in this area and dismiss or, at least, stay this lawsuit pending the DOJ's adoption of final regulations — which, as the recently-published ANPRM demonstrates, is a process that the DOJ has already initiated.

This situation squarely falls within the DOJ's policy-making authority. The effort to create the 2004 ADAAG was the subject of "extraordinary public participation and review." 69 Fed. Reg. at 58,769. The DOJ said that the 2004 ADAAG was "the product of ten years of effort to modify and update the current [1991] guidelines, reflecting compromise and the cooperative efforts of a host of private and public entities." *Id.* The Access Board "received more than 2,500 comments from individuals with disabilities, affected industries, State and local governments, and others," and the Board then "worked vigorously to harmonize the ADA and [ADAAG] with industry standards and model codes." *Id.* Through this extraordinary effort, the Access Board

and, forthcoming, the DOJ will determine what if any requirements for headphone jacks should apply to existing ATMs. In making this determination, the DOJ "seeks to strike an appropriate balance to ensure that people with disabilities are able to achieve access . . . without imposing unnecessary financial burdens on existing places of public accommodation." *Id.* at 58,771. The Plaintiffs should not be permitted to preempt this "extraordinary" rulemaking proceeding with this single lawsuit. *Cf. Independent Living Resources*, 982 F. Supp. at 746 ("The courts are ill-equipped to evaluate such claims [not based in agency regulations] and to make what amount to engineering, architectural, and policy determinations as to whether a particular design is feasible and desirable."); *accord National Amusements*, 180 F. Supp. 2d at 260-61 (following *Independent Living Resources*).

III. THE PLAINTIFFS ALSO DO NOT HAVE A VALID ACTION UNDER STATE LAW.

Lacking a valid claim under the ADA, the Plaintiffs therefore lack a claim under state law. Both of their claims under the MPAA and MERA are invalid.[5]

A. The Massachusetts Public Accommodations Act Does Not Provide Standards Different Than The ADA.

Plaintiffs' failure to state a claim under the ADA precludes their claim under the MPAA, Mass. Gen. Laws ch. 272, § 98, because the MPAA provides ***identical*** obligations as the ADA: "It is thus appropriate to look to the ADA, and decisions interpreting it, for guidance when interpreting the provisions of the Massachusetts Public Accommodation statute." *Nathanson v. Commonwealth of Mass.*, No. 1999-0657, 2003 Mass. Super. LEXIS 293, at *15 (Essex Sept. 12, 2003); *accord Lesley v. Hee Man Chie*, 250 F.3d 47, 58 n.17 (1st Cir. 2001) ("Interpretation of

[5] Even if Plaintiffs had valid state-law claims, the Court should decline to exercise supplemental jurisdiction over the claims. 28 U.S.C. § 1367(c)(3); *Newman v. Burgin*, 930 F.2d 955, 964 (1st Cir. 1991) ("when a district court dismisses all federal claims before trial, it normally will dismiss pendent state actions as well").

[the MPAA] goes 'hand in hand' with interpretation of the federal disability laws."). Because the ADA (as implemented by federal regulations) does not require headphone jacks, neither does the MPAA.

B. The Massachusetts Equal Rights Act Does Not Provide An Independent Standard For ATMs.

Similarly, Plaintiffs lack any claim under Massachusetts's more general equal-protection statute, the MERA. The MERA is designed to replicate its federal analogue, 42 U.S.C. § 1981. *McDonnell v. Certified Eng'g & Testing Co., Inc.*, 899 F. Supp. 739, 750 (D. Mass. 1995) ("MERA is modeled on 42 U.S.C. §§ 1981 and 1982, which codify the Civil Rights Act of 1866."). In interpreting the scope of the MERA, Massachusetts courts look to Section 1981 and related federal case law. *Howard v. Town of Burlington*, 506 N.E.2d 102, 105 (Mass. 1987). Claims under Section 1981 are limited to discrimination based on ancestry or ethnicity. *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48, 50 (7th Cir. 1984). Because Congress separately codified rights of the disabled in the ADA, courts squarely reject any effort to extend Section 1981 to the accessibility of public accommodations by the disabled. *E.g., Thomas v. Northern Telecom, Inc.*, 157 F. Supp. 2d 627, 633 (M.D.N.C. 2000) (Section 1981 claim does not extend to discrimination on basis of disability); *Tafoya v. Bobroff*, 865 F. Supp. 742, 752 (D.N.M. 1994) (same).

Plaintiffs try to plead around this limitation on MERA by invoking Article 114 of the Amendment to the Massachusetts Constitution, which guarantees equal protection regardless of handicap. Complaint ¶ 55. But where another statute (here, the MPAA) provides specific rights concerning the Plaintiffs' claims, Article 114 does not provide any independent cause of action. *Layne v. Superintendent, Mass. Corr. Instit.*, 546 N.E.2d 166, 168 (Mass. 1989) ("If a violation

of art. 114 rights can be redressed within the ambit of an existing statute . . . there is a well-worn procedural path to relief for such a violation."); *Cargill v. Harvard Univ.*, 804 N.E. 3d 377, 391 (Mass. App. Ct. 2004) (where plaintiff can advance claim under state employment discrimination statute, there is no independent claim under MERA and Article 114). MERA and Article 114 provide a cause of action only where the Massachusetts legislature has failed to adopt a statute directly addressing the subject-matter of the right at issue. *Layne*, 546 N.E.2d at 169-69. Here, Plaintiffs assert claims that are governed by another statute the MPAA. The only Massachusetts law that concerns accessibility of ATMs is the MPAA, not MERA or Article 114.

CONCLUSION

For these reasons, the Court should grant this motion and dismiss Plaintiffs' claims under the ADA and under state law.

Respectfully submitted,

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Dated: November 9, 2004

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CERTIFICATE OF SERVICE

I, Jenny Cooper, hereby certify that on November 9, 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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