UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, ET AL., Plaintiffs	
v.	CIVIL ACTION NO. 03-11206-MEL
E*TRADE ACCESS, INC., ET AL., Defendants	

PLAINTIFFS' OPPOSITION TO DEFENDANTS RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Defendants have moved for dispositive relief under Fed. R. Civ. P. 12(c) arguing that the relief Plaintiffs seek in their Second Amended Complaint, which they describe as an injunction requiring that Defendants retrofit their ATMs with voice-activated technology for use by the blind, has been "expressly rejected" under applicable law.

Defendants mischaracterize Plaintiffs' Second Amended Complaint, which seeks broad equitable relief arising from the Defendants' failure to make their ATMs accessible to and independently useable by blind customers. As Plaintiffs allege in the Second Amended Complaint, the vast majority of blind individuals do not read Braille, making voice-activated technology the most effective current means for satisfying Defendants' legal obligation. However, Plaintiffs' reference in their factual allegations to a preferred means of providing access affects neither the legal sufficiency of their claim that

Defendants' ATMs fail to comply with the law, nor the legal sufficiency of their broadly-worded prayer for relief.

Defendants also mischaracterize existing law when they suggest that voice-activated technology has been rejected as a method for complying with the accessibility and independent use mandate. This contention is based on an erroneous inference Defendants draw from the mere fact that the Department of Justice (DOJ) decided against mandating any specific approach to access – it did not regulate a voice-activation requirement any more than it regulated a Braille requirement – in favor of a flexible formulation that simply requires that owners and operators make their ATMs accessible to and independently useable by the blind.

Defendants cannot escape the fact that they were required to have employed a method to achieve compliance with the law. Defendants are still faced with, and have failed to respond to, Plaintiffs' allegations in the Second Amended Complaint that the ATMs at issue are not accessible to and independently usable by the blind and so violate existing law. Tellingly, the Defendants have not even asserted in the Motion before the Court that the ATMs at issue afford blind people access and independent use in compliance with existing law, undoubtedly because they are unable to support such a contention with any affirmative evidence.

Particularly given that the Court must accept Plaintiffs' allegations as true for purposes of this motion, the Court must reject the premise of Defendants' motion and, accordingly, should deny their motion.

ARGUMENT

For purposes of this motion for judgment on the pleadings, the Court must accept Plaintiffs' allegations as true. *See generally* 5C Charles A. Wright & Arthur P. Miller, Federal Practice and Procedure, § 1368 (2004) ("[F]or purposes of the Court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false."). *See also Rivera-Gomez v. de Castro*, 843 F.2d 631, 634 (1st Cir. 1988) ("[B]ecause rendition of judgment in such an abrupt fashion represents an extremely early assessment of the merits of the case, the trial court must accept all of the nonmovant's well-pleaded factual averments as true . . . and draw all reasonable inferences in his favor.").

In addition, a court may not enter judgment on the pleadings under Rule 12(c) "unless it appears beyond a doubt that the nonmoving party can prove no set of facts in support of [its] claim which would entitle it to relief." *Feliciano v. Rhode Island*, 160 F.3d 780, 788 (1st Cir. 1998). Not surprisingly, courts proceed cautiously under Rule 12(c), in recognition of the strong policy in favor of "ensuring to each litigant a full and fair hearing on the merits of his or her claims or defense." 5C Charles A. Wright and Arthur P. Miller, Federal Practice and Procedure, at § 1368. As demonstrated below, there is no basis whatsoever for denying Plaintiffs the opportunity to present their claims on the merits.

I. Plaintiffs' Allegations and Prayer for Relief Are Entirely Consistent With Existing Federal Law, and Anticipated Changes to the ADAAG Are Irrelevant.

A. Defendants' Mischaracterize Plaintiffs' Allegations.

Contrary to Defendants' assertion, the allegations of Plaintiffs' Second Amended Complaint are not focused exclusively on voice guidance technology, but, instead, are crafted in a manner that is consistent with the flexible, performance-based standard for ATMs set forth in the existing Americans with Disabilities Act Architectural Guidelines (ADAAG), 28 U.S.C. App. A., § 4.34.5, that "[i]nstructions and all information for use shall be made accessible and independently usable for persons with visual impairments." Plaintiffs allege repeatedly that blind individuals are unable to "independently use" E*TRADE ATMs (Second Amended Complaint, ¶¶ 5-10, 27) and, indeed, explain in some detail why this is true:

> E*Trade deprives blind people of the opportunity to independently engage in financial transactions on the same terms as sighted 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.

(Second Amended Complaint, ¶ 22) (emphasis supplied).

While, as the Defendants point out, DOJ has stated that "Braille and large print instructions ..., when used in conjunction with tactically marked keys or other means of identification, do serve as one source of accommodation for persons with vision impairments," 56 Fed. Reg. 35,444 (1991), Plaintiffs allege that although some E*TRADE-branded ATMs have Braille keypads and labels, this Braille text does not provide "sequential computer screen instructions or any information about the contents of

any given screen," and, therefore, blind individuals are "unable to independently use E*Trade-operated ATMs." (Second Amended Complaint, ¶ 27.) Defendants have not put before the Court any evidence that the ATMs at issue supply the required sequential screen instructions and other information about the contents of any given screen, or any other "instructions and information for use" required by ADAAG § 4.34.5, in a Braille and/or large print format, or any other accessible format, as contemplated by DOJ's statement.[1] Plaintiffs have clearly stated a claim that Defendants failed to comply with existing law by making their ATMs accessible to and independently usable by blind people, whether through use of Braille, voice technology or any other method.

Moreover, Plaintiffs' prayer for relief in their Second Amended Complaint makes no mention of "talking ATMs" and, instead, seeks injunctive relief consistent with the performance-based standard articulated in Section 4.34.5. Specifically, Plaintiffs request that the Court

> enjoin each of the Defendants from continuing to violate the ADA and Massachusetts law and order all Defendants immediately to make the necessary modifications to the ATMs they operate or operate and lease, ***so that blind people may have access to and independently use these ATMs*[.]**

(Second Amended Complaint, p. 14, ¶ (c)) (emphasis supplied).

Plaintiffs do allege that the most effective currently available method for achieving accessibility and independent use is to equip ATMs with voice guidance technology (Second Amended Complaint, ¶ 28), although their prayer for relief leaves open the possibility that some other options might exist that satisfy the legal mandate.

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[1] DOJ also observed that one ATM manufacturer supplied "training kits for bank customers with vision impairments that include a Braille workbook on how to use the machine." 56 Fed. Reg. 35,441. There is no evidence that Defendants' took such steps, or any other adequate steps, to afford blind customers access to and independent use of their ATMs.

Plaintiffs make this allegation regarding the efficacy of voice activation because out of an estimated 1.1 million blind persons nationwide, only 15% percent are Braille literate. (Second Amended Complaint, ¶¶ 1, 27(a)). Therefore, an approach that depends on Braille exclusively for fulfilling the accessibility and independent use requirement is likely inadequate under the law, especially in light of advances in voice guidance technology, as alleged by Plaintiffs. (Second Amended Complaint, ¶ 29). The mere fact that Plaintiffs have raised the possibility of voice guidance technology as a remedy for their claim that Defendants' ATMs are not in compliance with existing law is irrelevant for purposes of evaluating the sufficiency of Plaintiffs' pleadings.

B. Defendants Misconstrue the Applicable Law.

Defendants assert that DOJ specifically rejected voice-activated technology as a method for complying with the accessibility and independent use mandate. Their contention is insupportable. In fact, DOJ received 50 suggestions on making ATMs accessible to the blind, among them, "talking" ATMs, the installation of a handset voice output telephone device, use of large print and Braille, and use of cassette instructions. 56 Fed. Reg. 35,441. Far from rejecting any of these suggestions, DOJ decided, "[i]n light of the evolving technology in this area and to allow flexibility in design," to state "the requirement for accessibility ... in general performance terms." *Id.* DOJ did not reject "talking" ATMs any more than it required exclusively Braille and large print instructions.

Thus, Plaintiffs' position that voice guidance is the most effective accessibility option that is now available -- 13 years after the regulation was promulgated -- is entirely consistent with existing federal law. More importantly, however, even if Defendants are

correct that voice guidance is not the only means by which accessibility may be achieved, this does not alter Plaintiffs' contention -- which Defendants apparently cannot deny -- that E*TRADE-branded ATMs are not accessible to and independently usable by blind individuals within the meaning of the existing regulation. [2]

C. The 2004 ADAAG Rulemaking Process Will Not Affect Plaintiffs' Claims.

So, too, Defendants' reliance on the not-yet-implemented 2004 ADAAG is entirely misplaced. Defendants suggest that the 2004 ADAAG rulemaking process can somehow undo or dismantle Defendants' obligations under current law. Even if, as Defendants contend, DOJ were to establish a "safe harbor" for entities that are in compliance with existing regulations, the E*TRADE-branded ATMs at issue in this action simply would not be eligible. As DOJ explains:

> This safe harbor option would, of course, have no effect on noncompliant elements. To the extent that elements in existing facilities are not already in compliance with scoping and technical requirements in the current ADA standards, existing public accommodations would be required to remove barriers . . . to make elements comply with the revised standards.

69 Fed. Reg. 58,771 (2004). Because, as alleged in Plaintiffs' Second Amended Complaint, Defendants have not attempted to make their ATMs accessible under existing federal standards, they will be in no position to take advantage of any safe harbor provision that DOJ may ultimately promulgate. Therefore, whether or not the 2004

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[2] Defendants quote *Association For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 475 (S.D. Fla. 2002), as stating, "[T]alking ATMs are not even required by the ADA accessibility guidelines." The court, in this case, made this bald statement in the context of a discussion of standing, without relating it to any allegations or claims in that case and without citing any authority for its statement. In any event, the statement is irrelevant to the Court's determination here in light of the fact that Plaintiffs allege that Defendants' ATMs are, broadly speaking, inaccessible to and not independently useable by blind people in satisfaction of existing laws' requirements, and in light of Plaintiffs' general demand for an order that the Defendants make them so.

ADAAG ultimately becomes a final DOJ regulation and whether, if it does, it includes some type of safe harbor provision is entirely irrelevant to the issues in this case.

II. Plaintiffs Have Stated Valid Claims Under Massachusetts Law.

To the extent that Plaintiffs' claim under the Massachusetts Public Accommodation Act (MPAA), Mass. Gen. Laws ch. 272, § 98, is to be interpreted in a manner consistent with federal disability law, this Court should clearly permit Plaintiffs to proceed with this claim for all of the reasons discussed above.

In addition, there is no basis for Defendants' tortured argument that MPAA is Plaintiffs' exclusive vehicle for relief under Massachusetts law. Defendants argue that the Massachusetts Equal Rights Act (MERA), Mass. Gen. Laws ch. 93, § 103, is analogous to 42 U.S.C. § 1981,[3] and so because, they say, the ADA preempts Section 1981 claims, then the MPAA preempts claims under MERA. Defendants make this argument, even as they acknowledge that Section 1981 claims are limited to discrimination based on ancestry or ethnicity, by entirely ignoring the broader language in MERA specifically affording people with disabilities the right to the "full and equal benefit of all laws … , including, but not limited to, the rights secured under Article [114] of the Amendments to the [Massachusetts] Constitution." Mass. Gen. Laws ch. 93, § 103(a).[4] It is this language that forms the basis for Plaintiffs' MERA claim. (Second Amended Complaint, ¶¶ 52-55). There is no question that MERA is the appropriate

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[3] MERA includes language affording people with disabilities an equal right to "make and enforce contracts," *id.*, language similar to that of 42 U.S.C. § 1981. That is not the language on which Plaintiffs' MERA claim is based, as they explain.

[4] Article 114 was modeled almost verbatim on Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), not on the federal Civil Rights Act, 42 U.S.C. § 1981. *Layne*, 546 N.E.2d at 168 & n.4 (Article 114 modeled on Section 504); *Shedlock v. Dept. of Correction*, Civ. Action No. 98-3631-F [2002 WL 31356205] (Mass. Super. Oct. 3, 2002) (interpreting Article 114 consistently with Section 504, given it served as model).

procedural vehicle for bringing Article 114 claims. *See Greaney v. Heritage Hosp., Inc.*, Civ. Action No. 952547 [1995 WL 1146185 at **7] (Mass. Super. Dec. 28, 1995).

Defendants also attempt to rely on language in *Layne v. Superintendent, Mass. Corr. Inst.*, 546 N.E.2d 166, 168 (Mass. 1989), a decision that predates MERA,[5] to support their MPAA preemption argument. In *Layne*, the plaintiff brought an action directly under Article 114. The court observed that there was no statute generally implementing Article 114 (at the time), but had there been, that statute would have been the proper procedural path to relief for a violation of Article 114. 546 N.E.2d at 168. Subsequently, the Massachusetts legislature adopted MERA as the procedural vehicle for Article 114 violations. The Plaintiffs, by suing under MERA, have taken precisely the procedural path the court suggested in *Layne*.

Finally, Defendants cite *Cargill v. Harvard Univ.*, 804 N.E.3d 377, 391 (Mass. App. Ct. 2004), a case in which the plaintiff brought an employment discrimination claim under Chapter 151B and a claim identical in scope under MERA/Article 114. The court reiterated the well-established proposition that Chapter 151B is the exclusive procedural device for bringing a state law employment discrimination claim. *Id.* at 391.

Unlike the identical claims that were at issue in *Cargill*, and as this Court has already observed in denying E*TRADE Bank's motion to dismiss brought on the ground that it does not operate places of public accommodation, Plaintiffs' MPAA claim "goes 'hand in hand'" with their ADA claims, while "MERA is considerably broader in its scope than the ADA." Memorandum and Order dated March 29, 2004 (Lasker, J.) at 12-13; *see also Guckenberger v. Boston University*, 957 F. Supp. 306, 324 (D. Mass. 1997) ("[T]he amendment appears to sweep broadly, securing the right of handicapped persons

[5] MERA was promulgated in 1990. *See* St. 1990, c. 156.

against discrimination . . . perpetrated by any private person or entity."); *Haskins v. President and Fellows of Harvard College*, Civ. Action No. 993405 [2001 WL 1470314] (Mass. Super. Sept. 18, 2001) (recognizing that Article 114's "broad language" applies to "*any* program or activity *within* the commonwealth") (emphasis in original); *Greaney*, 1995 WL 1146185 at **6 (legislature's inclusion of broad specification that "program or activity be merely 'within the Commonwealth' suggests a deliberate choice to expand the reach of Article 114 to private conduct . . . ."). Plaintiffs' MERA/Article 114 claim alleges discrimination by the Defendants in their "programs and activities;"[6] Plaintiffs' MPAA claim alleges public accommodation discrimination by the Defendants.[7] Because Plaintiffs' MERA claim may capture discriminatory activities by the Defendants not captured by their MPAA claim, the Court should deny Defendants' motion for judgment on the pleadings as to this claim. *See, e.g.*, *Greaney*, 1995 WL 1146185 at **3 (allowing plaintiff to proceed on both Chapter 151B and MERA counts pending determination of whether, as a factual matter, Chapter 151B applied to him).

CONCLUSION

For these reasons, Plaintiffs ask this Court to deny Defendants' motion.

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[6] Article 114 states: "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth."

[7] Both Defendants assert as an affirmative defense that the ATMs at issue are not places of public accommodation. *See* Answer and Affirmative Defenses of E*TRADE Access, Inc. at 6 (Second Affirmative Defense); Answer and Affirmative Defenses of E*TRADE Bank to Plaintiffs' Second Amended Complaint at 6 (Second Affirmative Defense).

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CERTIFICATE OF SERVICE

I, Christine M. Netski, hereby certify that on November 23, 2004, I served the within document via e-mail and first-class mail, postage prepaid on the following counsel of record:

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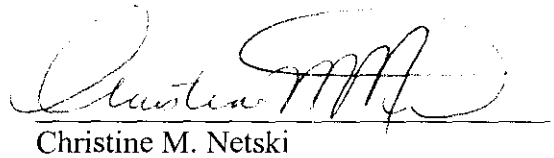

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