UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Cardtronics, LP and Cardtronics, Inc. ("Defendants") respectfully submit that the Court should deny Plaintiffs' Motion for Partial Summary Judgment for numerous, independent reasons:

First, because Plaintiffs refuse to identify the specific accommodations they seek, Plaintiffs fail to prove a *prima facie* case and they are not entitled to summary judgment. It is well settled that, under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12181-12189, the Plaintiffs have the affirmative burden of identifying the particular accommodation they demand. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 146 (D. Mass. 1997), *quoting Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997)); *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000). Plaintiffs have never satisfied this burden, despite numerous opportunities to identify the accommodations they seek, including in responses to Defendants' discovery requests. They therefore fail to present a *prima facie* claim under the ADA and therefore are not entitled to summary judgment.

Second, Plaintiffs demand an "obey the law" injunction that is strictly prohibited. Instead of demanding specific actions by the Defendants, Plaintiffs ask for an injunction essentially requiring Defendants to abide by the ADA. It is beyond dispute that any injunction under the ADA must particularly describe the specific accommodations that a defendant must implement. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *Henrietta D. v. Giuliani*, 246 F.3d 176, 182 (2d Cir. 2001). The generic, non-specific injunction Plaintiffs seek here is barred.

Third, Plaintiffs present no factual basis whatsoever to obtain summary judgment on 25,000 ATMs. To support their request for the nationwide, non-specific injunction they demand, Plaintiffs proclaim that they have discovered a variety of alleged problems with exactly 12 ATMs. Plaintiffs have no evidence of systematic problems with the entire fleet of 25,000 ATMs; in fact, the randomness of the minor complaints lodged proves that there was no systematic defect.

These fatal flaws in Plaintiffs' motion demonstrate the futility of this lawsuit. Plaintiffs' primary purpose in filing the lawsuit was to force Defendants to retrofit existing ATMs with "voice technology," which in its February 2005 Order the Court correctly ruled was not required by existing regulations. Forced to change their tactics, Plaintiffs now desire to foist onto the Defendants the obligation to prove compliance with the ADA based on the initial assumption that none of the ATMs comply with the ADA.

The Court should put an end to this futile lawsuit. Concurrently with this Opposition, Defendants are filing a Cross-Motion for Summary Judgment. The Court should grant Defendants' motion and deny Plaintiffs' motion, and enter final judgment in Defendants' favor because Plaintiffs simply have no valid claim under the ADA.

RELEVANT BACKGROUND

Defendants are separately submitting a Response to Plaintiffs' Statement of Undisputed Facts ("Def. Resp. to Pl. SUF"), showing that Plaintiffs make factual assertions unsupported by the record.[1] Critically, however, Plaintiffs present ***no evidence*** regarding systematic or design defects in Cardtronics's entire fleet of 25,000 ATMs — neither direct evidence about the entire fleet, nor even indirect or summary evidence that would permit the Court to draw any permissible inferences about the entire fleet.

Defendant Cardtronics either owns or provides information process services to a fleet of over 25,000 ATMs nationwide. Plaintiffs apparently visited 12 of these ATMs. Pl. SUF ¶¶ 9, 13, 17,21. (Actually, Plaintiffs might have visited more than 12 ATMs, but Plaintiffs provide evidence of alleged inaccessibility of only 12 ATMs — it is entirely likely that Plaintiffs found other ATMs fully accessible.) Plaintiffs claim these 12 ATMs were not accessible to blind users, for reasons that varied for each machine:

- Braille keys on three ATMs were allegedly "worn down," "rubbed off" or missing from about half of the keys. Declaration of Sharon Maneki ¶¶ 4.c & 4.d, attached as Pl. Mem. Ex. D ("Maneki Decl."); Declaration of Scott C. LaBarre ¶ 7, attached as Pl. Mem. Ex. H ("LaBarre Decl.") (Braille missing from over half of the buttons).

- One ATM's headphone jack was not operating. Declaration of Jennifer Bose ¶ 7.g, attached as Pl. Mem. Ex. J ("Bose Decl.").

- One ATM was completely nonfunctional. LaBarre Decl. ¶ 6.

- Numerous ATMs lacked headphone jacks for voice-enabled technology. Maneki Decl. ¶ 4.g; LaBarre Decl. ¶ 5; Bose Decl. ¶ 4.e; Declaration of Anil Lewis ¶¶ 4.c & 6.c, attached as Pl. Mem. Ex. F ("Lewis Decl.").

---

[1] Because Plaintiffs have not proven an essential element of their claims, the entirety of their "Statement of Undisputed Facts" is ***immaterial***, because none of those facts, even if true, can change the ultimate conclusion that Plaintiffs do not have a valid claim. *See, e.g., Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) ("On summary judgment, issues concerning all other elements of the claim become immaterial if the plaintiff does not come forward with sufficient evidence on any essential element of the cause of action.").

- Braille instructions were not sufficiently detailed on some of the ATMs. Maneki Decl. ¶¶ 3 & 4.f; LaBarre Decl. ¶¶ 4 & 5; Bose Decl. ¶¶ 4.a-d, 7.a-d, & 9.a-e; Lewis Decl. ¶ 4.a-b.

None of these alleged problems even indirectly suggest that other ATMs not visited by the Plaintiffs suffer from the same flaws. Plaintiffs therefore have no evidence of systematic or design flaws with the entire fleet of 25,000 ATMs — in fact, these alleged various problems ***prove*** that there is no systematic flaw. For example, Plaintiffs have not identified any design defect in any make or model ATM used in the Defendants' ATM fleet, nor have Plaintiffs submitted any evidence that the problems they found necessarily are occurring at other ATMs; and the fact that Braille keys were "worn down" or "rubbed off" on three ATMs says nothing about Braille keys on other ATMs.[2]

Notwithstanding a dearth of evidence about the entirety of Defendants' ATM fleet, Plaintiffs demand a broad, nationwide injunction requiring Defendants to make every one of their ATMs comply with the ADA. The injunctive relief Plaintiffs seek would not require Defendants to implement any specific accommodations, nor does it identify any particular ATMs that allegedly fail to meet ADA standards. Instead, Plaintiffs seek the broadest relief possible — a blanket, vague injunction essentially requiring that the Defendants comply with the ADA, leaving it to the Defendants to determine in the first instance which ATMs need to be changed and what accommodations are necessary at each of these ATMs.

---

[2] Defendants have not taken the depositions of Plaintiffs' declarants, and therefore Defendants are not yet able to respond to the factual averments of those witnesses. Accordingly, in the event the Court does not dismiss Plaintiffs' motion outright for reasons stated below, Defendants request additional time pursuant to Fed. R. Civ. P. 56(f) to conduct discovery in order to respond to Plaintiffs' factual averments.

STANDARD OF REVIEW

Plaintiffs seem indifferent to the standard of review for their motion under Fed. R. Civ. P. 56. The Court can grant the motion only if Plaintiffs prove the absence of a triable dispute of material fact. *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000) ("A party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law."). The Court cannot rely on inferences or speculation as to what facts might exist that could prove Plaintiffs' claims — the Plaintiffs have the burden of providing unrebutted evidence, not bases for speculation. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 251 (1st Cir. 1996) (Court must ignore "conclusory allegations, improbable inferences, and unsupported speculation."). Indeed, contrary to what Plaintiffs suggest, all inferences must be drawn ***against*** Plaintiffs. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) ("[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in that party's favor,'" *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

ARGUMENT

I. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THEY FAIL TO STATE A PRIMA FACIE CASE UNDER TITLE III OF THE ADA

Plaintiffs have not proven every essential element of their claim, and therefore cannot obtain summary judgment — in fact, because they lack any evidence on an essential element of their ADA claims, summary judgment is appropriate ***against*** Plaintiffs. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); *accord Terry v. Bayer Corp.*, 145 F.3d 28, 34 (1st Cir. 1998) (to avoid summary judgment, plaintiff must show

existence of evidence in support of each element essential to plaintiff's case). Under binding law of this and every other Circuit, the Plaintiffs have the affirmative obligation to identify the reasonable accommodation they allege Defendants are required to provide. Plaintiffs refuse to allege, let alone prove, any facts about specific accommodations they seek, so they have failed to prove a claim under the ADA. Therefore, the Court should deny Plaintiffs' motion for summary judgment.

A. Plaintiffs Have The Affirmative Burden Of Identifying The Accommodation They Seek Under Title III Of The ADA.

The First Circuit demands that an ADA plaintiff "bear[] the burden of showing the existence of a reasonable accommodation." *Feliciano v. State of R.I.*, 160 F.3d 780, 786 (1st Cir. 1998); *accord García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000) ("the burden of showing reasonable accommodation is on the plaintiff"). Only if Plaintiffs allege the existence of a reasonable accommodation does the burden shift to Defendants to show the proposed accommodation is unreasonable. *Feliciano*, 160 F.3d at 786-87; *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 36-37 (1st Cir. 2000) (where plaintiff first identified the accommodation, burden shifted to defendant to show it would impose an undue hardship).

Plaintiffs have consistently but wrongly tried to distinguish this First Circuit precedent by arguing that it does not apply to their claim under Title III of the ADA (42 U.S.C. §§ 12181-12189, concerning public accommodations), but only arises under Title I (42 U.S.C. §§ 12111-12117, concerning employment). For example, Plaintiffs have ridiculed their obligation to identify a reasonable accommodation or modification as a "bizarre notion . . . that arises in ADA employment cases, but is not part of the jurisprudence of Title III, the public

accommodations section of the ADA." Plaintiffs' Motion to Compel Further Answers to Their First Set of Interrogatories at 2 n.1 ("Pl. Mot. to Compel"). Plaintiffs do not cite a single case to support this proposition; the reason is because Plaintiffs are simply wrong.

As in other ADA cases, Title III plaintiffs are absolutely required "to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Borkowski,* 63 F.3d at 138; *accord Guckenberger*, 974 F. Supp. at 146 ("In the reasonable modifications context, the plaintiff has the initial burden of proving 'that a modification was requested and that the requested modification is generally reasonable'") (quoting *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997)); *Dahlberg*, 92 F. Supp. 2d at 1105 ("[T]he plaintiff in a title III case has the burden of proving that a modification was requested and that the requested modification is reasonable."). It makes perfect sense to apply to Title III claims the standard developed under Title I, because "there appears to be little, if any, substantive difference between the 'reasonable accommodation' which title I requires and the 'reasonable modification' which title III mandates." *Id.* at 1105.

The First Circuit is consistent with other courts that require a Title III plaintiff to identify what reasonable accommodation or modification would afford them access. The First Circuit set out the framework for a Title III plaintiff in a retail sales case:

> To recover under section 12182(b)(2)(A)(ii) in a retail sale case . . . the plaintiff must show that the defendant has a discriminatory policy or practice in effect; ***that he (the plaintiff) requested a reasonable modification in that policy or practice which, if granted, would have afforded him access to the desired goods; that the requested modification--or a modification like it--was necessary to afford that access***; and that the defendant nonetheless refused to modify the policy or practice.

Dudley v. Hannaford Bros. Co., 333 F.3d 299, 307 (1st Cir. 2003) (emphasis added); *see also Goldstein v. Harvard Univ.*, 77 Fed. Appx. 534, 537 (1st Cir. 2003) ("The operative provision, 42 U.S.C. § 12182(b)(2)(A)(ii), 'requires a person with a disability to request a reasonable and necessary modification...'"). These cases make clear that a mere showing of inaccessibility is inadequate to state a claim under Title III.

B. Plaintiffs Have Not Identified Any Specific Accommodation.

Because Plaintiffs have never presented any specific accommodation they claim satisfies the ADA (other than voice-enabled technology), they have not proven a valid ADA claim. Their demand for accommodations is always made in the broadest terms, for example: "Defendants must satisfy ADA's new facilities mandate, 42 U.S.C. § 12183(a)(1), and its implementing ADAAG regulation, 28 U.S.C. Part 36 App. A., § 4.34.5, by offering information and instructions to blind customers in a format they can use independently." Pl. Mem. at 8.

Besides voice-guidance technology, which the Court dismissed from this lawsuit, the only other specific accommodation the Plaintiffs have ever identified is Braille. Ironically, Plaintiffs' Motion implies that Braille instructions might be a sufficient accommodation, *see, e.g.*, Pl. Mem. at 5, and the vast majority of the declarations accompanying Plaintiffs' motion address Braille keys and instructions at 12 of the Defendants' ATMs. However, Plaintiffs have previously scoffed at Braille as a reasonable accommodation — even after the Court recently rejected Plaintiffs' preferred voice-enabled technology. Plaintiffs' Third Amended Complaint outright alleges, "Although some E*TRADE and Cardtronics ATMs have Braille keypads and labels, this feature is not an effective accommodation under the ADA." Third Amended Complaint ¶ 29. Plaintiffs cannot ask for summary judgment on a theory baldly rejected by their

own Complaint.[3] If Plaintiffs desire to reverse course almost two years into this litigation and now seek Braille accommodations, they would need to ask for leave to amend their Complaint — something Plaintiffs plainly refused to do.

Plaintiffs therefore fail to prove all of the elements of their claim, and thus the Plaintiffs are not entitled to summary judgment.

II. PLAINTIFFS IMPERMISSIBLY DEMAND A VAGUE, UNENFORCEABLE "OBEY THE LAW" INJUNCTION

Because Plaintiffs refuse to identify a specific accommodation, they ask for a vague injunction that merely would require Defendants to comply with the ADA for Defendants' thousands of ATMs. The injunction the Plaintiffs seek lacks any detail as to the specific changes Defendants must make, or which ATMs Defendants must change. Indeed, Plaintiffs actually believe that the injunction they seek "need not specify the manner in which the Defendants shall comply with regulation." Pl. Mem. at 10 n.13. The Plaintiffs are ***dead wrong***.

Every injunction must be specific as to the acts necessary to comply with it. Rule 65 provides that an injunction must "set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). The Supreme Court has repeatedly held that "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a

---

[3] *See, e.g.*, *Stefanik v. Friendly Ice Cream Corp.*, 183 F.R.D. 52, 53-54 (D. Mass. 1998) (on motion for summary judgment, "plaintiff is simply not permitted to offer, without explanation, evidence directly contradicting the allegations of his own complaint . . . . [P]laintiff is not permitted to kick over the chess board in the face of a checkmate. He is bound by the averments of his pleadings . . . .").

decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *see also Atiyeh v. Capps*, 449 U.S. 1312, 1316-17 (1981) (same); *NBA Props. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (same). Moreover, "basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt*, 414 U.S. at 476.

The type of injunction Plaintiffs desire, which basically just orders Defendants to "obey the ADA," is strictly prohibited:

> [A]n "obey the law" order entered in a case arising under statutes so general as the ADA and the Rehabilitation Act would not pass muster under Rule 65(d) of the Federal Rules of Civil Procedure, which requires that injunctions be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained."

Henrietta D. v. Giuliani, 246 F.3d 176, 182 (2d Cir. 2001). Every court other than the Second Circuit addressing this issue has reached the same conclusion.[4]

Plaintiffs' demand for an "obey the law" injunction would not end this litigation, but would prolong it. Plaintiffs would leave it up to Defendants to determine, in the first instance, which ATMs need to be changed, and how to change them. Having no guidelines

---

[4] *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (injunction where merely prohibited discrimination was too vague to be enforced; "Such 'obey the law' injunctions cannot be sustained."); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999) ("Appellants seek to enjoin the City from discriminating on the basis of race . . . As this injunction would do no more than instruct the City to 'obey the law,' we believe that it would not satisfy the specificity requirements of Rule 65(d) and that it would be incapable of enforcement."); *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994) ("Broad, non-specific language that merely enjoins a party to obey the law . . . does not give the restrained party fair notice of what conduct will risk contempt."); *In re Schering-Plough Corp. ERISA Litig.*, No. Civ. A 03-1204, 2004 WL 1774760, at *11 (D.N.J. June 28, 2004) (holding court lacked authority to enter "blanket injunction" that "would do nothing more than require the defendants to obey the law, something that they are already bound by ERISA to do."); *Keyes v. School Dist. No. 1*, 895 F.2d 659, 668-69 (10th Cir. 1990) (injunction that "defendants are directed to use their expertise and resources to comply with the constitutional requirement of equal education opportunity for all who are entitled to the benefits of public education in Denver, Colorado" did "no more than require the district to obey the law, and therefore must be stricken.").

whatsoever from the injunction itself (or even from Plaintiffs' papers, although Rule 65 prohibits use of those documents to interpret the injunction) to determine what ATMs need to be changed or how to change them, Defendants would have no way to predict what conduct would satisfy the injunction, and would face continued objections and arguments from the very litigious NFB and the other Plaintiffs as to whether Defendants were complying with it. The Court would not have settled anything with the injunction the Plaintiffs desire but would put Defendants in exactly the quandary the Supreme Court identified in *Schmidt*.

Ignoring the authority on "obey the law" injunctions, Plaintiffs make the bald assertion that, "Courts . . . have repeatedly granted affirmative injunctions . . . without specifying the precise steps or methods the defendant should use to comply." Pl. Mem. at 2. Plaintiffs support this conclusion with snippets of language from two cases. *See id.* at 9, *citing* *Independent Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Ore. 1997) ("*ILR*") and *Anderson v. Rochester-Genessee Reg'l Transp. Auth.*, 206 F.R.D. 57 (W.D.N.Y. 2001). Plaintiffs take both cases out of context:

- In *ILR*, the court issued a decision nearly 100 pages long analyzing myriad technical requirements that the defendant's arena had to address; the court's actual injunction near the end of this opinion was necessarily summary, with the court stating, "The Court will not repeat all of the particulars here." 982 F. Supp. at 785.

- In *Anderson* — which was reversed in part on appeal, *see* 337 F.3d 201 (2d Cir. 2003) — the district court's injunction was not just an "obey the law" injunction. Instead, it expressly required defendants to provide precisely the "next-day paratransit service" that the defendant had never before provided, and instead of the court delineating the specific actions defendant had to take, the court required the parties "to attempt to work together to formulate a comprehensive plan." 206 F.R.D. at 71-72.

Neither case, then, entered a vague, unenforceable "obey the law" injunction that Plaintiffs seek here. Plaintiffs have not cited a single authority supporting their request for an "obey the law" injunction.

Plaintiffs' demand for a vague, undefined "obey the law" injunction highlights the absurdity of Plaintiffs' entire lawsuit. Plaintiffs lack a valid claim under the ADA; the Court should deny their motion and grant Defendants' cross-motion.

III. GENUINE DISPUTES OF MATERIAL FACTS PREVENT SUMMARY JUDGMENT FOR PLAINTIFFS

Another independent reason Plaintiffs are not entitled to summary judgment is because genuine disputes exist on key material facts — including the threshold allegation that Defendants' fleet of over 25,000 ATMs lacks compliance with ADA. At best, Plaintiffs may have provided evidence supporting an injunction concerning no more than 12 ATMs, if the Plaintiffs could identify the specific accommodations they desire.

A. Plaintiffs Have Not Provided Any Evidence That Accommodations Are Necessary For Over 25,000 ATMs.

Plaintiffs claim they visited a total of 12 ATMs, out of over 25,000 in Defendants' fleet. Plaintiffs do not present one shred of evidence that, other than the 12 ATMs they visited, these other tens of thousands of ATMs are inaccessible to blind people. Instead, Plaintiffs ***infer*** this critical fact from the evidence they present about 12 particular ATMs. Plaintiffs seem to believe that by showing 12 ATMs arguably do not comply with the ADA, then none of the other ATMs can either. This speculation is precisely forbidden in a Rule 56 motion — any inference must be drawn against the Plaintiffs. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Plaintiffs have far more work to do before they could ever prove that the entire ATM fleet is inaccessible to blind people. If not visiting every individual ATM, Plaintiffs at least would have to show some kind of systematic problem persists throughout the fleet, or perhaps that particular ATM makes and models contain invariable design defects. Plaintiffs have not attempted any such showing — but instead they provide evidence showing the problems are random and anything but systematic. For instance, they rely on evidence that the Braille has "worn down" or was "rubbed off" of a few keys on a few ATMs, or that a headphone jack was inoperable on one ATM, or that another ATM was entirely dysfunctional. This anecdotal evidence, even if true, hardly provides the basis for a nationwide injunction for 25,000 ATMs. Instead, Plaintiffs have proven the opposite of what they want the Court to infer; they have proven that each ATM might possibly be inaccessible to a blind person for one of several different reasons, or each ATM might be fully accessible, but the only way to determine that is to approach each ATM individually.

Furthermore, Plaintiffs' repeated reliance on evidence about Braille keys is entirely irrelevant to Plaintiffs' claim, because Plaintiffs allege that Braille is always an insufficient accommodation and therefore Plaintiffs are not seeking Braille as an accommodation here. Finally, Plaintiffs' repeated reliance on evidence about voice-enabled technology is irrelevant because the Court dismissed that evidence from the lawsuit in its February 2005 Order. For these reasons, Plaintiffs have not come close to proving the lack of a genuine dispute about the need for a nationwide injunction affecting 25,000 ATMs.

B. Plaintiffs Have Not Proven That Any Accommodations Would Be "Reasonable."

Plaintiffs presume, without presenting any facts or making any argument, that "reasonable" accommodations exist that would permit ATMs to be accessible to blind people, or that the modifications they demand in the ATMs would not represent an "undue burden" on Defendants. *See* 42 U.S.C. §12182(b)(2)(A)(ii) & (iii) (accommodations not required if modifications are not "reasonable" or if they would result in "undue burden"). The Plaintiffs' assumption, however, is a mouthful. Whether an accommodation is "reasonable" or an "undue burden" depends on factual issues specific not only to the make and model of every ATM, and the age of an ATM, but more generally on economic interests, including whether the cost of accommodations is unduly burdensome given the profitability of the ATMs. *See* 28 C.F.R. § 36.104 ("undue burden" means entity would undergo "significant difficulty or expense"). Obviously, these kinds of thorny technical and financial issues cannot be resolved on summary judgment. *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1262 (9th Cir. 2001) (analysis of "undue burden" requires "particularized inquiry"); *Rennie v. United Parcel Serv.*, 139 F. Supp. 2d 159, 167-68 (D. Mass. 2001) (explaining that reasonableness of accommodation in ADA cases is normally fact question that precludes summary judgment and citing cases). But more importantly, Plaintiffs have not made one effort to show they would prevail on this issue. Plaintiffs instead ignore it as part of their refusal to engage in any discussion about which particular accommodations they desire.

Possibly to avoid this pitfall in their argument, Plaintiffs incorrectly claim that the only defense available to Defendants is whether "unique characteristics of the terrain make it structurally impracticable for [Defendants] to make their ATMs accessible to blind customers." Pl. Mem. at 8. Plaintiffs' argument — made without citation to a single case — arises from their

mistaken belief that Count V of their Complaint, arising under ADA Title III § 12183, is somehow different from the typical claim under ADA Title III §12182. The argument is frivolous. First, by its own language, § 12183 merely provides one specific application of the general requirements set forth in Title III § 12182; it is not a stand-alone section unrelated to the requirements in § 12182.[5] Second, Plaintiffs' semantic distinction has no practical effect as applied to this lawsuit. The injunction Plaintiffs seek ultimately would require physical modifications to Defendants' ATMs. ADA Title III only requires modifications that are "reasonable" or that do not impose "undue burdens." Plaintiffs have not cited a single case that stands for their notion that a defendant can be forced to modify its facility in order to comply with § 12183 even if the modification is not "reasonable" or even if it would be an "undue burden."

[5] Section 12183 reads: "Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination ***for the purposes of section 12182(a)*** of this title includes . . . " (listing specific requirements; emphasis added).

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion for Partial Summary Judgment, but instead should grant Defendants' Cross-Motion for Summary Judgment, and dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

E*TRADE ACCESS, INC., E*TRADE BANK, CARDTRONICS, LP AND CARDTRONICS, INC.

By their attorneys,

Joseph L. Kociubes BBO # 276360
Jenny K. Cooper BBO # 646860
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Douglas P. Lobel
David A. Vogel
ARNOLD & PORTER LLP
1600 Tysons Boulevard
Suite 900
McLean, Virginia 22102
(703) 720-7000

Dated: June 15, 2005