UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, NATIONAL FEDERATION OF THE BLIND, INC., NATIONAL FEDERATION OF THE BLIND OF MASSACHUSETTS, INC., ADRIENNE ASCH, JENNIFER BOSE, THERESA JERALDI AND PHILIP OLIVER Plaintiffs v. E*TRADE ACCESS, INC., E*TRADE BANK, CARDTRONICS, LP, and CARDTRONICS, INC. Defendants	CIVIL ACTION NO. 03-11206-MEL

PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

PRELIMINARY STATEMENT

Defendants have moved for summary judgment on Plaintiffs' claims under the Americans with Disabilities Act (ADA), asserting that Plaintiffs have failed to identify any "specific accommodation" that would make Cardtronics' ATMs accessible to the blind. In pursuing this motion, Defendants attempt to avoid the impact of this Court's denial of their Motion for Judgment on the Pleadings, in which they argued that the Court should dismiss Plaintiffs' ADA claims because Plaintiffs' pleadings refer to voice guidance as a preferred remedy and, according to Defendants, the applicable ADAAG does not mandate voice guidance. Relying on the Court's suggestion, in *dictum*, that it cannot order voice guidance as the method of compliance with ADAAG, Defendants now argue that the Court must dismiss Plaintiffs' ADA claims because Plaintiffs have not

identified some means of compliance other than voice guidance. This Court has already ruled, however, that "Plaintiffs have put forward a legally sufficient claim that under the existing regulations the Defendants' ATMs are not accessible to or independently usable by the blind."[1]

Defendants also misstate the applicable law. "Reasonable accommodation" has no relationship whatsoever to Plaintiffs' causes of action or, for that matter, to Title III, the public accommodations section of the ADA.[2] A related concept, "reasonable modification," comes into play only in one provision of Title III -- the requirement of reasonable modifications to the practices, policies and procedures of a public accommodation to make the services and goods of that accommodation accessible to persons with disabilities -- invoked by Count II of the Third Amended Complaint ("Complaint").[3] "Reasonable modification," like "reasonable accommodation," has no bearing on Counts I, III, IV or V of the Complaint. As explained below, those counts are based on provisions of the ADA as to which the elements of a cause of action do not include reasonable accommodation or modification.

While Count II alleges Defendants' failure to make reasonable modifications in policies, practices or procedures necessary to afford their services to individuals with disabilities (in violation of 42 U.S.C. § 12182(2)(A)(ii)), it is not incumbent upon Plaintiffs - certainly at this stage of the proceeding - to propose the precise means by which those policies, practices and procedures need to be altered. To the extent that such a showing is required, additional discovery is necessary and the Court should deny

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[1] *See* Mem. and Order 9, February 22, 2005.
[2] *Montalvo v. Radcliffe*, 167 F.3d 873, 876 n.2 (4th Cir. 1999) ("Title III ... does not impose a requirement that a place of public accommodation provide a 'reasonable accommodation' for a disability ....").
[3] *Id.*

Defendants' motion as premature. As demonstrated below, except with respect to Count V of Plaintiffs' Third Amended Complaint, extensive discovery remains to be done concerning the merits of the parties' claims and defenses.[4]

ARGUMENT

I. NO ALLEGED FAILURE BY PLAINTIFFS TO IDENTIFY A REASONABLE ACCOMMODATION WARRANTS THE ENTRY OF SUMMARY JUDGMENT.

A. The Claims Set Forth in Counts I, III, IV and V Do Not Require Plaintiffs to Prove a Reasonable Accommodation or Modification.

Count I alleges a violation of Title III's general prohibition against discrimination, 42 U.S.C. § 12182(a), which states:

> 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 leases to), or operates a place of public accommodation.

This provision of the ADA says nothing about "reasonable accommodation" and Defendants have not cited any case that even suggests that a plaintiff is required to identify an accommodation to establish a violation of this section. Cases arising under this section do not include reasonable accommodation among its elements.[5]

Nor does Plaintiffs' ability to prevail on Count III depend upon specifying a reasonable accommodation. That count alleges that Defendants have failed to provide auxiliary aids and services to make their ATMs accessible, in violation of 42 U.S.C. § 12182(b)(2)(A)(iii), which provides that discrimination includes

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[4] *See* Affidavit of Daniel F. Goldstein, Esq., Pursuant to Fed. R. Civ. P. 56(f), attached as Ex. 1.
[5] *See, e.g., Bragdon v. Abbott,* 524 U.S. 624 (1998); *Boots v. Nw. Mut. Life Ins. Co.,* 77 F. Supp. 2d 211 (D.N.H. 1999).

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden.

The operative language under this provision of the ADA is "necessary steps," not "reasonable accommodations." Again, Defendants have cited no case law or implementing regulations that override Congress' formulation and supplant it with a requirement that a plaintiff allege a "reasonable accommodation." Instead, cases analyzing claims under this section require a plaintiff only to prove a denial of service by virtue of the absence of an auxiliary aid or service, and then place the burden on a defendant to prove the affirmative defenses of undue burden or fundamental alteration, in accordance with the statutory language.[6]

Count IV is brought pursuant to 42 U.S.C. §12182(b)(2)(A)(iv), often referred to as the "existing facilities" mandate, which provides that discrimination includes

> a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities. . .where such removal is readily achievable.

This provision of the ADA applies to any of Defendants' ATMs that were installed before January 26, 1993. Again, the legal standard is clear. Modifications to these machines are required if it is "readily achievable," not if such modifications are reasonable.[7]

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[6]*Lindgren v. Camphill Vill. Minn., Inc.*, No. Civ. 00-2271 RHK\RLE, 2002 WL 1332796 at *5 (D. Minn. June 13, 2002) (failure to provide respite care as an auxiliary service that would have allowed continued residence of an autistic man in a group facility); *Mayberry v. Von Valtier*, 843 F. Supp. 1160 (E. D. Mich. 1994) (auxiliary aids and services for deaf patient of physician).

[7]Defendants have now indicated in discovery that all Cardtronics ATMs were installed after January 26, 1993 (and thus fall within the new construction mandate rather than the existing facilities mandate). To the extent the case is or becomes otherwise, further discovery is needed. *See* discussion *infra* Section II.

Finally, Count V invokes the new construction mandate and, as amply demonstrated in Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, which is incorporated in this argument, the concept of "reasonable accommodation" also has no bearing on this claim.

In sum, the subchapters of Title III of the ADA upon which Counts I, III, IV and V are based do not include any language that at all suggests that a plaintiff proceeding under those provisions is required to prove a reasonable accommodation or modification to establish liability. And, because the phrase "reasonable modification" does appear in 42 U.S.C. §12182(b)(2)(A)(ii), it must be presumed that Congress did not intend to include this limitation in these other provisions of the statute.[8]

B. Under Count II, the Court May Order Relief Based Upon Whether It Is Reasonable to Require Defendants to Modify Their Policies, Without Specifying Precisely How Those Policies Shall Be Modified.

In insisting that Plaintiffs have limited their efforts in this case to seeking an order requiring Defendants to equip their ATMs with voice guidance, Defendants entirely ignore the nature of Plaintiffs' allegations in Count II of their Complaint. That count does not address the retrofitting of ATMs. It is brought pursuant to 42 U.S.C. §12182(b)(2)(A)(ii), a provision of the ADA which requires the Court to consider, *at the appropriate time*, directing Defendants to modify illegal policies.[9] Specifically, Count II alleges that Defendants have failed to make reasonable modifications to their policies for

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[8] *See Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 309 (1st Cir. 2003), *quoting Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

[9] 42 U.S.C. § 12182(b)(2)(A)(ii) makes illegal "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."

providing ATM banking services to make those services fully accessible to and independently usable by blind individuals.

For example, because E*TRADE Bank does not operate brick and mortar branches, the only method by which a depositor can withdraw funds from E*TRADE Bank is by the use of an ATM. Thus, Plaintiffs allege that E*TRADE Bank's policy of offering "fee-free" ATM transactions to its depositors at E*TRADE Financial ATMs, the bulk of which are inaccessible to the blind, is discriminatory and can be reasonably modified. Indeed, prior to filing the present lawsuit, Plaintiffs requested that E*TRADE Bank modify its policies to permit access to its banking services to blind customers.[10] In doing so, Plaintiffs satisfied any requirement that they request a reasonable modification.[11]

Contrary to Defendants' suggestion, the Court can order a defendant to modify its policies to achieve nondiscrimination under this provision without specifying precisely how those policies must be altered, if it is reasonable to make that modification. In *Fortyune v. American Multi-Cinema, Inc.*,[12] a disabled plaintiff pursued a claim under § 12182(b)(2)(A)(ii), seeking to ensure the availability of an adjoining companion seat for his non-disabled wife when they went to the movies. The Ninth Circuit affirmed an order that simply directed the defendant to "modify its policies regarding companion seating to ensure that a companion of a wheelchair-bound patron be given priority in the use of companion seats . . . [up until] ten (10) minutes prior to show time." The court rejected the defendant's assertion that it needed to specify how those policies were to be modified.

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[10] *See* Demand letter, dated November 20, 2002, attached as Ex. 2.

[11] *See, e.g., Dudley*, 333 F.3d at 299 (finding mentally disabled plaintiff's request to retailer to deviate from its policy of not reconsidering cashier's decision not to sell him alcohol to satisfy the requirements of the statute).

[12] 364 F.3d 1075, 1087 (9th Cir. 2004).

So, too, in this case, if the Court finds that it would be reasonable, for example, for E*TRADE Bank to modify its policies to afford blind depositors fee-free transactions at accessible ATMs operated by deployers *other than* Defendants, it does not need to dictate the details of those policies. Indeed, as argued fully in Plaintiffs' Memorandum in Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, there is nothing in the ADA that prevents a court from entering a performance-based order or that requires a court to write corporate policies.

Nor would ADAAG play any role in the formulation of that relief because cases arising under the reasonable modification of policy mandate do not invoke or involve ADAAG.[13] Indeed, in *Fortyune,* the defendant argued that it did not need to modify its policy because companion seats were not required by ADAAG. The court firmly rejected that assertion, explaining that ADAAG is to be applied in cases "that involve the design of a public accommodation under the ADA (*e.g.,* a theater's placement of wheelchair spaces)," but not where policies are at issue.[14]

In short, Defendants' assertion that Plaintiffs have some obligation to identify a "reasonable accommodation" to sustain all of their ADA claims, much less one that comports with ADAAG, has no support and flies in the face of the Court's ruling that "Plaintiffs have put forward a legally sufficient claim. . . . "

II. DEFENDANTS' MOTION SHOULD ALSO BE DENIED AS PREMATURE, PURSUANT TO FED. R. CIV. P. 56(f).

In the alternative, the Court should deny Defendants' motion in accordance with Fed. R. Civ. P. 56(f), which "describes a method of buying time for a party who, when

[13] *See, e.g., Fortyune,* 364 F.3d at 1084-85; *Indep. Living Res.,* 1 F. Supp. 2d 1159, 1171-72 (D. Or. 1998); *Dahlberg v. Avis Rent a Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000); *Johnson v. Gambrinus Co./Spoetzl Brewery,* 116 F.3d 1052, 1059 (9th Cir. 1997); *Dudley,* 333 F.3d at 305.
[14] *Fortyune,* 364 F.3d at 1084-85.

confronted by a summary judgment motion, can demonstrate an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition."[15] To justify relief under Rule 56(f), the party opposing a motion for summary judgment must demonstrate that it has been diligent in conducting discovery and that it has a plausible basis for believing that facts exist that will influence the outcome of the motion.[16]

As detailed in the Affidavit of Daniel F. Goldstein, Esq., Plaintiffs are clearly entitled to relief under Rule 56(f). From the outset of this case, Plaintiffs have diligently pursued discovery from Defendants. Over a year ago, on June 14, 2004, Plaintiffs filed a Motion to Compel Production of Documents, For a Scheduling Conference Pursuant to Rule 16 and For Judicial Oversight of the Discovery Process in an attempt to address difficulties encountered during the discovery process.[17] On September 21, 2004, following the September 13, 2004, hearing on Defendants' Rule 12(b)(7) Motion to Join Necessary Parties, the Court stayed Plaintiffs' Motion to Compel pending the completion of Plaintiffs' deposition of the keeper of records of E*TRADE, Access, Inc.[18] On September 24, 2004, the Court denied Defendants' Rule 12(b)(7) motion.[19]

On October 20, 2004, Plaintiffs filed their Proposed Scheduling Plan, in which they set forth a proposed schedule for discovery and also informed the Court that their Motion to Compel was ripe for resolution.[20] Plaintiffs also reiterated their request that the Court refer discovery issues to a magistrate.[21] On that same date, Defendants also

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[15] *Resolution Trust Corp. v. N. Bridge Assoc., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994).
[16] *Id.*
[17] Ex. 1, ¶ 2.
[18] Ex. 1, ¶ 3.
[19] Ex. 1, ¶ 3.
[20] Ex. 1, ¶ 4.
[21] Ex. 1, ¶ 4.

filed a discovery plan, in which they proposed phased discovery and expressly acknowledged that discovery on the merits of Plaintiffs' claims would be a "massive effort."[22] Specifically, Defendants stated as follows:

> Plaintiffs will undoubtedly need to take depositions of former and current E*TRADE and Cardtronics personnel. Plaintiffs will need discovery and possibly even expert testimony on what might be extensive financial and business information about E*TRADE and Cardtronics as corporate entities, to determine whether retrofitting the fleet of ATMs is a *reasonable or undue burden*. It is conceivable that Plaintiffs might also need to take discovery from third parties, including the ATM manufacturers or some of the merchants.[23]

Defendants also suggested that they were prepared to file a motion for judgment on the pleadings to dismiss Plaintiffs' claims under the ADA and that the Court "might also consider staying discovery pending DOJ's decision."[24]

At a conference with the Court on October 26, 2004, the Court set a briefing schedule for Defendants' Rule 12(c) motion, but did not establish any schedule for discovery.[25] Nor has the Court ruled on Plaintiffs' motion to compel production of documents from E*TRADE Bank and E*TRADE Access, Inc.[26]

Even though the Court did not establish a discovery schedule, Plaintiffs have continued in their efforts to conduct written discovery.[27] Thus, on October 27, 2004, Plaintiffs served interrogatories on Defendant, E*TRADE Access, Inc.[28] Those interrogatories requested information relevant to the merits of Plaintiffs' ADA claims, including detailed information about Defendant's fleet of ATMs, detailed information about Defendant's contracts with merchants, detailed information concerning efforts by

[22] Ex. 1, ¶ 5.
[23] Ex. 1, ¶ 5 (emphasis supplied).
[24] Ex. 1, ¶ 5.
[25] Ex. 1, ¶ 6.
[26] Ex. 1, ¶ 6.
[27] Ex. 1, ¶ 7.
[28] Ex. 1, ¶ 7.

Defendant to upgrade and/or retrofit its machines, detailed information about Defendant's efforts, if any, to comply with existing ADAAG requirements, detailed information concerning the profitability of Defendant's ATM business and detailed information relating to the issue of whether Defendant is an "operator" of ATMs within the meaning of the ADA.[29]

Although Defendant E*TRADE Access, Inc. served its answers to Plaintiffs' interrogatories on December 17, 2004, many of Defendant's answers were incomplete and/or nonresponsive and, therefore, Plaintiffs' counsel made efforts to discuss these deficiencies with defense counsel.[30] Relying on Defendants' pending Motion for Judgment on the Pleadings, defense counsel declined to participate in a discovery conference.[31]

On February 22, 2005, the Court denied Defendants' Rule 12(c) motion and ruled that "Plaintiffs have put forward a legally sufficient claim that under the existing regulations the Defendants' ATMs are not accessible to or independently usable by the blind."[32] Shortly thereafter, Plaintiffs filed their Third Amended Complaint, adding Cardtronics, Inc. and Cardtronics, LP as Defendants.[33] On April 7, 2005, Plaintiffs served interrogatories, requests for production of documents and requests to admit on the newly-added Defendants.[34]

Notwithstanding the Court's denial of Defendants' Rule 12(c) motion, defense counsel persisted in his refusal to discuss the deficiencies in E*TRADE Access, Inc.'s

[29] Ex. 1, ¶ 7.
[30] Ex. 1, ¶ 8.
[31] Ex. 1, ¶ 8.
[32] Ex. 1, ¶ 9.
[33] Ex. 1, ¶ 10.
[34] Ex. 1, ¶ 12.

answers to plaintiffs' interrogatories.[35] Therefore, on April 21, 2005, Plaintiffs filed a motion to compel further answers to interrogatories, which is still pending with the Court.[36]

On May 20, 2005, Cardtronics responded to Private Plaintiffs' interrogatories, requests for production of documents and requests to admit.[37] The interrogatories requested, among other things, detailed information about each Cardtronics ATM, including its serial number, manufacturer and model, location, method of deployment, operating system, processor, income it generated, year of installation and the like.[38] Cardtronics promised to supply the information, but has not yet done so.[39]

Although Plaintiffs have diligently pursued discovery efforts in this case, there is an enormous amount of discovery relating to the merits of Plaintiffs' ADA claims that remains to be completed.[40] More specifically, plaintiffs have not yet had sufficient opportunity to conduct discovery to obtain evidence concerning issues such as the identification of the ATM's that are the subject of this lawsuit, the merchant contracts that are at issue, Defendants' efforts to make its ATMs accessible to the blind and the costs of those efforts, the potential means for making Defendants' ATMs accessible to the blind and the cost of those measures, and the economic impact of those measures on Defendants.[41] In addition, Plaintiffs' two separate motions to compel have not yet been addressed by the Court.[42] Once these motions are resolved, Plaintiffs intend to depose

[35] Ex. 1, ¶ 13.
[36] Ex. 1, ¶ 13.
[37] Ex. 1, ¶ 14.
[38] Ex. 1, ¶ 14.
[39] Ex. 1, ¶ 14.
[40] Ex. 1, ¶ 16.
[41] Ex. 1, ¶ 16.
[42] Ex. 1, ¶ 16.

representatives of Defendants and third-party witnesses concerning all of the issues that have been identified in the written discovery requests that have been served thus far.[43]

To the extent that the ultimate resolution of Count II may require Plaintiffs to propose specific "reasonable modifications" of Defendants' policies, practices or procedures, there is no question that Plaintiffs have been deprived of the opportunity to conduct meaningful discovery in order to meet this burden. To cite one discrete example, Plaintiffs began to undertake discovery of E*TRADE Bank's policies and contracts regarding its offer of "fee-free" ATM transactions to its depositors through a request for production of documents. Defendants answered that any responsive documents were produced by E*TRADE Access. The latter, however, produced none. Indeed, Plaintiffs have made E*TRADE Bank's failure to produce these documents the subject of a pending motion to compel and have chosen to defer serving interrogatories and doing further discovery of E*TRADE Bank's policies and practices until that motion is decided.[44] Only after Plaintiffs have completed discovery should the question come before the Court whether they have material evidence of each element of that claim.

In addition, although Plaintiffs are not required to identify any "reasonable modification" to prevail on Counts I, III and IV, they nevertheless must be given the opportunity to conduct additional discovery in order to establish the elements of those claims. Therefore, under Fed. R. Civ. P. 56(f), Plaintiffs request that this Court delay action on Defendants' motion for summary judgment until factual discovery is completed in this case.

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[43] Ex. 1, ¶ 16.

[44] *See* Mot. to Compel and accompanying papers, Docket Nos. 54, 55 and 58.

CONCLUSION

For these reasons, Plaintiffs request that this Court deny Defendants' cross-motion for summary judgment on Plaintiffs' claims under the Americans with Disabilities Act or, in the alternative, defer the motion until the completion of discovery, in accordance with Fed. R. Civ. P. 56(f).

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Dated: August 5, 2005

CERTIFICATE OF SERVICE

I, Christine M. Netski, hereby certify that on August 5, 2005, I served the within document via electronic mail and first-class mail postage prepaid on the following counsel of record:

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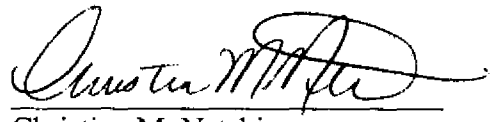

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