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' MEMORANDUM IN REPLY
TO DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs have moved for summary judgment on Count V of the Third Amended Complaint (violation of the ADA's new construction mandate) as to those Cardtronics-owned ATMs deployed after January 26, 1993, the applicable date of the Americans with Disabilities Act Architectural Guidelines ("ADAAG"). In support, Plaintiffs presented evidence from paired blind and sighted testers showing that *none* of the ATMs tested offered "instructions and all information for use" in a format that is "accessible to and independently useable" by the blind, in violation of 28 C.F.R. Part 26, App. A. § 4.34.5 and the new construction mandate established by 42 U.S.C. § 12183(a)(1) and 28 C.F.R. § 36.406.

Cardtronics has not provided any evidence that all its ATMs offer all instructions and information for use by any means other than text on a screen that must be seen to be understood.

In addition, Cardtronics concedes in its recent discovery responses that all Cardtronics-owned ATMs were deployed after the effective date of the ADAAG, and, except as to any ATMs that may have voice guidance,[1] those responses establish that the instructions displayed visually on the screens of these ATMs are neither visible to blind individuals nor communicated through some nonvisual means. Thus, Plaintiffs are entitled to a determination that Cardtronics has violated the ADA as to all Cardtronics-owned ATMs.

Cardtronics claims that to prevail on Count V, Plaintiffs must state how they could be "reasonably accommodated" or the ATMs "reasonably modified." The ADA's new construction mandate, however, simply requires the Court to determine whether or not Cardtronics-owned ATMs installed after ADAAG's effective date meet ADAAG.[2] Cardtronics also claims that it needs unspecified discovery from Plaintiffs' testers; however, it does not, and cannot, point to any facts the testers might supply that would dispute the testers' findings. Finally, Cardtronics also asserts that an injunction directing it to comply with a specific performance-based ADAAG would be a vague "obey the law" injunction invalid under Fed. R. Civ. P. 65. Because the order sought in this case is clear as to what constitutes a violation, ample precedent supports the Court entering such an order.

No evidence shows that Cardtronics' ATMs comply with ADAAG § 4.34.5. Accordingly, Cardtronics is in violation of the new construction mandate, and Plaintiffs are entitled to judgment as a matter of law on Count V of the Third Amended Complaint and to an order directing Cardtronics' compliance.

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[1] Cardtronics has not claimed that any of its ATMs have voice guidance, other than the ones already the subject of the pre-litigation partial settlement agreement with E*TRADE. However, to the extent that any of its ATMs have voice guidance, no order is sought or needed. *See* discussion *infra* Section II(B).

[2] Cardtronics does not assert that its compliance was structurally impracticable, the one defense the new construction mandate offers, as detailed in Plaintiffs' opening brief.

ARGUMENT

I. PLAINTIFFS HAVE ESTABLISHED CARDTRONICS' LIABILITY UNDER COUNT V OF THEIR COMPLAINT.

A. It Is Undisputed That the Fleet of Cardtronics-Owned ATMs Was Deployed After the Effective Date of the ADAAG and Is Not Accessible To And Independently Useable by Blind People.

"Upon a properly supported motion for summary judgment, the opposing party can avoid summary judgment only by presenting evidence sufficient to establish the existence of a genuine issue of material fact as to each element essential to its [defense]."[3] The evidence proffered by a summary judgment opponent must be admissible.[4]

1. Cardtronics admits that its fleet of ATMs was deployed after the effective date of the ADAAG.

Plaintiffs filed this Partial Summary Judgment Motion in April 2005. On May 20, 2005, Cardtronics served on the Plaintiffs certain discovery responses. In those responses Cardtronics admitted that the Cardtronics fleet of ATMs was deployed after January 26, 1993, the effective date of the ADAAG.[5] Thus, *all* ATMs at issue are subject to ADAAG § 4.34.5.

2. The evidence that Cardtronics' ATMs fail to offer instructions and all information for use in a format accessible to blind people is undisputed.

That blind people cannot use the many screens of an ATM when the text is only presented visually is well-documented in the affidavits submitted by Plaintiffs' testers, particularly the affidavits of Jennifer Bose and Nicholas Paras that painstakingly review each screen that arose, the choices offered by that screen and Ms. Bose's inability to know either the contents of the screen or the actions necessary to make one of the choices offered.

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[3] *Mattoon v. City of Pittsfield*, 980 F.2d 1, 7 (1st Cir. 1992) (citing *Price v. Gen. Motors Corp.*, 931 F.2d 162, 164 (1st Cir. 1991)).
[4] *Schubert v. Nissan Motor Corp.*, 148 F.3d 25, 32 (1st Cir. 1998).
[5] *See* Answer of Def. Cardtronics to Private Pls.' First Reqs. for Admis., attached as Ex. 1, No. 4.

Cardtronics has not submitted any evidence to dispute the testers' findings and concedes that Plaintiffs "have provided evidence supporting an injunction" with respect to the tested ATMs, but claims that Plaintiffs "at least would have to show [that] some kind of systematic problem persists throughout the fleet ...."[6] Cardtronics' recent discovery responses conclusively establish, however, that its ATMs suffer the same defects encountered by the testers.

Plaintiffs asked Cardtronics to admit that "[e]ach of Cardtronics' ATMs, with the exception of those that present information and instructions for use through voice guidance technology, do not have instructions and all information for use accessible to and independently usable by persons with vision impairments."[7] Cardtronics denied this request, but, when asked in an interrogatory to "state in detail *how* each instruction and information for use on each screen of a Cardtronics ATM is accessible to and independently usable by a person with vision impairments," admitted that "instructions displayed visually on an ATM display screen *may not* be visible to a person with vision impairments."[8]

Plaintiffs also requested that Cardtronics "identify all information and instructions for use as they appear on each screen of a Cardtronics ATM and *identify all formats* in which that information and those instructions are set forth."[9] In response, Cardtronics only directed the Plaintiffs to its contemporaneous document production as its complete answer. That production included documents depicting the text on the various display screens associated with conducting a transaction on its ATMs.[10] Although it produced a CD entitled "Voice Guidance Work Files," consisting of .wav files (sound files) of instructions, it did not produce any documents showing

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[6] Defs.' Opp'n. to Pls.' Mot. for Partial Summ. J. 12-13.
[7] *See* Ex. 1, Req. No. 1.
[8] *See* Answer of Def. Cardtronics to Private Pls.' Interrogs., attached as Ex. 2, No. 4 (emphasis supplied).
[9] *See* Ex. 2, Interrog. No. 2 (emphasis supplied).
[10] *See* Ex. 2, Answer to Interrog. No. 2; Docs. CARD000478-CARD0000553, attached as Ex. 3.

that this format is used at any of its ATMs nor did it so claim in its Answer to Interrogatories.[11] Accordingly, the record evidence is that Cardtronics' ATMs provide the information and instructions for use contained in screen prompts *only* in a visual format, and Cardtronics has conceded the obvious: a person with vision impairments would not be able to see the screens.[12] Thus, it is evident that the problem encountered by Ms. Bose and the other testers is indeed endemic to Cardtronics' entire fleet of ATMs.

Cardtronics also seeks to forestall partial summary judgment by requesting additional time under Fed. R. Civ. P. 56(f) for discovery, stating that "Defendants have not taken the depositions of Plaintiffs' [testers]."[13] Cardtronics' submission falls well short of the Rule 56(f) standard.

Rule 56(f) requires that a movant specify the facts to be discovered that would create a genuine issue of material fact.[14] Cardtronics does not point to specific facts it has yet to discover that would prove that its owned ATMs *do* offer instructions and all information for use in a non-visual format and so comply with ADAAG § 4.34.5. Thus, it is not entitled to a delay.[15]

It is difficult to imagine what facts Cardtronics could elicit in discovery from Plaintiffs' testers to create a genuine dispute of material fact. With respect to the twelve ATMs at issue,

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[11] *See* Affidavit of Daniel F. Goldstein, Esq., attached as Ex. 4. Cardtronics has assumed responsibility for the partial settlement agreement requiring that all ATMs that E*TRADE had owned be equipped with voice guidance. Those ATMs are not part of this suit.

[12] Again, if Cardtronics owns any ATMs with voice guidance, those ATMs would satisfy ADAAG and the Plaintiffs' Proposed Order would not require any action with respect to those ATMs. *See* discussion *infra* Section II(B). Of course, Cardtronics had the opportunity to specify in its interrogatory responses and in its Opposition to this motion that its owned ATMs offer instructions and all information for use in a non-visual format, but did not.

[13] *See* Defs.' Opp'n. to Pls.' Mot. for Partial Summ. J. 4, n.2; *see also* Defs.' Response to Pls.' Statement of Undisputed Facts Pursuant to Local Rule 56.1, ¶¶ 9-24.

[14] *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 142 F.3d 26, 44 (1st Cir. 1998) (Rule 56(f) "moving papers must contain a proffer which, at a bare minimum, articulates a plausible basis for the movant's belief that previously undisclosed or undocumented facts exist, that those facts can be secured by further discovery, and that, if obtained, there is some credible prospect that the new evidence will create a trialworthy issue"); *Mattoon*, 980 F.2d at 7; *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 987-88 (1st Cir. 1988).

[15] *See, e.g., Mattoon,* 980 F.2d at 7-8 (Rule 56(f) motion denied, and summary judgment against Rule 56(f) movant affirmed, where movant's papers needed, but failed, to describe a "realistic basis for believing that further discovery would disclose [pertinent] evidence.")

Cardtronics can visit the ATMs and consult its own documents and employees to determine whether the ATMs offered the screen prompts the testers described in any non-visual format. In any event, it has conceded that Plaintiffs "have provided evidence supporting an injunction" as to those twelve ATMs.[16] With respect to the rest of the Cardtronics fleet, Plaintiffs' testers would not have any knowledge, much less relevant testimony, to dispute what Plaintiffs have already established through Cardtronics' May 2005 discovery responses: the remainder of Cardtronics' fleet of ATMs fails to offer the instructions and all information for use that appear in visually-detected screen prompts in any non-visual format. In these circumstances, Rule 56(f) affords Cardtronics no "escape hatch."[17]

B. The Legal Standard Applicable to Plaintiffs' New Construction Mandate Claim Requires the Court to Determine Only Whether Defendants' ATMs Comply With ADAAG.

1. An entity violates the new construction mandate of the ADA when it installs a new facility that fails to conform to ADAAG.

Count V asserts that Cardtronics violated the ADA's new construction mandate. The applicable statutory provision defines discrimination as

> a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter.[18]

The regulations "issued under this subchapter" also provide that facilities constructed after January 26, 1993, "*shall comply* with the standards for accessible design published as appendix A to this part (ADAAG)."[19] ADAAG requires, among other things, that an ATM's "instructions and all information for use shall be made accessible to and independently usable by persons with

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[16] Defs.' Opp'n. to Pls.' Mot. for Partial Summ. J. 12.
[17] *Paterson-Leitch Co.*, 840 F.2d at 988.
[18] 42 U.S.C. § 12183(a)(1)(2005).
[19] 28 C.F.R. § 36.406(2005)(emphasis supplied).

vision impairments."[20] Since all Cardtronics-owned ATMs were installed after January 26, 1993, each must comply with ADAAG § 4.34.5 by offering instructions and all information for use in a format that is accessible to and independently useable by blind people.

Although other portions of the ADA require only "reasonable accommodations" or "reasonable modifications" to meet the needs of the disabled,[21] Congress expected entities to make new facilities accessible. It provided only one exception: if the entity could "demonstrate that it is structurally impracticable to meet the requirements" of the applicable regulations.[22] This is because requiring prospective compliance with regulations is generally considered reasonable. And the Department of Justice intended to make ADAAG reasonable to "ensure the high level of access contemplated by Congress, consistent with the ADA's balance between the interests of people with disabilities and the business community."[23]

Thus, the new construction mandate requires only that Plaintiffs show that Cardtronics' ATMs 1) were installed after January 26, 1993, and 2) do not comply with ADAAG.

2. To find a violation of the new construction mandate the courts require nothing more than proof that a new facility fails to conform to ADAAG.

When confronted with claims of violations of the new construction mandate, courts have determined liability according to whether or not the facility in question conforms to ADAAG. "Reasonable modification" or "accommodation" have played no part. As the court categorically stated in *Schonfeld v. City of Carlsbad*,[24] "construction is to be in conformance with the Uniform Federal Accessibility Standards . . . or with the ADAAG." In *Independent Living Resources v.*

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[20] 28 C.F.R. § 36.406, App. A § 4.34.5.
[21] *See* discussion *infra* Section IB(3).
[22] 42 U.S.C. § 12183(a)(1). As observed *supra* n.2, Cardtronics has not attempted to make a showing of "structural impracticability."
[23] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35, 544 (July 26, 1991) (addressing Section 36.406 Standards for New Construction and Alteration).
[24] 978 F. Supp. 1329, 1341 (S.D. Cal. 1997).

Oregon Arena,[25] the court entered summary judgment for the plaintiffs on a new construction claim and explained that "Congress has mandated that newly constructed facilities must be fully accessible from the start . . . . The [facilities] must comply with the design Standards." Because "barriers can be avoided at little or no cost" during the construction phase, another court observed, "the provisions applicable to new construction ... do not provide an undue burden defense."[26]

So, too, in this Circuit, liability for violation of the new construction mandate arises whenever a facility fails to conform to ADAAG. In *United States v. Hoyts Cinemas Corp.*,[27] the Court considered whether the wheelchair-accessible seats at a number of the defendants' newly-constructed movie theaters offered "comparable lines of sight" to standard seats and comprised an "integral part" of the theaters' "fixed seating plan," in conformity with ADAAG § 4.33.3. The Court looked at viewing angles from the seats in question and where the seats were located within the theaters, and entered summary judgment for the government after determining that the lines of sight were not comparable to those offered at standard seats and that the wheelchair-accessible seats were not sufficiently integrated.[28] The First Circuit, although ultimately concluding that the District Court had an insufficient evidentiary basis with respect to ADAAG's integration requirement, also analyzed liability by looking to see only whether there had been ADAAG compliance.[29]

Thus, the relevant case law follows the statutory and regulatory language of the new construction mandate, and teaches that to establish Cardtronics' liability for violation of the new

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[25] 982 F. Supp. 698, 764 (D. Or. 1997).
[26] *Anderson v. Dept. of Pub. Welfare*, 1 F. Supp. 2d 456, 464 (E.D. Pa. 1998) (quoting *Kinney v. Yerusalim*, 9 F.3d 1067, 1071 (3d Cir. 1993)).
[27] 256 F. Supp. 2d 73 (D. Mass. 2003), *aff'd in part, rev'd in part*, 380 F.3d 558 (1st Cir. 2004).
[28] *Id.* at 84-93.
[29] 380 F.3d at 561-62.

construction mandate, Plaintiffs need only show that (1) the Cardtronics-owned ATMs were deployed after January 26, 1993, and (2) they fail to conform with the ADAAG.

3. "Reasonable accommodation" or "reasonable modification" are not elements of a claim or defense under the new construction mandate.

Cardtronics insists that under the new construction mandate, Plaintiffs must also identify a reasonable accommodation or a reasonable modification. Neither the statute nor the regulation applicable to the new construction mandate, however, contains this exculpatory provision and the cases discussing the new construction mandate do not engraft such a provision. Indeed, the court in *Independent Living Resources v. Oregon Arena*[30] observed that it could simply order the demolition of a noncompliant stadium built after the enactment of the ADA for noncompliance with the new construction mandate.

Cardtronics makes no effort at statutory construction to support its claim. Indeed, no reasonable reading of the new construction mandate would support importing the requirement of reasonable accommodation. Instead, Cardtronics relies exclusively on cases that do not discuss the new construction mandate at all. Most interpret a provision of Title III of the ADA that governs a public accommodation's policies and procedures – a provision that is entirely inapplicable to the present motion. That part of the statute defines discrimination as

> 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.[31]

Cardtronics unjustifiably relies on cases interpreting the reasonable modification to policy mandate to support its assertion that "it is well settled" under the new construction

[30] 1 F. Supp. 2d 1159, 1165.
[31] 42 U.S.C. § 12182(2)(A)(ii) (emphasis supplied) (the "reasonable modification to policy mandate").

mandate that Plaintiffs must identify a specific "reasonable accommodation" or "reasonable modification" to prevail.[32] Indeed, the cases it cites make no attempt whatsoever to construe or interpret the new construction mandate and do not involve compliance with ADAAG. *See, e.g., Dudley v. Hannaford Bros. Co.*[33] (addressing the discriminatory impact of a retailer's liquor sales policy); *Goldstein v. Harvard Univ.*[34] (a student who needed to reschedule an examination for outside of "asthma" season was required to have put the university on notice that a disability interfered with her ability to take a regularly-scheduled examination); *Johnson v. Gambrinus Co./Spoetzl Brewery*[35] (addressing modifications to a brewery's "no animals" tour policy for patrons who use service animals); *Guckenberger v. Boston Univ.*[36] (addressing modification to college's policies to accommodate students with ADHD); *Dahlberg v. Avis Rent a Car Sys., Inc.*[37] (addressing discrimination in defendant's reservation system's policies).[38]

It is not surprising that in suits arising under the reasonable modification to policy mandate, some courts have required plaintiffs to specify what reasonable modifications to the entity's policies they need.[39] Given the enormous and varied universe of types of places of public accommodation, the goods and services they offer, the policies, practices, and procedures

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[32] Defs.' Opp'n. to Pls.' Mot. for Partial Summ. J. 1.
[33] 333 F.3d 299 (1st Cir. 2003).
[34] 77 Fed. Appx. 534, 537 (1st Cir. 2003).
[35] 116 F.3d 1052, 1059 (9th Cir. 1997).
[36] 974 F. Supp. 106, 145 (D. Mass. 1997).
[37] 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000).
[38] The remaining cases Cardtronics cites are employment cases that address "reasonable accommodation" under provisions of Title I of the ADA and the regulations of the Rehabilitation Act that define discrimination as a failure to provide a "reasonable accommodation." *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000); *Ward v. Mass. Health Research Inst., Inc.*, 209 F.3d 29, 36-37 (1st Cir. 2000); *Feliciano v. State of R.I.*, 160 F.3d 780, 786 (1st Cir. 1998); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 136 (2d Cir. 1995). They do not involve a public accommodation, the new construction mandate, ADAAG compliance or any aspect of Title III of the ADA. There is no section, paragraph or sentence of any of those opinions that states, suggests or implies that the First Circuit has read a "reasonable modification" qualification into the new construction mandate.
[39] Count II of Plaintiffs' Third Amended Complaint alleges a violation of the ADA's reasonable modification mandate. Pursuant to that Count, Plaintiffs will seek changes, for example, in the practices of E*TRADE Bank, a public accommodation which affords banking services on a discriminatory basis. If and when Plaintiffs bring such matters before the Court, it will have to consider whether it is reasonable to require the Bank to modify its policies. However, given Plaintiffs' utter inability to make any headway in discovery, Plaintiffs have not sought to move for summary judgment on that count.

they employ, and human disabilities (some of which are visible and obvious, some of which are not), Congress chose, through the general terms of the reasonable modification to policy mandate, to order places of public accommodation to be flexible so that customers with disabilities could have equal enjoyment of the goods and services they offer. The alternative available to Congress and DOJ would have amounted to an unworkable – and, in the end, ineffective -- attempt to erect a vast regulatory scheme to regulate impossible-to-anticipate minutiae of varied business practices by varied types of businesses faced with serving disabled customers with varied and individualized needs.

In enacting the new construction mandate, Congress sought to ensure that new facilities are constructed to afford access to people with disabilities. It did so by requiring that new facilities conform to design specifications that would assure access to people with disabilities. Once a business has complied with the *design* principles of ADAAG, the reasonable modification of policies mandate prohibits it from erecting barriers to people with disabilities through discriminatory *practices*.[40]

In sum:

1. The legal standard applicable to cases under the new construction mandate requires that courts simply determine whether a new facility conforms to the architectural specifications of ADAAG.
2. Neither the new construction mandate nor its implementing regulations mention "reasonable modifications" or "accommodations."
3. Courts, in the First Circuit and elsewhere, analyze cases arising under the new construction mandate without reference to any purported requirement that a plaintiff must show a "reasonable accommodation" or "modification."
4. The reasonable modification to policy mandate set forth in a different section of Title III of the ADA does not address the design of facilities, is not governed by ADAAG, and is not the basis for Plaintiffs' Motion for Partial Summary Judgment.

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[40] *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1084-85 (9th Cir. 2004); *Ind. Living Res.*, 1 F. Supp. 2d at 1171-72.

5. Cases analyzing the reasonable modification to policy mandate of Title III of the ADA have never suggested, intimated or supposed that this explicitly stated statutory requirement applicable to an entity's policies be applied, imported or utilized in determining the entity's legal responsibilities under the new construction mandate.

Cardtronics' contention that Plaintiffs must identify a "reasonable accommodation" or "reasonable modification" to prevail on their new construction mandate claim is simply not warranted under existing law.

II. PLAINTIFFS ARE ENTITLED TO EFFECTIVE RELIEF.

A. The Court May Issue An Injunction Requiring The Defendants To Comply With ADAAG § 4.34.5.

The ADAAG guaranteeing the blind access to ATMs states a clear, concise performance standard: an ATM satisfies ADAAG if all information and instructions for use are independently accessible and useable by the blind. ADAAG does not specify a particular means for compliance. Thus, to remedy Cardtronics' clear violation of the new construction mandate, Plaintiffs seek an injunction ordering Cardtronics to "take immediate action to insure that all ATMs they own and that were installed at their various locations after January 26, 1993, . . . have information and instructions for use that are accessible to and independently usable by the blind."[41]

Again, attempting to rely on inapplicable cases from an entirely different context, Defendants assert that Plaintiffs' request for an injunction ordering Cardtronics to comply with the ADAAG is a "vague, unenforceable 'obey the law' injunction."[42] Indeed, Cardtronics categorically and incorrectly asserts that injunctions that order law breakers to obey the law are *always* invalid.[43]

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[41] Proposed Order, attached to Pls.' Mot. for Summ. J., Docket No. 27.
[42] Defs.' Opp'n. 9.
[43] *Id.* at 9-10.

The Ninth Circuit rejected the precise arguments advanced by Cardtronics in upholding an injunction directing the defendant to satisfy a particular performance goal that did not specify the means to achieve that goal. The court in *Fortyune v. American Multi-Cinema, Inc.*[44] upheld an order directing the defendant movie theater 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."[45] To be lawful, the court stated, the injunction need not "provide AMC with explicit instructions on the appropriate means to accomplish this directive."[46] Rule 65(d), the court explained, only requires specificity in the act or acts sought to be restrained. Similarly, in this case, Plaintiffs seek an order specifically requiring that information or instructions for use that are presented visually also be presented in a format that is independently accessible to and usable by the blind.

Courts do indeed issue injunctions merely tracking the language of a statute or regulation. For example, in *McComb, Wage and Hour Adm'r v. Jacksonville Paper Co.*,[47] the Supreme Court upheld an injunction that ordered law breakers to obey specific Fair Labor Standards Act provisions. In *Taylor Wine Co. v. Bully Hill Vineyards, Inc.*,[48] the Second Circuit affirmed an injunction prohibiting defendant from "[o]therwise engaging in any act of unfair competition against the Taylor Wine Co., Inc. or trading upon its goodwill." And in *Securities and Exchange Comm'n v. Manor Nursing Ctrs., Inc.*,[49] it approved an injunction that "framed the order in language virtually identical to that of Rule 10b-5."

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[44] 364 F.3d at 1075.
[45] *Id.* at 1087.
[46] *Id.*
[47] 336 U.S. 192 (1949).
[48] 590 F.2d 701 (2d Cir. 1978).
[49] 458 F.2d 1082, 1103 (2d Cir. 1972).

An "obey the law" injunction is particularly appropriate where the law is specific about what a party is required to do. In *United States v. Miller*,[50] the Interstate Commerce Commission (ICC) won an injunction against several defendants from transporting property for compensation on public highways without obtaining the ICC's authorization. In rejecting a defendant's assertion that the injunction merely tracked the language of the Interstate Commerce Act and thus was too vague, the court stated

> [T]hat the injunction is framed in language almost identical to the statutory mandate does not make the language vague. In this situation the statutory terms adequately describe the impermissible conduct.[51]

Similarly, Plaintiffs seek an order directing Cardtronics to comply with a clear and specific performance standard applicable to its ATMs: that it offer "instructions and all information for use" in an accessible, or non-visual, format for the benefit of blind consumers. That standard merely requires Cardtronics to identify the "instructions and all information for use" offered at its ATMs, determine whether they are communicated through any sense other than sight, and translate them into a non-visual format. As the First Circuit has observed, Rule 65 does not "require that an [injunctive] order list the components of ... [terms] whose boundaries are understood by common parlance."[52]

By contrast, the cases on which Cardtronics relies involve "obey the law" injunctions where the laws at issue were themselves general in nature.[53] For example, in *Henrietta D. v. Giuliani*,[54] a class action challenging New York City's delivery of public health and public assistance benefits to city residents with HIV and AIDS, the court noted that an injunction ordering the defendants to "meet their obligations" under the ADA and Rehabilitation Act would

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[50] 588 F.2d 1256, 1261 (9th Cir. 1978).
[51] *Id.*
[52] *United States v. Prof'l Air Traffic Controllers*, 678 F.2d 1, 3 (1st Cir. 1982).
[53] Defs.' Opp'n. 10-11.
[54] 246 F.3d 176, 182 (2d Cir. 2001).

not have been sufficiently specific under Fed. R. Civ. P. 65. In *Payne v. Travenol Lab., Inc.*,[55] a general injunction prohibiting "employment discrimination on the basis of 'color, race or sex'" was held to lack sufficient specificity. *Burton v. City of Belle Glade*,[56] a Voting Rights Act case, rejected as vague an injunction prohibiting the defendant from violating that statute in its future "annexation decisions." Indeed, *Burton* expressly acknowledged that so-called "obey the law" injunctions are not categorically inappropriate, and cited *Sterling Drug v. Bayer AG* [57] as an example of the validity of such injunctions where "the context clarifies the scope of the injunction."[58]

Particularly because this Court has ample authority to enter an injunction in the form requested by Plaintiffs, this Court can and should issue an injunction directing compliance with the applicable ADAAG, but leaving open to Cardtronics the method by which it should comply.[59]

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[55] 565 F.2d 895, 898 (5th Cir. 1978).
[56] 178 F.3d 1175, 1201 (11th Cir. 1999).
[57] 14 F.3d 733, 748 (2d Cir. 1994).
[58] Indeed, Cardtronics' logic would create a "Catch-22" in which the Court cannot specify relief not found in ADAAG and ADAAG does not sufficiently specify relief. In its Rule 12(c) motion, Cardtronics told the Court that it could not order specific actions not articulated in ADAAG to remedy past violations of that ADAAG. Mem. and Order 4, Feb. 22, 2005. Now, Cardtronics argues that an injunction that tracks the language of the ADAAG and does not order specific actions is an unenforceable "obey the law" injunction. Defs.' Opp'n. to Pls.' Mot. for Partial Summ. J. 9-12.
[59] The Court could also reconsider its *dictum* of February 22, 2005, to craft relief that maps out a method for compliance. *United States v. Nat'l Amusements*, 180 F. Supp.2d 251 (D. Mass. 2001), on which the Court relied in its February 22, 2005, Memorandum and Order, holds that a defendant who has complied with ADAAG cannot also be held liable for violating the general discrimination prohibition of Title III. It did not address the equitable authority of the court to fashion injunctive relief to remedy existing or past violations of ADAAG. It is well settled that a court, having found a violation, has broad discretion in formulating injunctive relief. *See Boston Chapter, NAACP, Inc. v. Beecher,* 371 F. Supp. 507 (D. Mass. 1974) and cases cited. Indeed, the First Circuit remanded *Hoyts Cinemas Corp.* for the court to develop criteria, not contained in ADAAG, for what constituted comparable lines of sight.

B. That Only Twelve ATMs Were Tested Is Not a Barrier to Plaintiffs' Request for Relief.

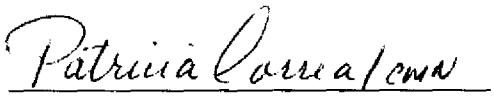
Because Cardtronics-owned machines were installed after January 26, 1993 and blind persons cannot independently use them, Plaintiffs are unquestionably entitled to declaratory relief that declares that all such ATMs violate the ADA's new construction mandate.

In addition, given that there is no dispute that Cardtronics' ATMs do not comply with ADAAG § 4.34.5, Plaintiffs are entitled to entry of the Proposed Order of injunctive relief, directing Cardtronics to "take immediate action to insure that all ATMs they own and that were installed at their various locations after January 26, 1993...have information and instructions for use that are acceptable to and independently usable by the blind." To the extent that any of the Cardtronics-owned machines are equipped with voice guidance, the Proposed Order would not require Cardtronics to take any action as to those machines.

CONCLUSION

For all of the foregoing reasons, Plaintiffs request this Court to grant Plaintiffs Motion for Partial Summary Judgment on Count V of the Third Amended Complaint with respect to Cardtronics-owned ATMs.

COMMONWEALTH OF MASSACHUSETTS,
By its Attorneys,



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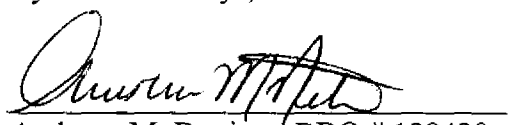

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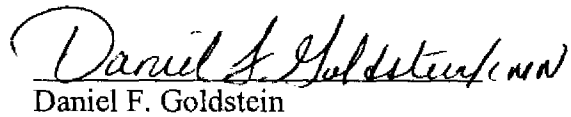

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Dated: August 5, 2005

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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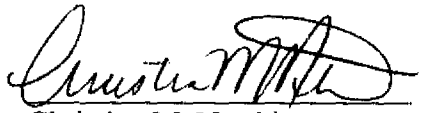

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