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, RICHARD DOWNS, THERESA JERALDI and PHILIP OLIVER,	**C.A. No.: 03 11206-MEI**
Plaintiffs,	
v.	
E*TRADE ACCESS, INC., E*TRADE BANK, CARDTRONICS, INC., and CARDTRONICS, LP	
Defendants.	

COMMONWEALTH'S SURREPLY TO DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

The Commonwealth submits this surreply to respond to a ground for summary judgment Defendants raise for the first time in Argument II of their reply brief[1] that they did not include a ground in their original cross-motion for summary judgment[2] nor mention or discuss in their original brief in support of that motion.[3] Defendants now argue that the new construction mandate does not apply at all to ATMs or any of the types of built-in equipment that are the subject of the detailed and exhaustive requirements of the ADAAG that DOJ adopted as its ov

[1] *See* Reply Brief in Support of Defendants' Cross-Motion for Summary Judgment ("Reply").
[2] *See* Defendants' Cross-Motion for Summary Judgment on Plaintiffs' Claims Under the Americans with Disabilities Act.
[3] *See* Memorandum in Support of Defendants' Cross-Motion for Summary Judgment on Plaintiffs' Claims Under the Americans with Disabilities Act.

regulation, which Defendants themselves acknowledge are entitled to "*Chevron*-type deference."[4]

Defendants selectively quote to the Court certain language in the new construction mandate, 42 U.S.C. § 12183, referencing such items as "certificates of occupancy," and mischaracterize the case law in support of their proposition. However, as Defendants are aw: the new construction mandate applies to new and altered "facilities," 42 U.S.C. § 12183(a), which DOJ's regulations – again, that are subject to "*Chevron*-type deference" -- define to include "all or any portion of ... equipment ... or other ... personal property," in addition to buildings or portions of them.[5]

Applicable legislative history issued by the Access Board and interpretive guidance ar regulation issued by DOJ add a caveat to this definition by specifying that to be covered by ADAAG, equipment must somehow be made part of a building. In its preamble to the ADA that was later adopted by DOJ,[6] the Access Board stated explicitly that the ADAAG "address ... that equipment that is fixed or built into the structure of the building."[7] The Access Board

---

[4] Reply at 5 & n.7 (citing *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *see also Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (citing *Chevron*, 467 U.S. at 844, granting deference to DOJ Title I regulations and Technical Assistance Manual given that DOJ was the "agency directed by Congress to issue implementing regulations, render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court") (citations omitted). The ADAAG is incorporated by reference in DOJ's Title III implementing regulations. *See* 28 C.F.R. Part 36.406.

[5] 28 C.F.R. Part 36.104.

[6] Defendants cannot dispute that the Access Board's preamble comprises relevant legislative history, as they relie on it extensively in support of their Fed. R. Civ. P. 12(c) motion. *See* Memorandum in Support of Defendants' R 12(c) Motion for Judgment on the Pleadings (filed November 9, 2004), Argument I.

[7] Preamble to Access Board's Final Guidelines (attached as Exhibit 3 to the Independent Community Bankers of America and America's Community Bankers' Appendix to Amici Curiae Brief, filed with the Court on February 2005, in connection with Defendants' Fed. R. Civ. P. 12(c) motion), 56 F.R. 35,408 at *12. Because this docume is voluminous, the Commonwealth does not resubmit it to the Court.

illustrates this caveat throughout its preamble in a number of instances where it adopts, reject r qualifies provisions relating to equipment, in some instances rejecting provisions that relate t equipment that is not fixed or built into a structure and therefore beyond its purview.[8] Its exposition of the provisions on ATMs, including ADAAG § 4.34.5, the provision at issue in t lawsuit, expresses its correct assumption that ATMs fall squarely within that category of buil equipment subject to regulation under the new construction mandate.[9]

In its own guidance, DOJ explicitly adopted the view of the Access Board, and indeed specifically discussed the example of ATMs:

> Only equipment that is fixed or built in to the facility is covered by the accessibility standards (e.g., ... built-in ATMs). Free-standing equipment is not covered by ADAA but public accommodations may be required to purchase accessible free-standing equipment in certain circumstances in order to provide equal opportunity.[10]

That DOJ interpreted and intended the new construction mandate to apply to built-in equipme is further demonstrated by its promulgation of a Title III implementing regulation that is specifically applicable to *equipment* subject to the new construction standard.[11]

---

[8] *See* 56 F.R. 35,408 at *52 (declining to issue guidelines on point-of-sale machines, explaining that in its view a majority of the machines are equipment that is not fixed or built into a structure and is "therefore not within the Board's purview"), *54 (explaining deletion from Final Guidelines of provision on vending machines on the grou that it "relates to equipment not under the jurisdiction of these guidelines"), *65 (explaining that ADAAG § 4.27 controls) applies to built-in appliances, not portable appliances such as toasters and coffee makers).

[9] *Id.* at *28, *49-*52 (stating that "the legislative history of the ADA specifically mentions automatic teller mach (ATMs) as covered by the accessibility requirements," and explaining its adoption of a "flexible performance standard" for ATMs).

[10] Title III Technical Assistance Manual 1994 Supplement, Section III-5.3000 (attached as Exhibit A).

[11] *Compare* 28 C.F.R. Part 36.211 (requiring the maintenance in operable condition of "*equipment* that [is] requi to be *readily accessible to and usable by persons with disabilities* by the Act or this part") (emphasis added) *with* U.S.C. § 12183(a) (requiring new construction and alterations to be *"readily accessible to and usable by individu with disabilities"*) (emphasis added).

It is therefore unremarkable that the ADAAG that DOJ adopted prescribes in detail th features of manufactured equipment that can be legally affixed or built into buildings. Doorknobs that are installed must "have a shape that is easy to grasp with one hand and does require tight grasping, tight pinching, or twisting of the wrist to operate" (such as a "lever-operated" or "push-type" mechanism);[12] water fountains and coolers selected for installation must be of a type that has the spout at the front and which directs the water flow in a direction that is "parallel or nearly parallel" to the front of the unit;[13] urinals that are chosen for bathroc must feature flush controls that are "hand operated or automatic;"[14] shower unit fixtures that a added must be of a type that includes "a hose at least 60 in (1525 mm) long that can be used t as a fixed shower head *and* as a hand-held shower,"[15] to name a few.[16]

The legislative history of, and case law under, the new construction mandate (includin cases cited by Defendants themselves)[17] confirm that even equipment that is *later* affixed to a building is covered by the ADAAG under the new construction mandate, notwithstanding Defendants' assertions to the contrary. For example, the Access Board's preamble to the

---

[12] ADAAG § 4.13.9.
[13] *Id.*, § 4.15.3.
[14] *Id.*, § 4.18.4.
[15] *Id.*, § 4. 20.6.
[16] An inexhaustive list of other examples include ADAAG §§ 4.19.5 (specifying features of faucets), 4.24.4 (specifying maximum depth of sinks), 4.26.2 (specifying diameter of grab bars), 4.27.4 (specifying that controls operating mechanisms shall be of a type that is "operable with one hand" and that does not require "tight graspin pinching, or twisting of the wrist"), 4.28.3 (specifying photometric features of visual alarms, including type, colo maximum pulse duration, intensity, and flash rate), 4.31.6 (requiring push button controls on telephones).
[17] The cases the Defendants cite in Exhibit 5 to their Reply fail to support their novel proposition that the ADAA does not apply to equipment built into structures. For example, Defendants categorize these cases by type of faci (rather than by type of building feature at issue, e.g., faucets, visual alarms, or ATMs) to apparently prove that th new construction mandate does not apply to equipment, but a number of the cases they list do concern violations ADAAG posed by non-compliant manufactured equipment that is built into structures, as explained in further det below. In addition, a number of the cases they cite only concern issues having nothing to do with the merits of claims under the new construction mandate and are inapposite to their arguments. *See, e.g., Clark v. McDonald Corp.*, 213 F.R.D. 198 (D.N.J. 2003) (class certification, standing, and request for more definite statement); *Moel v. Taco Bell Corp.*, 220 F.R.D. 604 (N.D. Cal. 2004) (class certification); *Disabled Americans for Equal Access, v. Ferries Del Caribe, Inc.*, 405 F.3d 60 (1st Cir. 2005) (applicability of ADA to cruise ships); *Weese v. Assoc. Wholesale Grocers, Inc.*, No. 99-2575-JWL (D. Kan. Sept. 28, 2000) (standing, in Title I case where plaintiff no longer employee).

ADAAG makes clear that a changed feature of a building, even relating to manufactured equipment, must comply with ADAAG; thus a changed door knob chosen for installation mu be of the type prescribed by ADAAG.[18] In *Lieber v. Macy's West, Inc.,*[19] a case cited by the Defendants in Exhibit 5 to their Reply, the plaintiffs challenged the accessibility of racks, she s and display counters that were affixed to portions of a preexisting structure in a manner that c not comply with ADAAG. The court reviewed testimony that the display-related equipment ; "fixed because they are 'wired,' or electronically attached to their locations on the floor," and concluded that they were therefore subject to ADAAG.[20] Similarly, other new elements that were obviously manufactured and later introduced as a fixed feature of the building, such as d hardware and self-service computer terminals (which the court analyzed under ADAAG § 4.2 governing "controls") were also subject to ADAAG. [21]

Defendants place great reliance on *Colorado Cross-Disability Coalition v. Too*[22] to ostensibly prove that only building features that are constructed rather than installed are subje to the new construction mandate. However, *Too* is hardly on point; the court's conclusion the that a retail store's display racks were not subject to ADAAG under the new construction mandate hinged on its explicit finding that the racks were "*movable*" rather than fixed.[23] In contrast to display racks, there is no question that ATMs are built into or affixed to structures.

---

[18] 56 F.R. 35408 at *29. While the Access Board made this statement in the context of discussing an altered feat (i.e., the *replacement* of a doorknob), it would defy common sense to think that the outcome is any different whe facility or feature of a facility is added to existing construction, such as where an ATM is newly deployed.
[19] 80 F. Supp. 2d 1065 (N.D. Cal. 1999).
[20] *Id.* at 1068, 1076-77.
[21] *Id.* at 1076. *See also Disabled in Action of Metropolitan New York,* [2003 WL 1751785] Civ. Action No. 01-5 (MBM) (April 2, 2003 S.D.N.Y.), cited in Exhibit 5 to Defendants' Reply (denying defendant's motion for summ judgment as to plaintiffs' claim that wheelchair lift that was added to pre-existing building failed to comply with ADAAG § 4.11.3's requirement that lifts be independently operable).
[22] 344. F. Supp. 2d 707 (D. Colo. 2004).
[23] *Id.*
[24] *See* Declaration of Dale H. Dentlinger, attached as Exhibit 1 to Memorandum in Support of Defendants' Rule 12(b)(7) Motion to Join Necessary Parties, filed April 16, 2004, ¶ 19 ("Replacing an ATM is not simple. For

Finally, it merits observation that the legally unsupported arguments Defendants mak
Argument I of their Reply are directly at odds with legal positions they previously submitted
DOJ. In January 2005, Cardtronics LP ("Cardtronics") submitted to DOJ a response to DOJ'
September 2004 Advance Notice of Proposed Rulemaking ("ANPRM") regarding the revise
ADAAG.[25] Cardtronics's legal positions taken in that submission contrast with the positions
Defendants' Reply in the following significant respects:

> *Defendants insist in the Reply that ATMs do not fall within the definition of "facilities." In its submission to DOJ, Cardtronics acknowledged that ATMs fall within the definition of "facilities" and specifically urged DOJ to include a safe harbor for ATMs that are compliant with the current ADAAG when it issues regulations applicable to the new ADAAG.[26]
>
> *Defendants insist in the Reply that the new construction mandate does not apply to ATMs at all, even when they are built-in. In its submission to DOJ, Cardtronics acknowledged that the ADAAG is "intended to implement the ADA requirements applicable to the design, new construction, and alterations of facilities and will directly apply only to fixed equipment – equipment that is built into the structure of the facility – and not to portable or movable (so called free standing) equipment," and urged DOJ to make this clear.[27]
>
> *Defendants insist in the Reply that Section 12183 of the ADA must not apply to ATMs since it refers to "certificates of occupancy" as a triggering event for coverage under the new construction mandate and ADAAG. In its submission to DOJ, Cardtronics acknowledged that "first use" (Plaintiffs have used analogous "first deployed" terminology) is the triggering event for ATMs.[28]

The Court should reject the late and mistaken view Defendants now offer to the Court of their obligations under ADAAG and the ADA's new construction mandate.

---

security reasons, ATMs, which, on average, contain $5,000 to $10,000 in their cash vault, are typically embedde walls or floors so that they cannot be easily carted away.... Additionally, the ATMs are hard-wired into the merchant's electrical and telephone systems.").

[25] *See* Exhibit B.

[26] *Id.*at CARD000474-75 ("Cardtronics believes Option I – providing a safe harbor for compliant elements -- is th only approach that makes sense. Although the revised ADA Standards would presumably not apply to ***existing facilities, including ATMs***, the continuing obligation of public accommodations to remove communication barri in existing equipment, will remain a source of continuing confusion and litigation unless there is some clear direction of what, at a minimum, that obligation entails.") (emphasis added).

[27] *Id.* at CARD000474.

[28] *See id.* at CARD000473.

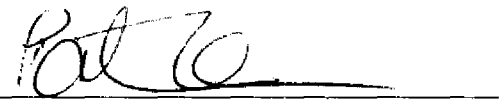
Conclusion

For these reasons, and for the reasons set forth in Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment on Plaintiffs' Claims Under the Americans with Disabilities Act, Plaintiffs' request that this Court deny Defendants' Cross-Motion for Summary Judgment.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS,
By its Attorneys,

THOMAS F. REILLY
ATTORNEY GENERAL



Patricia Correa, BBO No. 560437
Assistant Attorney General
Director, Disability Rights Project
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200, ext. 2919

Dated: September 15, 2005

CERTIFICATE OF SERVICE

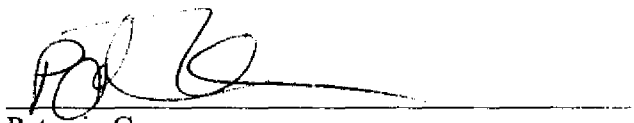
I, Patricia Correa, hereby certify that on this 15th day of September, 2005, I served th within document via first-class mail, postage prepaid (with attachments) and via e-mail (witl t attachments) on the following counsel of record:

Daniel F. Goldstein, Esquire
Sharon Krevor-Weisbaum, Esquire
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, MD 21202
dfg@browngold.com
skw@browngold.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

Christine M. Netski, Esquire
Sugarman, Rogers, Barshak, & Cohen, P.C.
101 Merrimac St.
Boston, MA 02114-4737
netski@srbc.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

Joseph L. Kociubes, Esquire
Bingham McCutchen, LLP
150 Federal Street
Boston, MA 02110
joe.kociubes@bingham.com
Attorney for Defendants, E*Trade Access, Inc. and E*Trade Bank

Douglas P. Lobel, Esquire
David A. Vogel, Esquire
Arnold & Porter
1600 Tysons Boulevard, Suite 900
McLean, VA 22102
douglas_lobel@aporter.com
david_vogel@aporter.com
Attorneys for Defendants, E*Trade Access, Inc. and E*Trade Bank



Patricia Correa