UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

DEFENDANT E*TRADE ACCESS, INC.'S RESPONSE TO PLAINTIFFS' SURREPLY ON JOINDER OF NECESSARY PARTIES

Apparently confused by an alleged "dizzying array" of ATM contracts, *see* Plaintiffs' Surreply, at 2, Plaintiffs lose sight of the enormous number of necessary and indispensable parties in this lawsuit. The few contracts that Plaintiffs mention in their Surreply do not disprove the existence of ***thousands*** of third-party ATM owners.

The vast majority of the contracts attached to Plaintiffs' Surreply, originally entered into by a company called NACS, which Access later acquired, concern ***Access-owned ATMs that are not at issue in this lawsuit***. Similarly, the contracts involving the company Xtra Cash, also later acquired by Access, expressly place the burden of compliance with the ADA on the merchants, which make them indistinguishable from the contracts at issue in *Frotton v. Barkan*, 219 F.R.D. 31 (D. Mass. 2003), and for that reason, the merchants are necessary parties. In any event, even if merchants with Xtra Cash contracts were deemed not to be necessary

parties, thousands of merchants had contracts with Access itself and, as Access explained in its prior pleadings, these merchants are all indispensable parties.[1]

I. THE NACS CONTRACTS ARE NOT AT ISSUE IN THIS LAWSUIT.

The NACS contracts that the Plaintiffs cite are irrelevant to this lawsuit because Access has already agreed to retrofit these machines. NACS was an independent ATM operator that entered into contracts with merchants to rent space in the merchants' stores for the ATMs. Access acquired NACS and thus now is the operator of these ATMs. As the Court is aware, in 2003, Plaintiffs and Access settled their dispute with respect to Access-owned ATMs and Access agreed to retrofit these ATMs as the Plaintiffs desired — ***including*** the ATMs originally owned by NACS. The scope of the lawsuit, as the parties repeatedly have acknowledged, deals only with ATMs that Access does not itself own. Therefore, the contracts Plaintiffs cite involving NACS are ***irrelevant*** to the lawsuit because the ATMs at issue in the contracts are outside of the scope of the lawsuit.

II. MERCHANTS THAT CONTRACTED WITH XTRA CASH ARE NECESSARY PARTIES.

Plaintiffs also claim that contracts originally made by Xtra Cash involve merchants that are not necessary parties. Plaintiffs ignore the plain language of these contracts. These contracts, two of which are attached to Plaintiffs' Surreply, expressly state that the merchant — which, as even Plaintiffs concede, are owners of the ATMs — is the exclusive "operator" of the ATMs as well. *See* Plaintiffs' Surreply, Exhibits N & O, at p. 4, ¶ 7. Under the ADA, the merchants therefore are responsible for the retrofits that Plaintiffs demand. Even if

[1] Since filing its Rule 19 motion, Access's assets were sold to Cardtronics, Inc. All references to "Access" in the original Motion and herein now refer to Cardtronics, but for the sake of consistency, the term "Access" will still be used.

Plaintiffs want to argue otherwise, the existence of this language creates the very factual controversy at issue in *Frotten* that led this Court to conclude that merchants and the mall owner were all necessary parties to an ADA dispute.

III. THE VAST NUMBER OF MERCHANTS ARE NECESSARY PARTIES.

But even if the merchants with Xtra Cash contracts were deemed necessary parties, these contracts are only a minor subset of the ATMs at issue in this lawsuit, and no dispute exists that the ***other*** merchants with ***other*** contracts ***are*** necessary.

Extrapolating from data without a rational basis, Plaintiffs surmise that "only a small fraction of merchants" might be necessary parties. *See* Plaintiffs' Surreply, at 4-5. Of course, the evidence directly on point — from Access's former President — is directly contrary. In support of its motion to join necessary parties, Access filed the affidavit of Dale Dentlinger, who explains that the Access network consists of approximately 13,388 ATMs. Those ATMs can be divided into two categories, Access-owned ATMs and merchant-owned ATMs. Dentlinger further states that the merchant-owned ATMs joined the Access network through SLAs, which give merchants the right to use Access's data processing services. Of the 13,388 ATMs in the Access network, Dentlinger confirms that only 2,033 are Access-owned. This means that approximately 11,355 ATM machines are owned by third parties that must be joined in this case. In their Amended Complaint, Plaintiffs themselves state that Access "holds legal title to only a few thousand of the more than 15,000 ATMs it operates within its network." *See* Amended Complaint, at 6, ¶ 15.

Based on a superficial and incomplete review of the discovery, Plaintiffs now dispute the basic arrangement Dentlinger described. By their own admission, Plaintiffs' conclusion rests on a reading of only 6,000 of 86,000 pages, less than 10% of the documents

produced. Although Plaintiffs are evidently satisfied with this cursory review, their work is incomplete. Moreover, within those 6,000 pages, which allegedly contain 803 ATM contracts, Plaintiffs misread the data. In disputing that the bulk of Access's ATMs are covered by SLAs, Plaintiffs claim to have uncovered only 59 SLA contracts. But this does not undercut Dentlinger's statement that the majority of Access's network-affiliated ATMs operate under an SLA. A single SLA contract with a large vendor may cover numerous ATMs at multiple locations.

More significant than these counting errors, Plaintiffs commit a fundamental mistake in misreading the procedural rules. Assuming that there are third-party ATM owners not subject to an SLA, Plaintiffs make the logical leap that ***no*** additional parties need be joined in this case. In the final pages of their motion, Plaintiffs make this extreme claim: "Contrary to Mr. Dentlinger's sworn affidavit in support of the motion, [the SLAs] apply to only a small fraction of the merchants. On that basis alone, [Access's Rule 19 motion] should be denied." *See* Plaintiffs' Surreply, at 4-5.

But Rule 19 contains no such exception. If there is a necessary party, then joinder is proper. It does not matter whether the party itself is ***significant*** to the wider case, or whether the class of necessary parties is ***large***. *See* Fed. R. Civ. P. 19. Moreover, for purposes of Rule 19, whether there is an SLA governing the relationship between Access and a third party owning an ATM is ***irrelevant***. So long as Plaintiffs seek to physically alter an ATM not owned or operated by Access, the owner and operator of the ATM must be joined. What matters is not the ***form*** of the contract between Access and the third party, but the fact that Plaintiffs seek to impact the third party's property rights.

CONCLUSION

For all of these reasons, Access respectfully requests that this Court grant its motion to join necessary parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jenny Cooper, hereby certify that on September 1, 2004, I caused a copy of the foregoing document to be served, via electronic and first class mail, upon the following counsel of record:

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