

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS)

et al.,)

Plaintiffs,)

v.)

E*TRADE ACCESS, INC. *et al.*,)

Defendants.)

Case No. 03 11206 MEL

**ANSWER AND AFFIRMATIVE DEFENSES OF E*TRADE BANK
TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendant E*TRADE Bank, by undersigned counsel, responds to the Second Amended Complaint as follows:

1. The allegations in Paragraph 1 state conclusions of law as to which no response is required.
2. The allegations in Paragraph 2 state conclusions of law as to which no response is required.
3. The allegations in Paragraph 3 state conclusions of law as to which no response is required.
4. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of Paragraph 4. The remaining allegations in Paragraph 4 state conclusions of law as to which no response is required.
5. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the sentences one, two, four, five and six of

Paragraph 5. The allegations in sentence three of Paragraph 5 state conclusions of law as to which no response is required.

6. The allegations in the first sentence of Paragraph 6 state conclusions of law as to which no response is required. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6.

7. The allegations in the first sentence of Paragraph 7 state conclusions of law as to which no response is required. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 7.

8. The allegations in the first sentence of Paragraph 8 state conclusions of law as to which no response is required. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 8.

9. The allegations in the first sentence of Paragraph 9 state conclusions of law as to which no response is required. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 9.

10. The allegations in the first sentence of Paragraph 10 state conclusions of law as to which no response is required. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 10.

11. The allegations in Paragraph 11 state conclusions of law as to which no response is required.

12. The allegations in Paragraph 12 state conclusions of law as to which no response is required.

13. The allegations in Paragraph 13 state conclusions of law as to which no response is required.

14. E*TRADE Bank denies the allegations in Paragraph 14.
15. E*TRADE Bank denies the allegations in the first two sentences of Paragraph 15. E*TRADE Bank admits on June 9, 2003 it signed a partial settlement agreement with the Commonwealth of Massachusetts and the National Federation of the Blind, the content of which speaks for itself.
16. E*TRADE Bank denies the allegations in Paragraph 16.
17. E*TRADE Bank denies the allegations in Paragraph 17.
18. E*TRADE Bank denies the allegations in Paragraph 18.
19. E*TRADE Bank denies the allegations in Paragraph 19.
20. The allegations in Paragraph 20 state conclusions of law as to which no response is required.
21. The allegations in Paragraph 21 state conclusions of law as to which no response is required.
22. E*TRADE Bank denies the allegations in Paragraph 22.
23. E*TRADE Bank denies the allegations in Paragraph 23.
24. E*TRADE Bank denies the allegations in Paragraph 24.
25. E*TRADE Bank denies the allegations in Paragraph 25.
26. E*TRADE Bank denies the allegations in Paragraph 26.
27. The allegations in Paragraph 27 state conclusions of law as to which no response is required.
28. The allegations in Paragraph 28 state conclusions of law as to which no response is required.

29. E*TRADE Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 29.

30. The allegations in Paragraph 30 state conclusions of law as to which no response is required.

31. E*TRADE Bank incorporates its responses to Paragraphs 1-30 by reference as if fully set forth herein.

32. The allegations in Paragraph 32 state conclusions of law as to which no response is required.

33. The allegations in Paragraph 33 state conclusions of law as to which no response is required.

34. The allegations in Paragraph 34 state conclusions of law as to which no response is required.

35. E*TRADE Bank incorporates its responses to Paragraphs 1-34 by reference as if fully set forth herein.

36. The allegations in Paragraph 36 state conclusions of law as to which no response is required.

37. The allegations in Paragraph 37 state conclusions of law as to which no response is required.

38. E*TRADE Bank incorporates its responses to Paragraphs 1-37 by reference as if fully set forth herein.

39. The allegations in Paragraph 39 state conclusions of law as to which no response is required.

40. The allegations in Paragraph 40 state conclusions of law as to which no response is required.

41. E*TRADE Bank incorporates its responses to Paragraphs 1-40 by reference as if fully set forth herein.

42. The allegations in Paragraph 42 state conclusions of law as to which no response is required.

43. The allegations in Paragraph 43 state conclusions of law as to which no response is required.

44. E*TRADE Bank incorporates its responses to Paragraphs 1-43 by reference as if fully set forth herein.

45. The allegations in Paragraph 45 state conclusions of law as to which no response is required.

46. The allegations in Paragraph 46 state conclusions of law as to which no response is required.

47. The allegations in Paragraph 47 state conclusions of law as to which no response is required.

48. E*TRADE Bank incorporates its responses to Paragraphs 1-47 by reference as if fully set forth herein.

49. The allegations in Paragraph 49 state conclusions of law as to which no response is required.

50. The allegations in Paragraph 50 state conclusions of law as to which no response is required.

51. The allegations in Paragraph 51 state conclusions of law as to which no response is required.

52. E*TRADE Bank incorporates its responses to Paragraphs 1-51 by reference as if fully set forth herein.

53. The allegations in Paragraph 53 state conclusions of law as to which no response is required.

54. The allegations in Paragraph 54 state conclusions of law as to which no response is required.

55. The allegations in Paragraph 55 state conclusions of law as to which no response is required.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

E*TRADE Bank does not own, operate or lease the ATMs at issue.

SECOND DEFENSE

The ATMs at issue are not places of public accommodation.

THIRD DEFENSE

Plaintiffs lack standing.

FOURTH DEFENSE

Plaintiffs failed to exhaust required administrative remedies.

FIFTH DEFENSE

Plaintiffs are not entitled to actual or punitive damages.

SIXTH DEFENSE

Plaintiffs' claims are barred by the statute of limitations.

SEVENTH DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

EIGHTH DEFENSE

Plaintiffs have failed to name necessary and indispensable parties.

NINTH DEFENSE

Requiring E*TRADE Bank to ensure the ATMs at issue have audio capabilities would be an undue burden under 42 U.S.C. § 12182(b)(2)(A)(iii) and applicable state law.

TENTH DEFENSE

E*TRADE Bank did not fail to remove a “communication barrier that [is] structural in nature” under 42 U.S.C. § 12182(b)(2)(A)(iv).

ELEVENTH DEFENSE

The removal demanded by Plaintiffs under 42 U.S.C. § 12182(b)(2)(A)(iv) is not “readily achievable.”

TWELFTH DEFENSE

Plaintiffs did not request a “reasonable modification” of any “policies, practices and procedures” under 42 U.S.C. § 12182(b)(2)(A)(ii).

THIRTEENTH DEFENSE

Plaintiffs were not denied any rights on the basis of their disability and good cause exists for any actions taken by E*TRADE Bank.

FOURTEENTH DEFENSE

E*TRADE Bank has not violated the Americans with Disabilities Act Accessibility Guidelines, which apply only to certain ATMs.

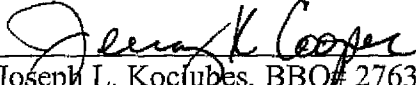
WHEREFORE, Defendant E*TRADE Bank respectfully requests that this Court:

1. dismiss with prejudice all claims against E*TRADE Bank;
2. enter judgment in favor of E*TRADE Bank;
3. award E*TRADE Bank its reasonable attorney's fees and costs pursuant to

42 U.S.C. §§ 12188 & 2000a-3(b); and

4. grant such other relief as the Court deems just and proper.

Respectfully submitted,


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Counsel for Defendants
E*TRADE Access, Inc. and
E*TRADE Bank

Dated: April 14, 2004

CERTIFICATE OF SERVICE

I, Jenny K. Cooper, hereby certify that on this 14th day of April, 2004, I served the foregoing document by mailing a copy of same, postage prepaid, to the following counsel of record:

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