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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT  
DISTRICT OF MASS.

COMMONWEALTH OF MASSACHUSETTS,  
ET AL.,

Plaintiffs

v.

E\*TRADE ACCESS, INC., ET AL.,

Defendants

CIVIL ACTION  
NO. 03-11206-MEL

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR JUDGMENT ON THE PLEADINGS**


Defendants continue to insist that they have complied with the requirement that ATMs be independently usable by the blind,<sup>1</sup> because, they claim, the Access Board determined that "ATMs could comply with the ADA by having Braille . . . instructions" that could be "used in conjunction with tactually marked keys . . ." Def. Mem. at 4. Defendants return to this point in their Reply Memorandum. Def. Rep. Mem at pp.4-5.

However, even if it is possible to make an ATM independently usable to a blind person by placing on the ATM Braille instructions to be used in conjunction with tactually marked keys, Defendants have not done so. Attached are Declarations of blind persons who have tested E\*TRADE Financial-branded ATMs. None of the ATMs located by those blind persons had one word of Braille instruction. Ex. 1, Tabs A-E. Some even lacked Braille on the keys. Moreover, nothing in the pleadings forms the basis for an assertion that Defendants' ATMs have Braille instructions.


<sup>1</sup> 1991 ADAAG Part 4.34.4 at Defendant's Exh. 1; 28 C.F.R. Pt. 36 App. A §4.34.5 at Exh. 2.

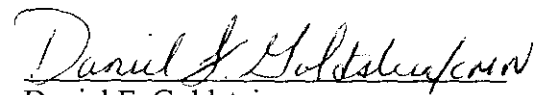
Defendants continue to confuse the question of liability with the question of remedy. As established by the attached Declarations, Defendants' ATMs are not independently usable by blind persons. Thus, it is clear that Defendants have violated the ADA (or, given the context of a motion for judgment on the pleadings, Defendants cannot establish that they have not violated the ADA). However, as a matter of remedy, if Defendants can devise an ATM that would have instructions in Braille and large print that would be independently usable by the blind, then they may be able to convince the Court that this remedy would more satisfy the requirements of the ADA. Given that modern ATMs have between 100 and 200 screens, that attempt may prove quixotic. That question, however, is for another day.

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Dated: February 7, 2005

CERTIFICATE OF SERVICE

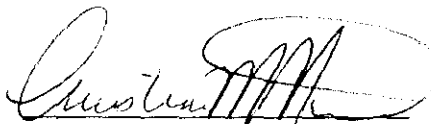
I, Christine M. Netski, hereby certify that on the above date I served the within document via electronic mail and first-class mail postage prepaid on the following counsel of record:

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