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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS,
ET AL.,

Plaintiffs

v.

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

U.S. DISTRICT COURT
DISTRICT OF MASS.

CIVIL ACTION
NO. 03-11206-MEL

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST
DEFENDANTS CARDTRONICS, LP AND CARDTRONICS, INC.**

Plaintiffs seek partial summary judgment and declaratory and injunctive relief under Count V of their Third Amended Complaint as to those ATMs (1) Cardtronics, LP and Cardtronics, Inc. (collectively, “Cardtronics”) own, (2) that were installed at their various locations after January 26, 1993, and (3) that do not have information and instructions for use that are accessible to and independently usable by the blind. Count V alleges a violation of the ADA’s new facilities mandate, 42 U.S.C. § 12183 (a)(1), which requires that all facilities constructed or installed after January 26, 1993, must comply with all applicable Americans with Disabilities Act Accessibility Guidelines (“ADAAG”) unless compliance is “structurally impracticable.”

As recently as one week ago, several blind persons went to ATMs Cardtronics owns but were not able to use them because none of the information or instructions for use was accessible to and independently usable by the blind, as ADAAG § 4.34.5 requires. Because the law does

not excuse this failure to comply with ADAAG for ATMs installed over the past thirteen years (after January 26, 1993), Plaintiffs are entitled to summary judgment as to all such machines.

Plaintiffs are also entitled to affirmative injunctive relief directing the Defendants to comply with the ADAAG requirement. Injunctive relief is the only relief Title III envisions for private Plaintiffs. 42 U.S.C. § 12188(a). Courts finding violations of the new facilities mandate have repeatedly granted affirmative injunctions instructing defendants to comply with ADAAG's requirements, without specifying the precise steps or methods the defendant should use to comply. Thus, the Court, upon finding liability, should order the Defendants to take immediate steps to comply with their longstanding obligations under the ADA and its implementing regulations to make all information and instructions for use readily accessible to and independently usable by the blind.

ARGUMENT

Pursuant to Rule 56, a party may obtain summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986); *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir.), *cert. denied*, 502 U.S. 861 (1991); *Desmond v. Federal Deposit Insurance Corp.*, 798 F. Supp. 829 (D. Mass. 1992). Plaintiffs satisfy that standard here.

I. THE FACTS ARE UNDISPUTED: BLIND PERSONS DO NOT HAVE ACCESS TO AND CANNOT INDEPENDENTLY USE ATMS CARDTRONICS OWN.

On or about June 2, 2004, Cardtronics acquired the ATM business of Defendant E*TRADE Access, Inc. Plaintiffs' Statement of Undisputed Facts Pursuant to L.R. 56.1

("U.F."), ¶ 3; Ex. B. The acquisition included approximately 13,200 active ATMs, increasing the already existing Cardtronics ATM network to over 25,000 ATMs nationwide. U.F., ¶¶ 1, 4-5; Ex. C. According to its own statements, this acquisition makes Cardtronics the nation's largest independent owner/operator of ATMs. U.F., ¶¶ 4-5; Ex. C.

The Cardtronics ATM network consists of ATMs owned or leased by Cardtronics, and ATMs owned by third-party merchants, but operated by Cardtronics. U.F., ¶ 2; Ex. A, pp. 26-7. Only the Cardtronics-owned ATMs are the subject of this Motion for Partial Summary Judgment.¹ Cardtronics denominates the machines that it owns as "turnkey" deployments and it places these Cardtronics-owned machines with major retailers. U.F., ¶¶ 6-8; Ex. A, pp. 26-7. Cardtronics has entered into turnkey arrangements with, among others, A&P, Amerada Hess, Bloomingdale's, Circle K, Costco, Duane Reade, ExxonMobil, Giant, Kroger, Macy's, Mills Malls, Rite Aid, Sears, Sunoco, Walgreens and Winn-Dixie. U.F., ¶¶ 6, 8; Ex. A, pp. 26-7, 49.

A number of blind individuals recently visited some of these retailers with turnkey Cardtronics ATMs on their premises, including Amerada Hess and Costco outlets in Massachusetts, and Rite Aid, Costco, Giant, Circle K, and Save Rite² retail outlets elsewhere throughout the country. Not one individual could successfully use the ATM by him or herself. Moreover, none of the ATMs provided information and instructions for use accessible to and independently usable by these blind individuals, as the ADA and its implementing regulations,

¹ According to a Cardtronics filing with the SEC, it "operates" those Cardtronics ATMs which are merchant-owned. U.F., ¶ 2; Ex. A, p. 26. Title III of the ADA imposes liability on any entity that owns or "operates" a public accommodation. Before seeking summary judgment as to those machines, Plaintiffs will complete discovery that will establish that Cardtronics "operates" its merchant-owned machines.

² According to the ATM Finder on Cardtronics's web-site, there is a Cardtronics ATM at a Winn Dixie store at 1200 Barrett Parkway, Kennesaw, Georgia. Winn Dixie recently declared bankruptcy and the Cardtronics ATM continues to be at the same location, but the grocery store is now called Save Rite.

including the ADAAG, require. U.F., ¶¶ 11, 15, 19, 23; Ex. D (Declaration of Sharon Maneki)³; Ex. F (Declaration of Anil Lewis)⁴; Ex. H (Declaration of Scott LaBarre)⁵; Ex. J (Declaration of Jennifer Bose).

The experiences of Jennifer Bose, in Massachusetts, illustrate the problem. Ms. Bose, accompanied by Nicholas Paras, a sighted investigator for the Commonwealth, attempted to use three Cardtronics ATMs in Massachusetts. U.F., ¶ 21-2; Ex. J, ¶ 3; Ex. K (Declaration of Nicholas P. Paras), ¶ 3. At an Amerada Hess in Needham, she found a machine with symbol markings on the keys, but the symbols were neither Braille nor recognizable to her. As a result, the symbols provided no guidance to her as she tried to use the ATM. Ex. J, ¶¶ 9-10. Ms. Bose independently located a headphone jack and plugged in her headphones, slid her card through the card reader, and awaited verbal instructions. Ex. J, ¶ 10. The audio, however, remained silent. *Id.* In order to proceed, Ms. Bose had to ask Mr. Paras for help, and he read the screen and guided her through the next step, which required her to pick a language and press the appropriate button. Ex. J, ¶ 11; Ex. K, ¶ 11. Following this step, Ms. Bose heard through the headphones, "Welcome, please enter your secret number." *Id.* Ms. Bose entered her Personal Identification Number (PIN) and waited for further instruction. *Id.* Instead of providing further direction, the machine started beeping and Ms. Bose was unable to continue, even when she tried pressing random buttons. *Id.* From this point on, Ms. Bose could only use the ATM with the help of Mr.

³ Denise Altobelli, who accompanied Ms. Maneki, took photographs establishing that each ATM was a Cardtronics ATM. U.F., ¶ 11; Ex. E (Declaration of Denise Altobelli).

⁴ Frank Pegram, who accompanied Mr. Lewis, took photographs confirming that the machines that Mr. Lewis sought to operate are Cardtronics machines. U.F., ¶ 14; Ex. G (Declaration of Frank Pegram).

⁵ David Smith, a sighted person who accompanied Mr. LaBarre, took photographs and made observations establishing that these were indeed Cardtronics machines. U.F., ¶ 18; Ex. I (Declaration of David K. Smith).

Paras, who told her the text of each screen and the buttons she should push to accomplish the transaction she desired. *Id.*

Similarly, Ms. Bose was unable to use Cardtronics ATMs at either the Costco or Amerada Hess in Waltham. Ex. J, ¶¶ 4-8. The Amerada Hess ATM had no Braille whatsoever, either on the keypads or in any instructional manual, and no headset for voice guidance. Ex. J, ¶ 4; Ex. K, ¶ 4. With help from Mr. Paras, Ms. Bose slid her card through the card reader and after receiving no further instructions, the machine began to beep. Ex. J, ¶ 5. By pressing all the buttons, she succeeded in hitting "Cancel" and getting her card back. Ex. J, ¶ 5; Ex. K, ¶ 5.

While the Costco ATM keys had Braille, there were no Braille instructions on the machine or a Braille instruction booklet, rendering the Braille of no assistance to Ms. Bose in her attempt to independently use the ATM. Ex. J, ¶ 7. A headphone jack was present, but when Ms. Bose plugged in her headphones, it was inoperative. Ex. J, ¶ 7; Ex. K, ¶ 7.

At the Costco and Amerada Hess in Waltham and the Amerada Hess in Needham, Ms. Bose could only operate Cardtronics ATM machines by revealing her PIN number and obtaining guidance on each step from a sighted person, Mr. Paras, who read to her the text on each screen and told her which buttons she needed to press throughout the process. Ex. J, ¶¶ 6, 8, 11; Ex. K, ¶¶ 6, 8, 11. These experiences were extremely frustrating, as well as time consuming and inefficient for Ms. Bose. Without Mr. Paras' help, she would have been entirely unsuccessful in her transactions at the Cardtronics ATMs. Ex. J, ¶ 12.

Cardtronics will be unable to dispute that it owns ATMs that are neither accessible nor independently usable by the blind and, therefore, fail to meet the requirements of ADAAG, 28 U.S.C. App. A., § 4.34.5. As set forth below, for all ATMs that Cardtronics owns that were

installed after January 26, 1993, and that do not meet the ADAAG standard, Plaintiffs are entitled to summary judgment and an order directing compliance.

**II. DEFENDANTS' ATMS ARE FACILITIES COVERED BY
ADAAG AND THE NEW FACILITIES MANDATE.**

Plaintiffs allege in their Complaint that the Defendants have violated the ADA's new facilities mandate, 42 U.S.C. § 12183 (a)(1), by failing to comply with the ADAAG standard adopted as part of this mandate. *See* Plaintiffs' Third Amended Complaint, Count V; *see also* 28 C.F.R. § 36.406; 28 U.S.C. Part 36 App. A., § 4.34.5. It is undisputed that the ADAAG standard applies to Cardtronics ATMs,⁶ and the Court has ruled that Department of Justice regulations, which incorporate the ADAAG, set forth the standard which is "sufficient to satisfy" the ADA obligation that ATMs be independently usable by blind persons. *See* Memorandum and Order at 8 (2/22/05).

The ADAAG, adopted as regulation by the Department of Justice and codified at 28 C.F.R. Part 36 App A, were developed pursuant to the ADA for the purpose of establishing design standards required for all (1) new facility construction; (2) owner-initiated alterations, to the maximum extent feasible; and (3) structural communication and architectural barriers in facilities in existence on or before January 26, 1993, if readily achievable.⁷ 42 U.S.C. §

⁶ In fact, Defendants unsuccessfully sought judgment on the pleadings, arguing that the ADAAG standards barred the "sole" relief of voice guidance Plaintiffs requested and that upcoming changes in ADAAG standards would moot this lawsuit. In their pleadings, the Defendants expressly asserted that their ATMs are facilities governed by ADAAG, that ADAAG regulations set forth the accessibility requirements for ATMs, and that those regulations require that ATMs be "independently usable" by blind people. *See* Memorandum in Support of Defendants' Rule 12(c) Motion for Judgment on the Pleadings ("Def. 12(c) Mem."), p. 2 (stating "ADAAG's specific provisions set forth accessibility requirements for ATMs" and quoting the "independently usable" standard) and p. 9 (emphasizing that Congress unambiguously expected compliance with ADAAG and that ADAAG addresses ATMs).

⁷ "Facilities" cover more than buildings and include equipment such as ATMs. ADAAG begins by explaining that "This document contains scoping and technical requirements for accessibility to buildings *and* facilities by individuals with disabilities under the Americans with Disabilities Act (ADA) of 1990. These scoping and technical requirements are to be applied during the design, construction and alteration of buildings *and* facilities covered by titles II and III of the ADA..." 28 C.F.R. Part 36, App. A, ADAAG, Purpose Clause, § 1 (emphasis added). In turn,

12204(b); *see* Department of Justice ADA Title III Technical Assistance Manual §§ III-5.000 and III-4.4300. *See United States v. AMC Entertainment, Inc.*, 245 F. Supp 2d 1094, 1100 (C.D. Cal. 2003).

A “new facility” (one installed or built after January 26, 1993) must comply with the ADAAG requirements unless it is structurally impracticable to do so. 42 U.S.C. § 12193(a)(1). Within ADAAG, § 4.34.5 is the standard that applies to ATMs deployed after January 26, 1993. It is, therefore, the standard under which the Court should decide this motion for summary judgment on Count V of the Third Amended Complaint, targeted at Cardtronics-owned ATMs installed after January 26, 1993.⁸

Recognizing that retrofits of existing facilities and changes to policies, auxiliary aids and services could be costly to the owner or operator of a public accommodation, Congress tempered those sections of the Act that imposed such requirements by, for example, allowing discriminatory policies when nondiscrimination would impose an undue burden and excusing structural modifications to existing facilities that would not be readily achievable. *See, e.g.*, 42 U.S.C. § 12182(b)(2)(A)(ii)-(iv). H.R. Rep. 101-485(III), 101st Cong. 2nd Sess., pt. 3 at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 483 (“House Report”). Congress still believed, however, that it was reasonable to expect compliance with respect to physical structures and facilities completed 30 months after the effective date of the Act (January 26, 1993), so it established only a very limited exception from the new facilities mandate: compliance was

a “facility” is defined in part as “*any portion of buildings, structures, site improvements . . . equipment . . . or other . . . personal property located on a site.*” 28 C.F.R. § 36.104; 28 C.F.R. Part 36, App. A, ADAAG, Definitions, § 3.5. (emphasis added).

⁸The Plaintiffs’ Third Amended Complaint also presses ADA claims that fall outside ADAAG because they do not deal with facilities at all. *See* Third Amended Complaint, Count I (based on the ADA’s full enjoyment mandate, 42 U.S.C. § 12182(a)), Count II (based on the reasonable modification of policies, procedures and practices mandate, 42 U.S.C. § 12182(2)(A)(ii)), and Count III (based on the auxiliary aids and services mandate, 42 U.S.C. § 12182(2)(A)(iii)). These counts are not at issue in this motion.

excused only if it was “structurally impracticable.” 42 U.S.C. § 12183(a)(1); *see also* House Report at 60. The structural impracticability exception, however, only arises when unique characteristics of terrain bar compliance with an ADAAG requirement.⁹ A defense of structural impracticability, therefore, does not apply to the ADA violation alleged in the Plaintiffs’ Complaint. ATMs must provide all instructions and information for use in a format that is independently usable and accessible to the blind.

The Court has already held that ADAAG applies to the ATMs at issue and, therefore, for those ATMs owned by Cardtronics and installed after January 26, 1993, the Defendants must satisfy ADA’s new facilities mandate, 42 U.S.C. § 12183 (a)(1), and its implementing ADAAG regulation, 28 U.S.C. Part 36 App. A., § 4.34.5, by offering information and instructions to blind customers in a format they can use independently. The affidavits of the blind testers establish, however, that Cardtronics has not complied with the relevant ADAAG provision. Defendants have not, and cannot, assert the only defense available for non-compliance—that unique characteristics of the terrain make it structurally impracticable for them to make their ATMs accessible to blind customers. Accordingly, the Court should enter both summary and declaratory judgments holding Cardtronics liable under Count V for all such ATMs.

III. THE COURT SHOULD ORDER CARDTRONICS TO COMPLY WITH ADAAG § 4.34.5.

Upon granting partial summary judgment to Plaintiffs, the Court should order Cardtronics to comply with ADAAG § 4.34.5 as to all ATMs it currently owns that were installed after January 26, 1993, and that do not have all information and instructions for use

⁹ “The limited structural impracticability exception means that it is acceptable to deviate from accessibility requirements only where unique characteristics of terrain prevent the incorporation of accessibility features and where providing accessibility would destroy the physical integrity of a facility.” Preamble to 28 C.F.R. Part 36 Appendix, 56 F.R. 35546 *et seq.*, Comments to Section 36.401 (July 26, 1991).

readily accessible to and independently usable by the blind.¹⁰ Neither the law nor the facts are in dispute. The enforcement provisions of the ADA specifically authorize affirmative injunctive relief. 42 U.S.C. § 12188(a)(1).¹¹ Moreover, when the new facilities mandate is violated, the ADA expressly requires that injunctive relief “include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities....” 42 U.S.C. § 12188(a)(2).¹²

Courts confronted with violations of Title III’s new facilities mandate have issued such affirmative injunctions, specifying simply the ADAAG provision to which the public accommodation must adhere. For example, the court in *Independent Living Resources v. Oregon Arena Corporation*, 982 F. Supp. 698 (D. Ore. 1997), after determining that the owners of a large arena had violated a number of ADAAG’s design provisions, ordered the defendants to comply with the specifics of the applicable ADAAG standard. *Id.* at 786 (directing that “[t]he suites must comply with the design Standards and be made readily accessible to persons with disabilities.”), see *Anderson v. Rochester-Genesee Regional Transportation Authority*, 206 F.R.D. 57, 71 (W.D.N.Y. 2001) (in granting partial summary judgment in favor of plaintiffs, defendants were ordered “to take immediate steps to comply with their obligations under the

¹⁰ Cardtronics owns some ATMs equipped with a voice guidance system that presents all instructions and information for use in a manner accessible to and independently usable by the blind, including, notably, some of the ATMs E*TRADE Access, Inc. owned and equipped with voice guidance as a result of a partial settlement agreement between the parties. Plaintiffs, of course, do not seek relief as to those machines covered by that partial settlement agreement nor as to any other Cardtronics-owned ATMs whose voice guidance system fully satisfies ADAAG’s independent usability standard, not because voice guidance is the only method of satisfying the ADAAG requirement, but because it is one method that does satisfy the ADAAG requirement.

¹¹ 42 U.S.C. § 12188(a)(1) incorporates the remedies and procedures set forth in section 42 U.S.C. § 2000a-3(a) as the remedies and procedures available under Title III. These include “... an application for permanent or temporary injunction, restraining order, or other order....”

¹² Plaintiffs believe that the Court can order voice guidance, but because the Court has indicated otherwise, Plaintiffs seek, instead, an injunction directing the Defendants to comply with ADAAG’s specific directive addressing the accessibility of ATMs by the blind.

ADA and federal regulations implementing that Act. . . .”) Given that the only relief that the Court can provide in this Title III action is injunctive in nature, and given the years that Cardtronics has violated the ADAAG regulation, there is no reason for the Court to delay in promptly ordering compliance with the law.¹³ To do otherwise would be to find that there is a right without a remedy – a conclusion abhorrent to our jurisprudence. *See, e.g., Siegel v. First Pa. Banking & Trust Co.*, 201 F. Supp. 664, 670 (E.D. Pa. 1961)(“A right without remedy is no right at all.”).

CONCLUSION

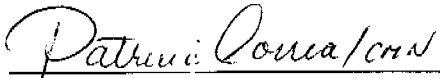
For these reasons, Plaintiffs request that their Motion for Partial Summary Judgment be granted as to all Cardtronics-owned ATMs installed after January 26, 1993 and, that the Court order Defendants Cardtronics, LP and Cardtronics, Inc., to immediately take actions to comply with ADAAG § 4.34.5.

¹³ The injunction need not specify the manner in which the Defendants shall comply with the regulation. As Defendants have argued, *see* Deft. 12(c) Mem., p. 3, and the Court has noted, the framers of the ADAAG determined to leave it to the deployers of ATMs which method they would use to satisfy the ADAAG standard.

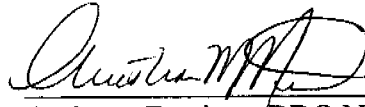
Respectfully submitted,

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CERTIFICATE OF SERVICE

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