

**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.** )

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**Case No. 03 11206 MEL**

**MEMORANDUM IN SUPPORT OF DEFENDANTS'  
CROSS-MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS'  
CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT**

Plaintiffs either will not or cannot allege a valid claim under Title III of the Americans with Disabilities Act ("ADA"). The law is absolutely clear: Title III imposes an affirmative burden on Plaintiffs to identify the specific accommodation they contend will rectify an alleged inaccessibility. These Plaintiffs obstinately refuse to acknowledge this burden. They pretend Title III law does not apply to them, and they have repeatedly refused to identify any specific accommodation that they champion. Plaintiffs' silence is remarkable; it pervades their thrice-amended Complaint, their numerous motions, and their discovery responses.

Throughout this lawsuit, Plaintiffs have identified only two specific accommodations, but Plaintiffs' claim is not based on either one. (1) Plaintiffs' primary purpose in filing the lawsuit was to require Defendants to implement voice-enabled technologies in the Defendants' ATMs. In its February 2005 Order, the Court correctly ruled that Plaintiffs were not entitled to this relief under the ADA. (2) The only other specific accommodation Plaintiffs have ever mentioned is Braille instructions. However, Plaintiffs' own Third Amended Complaint

expressly rejects any claim for Braille, alleging that Braille could never be a sufficient accommodation. Third Amended Complaint ¶ 29. Plaintiffs are masters of their own Complaint; having chosen to plead that Braille is not satisfactory to them, they cannot not rely on a Braille accommodation to satisfy their affirmative burden.

In its February 2005 Order, the Court concluded (under the liberal standard of review of Rule 12(b)) that Plaintiffs might be able to establish a “set of facts” that would constitute a valid claim under the ADA. It is now obvious that Plaintiffs will not or cannot even allege, much less prove, the facts that constitute a sufficient ADA claim. Defendants do not suggest that no accommodation exists. However, Plaintiffs, not Defendants, have the initial burden of identifying one or more appropriate accommodations. Because Plaintiffs refuse to identify an accommodation acceptable to them, and therefore have not alleged a valid ADA claim, the Court should grant summary judgment in Defendants’ favor and dismiss Plaintiffs’ ADA claims with prejudice.

### **BACKGROUND**

Plaintiffs have argued at length about perceived inaccessibility of Defendants’ ATMs, but Plaintiffs have never identified a specific, legally permissible accommodation they seek. Instead, Plaintiffs focus all of their energy on a potential accommodation this Court has already rejected (voice-enabled technology) and another accommodation Plaintiffs themselves have rejected as insufficient under the ADA (Braille).

In their Third Amended Complaint, substantively unchanged from their initial Complaint, Plaintiffs allege that Defendants’ ATMs are inaccessible to blind people. Despite being filed well after the Court rejected their claim for voice-enabled technology, the Third Amended Complaint at length expounds on the virtues of this technology. *See* Third Amended

Complaint ¶¶ 25, 30 & 31. The Third Amended Complaint also expressly rejects the use of Braille instructions as an accommodation for blind users of the ATMs:

Although some E\*TRADE and Cardtronics ATMs have Braille keypads and labels, this feature is not an effective accommodation under the ADA.

*Id.* ¶ 29. Nowhere does the Third Amended Complaint mention any other specific accommodation to the alleged inaccessibility.

Plaintiffs similarly make no mention of any other accommodation in their pleadings and discovery responses. In fact, Plaintiffs have *refused* to identify any other accommodation. Defendants served a pointed interrogatory, asking Plaintiffs to “[d]escribe in detail each and every different type of accommodation that Plaintiffs . . . contend[] is reasonable . . . and would make an ATM ‘independently usable’ by blind people . . . .” Plaintiffs’ rambling, argumentative response never answered the question: Plaintiffs did not identify a single, specific accommodation for blind users of ATMs, other than voice-enabled technology. *See* Plaintiffs’ Response to Defendants’ Second Set of Interrogatories, attached hereto as Exhibit 1. In no other pleading, filing or oral argument has Plaintiff identified any solution to the alleged inaccessibility of ATMs to blind people, other than voice-enabled technology or Braille. Plaintiffs have had more than ample opportunity, having filed oppositions to Defendants’ separate motions under Rule 19 and for judgment on the pleadings, and having filed numerous discovery-related motions.

### **STANDARD OF REVIEW**

Under Fed. R. Civ. P. 56, summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*,

477 U.S. 317, 322 (1986); *accord Terry v. Bayer Corp.*, 145 F.3d 28, 34 (1st Cir. 1998) (to avoid summary judgment, plaintiff must show existence of evidence in support of each element essential to plaintiff's case); *Ralar Distribs., Inc. v. Rubbermaid, Inc.*, 4 F.3d 62, 67 (1st Cir.1993). Defendants can move for summary judgment not by offering evidence but merely by pointing out the lack of evidence on an essential element of Plaintiffs' claim. *Terry*, 145 F.3d at 34; *Storage Tech. Corp. v. Cisco Sys., Inc.*, 395 F.3d 921, 923 (8th Cir. 2005); *Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 390 F.3d 336, 339 (5th Cir. 2004). In response to such a motion, Plaintiffs must come forward with admissible evidence showing that at least a genuine dispute exists on every essential element of their claim. *Celotex*, 477 U.S. at 322; *Terry*, 145 F.3d at 34. If Plaintiffs do not oppose such a motion with evidence supporting every element of their claim, the Court should enter summary judgment in favor of the Defendants. *Celotex*, 477 U.S. at 322; *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1197-98 (10th Cir. 2000).

### ARGUMENT

In its February 22, 2005 Order, the Court did not dismiss Plaintiffs' ADA claims outright because "the Plaintiffs may be able to prove a set of facts that would entitle them to some relief, other than voice-guidance technology." Order at 9.

Defendants respectfully submit that, after numerous opportunities, Plaintiffs have more than sufficiently demonstrated they are unwilling or unable to even allege — much less prove — any facts that constitute a sufficient ADA claim. Plaintiffs abjectly refuse to identify even one specific accommodation they seek at Defendants' ATMs. Plaintiffs would rather turn that burden over to the Defendants in the first instance. Plaintiffs therefore fail to state a valid claim under the ADA. The precedent under the ADA is remarkably stark and consistent: the

plaintiff has the initial burden of identifying the accommodation or modification it seeks in the litigation. Plaintiffs here cannot ignore this obligation and pretend it should fall on Defendants. Because they are unwilling or unable to satisfy their affirmative obligation, Plaintiffs fail to state a valid claim under the ADA, and the Court should grant summary judgment in Defendants' favor.

**I. PLAINTIFFS HAVE THE AFFIRMATIVE BURDEN OF IDENTIFYING THE ACCOMMODATION THEY SEEK UNDER TITLE III OF THE ADA**

The First Circuit demands that an ADA plaintiff "bear the burden of showing the existence of a reasonable accommodation." *Feliciano v. State of R.I.*, 160 F.3d 780, 786 (1st Cir. 1998); accord *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000) ("the burden of showing reasonable accommodation is on the plaintiff"). Only if Plaintiffs allege the existence of a reasonable accommodation does the burden shift to Defendants to show the proposed accommodation is unreasonable. *Feliciano*, 160 F.3d at 786-87; *Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 36-37 (1st Cir. 2000) (where plaintiff first identified the accommodation, burden shifted to defendant to show it would impose an undue hardship).

Plaintiffs have consistently but wrongly tried to distinguish this First Circuit precedent by arguing that it does not apply to their claim under Title III of the ADA (42 U.S.C. §§ 12181-12189, concerning public accommodations), but only arises under Title I (42 U.S.C. §§ 12111-12117, concerning employment). For example, Plaintiffs have ridiculed their obligation to identify a reasonable accommodation or modification as a "bizarre notion . . . that arises in ADA employment cases, but is not part of the jurisprudence of Title III, the public accommodations section of the ADA." Plaintiffs' Motion to Compel Further Answers to Their

First Set of Interrogatories at 2 n. 1. Plaintiffs do not cite a single case to support this proposition; the reason is because Plaintiffs are simply wrong.

As in other ADA cases, Title III plaintiffs are absolutely required “to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.” *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *accord Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 146 (D. Mass. 1997) (“In the reasonable modifications context, the plaintiff has the initial burden of proving ‘that a modification was requested and that the requested modification is generally reasonable’”) (quoting *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir. 1997)); *Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1105 (D. Colo. 2000) (“[T]he plaintiff in a title III case has the burden of proving that a modification was requested and that the requested modification is reasonable.”). It makes perfect sense to apply to Title III claims the standard developed under Title I, because “there appears to be little, if any, substantive difference between the ‘reasonable accommodation’ which title I requires and the ‘reasonable modification’ which title III mandates.” *Dahlberg*, 92 F. Supp. 2d at 1105-06.

The First Circuit is consistent with other courts that require a Title III plaintiff to identify what reasonable accommodation or modification would afford them access. The First Circuit set out the framework for a Title III plaintiff in a retail sales case:

To recover under section 12182(b)(2)(A)(ii) in a retail sale case . . . the plaintiff must show that the defendant has a discriminatory policy or practice in effect; ***that he (the plaintiff) requested a reasonable modification in that policy or practice which, if granted, would have afforded him access to the desired goods; that the requested modification--or a modification like it--was necessary to afford that access***; and that the defendant nonetheless refused to modify the policy or practice.

*Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) (emphasis added); *see also Goldstein v. Harvard Univ.*, 77 Fed. Appx. 534, 537 (1st Cir. 2003) (“The operative provision, 42 U.S.C. § 12182(b)(2)(A)(ii), requires a person with a disability to request a reasonable and necessary modification.”). These cases make clear that a mere showing of inaccessibility is inadequate to state a claim under Title III.

## **II. PLAINTIFFS HAVE NOT IDENTIFIED ANY SPECIFIC ACCOMMODATION**

Plaintiffs do not present any specific accommodation they desire under the ADA, and therefore they have not proven a valid ADA claim.

Because Plaintiffs have never presented any specific accommodation they claim satisfies the ADA (other than voice-enabled technology), they have not proven a valid ADA claim. Their demand for accommodations is always made in the broadest terms, for example: “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.” Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment at 8 (“Pl. Mem.”).

Besides voice-guidance technology, which the Court dismissed from this lawsuit, the only other specific accommodation the Plaintiffs have ever identified is Braille. Ironically, Plaintiffs’ motion implies that Braille instructions might be a sufficient accommodation, *see, e.g.*, Pl. Mem. at 5, and the vast majority of the declarations accompanying Plaintiffs’ motion address Braille keys and instructions at 12 of Defendants’ ATMs. However, Plaintiffs have previously scoffed at Braille as a reasonable accommodation — even after the Court recently rejected Plaintiffs’ preferred voice-enabled technology. Plaintiffs’ Third Amended Complaint outright alleges, “Although some E\*TRADE and Cardtronics ATMs have Braille keypads and

labels, this feature is not an effective accommodation under the ADA.” Third Amended Complaint ¶ 29. Plaintiffs cannot ask for summary judgment on a theory baldly rejected by their own Complaint. *Stefanik v. Friendly Ice Cream Corp.*, 183 F.R.D. 52, 53-54 (D. Mass. 1998) (on motion for summary judgment, “plaintiff is simply not permitted to offer, without explanation, evidence directly contradicting the allegations of his own complaint . . . [P]laintiff is not permitted to kick over the chess board in the face of a checkmate. He is bound by the averments of his pleadings and may not . . . simply contradict them to avoid summary judgment”). If Plaintiffs desire to reverse course almost two years into this litigation and now seek Braille accommodations, they would need to ask for leave to amend their Complaint — something Plaintiffs plainly refused to do.

Plaintiffs demonstrate in their own motion for summary judgment that they have no intention of asking for a specific accommodation at Defendants’ ATMs. Through their motion, Plaintiffs seek an injunction that uses the broadest possible language — constituting nothing more than a prohibited “obey the law” injunction, *see* Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment at 9-12. In support of that vague, unenforceable injunction, Plaintiffs contend they “need not specify the manner in which the Defendants shall comply with regulation.” Pl. Mem. at 10 n.13. This argument demonstrates that Plaintiffs are unable or unwilling to satisfy their affirmative burden under the ADA to allege the particular accommodation they seek.

The Plaintiffs are masters of their own Complaint; it is their lawsuit, not the Court’s and certainly not the Defendants’. Plaintiffs choose not to identify the accommodation(s) about which the litigation should revolve, and Plaintiffs therefore fail to satisfy their affirmative burden under the ADA. Neither the Court nor the Defendants have the



obligation or burden of filling the void left in the Plaintiffs' affirmative case. With the Plaintiffs having refused time after time over two years to meet their own burden, it is no longer a matter of theoretical possibilities that the Plaintiffs might prove at trial (as it was when the Court ruled in February on Defendants' Motion for Judgment on the Pleadings). Lacking any evidence from the Plaintiffs that would satisfy their affirmative burden, Defendants are entitled to summary judgment.


### CONCLUSION

For these reasons, the Court should grant Defendants' Cross Motion for Summary Judgment On Plaintiffs' Claims Under The ADA, and enter final judgment in Defendants' favor dismissing with prejudice Plaintiffs' claims arising under the Americans With Disabilities Act.

Respectfully submitted,

E\*TRADE ACCESS, INC., E\*TRADE BANK,  
CARDTRONICS, LP AND CARDTRONICS, INC.

By their attorneys,

  
\_\_\_\_\_  
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McLean, Virginia 22102  
(703) 720-7000

Dated: June 15, 2005

# **EXHIBIT 1**

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, JENNIFER BOSE,  
THERESA JERALDI and  
PHILIP OLIVER,

C.A. No.: 03 11206-MEL

Plaintiffs,

v.

E\*TRADE ACCESS, INC. and  
E\*TRADE BANK,

Defendants.  
.....

**COMMONWEALTH'S RESPONSES TO DEFENDANT  
E\*TRADE ACCESS, INC.'S SECOND SET OF INTERROGATORIES  
TO PLAINTIFF COMMONWEALTH OF MASSACHUSETTS**

In accordance with Fed. R. Civ. P. 26 and 33, the Commonwealth hereby submits its response to the Defendant E\*TRADE Access, Inc.'s Second Set of Interrogatories to Plaintiff Commonwealth of Massachusetts. The Commonwealth reserves its right to supplement its response.

**DEFINITIONS**

1. "Commonwealth" refers to plaintiff the Commonwealth of Massachusetts.
2. "NFB" refers to the National Federation of the Blind, Inc.
3. "Access" refers to defendant E\*TRADE Access, Inc.

1/4/06

4. "Allied lawyer doctrine" refers to the doctrine variously so called or alternatively called the "common interest doctrine" or "joint prosecution doctrine," that extends the protection of the work product doctrine and attorney-client privilege to such information shared between co-plaintiffs or other allied parties.

#### **GENERAL OBJECTIONS**

The Commonwealth incorporates herein its General Objections set forth in the Commonwealth's Responses to Defendant E\*TRADE Access, Inc.'s First Set of Interrogatories to Plaintiff Commonwealth of Massachusetts.

#### **INTERROGATORIES AND RESPONSES**

##### **Interrogatory Number 1:**

Describe in detail each and every different type or kind of accommodation that Plaintiff Commonwealth of Massachusetts contends is reasonable, not an undue burden, and would make an ATM "independently usable" by blind people, as defined in or required by 28 C.F.R. pt. 36 App. A section 4.35 (1992).

##### **Objection to Interrogatory No. 1:**

The Commonwealth objects to this interrogatory to the extent that it calls for a legal conclusion. The Commonwealth further objects to this interrogatory on the ground that the reasonableness of an accommodation and undue burden are, when applicable, affirmative defenses, and Defendants have not, to date, identified which, if any, ATMs they contend cannot reasonably be made independently useable by blind people or cannot be made independently useable without causing an undue burden. Moreover, the kinds of accommodation that will

make Defendants' various ATMs independently useable by blind persons, as well as the reasonableness and burdensomeness of those accommodations, will be the subject of expert testimony by Plaintiffs' experts based on information Defendants have not yet provided, which may include, among other things, the precise model, year, operating system and type of each ATM; its remaining useful life; the available measures to retrofit the ATMs with voice guidance technology, and the cost of doing so, in light of the model, year, and type of each ATM; the cost of any necessary replacement ATMs under Defendants' contracts with manufacturers; the revenue and profit generated by the ATMs and the role and effect of the ATMs in generating revenue and goodwill for Defendants' businesses by providing physical touch points for Defendants' web-based financial services; the extent to which Defendants factored into the purchase price for the ATMs their non-compliance with the Americans with Disabilities Act; the extent to which Defendants will need to upgrade ATMs in the next several years to satisfy regulatory mandates, to become Triple DES compliant, to respond to other changes in the industry (e.g., the end of IBM's support of the OS/2 operating system), and to offer advanced functions to customers; and the extent to which the cost of retrofitting or replacing ATMs will be offset by the Jobs and Growth Tax Relief Reconciliation Act, which provides a first-year bonus depreciation for certain upgrades to ATMs. Accordingly, Plaintiffs reserve the right to supplement its answer. Moreover, because disclosure of expert reports is not yet due, a response to this interrogatory would be premature.

**Response to Interrogatory No. Number 1:**


Subject to and without waiving the foregoing objections and General Objections, the Commonwealth responds as follows: Plaintiffs contend that voice guidance technology is the

most effective means of making ATMs independently useable by blind people within the meaning of 28 C.F.R. pt. 36 App. A section 4.35 (1992). Whether equipping the ATMs at issue with voice guidance technology, either by retrofitting them or by replacing them, poses an undue burden must be evaluated individually, and with the assistance of an expert, with respect to each ATM, depending on a number of factors that are unknown to Plaintiffs given the present state of discovery and Defendants' sole possession of relevant information (see Objection to Interrogatory No. 1 above). To the extent that equipping or replacing particular ATMs with voice guidance technology could be argued to pose an undue burden, Plaintiffs will determine, after Defendants have provided the relevant discovery, whether there are alternative effective accommodations that would not pose an undue burden. To date, however, Defendants have not identified specific ATMs that they contend cannot be equipped with voice guidance technology without posing an undue burden, and the factors that make it burdensome or unreasonable to make specific ATMs independently useable by the blind. In addition, Plaintiffs do not currently have information concerning what if any measures Defendants have taken with respect to accommodations other than voice guidance technology and what the actual or projected cost of such measures was or is.

Accordingly, Plaintiffs do not currently have the information necessary to respond to this interrogatory; and Plaintiffs reserve the right to supplement this answer.

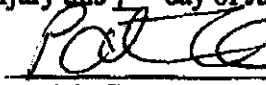
Dated: January 4, 2005

As to objections:

  
\_\_\_\_\_  
Patricia Correa, BBO # 560437  
Assistant Attorney General  
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(617) 727-2200, x 2919

I, Patricia Correa, in my capacity as Assistant Attorney General, state that the foregoing interrogatory response is based upon my personal knowledge, upon information provided to me by employees of the Attorney General's Office and co-counsel, and upon information contained in documents maintained by the Attorney General's Office. I further state that I am authorized to sign this answer on behalf of Attorney General Reilly, and while I do not have personal knowledge of all the information provided in the answer, I believe that it is true.

Sworn to under the pains and penalties of perjury this 4<sup>th</sup> day of January, 2005.

  
\_\_\_\_\_  
Patricia Correa

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail (by hand) \_\_\_\_\_

on 1/4/05

  
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**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, JENNIFER BOSE,  
THERESA JERALDI and  
PHILIP OLIVER,

C.A. No.: 03 11206-MEL

Plaintiffs,

v.

E\*TRADE ACCESS, INC. and  
E\*TRADE BANK,

Defendants.  
.....

**NATIONAL FEDERATION OF THE BLIND, INC.'S RESPONSE TO  
DEFENDANT E\*TRADE ACCESS, INC.'S SECOND SET OF INTERROGATORIES TO  
PLAINTIFF NATIONAL FEDERATION OF THE BLIND, INC.**

In accordance with Fed. R. Civ. P. 26 and 33, the NFB hereby submits its response to the Defendant E\*TRADE Access, Inc.'s Second Set of Interrogatories to Plaintiff, NFB. The NFB reserves its right to supplement its response.

**DEFINITIONS**

1. NFB refers to the National Federation of the Blind, Inc.
2. Access refers to defendant E\*TRADE Access, Inc.

**GENERAL OBJECTIONS**

The NFB incorporates herein its General Objections set forth in the NFB's Response to Defendant E\*TRADE Access, Inc.'s First Set of Interrogatories to Plaintiff, NFB.

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**INTERROGATORIES AND RESPONSES**

**Interrogatory Number 1:**

Describe in detail each and every different type or kind of accommodation that Plaintiff National Federation of the Blind contends is reasonable, not an undue burden, and would make an ATM "independently usable" by blind people, as defined in or required by 28 C.F.R. pt. 36 App. A section 4.35 (1992).

**Objection to Interrogatory No. 1:**

The NFB objects to this interrogatory to the extent that it calls for a legal conclusion. The NFB further objects to this interrogatory on the ground that the reasonableness of an accommodation and undue burden are, when applicable, affirmative defenses and Defendants have not, to date, identified which, if any, ATMs they contend cannot reasonably be made independently useable by blind people or cannot be made independently useable without causing an undue burden. Moreover, the kinds of accommodation that will make Defendants' various ATMs independently useable by blind persons, as well as the reasonableness and burdensomeness of those accommodations, will be the subject of expert testimony by Plaintiffs' experts based on information Defendants have not yet provided, which may include, among other things, the precise model, year, operating system and type of each ATM; its remaining useful life; the available measures to retrofit the ATMs with voice guidance technology, and the cost of doing so, in light of the model, year, and type of each ATM; the cost of any necessary replacement ATMs under Defendants' contracts with manufacturers; the revenue and profit generated by the ATMs and the role and effect of the ATMs in generating revenue and goodwill for Defendants' businesses by providing physical touch points for Defendants' web-based financial services; the extent to which Defendants factored into the purchase price for the ATMs their non-compliance with the Americans with Disabilities Act; the extent to which Defendants

will need to upgrade ATMs in the next several years to satisfy regulatory mandates, to become Triple DES compliant, to respond to other changes in the industry (e.g., the end of IBM's support of the OS/2 operating system), and to offer advanced functions to customers; and the extent to which the cost of retrofitting or replacing ATMs will be offset by the Jobs and Growth Tax Relief Reconciliation Act, which provides a first-year bonus depreciation for certain upgrades to ATMs. Accordingly, Plaintiffs reserve the right to supplement its answer. Moreover, because disclosure of expert reports is not yet due, a response to this interrogatory would be premature.

**Response to Interrogatory No. Number 1:**


Subject to and without waiving the foregoing objections and General Objections, the NFB responds as follows: Plaintiffs contend that voice guidance technology is the most effective means of making ATMs independently useable by blind people within the meaning of 28 C.F.R. pt. 36 App. A section 4.35 (1992). Whether equipping the ATMs at issue with voice guidance technology, either by retrofitting them or by replacing them, poses an undue burden must be evaluated individually, and with the assistance of an expert, with respect to each ATM, depending on a number of factors that are unknown to Plaintiffs given the present state of discovery and Defendants' sole possession of relevant information (see Objection to Interrogatory No. 1 above). To the extent that equipping or replacing particular ATMs with voice guidance technology could be argued to pose an undue burden, Plaintiffs will determine, after Defendants have provided the relevant discovery, whether there are alternative effective accommodations that would not pose an undue burden. To date, however, Defendants have not identified specific ATMs that they contend cannot be equipped with voice guidance technology without posing an undue burden, and the factors that make it burdensome or unreasonable to make specific ATMs independently useable by the blind. In addition, Plaintiffs do not currently have information concerning what if any measures Defendants have taken with respect to

accommodations other than voice guidance technology and what the actual or projected cost of such measures was or is.

Accordingly, Plaintiffs do not currently have the information necessary to respond to this interrogatory; and Plaintiffs reserve the right to supplement this answer.

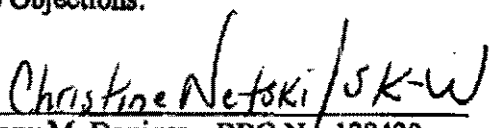
**VERIFICATION**

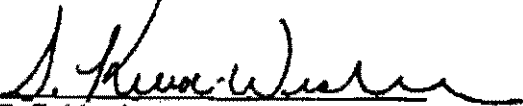
I solemnly declare and affirm under the penalties of perjury that the foregoing Response to Interrogatories is true to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
National Federation of the Blind  
By: Marc Maurer, President

Dated: January 5, 2005

As to Objections:

  
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