UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

REPLY BRIEF IN SUPPORT OF
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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

By their attorneys,

Joseph L. Kociubes BBO # 276360
Jenny K. Cooper BBO # 646860
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Douglas P. Lobel
David A. Vogel
ARNOLD & PORTER LLP
1600 Tysons Boulevard
McLean, Virginia 22102
(703) 720-7000

TABLE OF CONTENTS

Repeatedly pressed to describe how Defendants should modify their ATMs to make them comply with the ADA, Plaintiffs never respond. Instead, Plaintiffs misconstrue the ADA, ignore a wealth of precedent, misstate their burdens, and assert factual conclusions either unsupported by evidence or facially unreasonable. The record shows that Plaintiffs have not produced evidence to support a *prima facie* ADA claim; as a result, Defendants are entitled to summary judgment on all counts.

First, Plaintiffs have failed to establish that their claims about ATMs even fall within the scope of two of the ADA sections they rely upon. Plaintiffs cannot get partial summary judgment under ADA § 12183(a) (Count V) because the language of the statute, the implementing regulations, the legislative history, and ***every*** case decided under it make clear that this section applies only to the ***design and construction of buildings and facilities of occupancy***, not to equipment like ATMs. Similarly, Plaintiffs have not articulated any viable theory under the general ADA provision in § 12182(a) (Count I), because regulations and Supreme Court precedent require Plaintiffs to raise claims under the more specific provisions of ADA § 12182(b) (Counts II through IV).

Second, Plaintiffs have failed to satisfy their burdens under the ADA and Rule 56. Defendants argued in their initial brief that Plaintiffs have failed to identify the "accommodation" they seek, *i.e.*, to identify how Defendants must modify their ATMs to comply with the ADA. Plaintiffs play word games by arguing that none of the ADA sections at issue use the term "accommodation," but ***every*** relevant ADA section imposes a similar burden on Plaintiffs to identify: a "reasonable modification" to policies or procedures (Count II, under § 12182(b)(2)(A)(ii)); "necessary steps" to "remedy" the "absence of an auxiliary aid" (Count III, under § 12182(b)(2)(A)(iii)); or how Defendants can "readily" "remove" alleged "structural

barriers" (Count IV, under § 12182(b)(2)(A)(iv)). Because Plaintiffs offer ***no evidence*** to meet any of these standards, they have not met their burden under the ADA and Rule 56, and Defendants are entitled to summary judgment.

In their Opposition, Plaintiffs repeatedly contest what their burdens are. In fact, Plaintiffs' burdens are plainly set forth in the ADA and case law, and just as plainly have not been met:

COUNT	SUBSECTION OF ADA	UNDER STATUTE, PLAINTIFF MUST:	PLAINTIFFS' BURDEN OF PROOF
I	12182(a)	Identify discrimination by a public accommodation not defined by subsection 12182(b)	NOT MET - because specific provisions of 12182(b) control over general rule of 12182(a) (28 C.F.R. 36.213; *Martin*)[1]
II	12182(b)(2)(a)(ii)	Identify reasonable modifications to policies, practices or procedures	NOT MET - because Plaintiffs have not identified evidence of any reasonable modification to Defendants' policies (*Johnson*; *Dudley*)[2]
III	12182(b)(2)(a)(iii)	Identify steps necessary to remedy the absence of auxiliary aids	NOT MET - because Plaintiffs have not identified the necessary steps or the absent auxiliary aid (*Lindgren*)[3]
IV	12182(b)(2)(a)(iv)	Identify how removal of structural barriers is readily achievable	NOT MET - because Plaintiffs have not suggested a method of barrier removal or proffered evidence that the method is readily achievable (*Hermanson*; *Brother*)[4]
V	12183(a)(1)	Identify failures in the design and construction of "facilities for first occupancy," except where it is structurally impracticable	NOT MET - because this section only governs the design and construction of buildings themselves, not equipment that might be installed in buildings (28 C.F.R. § 36.401; *CCDC*)[5]

1 *See* Section III(D), at 20-22.

2 *See* Section III(C), at 14-20.

3 *See* Section III(A), at 10-12.

4 *See* Section III(B), at 12-14.

5 *See* Section II, at 4-9.

I. PLAINTIFFS CANNOT AVOID SUMMARY JUDGMENT UNDER RULE 56 BY INVOKING THE COURT'S PREVIOUS ORDER UNDER RULE 12

Plaintiffs repeatedly but wrongly claim that Defendants' Cross-Motion for Summary Judgment was already resolved in the Court's February 22, 2005, Order ruling that the ADA does not require voice guidance technology. *See* Pl. Opp. at 2. Plaintiffs confuse two different standards of review. The Court's February Order examined the sufficiency of the Complaint under the liberal Rule 12 standard; Defendants' Motion under Rule 56 requires Plaintiffs to set forth admissible evidence supporting every element of their claims. The Court's Order addressing Plaintiffs' pleading does not excuse their failure to satisfy their evidentiary burden on summary judgment.

Ironically, while Plaintiffs embrace part of the Court's Order, they call the Court's ruling that the ADA does not require voice technology a "***suggestion, in dicta***," Pl. Opp. at 1. Since that Order was issued, Plaintiffs have not identified ***any other change*** they want made to Defendants' ATMs. Realistically, the ATM industry has only two plausible alternatives to make ATMs accessible to blind people: Braille (an option Plaintiffs entirely reject in their Complaint) and voice technology (an option not required by the ADA). Plaintiffs remain silent about what alternative they wish Defendants to employ, pretending that they are giving Defendants "flexibility," *see* Plaintiffs' Memorandum in Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Pl. Reply") at 15, but knowing full well that Defendants would have no other alternative but to use voice technology. Plaintiffs thus seek to achieve indirectly the very result this Court "suggested" is not available to them by doing an end-run around this Court's February Order.

II. PLAINTIFFS HAVE NOT SHOWN ADA § 12183(a)(1) APPLIES TO ATMS, SO DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT V

Not only have Plaintiffs failed to prove they are entitled to summary judgment on Count V under ADA § 12183(a)(1) (which Plaintiffs call the "new construction mandate"), but Plaintiffs have failed to establish a *prima facie* claim: that ADA section ***has no application*** whatsoever to claims involving ATMs. The plain language of the section, the implementing regulations, the statute's legislative history, and every case ever interpreting § 12183(a)(1) confirms this. Plaintiffs have not and cannot cite a single case showing they can maintain a claim for ATMs under § 12183(a)(1); in fact, the case of *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707 (D. Colo. 2004) ("*CCDC*"), painstakingly analyzes why § 12183(a)(1) does not apply to claims such as those Plaintiffs raise here.

A. The Plain Language Of § 12183 Makes Clear That It Does Not Cover ATM Accessibility.

To avoid Defendants' argument that their ADA claims require Plaintiffs to identify the accommodation they desire, Plaintiffs simply assert that a claim under ADA § 12183(a)(1) imposes different (and broader) requirements than § 12182. Pl. Opp. at 5. Section 12183(a)(1) is indeed different -- it does not apply to ATMs at all -- because it concerns ***only*** the ***construction*** of ***buildings*** and other facilities ***for occupancy***, not devices that might later be affixed to them. This limitation on § 12183(a)(1) is obvious from its plain language:

> [A]pplied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes . . . a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection.

42 U.S.C. § 12183(a)(1). An ATM is not "constructed" (it is manufactured) and it is not "occupied" (it is used). A plain reading of this statutory language shows that this section is inapplicable to ATMs.[6]

B. The Implementing Regulations Prove That § 12183 Does Not Cover ATMs.

The Department of Justice's regulations implementing § 12183 (to which this Court should afford *Chevron*-type deference)[7] prove that § 12183 does not cover ATMs. The regulations interpret "facility" to mean only buildings -- not devices like ATMs. This is made clear from several aspects of the regulations:

"Date of First Occupancy." The regulations measure the statutory requirement of "first occupancy" by the dates that the defendant obtains "building permits" or "certificates of occupancy" for the "facility." 28 C.F.R. § 36.401(a)(2) (*see* Exhibit 1). These events -- the ***only*** tests set forth in the regulations -- obviously do not relate to ATMs, for which such permits and certificates are inapplicable.

Plaintiffs try to obscure this distinction by, for instance, referring to the dates Defendants' ATMs were "deployed." *E.g.*, Pl. Reply at 3. But neither § 12183 nor the implementing regulations refers to "deployment" dates. Plaintiffs have ignored completely the requirement to establish the applicability of § 12183 based on the dates of "building permits" or "certificates of occupancy," so they have not met their moving burden.

---

[6] The statute makes no reference whatsoever to any devices or machines that might be attached to buildings, other than elevators. *Id.* § 12183(b) (defining which buildings must contain elevators). But the reference to elevators ultimately is a reference to the design of the building itself; the decision whether to include an elevator in a building radically affects the design and construction of the building itself. Nothing in this lawsuit possibly affects the design of a building. Whether an ATM's façade has a small hole on its face to accommodate headphones or has a Braille sticker in no way affects a building's floor plan.

[7] *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

"Structurally Impracticable." The regulation also defines the statutory exception of "structural impracticability" as when an accommodation is impossible because of the "terrain" around the building. *Id.* § 36.401(c)(1) (*see* Exhibit 1). "Terrain" only affects the design of a building, not the design of the face plate or software of an ATM, or for that matter, of any device installed within the building. In fact, Plaintiffs concede that ATMs are not affected by "terrain" when they assert that Defendants here have no "structural impracticability" defense under this section. Pl. Reply at 7. This provides additional support for the conclusion that § 12183 does not apply to ATMs.

C. The Legislative History Of § 12183 Proves It Covers Only Buildings, Not Devices That Might Be Attached To Buildings Like ATMs.

Plaintiffs also ignore the legislative history that proves that Congress intended § 12183 to apply only to the design and construction of the buildings and places of occupancy, not to devices that might be later installed in a building.

Congress expressly stated that § 12183 is limited to accessibility issues arising in the "planning and construction of new buildings and alterations." H.R. Rep. No. 485, 101st Cong., 2nd Sess., pt. 3, at 60 (1990), *reprinted in* 1990 U.S. Code Cong. & Admin. News 445, 483 (*see* Exhibit 2). Section 12183 ensured that "all new facilities which potentially may be occupied by places of public accommodation but whose first occupant may not be such an entity are constructed in such a way that they are readily accessible to and usable by individuals with disabilities for the original use ***for which the building is intended***." S. Rep. No. 101-116, at 72 (1989) (*see* Exhibit 3). Nowhere does the legislative history of § 12183 discuss accessibility of manufactured devices like ATMs that are later affixed to a building.

The purpose of § 12183 shows why Plaintiffs cannot extend § 12183 to ATMs. Congress determined that accommodations for disabled persons are most easily adopted during the initial design and construction of a facility. H.R. Rep. No. 485, at 60 (1990). By contrast, a change to a device like an ATM after it is manufactured requires retrofits, for which the relative costs of the retrofit must be considered. *Id*. Plaintiffs' interpretation of §12183 -- that the relative cost of retrofitting an ATM is irrelevant (Pl. Reply at 7-8) -- would turn this entire analysis on its head. Nowhere does Congress express an intent to force Defendants to retrofit machines regardless of cost, just because they were installed in buildings constructed after a certain date. In fact, the defenses Congress gave Defendants under § 12182 belie any such notion.[8] Plaintiffs' interpretation of § 12183 is nonsensical, and Plaintiffs offer no statutory, regulatory or case support to justify its expansive view.

D. Every Case To Apply § 12183 Proves That It Covers Only The Design Of Buildings, Not The Design Of Devices Like ATMs.

Finally, the case law under § 12183(a)(1) ***without exception*** proves that the section applies only to the design of buildings and other facilities for occupancy, and not to fixtures or devices like ATMs. Plaintiffs cite no case applying § 12183(a)(1) to devices like ATMs -- precisely because ***every*** case addressing claims under § 12183(a)(1) applies the section only to alleged inaccessibility of occupiable facilities like:

- movie theatres and sports arenas;
- hotels and condominiums; and

[8] These defenses prevent plaintiffs from requiring defendants to take steps that impose an "undue" financial burden (§ 12182(b)(2)(A)(iii)) or to remove barriers that are not "readily achievable" (§ 12182(b)(2)(A)(iv)). *See* 28 C.F.R. § 36.104 (Exhibit 4) ("undue burden means significant difficulty or expense . . . readily achievable means easily accomplishable and able to be carried out without much difficulty and expense").

- retail stores or restaurants.

See Exhibit 5 (cataloging every published opinion applying § 12183)(a)(1)). Consistent with the plain language of the statute, regulation and legislative history, these cases analyze whether designs of these large structures capable of being "occupied" accommodate persons in wheelchairs or with other locomotion disabilities. None of the cases address alleged inaccessibility of controls on small devices like ATMs that could not have affected the choices made in the layout of the structures.

One recent analogous federal decision specifically held, after a lengthy analysis, that § 12183 applies only to alleged inaccessibility of a building design, not to the design of devices ***inside*** the building. In *Colorado Cross-Disability Coalition v. Too (Delaware), Inc.*, 344 F. Supp. 2d 707 (D. Colo. 2004), the court held that § 12183 did not apply to claims concerning alleged inaccessibility caused by movable display racks inside a clothing retailer. Examining the language of § 12183 and its legislative history, the court held that the accessibility requirements imposed by § 12183 are limited only to "actions taken during the building process" of a building. *Id.* at 710. By contrast, any claim regarding "fixtures" within the building cannot arise under § 12183, but instead only (if at all) under § 12182. *Id.* at 710-712. The court noted that the case law under § 12183 permitted no other conclusion. *Id.* at 714-15. The lengthy analysis in *Colorado Cross-Disability Coalition* is entirely on point and proves that claims under § 12183 are relegated only to alleged design flaws of buildings or other large physical structures.

E. Plaintiffs Offer No Support That The Term "Facility" In § 12183 Includes Devices Like ATMs.

Ignoring all of the foregoing authorities, Plaintiffs misleadingly argue that ATMs fall within the scope of § 12183(a)(1) by claiming that the term "facility" in the ADA includes attachments to buildings. Plaintiffs cite the general definitions of "facility" in the implementing

regulations. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment ("Pl. Mem.") at 6 n.7 (*citing* 28 C.F.R. § 36.104 & Pt. 36 Appx. A §§ 1, 3.5). These definitions provide the meaning of "facility" for all of Title II ***and*** Title III of the ADA. Plaintiffs, however, ignore the qualifications and limitations in § 12183. As shown above, Section 12183 -- including the language in the statute, its legislative history, and the regulatory definitions implementing that section -- construes "facility" in a much more limited sense. This same conclusion was reached in *Colorado Cross-Disability Coalition*, which rejected the same argument Plaintiffs make here that "facility" in § 12183 should be read broadly to include equipment or devices attached to the building. *Colorado Cross-Disability Coalition*, 344 F. Supp. 2d at 713-14. In the face of all of this authority, Plaintiffs have no authority supporting their expansive interpretation of § 12183.

* * * *

For all these reasons, Plaintiffs have not and cannot sustain a claim under ADA § 12183. The alleged inaccessibility of ATMs simply cannot be remedied by § 12183. Therefore, the Court should deny Plaintiffs' Motion for Partial Summary Judgment (which rests solely on Count V) and grant summary judgment to Defendants on Plaintiffs' claim under § 12183 (Count V of the Complaint).

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FOUR ADDITIONAL COUNTS UNDER ADA § 12182

Regarding Plaintiffs' other four causes of action, all under ADA § 12182, Defendants moved for summary judgment in part because Plaintiffs have not met their burden of identifying and producing evidence about the change to the ATMs (or the specific "accommodation") required to comply with the ADA. Plaintiffs respond to Defendants' Motion

with wordplay: they say ADA § 12182 does not actually use the term "accommodation" so Plaintiffs have no such burden for the four causes of action under §12182 (Pl. Opp. at 3-4).

Plaintiffs focus on wording difference with no substantive distinctions. As shown below, every subsection of § 12182 -- using varying but effectively similar terms like "modification," "auxiliary aid" and "structural barrier" -- requires Plaintiffs to identify, ***as part of their initial burden***, the specific accommodation they claim will make Defendants' ATMs ADA compliant; then Plaintiffs are required under Rule 56 to produce admissible evidence that such accommodations exist and are required under the statute.

Because Plaintiffs have not met their initial burdens with admissible evidence under each of these subsections of § 12182, Defendants are entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment for defendant appropriate where plaintiff fails to oppose motion with admissible evidence establishing every element of plaintiff's claim); *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).

A. Count III, ADA § 12182(b)(2)(A)(iii) (Failure To Provide Auxiliary Aids).

Plaintiffs misstate their initial burden under Count III (asserting a violation of § 12182(b)(2)(A)(iii) ("subsection (iii)")), and then fail to provide evidence supporting their burden.

Subsection (iii) states:

> For purposes of subsection (a) of this section, discrimination includes . . . a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services,

> unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]

42 U.S.C. § 12182(b)(2)(A)(iii). Defendants argued that Plaintiffs' failure to identify the specific "accommodation" they seek renders their claim invalid. (Def. Mem. at 7-9). Plaintiffs quibble with Defendants' wording, arguing that this subsection speaks to "auxiliary aids" and "necessary steps," not "accommodations." Pl. Opp. at 4. Plaintiffs then argue that they "only [need] to prove a denial of a service by virtue of the absence of an auxiliary aid or service." *Id.*

In essence, Plaintiffs are arguing that they can prevail on their claim without ever identifying the "auxiliary aid" needed to make the ATMs useable by blind people. While they admit they must prove the "absence of an auxiliary aid," they do not explain how they can prove an aid is "absent" if they have never identified the aid they have in mind.

Plaintiffs' argument is unsupported by both the plain language of the statute ***and*** by the entirety of case law under this subsection. ***Every*** case granting relief under subsection (iii) has ***always*** involved a specifically identified "auxiliary aid."[9] By contrast, Defendants have not found any case that granted relief under this subsection where the plaintiff failed to identify the specific "auxiliary aid" it wanted.

---

[9] Cases applying subsection (iii) inevitably involve a specifically identified "auxilliary aid." *E.g., Roberts v. KinderCare Learning Centers, Inc.*, 86 F.3d 844 (8th Cir. 1996) (one-on-one care for disabled child); *Dryer v. Flower Hosp.*, No. 3:04CV7631, 2005 WL 2037364 (N.D. Ohio Aug. 25, 2005) (access to oxygen ports at hospital); *Burriola v. Greater Toledo YMCA*, 133 F. Supp. 2d 1034 (N.D. Ohio 2001) (specific techniques to support autistic child at day care center for which counselors at day care center had been trained); *Alvarez v. Fountainhead, Inc.*, 55 F. Supp. 2d 1048 (N.D. Cal. 1999) (use of inhaler by asthmatic child); *Dunlap v. Association of Bay Area Gov'ts*, 996 F. Supp. 962 (N.D. Cal. 1998) (medical care); *Naiman v. New York Univ.*, No. 95 CIV. 6469 (LMM), 1997 WL 249970 (S.D. N.Y. May 13, 1997) (qualified sign language interpreters); *Mayberry v. Von Valtier*, 843 F.Supp. 1160 (E.D. Mich. 1994) (interpreter for deaf patient); *Bunjer v. Edwards*, 985 F.Supp. 165 (D.C. D.C. 1997) (sign at drive-through speaker/menu instructing deaf patrons to proceed directly to drive through window to have orders filled).

Even cases on which Plaintiffs rely (Pl. Opp. at 4 n.6) expressly conclude that a claim under subsection (iii) requires identification of the specific "auxiliary aid" a plaintiff seeks. In *Lindgren v. Camphill Village Minn., Inc.*, No. 00-2271 RKH/RLE, 2002 WL 1332796, at *5 (D. Minn. June 13, 2002), for example, the plaintiffs asserted a cause of action under the auxiliary aid subsection (iii). The court held that a necessary element of this claim was proof that the defendant "failed to take the necessary steps to ensure that [plaintiffs] w[ere] not denied services because of the absence of auxiliary aids . . . ." *Id.* at *5. The court clarified that the "necessary steps" for an "auxiliary aid" had to be "the steps ***Plaintiffs ask for***." *Id.* (emphasis added). The court held that the plaintiffs stated a "*minimally sufficient*" claim because "they have identified the accommodation -- additional respite care," and thus met this necessary element of their claim. *Id.* at *6 & *7 n.9. Plaintiffs' own analysis in *Lindgren* directly supports Defendants' position that Plaintiffs' claim under subsection (iii) is deficient because the Plaintiffs have not identified the "steps" or "aid" they want.

For these reasons, Defendants are entitled to summary judgment on Count III.

B. Count IV, ADA § 12182(b)(2)(A)(iv) (Failure To Remove Architectural Barriers Or Structural Communication Barriers).

Plaintiffs' Opposition also fails to establish all of the required elements of their claim in Count IV under § 12182(b)(2)(A)(iv) ("subsection (iv)").

Subsection (iv) states:

> For purposes of subsection (a) of this section, discrimination includes . . . a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable[.]

42 U.S.C. § 12182(b)(2)(A)(iv). Plaintiffs do not even try to meet their burden under this subsection. In a half page discussion, Plaintiffs merely quote the statute, tersely state that "the

legal standard is clear," and then restate the statutory language. Pl. Opp. at 4. Plaintiffs never mention the standard of proof, as described in numerous cases, and they do not even attempt to show they have satisfied their burdens under subsection (iv).

Plaintiffs avoid talking about their obligations under subsection (iv) because they have not and cannot satisfy them. Universal authority imposes the initial burden on Plaintiffs of proving not only that a barrier exists, but also proving that the barrier can be removed in a "readily achievable" way: *Colorado Cross Disability Coalition v. Hermanson Family Ltd.*, 264 F.3d 999, 1007 (10th Cir. 2001) ("*Hermanson*") ("Plaintiff must initially introduce evidence tending to establish that the proposed method of architectural barrier removal is 'readily achievable' . . . [o]nly if Plaintiff satisfies this initial burden does the burden of persuasion shift to Defendant"); *Brother v. CPL Invests., Inc.*, 317 F. Supp. 2d 1358, 1370 (S.D. Fla. 2004) ("Plaintiff bears the initial burden of suggesting a method of removal for each barrier identified, and proffering evidence that their suggested method is readily achievable."); *Parr v. L&L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1085 (D. Haw. 2000) ("To succeed on a ADA claim . . . due to an *architectural barrier*, the plaintiff must also prove . . . removal of a barrier is readily achievable") (emphasis in original).[10]

Plaintiffs have not provided admissible evidence as to how Defendants can "readily" "remove" the alleged "barriers" at their ATMs -- that is, how ATMs can be made

[10] *See also Association for Disabled Ams. v. Claypool Holdings*, No. IP00-0344-C-TIG, 2001 WL 1112109, at *26 (S.D. Ind. Aug. 6, 2001) ("To establish a prima facie case of disability discrimination based on an architectural barrier . . . a plaintiff must demonstrate . . . that: (1) the facility presents an architectural barrier prohibited by the ADA; and (2) removal of the barrier is 'readily achievable'."); *Pascuiti v. New York Yankees*, No. 98 CIV. 8186 (SAS), 1999 WL 112748, at *1 (S.D.N.Y. Dec. 6, 1999) (plaintiffs "bear the initial burden of suggesting a method of barrier removal and proffering evidence that their suggested method meets the statutory definition of 'readily achievable'").

accessible to blind people (without voice technology). This Court should follow numerous other decisions denying claims where, as here, plaintiffs fail to provide admissible evidence of how defendants can remove these structural barriers. For example, in the Tenth Circuit *Hermanson* case, the plaintiff sought wheelchair access to a building. But because the plaintiff only offered "speculative concepts" of how a ramp could be installed, and did not provide any evidence of a specific design, the court ruled for the defendant. 264 F.3d at 1009. Numerous other courts have reached similar results. *E.g.*, *Speciner v. Nationsbank, N.A.*, 215 F. Supp. 2d 622, 632-33 (D. Md. 2002) (plaintiff failed to meet burden, because plaintiff provided only a "conceptual sketch" of how a barrier could be removed); *Access Now, Inc. v. South Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1370 (S.D. Fla. 2001) (plaintiff "completely failed to suggest a plan of modification, much less demonstrate that such modification would be readily achievable"); *Gilbert v. Eckerd Drugs*, No. CIV. A. 97-3118, 1998 WL 388567, at *2 (E.D. La. July 8, 1998) (dismissing plaintiff's claim where plaintiff failed to prove removal of the barrier was "readily achievable").

Because Plaintiffs ignore the relevant standard and fail to provide any evidence in support of their initial burden, Defendants are entitled to summary judgment on Count IV.[11]

C. Count II, ADA § 12182(b)(2)(A)(ii) (Modification of Policies).

Finally, Plaintiffs also fail to provide any evidence supporting Count II, which asserts a claim under § 12182(b)(2)(A)(ii) ("subsection (ii)").

Subsection (ii) states:

[11] In a footnote Plaintiffs seem to suggest that based on Defendants' discovery responses they do not have a claim under subsection (iv) anyway. *See* Pl. Opp. at 4 n.7. Plaintiffs appear to be arguing that they can have a valid claim under § 12182's subsection (iv) or under § 12183 (analyzed above), but not both. Plaintiffs cite no authority for this proposition. At oral argument, the Court should determine if Plaintiffs still assert a claim under subsection (iv).

> For purposes of subsection (a) of this section, discrimination includes . . . a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

42 U.S.C. § 12182(b)(2)(A)(ii). Plaintiffs' Opposition actually ***supports*** summary judgment for Defendants on this count because: (1) Plaintiffs admit Count II does not apply to defendant Cardtronics; (2) Plaintiffs misstate their initial burden under controlling First Circuit case law; and (3) Plaintiffs fail to proffer evidence to meet their initial burden.

1. Plaintiffs Effectively Admit They Have No Claim Under This Subsection Against Defendant Cardtronics.

Count II differs from the other counts in a very significant way: Count II does not address the design of the ATMs, but instead only concerns "policies, practices, or procedures" regarding "banking services." Pl. Opp. at 5-6 ("Count II alleges that Defendants have failed to make reasonable modifications to their policies for providing ATM banking services" but does not "address the retrofitting of ATMs"). Plaintiffs solely focus on defendant E*TRADE Bank, *id.* at 6-7, never mentioning how Count II could apply to defendant Cardtronics, a non-banking entity that owns some ATMs. Plaintiffs have not asserted that any banking "policy, practice, or procedure" of Cardtronics needs to be "modified" pursuant to subsection (ii) -- nor could they, because Cardtronics is not a bank, and does not offer "banking services." As a result, the Court can enter partial summary judgment for defendant Cardtronics regarding Count II.

2. Plaintiffs Ignore The Burden Imposed By Controlling And Persuasive Authorities.

Regarding defendant E*TRADE Bank, Plaintiffs cannot rebut the requirement that they identify a specific "reasonable" modification they seek. *See* Def. Mem. at 6.[12] The Supreme Court explained that a "reasonable modification" claim requires specificity, because "an individualized inquiry must be made to determine whether ***a specific modification*** for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) ("*Martin*") (emphasis added).

Ignoring the Supreme Court's rule in *Martin*, Plaintiffs instead argue that they only need to request a change in policy, without specifying any particular change. Pl. Opp. at 6. Plaintiffs rely on only two cases for this incorrect proposition, both of which actually prove Defendants' arguments. In the First Circuit case of *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299 (1st Cir. 2003) (cited at Pl. Opp. at 6 n.11), the court expressly held that Plaintiffs have an initial burden of proving --

> 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 . . . .

Id. at 307. Consistent with that burden, the plaintiff in that case specifically identified the policy change he wanted.[13]

---

[12] *Citing, inter alia, Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (plaintiff must "suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits."); *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.").

[13] In the words of the Plaintiffs, the request in *Dudley* was for a retailer "to deviate from its policy of not reconsidering cashier's decision not to sell him alcohol to satisfy the requirements

Footnote continued on next page

This requirement does not mean (as Plaintiffs suggest) that Plaintiffs can request some unnamed modification and leave it to Defendants to figure out how to accomplish it. The First Circuit requires the Plaintiffs to request "a reasonable modification" "or a modification like it" that would remedy the alleged inaccessibility, language which is meaningless if Plaintiffs did not have to identify the specific modification they seek. *Id.*; *see also 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'" (emphasis added)).

Plaintiffs rely heavily on the Ninth Circuit decision in *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004) ("*Fortyune*") (cited at Pl. Opp. at 6-7), but that case actually supports Defendants' argument. The Ninth Circuit held that "[t]o establish a violation of Title III . . . [plaintiff] must also show that [defendant] discriminated against him by failing to make ***a reasonable modification*** in 'policies, practices, or procedures.'" *Id.* at 1082 (emphasis added); (also stating this element as a showing that defendant "failed to make ***a requested*** reasonable modification"). *Id.* Nothing in *Fortyune* supports Plaintiffs' contention that they need only request a modification without specifying what modification they desire.

In sum, applying the binding rule in *Martin*, the cases both parties cite require Plaintiffs to identify the specific "reasonable modification" they seek for Defendant E*TRADE Bank's "policies, practices, or procedures."

Footnote continued from previous page
of the statute." Pl. Opp. at 6 n.11. Stated in the affirmative, the policy change was for the retailer to sell the alcohol to the plaintiff.

*3. Plaintiffs Have Not Met Their Burden To Produce Evidence That E*TRADE Bank Can Reasonably Modify Its Policies, Practices, Or Procedures.*

Because Plaintiffs have failed to produce evidence that they requested a specific modification that would be "reasonable," E*TRADE Bank is entitled to summary judgment on Count II.

First, Plaintiffs have failed to produce evidence that they ever requested a modification to a "policy, practice, or procedure" of E*TRADE Bank. The only "evidence" Plaintiffs cite is a letter the NFB sent to E*TRADE Bank dated November 20, 2002, *see* Pl. Opp. at 6 & n.10 and Ex. 2 to Pl. Opp. However, the letter ***does not request any changes to bank "policies" or practices***. Instead, it requests alteration of ***the ATMs themselves*** to make them comply with the ADAAG. *Id.* Plaintiffs themselves drew the line between changes to the Bank's policies and changes to the design of ATMs. Pl. Opp. at 6-7. The letter falls on the latter side of this line. Plaintiffs therefore have not shown any evidence that they ever requested a modification to the Bank's policies, so Defendants are entitled to summary judgment on Count II.

Second, even if the lawsuit itself is deemed a "request" for a modification (which would be inconsistent with *Martin* and all of its progeny), Plaintiffs still fail to meet their burden because the changes they seek in this lawsuit are facially unreasonable.

Plaintiffs argue that the Bank should change the terms of its services offered to blind people. They allege that E*TRADE Bank's services can only be accessed through ATMs, Pl. Opp. at 6, and that customers are not charged for using E*TRADE-branded ATMs, but only for non-E*TRADE ATMs. *Id.* Plaintiffs claim that these services are discriminatory because blind people who cannot use E*TRADE ATMs must always pay a surcharge for the Bank's

services. *Id.* Plaintiffs seek "modifications" to the Bank's services so that blind people can avoid paying surcharges that sighted customers can readily avoid.

But none of the Plaintiffs' requested "modifications" is even facially reasonable. At first Plaintiffs modestly suggest that the Bank abandon its exclusively mail and electronic business model and instead build a nationwide network of "brick-and-mortar" branch offices. Pl. Opp. to Def. Motion Under Rule 19 at 5-7. The Court can conclude that, on its face, an order requiring E*TRADE Bank to abandon its electronic model and instead build 11,000 "brick and mortar" bank branches (to substitute for each existing ATM) is not a "reasonable" modification and would "fundamentally alter" the nature of the Bank's services, a modification expressly not required by subsection (ii). *Cf. Dahlberg*, 92 F. Supp. 2d at 1105 (granting summary judgment for defendant because plaintiff failed to explain how suggested modification to defendant's reservation system was reasonable); *Dryer*, 2005 WL 2037364, at *8 & *9 (granting summary judgment for defendant because plaintiff's suggested modification requiring defendant hospital to provide oxygen access to non-patients was unreasonable).

Plaintiffs further suggest that E*TRADE Bank can "modify its policies to afford blind depositors fee-free transactions at ***accessible*** ATMs operated by deployers ***other than*** Defendants." Pl. Opp. at 7 (emphases added). Plaintiffs are suggesting that the Bank allow blind people to use non-E*TRADE/non-Cardtronic ATMs without a fee. The Court can also reject this specious suggestion on summary judgment. Plaintiffs offer no admissible evidence that "other" ATMs are "accessible" to blind people while Defendants' are not. Indeed, because Plaintiffs have never explained how Defendants' ATMs can be made "accessible" within the

ADA's current requirements, Plaintiffs have not supported the suggestion that "other" ATMs are themselves "accessible" as defined by the ADAAG.[14]

Plaintiffs cannot articulate a "reasonable" policy modification because they are not seeking a change to a "policy" at all, but are still fighting the design of the ATMs. E*TRADE Bank's existing policy is entirely nondiscriminatory: any customer, blind or otherwise, using E*TRADE-branded ATMs is not charged fees for using those ATMs. Blind people certainly are not singled out by the policy. The ***only*** reason this policy allegedly is discriminatory is because the ***design*** of the ATMs allegedly makes the ATMs inaccessible to blind people. This claim is therefore a veiled challenge to the ***design*** of the ATMs, merely couched as a challenge to the Bank's policies.

For all of the foregoing reasons, the Court should grant summary judgment in Defendants' favor under Count II, invoking § 12182(b)(2)(A)(ii).

D. Because Defendants Are Entitled To Summary Judgment On All Counts Under § 12182(b), Defendants Are Also Entitled To Summary Judgment On Plaintiffs' Count I Under § 12182(a).

Plaintiffs wrongly argue that they have an independent claim under ADA § 12182(a). Pl. Opp. at 3. The law says otherwise. This subsection provides the ADA's ***general*** standard for places of public accommodation. It does not set forth any specific requirements, and it provides no affirmative defenses. The substantive requirements of what constitutes "discrimination" against disabled persons are set forth in the subsequent provisions of

[14] Plaintiffs demand for fee-free transactions at accessible ATMs of deployers other than Defendants is a thinly veiled suggestion that the Court should require E*TRADE's policies to allow fee-free use of voice accessible machines. Of course, the Court has already rejected Plaintiffs' assertion that the ADA requires voice accessibility, so it follows that no "banking policy" can be required to use voice-accessible machines.

§ 12182(b). *See* 42 U.S.C. § 12182(b) ("For purposes of subsection (a) of this section, discrimination includes . . . ").

Section 12182(a) does not provide an independent basis for recovery where Plaintiffs seek recovery under the more specific § 12182(b) provision. The implementing regulations (to which this Court should afford *Chevron*-type deference) make clear that the general standard in § 12182(a) does not apply where specific limitations of § 12182(b) also apply. *See* 28 C.F.R. § 36.213 (Exhibit 6) (the "specific limitations" of regulations implementing § 12182(b) "control over the general provisions" implementing § 12182(a) "where both specific and general provisions apply"). The Supreme Court has explained that the "the question of whether [a party] has violated" the general rule in § 12182(a) "depends on a proper construction of the term 'discrimination,' which is defined" in § 12812(b). *Martin*, 532 U.S. at 681-82. For this reason, courts typically reject claims under § 12182(a) where the plaintiff's claim is addressed by the more specific provisions of § 12182(b). *See, e.g., Lonberg v. Sanborn Theatres, Inc.*, 259 F.2d 1029, 1033 (9th Cir. 2001) (holding that § 12182(a) "does not define discrimination," but "subsequent provisions of Title III define the activities which constitute 'discrimination' in the '[g]eneral rule' of liability"); *Menkowitz v. Pottstown Mem. Med. Ctr.*, 154 F.3d 113, 117 (3d Cir. 1998) (definitions of "discrimination" in § 12182(b) "define the term discrimination for the purposes of the general rule announced in . . . §12182(a)").

Plaintiffs do not present any authority to the contrary. They cite only two cases, *see* Pl. Opp. at 3 n.5, where the parties disputed if the plaintiffs' claims were governed by Title III of the ADA. Neither case addressed whether the claim could be brought under

§ 12182(a) where claims under § 12182(b) also are raised.[15] Therefore, these cases are of no use here.

Because Defendants are entitled to summary judgment on all of Plaintiffs' claims under § 12182(b), Defendants are also entitled to summary judgment on Plaintiffs' claim under § 12182(a), which does not provide any different or additional substantive requirements on Defendants.[16]

IV. PLAINTIFFS HAVE NOT OFFERED SUFFICIENT EVIDENCE TO PREVAIL ON SUMMARY JUDGMENT

Plaintiffs improperly seek summary judgment under Count V for thousands of Defendants' ATMs based on evidence about only 12 specific ATMs. Plaintiffs' Opposition recognizes this problem and invites the Court to make unwarranted assumptions and inferences about the other over ten thousand ATMs. Pl. Opp. at 4-5. Plaintiffs speculate that "the problems encountered [at the 12 ATMs] is indeed endemic to Cardtronics' entire fleet of ATMs." *Id.* Plaintiffs present no admissible evidence to support that preposterous conclusion.

More startling, Plaintiffs base their motion on a Request for Admission that defendant Cardtronics ***denied***. Pl. Opp. at 4. Cardtronics denied that its ATMs were not "independently usable" by blind people. Unphased, Plaintiffs ask the Court to grant summary judgment on the basis of this denied Request for Admission because Defendants' other discovery

---

[15] That the Supreme Court case cited by the Plaintiffs, *Bragdon v. Abbot*, 524 U.S. 624 (1998), did not address the elements of a *prima facie* claim under 12182(a) is made clear by the fact that the Supreme Court was reviewing a case involving a violation of 12182(b). *See Abbot v. Bragdon*, 912 F. Supp. 580, 596 (D. Me. 1995) ("The Court has determined that Defendant's conduct violated title III of the ADA, specifically, 42 U.S.C. § 12182(b)(2)(A)(i)."). The Supreme Court did not address this aspect of the District Court's decision. 524 U.S. at 628.

[16] Indeed, 12182(a) does not allow for any affirmative defenses, further proving the point that § 12182(b) is the section of the statute courts look to when determining liability under Title III of the ADA.

responses, and documents Defendants produced, allegedly did not provide evidence supporting the denial. *Id.* at 4-5. This is patently ridiculous. For example, although Defendants "admitted" the obvious, that the ATMs' visual screens might not be visible to some blind people (who, by definition, cannot see normally), Plaintiffs stretch that unremarkable proposition to the conclusion that Defendants' ATMs have ***no*** information useful to blind people. *Id.* at 5. This leap is completely unwarranted. ATMs contain instructions other than in computer screens; Plaintiffs' own affidavits prove, for example, that ATMs they visited contained Braille instructions.

Plaintiffs cannot obtain summary judgment on the mere ***inference*** that the thousands of ATMs lack any instructions. It is well settled that all inferences here must be drawn ***against*** the Plaintiffs. *Douglas v. York County*, 360 F.3d 286, 290 (1st Cir. 2004) (on a motion for summary judgment all reasonable inferences must be drawn in favor of the non-moving party, regardless of who bears the ultimate burden of proof); *Sparks v. Fidelity Nat'l Title Ins. Co.*, 294 F.3d 259, 266 (1st Cir. 2002) (must view the evidence in the light most favorable to the non-moving party and must draw all reasonable inferences in the non-moving party's favor). Lacking any evidence whatsoever regarding Braille instructions at the thousands of other ATMs, Plaintiffs have absolutely no basis to move for summary judgment on the entire fleet of ATMs.

If the Court does not reject Plaintiffs' Motion for Partial Summary Judgment because Count V does not apply to ATMs (*see* Part II, *supra*), the Court should deny that motion because Plaintiffs offer only conjecture, not admissible evidence, supporting it.

V. PLAINTIFFS ARE SEEKING A PROHIBITED "OBEY THE LAW" INJUNCTION, BECAUSE DEFENDANTS HAVE NO GUIDANCE WITH RESPECT TO HOW TO OBEY IT

Defendants argued that Plaintiffs are seeking an impermissibly overbroad "obey the law" injunction. Plaintiffs respond that sometimes an injunction is adequate if it merely restates the governing statutory (or, here, regulatory) "performance-based" standard. Pl. Reply at 12-15. That is true but inapplicable here.

The Court can easily conclude that the injunction Plaintiffs desire, merely requiring ATMs to be "independently usable," is ambiguous if it is different than what Defendants (and the entire industry) have done for the last 15 years. If so, Defendants could not possibly know how to comply with the proposed injunction. The parties have debated for two years now what "independently usable" means. Plaintiffs asserted for over a year that the term required voice technology; the Court rejected that, and the Plaintiffs ***still*** disagree. Now, Defendants contend Braille is sufficient, based on the ADAAG, but Plaintiffs continue to allege it is never sufficient. Third Amended Complaint ¶ 29. This debate will continue even if the Court enters the injunction Plaintiffs demand.

None of the cases Plaintiffs cite allows the Court to enter an injunction that has no obvious method of compliance. In *Fortyune v. American Multi-Cinema*, a case Plaintiffs repeatedly cite, the Ninth Circuit required a "performance-based" injunction (to use Plaintiffs' words) that was far more specific than the injunction requested here;[17] also, the Court was "confident that [defendant] is capable of devising such means, particularly in light of the

[17] The injunction, which the Court stated "could not have been much clearer in describing what AMC must do to comply" dictated "that AMC must ensure that companions to wheelchair-bound patrons be able to sit with their companions until ten minutes before the film begins." 364 F.3d at 1087.

numerous workable suggestions articulated at oral argument." 364 F.3d at 1087 (emphasis added).[18] Here, in contrast, the requested injunction (making ATMs independently usable) is non-specific, and Defendants are still pleading with Plaintiffs to articulate even ***one*** workable change to its ATMs that would be required by the ADAAG.

The other cases on which Plaintiffs rely merely prohibited Defendants from engaging in actions they had already taken, creating no uncertainty as to how to comply.[19] The injunction Plaintiffs desire, although couched as a negative prohibition ("do not violate the ADA"), actually seeks affirmative relief in the form of changes to existing ATMs. Therefore, none of these cases supports Plaintiffs.

Plaintiffs are not entitled to the broad injunction they seek. Rather, they must identify the specific accommodations (or, using various terms used in the ADA, "modifications," "auxiliary aids," or "removals" of "structural barriers") that would permit Defendants to comply with the ADA. Plaintiffs refuse to provide this clarity because they have no options to offer -- other than voice technology, which this Court has already rejected.

---

[18] *See also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 189 (1949) (Pl. Reply at 13) (requiring defendant to keep records);*Taylor Wine Co. v. Bully Hill Vineyards, Inc.*, 590 F.2d 701, 704 (2d Cir. 1978) (Pl. Reply at 13) (specifying labeling requirements for bottles).

[19] *McComb*, 336 U.S. at 189 (upholding contempt order for a defendant's refusal to comply with an injunction prohibiting specific acts such as "paying the designated employees less than 30 CENTS an hour from date of judgment to October 24, 1945," in light of the defendant's "continuing violation of FLSA"); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972) (Pl. Reply at 13) (defendant admitted violations of § 10b of Security Exchange Act, so "there can be no abuse of discretion in framing an injunction in terms of the specific statutory provision which the court concludes has been violated"); *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978) (Pl. Reply at 14) (upholding injunction requiring compliance with ICC licensing provisions after the Court found 85 prior violations of ICC requirements); *Taylor Wine*, 590 F.2d at 704 (upholding a preliminary injunction that included more than 22 separately delineated, detailed requirements temporarily prohibiting defendants from continuing its anticompetitive acts).

VI. PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY IS A RUSE TO AVOID SUMMARY JUDGMENT

As a last resort, Plaintiffs predictably invoke Rule 56(f) and request additional discovery on the grounds they are unable to respond adequately to Defendants' motion. Pl. Opp. at 7-12. The Court can easily reject this request.

Plaintiff National Federation of the Blind ("NFB") and its national counsel representing it here are long experienced in the ATM industry. NFB has participated for years in the Department of Justice's formulation of changes to the regulations implementing the ADA, particularly as they apply to ATMs. NFB has negotiated settlements with many large banks regarding their ATMs' compliance with the ADA. NFB's discovery requests on E*TRADE shows NFB's sophistication in the industry, asking pointed technologically-savvy questions, such as, about the ATM's use of "Triple DES" standards.

In short, Plaintiffs are fully capable of suggesting changes to Defendants' ATMs that they believe would remedy the alleged inaccessibility. If other banks use auxiliary aids or devices that afford full access to blind people (other than voice guidance), the Plaintiffs surely know exactly what that is. Indeed, Plaintiffs are arguing that E*TRADE Bank should modify its "policies" to allow no-surcharge use of "other" "accessible" ATMs by blind customers -- if Plaintiffs have any basis for that demand, then they surely know what controls the "other" ATMs have to make them accessible but that are lacking in Defendants' ATMs. Plaintiffs' failure to identify even one such auxiliary aid or device provides a basis to grant summary judgment for Defendants. No discovery from Defendants can affect that issue; in fact, Defendants repeatedly profess ignorance at any such aids or devices, so further discovery on Defendants will never give Plaintiffs the information they would need to avoid summary judgment.

VII. CONCLUSION

For these reasons, the Court should grant Defendants' Cross-Motion for Summary Judgment, deny Plaintiffs' Motion for Partial Summary Judgment, and enter final judgment against Plaintiffs and in Defendants' favor.

Respectfully submitted,

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

By their attorneys,

/s/ Douglas P. Lobel
Douglas P. Lobel
David A. Vogel
ARNOLD & PORTER LLP
1600 Tysons Boulevard
McLean, Virginia 22102
(703) 720-7000

Joseph L. Kociubes BBO # 276360
Jenny K. Cooper BBO # 646860
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

CERTIFICATE OF SERVICE

I, Douglas P. Lobel, hereby certify that on September 7, 2005, I caused a true and accurate copy of Reply Brief in Support of Defendants' Cross-Motion for Summary Judgment to be served via electronic and first class mail upon the following counsel of record:

Patricia Correa, Esquire
Assistant Attorney General
Director, Disability Rights Project
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
patty.correa@ago.state.ma.us
Attorney for Plaintiff
Commonwealth of Massachusetts

Anthony M. Doniger, Esquire
Christine M. Netski, Esquire
Sugarman, Rogers, Barshak & Cohen, P.C.
101 Merrimac Street
Boston, Massachusetts 02114-4737
doniger@srbc.com
netski@srbc.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

Joseph L. Kociubes, Esquire
Jenny K. Cooper, Esquire
Bingham & McCutchen LLP
150 Federal Street
Boston, Massachusetts 02110
joe.kociubes@bingham.com
jenny.cooper@bingham.com
*Attorneys for Defendants, E*Trade Access, Inc., E*Trade Bank, Cardtronics, LP and Cardtronics, Inc.*

Daniel F. Goldstein, Esquire
Sharon Krevor-Weisbaum, Esquire
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
dfg@browngold.com
skw@browngold.com
Attorneys for Plaintiffs, National Federation of the Blind, Inc., National Federation of Blind of Massachusetts, Inc., Adrienne Asch, Richard Downs, Theresa Jeraldi and Philip Oliver

/s/ Douglas P. Lobel