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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 Plaintiffs v. E*TRADE ACCESS, INC., E*TRADE BANK, CARDTRONICS, LP, and CARDTRONICS, INC. Defendants	CIVIL ACTION NO. 03-1206-MEL

PRIVATE PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs submit this surreply to address an argument that was not presented by Defendants in their original cross-motion, that is inconsistent with Defendants' earlier position in this case and that is entirely unsupported by existing law.[1] In their reply brief, Defendants argue for the very first time that ATMs are equipment and, therefore, the ADA's new construction and planned alteration mandate, 42 U.S.C. §12183, has no application to this dispute. In so arguing, Defendants are necessarily arguing that ADAAG has no application to this case. Defendants are wrong. Both ADAAG and Section 12183 apply to this case.

[1] Defendants' Reply also improperly raises arguments that are only relevant to Plaintiffs' Motion for Summary Judgment. *See* Reply, Sections IV, V and VI. Those arguments may be fully addressed at oral argument without a further written supplementation.

Facilities that postdate ADAAG's effective date which fail to comply with ADAAG violate Section 12183(a)(1), the new construction and planned alteration mandate. ADAAG addresses ATMs.[2] Cardtronics has admitted that its ATMs were all installed after ADAAG's effective date.[3] Hence, if Cardtronics' ATMs do not comply with ADAAG, it has violated Section 12183(a)(1).

ADAAG has no connection to any other part of Title III of the ADA involved in this suit. Thus, by claiming that Count V is not proper, Cardtronics is asserting that ADAAG is irrelevant to this case. Either through a lack of candor or of understanding, Defendants do not explain this to the Court. This remarkable assertion represents a dramatic turnaround by the Defendants, who have not only insisted in prior pleadings that the relief the Court may grant to the Plaintiffs under the ADA is framed by ADAAG, but have asked the Court to stay this litigation while the relevant ADAAG is amended.

ADAAG and the new construction and planned alteration mandate have identically limited reach. Each is restricted to buildings and facilities.[4] Indeed, ADAAG's formal name is the ADA Accessibility Guidelines for Buildings and Facilities. As the preamble to ADAAG explains, the "guidelines are intended to address *only* that equipment that is fixed or built into the structure of the building."[5] Thus, toilets are covered, but bedpans are not; drinking fountains are covered, but percolators are not.[6]

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[2] 28 C.F.R. §36.401, App. A., 4.34.5.
[3] *See* Answer of Def. Cardtronics to Private Pls.' First Reqs. For Admis., attached to Pls.' Reply in Support of its Motion for Partial Summary Judgment as Ex. 1, No. 4.
[4] As the Access Board's web site explains with respect to "Frequently Asked Questions," ADAAG was "developed to guide new construction and alterations undertaken by covered entities. The guidelines establish the minimum requirements for accessibility in buildings and facilities." www.access-board.gov/adaag/about/FAQ.htm.
[5] 56 C.F.R. 35414-15 (July 26, 1991) (Preamble to ADAAG).
[6] 28 C.F.R. §36.401, App. A., 4.16 (toilets); 4.15 (water fountains).

Similarly, as *Colorado Cross-Disability Coalition*[7] makes clear, display racks and shelves that are fixed are covered by ADAAG and, consequently, the new construction mandate, while equipment that is not fixed or built into the building is covered neither by ADAAG nor the new construction and alteration mandate.[8]

As Defendants have repeatedly acknowledged in their earlier pleadings, ADAAG expressly addresses the accessibility of ATMs under a provision entitled "Equipment for Persons with Vision Impairment," and specifically requires that "[i]nstructions and all information for use shall be made accessible to and independently usable by persons with vision impairments.[9] Thus, both the Access Board and the Department of Justice clearly contemplated that ATMs would be covered by the new construction mandate - either as facilities themselves or as equipment that is fixed into the structure of the building.

And the Department of Justice was correct - at least as to these Defendants - that ATMs are equipment fixed into the structures of buildings. Indeed, Defendants have represented to this Court that their ATMs are "typically physically embedded in walls or floors so that they cannot easily be removed . . . and are hard-wired into a stores' [sic] electrical system and telephone lines. . . ."[10] To support this assertion, Defendants even submitted the sworn testimony of Mr. Dentlinger, the President of E*TRADE Access, Inc. And the Court must surely recall Mr. Lobel's dramatic oral argument in support of the Defendants' Rule 12(b)(7) motion, where he invoked the specter of unsuspecting

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[7] 344 F. Supp.2d 707 (D. Colo. 2004)
[8] *Colorado Cross-Disability Coalition,* 344 F. Supp.2d at 712-714.
[9] 28 C.F.R. §36.401, App. A., 4.34.5.
[10] Mem. in Support of Defendants' Rule 12(b)(7) Motion to Join Necessary Parties at 6.

nonparty merchants having ATMs ripped from the walls pursuant to a court order, leaving gaping holes in their stores.[11]

Defendants now argue, however, more than a year after Mr. Dentlinger submitted his declaration, that because ATMs are "manufactured," not "constructed," and "used" not "occupied," they fall outside the scope of Section 12183 of the ADA. Defendants, if correct, would gut ADAAG of fixed equipment. For example, urinals are manufactured, not constructed, and used, not occupied. Nonetheless, urinals are governed by ADAAG and the new construction mandate.[12] Defendants' cramped view of the reach of Section 12183 would similarly exclude all other fixtures that, like ATMs, are currently covered by ADAAG, e.g., wheelchair lifts,[13] lavatory mirrors,[14] fixed storage facilities like shelves, cabinets, closets and drawers, [15] and telephones.[16] Each of these items, too, are manufactured and used, not constructed and occupied.

Defendants also argue that the use in the implementing regulations of phrases that seem not to apply to ATMs, such as "dates of first occupancy" and "structural impracticability of the terrain," demonstrates that ADAAG must not apply to ATMs. Again, this interpretation would doom the ADAAG requirements for sinks,[17] which generally do not have dates of first occupancy, and bathtubs, which, when inside a

[11] At the hearing on February 11, 2005, on the Motion for Judgment on the Pleadings, Mr. Lobel again made reference to "existing machines in the walls of various banks." Tr. p. 7 (2/11/05).
[12] *See* 28 C.F.R. §36.401, App. A., 4.18.
[13] 28 C.F.R. §36.401, App. A., 4.11.
[14] 28 C.F.R. §36.401, App. A., 4.19.6.
[15] 28 C.F.R. §36.401, App. A., 4.25.
[16] 28 C.F.R. §36.401, App. A., 4.31
[17] 28 C.F.R. §36.401, App. A., 4.24.

building, generally do not present any more issues concerning the impracticality of the terrain than do ATMs.[18]

As mentioned, this is the very first occasion in this litigation on which the Defendants have taken this position. Defendants did not argue in any of their motions to dismiss that Count V - the new construction and alterations mandate - had no application to this case. Defendants did not even make that argument in their opposition to Plaintiffs' pending Motion for Partial Summary Judgment on Count V, even though it would have been responsive and apt (unlike its inclusion in their reply to their own motion for summary judgment that did not raise this issue). Rather, they have waited until the eleventh hour to make an argument that is unsupported by existing law and would be a frivolous extension of existing law. There can be no purpose in doing so other than to attempt to create further confusion and delay.

Moreover, the expediency of Defendants' decision to jettison ADAAG as inapplicable to this case is breathtaking. Defendants persuaded this Court to stay discovery in this case and put off resolving discovery disputes because, they said, they were going to file a Rule 12(c) motion that would establish that this case is controlled by the requirements of ADAAG and that Plaintiffs have not sought any relief that accords with ADAAG. Defendants then filed that motion and, at the hearing, defense counsel, with reference to ADAAG said, "it's undisputed that these regulations and these guidelines are dispositive in the sense that compliance with the guidelines is compliance

[18] 28 C.F.R. §36.401, App. A., 4.20. Interestingly, although the Defendants rely on the "implementing regulations" to 42 U.S.C. §12183, Def. Reply Brief at 5, and cite to 28 C.F.R. §36.401, they conveniently fail to alert the Court that Appendix A to the New Construction and Alterations regulations is ADAAG, or that ADAAG specifically has provisions applicable to ATMs. *See* 28 C.F.R. §36.401, App. A., 4.34.

with the ADA." (Tr. P.9 2/11/05). Plaintiffs agree, and that has been and still is the basis for Plaintiffs' Motion for Partial Summary Judgment as to Count V.

For these reasons, and for the reasons set forth in Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment on Plaintiffs' Claims Under the Americans with Disabilities Act, Plaintiffs' request that this Court deny Defendants' Cross-Motion for Summary Judgment.

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AND THE INDIVIDUAL
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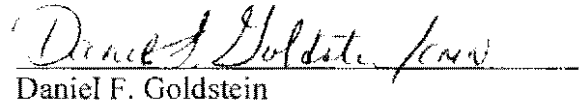
By their Attorneys,



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DATED: September 14, 2005

CERTIFICATE OF SERVICE

I, Christine M. Netski, hereby certify that on September 14, 2005 I served the within document via electronic mail and first-class mail, postage prepaid on the following counsel of record:

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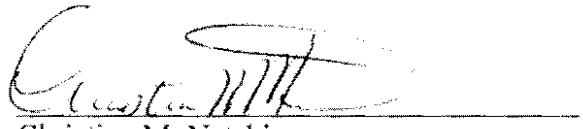

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