

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

COMMONWEALTH OF MASSACHUSETTS)

et al.,)

Plaintiffs,)

v.)

E*TRADE ACCESS, INC. *et al.*,)

Defendants.)

Case No. 03 11206 MEL

**DEFENDANTS' RESPONSE TO NEW EVIDENCE
AND LEGAL AUTHORITIES FIRST INTRODUCED BY
PLAINTIFFS AT THE OCTOBER 6, 2005 ORAL ARGUMENT**

At oral argument on October 6, 2005, Plaintiffs presented new evidence and new legal authority regarding their claim that ATMs are the “facility for first occupancy” governed by ADA § 12183(a)(1). Plaintiffs submitted to the Court and Defendants a “Building Permit” from the Town of Framingham, Massachusetts. Plaintiffs argued that this permit proves that an ATM is a “facility” that can be “occupied” and thus is independently subject to § 12183(a)(1). Plaintiffs further supported their argument by citing new legal authority, Mass. ch. 143 § 3L, for the proposition that ATMs may be the subject of “building permits.” Finally, Plaintiffs cited definitions of the term “facility” that Plaintiffs argued, wrongly, define the phrase “facility for first occupancy” used in § 12183(a)(1).

1. The Framingham Building Permit Supports Defendants' Argument.

Plaintiffs are in denial. The Framingham building permit that Plaintiffs presented in Court proves *Defendants'* point -- that the term “facility” as applied to § 12183(a)(1) means a building *plus* its equipment, and does not mean the equipment (here, an ATM) by itself.

As prior briefs established, the regulations implementing § 12183(a)(1) measure the date of a facility's "first occupancy" based on, among other things, the date a building permit was issued. Plaintiffs argue that ATMs can be the subject of building permits and, thus, ATMs can meet the regulatory definition of "facilities for first occupancy." Plaintiffs claim the Framingham building permit is an example of such a building permit issued for an ATM.

The Framingham building permit is nothing of the sort. The permit on its face says its purpose is to authorize a Framingham bank to "add ATM machine inside bank." Its title is "**building** permit," and its stated purpose is to allow the **bank** (a building) to be **altered** to include an ATM. The permit's second page is related exclusively to the building itself, showing its owner, its value (nearly \$900,000 -- orders of magnitude more than the value of an ATM), its "structures" (built in 1964, in fact), and its "other information" (**none** of which references the ATM). This "building permit" is clearly addressed to the building, not the ATM. Consequently, far from supporting Plaintiffs' argument that an ATM can be the subject of a building permit, this new evidence directly rebuts Plaintiffs' argument.¹

The Framingham building permit also shows the fundamental legal error Plaintiffs make regarding their motion for partial summary judgment. Plaintiffs admitted at oral argument that their motion arises solely under § 12183(a)(1) ("new construction") and not § 12183(a)(2) ("alterations" to facilities). To justify their argument that an ATM is the "facility for first occupancy" subject to § 12183(a)(1), Plaintiffs argued that the date of the "design and

¹ Plaintiffs argued that an ATM affixed to a building presents "two facilities" under § 12183(a)(1) -- (1) the building and (2) the ATM. That shocking argument is not supported by any case, and it reads out of existence the phrase in the statute "for first occupancy." There is only one facility capable of "first occupancy," the building/ATM combination. It is governed by § 12183(a)(1) only if the building/ATM combination was "designed and constructed" after January 1993.

construction” of an ATM “facility” is the date the ATM is installed in a building. The Framingham building permit proves the Plaintiffs have it all wrong. The date the ATM is “added” to the building (using the terms of the permit) is the date that the building is “altered.” Thus, the addition of the ATM to this bank in Framingham made the ATM subject to the ADA *not* under § 12183(a)(1) (new construction), but instead, if at all, under §12183(a)(2), as an alteration of the facility after 1993. Even if this ATM were one of Defendants’ ATMs (which Plaintiffs do not even argue), it could not fall within the scope of Plaintiffs’ summary judgment motion based solely on § 12183(a)(1). Furthermore, because the Framingham building permit was issued in May 1999, it falls well outside the three-year statute of limitations of any claim under § 12183(a)(2).

2. *Massachusetts Law ch. 143 § 3L Also Supports Defendants.*

Plaintiffs’ reliance at the oral argument on Mass. ch. 143 § 3L is equally misleading. Plaintiffs claim that § 3L permits ATMs to be the subject of building permits.

Chapter 143 generally governs buildings. It is entitled “Inspection and Regulation of, and Licenses for, Buildings, Elevators and Cinematograph.” It defines a “building” as “a combination of any materials, whether portable or fixed, having a roof, to form a structure for the shelter,” including “part or parts thereof.” *Id.* § 1. The ATM therefore is a “building” under this law only if the ATM is made a “part” of an occupied structure.

Ignoring this part of Chapter 143, Plaintiffs contend that § 3L authorizes localities to require building permits for the installation of ATMs. But § 3L does not stand for the conclusion Plaintiffs assert. Section 3L merely authorizes local authorities to grant permits “relative to the installation, repair and maintenance of electrical wiring and electrical fixtures used for light, heat and power purposes *in buildings and structures.*” Assuming the addition of

an ATM falls within this scope, any permit authorized by § 3L is not a building permit *for* an ATM, it is a permit to *alter a building* so that the building can have an ATM. This Massachusetts law does not support Plaintiffs' absurd notion that an ATM is itself a "facility for first occupancy" under § 12183(a)(1); the installation of an ATM would fall under § 12183(a)(2) as an "alteration" to a building or structure.

3. *Regulatory Definitions Of "Facility" Do Not Define The More Limited Phrase "Facility For First Occupancy."*

Another new argument Plaintiffs raised at the oral argument was that regulatory definitions of the term "facility" are broader than just buildings and can encompass things like mobile trucks, so that ATMs too can fall within the meaning of "facility."

Plaintiffs' arguments fail because no regulation expressly or solely interprets the phrase "facility *for first occupancy*" that is used in § 12183(a)(1). The term "facility" appears elsewhere in the ADA without the limiting modifier "for first occupancy." The regulations on which Plaintiffs rely define the term "facility" as it is used throughout all of Titles II and III of the ADA, not just to one section of Title III. Thus, the general definition of "facility" is not persuasive in defining the scope of the more restricted phrase contained in § 12183(a)(1).

Plaintiffs' use of the general definitions to define the limited scope of § 12183(a)(1) is as misguided as their mistaken argument that the ADAAG and § 12183(a)(1) are synonymous. Just because an ATM falls within the scope of the ADAAG does not mean that an ATM must be within the scope of § 12183. The ADAAG implements far more than just § 12183(a)(1); for example, an ATM could be affixed after 1993 to an older building and thus fall under § 12183(a)(2); or the ATM could be the subject of a claim under § 12182(b)(2)(A)(iv) ("removal of communication barriers"). Plaintiffs themselves argued that the ADAAG has this

broader applicability beyond § 12183(a)(1). Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 6.

The Court should therefore reject the Plaintiffs' continuous reliance on the broader definitions of the term "facility" where the definitions are not implementing the phrase from § 12183(a)(1); instead, the Court should rely on the legislative history, implementing regulations, and case law all construing and limiting the scope of the term "facilities" in § 12183(a)(1).

Respectfully submitted,

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.

E*TRADE ACCESS, INC.,

et al.,

Defendants.

Case No. 03 11206 MEL

CERTIFICATE OF SERVICE

I, Douglas P. Lobel, hereby certify that I have, this 11th day of October 2005, caused a true and accurate copy of **Defendants' Response To New Evidence And Legal Authorities First Introduced By Plaintiffs At The October 6, 2005 Oral Argument**, 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, MA 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, MA 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, MA 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, MD 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
Douglas P. Lobel