

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF  
MASSACHUSETTS, *et al.*,

Plaintiffs

v.

CARDTRONICS, INC., *et al.*,

Defendants

CIVIL ACTION NO. 03-11206-MEL

**ORDER GRANTING JOINT MOTION FOR PRELIMINARY  
APPROVAL OF PROPOSED REMEDIATION PLAN CONCERNING CLASS ACTION  
SETTLEMENT AGREEMENT, AND FOR A FAIRNESS HEARING**

Plaintiffs Commonwealth of Massachusetts, National Federation of the Blind, Inc., Adrienne Asch, Jennifer Bose, Norma Crosby, Dwight Sayer, Robert Crowley, Jr., Raymond Wayne, Terri Uttermohlen, and Bryan Bashin and Defendants Cardtronics Inc. and Cardtronics USA, Inc (successor by conversion to Cardtronics, LP) (collectively "Cardtronics") seek preliminary approval of a remediation plan ("Proposed Remediation Plan") concerning alleged violations of a class action settlement agreement that was approved by this Court on December 4, 2007. *See* Final Order and Judgment ("Final Order") at 12 (Docket No. 279, Dec. 4, 2007). The Parties also request that a final fairness hearing be scheduled. For the reasons set forth below, this motion is hereby granted.

**I. Background**

The underlying action that resulted in the settlement in this case was brought by the Commonwealth of Massachusetts, the National Federation of the Blind, Inc. ("NFB"), and eight blind individuals. Cardtronics owns and/or operates approximately 30,000 ATMs throughout the United States. Currently, Cardtronics owns approximately 18,000 ATMs ("Cardtronics-owned

ATMs”) and operates approximately 12,000 ATMs that are owned by independent merchants who are customers of Cardtronics (“Merchant-owned ATMs”).

Plaintiffs brought suit under the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, and Massachusetts state law. Plaintiffs requested that Defendants’ ATMs be made accessible to and independently useable by blind people through the use of Voice-guidance technology.

In 2007, the parties reached a comprehensive and detailed settlement. On December 4, 2007, the Court issued its Final Order, in which it gave final approval to the parties’ settlement agreement, incorporated the settlement agreement as Exhibit I to the Final Order (“Final Order Ex. 1”), and retained jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of the Agreement. Final Order at 12-13.

## **II. The Events Leading To This Motion**

Final Order Ex. 1 provided that the NFB would monitor compliance with the Final Order by conducting tests of ATMs around the country to ensure that they were Voice-guided and otherwise complied with the Final Order. The NFB began conducting these tests in 2008, and the tests indicated problems with Cardtronics’ implementation of the Final Order. This began a meet and confer process, consistent with the requirements of the Final Order, to identify all requirements that Cardtronics had failed to meet, the reasons for those failures and how best to remedy those failures. This meet and confer process included numerous calls and letters, production by the parties of relevant documents and information, and two in-person meetings

between the parties, which included one meeting between the parties' technical experts in an effort to improve the scripts<sup>1</sup> running on the various makes and models of ATM.

This process has established that the following requirements of the Final Order have not been, or will not be, met:

- Approximately 3,800 Cardtronics-owned ATMs are not Voice-guided as required by the Final Order.
- Cardtronics has acknowledged that it is not likely to meet the July 1, 2010, deadline for at least ninety percent of all transactions nationally, and within Massachusetts, to occur on Voice-guided ATMs.
- Many of the scripts on the ATMs are confusing to the blind user; some scripts do not allow a blind user to complete each step in the transaction and/or do not adequately describe the layout of the machine.
- Some purportedly Voice-guided ATMs do not comply with the Final Order because they do not have headphone jacks or tactilely discernible controls.
- The signage requirements of the Final Order have not been met.
- The ATM locator on Cardtronics' website has not been consistently updated to accurately identify ATMs that are equipped with Voice-guidance.

The parties have reached agreement on a Proposed Remediation Plan, for which they seek preliminary approval.

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<sup>1</sup> A "script" consists of software loaded on the ATM that provides an audio description of the machine, so that a blind user knows the location of various controls, and gives audio instructions allowing blind users to withdraw money, check bank balances and accomplish any other transactions available through the ATM.

### **III. The Parties' Proposed Remediation Plan**

The Proposed Remediation Plan provides as follows:

(1) All Cardtronics-owned ATMs in Massachusetts will be Voice-guided no later than June 30, 2010.

(2) By December 31, 2010, at least ninety percent (90%) of all transactions at covered ATMs occurring within the borders of Massachusetts will occur on ATMs that are Voice-guided.

(3) All Cardtronics-owned ATMs nationally will be Voice-guided no later than December 31, 2010, with the exception of Cardtronics-owned ATMs located in 7-Eleven stores which will be Voice-guided no later than March 31, 2011.

(4) By March 31, 2011, at least ninety percent (90%) of all transactions at covered ATMs nationally will occur on ATMs that are Voice-guided.

(5) With the assistance of the NFB, Cardtronics has developed enhanced scripts for the great majority of the ATMs it owns. With the exception of Cardtronics-owned ATMs located in 7-Eleven stores, on or before December 31, 2010 Cardtronics will install enhanced scripts on all Cardtronics-owned ATMs, except where it is not technologically feasible to do so, in which cases, on or before December 31, 2010, Cardtronics shall either (i) replace such ATMs with ATMs on which an enhanced script can and will be installed, or (ii) remove such ATMs from the Cardtronics-owned fleet. Cardtronics-owned ATMs located in 7-Eleven stores will be Voice-guided no later than March 31, 2011. Any script on any Cardtronics-owned ATM, including the enhanced scripts, shall meet the requirements set forth in the definition of "Voice-guided" and "Voice-Guidance" set forth in the Final Order<sup>2</sup> and as supplemented in paragraph 6 of this Order.

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<sup>2</sup> Final Order Ex. 1 at 4.

(6) With the exception of Cardtronics-owned ATMs located in 7-Eleven stores, by December 31, 2010, all Cardtronics-owned Voice-guided ATMs and those merchant-owned, Voice-guided ATMs that Cardtronics designates as making up a portion of the ninety percent (90%) transaction requirements of paragraphs 2 and 4 above, will have tactilely discernible controls, that is, operating mechanisms used in conjunction with speech output that can be located and operated by feel. When a numeric keypad is part of the tactilely discernible controls, all function keys will be mapped to the numeric keypad and, except for those remaining Wincor ATMs installed in Target stores prior to June 2007, the numeric keypad will have an "echo" effect such that the user's numeric entries (other than the entry of a personal identification number) are repeated in voice form. All tactilely discernible controls will otherwise comply with applicable regulations. All Cardtronics-owned ATMs located in 7-Eleven stores will meet these requirements no later than March 31, 2011.

(7) With the exception of Cardtronics-owned ATMs located in 7-Eleven stores, by December 31, 2010, all Cardtronics-owned ATMs will have appropriate signage as identified in the Final Order Ex. 1.<sup>3</sup> All Cardtronics-owned ATMs located in 7-Eleven stores will meet these requirements no later than March 31, 2011. By December 31, 2010, Cardtronics will send such signage to each of its Merchant-owned customers that operate a Voice-guided ATM (with the exception of those customers for whom Cardtronics physically placed Braille signage on each of the customer's Voice-guided ATMs after April 9, 2007) requesting that those customers install such signage on their Voice-guided ATMs. Cardtronics will include a letter from the NFB describing the importance of such signage with its request. On or before February 1, 2011,

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<sup>3</sup> See Final Order Ex. 1 at ¶ 4.2.

Cardtronics will provide the NFB with the approximate date on which it placed signage on each of the Merchant-owned Voice-guided ATMs or sent the appropriate signage by mail.

(8) By December 31, 2012, Cardtronics will cause to have inspected all Cardtronics-owned, non-branded ATMs to ensure that the Voice-guided features of these ATMs are in working condition. Approximately 10,000 of these inspections shall take place in calendar years 2010 and 2011, with the balance taking place in calendar year 2012. To the extent Cardtronics can demonstrate to Class counsel that within the first two years of conducting such inspections the Voice-guided features are in compliance with the definition of Voice-guidance, the parties shall meet to discuss the results of these inspections and may agree in writing that Cardtronics shall cause to have inspected a minimum of 1,000 Cardtronics-owned, non-branded ATMs each year for the remainder of the term of the Agreement. These inspections will be documented in a manner showing that the person conducting the inspection used headphones to listen to the voice script on the ATM. Similarly, in the course of conducting its routine inspections of Cardtronics-owned, branded ATMs, such inspections shall be documented in a manner showing that the person conducting the inspection used headphones to listen to the voice script on the ATM. On a monthly basis, Cardtronics shall report the results of all inspections required by this paragraph to Class counsel.

(9) In addition to the reporting requirements identified in the Final Order,<sup>4</sup> Cardtronics will report monthly between June 1, 2010 and December 31, 2011. For the period between June 1, 2010 and December 31, 2011, Cardtronics will add to the information it is currently reporting for each Cardtronics-owned ATM whether the enhanced script has been

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<sup>4</sup> See *id.* at ¶ 4.4.1.

installed on the ATM, as well as the month and year of such installation. No later than October 31, 2010, for each Cardtronics-owned ATM on which it is not technologically feasible to install an enhanced script, Cardtronics will indicate whether it will replace such ATM with a Voice-guided ATM or remove the ATM from the fleet.

(10) Cardtronics will keep its ATM locator on its website up to date as to whether a covered ATM is equipped with Voice-guidance.

(11) Notice of the Proposed Remediation Plan will be provided to the Class in the manner described below.

(12) In addition to the testing costs set forth in Final Order Ex. 1, Cardtronics will pay \$60,000 to the NFB to be used for interim testing and other compliance monitoring by the NFB taking place in 2010 and the first quarter of 2011. The NFB shall provide Cardtronics with invoices as testing is completed, to be payable by Cardtronics within 30 days of receipt of each invoice.

(13) Cardtronics will pay the NFB \$145,000 for the reasonable fees and costs incurred by the NFB as a result of Cardtronics' failure to comply with the Final Order. This amount includes attorneys' fees and testing costs that the NFB incurred due to the failure of Cardtronics to comply with the Final Order and shall be paid in two equal installments of \$72,500, one upon the effective date of this Court's final approval of the Proposed Remediation Plan and the second 60 days thereafter.

(14) The requirements set forth in Final Order Ex. 1 shall remain in effect, in whole or in part, for eight years from the date of this Court's final approval of the Proposed Remediation Plan. The Parties may agree in writing to extend the requirements of Final Order Ex. 1 further or

the Court may so order in connection with paragraph 13.3. Notwithstanding any expiration of Final Order Ex. 1, paragraphs 6, 7 and 13 of Final Order Ex. 1 shall continue to remain in effect in perpetuity.

(15) To the extent that the requirements set forth herein are inconsistent with any provision of Final Order Ex. 1, this Order controls. All other terms and requirements of the Final Order, including Final Order Ex. 1, will remain in full force and effect.

### **DISCUSSION**

#### **I. The Proposed Remediation Plan Will be Granted Preliminary Approval.**

Where, as here, “all parties . . . agree to the proposed modification of the [Final Order], the standards . . . to determine whether the modification should be approved are governed by Fed. R. Civ. P. 23(e).”<sup>5</sup> This rule provides that approval should be granted when the proposed modification is “fair, reasonable, and adequate.”<sup>6</sup>

The purpose of the preliminary review process is to ascertain whether there is any reason not to notify the class members of the proposed modification and to proceed with a fairness hearing.<sup>7</sup> “If the preliminary evaluation of the proposed [modification] does not disclose grounds to doubt its fairness or other obvious deficiencies . . . and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing . . . .”<sup>8</sup>

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<sup>5</sup> See, e.g., *Dillard v. Chilton County Comm’n*, 2008 WL 912753, at \*2 (M.D. Ala. Apr. 3, 2008).

<sup>6</sup> Fed. R. Civ. P. 23(e)(1)(C); see also *City P’ship Co. v. Atlantic Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (same).

<sup>7</sup> See, e.g., *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).

<sup>8</sup> 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:25 at 38 (4th ed. 2002) (hereinafter “*Newberg*”) (quoting *Manual for Complex Litigation* (Third) § 30.41 (1995)).



Among the factors to be considered are (1) the reaction of the class to the settlement; (2) the stage of the proceedings and the amount of discovery completed; (3) the range of reasonableness of the settlement fund in light of the best possible recovery; and (4) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.<sup>9</sup> An analysis of these factors supports preliminary approval of the Proposed Remediation Plan.

**A. The Reaction of the Class to the Settlement**

Although this factor is difficult to assess prior to the issuance of notice to class members and an opportunity to object,<sup>10</sup> at this stage, it is important to note that the representative plaintiffs as well as the Commonwealth and the President of the NFB all believe that the Proposed Remediation Plan is fair, reasonable and adequate. In addition, class counsel and the Attorney General of Massachusetts concur based on their experience with ATM cases and settlements and Title III class action litigation, as does Cardtronics' General Counsel. This factor favors approval of the Proposed Remediation Plan.

**B. The Stage of the Proceedings and the Amount of Discovery Completed**

Because this dispute is not in litigation, the parties did not engage in formal discovery in reaching the Proposed Remediation Plan. As set forth above, however, the parties did engage in extensive fact finding, including exchanging documents and participating in numerous telephonic

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<sup>9</sup> *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *overruled on other grounds by Missouri v. Jenkins*, 491 U.S. 274 (1989); see *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72-74 (D. Mass. 2005) (analyzing fairness using *Grinnell* factor); *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 95-98 (D. Mass. 2005) (same). Other factors relevant to the settlement of a case in litigation -- for example, the risks of establishing damages -- are irrelevant here.

<sup>10</sup> See *In re Lupron*, 228 F.R.D. at 96 (analyzing objections to assess this factor).

and in-person meetings. These facts support preliminary approval of the Proposed Remediation Plan.

**C. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery**

While this case does not involve a settlement fund, it is possible to consider the Proposed Remediation Plan in light of the best possible outcome and the delay resulting from litigating this dispute.

The Proposed Remediation Plan includes requirements that go beyond those found in the Final Order, including more extensive monitoring and increased reporting by Cardtronics.

Equally important, a dispute very likely would have delayed the most important goal of the underlying litigation -- making the covered ATMs accessible to the blind. Under the Proposed Remediation Plan, this will be accomplished by March 30, 2011. Litigating to enforce the terms of the Final Order may well have delayed the date on which the covered ATMs are made accessible.

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Based on the above, the Court grants preliminary approval to the Proposed Remediation Plan.

**II. Notice to the Class**

Rule 23(e)(1) states that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” “The court has complete discretion in

determining what constitutes a reasonable notice scheme, both in terms of how notice is given and what it contains.”<sup>11</sup>

Plaintiffs propose that notice of the Proposed Remediation Plan be: (1) posted on Cardtronics’ and NFB’s websites; (2) mailed and/or emailed to numerous disability rights organizations; (3) emailed to a listserv that includes blind persons; and (4) published as a one-half page advertisement in the *Braille Monitor* and the *Braille Forum*.

The *Braille Monitor* is the publication of the NFB. It is regularly sent to the NFB’s approximately 50,000 members, among others. The *Braille Forum*, the monthly magazine of the American Council of the Blind, has a total circulation of approximately 25,000. In addition, the organizations to which the notice is to be sent include a number composed of, and/or focused on the issues of, blind people. That list also includes all of the Protection and Advocacy Systems (P&As) around the United States, federally-funded nonprofit corporations with a mandate to advocate for the rights of individuals with disabilities, and all Centers for Independent Living (CILs), federally-funded, nonprofit corporations that provide services to maximize the independence of individuals with disabilities. Both the P&As and CILs will have the ability to reach blind people who are not involved with any of the mainstream blindness organizations. Finally, the list also includes a number of disability rights organizations.

The Court holds that the notice program proposed by the parties will satisfy the requirements of Rule 23 and due process.

In addition, the Court approves the proposed form of the notice, attached as Exhibit B to the Joint Motion for Preliminary Approval of Proposed Remediation Plan. That notice describes

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<sup>11</sup> 7B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1797.6 (3d ed.

the nature of the action, including the class, provides a description of the Proposed Remediation Plan, and class members' rights to object to the Plan, including through counsel, should they so choose. As such, the proposed notice meets the requirements of Rule 23 and due process.

Finally, class members who wish to object to the Proposed Remediation Plan must submit their objection in writing to the Court, with copies to all Counsel, within 30 days after the publication of notice as described above. "In order to prevent spurious objections to the settlement, the majority of settlements include a mandatory procedure which objectors must follow if their objections are to be considered." 4 Newberg § 11.56 at 181. This Court approves the parties' proposed procedure for class members to express their objection to the Proposed Remediation Plan.

Accordingly, the Court GRANTS the Joint Motion for Preliminary Approval of Proposed Remediation Plan Concerning Class Action Settlement Agreement, and for a Fairness Hearing and will hold a Fairness Hearing on the Proposed Remediation Plan on

Thursday 8/19/2010 at 2:00 p.m.

It is so ordered.

Dated: 5/18/10

Nathaniel M. Gorton  
United States District  Judge