

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DINO N. THEODORE,)	
and)	
ACCESS WITH SUCCESS, INC.,)	
Plaintiffs,)	CIVIL ACTION NO.
)	18-cv-12147-DPW
v.)	
)	
UBER TECHNOLOGIES, INC.,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

March 3, 2020

Dino Theodore and Access with Success, Inc. bring this action seeking permanent injunctive relief barring an allegedly discriminatory practice by Uber Technologies, Inc. of not providing wheelchair accessible vehicles to all areas of the Commonwealth of Massachusetts, or at least those currently served by Uber. In particular, Mr. Theodore and Access with Success contend in their now-operative second amended complaint that Uber's failure to provide wheelchair accessible vehicles in the suburb where Mr. Theodore resides, northwest of Boston near the border with New Hampshire, violates Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*

Uber has moved for an order to compel arbitration of all claims, under the Terms and Conditions to which Uber contends Mr. Theodore agreed when he created his account. More specifically, Uber argues that, at a minimum, an arbitrator

should decide at the threshold the arbitrability of the claims set forth by Mr. Theodore and Access with Success under the delegation clause of the Terms and Conditions.

In opposition, Mr. Theodore and Access with Success contend that there was never any valid written agreement between Mr. Theodore and Uber through which the parties agreed to arbitrate the claims set forth in Plaintiffs' second amended complaint.

I. BACKGROUND

A. *Factual Background*

Mr. Theodore is a 58-year-old practicing attorney, who is paralyzed from the chest down; he lives in Dracut, Massachusetts. Due to his condition and other physical setbacks, he has begun to rely more heavily on a power wheelchair that does not allow him to use an automobile equipped with hand controls, which he otherwise could drive.

Access with Success is a non-profit corporation, whose "members are able-bodied individuals and qualified individuals with disabilities as defined by the ADA." Mr. Theodore serves as a member and a director of Access with Success, with whom he has filed at least 45 federal actions as a co-plaintiff.

In October 2016, the Massachusetts Bay Transportation Authority began working with Uber, as well as its competitor ride-share company, Lyft Inc., to introduce a pilot program to provide subsidized rides in wheelchair accessible vehicles for

disabled passengers in a specific region of the Commonwealth.¹ Dracut is outside the region served by the RIDE program, which is where Uber's pilot program operates; consequently, Uber allegedly has no wheelchair accessible vehicles available for Mr. Theodore to take from his home.

Massachusetts General Law c. 161A provides statutory authority for the MBTA, including the definition of its "area constituting the authority." M.G.L. c. 161A § 1 (the "area constituting the authority" of the MBTA is "the service area of the authority consisting of the 14 cities and towns, the 51 cities and towns, and other served communities," which are all defined terms under the statute). Dracut is included under the "other served communities" within the "area constituting the authority" of the MBTA, *id.*, as well as the Lowell Regional

¹ The pilot program is designed to operate within the region that is served by the MBTA's para-transit service, "The RIDE," which provides transportation for people who have a disability that prevents them from using typical MBTA services such as buses, subways, or trolleys.

To provide context for this Memorandum, I take notice that MBTA is of the view that, "[u]nder the ADA, paratransit functions as a safety net. It is not intended to be a comprehensive system of transportation, and it's different from medical or human services transportation." *See generally* <https://www.mbta.com/accessibility/the-ride> (last visited Mar. 3, 2020). The RIDE program is available in 58 cities and towns "in the greater Boston area..." *Id.* Dracut, Massachusetts is outside the RIDE Service Area. As of March 2017, the pilot program was expanded to "all eligible users of the RIDE." *See* <https://www.mass.gov/news/governor-baker-mbta-celebrate-expansion-of-the-rides-on-demand-paratransit-service> (last visited Mar. 3, 2020).

Transit Authority, under M.G.L. c. 161B § 2. "The area constituting the authority and the inhabitants thereof are ... a body politic and corporate, and a political subdivision of the commonwealth, under the name of Massachusetts Bay Transportation Authority." M.G.L. c. 161A § 2. The MBTA's organic statute provides that "no person shall, on the grounds of... handicap, be denied participation in, or the benefits of, or be otherwise subjected to discrimination under any program or activity administered or operated by or for the authority." M.G.L. c. 161A § 5(a). Within the MBTA's statutory authority is the power to "conduct research... experimentation... and development, in cooperation with the [mass transit division within the] department [of transportation], and other governmental agencies and private organizations when appropriate, with regard to mass transportation ... services." M.G.L. c. 161A § 3(1).

On October 4, 2016, Mr. Theodore created an account on Uber's website and downloaded the app to his smartphone. None of the options presented for his desired destination included a wheelchair accessible vehicle, and after doing more research, Mr. Theodore concluded that this service was not available and deleted the app from his phone. On July 12, 2018, after hearing about the availability of Uber wheelchair accessible vehicles, Mr. Theodore logged onto the website and began to "sign-up" again; however, he did not complete the process once he

determined that Uber's wheelchair accessible vehicles were not available to him in Dracut.

B. Questions Presented

Uber's motion to compel arbitration presents the need to make determinations regarding who will decide the applicability of the Terms and Conditions of the account agreement which Mr. Theodore created on October 4, 2016.²

These determinations will be applicable both to Mr. Theodore and Access with Success.³

² In this connection, I note at the outset my conclusion that Mr. Theodore did not effectively cancel his account by his collateral act of deleting the related app. Indeed, the Terms and Conditions of that account agreement state that the dispute resolution section survives cancellation of a user's account. Thus, I find the argument by Mr. Theodore and Access with Success that his deletion of the app had the effect of freeing Mr. Theodore from the Terms and Conditions of the account agreement to be unavailing.

³ If Mr. Theodore is compelled to arbitrate, then so too is Access with Success because it is suing either as a membership organization, or as his alter ego. Access with Success has served as an organizational co-plaintiff for Mr. Theodore on numerous occasions. In fact, it has joined Mr. Theodore as a co-plaintiff in the last 45 federal lawsuits filed by Access with Success. "Associations suing in a representative capacity are bound by the same limitations and obligations as their members . . ." *Klay v. All Defendants*, 389 F.3d 1191, 2012-03 (11th Cir. 2004) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65-66 (1997)). Access with Success alleges it sues as a co-plaintiff here based on its "injury as a result of the defendant's actions or inactions . . . [and] because of its association with Dino Theodore and his claims . . ." Accordingly, it is a co-plaintiff in its representative capacity and would be bound by enforced arbitration against Mr. Theodore.

Moreover, "where corporations are formed, or availed of, to carry out the objectives and purposes of the corporations or

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