

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DISABLED IN ACTION OF	:	
PENNSYLVANIA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 03-CV-1577
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
	:	
Defendant.	:	

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**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, upon consideration of Plaintiff's Motion for Summary Judgment, and the response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED.

Defendant, SEPTA, is hereby ORDERED to construct an elevator at the 15<sup>th</sup> Street Entrance to the 15<sup>th</sup> Street Market-Frankford Station, from street level to concourse level, and to construct an elevator in the southeast City Hall Courtyard from street level to concourse level, to provide access to individuals who use wheelchairs.

SEPTA is further ORDERED to submit a schedule of compliance to Plaintiff's counsel and the Court within 45 days.

BY THE COURT:

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Honorable Gene E.K. Pratter  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Defendant.	:	

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**PLAINTIFF DISABLED IN ACTION OF PENNSYLVANIA’S  
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff, Disabled in Action of Pennsylvania (DIA), by and through its counsel, files this Motion for Summary Judgment. The undisputed material facts and the relevant law establish that Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) has discriminated against individuals with disabilities in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132, 12147(a), and 12147(b), and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794.

Specifically, as stated in Count I of Plaintiff’s Fourth Amended Complaint (Complaint), SEPTA violated the ADA and Section 504 by: (1) failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the 15<sup>th</sup> and Market Streets entrance (15<sup>th</sup> Street Entrance) to the Market-Frankford Subway-Elevated Line 15<sup>th</sup> Street Station; and (2) by failing to provide access to persons with mobility disabilities,

including those who use wheelchairs, when it altered and renovated the southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station.

In support of this Motion, Plaintiff submits the attached Memorandum of Law, including Plaintiff's Statement of Undisputed Facts, which are incorporated by reference as if fully set forth herein. Plaintiff also incorporates by reference the Exhibits filed in support of their prior April 5, 2006 Motion for Summary Judgment and their prior Response to SEPTA's April 5, 2006 Motion for Summary Judgment.

Respectfully submitted,

//s// Rocco J. Iacullo

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DATED: November 4, 2008

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DISABLED IN ACTION OF	:	
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Defendant.	:	

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**PLAINTIFF DISABLED IN ACTION OF PENNSYLVANIA’S  
MEMORANDUM OF LAW AND PROPOSED FINDINGS OF FACT  
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff Disabled in Action of Pennsylvania (DIA), by and through its counsel, submits this Memorandum of Law and Proposed Findings of Fact in support of its Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. With no disputed material facts, the case is appropriate for summary judgment.

The undisputed material facts and the relevant law establish that Defendant Southeastern Pennsylvania Transportation Authority (SEPTA) has discriminated against individuals with disabilities in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132, 12147(a), and 12147(b), and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. § 794.

Specifically, as stated in Count I of Plaintiff’s Fourth Amended Complaint (Complaint), SEPTA violated the ADA and Section 504 by: (1) failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the 15<sup>th</sup> and Market Streets entrance (15<sup>th</sup> Street Entrance) to the Market-Frankford Subway Elevated

Line (Market-Frankford Line) 15<sup>th</sup> Street Station; and (2) by failing to provide access to persons with mobility disabilities, including those who use wheelchairs, when it altered and renovated the southeast City Hall Courtyard exit from the City Hall Station of the Broad Street Subway.

**I. STATEMENT OF UNDISPUTED MATERIAL FACTS**

**A. Plaintiff Disabled in Action**

1. Plaintiff Disabled in Action of Pennsylvania (DIA) is a non-profit corporation which advocates for the civil rights of and services for persons with disabilities. See Plaintiff's Exhibit 2 to its April 5, 2006 Motion for Summary Judgment at pgs. 13-18<sup>1</sup>.

2. DIA has approximately 450 current active members, many of whom use wheelchairs and use SEPTA for their public transportation. Id. at pg.15.

3. DIA assists persons with disabilities to achieve equality with non-disabled persons and to advocate for the elimination of discrimination against people with disabilities in all aspects of community life, including transportation and housing. Id. at pgs. 23-42.

4. DIA has advocated for accessible entrances to both the Broad Street Subway City Hall Station and the Market-Frankford Elevated Line 15<sup>th</sup> Street Station. Id.

5. DIA's members and participants use and want access to SEPTA's Market-Frankford Line 15<sup>th</sup> Street Station and the Broad Street Subway City Hall Station. Id.

6. SEPTA's violation of the ADA and Section 504 has injured DIA by forcing it to advocate for the development and improvement of nondiscriminatory transportation services, diverting its time and resources from assisting persons with disabilities with other issues

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<sup>1</sup> Rather than resubmitting the voluminous Exhibits to both Plaintiff's April 5, 2006 Motion for Summary Judgment, and its May 3, 2006 Response to SEPTA's April 5, 2006 Motion for Summary Judgment, Plaintiff instead references those Exhibits throughout this Motion as either Plaintiff's Motion Exhibits or Plaintiff's Response Exhibits. Likewise, Plaintiff references any Exhibits from SEPTA's April 5, 2006 Motion for Summary Judgment as SEPTA Motion Exhibits.

including accessible and affordable housing, attendant care services, equal employment opportunities and access to places of public accommodation. Id. at pgs. 40-42.

7. DIA and its members are also directly and concretely injured by SEPTA's failure to provide access to the Market-Frankford Line 15<sup>th</sup> Street Station and the Broad Street Subway City Hall Station because members are unable to use these stations to get to and from meetings, programs and advocacy activities, which further curtails the organizational activities and goals of DIA. Id. at pgs. 39-41.

**B. Southeastern Pennsylvania Transportation Authority**

8. SEPTA is a state-created instrumentality that provides public transportation services in southeastern Pennsylvania, including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. Pa. Cons. Stat. Ann. § 1711; see also SEPTA Fiscal Year 2006 Capital Budget and Fiscal Year 2006-2017 Capital Program (Plaintiff's Motion Exhibit 3) at pg. 5.

9. SEPTA operates a "vast network of fixed-route services including bus, subway, subway-elevated, regional rail, light rail, and trackless trolley, as well as customized community service." Plaintiff's Motion Exhibit 3 at pg. 5.

10. SEPTA's City Transit Division operates a network of 82 subway-elevated, light rail, trackless trolley, and bus routes, providing approximately 850,000 passenger trips per day. Id.

11. SEPTA receives federal financial assistance and is subject to the Rehabilitation Act, 29 U.S.C. §§ 794(a)-(b)(1)(A). Id. at pgs. 9-17. SEPTA is also a public entity as defined by Title II of the ADA, 42 U.S.C. § 12131. Id.

**C. The Market-Frankford Line 15<sup>th</sup> Street Station**

12. The Market-Frankford Line is a high-speed light rail line operated by SEPTA that operates in part above ground (elevated) and in part below ground (subway). See SEPTA history of Market-Frankford Subway-Elevated Line (Plaintiff's Motion Exhibit 4) and Market-Frankford Line Route Map (Plaintiff's Motion Exhibit 5); see also Plaintiff's Motion Exhibit 3 at pg. 44.

13. The Market-Frankford Line operates above ground from the Frankford Transportation Center located in Northeast Philadelphia through the Spring Garden Station. It then operates underground between the stations at 2<sup>nd</sup> and Market Streets and 44<sup>th</sup> and Market Streets and then continues above-ground to its 69<sup>th</sup> and Market Streets Station in Delaware County. Plaintiff's Motion Exhibit 3 at pg. 44.

14. The Market-Frankford Line has the following subway station stops in Center City: 2<sup>nd</sup> and Market Streets, 5<sup>th</sup> and Market Streets, 8<sup>th</sup> and Market Streets, 11<sup>th</sup> and Market Streets, 13<sup>th</sup> and Market Streets, and 15<sup>th</sup> and Market Streets. See Plaintiff's Motion Exhibit 5.

15. The Market Frankford Line 15<sup>th</sup> Street Station is located underground at 15<sup>th</sup> and Market Streets, with the eastbound and westbound platforms of the station located under the bed of 15<sup>th</sup> Street adjacent to Dilworth Plaza and City Hall. See Plaintiff's Motion Exhibits 6 and 7.

16. The address of the 15<sup>th</sup> Street Market-Frankford Line Station is 15<sup>th</sup> and Market Streets. See Plaintiff's Motion Exhibit 6.

17. The 15<sup>th</sup> Street Station serves as the major transfer point and interchange with other SEPTA rail lines, including the Broad Street Subway, Subway-Surface Trolleys, and Regional Rail lines. See SEPTA Market-Frankford Line, Broad Street Subway, Subway-Surface and Regional Rail Maps and SEPTA Center City Philadelphia Street and Transit Map (Plaintiff's Motion Exhibit 8).

18. The Suburban Regional Rail Station serves distinct and separate rail lines than the 15<sup>th</sup> Street Station. Id. The Suburban Regional Rail Station serves SEPTA's regional rail lines and the 15<sup>th</sup> Street Station serves the Market-Frankford Line. Id.

19. The address of Suburban Regional Rail Station is 16<sup>th</sup> Street and JFK Boulevard. See Plaintiff's Motion Exhibit 9.

**D. 15<sup>th</sup> Street Market-Frankford Line Entrance**

20. The 15<sup>th</sup> Street Entrance is a street level open-air entrance to the Market-Frankford Line 15<sup>th</sup> Street Station located at the northwest corner of 15<sup>th</sup> and Market Streets, directly across the street from City Hall and Dilworth Plaza. See photographs of the 15<sup>th</sup> Street Entrance taken by Plaintiff's counsel (Plaintiff's Motion Exhibit 15); see also SEPTA photograph of directional signage within the 15<sup>th</sup> Street Entrance escalator headhouse (Plaintiff's Motion Exhibit 16).

21. The 15<sup>th</sup> Street Entrance is located on land owned by the City and leased to SEPTA. See statement by Andres Perez of June 15, 2000 (Plaintiff's Motion Exhibit 17) and Deposition of Christopher Zearfoss, Senior Transportation Project Manager, City of Philadelphia Office of Strategic Planning (Plaintiff's Motion Exhibit 18) at pg. 63, line 13 – pg. 64, line 12.

22. The City of Philadelphia, shortly after the 15<sup>th</sup> Street Entrance's construction in the 1960's, depicted the entrance as an entrance to the 15<sup>th</sup> Street Station of the Market-Street Subway and the Subway-Surface Lines. See City of Philadelphia 1963 Capital Program photograph and description of 15<sup>th</sup> Street Entrance (Plaintiff's Motion Exhibit 19).

23. Christopher Zearfoss, Senior Transportation Project Manager, City of Philadelphia Office of Strategic Planning, testified that you can directly access the 15<sup>th</sup> Street Station from the 15<sup>th</sup> Street Entrance as follows: "if you're proceeding west, having come down

the stairway, you take a left, you come to a flight of steps that lead up to the cashier facility that leads to the 15<sup>th</sup> Street Station of the Market-Frankford Line.” Plaintiff’s Motion Exhibit 18 at pg. 81, line 6 – pg. 82, line 8.

24. Mr. Zearfoss further testified that the platform and tracks for the Market-Frankford Line are located directly under the stairs leading to the cashier facility for the 15<sup>th</sup> Street Station. Id.

25. SEPTA clearly recognizes and acknowledges the 15<sup>th</sup> Street Entrance as an entrance to the 15<sup>th</sup> Street Market-Frankford Line Station. See Plaintiff’s Motion Exhibit 6.

26. SEPTA’s own directional signage affixed to the renovated escalator headhouse at the 15<sup>th</sup> Street Entrance, which is viewed by SEPTA patrons as they descend the escalator, identifies it as an entrance to the Market-Frankford Line 15<sup>th</sup> Street Station as well as providing access to the Subway-Surface Trolley Lines, the Broad Street Subway, and to the Suburban Regional Rail System. See Plaintiff Motion Exhibits 15 and 16.

27. Gerald Maier, SEPTA’s Director of Real Estate, testified that pedestrians can reach the 15<sup>th</sup> Street Station by utilizing the 15<sup>th</sup> Street Entrance. See Deposition of Gerald Maier (Plaintiff’s Motion Exhibit 20) at pg. 65, line 23 – pg. 67, line 20.

28. Various maps and diagrams depict the close proximity of the 15<sup>th</sup> Street Entrance to the Market-Frankford Line 15<sup>th</sup> Street Station, and demonstrate that the 15<sup>th</sup> Street Entrance is closer to the Market-Frankford Line than it is to the high speed Subway-Surface Trolley line, the Broad Street Subway, and to the Suburban Regional Rail System. See Plaintiff’s Motion Exhibit 7; see also portion of City of Philadelphia Center City Concourse System map, dated November 3, 1978 (Plaintiff’s Motion Exhibit 21).

29. The 15<sup>th</sup> Street Entrance is highly visible to the public, it is advertised by SEPTA as an entrance to the Market-Frankford Line, and pedestrians use it to enter the Market-Frankford Line 15<sup>th</sup> Street Station. Plaintiff's Motion Exhibits 15-21.

30. The 15<sup>th</sup> Street Entrance undisputedly provides access to and is an entrance to the 15<sup>th</sup> Street Market-Frankford Station. See Disabled in Action v. Southeastern Pennsylvania Transportation Authority, 539 F.3d 199, 202 n.1 (3<sup>rd</sup> Cir. 2008).

**E. The 15<sup>th</sup> Street Entrance is Distinct From Suburban Station**

31. There are multiple property lines within the geographical boundary that SEPTA defines as the Suburban Station facility extending from 15<sup>th</sup> Street to 18<sup>th</sup> Street and from Cuthbert to Market Street. See SEPTA's Exhibit 48 to its April 5, 2006 Motion for Summary Judgment (hereinafter SEPTA's Motion Exhibits), see also Three Penn Center Plot Plan, Two Penn Center Topographical Plans, and Commonwealth Land Title Insurance Co. Plan attached as Exhibits D, E, and F to Plaintiff's May 3, 2006 Response to SEPTA's Motion for Summary Judgment (hereinafter Plaintiff's Response Exhibits).

32. The 15<sup>th</sup> Street Entrance has its own discrete property line, as does Two Penn Center, Three Penn Center and many of the other office buildings within the SEPTA defined so-called outer perimeter of the "Suburban Station facility." Id.

33. SEPTA readily admits that there are multiple property lines within the perimeter that SEPTA defines as the Suburban Station facility, which are depicted on the BLT Concourse Property Line Plan dated 8/15/01. See SEPTA's Motion Exhibit 48, and Deposition of SEPTA expert, Donald Kloehn (Plaintiff's Response Exhibit G), at pg. 95, line 14-pg. 103, line 7.

34. Roderick Wolfson (the project architect from Bower Lewis Thrower, who specified the demolition of the existing stairs at the 15<sup>th</sup> Street Entrance and designed the

replacement stairs) admitted that there are multiple property lines within that geographical boundary, including a discrete property line for the 15<sup>th</sup> Street Entrance and Courtyard. See Plaintiff's Response Exhibit H at pg 16, line 9 – pg. 19, line 3; and pg. 39, line 24 – Pg. 44, line 25.

35. Deeds uncovered by Plaintiff show that the property upon which the 15<sup>th</sup> Street Entrance stands, and as delineated by the property lines on the BLT Concourse Plan, was conveyed from the Pennsylvania Railroad Company to the City of Philadelphia in 1960. See Plaintiff's Response Exhibit I.

36. There is also a deed referencing the conveyance of the land upon which Three Penn Center stands from the Pennsylvania Railroad Company to Three Penn Center in 1956. See Plaintiff's Response Exhibit J.

37. Both of these deeds also mention the rights of the "Market Street Elevated Passenger Railway Co. and the Philadelphia Transportation Co. .... to use, operate and maintain the subway in Market Street and also the entrances to and exits from said subway on the land hereby conveyed." See Plaintiff's Response Exhibit I at pg. 3, ¶ 3; Exhibit J at pg. 4.

38. Mr. Wolfson acknowledged that the City of Philadelphia, not SEPTA, owns the 15<sup>th</sup> Street Courtyard/Entrance, and that it has its own discrete property line. Plaintiff's Response Exhibit H at pg. 16, line 17 – line 22.

39. Mr. Wolfson admitted that as rightful owner of the 15<sup>th</sup> Street Entrance the City of Philadelphia has control over that property and that they could close it down and it would no longer be part of "Suburban Station facility." Id. at pg. 20, line 14 – line 24.

40. Mr. Wolfson also stated that there are so called “islands of exclusions” within SEPTA’s designated outer perimeter of the Suburban Station Facility. Id. at pg. 26, line 22 – pg. 28, line 9.

41. He testified that by “islands of exclusions” he was referring to property ownership belonging to the office towers, including their property at concourse level, that are not part of the Suburban Station Transit Facility, even though their property is located within the outer perimeter of the SEPTA defined facility. Id.

42. According to the BLT Property Line Concourse Plan, there is a distinct property line for an area that directly encompasses what could be considered the primary area of Suburban Station (16<sup>th</sup> Street to 17<sup>th</sup> Street, JFK Blvd. to Cuthbert Street), including waiting areas, ticket offices at concourse level and the train platforms at platform level. See SEPTA Motion Exhibit 48, and Plaintiff’s Response Exhibit K.

43. The waiting areas and ticket areas of Suburban Station are approximately one and half blocks from the 15<sup>th</sup> Street Entrance. Plaintiff’s Response Exhibit G at pg. 49 line 17 – pg. 50 line 15.

44. The 15<sup>th</sup> Street Entrance does not provide direct access to these waiting areas or ticket areas of Suburban Station and does not provide direct access to the train platforms of Suburban Station. Id.

**F. 15<sup>th</sup> Street Market-Frankford Line Entrance Alterations and Renovations**

45. Prior to 2001, the 15<sup>th</sup> Street Entrance consisted of a set of stairs, which descended into the center of a courtyard, and two escalators enclosed within a headhouse. See SEPTA pre-renovation photographs of 15<sup>th</sup> Street Entrance (Plaintiff’s Motion Exhibit 22).

46. In February 2001, SEPTA began an alteration and renovation of the 15<sup>th</sup> Street Entrance. See SEPTA Capital Project Progress Report from February 2001 (Plaintiff's Motion Exhibit 23).

47. As part of the renovation work, SEPTA completely demolished the centrally located existing stairs and constructed new stairs along the southeastern wall of the entrance. See Plaintiff's Motion Exhibit 20 at pg. 60, line 25 – pg. 61, line 22, and Deposition of Terry Heiser, SEPTA Senior Project Manager for the Suburban Station and City Hall Station Renovation projects (Plaintiff's Motion Exhibit 24) at pg. 14, line 22 – pg. 15, line 25.

48. Gerald Maier stated that “the original stairs came from the western part of the courtyard about in the middle and kind of plunked themselves down into the middle of the courtyard” and that “the plan was to remove those stairs and to replace them with a stair entrance right at the corner of 15<sup>th</sup> and Market, which is what was done.” Plaintiff's Motion Exhibit 20 at pg. 60, line 25 – pg. 61, line 22

49. Terry Heiser also verified the demolition of the stairs and construction of new stairs as part of the renovation to the 15<sup>th</sup> Street Entrance. Plaintiff's Motion Exhibit 24 at pg. 14, line 22 – pg. 15, line 25.

50. Roderick Wolfson, Project Architect with Bower Lewis Thrower hired by SEPTA for the Suburban Station and City Hall Station Rehabilitation Projects, testified that the 15<sup>th</sup> Street Entrance stair was demolished as it was BLT's conclusion that the stair was beyond repair due to deterioration of the concrete. See Deposition of Roderick Wolfson (Plaintiff's Motion Exhibit 25) at pg.13, line 12 - line 22.

51. SEPTA's building permit submitted to the City of Philadelphia identified the project as follows:

Demolition incorporates head house, stair, railings, limited wall, veneer, pavement and lighting systems. Also to be removed are planters, fountain and ceilings. Construction scope consists of glass head house, stair, (2) retail spaces, railings, storefront system, planters, lighting and paving installed, as well as new ceiling. Plaintiff's Motion Exhibit 26.

52. Photographs produced by SEPTA explicitly depict the demolition of the centrally located existing stairs, and the construction of the new stairs along the southeastern edge of the 15<sup>th</sup> Street Entrance. See SEPTA 15<sup>th</sup> Street Entrance construction photographs (Plaintiff's Motion Exhibit 27).

53. SEPTA recognizes that the stairs at the 15<sup>th</sup> Street Entrance were unsafe, in disrepair, and were entirely replaced. See SEPTA Brief in Support of its April 5, 2006 Motion for Summary Judgment at 48.

54. Mr. Wolfson admitted that the existing stairs could have been repaired by replacing the concrete treads, i.e. "normal maintenance," instead of demolishing the stairs and replacing them. Plaintiff's Response Exhibit H at pg. 55, line 18 – pg. 57, line 17.

55. He admitted that normal maintenance would have included putting new treads on stairs, painting the area, and installing new lighting. Id.

56. Mr. Wolfson also admitted the obvious fact that stairs affect the usability of a facility. Plaintiff's Response Exhibit H at pg. 53, line 11 – pg. 55, line 17.

57. SEPTA's expert, Donald Kloehn, admitted that stairs affect the usability of a facility. Plaintiff's Response Exhibit G at pg. 71, line 19 – pg. 72, line 4; pg. 77, line 14-line 22.

58. The alteration and renovation project was completed, and the new stairs were reopened to the public on August 8, 2002. See SEPTA Capital Project Summary Report, August 2002 (Plaintiff's Motion Exhibit 28).

59. SEPTA did not install an elevator at the 15<sup>th</sup> Street Entrance as part of the project, and thus, the newly renovated entrance cannot be used by individuals who use wheelchairs. Plaintiff's Motion Exhibits 23-28.

60. It is technically feasible to install an elevator at the 15<sup>th</sup> Street Entrance from street level to the concourse level. Plaintiff's Motion Exhibit 24 at pg. 54, line 11 – pg. 55, line 5.

**G. City Hall Broad Street Subway Station**

61. City Hall Station was constructed in 1928 as part of the original Broad Street Subway which extended underground below Broad Street from Olney Avenue to City Hall. See SEPTA Broad Street Subway History (Plaintiff's Motion Exhibit 29); and City Hall Renovations document. (Plaintiff's Motion Exhibit 30).

62. City Hall Station served as the southern terminus of the Broad Street Subway line until April 1930, when the line was extended to South Street. Id. The subway now extends as far north as Fern Rock Station and as far south as Pattison Avenue Station. Id.

63. The Broad Street Subway and the City Hall Station are located under the Market-Frankford Line and Subway Surface Lines underneath City Hall's western foundations. See City Hall Station Renovations –Request for Proposal (Plaintiff's Motion Exhibit 31).

64. The address for the City Hall Broad Street Subway Station is Broad and Market Streets. See SEPTA City Hall Station address (Plaintiff's Motion Exhibit 32).

65. The City Hall Station has several direct entrances including a stair entrance from Dilworth Plaza at street level to the lower north concourse, a stair entrance from street level at the City Hall Courtyard to the lower south concourse, and an escalator serving as an exit from the lower south concourse to the southeast City Hall Courtyard. Plaintiff's Motion Exhibit 29; see also Heiser Deposition Exhibits 5B, 6A, & 6B (Plaintiff's Motion Exhibit 33); and City Hall Station Renovations Existing Concourse Level Plan (Plaintiff's Motion Exhibit 34).

66. The escalator located in the southeast City Hall Courtyard is an exit from the City Hall Station mezzanine or concourse level. See Disabled in Action v. Southeastern Pennsylvania Transportation Authority, 539 F.3d 199, 202 n.8 (3<sup>rd</sup> Cir. 2008).

67. The Broad Street Subway's lower concourses run north and south of the Market-Frankford Line. See Plaintiff's Motion Exhibits 30, 33 and 34.

68. From the lower south concourse under the City Hall Courtyard pedestrians can travel east through the concourse, without using any stairs, to reach the eastbound platforms of the 13<sup>th</sup> Street Market-Frankford Station and the 11<sup>th</sup> Street Market-Frankford Station. Id.; see also deposition transcript of Skip Brooke, Director of Engineering in SEPTA's Bridges and Buildings Department (Plaintiff's Motion Exhibit 35) at pg. 22, line 21 – pg. 26, line 13.

69. From that same location in the lower south concourse under City Hall Courtyard, a pedestrian can travel east and then south, without using stairs, to reach the South Broad Street concourse, the Walnut-Locust Broad Street Subway Station, and can actually continue in the South Broad Street concourse to the PATCO Line under 15<sup>th</sup> and Locust Streets (there is a PATCO elevator which can be used to reach the street at this location). See Plaintiff's Motion Exhibit 35 at pg. 40, line 6 – pg. 41, line 7; Exhibit 24 at pg. 74, line 11 – pg. 77, line 10; Exhibit 18 at pg. 144, line 21 – pg. 147, line 3; see also Plaintiff's Motion Exhibit 33.

70. The station serves as a major interchange between the Broad Street Line, Market-Frankford Line, Subway-Surface Lines and Regional Rail Lines. Id.; see also Plaintiff's Motion Exhibit 8.

**H. City Hall Broad Street Subway Station Southeast Escalator Replacement**

71. In August 2003, SEPTA completed the replacement of an escalator in the southeast corner of the central City Hall Courtyard, which serves as an exit for patrons disembarking from the Broad Street Subway City Hall Station and pedestrians traversing the concourse. See City Hall Station Renovations BLT Meeting Minutes at Item 20-03 and FY 2003 Capital Budget, Escalator/Elevator Program report (Plaintiff's Motion Exhibit 42); see also Brooke Affidavit at ¶ 19 (Plaintiff's Motion Exhibit 43); and Plaintiff's Motion Exhibits 33 & 34.

72. The escalator was inoperable prior to the replacement. See Plaintiff's Motion Exhibit 43 at ¶ 15.

73. The southeast City Hall Courtyard escalator was one of six escalators replaced as part of Phase II of SEPTA's Escalator Replacement Program, a program under which numerous inoperable or deteriorated escalators have been replaced throughout SEPTA's transit system. Plaintiff's Motion Exhibit 43 at ¶¶ 4-7 & Exhibit 35 at pg. 13, line 16 – pg. 19, line 20.

74. Skip Brooke, Director of Engineering in the Bridges and Buildings Department at SEPTA, testified that the existing southeast City Hall Courtyard escalator was removed from the wellway in order to facilitate installation of the new escalator. Plaintiff's Motion Exhibit 35 at pg. 49, line 3 – 11.

75. Mr. Brooke testified that the prior escalator had inadequate vertical clearance for the new escalator. Plaintiff's Motion Exhibit 35 at pg. 55, line 2 – line 10; pg. 57, line 21 – pg. 58, line 2; pg. 69, line 21 – pg. 70, line 4; and pg. 73, line 4 – line 18.

76. Mr. Brooke testified that installation of the new escalator required SEPTA to physically relocate the truss in the wellway (the truss is the structural piece that physically supports the escalator along its length) to accomplish the required seven foot vertical clearance. Id.

77. Mr. Brooke also explained in detail the construction photographs taken of the southeast City Hall Courtyard escalator replacement project. Plaintiff's Motion Exhibit 35 at pg. 58, line 8 – pg. 77, line 14; see also photographs of escalator before, during and after construction (Plaintiff's Motion Exhibit 44). SEPTA's Fiscal Year 2005 Capital Budget also contains two photographs depicting the new escalator and headhouse in the southeast City Hall courtyard, and identifies plans to replace the escalator in the Northwest courtyard. See 2005 Fiscal Year Capital Budget at pgs. 42-43 (Plaintiff's Motion Exhibit 45).

78. SEPTA admitted that the replacement of the escalator affected the usability of the City Hall Station because it was previously inoperable and unusable by people disembarking from the station, but after the replacement, the escalator can now be used by people exiting the station. See Plaintiff's Motion Exhibit 35.

79. SEPTA provided no elevator access for individuals who use wheelchairs as part of this renovation project to the City Hall Station southeast City Hall Courtyard. Plaintiff's Motion Exhibits 42 – 45.

80. It is technically feasible to install an elevator in the City Hall Courtyard to provide access from the street level to the lower concourse level. Plaintiff's Motion Exhibit 35 at pg. 95, lines 9-16; and Exhibit 43 at ¶ 36.

## **II. ARGUMENT**

### **A. Summary Judgment Standard**

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c). See also Pittston Co. Ultramar America v. Allianz Ins., 124 F.3d 508, 515 (3d Cir. 1997). If there is no genuine dispute concerning any facts material to its claims, summary judgment must be entered in favor of Plaintiff.

### **B. Plaintiff Has Standing To Pursue These Claims**

Plaintiff DIA has sustained injury in its own right as a result of SEPTA's failure to make the 15<sup>th</sup> Street Entrance to the Market-Frankford Line 15<sup>th</sup> Street Station and the southeast City Hall Courtyard Broad Street Subway exit accessible to persons with disabilities, including those who use wheelchairs. See Statement of Undisputed Facts (SUF) Nos. 1-7. DIA has expended its own time, money and resources in a variety of ways due to the inaccessibility of the identified transportation facilities. SUF No. 6. DIA's work has been interrupted as a result of the inaccessibility of the entrances. SUF Nos. 6 & 7. Accordingly, DIA has standing to sue as an organization. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Alexander v. Riga, 208 F.3d 419, 427 n.4 (3d Cir. 2000); Robinson v. Block, 869 F.2d 202, 207, 210 n.9 (3d Cir. 1989); ADAPT v. Philadelphia Housing Authority, No. 98-4609, 2000 WL 433976 at \*2-\*3, \*5-\*6 (E.D. Pa. Apr. 14, 2000); Liberty Resources, Inc. v. SEPTA, 155 F.Supp. 2d 242, 242-52 (E.D.Pa. 2001), vacated as moot, 54 Fed. Appx. 769 (3d Cir. 2002).

DIA also has standing to pursue this lawsuit on behalf of its members. DIA's members are individuals with disabilities who utilize SEPTA's transportation services and these individuals have been unable to access SEPTA's facilities at the identified entrances. SUF Nos. 2, 5, & 7. DIA's members are qualified individuals with disabilities as defined by the ADA and the Rehabilitation Act of 1973. SUF No. 2. DIA may pursue this case on behalf of its members because (1) those members have been harmed by SEPTA's failure to make the identified entrances wheelchair accessible and (2) the interests DIA seeks to protect are germane to its organizational purposes to eradicate transportation barriers that inhibit the ability of individuals with disabilities to live independently in their communities. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); Doe v. Stincer, 175 F.3d 879, 882-83, 885-86 (11th Cir. 1999).

**C. SEPTA Violated the ADA By Altering the 15th Street Market-Frankford Station Entrance and The City Hall Broad Street Subway Station Exit Without Making Them Accessible To Individuals With Disabilities**

**1. Plaintiff Represents Individuals With Disabilities Protected By The ADA and Section 504 and SEPTA Is Subject To The Requirements Of Those Statutes**

There is no dispute that all of DIA's members are eligible to use SEPTA's fixed route transportation system. SUF Nos. 2, 5, & 7. Therefore, they are qualified persons with disabilities under the ADA and Section 504. 42 U.S.C. §§ 12102(2), 12131(2); 29 U.S.C. §§ 705(9)(B), 705(20). It is also undisputed that SEPTA is a public entity subject to Title II of the ADA, including the provisions governing public transportation. 42 U.S.C. § 12131(1)(B); 74 Pa. Cons. Stat. Ann. § 1711, and SUF Nos. 8-11. As the recipient of federal funds, SEPTA is also subject to Section 504 of the Rehabilitation Act. 29 U.S.C. § 794; Id. Since SEPTA is a federally-funded, public entity that operates a fixed route transportation system, it is required to comply

with the new construction and alterations provisions of the ADA, 42 U.S.C. § 12147, and Rehabilitation Act, 29 U.S.C. § 794.

**2. Under the ADA, Congress Intended That Alterations To Transportation Facilities Would Trigger Equal Access**

In enacting the ADA, Congress found that isolation, segregation, and discrimination against individuals with disabilities persists in the “critical area[] of . . . transportation.” 42 U.S.C. §12101(a)(3). Accordingly, the ADA bars discrimination in public transportation. 42 U.S.C. §12147(a); see also S. REP. NO. 101-116, at 13 (1989) (“Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society.”); H.R. REP. NO. 101-485, pt. 3, at 63 (1990) (“The ADA is geared to the future-the goal being that, over time, access will be the rule, rather than the exception”)(emphasis added). In recent cases, the United States Supreme Court and Courts of Appeals have construed Title II of the ADA broadly to be “faithful to the Act’s demand . . . to secure access and avoid exclusion.” Tennessee v. Lane, 124 S. Ct. 1978, 1996 (2004) (Ginsburg, J., concurring); (“Including individuals with disabilities among people who count in composing ‘We the People’, Congress understood in shaping the ADA would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation”); see also Olmstead v. L.C., 527 U.S. 581, 598 (1999) (finding that Congress had a comprehensive view of the concept of discrimination advanced in the ADA “that included disparate treatment among members of the same protected class”); Hason v. Med. Bd., 279 F.3d 1167, 1172 (9th Cir. 2002) (quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 861 (1st Cir. 1998)) (finding that the ADA must be construed “broadly in order to effectively implement the ADA’s fundamental purpose of ‘providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’”).

Congress and the federal agencies understood that equal access would be achieved over time primarily as both new construction and alterations occurred. Whenever a public entity, including a transit authority such as SEPTA, newly constructs or alters a facility or part of a facility, the new construction or alteration triggers the ADA's mandate of equal access. Thus, the federal regulations are substantially more stringent concerning alterations and new construction undertaken by public entities than they are concerning the retrofitting of existing, non-altered facilities. Kinney v. Yerusalim, 9 F.3d 1067, 1071 (3d Cir. 1993), cert. denied 511 U.S. 1033 (1994); see also Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988) (holding that the alteration of the Columbia Avenue Subway Station entrance without making it accessible violated Section 504 of the Rehabilitation Act and its federal regulations, the relevant portions of which were identical to 49 C.F.R. § 37.43(a)(1)).

The distinction between new construction and alterations, on one hand, and existing facilities, which the public entity does not alter, on the other hand, is one of the bedrocks of both the ADA and Section 504. If a public entity continued after enactment of the ADA to construct and alter its existing facilities without making them accessible, then the future goal of achieving full access would never be obtained. Thus, both the ADA and Section 504 require public entities, if and only if they decide to make an alteration, to assure that the alteration is made in a manner that is accessible to people with disabilities.

The distinction between new construction and alterations, on one hand, and existing facilities which the public entity need not alter, on the other hand, also “reflects Congress’ recognition that mandating changes to existing facilities could impose extraordinary costs. ‘**New construction and alterations**, however, present an immediate opportunity to provide **full accessibility.**’” Kinney, 9 F.3d at 1074 (emphasis added). Further, it is “discriminatory to the

disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded.” *Id.* at 1073. While “the obligation of accessibility for alterations does not allow for non-compliance based upon undue burden,” *Id.* at 1071, if a transit authority did have to prioritize accessibility, “**an accessible entrance would generally be the most important . . .** since without it the facility will be totally unusable by many persons with disabilities.” H.R. REP. NO. 101-485, pt. 3, at 65 (1990)(emphasis added).

In keeping with the intent of Congress, and to facilitate accessibility of public transportation systems, the ADA, as did Section 504, *see Sykes, supra*, mandates that transit authorities, when making an alteration to an existing station or part thereof, make the altered portion accessible to individuals with disabilities:

With respect to alterations of an existing facility **or part thereof** used in the provision of designated transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of Sec. 12132 of this title and Sec. 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), for a public entity to fail to make such alterations in such a manner that, to the maximum extent feasible, the **altered portions** of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

42 U.S.C. § 12147(a) (emphasis added). The U.S. Department of Transportation (DOT) regulations promulgated under this part of the ADA reiterates transit authorities’ responsibilities.

49 C.F.R. § 37.43(a)(1)(emphasis added); *see also* 28 C.F.R. § 35.151(b)(regulation promulgated by the Department of Justice under the ADA with almost identical language and the regulation that the Third Circuit construed in *Sykes*). Thus, the statute and regulations make clear that (1) if the existing facility in question is a facility used in providing designated public transportation services, or is part of a facility used in providing designated public transportation services, and (2) if the public entity decides to alter that existing facility, or part thereof, then (3) the public

entity is mandated to make that altered facility or the altered portions of the facility readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, to the maximum extent feasible.

**3. The 15<sup>th</sup> Street Courtyard And Southeast City Hall Escalator Are Part of Existing Stations/Facilities Covered By The ADA Alterations Provisions**

**a. The 15<sup>th</sup> Street Entrance Is An Entrance To The Market-Frankford Line 15<sup>th</sup> Street Station**

The Market-Frankford Line 15<sup>th</sup> Street Station is located underground at 15<sup>th</sup> and Market Streets. SUF Nos. 15-16. The 15<sup>th</sup> Street Entrance is a street level open-air entrance to the Market-Frankford Line 15<sup>th</sup> Street Station that is located at the northwest corner of 15<sup>th</sup> and Market Streets, across the street from City Hall and Dilworth Plaza. SUF No. 20. Various maps and diagrams of the concourse depict the close proximity of the 15<sup>th</sup> Street Entrance to the Market-Frankford Line 15<sup>th</sup> Street Station, in fact, they demonstrate that it is situated directly adjacent to the 15<sup>th</sup> Street Station platforms. SUF No. 28. The City, which owns the property of the 15<sup>th</sup> Street Entrance, recognizes the 15<sup>th</sup> Street Entrance as an entrance to the 15<sup>th</sup> Street Market-Frankford Station. SUF Nos. 21-24. Even SEPTA itself recognizes the reality that the 15<sup>th</sup> Street Entrance is an entrance to the 15<sup>th</sup> Street Market-Frankford Station. SUF Nos. 25-27.

According to the DOT regulations, a facility is defined as “all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, structure, or equipment is located.” 49 C.F.R. §37.3. This definition is very broad and supports Plaintiff’s claim that the 15<sup>th</sup> Street Entrance is unequivocally part of the Market-Frankford Line 15<sup>th</sup> Street Station. To access the 15<sup>th</sup> Street Station from the 15<sup>th</sup> Street Entrance, a pedestrian would descend either the stairs or escalator, then turn left into the 15<sup>th</sup> Street concourse corridor, ascend a flight of stairs and then

proceed through the turnstiles, and then descend another set of stairs to the train platforms. SUF Nos. 23 & 27. The evidence, and the reality, make it readily apparent that the 15<sup>th</sup> Street Entrance provides a direct connection to the 15<sup>th</sup> Street Station through the 15<sup>th</sup> Street Corridor, that pedestrians use it to get to the 15<sup>th</sup> Street Station, and thus, that it is an entrance and part of the 15<sup>th</sup> Street Station. As the Third Circuit suggested, the 15<sup>th</sup> Street Entrance undisputedly provides access to and is an entrance to the 15<sup>th</sup> Street Market-Frankford Station. Disabled in Action v. Southeastern Pennsylvania Transportation Authority, 539 F.3d 199, 202 n.1 (3<sup>rd</sup> Cir. 2008).

**b. The Southeast City Hall Escalator Is Part Of The Broad Street Subway City Hall Station**

The undisputed documentary evidence identifies the southeast City Hall Courtyard Escalator as part of the City Hall Broad Street Subway Station. SUF Nos. 65-66; 71-77. The construction photographs produced by SEPTA explicitly depict the Southeast City Hall Escalator as part of the City Hall Broad Street Subway Station. SUF No. 77. The escalator at this location is clearly marked on the side of the headhouse as an exit for SEPTA patrons disembarking from the Broad Street Subway at City Hall Station. SUF No. 77. Construction documents related to the replacement of the southeast City Hall Courtyard escalator continuously refer to the escalator as being part of the City Hall Station. SUF Nos. 71-77. The escalator located in the southeast City Hall Courtyard is an exit from the City Hall Station mezzanine or concourse level. See Disabled in Action v. Southeastern Pennsylvania Transportation Authority, 539 F.3d 199, 202 n.8 (3<sup>rd</sup> Cir. 2008). There is no question that the southeast City Hall Courtyard escalator is part of the Broad Street Subway City Hall Station. SUF Nos. 66; 71-77.

**4. The 15<sup>th</sup> Street Courtyard and City Hall Southeast Escalator Renovations Unequivocally Qualify As Alterations Triggering The ADA Mandate of Accessibility**

Neither the 15<sup>th</sup> Street Entrance nor the Market-Frankford Line 15<sup>th</sup> Street Station is currently accessible to individuals who use wheelchairs. SUF No. 59. There are no other accessible entrances to either the 15<sup>th</sup> Street Station or the City Hall Station. SUF Nos. 45, 59 and 79. Both the 15<sup>th</sup> Street Entrance and City Hall escalator construction projects unequivocally qualify as alterations for the purposes of the ADA, as it cannot be disputed that the alterations were substantial in nature and affected the usability of the respective facilities that they are part of. 42 U.S.C. § 12147(a). As such, the ADA and Section 504 required that SEPTA make these entrances readily accessible to and usable by individuals with disabilities, including those who use wheelchairs.

The federal regulations define an alteration as “a change to an existing facility, including, but not limited to remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.” 49 C.F.R. § 37.3. “Minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability do not trigger the requirement that the altered areas must be made accessible.” H.R. Rep. No. 101-485, pt. 3, at 64 (1990); see also 49 C.F.R. § 37.3. The Americans with Disabilities Act Accessibility Guidelines, which apply to Title II of the ADA, define alteration as “a change to a building or facility ... that affects or could affect the usability of the building or facility or part thereof. 28 C.F.R. § 36, Appendix. A. It continues by stating “normal maintenance ... is not an alteration unless it affects the usability of the building or facility.” Id.

The Third Circuit has interpreted the alterations provision of the ADA broadly to effectuate accessibility. In Kinney v. Yerusalem, 9 F.3d 1067, 1069 (3d Cir. 1993), cert. denied 511 U.S. 1033 (1994), the court squarely faced the question of what constitutes an alteration under the ADA, specifically in the context of whether street resurfacing constituted an alteration triggering an ADA requirement to install curb ramps and provide accessibility pursuant to the resurfacing. The court focused with precision on the concept of usability that is expressed in the statutory language for alterations. Kinney at 1072-1074. The court held that street resurfacing constitutes an alteration because it unequivocally affected usability by making the street more usable by pedestrians. Id. at 1073-1074. It accepted the district court's opinion that: "Resurfacing makes driving on and crossing streets easier and safer. It also helps to prevent damage to vehicles and injury to people and generally promotes convenience and travel. The surface of a street is the part of the street that is "used" by both pedestrian and vehicular traffic. When that surface is improved, the street becomes more usable in a fundamental way." Id. (quoting Kinney, 812 F.Supp. 547, 551 (E.D. Pa. 1993)). The court made clear that, "if a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities." Id. at 1073. The court reasoned that its reading "helps to implement the legislative vision, for Congress felt that it was discriminatory to the disabled to enhance or improve an existing facility without making it fully accessible to those previously excluded." Id. The court also held that resurfacing constituted an alteration under the ADA because it involved more than minor repairs or maintenance. Id.; see also Molloy v. Metropolitan Transp. Auth., 94 F.3d 808, 811-12 (2d Cir. 1996) (holding that installation of movable ticket machines is an alteration, and requiring ticket machines to be readily accessible); Civic Association of the Deaf v. Giuliani, 970 F. Supp. 352, 359 (S.D. NY 1997) (finding that replacement of two-button

emergency boxes with one-button boxes constitutes an alteration under the ADA because it was a “change to the physical and functional structure of the equipment,” and requiring that defendants restore the two-button boxes since the one-button boxes did not provide adequate access for the deaf citizens of the city).

It is undisputed that SEPTA demolished the existing centrally located stairs at the 15<sup>th</sup> Street Entrance, including their foundation, and constructed an entirely new set of stairs and new foundation along the southern edge of the entrance. SUF Nos. 45-52. These renovations were substantial in nature and affected a change in the physical and functional structure of the entrance. Id. The construction work undertaken at the 15<sup>th</sup> Street Entrance involved substantially more than mere maintenance. SUF Nos. 54-55. Further, it is beyond dispute that the renovations affected the usability of the 15<sup>th</sup> Street Entrance since the stairway is the means by which people use the facility. SUF Nos. 56-57. This is directly analogous to Kinney in that the changes made to the stairs promoted convenience and travel, and made the stairs safer to use. SEPTA admitted that the old stairs were entirely demolished because they were in such disrepair that they could not be fixed. SUF Nos. 50 & 53. Since the old stairs were in such disrepair, clearly the new stairs are much safer for pedestrians to use than the old stairs. It simply cannot be argued in good faith that the installation of new stairs at the 15<sup>th</sup> Street Entrance to the Market-Frankford 15<sup>th</sup> Street Station did not affect the usability of that entrance. Thus, the alterations qualify as alterations under the ADA, and SEPTA was legally required to make the 15<sup>th</sup> Street Entrance accessible to persons who use wheelchairs by installing an elevator.

Likewise, the renovation to the southeast City Hall Courtyard exit from the Broad Street Subway was substantial in nature as it included the demolition of the existing escalator and truss and installation of an entirely new escalator and truss. SUF Nos. 72-77. The photographs

produced by SEPTA demonstrate the extensive nature of the replacement of the escalator, including the relocation of the truss. Id. Based upon the evidence, it simply cannot be disputed that the replacement work was substantial in nature and constituted more than just minor maintenance. Further, there is no question that the renovations affected the usability of the Broad Street Subway City Hall Station. SUF No. 72. Prior to the renovations, pedestrians could not use the escalator to exit the lower south concourse to the City Hall Courtyard after disembarking from the City Hall Station. Id. Now, with the installation of the new escalator, pedestrians can use that escalator as another means to exit the lower south concourse after disembarking from the Broad Street Subway at City Hall Station. SUF Nos. 66, 71, & 78. Thus, installing a new, escalator increased the usability of the Station by adding another means of egress from the station. Id. Unequivocally, the alterations qualify as alterations under the ADA, and thus, SEPTA was legally required to make the altered southeast City Hall Courtyard exit from the Broad Street Subway City Hall Station accessible to persons who use wheelchairs.

The alterations to the 15<sup>th</sup> Street Entrance and the southeast City Hall escalator are virtually the same in DIA v. Sykes, 833 F.2d 1113 (3d Cir. 1987), cert. denied 485 U.S. 989 (1988), which involved alterations to the Columbia Avenue Broad Street Subway Station. There SEPTA demolished the existing stairway and constructed a new stair in the same location (unlike the 15<sup>th</sup> Street stairway where SEPTA relocated the stair) and installed an escalator. While decided before the ADA, the Court upheld the lower court's application of the Rehabilitation Act alteration provision, 49 C.F.R. § 27.67(b), which is nearly identical to the ADA alteration provision, 42 U.S.C. § 12147(a), to SEPTA's reconstruction of stairs, and construction of new stairs and an escalator, leading to the Subway. In that case, the Court dealt with alterations identical to those at 15<sup>th</sup> Street and City Hall Courtyard and it mandated that SEPTA provide

elevator access to people with disabilities. The Sykes decision is binding for purposes of the 15<sup>th</sup> Street Entrance and the southeast City Hall Courtyard exit. Thus, unequivocally SEPTA should also be required to provide elevator access to people with disabilities at both the 15<sup>th</sup> Street Entrance and the southeast City Hall Courtyard.

**5. SEPTA Violated The ADA By Not Making The Altered Entrances Accessible To The Maximum Extent Feasible**

The ADA provides that it shall be considered discrimination for a public entity to “fail to make ... alterations in such a manner that, to the maximum extent feasible, the **altered portions** of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.” 42 U.S.C. § 12147(a) (emphasis added). The regulations specify that to the maximum extent feasible means that all changes that are possible must be made. 49 C.F.R. Part 37, App. D. A transit authority will only be excused in the “occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration.” 49 C.F.R. § 37.43(b). SEPTA does not claim, nor can it claim, that it is impossible to make the 15<sup>th</sup> Street Entrance itself accessible to individuals with disabilities by installing an ADA-compliant elevator.

SEPTA may claim that it cannot provide direct access to 15<sup>th</sup> Street Station by installing one elevator at the 15<sup>th</sup> Street Entrance and that providing an elevator thus, would serve no useful purpose. However, this argument is irrelevant and misses the point. The ADA mandates that the **altered portions** of the station are readily accessible to and usable by individuals with disabilities.” 42 U.S.C. § 12147(a)(emphasis added). In reference to the 15<sup>th</sup> Street Entrance, the installation of an elevator, which would provide access to persons in wheelchairs from street level to concourse level, is itself unequivocally feasible. SUF No. 60. The street level entrance is

the part of the facility, i.e. the 15<sup>th</sup> Street Station, that the ADA requires that SEPTA make accessible, not necessarily the entire facility. This follows Congress' goal that "over time, access will be the rule, rather than the exception." H.R. REP. NO. 101-485, pt. 3, at 63 (1990). This is the purpose Congress had in mind when developing the alterations provisions of the ADA. Because there is no dispute that it was feasible to install an elevator at the 15<sup>th</sup> Street Entrance, the ADA mandated that SEPTA provide access to persons who use wheelchairs. SEPTA failed to do so.

Likewise, it is feasible for SEPTA to install an elevator in the City Hall Courtyard near the renovated escalator. SUF No. 80. Again, because there is no barrier to installing an elevator near the renovated southeast City Hall Courtyard escalator providing access to the lower south concourse, the ADA mandated that SEPTA install such an elevator to provide access to persons who use wheelchairs.

It is undisputed that SEPTA made alterations to the 15<sup>th</sup> Street Market-Frankford Line Entrance and the southeast City Hall Courtyard Broad Street Subway Station exit. SUF Nos. 45-55; 71-77. It is further undisputed that SEPTA did not install an elevator at the 15<sup>th</sup> Street Entrance or City Hall Courtyard southeast exit as part of the renovations, and thus, the entrances themselves cannot be used by individuals who use wheelchairs. SUF Nos. 59 & 79. These alterations unequivocally affected the usability of parts of existing stations/facilities, SUF Nos. 56, 57, & 78, and SEPTA failed to make the altered parts of those stations/facilities readily accessible to individuals with mobility disabilities, including those who use wheelchairs, SUF Nos. 59 & 79, in violation of the ADA and the Rehabilitation Act. SEPTA continues to discriminate against individuals with disabilities every day that the entrances are not made accessible. This illegal discrimination will only end when SEPTA makes the 15<sup>th</sup> Street Entrance

and the southeast City Hall Courtyard Broad Street Subway exit readily accessible to and usable by individuals with mobility disabilities, including those in wheelchairs, to the maximum extent feasible.

**6. SEPTA Had a Separate Legal Duty To Make The 15<sup>th</sup> Street Entrance Accessible As It Serves The 15<sup>th</sup> Street Station of the Market-Frankford Line Which is A Separate and Distinct “Facility” From Suburban Station**

SEPTA asserted in its April 5, 2006 Motion that it was not required to install an elevator at the 15<sup>th</sup> Street Entrance because SEPTA included the alterations to that entrance in its project to renovate Suburban Station, and that project included installation of elevators at two other locations (17<sup>th</sup> Street and JFK Blvd. and 16<sup>th</sup> Street and JFK Blvd.) to provide access to the “key commuter rail station” of Suburban Station. The problem with SEPTA’s argument is that it ignores the undisputed evidence that the 15<sup>th</sup> Street Entrance serves the 15<sup>th</sup> Street Station of the Market-Frankford Line which is a distinct transportation facility from Suburban Station. SUF Nos. 20-30. Therefore, elevators installed to access Suburban Station cannot be deemed to provide access to a wholly separate transportation facility, such as the 15<sup>th</sup> Street Market-Frankford Line Station. The “existing facility used in providing designated public transportation,” for the purposes of 42 U.S.C. § 12147(a) and 49 C.F.R. § 37.43(a)(1), which the 15<sup>th</sup> Street Entrance is a part of, is the Market-Frankford Line 15<sup>th</sup> Street Station, which is a separate and distinct “facility” from Suburban Station, and thus, the ADA required SEPTA to make that entrance wheelchair accessible when it altered it.

SEPTA contends that the 15<sup>th</sup> Street Entrance is part of Suburban Station because it claims that the “Suburban Station facility” has “clearly demarcated boundaries” extending from 15<sup>th</sup> Street to 18<sup>th</sup> Street, Market Street to Cuthbert Streets. SEPTA’s Motion Brief at 41. Assuming arguendo that property lines are relevant, and they are not, SEPTA’s argument must

fail. SEPTA relies upon the Bower Lewis and Thrower Suburban Stations Renovations Property Line Concourse Level Plan, SEPTA Motion Exhibit 48, to support its contention that the Suburban Station facility has these boundaries. However, SEPTA's BLT document and other diagrams of the areas in fact refute SEPTA's contention that there is only one "clearly demarcated boundary" for the Suburban Station Transit Facility. Rather, there are multiple property lines within the geographical boundary that SEPTA defines as extending from 15<sup>th</sup> Street to 18<sup>th</sup> Street and from Cuthbert to Market Street. SUF Nos. 31-34.

It is undisputed that the 15<sup>th</sup> Street Entrance has its own discrete property line, as does Two Penn Center, Three Penn Center and many of the other office buildings within the SEPTA defined so-called outer perimeter of the "Suburban Station Project." SUF Nos. 31-34. SEPTA readily admits that there are multiple property lines within the perimeter that SEPTA defines as the Suburban Station facility, which are depicted on the BLT Concourse Property Line Plan dated 8/15/01. SUF No. 33. SEPTA's proffered expert witness, Roderick Wolfson (the project architect from Bower Lewis Thrower, who specified the demolition of the existing stairs at the 15<sup>th</sup> Street Entrance and designed the replacement stairs) admitted that there are multiple property lines within that geographical boundary, including a discrete property line for the 15<sup>th</sup> Street Entrance and Courtyard. SUF No. 34. Deeds uncovered by Plaintiff show that the property upon which the 15<sup>th</sup> Street Entrance stands, and as delineated by the property lines on the BLT Concourse Plan, was conveyed from the Pennsylvania Railroad Company to the City of Philadelphia in 1960. SUF No. 35. There is also a deed referencing the conveyance of the land upon which Three Penn Center stands from the Pennsylvania Railroad Company to Three Penn Center in 1956. SUF No. 36. Both of these deeds also mention the rights of the "Market Street Elevated Passenger Railway Co. and the Philadelphia Transportation Co. .... to use, operate and

maintain the subway in Market Street and also the entrances to and exits from said subway on the land hereby conveyed.” SUF No. 37.

Mr. Wolfson acknowledged that the City of Philadelphia, not SEPTA, owns the 15<sup>th</sup> Street Entrance, and that the Entrance has its own discrete property line. SUF No. 38. Mr. Wolfson admitted that as rightful owner of the Entrance, the City of Philadelphia has control over that property and that they could close it down and it would no longer be part of SEPTA’s definition of “Suburban Station facility.” SUF No. 39. Mr. Wolfson also stated that there are so called “islands of exclusions” within SEPTA’s designated outer perimeter of the Suburban Station Facility. SUF No. 40. He testified that by “islands of exclusions” he was referring to property ownership belonging to the office towers, including their property at concourse level, that are not part of the Suburban Station Transit Facility, even though their property is located within the outer perimeter of the SEPTA defined facility. SUF No. 41. This evidence unequivocally establishes that there are separate and distinct facilities, serving distinct purposes, within the SEPTA defined footprint of the Suburban Station facility that are not actually part of the Suburban Station facility.

There is a actually a distinct property line for an area that directly encompasses what could be considered the primary area of Suburban Station (16<sup>th</sup> Street to 17<sup>th</sup> Street, JFK Blvd. to Cuthbert Street), including waiting areas, ticket offices at concourse level and the train platforms at platform level. SUF No. 42. The waiting areas and ticket areas of Suburban Station are approximately one and half blocks from the 15<sup>th</sup> Street Entrance. SUF No. 43. The 15<sup>th</sup> Street Entrance does not provide direct access to these waiting areas or ticket areas of Suburban Station and does not provide direct access to the train platforms of Suburban Station. SUF No. 44. Indeed, the 15<sup>th</sup> Street Entrance undisputedly serves as an entrance to the 15<sup>th</sup> Street Station of

the Market-Frankford Line, which again is a separate and distinct facility from Suburban Station. SUF No. 30. Because SEPTA altered the 15<sup>th</sup> Street Entrance, which is designed to serve the 15<sup>th</sup> Street Station of the Market-Frankford Line, see SUF Nos. 20-30, SEPTA was required by the ADA to make that Entrance accessible to people who use wheelchairs. It is totally irrelevant that SEPTA decided to install two elevators to provide access to the Suburban Station.

**7. SEPTA's Contention That An ADA Vertical Accessibility Requirement Is Not Triggered By The Demolition And Reconstruction of Existing Stairs or An Existing Escalator Is Based On Its Erroneous Reading of DIA v. Sykes and The ADA Regulations and Is Without Merit**

SEPTA argued in its Motion that there was no vertical accessibility requirement triggered by the demolition and replacement of the escalator in the City Hall Courtyard or demolition and subsequent replacement of stairs at the 15<sup>th</sup> Street Entrance because it did not change the access, as the demolition and installation of the new escalator and demolition and installation of the stairs occurred in the same location or nearby. SEPTA's reading of ADAAG provision 4.1.6(f) and the DIA v. Sykes case is erroneous. The ADAAG provision cited by SEPTA only states that vertical accessibility is required when new stairs and escalators are installed where none existed previously. Neither this provision, nor any other in ADAAG, nor the other federal regulations state that the demolition of an existing escalator and replacement with a new escalator and demolition of stairs and replacement with new stairs are not alterations, nor that vertical accessibility is not required as part of such alterations under the ADA.

SEPTA's reading of the Third Circuit's decision in DIA v. Sykes, 833 F.2d 1113 (3<sup>rd</sup> Circ. 1987) in its Motion is incorrect. First, there is no question that in DIA v. Sykes there had also been a demolition of the existing stairs in its northbound station and a replacement of those stairs that triggered the ADA's legal requirement to provide accessibility to the northbound

terminal. Id. at 1120. Second, SEPTA states in its Brief that “the reconstruction of two existing stairs on the southbound side of Columbia Station in Sykes was insufficient to trigger a vertical accessibility requirement.” SEPTA Motion Brief at 48-49. SEPTA’s statement implies that the Sykes court affirmatively ruled on Plaintiff’s claims that the work to the southbound stairs triggered an accessibility requirement. It did not. Rather, the court found that there was insufficient evidence for it to determine whether or not the work performed on the southbound stairs amounted to normal maintenance or constituted an alteration, and it therefore remanded for determination of the issue at trial. Id. at 1121. However, the issue was never decided by the District Court because the case settled and SEPTA voluntarily agreed to make the southbound side of the Columbia Avenue Station accessible. Further, on the northbound side, the court not only dealt with installation of an escalator but most relevant to the instance case SEPTA demolished the existing stairs, and exactly like the 15<sup>th</sup> Street Entrance, replaced them in a slightly relocated position. Therefore, DIA v. Sykes does not, in anyway, compel the conclusion that vertical accessibility is not required by the reconstruction and alteration of an existing stairway and vertical accessibility is not required in the 15<sup>th</sup> Street Entrance.

SEPTA, and its expert, Mr. Kloehn, erroneously argue that ADAAG supports their contention that SEPTA was not required to provide vertical accessibility at the 15<sup>th</sup> Street Entrance or the City Hall Courtyard. SEPTA and Mr. Kloehn rely upon Section 4.1.6(f) of ADAAG, which is an affirmative statement that if an escalator or stair is planned where none existed previously then vertical access must be provided. See SEPTA Motion Brief at 47-48; 53; and Plaintiff’s Response Exhibit G at pg. 110, line 14 – line 22. However, it does not state that the demolition of an existing stair and replacement with a new stair does not constitute an alteration under the ADA. In fact, Mr. Kloehn admitted that no where does the ADA or the DOT

regulations state that demolishing an existing stair and replacing it with a new stair is not an alteration under the ADA. Plaintiff's Response Exhibit G at pg. 107, line 17 – pg. 108, line 5. Mr. Kloehn simply has no legal basis for his conclusion that demolishing an existing stair and replacing it with a new stair does not constitute an alteration and thus, does not trigger a requirement to provide vertical accessibility based upon this ADAAG provision. His testimony in this regard is thus not legally competent and this Court must disregard his testimony.

The alterations regulations permit non-accessibility only where the alteration constitutes “normal maintenance.” Certainly, in this case, SEPTA's demolition of the stairs and construction of new stairs at a different location from the previous stairs at the 15<sup>th</sup> Street Entrance is far from “normal maintenance.” The photographs of the City Hall Courtyard project clearly show that SEPTA entirely replaced an existing inoperable escalator – which is also far more than normal maintenance. SUF No. 77. SEPTA admitted that the existing stairs at the 15<sup>th</sup> Street Entrance were demolished and the courtyard was remodeled by constructing a new set of stairs. SUF No. 47. SEPTA recognizes that the stairs at the 15<sup>th</sup> Street Entrance were unsafe, in disrepair and were entirely replaced. SUF No. 53. Mr. Wolfson admitted that the existing stairs could have been repaired by replacing the concrete treads, i.e. “normal maintenance,” instead of demolishing the stairs and replacing them. SUF No. 54. He admitted that normal maintenance would have included putting new treads on stairs, painting the area, and installing new lighting. SUF No. 55. With regard to the City Hall Courtyard project, SEPTA admits that there is no disputed issue of material fact that the existing unsafe escalator was replaced with another escalator and that the well-way was significantly extended to accommodate the new escalator. SUF Nos. 71-77.

SEPTA and its expert, Donald L. Kloehn, misunderstand and confuse the ADA alterations requirements as established by the Third Circuit in Kinney v. Yerusolim, 9 F.3d 1067

(3<sup>rd</sup> Cir. 1993). Mr. Kloehn was questioned regarding whether an accessibility requirement would be triggered by the reconstruction of an existing stairway leading to a train platform. See Plaintiff's Response Exhibit G at pg. 28, line 25 – pg. 31, line 20. He stated that an accessibility requirement would not be triggered by such a reconstruction because “it made no change in the **accessibility** of that particular platform.” Id. In Kinney, the court held that the focus on whether particular construction work constitutes an alteration for ADA purposes is on whether the work affected or could have affected the **usability** of the facility and held that an alteration which affects usability undoubtedly constitutes an alteration under the ADA. 9 F.3d at 1072. The correct focus under ADA alterations is whether the construction affects the **usability** of the facility not whether it affects accessibility, as SEPTA and its expert argues, which was the old standard under the Rehabilitation Act regulations, 49 C.F.R. § 27.67(b).

The 15<sup>th</sup> Street Entrance Renovation and the City Hall Courtyard escalator replacement were unequivocally more than just normal maintenance due to the substantial demolition and reconstruction that took place. This work was undertaken so that non-disabled people could use the new stairs and newly installed escalator. Both alterations affected the usability of the entrance and exit for non-disabled people, regardless that there had been a pre-existing set of stairs and pre-existing inoperable escalator. The ADAAG defines alteration as “a change to a building or facility ... that **affects** or **could affect** the **usability** of the building or facility or part thereof,” and states that “normal maintenance ... is not an alteration **unless** it affects the usability of the building or facility.” 28 C.F.R. § 36, Appendix A. Therefore, even if a public entity engages in maintenance of a facility in a manner that affects the usability of the facility, then that maintenance can still be considered an alteration under the ADA.

Mr. Kloehn admitted that stairs affect the usability of a facility. SUF No. 57. Mr. Wolfson also admitted the obvious fact that stairs affect usability of a facility. SUF No. 56. SEPTA also admitted that the replacement of the escalator affected the usability of the City Hall Station because it was previously inoperable and unusable by people disembarking from the station, but can now be used by people exiting the station. SUF No. 78. There can be no real dispute that the demolition and reconstruction of new stairs and the demolition of an escalator and installation of a new escalator are alterations under the ADA because they affected the usability of the 15<sup>th</sup> Street Station and City Hall Station as people use the 15<sup>th</sup> Street Entrance to enter the 15<sup>th</sup> Street Station and people use the escalator in the City Hall Courtyard after disembarking from the City Hall Broad Street Subway Station. Therefore, there can be no reasonable dispute that SEPTA violated the ADA by not providing access to persons who use wheelchairs as part of the identified renovations of the 15<sup>th</sup> Street Entrance and the City Hall Station escalator.

**III. CONCLUSION**

For all the reasons set forth above, Plaintiff respectfully requests that the Court enter summary judgment in favor of Plaintiff and against SEPTA, declare that SEPTA violated the ADA and Section 504, and order SEPTA to install an elevator at the 15<sup>th</sup> Street Entrance and to install an elevator in the southeast City Hall Courtyard.

Respectfully submitted,

//s// Rocco J. Iacullo

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DATED: November 4, 2008

**CERTIFICATE OF SERVICE**

I, Rocco J. Iacullo, Esquire, hereby certify that Plaintiff's Motion for Summary Judgment, including Statement of Undisputed Facts, Memorandum of Law in support of that Motion, and proposed Order has been filed electronically with the Court on November 4, 2008, and are available for viewing and downloading from the ECF system by the below counsel, who has consented to electronic service:

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