UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER NOEL, SIMI LINTON, UNITED SPINAL, a nonprofit organization, THE TAXIS FOR ALL CAMPAIGN, a nonprofit organization, 504 DEMOCRATIC CLUB, a nonprofit organization, DISABLED IN ACTION, a nonprofit organization Plaintiffs, -against- NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, a charter mandated agency, and DAVID YASSKY, in his official capacity as chairman and commissioner of the New York City Taxi and Limousine Commission, Defendants.	Case no. 11-cv-0237 (GBD) **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION

Defendants do not dispute that summary judgment is appropriate. They do not dispute that more than 98% of the New York City taxicab fleet is not accessible to wheelchair users. Defendants' response to Plaintiffs' Rule 56.1 Statement confirms that there is no genuine dispute as to any material facts. Accordingly, whether or not Defendants have a duty to provide wheelchair users with access to their taxicab system is a pure question of law.

Defendants' legal arguments are the same as those rejected by this Court in their Motion to Dismiss. Defendants merely repeat their previous claims that: (1) Subpart A of the Americans with Disabilities Act ("ADA") only prohibits them from discriminating in the issuance of licenses; (2) Subpart B of the ADA does not apply to them because they do not "operate" taxicabs; and (3) Title III of the ADA, expressly not applicable to public entities, somehow exempts the TLC from any responsibility to ensure that the taxicab system *as a whole* does not discriminate. The only new argument Defendants make is not a legal argument at all. Defendants ask this Court to not rule because they have some plans to purportedly provide access to the taxicab system – though they claim they have no duty to do so – sometime next year.

Defendants' argument to delay ruling because "the factual underpinnings of this lawsuit are about to change" is irrelevant, disingenuous and dismissive of the continuing harm Plaintiffs are suffering. Defs. Mot. in Opp. at 2. Defendants admit there is no dispatch system currently in place. Declaration of Julia M. Pinover in Support of Plaintiffs Motion for Partial Summary Judgment, ("Pinover Decl.") Exh. C (Chhabra Tr.) at 16:23-17:2. There will be no way to know what access their program will provide until it is in place long enough to be assessed. For a bureaucracy like the TLC, this could take years. Defendants other hope – legislative efforts – are even less predictable. At best, the current legislation pending Governor approval would still leave over 94% of the fleet inaccessible.

In sum, Defendants tell the Court that the law does not apply to them for all the same reasons that were rejected by the Court in Defendants' Motion to Dismiss. Defendants also ask the Court not rule so that Defendants can attempt to fix the problem they claim they do not need to fix. All the while, the TLC continues to sanction the purchase of *new* inaccessible vehicles

(thus perpetuating the inaccessibility of the taxicab fleet well into the future) and Plaintiffs continue to be deprived of an essential public benefit. As a result, every day wheelchair users face the injustice and indignity of being unable to hail a taxicab to get to a meeting, work, or to visit a sick relative. This denial and exclusion is a clear and ongoing violation of the ADA.[1]

II. BASED ON THE UNDISPUTED FACTS DEFENDANTS ARE CURRENTLY DENYING WHEELCHAIR USERS ACCESS TO MEDALLION TAXICAB SERVICE IN VIOLATION OF THE ADA

A. As Defendants Admit, Over 98% of the Current Taxicab System is Inaccessible to Wheelchair Users

The TLC does not dispute that currently more than 98% of the taxi fleet is not accessible. Def's Resp. to Pltfs 56.1 Statement ¶ 49. The TLC does not dispute that persons using wheelchairs are less likely to be able to hail a wheelchair accessible vehicle than a non-wheelchair accessible vehicle. *Id.* ¶ 17. In fact, TLC does not dispute the findings of Plaintiffs' statistical expert that a non-disabled person is over twenty-five (25) times more likely to hail a taxi within ten minutes than is a person who uses a wheelchair. *Id.* ¶ 18.

B. As Defendants Admit, The TLC has the Power to Increase the Accessibility of the Taxicab System

There is no dispute that the TLC has the power to significantly increase accessibility. *Id.* ¶¶ 21-25. The TLC admits it could designate a single vehicle for use which is accessible to wheelchair users. *Id.* ¶ 21. In addition, the TLC is unable to cite a single reason why they could not require more accessible taxicabs. *Id.* ¶ 23. Thus, there is no need to wait for the legislature to authorize additional medallions to increase accessibility. The TLC admittedly has the power to increase accessibility; it is simply unwilling to do so.

The only reason Defendants advance not to increase accessibility of the taxicab system appears to be cost. In the single declaration that Defendants submit, Mr. Chhabra testifies to the purported costs of increasing accessibility.[2] However, in their brief, Defendants never assert cost

[1] Plaintiffs filed their motion for partial summary judgment seeking only declaratory relief under the ADA as to Defendants liability for the taxicab system as it currently exists. Defendants filed a cross-motion for summary judgment combined with their opposition to Plaintiffs' motion for partial summary judgment. This Reply addresses Defendants' arguments opposing their liability under the ADA. Plaintiffs' opposition to Defendants' cross-motion will be filed on October 11, 2011 and will address Defendants' request for summary judgment.

as a defense and they would be unable to do so. Though cost can sometimes be a defense; it is not one here because it must always be weighed against the overall financial resources of the public entity. See e.g., 28 C.F.R. §35.150(a)(3) (undue financial burden defense must consider "all resources available for use in the funding and operation of the service, program, or activity"). As Defendants own materials show, the various programs administered by the TLC generate over four billion dollars in private revenue annually. Declaration of Ashwini Chhabra ("Chhabra Decl.") Exh. C, p. 3. The planned sale of an additional 1500 medallions, which sell for as much as $950,000 (Defs. Resp. to Pltfs 56.1 Statement ¶ 5) would generate at least one billion dollars ($1,000,000,000.00) in revenue for the TLC. Chhabra Decl., Exh. A, p. 1. A tiny portion of these revenues could easily be used to offset any additional costs associated with accessible taxicabs. Defendants could also utilize existing tax credits[3], initiate a slight fare increase, reduce licensing fees, or shift lease rates. Any combination of these could be used.

III. DEFENDANTS NARROW INTERPRETATION OF THE ADA IS BASELESS AND IS AKIN TO ARGUING THEY ARE ABOVE THE LAW

A. The Anti-Discrimination Provisions of Subtitle A of the ADA Apply Broadly to All of TLC's Actions, Not Merely to the Issuance of Licenses

Plaintiffs argue that Defendants violate the statutory and, at least, four regulatory, prohibitions on discrimination under Subpart A of the ADA. In their response, Defendants attempt to whittle down their legal responsibilities under Subpart A, arguing that all Subpart A requires is that TLC not discriminate against persons with disabilities when issuing medallions. Defendants' argument is illogical and ignores both this Court's earlier ruling as well as the stated intent of the ADA and Second Circuit precedent. As this Court noted, in rejecting Defendants' Motion to Dismiss, "I can't believe the ADA is so limited that it says the only thing it's trying to regulate is whether or not you deny a medallion to someone who is in a wheelchair." Reply Declaration of Julia M. Pinover In support of Plaintiffs' Motion for Partial Summary Judgment

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[2] Plaintiffs have moved to strike this testimony on multiple grounds including relevance, inadmissible hearsay, improper expert or lay opinion and lack of personal knowledge. See Plaintiffs' Motion to Strike Portions of the Declaration of Ashwini Chhabra (filed under separate cover).

[3] These include a $10,000 tax credit, passed by the New York State legislature, and a Federal tax deduction of up to $15,000 for conversion expenses incurred in making a public transportation vehicle more accessible or usable to a person with a disability. 26 U.S.C.S. §190.

("Pinover Reply Decl."), Exh. A, (Oral Arg. Tr.) at 7:12-15. Congress passed the ADA to establish a "clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities," 42 U.SC. §12101(b)(1). The Second Circuit has ruled that the ADA is to be "broadly construed" to effectuate this purpose. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003), *citing, Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967).

Moreover, the TLC, as a public entity, cannot discriminate in anything it does. *See Innovative Health Sys., v. White Plains,* 117 F.3d 37, 45 (2d Cir. 1997) (defining the phrase "programs, services or activities" broadly as a "catch-all phrase that prohibits all discrimination by a public entity regardless of the context"). As Plaintiffs have discussed, the TLC engages in a wide variety of governmental functions and activities which result in the TLC exercising complete control of virtually all aspects of taxicab service in New York City. *See* Plts' Motion for Summary Judgment, pp. 6-9. Defendants do not dispute any of these facts.[4] Defs. Resp. to Plts 56.1 Statement ¶¶ 26-32. Through these undisputed functions and activities, the TLC has allowed the taxicab system that it runs to remain overwhelmingly inaccessible to men, women and children who use wheelchairs. In so doing, the TLC discriminated as surely as if it adopted a policy forbidding drivers from picking up wheelchair using passengers.

B. No Dispatch System Is In Effect and In Any Event It Cannot Provide Wheelchair Users with Access to the Benefits of a Taxicab System Based on Street Hails

Defendants argue that in any case, the TLC *will* in the future meet these requirements by a dispatch system. However, Defendants' hopes of implementing some dispatch system is irrelevant because (1) Plaintiffs' motion deals with the discriminatory taxicab system *as it now*

[4] Defendants continued reliance on *Reeves v. Queens City Transp.,* 10 F. Supp. 2d 1181 (D. Colo. 1998) is misplaced. Def. Mot. in Opp., at 7-9. This Court has explicitly rejected they idea that *Reeves* somehow exempts the TLC from compliance with the ADA. Pinover Reply Decl., Exh. A (Oral Arg. Tr.) at 7:10-12 ("But that's not what *Reeves* says. *Reeves* doesn't say that that automatically exempts you [the TLC] from any other discriminatory actions or consequences.") In fact, the TLC's broad, intensive, and specific governance of the day to day operation of the taxi industry is much more like the situation in *Paxton v. W.Va.,* 451 S.E.2d 779 (W. Va. 1994). The TLC's relationship with medallion taxis, like the lottery commission *in Paxton*, goes far beyond mere licensing. The TLC, which obtains substantial revenues from the sale of medallions and manages every aspect of the New York City taxi services, falls easily within the purview of Title II of the ADA. Defs Resp. to Plts 56.1 Statement ¶¶ 4-6, 28-42.

exists; and (2) a dispatch system cannot provide meaningful access to the primary benefit of medallion taxicab service, i.e. the ability to spontaneously access transportation from the street.[5]

No dispatch program is currently in place. Pinover Decl., Exh. C (Chhabra Tr.) at 16:23-17:2. ("Q: Am I correct that currently there is no dispatch program for people with disabilities? A: That's correct"). Here, arguments about purported future plans are pure speculation and inappropriate in response to a summary judgment motion. *FDIC v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (internal quotation marks omitted) (nonmoving party does not adequately respond to a summary judgment motion by relying on "conclusory allegations or unsubstantiated speculation.") (quoting *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998)).

In any event, a dispatch system does not provide either equal or meaningful access to New York City's system. Meaningful access must be provided "to the benefit that the [public entity] offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Courts have warned against defining the benefit in a way that "effectively denies [persons with disabilities] the meaningful access to which they are entitled." *Id.* Here the relevant benefit is taxicab service which is an all street hail service. What differentiates medallion taxicab service from other for-hire transportation is that the taxicabs are permitted to accept hails from the street. Chhabra Decl., ¶ 19. The benefit of a hailing system is that it allows a person the ability to quickly and spontaneously access transportation whenever they see an available taxicab. In a fast-paced city like New York, the ability to hop into a taxicab is invaluable. It is this benefit that Plaintiffs are currently deprived of – solely because they use wheelchairs – and it is this benefit Plaintiffs seek access to.[6]

Defendants are trying to redefine the benefit offered from one of being able to hail a taxicab spontaneously to one of merely getting from point A to point B regardless of the time

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[5] In addition, under Subtitle B of the ADA the TLC is required to provide "equivalent service," defined in part as a service which provides an "equal response time." 49 C.F.R. § 37.105. Defendants do not even attempt to claim that their proposed dispatch program – which requires the individual to call a dispatcher who must then locate an in service and available accessible taxicab and re-direct that taxicab to the individual – can provide a response time equal to that provided to the individual who can stick their hand out and get a taxicab within minutes.

[6] An analysis of the previous Accessible Dispatch Pilot Program, in place from 2008-2010, showed that the average wait time for a dispatch (i.e. the time from passenger call to pick-up) was 34 minutes. Chhabra Decl., Exh. E.

and effort involved. In enacting the ADA, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). A dispatch program is another means of doing just that. It is a separate and second-class system. It will not enable a wheelchair user to hail a taxicab while out with non-wheelchair using companions. It will not allow them to travel spontaneously as they will first have to get to a phone to call the dispatcher, place a request and wait; all while watching available, inaccessible taxicabs pass them by.

C. Subpart B of the ADA Applies Because the TLC Is In Complete Control of the Operation of the System of Medallion Taxicab Service

Defendants argue that they do not "operate" a taxicab service. Defs. Mot. in Opp. at 13. Defendants ignore the plain language of the ADA. The TLC uses the word "operate" as if it only refers to physical operation of a piece of machinery. However, the ADA explicitly ties the word to the "operation of such *system*." 42 U.S.C. §12144(4) (emphasis added). There can be no question that the TLC is in full control of, and operate, the *system* of taxicab service in NYC.

Defendants' also utterly ignore the ADA's definition of "operate" which includes all situations where the system is operated by a person "under a contractual or *other arrangement or relationship* with a public entity." 43 U.S.C. § 12144(4) (emphasis added). Thus, a public entity need not itself operate the transportation system. It can do so based on contractual or other arrangement or relationship with a private entity. Furthermore, "[w]hen a public entity enters into a contractual or other arrangement or relationship with a private entity to operate . . . [transportation] service, the public entity *shall ensure* that the private entity meet the requirements . . . that would apply to the public entity if the public entity itself provided the service." 49 C.F.R. § 37.23 (emphasis added).

The TLC, as a public entity, has an arrangement or relationship with each and every medallion owner, in which issuance of a medallion is conditional on strict adherence to the TLC's requirements and specifications. Defs. Resp. to Pltfs 56.1 Statement, ¶ 8. Thus, the TLC operates a public transportation system consisting of medallion taxicabs and based on

arrangements and relationships with the medallion owners. Under federal regulations, because it has an arrangement or relationship with private providers, the TLC must ensure that taxicab owners step into the shoes of the TLC and comply with applicable statutory requirements. Thus, the TLC must ensure that each new vehicle purchased or leased be "readily accessible to and useable by individuals with disabilities" or that the system, when viewed in its entirety, provides an equivalent level of service to persons with disabilities. It is undisputed that the TLC has failed to do this. Accordingly, the TLC's program of public transportation using medallion taxicabs violates Subtitle B of Title II of the ADA.

D. Title III of the ADA, Which Does Not Apply To Public Entities, Is Irrelevant Here; Actions and Policies of Public Entities Must Comply with Title II

TLC's claim that Title III should excuse the TLC from liability was rejected by this Court. Pinover Reply Decl., Exh. A (Oral Arg. Tr.) at 53:5-6 ("There is no such automatic immunity for any entity, particularly any public entity"). Plaintiffs have sued the TLC – a public entity – for its failure to comply with Title II. Plaintiffs' have not pursued any claims under Title III against medallion holders. Any "exemption" in Title III of the ADA, explicitly inapplicable to the TLC, is irrelevant.

As a Title II public entity, TLC is obligated to ensure that any programs, services or activities it provides comply with Title II. This situation is specifically addressed by the Title II Technical Assistance Manual, which interprets the Department of Justice regulations implementing Title II and states:

> "where public and private entities act jointly, **the public entity must ensure that the relevant requirements of title II are met**; and the private entity must ensure compliance with Title III…In cases where the standards differ, the…standard that provides the highest degree of access to individuals with disabilities [must be met]." Dept. of Justice, Civil Rights Division, Disability Rights Section, Americans with Disabilities Act: Title II Technical Assistance Manual § II-1.3000 – Relationship to Title III Illustration 3 (1993) (emphasis added)

When the City holds a public meeting, it cannot meet its access obligations by holding it in a location barred by stairways but permitting attendees in wheelchairs to bring their own ramps. A public entity cannot avoid its obligation to provide sign language interpreters at public

events by allowing individuals to bring their own. Similarly the TLC, as a public entity, cannot avoid its obligation to provide access under Title II of the ADA by hoping that third parties will voluntarily choose to provide access.

In addition, private entities that *choose* to enter relationships with public entities like the TLC are held to a higher standard to ensure that the public entity's duty to the public is fulfilled. *See Stathros v. Taxi and Limousine Comm'n,* 198 F.3d 317, 324 (2d Cir. 1999) (applying standard for *public employees* to medallion holder challenging financial disclosure rules and stating "Plaintiffs have chosen to enter the heavily regulated taxi industry. As a result their interest in confidentiality is not significantly greater than that of a government employee…").

It would be entirely novel to excuse a public entity like the TLC from complying with access standards as a result of a relationship with a private entity – particularly a relationship that is so intertwined that the public entity's decisions entirely extinguish the private actors' ability to act independently.[7] Title II imposes obligations upon all public entities to not engage in discrimination practices. Regardless of what private parties do, the TLC, as public entity, must take affirmative steps to ensure that the taxi *system* provides a level of access to people with disabilities that complies with Title II of the ADA.

IV. DEFENDANTS' UNSUPPORTED REQUEST FOR A DELAY IN RULING ON THIS MOTION, BASED ON FUTURE POSSIBILITIES, IS INAPPROPRIATE WITHOUT LEGAL AUTHORITY AND SHOULD BE DENIED

> How long are we to wait before giving the defendants the judgment they are clearly entitled to? 5 years, 50 years? Would not the concept of finality in the American system of justice be rendered meaningless if we are going to delay entering judgment because of future actions that a legislative body might take. We might sooner wait for the end of the world to finally terminate litigation."
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> *Gabarczyk v. Board of Educ. of City School Dist. of Poughkeepsie*, 738 F.Supp. 118, 121 (S.D.N.Y., 1990) (internal citations omitted)

Defendants request that the ruling on this motion be delayed because (1) the legislature and governor might decide to take action, and/or (2) TLC is working on a dispatch program -

[7] *See Medina v. Valdez,* 2011 WL 887553, at *5 (D.Idaho March 10, 2011) citing *James v. Peter Pan Transit Management, Inc.,* 1999 WL 735173 (E.D.N.C. January 20, 1999) ("City is not relieved of its title II obligations merely because Peter Pan is an independent contractor").

which will not even be implemented until next year at the earliest. Defendants cannot cite to a single case where a delay for these reasons was found to be appropriate and they ignore binding case law directly to the contrary. *Garbaczyk, supra*, 738 F.Supp. at 121 (declining to hold matter in abeyance in light of the uncertainty of the nature and timing of Congressional action); *See also Warren v. Oil, Chemical and Atomic Workers, Union – Industry Pension Fund,* 729 F.Supp. 563 (E.D. Mich. 1989) (declining to hold matter in abeyance pending outcome of legislative effort).

A party requesting delay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. North American Co.,* 299 U.S. 248, 254 (1936). Defendants cannot claim any hardship or inequity they will suffer in being required to go forward.[8] Meanwhile, a delay in ruling on this motion will allow the TLC to continue to sanction the purchase of new inaccessible taxicabs, thus perpetuating the continued massive inaccessibility of the taxicab fleet and causing further harm to Plaintiffs.

Defendants ask this court to delay its ruling until both the legislature has acted *and* a dispatch program has been implemented and is in place long enough for the Court to determine whether it is effective. This could easily take years. If this were an acceptable practice, motions for summary judgment would never be ruled upon. Opposing parties could always conjure up some future "plan" that would purportedly change the factual underpinnings of the lawsuit.[9] Meanwhile, judgment and justice would be delayed indefinitely.

V. CONCLUSION

Defendants want to the court to give them carte blanch to continue to discriminate on a daily basis while they purport to try to fix a problem they claim they have no responsibility for

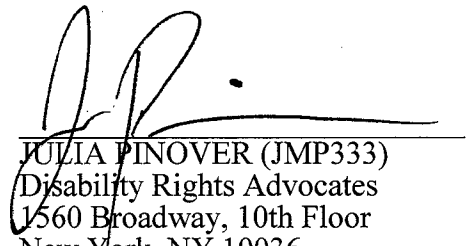
[8] Defendants note the fact that Plaintiffs filed this motion before close of discovery. However, Defendants do not claim that further discovery is warranted or that there are any material facts in dispute. To the contrary, Defendants recognition that judgment as a matter of law is appropriate is apparent in the fact they have filed their own cross-motion.

[9] In fact, courts routinely rule even where the facts of the case have changed. Even where Defendants have ended the discrimination, courts have held that this is not ground for denying equitable relief. See e.g., *Davis v. City of New York,* 2011 WL 2652433, *5 (S.D.N.Y. July 05, 2011); *Cupola v. Bay Area Rapid Transit,* 5 F.Supp.2d 1078, 1084 (N.D.Cal., 1997) ("The Court's power to grant injunctive relief survives the discontinuance of the illegal conduct.") (citing *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)).

fixing. There is no legal or practical basis for such an extraordinary position. Defendants are currently administering a system which excludes wheelchair users and denies them an important public benefit available to all others – the ability to quickly and spontaneously hail a taxicab. This is a blatant violation of both the intent and stated terms of the ADA.

Plaintiffs have not asked that a single inaccessible vehicle, now in use, be retrofitted or taken off the streets. Every year thousands of old vehicles are retired and new ones put into use. This presents a golden opportunity to increase the accessibility of the fleet. However, until liability is resolved Defendants will assuredly continue to take no steps to begin this critical transition.

Dated: October 3, 2011
New York, NY

By: 

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