UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION OF PENNSYLVANIA	:	CIVIL ACTION NO. 03-CV-1577
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

DEFENDANT SEPTA'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

For the reasons more fully discussed below, SEPTA's Motion for Summary Judgment should be granted on Counts I and II of DIA's Fourth Amended Complaint.

I. LEGAL STANDARD

"In deciding a motion for summary judgment under Fed.R.Civ.P. 56(c), a court must determine 'whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.'" Gregory R. v. Penn Delco School District, 262 F.Supp.2d 488, 490 (E.D.Pa. 2003), citing Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted).

The non-moving party "must, through affidavits, admissions, depositions, or other evidence, demonstrate that a genuine issue exists for trial." Id. at 491 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). "In making its showing, the non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material facts,' [citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986)] and must produce more than a 'mere scintilla of evidence in its favor' to withstand summary judgment." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249,

106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "If the non-moving party fails to create 'sufficient disagreement to require submission [of the evidence] to a jury,' the moving party is entitled to judgment as a matter of law." Id.

Application of these standards requires the grant of summary judgment in SEPTA's favor.

II. SUMMARY OF ARGUMENT

DIA filed a Fourth Amended Complaint against SEPTA on February 15, 2005 alleging violations of Title II of the Americans with Disabilities Act of 1990 ("ADA") and § 504 of the Rehabilitation Act of 1973. Count I alleges that SEPTA impermissibly altered the 15th Street Courtyard and City Hall Courtyard without providing wheelchair access. SEPTA moves the Court for summary judgment on Count I based on the statute of limitations, unclean hands, laches, and compliance with the alteration provisions of the ADA. Count II alleges that SEPTA's City Hall Station and 15th Street Station are "key stations" and that SEPTA's failure to make them wheelchair accessible violates the "key station" requirements of the ADA and § 504 of the Rehabilitation Act. SEPTA moves for summary judgment on Count II based on waiver, laches, the primacy of the applicable regulation, the absence of a private cause of action, res judicata and collateral estoppel.

III. ARGUMENT - COUNT II

A. DIA'S KEY STATION CLAIM IS BARRED BY WAIVER

DIA's contention that City Hall Station and 15th Street Station are "key stations" is wholly dependent upon a direct challenge to ADA-implementing regulation 49 C.F.R. § 37.53. DIA has already waived its right to challenge that regulation, which incorporates the "key

stations" listed in the EPVA v. Sykes Settlement Agreement ("Settlement Agreement") and states that SEPTA has complied with the ADA's key station designation requirements. As neither City Hall Station nor 15th Street Station were included in the Settlement Agreement, they are not "key stations" under the ADA.

A party who fails to object to a proposed regulation during the rulemaking process waives its right to challenge that regulation in a subsequent judicial proceeding. Having remained mute during the rulemaking process, DIA has waived entirely the right to challenge the straightforward language of 49 C.F.R. § 37.53. Because of that waiver, SEPTA is entitled to summary judgment on Count II.

This Circuit has held that "[g]enerally*, federal appellate courts do not consider issues that have not been passed on by the agency ... whose action is being reviewed."* Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 112 (3d Cir. 1997) (emphasis added) (internal citation omitted). In that case, the Third Circuit specifically rejected any effort to evade a party's responsibility to challenge a proposed regulation during the rulemaking process, holding that "[w]e agree with the EPA that the petitioner may not raise this argument on appeal *because this argument was not raised during the rulemaking process*." Id. at 106, 111, 112 (emphasis added). The Court noted that "[a]lthough appellate courts are certainly capable of addressing questions of statutory interpretation that were not raised during an agency's rulemaking process, *it is far more efficient for courts to face such questions only after they have been considered by the agency that Congress has charged with the primary responsibility for enforcing the complex statute in question*." Id. at 112 (emphasis added). See also Bicycle Trails Council of Marin v. Babbitt, 1994 WL 508892 at *3 (N.D.Cal. 1994); See also Marathon Oil Co. v. United States,

807 F.2d 759, 767-768 (9th Cir. 1986) (noting that courts generally "will not consider issues not presented before administrative proceedings at the appropriate time.").

The District of Columbia Circuit likewise invokes the doctrine of waiver to bar challenges to federal regulations when a party fails to challenge the regulation during the rulemaking process. See State of Ohio v. United States Environmental Protection Agency, 997 F.2d 1520, 1528 (D.C. Cir. 1993). That Court has noted that "[t]he doctrine promotes agency autonomy by according the agency an opportunity to discover and correct its own errors before judicial review occurs" and that "[j]udicial efficiency is served because issues that are raised before the agency might be resolved before that judicial intervention." Id. at 1528, 1529 (citing McKart v. United States, 395 U.S. 185, 195, 89 S.Ct. 1657, 1663, 23 L.Ed.2d 194 (1969)).

DIA's assertion that City Hall Station and 15th Street Station are "key stations" within the meaning of 42 U.S.C.A. § 12147(b) and 42 U.S.C.A. § 12162(e)(2) is a legally improper belated effort to challenge the validity and plain language of 49 C.F.R. § 37.53 in a judicial forum after having failed to assert any challenge during the regulatory rulemaking process. The intent of DIA's "key station" claim is to override that regulation's incorporation of the EPVA v. Sykes Settlement Agreement's list of key stations which, by virtue of that list, deems SEPTA to be in compliance with the ADA's "key station" designation obligations.

DIA's end-run around the regulatory rulemaking process and usurpation of DOT's ADA-implementing authority cannot be permitted. Fourteen years after the fact, DIA is challenging the unambiguous language of a regulation that was mandated by Congress, held out for public comment, promulgated by the DOT, and that has been relied upon in good faith by SEPTA in rendering its transportation system accessible to individuals with disabilities in compliance with

the ADA. Now, after SEPTA has timely made nearly 90% of its "key stations" accessible to the disabled, DIA seeks to upend the rulemaking process and eviscerate 49 C.F.R. § 37.53 in order to compel SEPTA to effectively recommence the "key station" process. DIA has waived that claim and SEPTA is accordingly entitled to summary judgment on Count II.

B. DIA'S KEY STATION CLAIM IS BARRED BY LACHES

SEPTA is also entitled to summary judgment because DIA's Count II claim is barred by laches. A party must demonstrate two elements to support a laches defense: inexcusable delay in bringing suit and prejudice to the defendant as a result of the delay. Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123, 138 (3d Cir. 2005). Once the limitations period has expired, as here, the defendant "enjoys the benefit of a presumption of inexcusable delay and prejudice" and the plaintiff bears the burden of justifying its delay and demonstrating that the defendant has not been prejudiced. Id. at 138 (quoting EEOC v. The Great Atlantic & Pacific Tea Co., 735 F.2d 69, 80 (3d Cir. 1984)).

DIA has inexcusably delayed filing suit by at least 12 years. Courts within this Circuit have found inexcusable delay in as little as 2 ½ years. Shiffler v. Schlesinger, 548 F.2d. 96, 103 (3d Cir. 1977). Obviously, longer time periods have supported findings of inexcusable delay. See Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123 at 138-140 (eight year delay was inexcusable).[1]

[1] Elsewhere, the U.S. Court of Appeals for the District of Columbia has held that a 12 year delay in objecting to an administrative ruling is barred by laches. Independent Bankers Assoc. of America v. Heimann, 627 F.2d 486 (D.C. Cir. 1980). That Court stated that equity will not protect those who "through years of silence ha[ve] created an impression of acquiescence that has lead others to make substantial financial commitments." Id. at 488. Similarly, the District Court for the District of Columbia granted summary judgment on laches grounds when a plaintiff waited 14 years to challenge the repeal of a regulation. Washington Hospital Center v. Heckler,

A delay of three years in objecting to an administrative agency's action has been deemed "untimely." Energy Cooperative, Inc. v. Department of Energy, 659 F.2d 146 (Em.App. 1981). The court specifically cited the plaintiff's failure to participate in the rulemaking process through comments and/or participation at a public hearing, which would have given the Department of Energy the opportunity to cure any alleged errors. Id. at 149-150.

To establish prejudice, a party raising laches must demonstrate that the delay caused a disadvantage in asserting and establishing a claimed right or defense. U.S. Fire Insurance Co. v. Asbestospray, Inc., 182 F.3d 201, 208 (3d Cir. 1999).[2] The Third Circuit has placed particular weight on several factors. First, it is particularly disposed to find prejudice where a party seeking injunctive relief seeks to upset a long-established regulatory scheme. Shiffler v. Schlesinger, 548 F.2d 96 (3d Cir. 1977) (prejudice found if plaintiff permitted to upset agency determination that Environmental Impact Statement need not be prepared in conjunction with the realignment of a military installation). See also Energy Cooperative, Inc. v. Department of Energy, 659 F.2d 146 (Em.App. 1981) (prejudice found where plaintiff allowed to upset established regulatory scheme).

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581 F.Supp. 195, 198-199 (D.D.C. 1984). The court specifically found that "the apparent acquiescence on the plaintiffs' part, for which no justification is offered, belies any claim of 'substantial impact.'" Id. at 198-199.

[2] The Pennsylvania Superior Court has held that prejudice exists whenever there is some changed condition of the party which occurs during the period of, and in reliance on, the delay, such as where records have become lost or unavailable, witnesses die or cannot be located, and where the party asserting laches has changed his position in anticipation that a party will not pursue a particular claim. Miller v. Bistransky, 451 Pa.Super. 433, 437-438, 679 A.2d 1300, 1302 (1996).

Second, the Third Circuit is particularly disposed to find prejudice where a party seeking an injunction seeks to disrupt a project that is in significant stages of completion. Shiffler v. Schlesinger, 548 F.2d at 104 (prejudice found where realignment of military installation is 85% completed). See also Mansfield Area Citizens Group v. United States, 413 F.Supp. 810, 824-826 (M.D.Pa. 1976) (prejudice found where most construction contracts had been awarded, foundations had been excavated, relocation of displaced persons was nearly complete, and reconstruction of highway was 91% completed).

Third, the Third Circuit is particularly disposed to find prejudice where a significant outlay of money already has been incurred with respect to a project sought to be altered through injunctive relief, or will be incurred as a result of injunctive relief that alters a project. Shiffler v. Schlesinger, 548 F.2d at 104 (cost to party invoking laches defense totaled $6.5 million). See also Mansfield Area Citizens Group v. United States, 413 F.Supp. at 824 (nearly half of project's expected monetary outlay had occurred).

DIA has missed the relevant limitations period with respect to the Count II key station claims by its failure to object either to the EPVA v. Sykes Settlement Agreement or the promulgation of 49 C.F.R. § 37.53. The proper time for DIA to have objected to the key station designations was in July of 1989 when all Class members were invited to object to the Settlement Agreement. In regard to the promulgation of 49 C.F.R. § 37.53, as discussed above, DIA's time to object came and went during the rulemaking process in 1991. See Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 111-112 (3d Cir. 1997). Because DIA failed to object at either opportunity within the respective limitations periods, laches is presumed and

DIA, as plaintiff, shoulders the burden to justify its delay and refute the presumption of prejudice.

By any objective measure, DIA has vastly exceeded the temporal limits for finding inexcusable delay, having long surpassed the two and a half year period in Shiffler v. Schlesinger. DIA alleged for the first time that City Hall Station was a key station on December 15, 2003 when it filed its Third Amended Complaint. DIA alleged for the first time that 15th Street Station was a key station when it filed its Fourth Amended Complaint on February 15, 2005. DIA thus contends that City Hall Station and 15th Street Station should be "key stations" 14 years after approval of the EPVA v. Sykes Settlement Agreement and 12 years after DOT issued 49 C.F.R. § 37.53. There can be no credible contention that DIA's decade-plus delay is excusable under any facts of record.

Under prevailing Third Circuit case law and the factors deemed critical therein, SEPTA will plainly be prejudiced in the event that DIA's request for injunctive relief on Count II is granted. First, DIA's attempt to re-write the key station regulation found at 49 C.F.R. § 37.53 constitutes an effort to upset an established regulatory scheme relied upon for 14 years not only by SEPTA, but also by MTA in New York. See Shiffler v. Schlesinger, 548 F.2d 96 (3d Cir. 1977).

Second, SEPTA's retrofitting of those key stations identified in the EPVA v. Sykes Settlement Agreement is already 89 % complete (31 of 35 key stations complete). Lister Affidavit, **Exhibit "17"** at ¶ 3. See Shiffler v. Schlesinger, 548 F.2d at 104 (prejudice found where project 85-90% complete). See also Mansfield Area Citizens Group v. United States, *supra* (prejudice found where construction project 91% complete).

Third, the cost of the mandatory retrofitting of City Hall Station and 15th Street Station, should such stations now belatedly be designated as key stations, comes with a staggering price tag of $100 million. Heiser Affidavit, 3/14/06, **Exhibit "23"** at ¶ 10.

Fourth, not only has SEPTA renovated key stations in reliance on the legal validity of the EPVA v. Sykes Settlement Agreement and the implementing regulations set forth at 49 C.F.R. § 37.53, but it will be prejudiced in that it cannot defend this matter adequately as critical witnesses are now deceased or unavailable and records have been lost or are unavailable. See Miller v. Bistransky, 451 Pa.Super. 433, 437-438, 679 A.2d 1300, 1302 (1996). In particular, Harvey Bartle, III, SEPTA's counsel in the negotiation and conclusion of the EPVA v. Sykes Settlement Agreement, is now the Chief Judge of this Court and has expressed that he has no specific recollection of the subject events. The Honorable Clarence Newcomer is now deceased. Other witnesses whose testimony is relevant are either deceased or no longer employed by SEPTA.

Moreover, because of the lapse of approximately 14 years, memories have faded and many relevant records have been destroyed. Indeed, DIA's counsel, Stephen F. Gold, Esquire, claims to not be able to recall his involvement in events that were germane to the approval of the Settlement Agreement and the promulgation of 49 C.F.R. § 37.53, and both DIA and its counsel claim to be unable to find documents that are relevant to these events. DIA's Amended Responses and Objections to SEPTA's First Set of Requests for Admissions, **Exhibit "3"** at ¶¶ 6-12, 17-20, 34-36, 38-42, 44, 53-54, 56-66, 73, 76-78, 82-83, 90-93, and 95.

All of the above reasons demonstrate that DIA has inexcusably delayed raising the key station claim set forth in Count II and that SEPTA will suffer prejudice should the requested injunctive relief be granted.

C. SEPTA IS IN FULL COMPLIANCE WITH THE ADA'S "KEY STATION" DESIGNATION REQUIREMENTS

SEPTA is also entitled to summary judgment on Count II because DOT has already determined that SEPTA is in full compliance with the ADA's "key station" designation requirements as set forth in 49 CFR § 37.53.

The Supreme Court, in the seminal case of Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778 (1984), established a two step process for reviewing an agency's construction of a statute which it administers. First, the court determines whether Congress clearly expressed its intent with respect to the precise issue at hand. If Congress clearly expressed its intent, the Court must give it effect. If Congress has not directly addressed the issue at hand and the statute is silent or ambiguous, the court must determine whether the agency's construction of the statute is permissible. Id., 467 U.S. at 842-43, 104 S.Ct. at 2781-82. Second, if Congress explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Id. 104 S.Ct. at 2782. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. Id., 104 S.Ct. at 2782.

DOT's promulgation of 49 C.F.R. § 37.53 satisfies each of the Chevron criteria. With respect to the designation of key stations, 42 U.S.C.A. § 12147 presents an explicit gap for DOT to fill -- the establishment of key station criteria -- along with an express delegation to the agency to elucidate a specific provision of the statute by regulation. This delegation is made twice in 42

U.S.C.A. § 12147, first relating generally to key stations, and second relating specifically to the timing of key station accessibility. Accordingly, these statutory provisions fit squarely into the Chevron analytic paradigm.

Because of Congress' express delegation with respect to key stations, 49 C.F.R. § 37.53 is to be given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the ADA. In the instant matter, *DIA admits that 49 C.F.R. § 37.53 is not arbitrary, capricious, nor manifestly contrary to the statute*. See Excerpt from DIA's Response to SEPTA's Contention Interrogatories, **Exhibit "9"** at ¶¶ 7-16. Even had DIA not made that admission, the ADA's legislative history reflects that the regulation is not arbitrary, capricious or manifestly contrary to the statute.

Multiple committees of both the United States House of Representatives and Senate affirmed the understanding that the stations listed in the Settlement Agreement would satisfy the ADA's requirement for key station identification and that such designations were to be recognized as complying with the ADA's key station selection requirements. The Settlement Agreement, along with a similar settlement agreement in New York City, were the subject of discussions in committees debating the ADA. For instance, the Senate Committee on Labor and Human Resources specifically stated in its official report that "the settlement agreements recently reached in New York City ... and Philadelphia ... are in full compliance" with the ADA key station accessibility requirements and "these plans would satisfy the bill's requirement for accessibility of key stations." S. Rep. No. 101-116, 101st Cong., 1st Sess. at 56, 94 (1989). Additionally, The House Committee on Public Works and Transportation stated in its official report:

> The Committee finds special merit in local settlement agreements (such as those negotiated in New York and Philadelphia) regarding the identification of key stations, when they have been negotiated in good faith by public entities and representatives of the disability community. The Committee expects the criteria established by the Secretary to find that these *local agreements fully meet the requirements of this subsection*.

H. Rep. No. 101-485 (I), 101st Cong., 2nd Sess. at 9 (1990) (emphasis added). See also H. Rep. No. 101-485(II), 101st Cong., 2nd Sess. at 96-97 (1990); H. Rep. No. 101-485 (IV), 101st Cong., 2nd Sess. at 52 (1990); H. Rep. No. 101-32, 101st Cong., 1st Sess. at 14 (1989).

This detailed legislative history conclusively demonstrates that 49 C.F.R. §37.53 is consistent with Congressional intent and must be upheld pursuant to Chevron.

To the extent that DIA intends to rely upon the testimony of James Weisman to "interpret" the ADA-implementing regulations, including 49 C.F.R. § 37.53, such reliance is flatly prohibited. Mr. Weisman was never employed by DOT, nor did he ever author any regulations. Weisman Deposition**, Exhibit "63"** at 282-283. He was a member of a Federal Advisory Committee that, by his own admission, had no decision making authority regarding promulgation of the ADA regulations. Id. at 78. Mr. Weisman's membership on the Advisory Committee, which had no authority, does not render him competent to testify as to the meaning of regulations or the intentions of DOT or any other administrative agency.

Mr. Weisman's testimony interpreting 49 C.F.R. 37.53 and the alleged intentions of DOT in promulgating that regulation is not legally competent evidence and must be excluded. The Court is prohibited from disturbing an agency's interpretation of its own regulations by extraneous testimony. Connecticut General Life Insurance Co. v. Commissioner of IRS, 177 F.3d 136, 143-145 (3rd Cir. 1999). In Connecticut General Life Insurance Co. , the Third Circuit rejected the affidavits of 2 Treasury Department officials regarding the meaning of a clause in a

regulation. Id. at 145. The Court found that "reliance upon remembered details from officials who lacked the ultimate authority to issue any proposed regulation has little support in the law." Id. (citing Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123, 107 S.Ct. 1038 (1987) and Armco, Inc. v. Commissioner, 87 T.C. 865, 867, 1986 WL 22040 (1986). If the statements of an agency's former employees cannot be considered competent evidence in interpreting a regulation, then the extraneous statements of Mr. Weisman, who was never employed by DOT, regarding the meaning of the DOT regulations on key stations or the intent of DOT in promulgating the regulations certainly would be prohibited as evidence.

The Third Circuit recently reaffirmed the rule that in reviewing a federal regulation, a court can rely *only* on the administrative record and not on any additional evidence. NVE, Inc. v. Department of Health and Human Services, 436 F.3d 182, 189, 195, 197 (3d Cir. 2006). In NVE, Inc., the plaintiff sought to present extraneous expert testimony to challenge a regulation. In precluding that testimony, the Third Circuit held that review must be limited to the administrative record as the agency had considered the issues raised in the suit during the rule-making process. Id. The court quoted its previous decision in Grant v. Shalala, 989 F.2d 1332, 1344 (3d Cir. 1993), stating that "attempts to prove the thought and decision making processes of judges and administrators are generally improper." Id. at 195.

The decision in NVE, Inc is directly applicable to the instant matter. Mr. Weisman's opinions regarding what SEPTA stations should be considered key stations is inadmissable under NVE, Inc because the issue of SEPTA's key stations obligations under the ADA was already considered by DOT during its rule-making process. DOT, in its discretion, decided to incorporate the Settlement Agreement into 49 C.F.R. 37.53 and that decision must stand as it is

supported by legislative history and the intent of Congress. Furthermore, Mr. Weisman's testimony regarding DOT's intentions and/or decision making process is equally inadmissable under both NVE, Inc. and Grant as any such testimony impermissibly probes the thought and decision making process of DOT, which is reflected in the Notice of Proposed Rulemaking and the Final Rule and cannot be contradicted by other evidence.

D. NO PRIVATE CAUSE OF ACTION EXISTS TO HAVE A STATION DESIGNATED AS A "KEY STATION" OR TO HAVE A STATION COMPLETED WITHIN A SPECIFIC TIME FRAME

DIA asks this Court to designate City Hall Station and the 15th Street Station as key stations or, alternatively, to order SEPTA to provide wheelchair access to these stations by a date certain. Such relief cannot be granted because the relevant statute and regulations do not provide a private cause of action with respect to key station designations or with respect to requiring completion of any station by a specific date. SEPTA accordingly is entitled to summary judgment with respect to Count II.

In Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the Supreme Court held that for a private cause of action to exist, a statute must manifest Congress' intent to create (1) a private right and (2) a private remedy. Id., 532 U.S. at 285-88, 121 S.Ct. at 1519-20.

First, a court must look to the statutory text for explicit "rights-creating" language. Id., 532 U.S. at 288-89, 121 S.Ct. at 1521; Gonzaga University v. Doe, 536 U.S. 273, 279-87, 122 S.Ct. 2268, 2273-77, 153 L.Ed.2d 309 (2002); Cannon v. University of Chicago, 441 U.S. 677, 693, n. 13, 99 S.Ct. 1946, 1953, n.13, 60 L.Ed.2d 580 (1979). Statutory language must explicitly confer a right directly on a class of persons that includes a plaintiff or that identifies the class for

whose benefit the legislation was enacted. Id., 441 U.S. at 689, n.9, 99 S.Ct. at 1953 n. 9.[3] Second, a court may determine if there is an enforcement mechanism. Sandoval, 532 U.S. at 289-291, 121 S.Ct. at 1521-22. Third, if statutory text and structure have not resolved whether a private cause of action exists, legislative history may have to be considered. See Cannon, 441 U.S. at 694, 99 S.Ct. at 1956 (legislative history of a statute that is itself unclear will typically be silent on the question). If the examination of the statute's text, structure, and history does not yield the conclusion that Congress intended to confer a private right and a private remedy, Sandoval instructs that such a right may not be created or conferred by regulations promulgated to interpret and enforce it. Sandoval, 532 U.S. at 291, 121 S.Ct. at 1522 (internal citation omitted).

No language exists in the ADA or its implementing regulations which creates a private right or a private remedy pertaining to key stations generally, or specifically with respect to those of SEPTA and New York's MTA. Neither the ADA nor its implementing regulations create personal rights in DIA or any plaintiff to have a station designated as a key station or any capacity to have a station completed by a certain date. Instead, the designation of key stations was left *solely* to the discretion of the transit operator, not to the FTA and not to any private parties.

The statutory framework which places the designation of key stations in the hands of the transit operators and which accepted the EPVA v. Sykes key station designation undermines any claim of Congressional intent to create a private right of action to create key stations. Moreover,

[3] Statutes that focus on the person regulated rather than on individuals protected create no implication of an intent to confer rights. Sandoval, 532 U.S. at 289, 121 S.Ct. at 1521.

the statute and regulations pertaining to a key station do not focus on the individual but rather put in motion a systemwide requirement on the transit operators. There is no language to suggest a personal right of action. See Sandoval, *supra;* Blessing v. Freestone, 520 U.S. 329, 117 S.Ct. 1353, 1360, 137 L.Ed.2d 569 (1997).

In addition, neither the ADA nor its implementing regulations provide a mechanism by which any individual or entity, including the FTA, can challenge a transit authority's key station designations and timetable.

Because the statutory and regulatory scheme fails to establish any private rights or enforcement mechanisms which would create a private cause of action, it is not necessary under Sandoval to examine the legislative history to determine Congressional intent. The legislative history nevertheless establishes that Congress fully intended the key station list from the EPVA v. Sykes Settlement Agreement to satisfy SEPTA's key station requirements, and did not intend to subject SEPTA to a key station provision that would allow for a private cause of action to have particular stations designated as key stations or to require completion by a date certain. See S. Rep. No. 101-116, 101st Cong., 1st Sess. at 56, 94 (1989); H. Rep. No. 101-485 (I), 101st Cong., 2nd Sess. at 9 (1990); H. Rep. No. 101-485(II), 101st Cong., 2nd Sess. at 96-97 (1990); H. Rep. No. 101-485 (IV), 101st Cong., 2nd Sess. at 52 (1990).

E. RES JUDICATA BARS DIA'S COUNT II CLAIM

Both res judicata and collateral estoppel bar DIA's Count II claim that SEPTA's failure to make City Hall Station and 15th Station wheelchair accessible violates the "key station" requirements of the ADA and the Rehabilitation Act.

The Third Circuit succinctly characterized collateral estoppel and res judicata in Parkview Associates v. City of Lebanon, 225 F.3d 321 (3d Cir. 2000).

> Issue preclusion, otherwise known as collateral estoppel, bars re-litigation of an issue identical to that in a prior action. Claim preclusion, otherwise known as res judicata, prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action.

Id. at 328 (citing Bradley v. Pittsburgh Board of Education, 913 F.2d 1064, 1070 (3d Cir. 1990)). As set forth below, the EPVA v. Sykes Order and Judgment precludes DIA's relitigation of the alleged key station status of City Hall Station and 15th Street Station under either res judicata or collateral estoppel jurisprudence.

In determining whether the suit before it should be barred by res judicata or collateral estoppel, federal courts look to the substantive law of the adjudicating state. O'Leary v. Liberty Mutual Insurance Company, 923 F.2d 1062, 1064 (3d Cir. 1991). Pennsylvania law holds that res judicata requires the "coalescence" of four factors:

> Technical res judicata requires the coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. [citation omitted] Res judicata applies to claims that were actually litigated as well as those matters that should have been litigated. Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings.

J.S. v. Bethlehem Area School District, 794 A.2d 936, 939 (Pa.Cmwlth. 2002), *allocatur denied* 572 Pa. 760, 818 A.2d 506 (2003).

The Third Circuit rightly refrains from a "mechanical application of the res judicata test," but focuses instead "... on its ultimate purpose of requiring a plaintiff to present all claims arising out of the same occurrence in a single suit." Williams v. Lehigh County Department of

Corrections, 19 F.Supp.2d 409, 412 (E.D.Pa. 1998)(citing Board of Trustees v. Centra, 983 F.2d 495, 504 (3d. Cir. 1992)). Indeed, this District has prudently held that res judicata "will not be defeated by minor differences of form, parties or allegations" where the "controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." Zhang v. Southeastern Financial Group, 980 F.Supp. 787, 794 (E.D.Pa. 1997) (quoting Helmig v. Rockwell Manufacturing Company, 389 Pa. 21, 131 A.2d 622, 626-627, *cert. denied* 355 U.S. 832, 78 S.Ct. 46, 2 L.Ed. 2d 44 (1957) ("Appellant would inevitably call the same witnesses and present exactly the same evidence in this second action. In such a situation this court must pierce the technical differences between the two actions, and ... find that beneath the camouflage net of the second action stands the first -- the identical action previously litigated to the fullest extent.").

With respect to class actions like EPVA v. Sykes, a judgment generally binds class members in subsequent litigation. See Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880, 104 S.Ct. 2794, 2801, 81 L.Ed. 718 (1984). Indeed, the Third Circuit has held that,

> The very nature of a (b)(2) class is that it is homogeneous without any conflicting interest between the members of the class. Since the class is cohesive, its members would be bound either by the collateral estoppel or the *stare decisis* effect of a suit brought by an individual plaintiff. Thus, as long as the representation is adequate and faithful, there is no unfairness in giving res judicata effect to a judgment against all members of the class even if they have not received notice.

Wetzel v. Liberty Mutual, 508 F.2d 239, 256 (3d Cir. 1975). Accordingly, the Third Circuit has expressed a preference for giving class actions like EPVA v. Sykes "superior" res judicata effect where possible.

> Virtually every class action meeting the requirements of 23(b)(2) will also meet the less severe requirements of 23(b)(3). [citation omitted] If the actions are classified under (b)(3), members of the class could elect to opt out and thereby not be bound by the judgment. This would permit the institution of separate litigation and would defeat the fundamental objective of (b)(2), to bind the members of the class with one conclusive adjudication.
>
> * * *
>
> We ... agree ... that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect ...

Id. at 252-253.

Additionally, a judgment entered by consent or the agreement of the parties, as in EPVA v. Sykes, is res judicata to the same extent as if entered after a contest. Allegheny International, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1429 (3d Cir. 1994) (fact that dismissal of earlier suit with prejudice was based upon the stipulation by the parties is irrelevant).

Consistent with the above, DIA's effort to revisit the "key station" status of the City Hall and 15th Street Stations should be barred as all four factors of Pennsylvania's res judicata test have "coalesced." There is plainly an identity of the thing sued upon and for by both the EPVA Class and DIA. While EPVA sought wheelchair accessibility *to all* SEPTA rail stations which were then or would be inaccessible to the mobility-impaired (EPVA Amended Complaint, **Exhibit "1"** at ¶¶ 8, 43, Prayer For Relief), DIA seeks wheelchair access to City Hall and 15th Street Stations (DIA Fourth Amended Complaint, **Exhibit "20"** at ¶ 61, Prayer For Relief), a subset of the relief sought in EPVA v. Sykes.

The test for whether the causes of action are the same for res judicata purposes is: (1) whether the acts and the demand for relief are the same; (2) whether the theory of recovery is the

same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same. United States v. Athalone Industries, 746 F.2d 977, 984 (3d Cir. 1984). As set forth above, there is an obvious identity between the alleged acts, material facts and demands for relief in the EPVA and DIA Complaints. Indeed, DIA admits that it is contending through the instant litigation that other stations existing at the time of the EPVA v. Sykes Settlement Agreement, which were not included therein by the agreement of those parties, are in fact key stations. DIA's Amended Responses to Defendant SEPTA's Contention Interrogatories, **Exhibit "21",** No. 4. It further contends that the EPVA v. Sykes parties included as key stations in the Settlement Agreement certain stations which are not in fact key stations. Id. To that end, DIA's proposed witnesses are to testify regarding the alleged key station characteristics of 15th Street Station and City Hall Station (DIA's Responses to SEPTA's First Set of Interrogatories, **Exhibit "22,"** No. 9), testimony which would have been presented of necessity had EPVA v. Sykes been tried.

The DIA and EPVA theories of recovery are likewise the same. EPVA's causes of action were pursuant to Section 504 of the Rehabilitation Act of 1973, and certain other statutes. EPVA Amended Complaint, **Exhibit "1"** at ¶¶ 47-64. DIA's Fourth Amended Complaint also seeks relief premised on Section 504 of the Rehabilitation Act of 1973, but also asserts causes of action under the ADA and DOT regulations implementing same. DIA's Fourth Amended Complaint, **Exhibit "20"**.

While the ADA didn't take effect until one year *after* Judge Newcomer's approval of the EPVA v. Sykes Settlement Agreement, any assertion by DIA that the ADA has created a "key station" claim where none existed before constitutes the elevation of form over substance

rejected in Zhang, *supra*. The fact remains that those DOT regulations setting forth the criteria for key stations under the ADA are substantially identical to those corresponding 1979 key station regulations implementing the Rehabilitation Act of 1973. 49 C.F.R. §§ 37.47, 37.51, **Exhibit "6";"** 49 C.F.R. §§ 27.87, 27.89, **Exhibit "7."** Accordingly, the EPVA v. Sykes parties specifically incorporated DOT's longstanding "key station" language into the Settlement Agreement and specifically identified each "key station" in the Notice of the settlement to the EPVA Class![4]

Moreover, the issue was revisited in 1996 when Judge Newcomer approved substitutions for two key stations. While the ADA had been in effect for *six years* at that point, no ADA-based challenges to the ADA's implementing regulations, the Settlement Agreement or its amendment were asserted, including by DIA or its members.

Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings. J.S. v. Bethlehem Area School District, *supra*. The subject matter and ultimate issue in EPVA v. Sykes -- whether the mobility-impaired are entitled to wheelchair access to stations *including 15th Street and City Hall Stations* -- could hardly be more "the same" as those in the instant action.

There is likewise an identity of the parties to both EPVA v. Sykes and the instant litigation. In EPVA v. Sykes, Judge Newcomer defined the Fed.R.Civ.P. 23(b)(2) Class as "all mobility-handicapped persons living, working or traveling in the City and County of

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[4] *E.g.*, "It is the purpose of this Agreement to further the process of making the mass transportation system ... serviced by SEPTA, accessible to the mobility-handicapped, by providing for the renovation of certain key stations ..." Settlement Agreement, **Exhibit "2"** at ¶ 1; "SEPTA has agreed to make certain key stations ... accessible to the mobility-handicapped ..." Notice to the Class, Zuckerman Affidavit, **Exhibit "4"**.

Philadelphia, and in the Counties of Bucks, Chester, Delaware and Montgomery, Pennsylvania from any time to the present." **Exhibit "5."** DIA's Fourth Amended Complaint asserts that it is an organization open to anyone who has a disability and, like EPVA, includes persons with mobility impairments (¶ 6); that its participants, like EPVA's, "... use and want access to SEPTA's Frankford-Market Elevated and Broad Street Subway Lines and to access them at the City Hall/15th Street entrances" (¶ 8); and, as did EPVA, seeks relief in the form of accessibility for "persons with disabilities" (Prayer for Relief, ¶ C). **Exhibit "20."**

Of course, DIA admits that its membership on the date that the Settlement Agreement was initially approved included members of the Class certified by Judge Newcomer! DIA's Amended Responses and Objections to SEPTA's First Set of Requests for Admissions, **Exhibit "3"**, No. 32. Although notice of the proposed settlement was published to all mobility-handicapped persons living, working or traveling in the City and County of Philadelphia and contiguous counties, and provided for any such person to object to the approval of the Settlement Agreement, neither DIA nor any of its members did so.

It is accordingly beyond dispute that the EPVA Class subsumed the same constituency as that which DIA purports to represent -- mobility-impaired disabled persons seeking wheelchair access to two SEPTA rail stations -- and the EPVA v. Sykes Order and Judgment Approving Settlement is entitled to the superior res judicata effect contemplated by F.R.C.P. 23(b) and this Circuit. See Wetzel v. Liberty Mutual, *supra.*

In addition to those factors set forth in the foregoing sections, Pennsylvania looks to the Restatement (Second) of Judgments, §§41 and 42 with respect to the binding effect of a judgment for or against a party who purports to represent another person. See Sica v. City of

Philadelphia, 77 Pa.Cmwlth. 97, 465 A.2d 91, 98 (1983). A person who is not a party to an action, but who is represented by a party, is bound by the judgment as though he were a party. A person is represented by a party who is, "The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." Restatement (Second) of Judgments, §41(1)(e). Such person is generally bound by the judgment against the party who purports to represent him unless any required notice wasn't given; the subject matter of the action was not within the interest of the represented person; the party was divested of representative authority; there was a diversion of interest between the parties and the members of the class such that he could not fairly represent them; or the party failed to prosecute the action with due diligence and reasonable proof. Restatement (Second) of Judgments, §42(1).

None of those factors can fairly divide the EPVA Class and DIA. Notice of the proposed EPVA v. Sykes Settlement Agreement was provided to members of the class of mobility-handicapped persons living, working, or traveling in Philadelphia and the surrounding counties. Making the mass transportation system in Philadelphia and the area serviced by SEPTA accessible to the mobility-handicapped was not only within the interest of EPVA, but one of its "chief concerns."[5] EPVA was never divested of its representative authority, which was in fact reaffirmed in 1996 when Judge Newcomer approved the amendment to the Settlement Agreement. Finally, EPVA unquestionably prosecuted the action with due diligence and reasonable proof. Indeed, after Hearings of which DIA members had notice and at which they

[5] "Chief among [EPVA's] concerns is that every individual who has a mobility impairment or inhibition due to disability ... lead as full and productive a life as practically possible in today's society. To that end, they seek enforcement of existing laws and the vindication of the civil rights of all disabled persons pertaining to access for all persons to public transportation." EPVA's Amended Complaint, **Exhibit "1"** at ¶ 3(a).

had a full opportunity to participate, Judge Newcomer found both the initial Settlement Agreement and the subsequent Amendment to be "fair, adequate and reasonable." **Exhibits "5" and "19."**

Res judicata is not to be defeated by minor differences of form where the controlling issues have been resolved in the prior proceeding in which the present parties had an opportunity to appear and assert their rights. Zhang v. Southeastern Financial Group, *supra*. In light of all of the above, the Court's holding in Valerio v. Boise Cascade Corp., 80 F.R.D. 626 (D.C. Cal. 1978), while a California case, forthrightly addresses the crux of DIA's claim in the instant action.

> In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the McCubbrey settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. They cannot now relitigate that issue behind a rhetorical smokescreen of fraud and conspiracy [the causes of action raised in the second action].

Id. at 658. DIA now endeavors to relitigate the exclusion of the 15th Street and City Hall Stations from the EPVA v. Sykes Settlement Agreement, yet has scarcely bothered even to create a "smokescreen" to mask its efforts.

F. COLLATERAL ESTOPPEL BARS DIA'S COUNT II CLAIM

With respect to collateral estoppel, as with res judicata, the Third Circuit looks to the substantive law of the adjudicating state. O'Leary v. Liberty Mutual, *supra*. Pennsylvania follows the rule of collateral estoppel that when a court has determined the litigated cause on its merits, the judgment entered is final and conclusive between the parties and their privies with

regard to every fact which might properly be considered in reaching the judicial determination, and with regard to all questions of law adjudicated as those facts and points of law relate to the cause of action. Schroeder v. Acceleration Life Insurance, 972 F.2d 41, 45 (3d Cir. 1992).

Collateral estoppel applies where: (1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea was asserted was a party or in privity with the party to the prior adjudication;[6] and (4) the party against whom it is asserted had a full and fair opportunity to litigate the issue in the prior action. Tran v. Metropolitan Life Insurance Company, 408 F.3d 130, 138 (3d Cir. 2005). In determining whether there are identical issues, the Court begins with an assessment as to whether the material facts are the same. Facchiano Construction Company v. U.S. Department of Labor, 987 F.2d 206, 212 (3d Cir. 1992).

As set forth above with respect to res judicata, the issue in the DIA claim is not only "in substance the same" as that decided in EPVA v. Sykes, but is in fact identical.[7] There was a final judgment on the merits on July 28, 1989 when Judge Newcomer dismissed the EPVA Class action "with prejudice in accordance with the terms of the [Settlement] Agreement." **Exhibit**

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[6] A privy includes one whose interests are represented by a party to the action. Restatement, Judgments, § 83, Comment A.; Lawlor v. National Screen Service, 349 U.S. 322, 330, 75 S.Ct. 865, 869 (1955).

[7] To avoid collateral estoppel on the ground that there is no identity of the issues, the difference in the applicable legal standards must be "substantial." Montana v. United States, 440 U.S. 147, 155, 99 S.Ct. 970, 974, 59, L.Ed. 2d 210 (1979) (the identity of issues requirement is fulfilled where the issues in the current case are "in substance the same" as those previously resolved); Raytech Corporation v. White, 54 F.3d 187, 191 (3d Cir. 1995). With respect to the criteria attendant to key stations, there is simply no substantial difference between the DOT regulations implementing the Rehabilitation Act of 1973 at the time of EPVA v. Sykes and those implementing the ADA now.

"5." DIA's members were properly a part of the EPVA v. Sykes class of plaintiffs and, at a minimum, were privies whose interests were represented by EPVA. Finally, there was a full opportunity for DIA members to be heard and litigate the issue in that action. DIA is accordingly collaterally estopped with respect to its "key station" claim.

Collateral estoppel is used to protect the finality of judgments and to conserve judicial resources. Montrose Medical Group v. Bulger, 243 F.3d 773, 779 (3d Cir. 2001). It furthers the goals of reducing the costs of multiple lawsuits, facilitating judicial consistency and encouraging reliance on adjudications. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 547 (3d Cir. 1996). There can hardly be a more wasteful expenditure of judicial resources, a greater invitation to judicial inconsistency, or greater discouragement to reliance on longstanding consent judgments than to relitigate the key station status of rail stations whose status was adjudicated 17 years ago.

IV. ARGUMENT - COUNT I

A. DIA'S COUNT I CLAIM REGARDING THE 15TH STREET COURTYARD IS BARRED BY THE STATUTE OF LIMITATIONS

In Count I, DIA claims that SEPTA violated the ADA and Rehabilitation Act when it failed to install an elevator in the 15th Street Courtyard. That claim is barred by the statute of limitations.

DIA knew that SEPTA would not be installing an elevator at the 15th Street Courtyard as early as August 3, 2000, as evidenced by letters sent by DIA's counsel to the Commissioner of the Department of License & Inspections and the City Solicitor's Office. Gold Deposition, 11/4/05, **Exhibit "24"** at 33-34; letter from Gold to McLaughlin, **Exhibit "25,"** 8/3/00; letter from Gold to Winebrake, **Exhibit "26,"** 9/28/00. On November 14, 2000, DIA was put on

notice by the City Solicitor's Office that the City had issued a building permit for the project and that, if DIA intended to file suit to enjoin the project, it should do so in an expeditious manner. Letter from Pasour to Gold, **Exhibit "27,"** 11/14/00. DIA nevertheless failed to initiate this action until March 2003 and it is therefore barred by Pennsylvania's two year statute of limitations.

The limitations period under Title II of the ADA and the Rehabilitation Act is the forum state's personal injury limitations period. Estrada v. Trager, 2002 WL 31053819 (E.D.Pa. 2002). In Pennsylvania, that limitations period is two years. 42 Pa.C.S. § 5524(7). Menamin v. City of Philadelphia, 2000 U.S. Dist. LEXIS 9040 (E.D.Pa. 2000).

Federal law determines when a federal claim accrues. Antonioli v. Lehigh Coal & Navigation Co., 451 F.2d 1171, 1175 (3d Cir. 1971), cert. denied, 406 U.S. 906, 31 L.Ed.2d 816, 92 S.Ct. 1608 (1972). Under the ADA, a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury which forms the basis for his action. Burkhart v. Widener University, 70 Fed.Appx. 52 (3d Cir. 2003). In a discrimination action the focus is upon "the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 504 (1980). In Ricks, a plaintiff was advised that he would not be granted tenure. The Court held that the cause of action accrued on the date that tenure was denied, not his last day of work. Id.; See also Chardon v. Fernandez, 454 U.S. 6, 8, 102 S.Ct. 28, 29 (1981). Both the Third Circuit and the Eastern District have uniformly applied the Ricks and Chardon holdings to actions arising under the ADA. See, e.g., Burkhart, 70 Fed.Appx. 52 (3d Cir. 2003); Saylor v. Ridge, 989 F.Supp. 680, 686 (E.D.Pa. 1998). That the initial discriminatory

act, not the subsequent effect, starts the running of the statute of limitations is also supported by multiple recent cases in this District. E.g., Saylor, 989 F.Supp. at 686; Sessa v. Sears, 2004 WL 2203743 (E.D.Pa. 2004).

Here, DIA's counsel and its Executive Director acknowledged being on notice, in Gold's August 3, 2000 letter to the City's Department of License & Inspections, that SEPTA's plans did not include an elevator in the 15th Street Courtyard. **Exhibit "24"** at 12-16; 33-34; **Exhibit "25";** Salandra Deposition, 11/4/05, **Exhibit "28"** at 42-43, 45, 48. Thus, the alleged "discriminatory act" occurred, and the cause of action accrued, on August 3, 2000.[8] Because DIA failed to file suit until March 14, 2003, its claim is time-barred by the two-year statute of limitations.

To the extent that DIA might argue that the discriminatory act occurred when the 15th Street Courtyard was re-opened and a wheelchair-bound individual could not then access it because of the lack of an elevator, its request for relief based on an alleged continuing violation has no legal support, either under Chardon v. Fernandez or under Third Circuit decisions. In Chardon, the Supreme Court held that the discriminatory act occurred, and thus the statute began to run, when the plaintiff learned that he was being terminated from his job, *not* when he stopped working. Id., 454 U.S. at 8, 102 S.Ct. at 29. Applying the Chardon analysis, the statute of limitations began to run when DIA became aware that SEPTA would be renovating the 15th Street Courtyard without adding an elevator. The alleged lack of accessibility to the Courtyard

[8] Even to the extent that DIA argues that SEPTA's plans were contingent in August 2000, its cause of action accrued no later than November 14, 2000, when its counsel received a letter from the City Solicitor's Office advising that a building permit had been issued and that, if DIA intended to file suit, it should do so expeditiously.

would merely be an "effect" of that allegedly discriminatory decision not to build an elevator, not the discriminatory act itself.

The Third Circuit has held that the focus of a continuing violations theory is on the affirmative acts by the defendant. Cowell v. Palmer Township, 263 F.3d 286 (3d Cir. 2001). In Cowell, the Court emphasized that "[a] *continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation*." Id. at 293 (quoting Ocean Acres, Ltd. v. Dare County Bd. of Health, 707 F.2d 103, 106 (4th Cir. 1983) (emphasis added)). The statute of limitations under the ADA begins to run once the plaintiff realizes that he will be victimized by the defendant's discriminatory action. Saylor v. Ridge, 989 F.Supp. 680, 686 (E.D.Pa. 1998). Where the continuing violation doctrine applies, the illegal practice complained of has materialized or become cognizable as such only over time. Estrada v. Trager, 2002 WL 31053819 (E.D.Pa. 2002) (doctor's refusal to provide interpreter to deaf patient a discrete discriminatory act, not an illegal practice that would constitute a continuing violation).

In the instant matter, it is undisputed that the potential discriminatory impact was apparent to DIA when it learned that SEPTA would not be building an elevator at the 15th Street Courtyard. DIA's counsel stated in his letter to the City Solicitor that he considered SEPTA's actions to be discriminatory and that he was contemplating legal action. See **Exhibits "25" and "26"**. There were no alleged additional "continual unlawful acts" once SEPTA decided not to build an elevator at the 15th Street Courtyard. The alleged ill effects of the decision occurred when disabled riders were unable to access the 15th Street Courtyard. As there were no additional "continual acts," there is no continuing violation under Cowell.

Once DIA became aware of the allegedly discriminatory nature of the construction of the 15th Street Courtyard, it had a legal duty to institute suit without delay or forfeit its remedy. Kichline v. Consolidated Rail Corp., 800 F.2d 356, 360 (3d Cir. 1986); See also Cowell, 263 F.3d at 295. If this Court were to find that the lack of an elevator in the 15th Street Courtyard constitutes a continuing violation, it would render the ADA's time limitations meaningless as there would be no time constraint on a plaintiff's ability to institute suit. Kichline, 800 F.2d at 360. See also Community Interactions - Bucks Co. v. Township of Bensalem, 1994 WL 276476 at *6 (E.D.Pa. 1994).

Accordingly, DIA's claim regarding the inaccessibility of the 15th Street Courtyard is barred by the statute of limitations.

B. DIA'S CLAIM REGARDING THE INACCESSIBILITY OF THE 15TH STREET COURTYARD IS BARRED BY LACHES

DIA's claim regarding the inaccessibility of the 15th Street Courtyard is also barred by laches, which occurs when there is an inexcusable delay in bringing suit resulting in prejudice to the defendant. Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123, 138 (3d Cir. 2005). Where, as here, the statute of limitations has expired, the defendant "enjoys the benefit of a presumption of inexcusable delay and prejudice." Id. (quoting EEOC v. The Great Atlantic & Pacific Tea Co., 735 F.2d 69, 80 (3d Cir. 1984)). See argument section III, B, supra, regarding laches.

DIA must justify its delay and negate prejudice by showing that its delay was excusable. Id. at 139-140. Here, the delay occurred because of DIA's counsel's belief that DIA would gain a tactical advantage over SEPTA by delaying suit. Gold Deposition, 11/4/05, **"Exhibit "24"** at

39. That delay is not excusable and DIA cannot negate the prejudice suffered by SEPTA as a result thereof.

Mansfield Area Citizens Group v. United States, 413 F.Supp. 810 (M.D.Pa. 1976), is directly on point. There, the Court held that the plaintiff unreasonably delayed suit where construction had been ongoing for years and public meetings, discussions with elected officials, newspaper articles and display models brought the construction of a dam to the attention of the public. Id. at 824. In ruling that laches barred the plaintiff's injunction request, the Court held that the defendant would be substantially harmed because it had already incurred half of the projected costs, substantial work on the project had been completed, and contracts for future work were already awarded. Id.

A finding of laches is more compelling here than in Mansfield, where the plaintiff had at least filed suit *while construction was in progress* and the defendant had only incurred half of the projected costs. Here, despite its knowledge as of August 2000 of SEPTA's construction work, DIA delayed filing suit until *after* the 15th Street Courtyard construction was completed. [9]

Requiring additional construction on the 15th Street Courtyard after the project's completion will require the expenditure of yet additional funds which have not been budgeted and cause additional inconvenience to the public as a result of the new construction. Heiser Affidavit, **Exhibit "23"** at ¶¶ 8-9. All of this could have been avoided had DIA timely filed its Complaint. As it inexcusably failed to do so, DIA is barred by laches from proceeding.

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[9] The construction of the 15th Street Courtyard began in February 2001. Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 39. The 15th Street Courtyard was opened to the public on August 8, 2002. Heiser Affidavit, 3/14/06, **Exhibit "23"** at ¶ 7.

C. DIA'S CLAIM REGARDING THE INACCESSIBILITY OF THE 15TH STREET COURTYARD IS BARRED BY ITS "UNCLEAN HANDS"

DIA's counsel testified that he delayed filing suit to gain a tactical advantage over SEPTA. **Exhibit "S"** at 39. Unfortunately for DIA, it is well settled that one who seeks equity must do so with clean hands. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244-5, 54 S.Ct. 146, 147 (1933). "[C]lean hands" means good faith. Id. A party has unclean hands when (1) it is seeking affirmative relief; (2) is guilty of conduct involving fraud, deceit, unconscionability, or bad faith; (3) that is directly related to the matter in issue; (4) that injures the other party; and (5) affects the balance of equities between the litigants. Imprisoned Citizens Union v. Shapp, 11 F.Supp.2d 586, 608 (E.D.Pa. 1998). Inequitable conduct connected to the matters before the court for resolution is the primary focus. In re New Valley Corp. v. Corp. Property Associates 2 and 3, 181 F.3d 517, 525 (3d Cir. 1999).

Mr. Gold's testimony that, "if they didn't proceed there would be no elevator," so he decided, "after giving it significant thought and consideration to let [SEPTA] sit in their own petard," reflects DIA's bad faith and constitutes unclean hands. In Carney v. School District of Philadelphia, 633 F.Supp. 1273, 1285 (E.D.Pa. 1986), this Court stated that "[w]hat is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts." DIA "dirtied" its hands by deliberately failing to act in a timely manner and allowing construction to be completed in the 15th Street Courtyard before filing suit.

As discussed in the previous section, additional construction at this late stage would require the expenditure of additional funds by SEPTA and inconvenience to the public, which could have been avoided had DIA timely filed suit. **Exhibit "23"** at ¶¶ 8-9. DIA should not now be allowed to benefit from its own bad faith.

D. A COURT-APPROVED STIPULATION PRECLUDES THE EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

DIA has previously asserted that its claim regarding the 15th Street Courtyard is not time-barred because the limitation period was equitably tolled by SEPTA's alleged representation that alternate elevators at City Hall would be constructed in exchange for DIA not initiating a lawsuit over the 15th Street Courtyard. Plaintiff's Reply In Support of Its Motion for Partial Summary Judgment, 5/23/05, **Exhibit "30"** at ¶¶ 4-5. That assertion must be rejected.

A Court-approved Stipulation bars DIA from presenting any claim that SEPTA agreed to construct elevators at City Hall in lieu of an elevator in the 15th Street Courtyard. Docket #36, Order of the Honorable Clifford Scott Green, 7/20/04. The Stipulation stated:

> Plaintiff is hereby precluded from presenting *any claim* that Defendant SEPTA allegedly agreed to construct elevators at City Hall in lieu of construction of an elevator at the northwest corner of 15th and Market Streets *or* that SEPTA is liable for failing to abide by any such alleged agreement *at trial or in any hearing or in any other proceeding; said claims are hereby dismissed with prejudice.*

Id. (emphasis added).

This Court specifically ordered DIA to excise all allegations relating to the alleged agreement and to file a Fourth Amended Complaint *without* the stricken allegations. Docket #70, Order of the Honorable Gene E.K. Pratter, 12/23/04. Undeterred by this Court's Order, DIA maintains that the Stipulation does not preclude it from introducing evidence of such a promise to defeat the statute of limitations. **Exhibit "30"** at 4.

DIA's argument is belied by the plain language of the Stipulation which *precludes* it from presenting *any claim* that SEPTA agreed to construct elevators at City Hall in lieu of an elevator at 15th and Market Streets *or any claim* that SEPTA is liable for failing to abide by any such

alleged agreement, and dismisses such claims *with prejudice*. DIA cannot now resurrect these same claims in an effort to toll the statute of limitations.

Even assuming *arguendo* that the Stipulation does not bar DIA from asserting that the limitations period was equitably tolled, it cannot proceed with this claim. Equitable tolling applies only: 1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; 2) where the plaintiff in some extraordinary way has been prevented from asserting his rights; or 3) where the plaintiff has timely asserted his rights mistakenly in the wrong forum. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994).

If a plaintiff asserts that it has been actively misled, it must show that the defendant engaged in affirmative acts of concealment with respect to the relevant facts and that plaintiff exercised reasonable diligence to uncover the relevant facts. Forbes v. Eagleson, 228 F.3d 471, 487 (3d Cir. 2000). The statute of limitations should not be equitably tolled here because SEPTA did not engage in a single act of affirmative concealment to mislead DIA and DIA failed to exercise reasonable diligence in seeking to uncover the relevant facts.

In an effort to show that they were misled, DIA will apparently rely on an alleged representation by Fran Egan, SEPTA's former Assistant General Manager for Public, Government and Customer Affairs, that elevators at City Hall would be built by a certain date. **Exhibit "24"** at 14, 16-22, 24. Even if those representations were made -- SEPTA denies that they were and Ms. Egan is now deceased -- she had no authority, actual or apparent, to make them. Ms. Egan's job duties involved developing political and public support for SEPTA and building and maintaining relationships with government and community groups within the five county region. Torres Affidavit, **Exhibit "31"** at ¶ 4. Ms. Egan had no input into how SEPTA's

Capital Budget was developed or what funding was assigned to particular Capital Projects. Id. at ¶ 6. She had no decision-making or advocacy role regarding whether a particular Capital Project was funded, nor did she have any authority to commit funding to a Capital Project. Id.

SEPTA is not bound by any of Ms. Egan's alleged statements to DIA as Egan had no authority to commit to a timetable for the City Hall elevators or commit funds for this project. Id.; Burnfield Affidavit, **Exhibit "32"** at ¶ 18. Only SEPTA's Board of Directors has the statutory authority to approve a multi-million dollar expenditure such as the installation of elevators at City Hall. 74 Pa.C.S.A. § 1751(a); Burnfield Affidavit, **Exhibit "32"** at ¶ 18. Thus, any representations made by her were not binding upon SEPTA.

Not only did Ms. Egan lack the legal authority to bind SEPTA, not even SEPTA's General Manager has such authority. Wilson v. SEPTA, 709 F.Supp. 623, 626 (E.D.Pa. 1989)(a written promise of a promotion signed by SEPTA's General Manager and Board Chairman was ultra vires and void because only the Board as a whole has the authority to make such a decision).

Even were DIA to contend that Ms. Egan had apparent authority to make the alleged representation, the Commonwealth and its subdivisions and instrumentalities cannot be estopped by "acts of its agents and employees if those acts are outside the agent's powers, in violation of positive law, or acts which require legislative or executive action." Central Storage & Transfer Co v. Kaplan, 487 Pa. 485, 489, 410 A.2d 292, 294 (1979) (quoting Kellams v. Public Sch. Emp. Retirement Bd., 486 Pa. 95, 403 A.2d 1315, 1318 (1979). As a result, persons contracting with agents cannot rely on an agent's representation unless the agent has actual authority to bind the agency. Id. at 489, 410 A.2d at 294. This is particularly true where, as here, the authority of

SEPTA is defined by statute and is therefore a matter of public record. Id.; In the Matter of the Estate of Van B. Hooper, 359 F.2d 569, 577-8 (3d Cir. 1966).

Further, DIA cannot demonstrate that it was actively misled by SEPTA or that it exercised due diligence in seeking to uncover relevant facts about the status of the City Hall elevators, both of which are necessary to invoke equitable tolling. See Oshiver, 38 F.3d at 1390. DIA did not inquire about Ms. Egan's authority. Both its counsel and Executive Director testified that following their "acceptance" of Ms. Egan's alleged promise, they did *nothing* to confirm that elevators at City Hall would be built by the end of 2002. **Exhibit "24"** at 22, 24, 25, 28-29; **Exhibit "28"** at 32.

On the contrary, DIA was on notice that construction would *not* be finished by the allegedly promised completion date by virtue of SEPTA's public documents and hearings confirming same. DIA's Executive Director testified that she reviews SEPTA's Capital Budget every year. **Exhibit "28"** at 30-31. Although the City Hall Station Rehabilitation Project, which would include the elevators, was funded for $4,000,000 for design only in the Capital Budget for Fiscal Year 2001, it was not funded in SEPTA's Capital Budget for Fiscal Year 2002, nor listed as one of SEPTA's Capital Projects for Fiscal Years 2002-2005. **Exhibit "16"** at SEP 2147-2149. At least as of June 21, 2001, the date that the Capital Budget for Fiscal Year 2002 was approved by the Board, DIA knew or should have known that City Hall elevators would not be completed by the end of 2002. DIA nevertheless failed to file suit at that time, when it would have been well within the statute of limitations.

Furthermore, DIA was free to attend annual public hearings on SEPTA's proposed Capital Budgets and question both Ms. Egan's authority and the status of City Hall. Burnfield

Affidavit, **Exhibit "32."** at ¶14. However, the sign-in sheets for the public hearings on the Capital Budgets for Fiscal Years 2001, 2002 and 2003 reveal that neither DIA's counsel nor its Executive Director attended those hearings. See **Exhibit "33"** at SEP 9138-9140; 9436-9446; 9497; 9906-9915; 10308-10318.

Considering the wealth of information readily available to DIA to ascertain both Ms. Egan's lack of authority and the status of the City Hall elevators, any argument that SEPTA actively misled DIA is disingenuous.[10] Consequently, DIA has failed to establish that the statute of limitations was equitably tolled by SEPTA's conduct and its claim is accordingly time-barred.

E. DIA'S CLAIM REGARDING THE REPLACEMENT OF AN ESCALATOR IN THE SOUTHEAST PORTION OF CITY HALL COURTYARD IS BARRED BY THE STATUTE OF LIMITATIONS

DIA's Count I claim that SEPTA impermissibly altered an escalator in the southeast portion of City Hall Courtyard without providing an elevator is also barred by the two-year statute of limitations.

DIA's Executive Director testified that DIA became aware of the City Hall Courtyard construction when the barricades went up on June 1, 2001. **Exhibit "28"** at 61-62, 64. Furthermore, the project was identified and funded in SEPTA's Capital Budget in Fiscal Year 2001 and discussed at the public hearing on the Capital Budget for Fiscal Year 2001. See SEPTA's Capital Budget and Capital Program for Fiscal Year 2001, **Exhibit "16"** at SEP 2047; Transcripts from SEPTA Public Hearings, **Exhibit "33"** at SEPT 9069-70; Burnfield Affidavit,

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[10] Since the proposed changes in the 15th Street Courtyard were also known to DIA, it was not "in some extraordinary" way prevented from asserting its rights under the second exception of the equitable tolling doctrine. In fact, DIA was encouraged to pursue a remedy by the City Solicitor's November 14, 2000 letter. The third exception also does not apply to DIA as it did not mistakenly file in the wrong forum.

Exhibit "32" at ¶¶ 19, 20. Since DIA's Executive Director testified that she reviewed SEPTA's Capital Budget every year, DIA was on notice from the Capital Budget that SEPTA was replacing an escalator in the City Hall Courtyard. **Exhibit "28"** at 30-31.

Under Ricks and Chardon, the discriminatory act occurred, and the cause of action accrued, in June 2001 when DIA became aware of the construction in the Courtyard. DIA nevertheless failed to file its claim regarding the escalator replacement until over three and a half years later when it amended its Complaint for the fourth time in February 2005.

To the extent that DIA argues that it was unaware, until the barriers came down, than an elevator would not be constructed, it had an affirmative duty to exercise reasonable diligence to ascertain the relevant facts. Forbes v. Eagleson, 228 F.3d at 487. As discussed previously, DIA's agents failed to attend public hearings on the Capital Budget. Had they attended the hearing on the Capital Budget for Fiscal Year 2001, they would have known that the construction in the City Hall Courtyard would be confined to an escalator replacement. Furthermore, had DIA simply read the sign on the barriers, it would have discovered that there was no elevator construction taking place behind those barriers. Moreover, DIA's Executive Director testified that when DIA became aware of the construction, it did not designate anyone to determine if an elevator would be included. **Exhibit "28"** at 63. Alleged assumptions on DIA's part are not enough to toll the statute of limitations. Oshiver, 38 F.3d at 1392.

Under Oshiver, equitable tolling does not apply as SEPTA did not mislead DIA regarding construction at the City Hall Courtyard. [11] DIA failed to exercise due diligence in ascertaining the facts there and cannot be allowed to proceed. Id.

F. DIA'S CLAIM REGARDING THE REPLACEMENT OF AN ESCALATOR IN THE SOUTHEAST PORTION OF CITY HALL COURTYARD IS BARRED BY LACHES

DIA's claim relating to the City Hall escalator replacement is also barred by laches. Both inexcusable delay in bringing suit and prejudice to SEPTA as a result of the delay are present. Santana Products, Inc., 401 F.3d at 138. Since the statute of limitations expired, there is a presumption of laches and the burden shifts to DIA to justify its delay and negate prejudice. Id. at 138-140. DIA's delay in filing suit is inexcusable considering all of the information available to it. Just as the plaintiff in Mansfield Area Citizens Group had notice of the dam project through public meetings, discussions with elected officials, articles in newspapers and ongoing construction, DIA had notice of the escalator replacement due to the visible signs around the barricades, SEPTA's Capital Budget that identified the escalator replacement program in Fiscal Year 2001, and the public meeting on SEPTA's Capital Budget for that year.

As the escalator replacement has already been completed, SEPTA would now have to incur $2 million to install an elevator at City Hall Courtyard -- costs which could have been avoided if DIA had timely filed suit. Brooke Affidavit, **Exhibit "35"** at ¶ 36. SEPTA should not be prejudiced by DIA's unreasonable delay, and the claim regarding the City Hall escalator replacement should be barred by laches.

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[11] DIA was not prevented from asserting its claim as a result of other extraordinary circumstances, nor did DIA file suit in the wrong forum.

G. SEPTA'S SUBURBAN STATION RENOVATIONS ARE IN FULL COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

SEPTA's Suburban Station is a "key station" and is subject to the Transportation Facilities provisions of DOT regulations, Subpart C, § 37.53. See Final ADA Key Station Plan and Schedule, July 23, 1992, **Exhibit "11;"** Settlement Agreement, **Exhibit "2"** at 7; 49 C.F.R. § 37.53. For over 50 years, Suburban Station has been a mixed use transit complex combining retail, office, and transit operations in an integrated facility spanning from 15th Street to 18th Street, Market to Cuthbert Streets. Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 12; Gravel Affidavit, **Exhibit "37"** at Exhibit "1" at 18-21. The mixed use nature of Suburban Station has remained consistent over this 50 year period. See Gravel Affidavit, **Exhibit "37"** at Exhibit "1" at 18.

In February 1995, SEPTA and the City reached a general agreement concerning the framework for the renovation of Suburban Station, its retail spaces and its concourse (the "Project"). General Agreement, **Exhibit "38."** One of the objectives was to have SEPTA, the City and private ownership enter into cooperative agreements to implement the renovations without regard to property ownership.[12] Id., **Exhibit "38"** at 2; Maier Deposition, 9/1/05, **Exhibit "39"** at 14-20.

The purpose of the Project is the comprehensive renovation of the Suburban Station transit facility. ADA accessibility has been a hallmark of the Project from its outset. In its Request For Proposal SEPTA broadly outlined design requirements for renovations to below

[12] This is consistent with 49 C.F.R. § 37.51 which identifies the "responsible parties" and their legal obligations in making key stations in commuter rail systems accessible. Id., **Exhibit "38."**

ground concourses, courtyards, station and train operations, corridors, retail spaces, entrances and specifically included ADA accessibility requirements. Heiser Affidavit, **Exhibit "29"** 5/3/05 at ¶¶ 20-22. Request for Proposal, **Exhibit "40"** at 3 ("All project design and construction elements must conform with all applicable codes and laws, including the Americans with Disabilities Act (ADA) and Pennsylvania's Disability Act."), 4, 9, 13, 21.

In 1997, Bower, Lewis & Thrower ("BLT") was awarded the design contract. Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 21. From the Project's inception, the 15th Street Courtyard was within the scope of the Project. Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 18; Request for Proposal, **Exhibit "40"** at 3, 4; Heiser Deposition, 10/6/05, **Exhibit "41"** at 12, 13, 90, 91; Wolfson Deposition, 10/7/05, **Exhibit 43** at 7, 8. BLT Concourse Level Axonometric View, **Exhibit "44."**[13]

The Suburban Station transit facility has clearly demarcated boundaries -- extending from 15th Street to 18th Street and from Cuthbert Street to Market Street, including the 15th Street Courtyard. See Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 5. See also BLT Suburban Station Renovations Property Line Plan Concourse Level (the "Zoning Plan"), **Exhibit "48."**[14] The

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[13] Counsel for SEPTA provided counsel for DIA 30 x 42 inch color copies of the BLT Concourse Level Axonometric View, **Exhibit "44;"** the "Zoning Plan," **Exhibit "48;"** and the Architectural Schematic of Concourse Level, Suburban Station, **Exhibit "49"** under cover of a December 30, 2005 letter. Counsel for SEPTA also provided Mr. Iacullo with the expert reports of Andrew C. Putnam, P.L.S., Donald L. Kloehn, A.J. Gravel, and Roderick Wolfson, including a copy of the Zoning Plan, under cover of a December 22, 2005 letter.

[14] The ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") defines "Facility," without any regard to ownership, as "[a]ll or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site." 49 C.F.R. Part 37, Appendix A, Definitions 3.5. A "Site," in turn, is defined as "[a] parcel of land bounded by a property line or a designated portion of a public right-of-way." 49 C.F.R. Part 37, Appendix A, Definitions 3.5; Kloehn Deposition,

property lines that define the scope of the Project and its site are shown on the Zoning Plan and on BLT's architectural schematic drawing of the Suburban Station concourse. See Zoning Plan, **Exhibit "48;"** Architectural Schematic of Concourse Level, Suburban Station, **Exhibit "49."** The Zoning Plan identifies, *inter alia,* in bold red lines, the Project's perimeter boundary lines and main phase work that SEPTA would be performing on SEPTA, City, or privately owned property within these boundaries. See Zoning Plan, **Exhibit "48."**[15] BLT's architectural schematic drawing of the Suburban Station concourse shows a concourse-level view of the boundary lines of the Project highlighted in red. See Architectural Schematic of Concourse Level, Suburban Station, **Exhibit "49."**[16]

Suburban Station has particularized accessibility requirements under the ADAAG, which are found at 49 C.F.R. Part 37, Appendix A.[17] The ADAAG requires only *one* accessible entrance in order to be ADA compliant. 49 C.F.R. Part 37, Appendix A, Transportation Facilities, Section 10.3.2(1) (Existing Facilities: Key Stations) ("Rapid, light, and commuter rail key stations ... and existing intercity rail stations shall provide at least one accessible route from

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2/14/06, **Exhibit "45"** at 67-68. Clearly, Suburban Station is a facility on a site.

[15] Ownership within a transit facility is not relevant to the definition of the facility or the scope of a particular renovation project. Kloehn Deposition, 2/14/06, **Exhibit "45"** at 45-46, 70.

[16] The property lines defining the scope of the Project are the same as those established for Suburban Station and the Penn Center Complex (as it was then named) by the Pennsylvania Railroad in 1950. Putnam Affidavit, **Exhibit "59"** at Exhibit "1" at 2.

[17] The ADAAG provides the standards for accessible facilities and states that it "... sets guidelines for accessibility to buildings and facilities by individuals with disabilities under the ... ADA. These guidelines are to be applied during the design, construction, and alteration of buildings and facilities covered by Titles II and III of the ADA to the extent required by regulations issued by federal agencies, including the Department of Justice and the Department of Transportation, under the ADA." 49 C.F.R. Part 37, Appendix A, § 1.

an accessible entrance to those areas necessary for use of the transportation system."). The ADAAG guideline for entrances when "alterations" to a building are performed likewise requires only one accessible entrance to an altered building so long as signage is appropriate. 49 C.F.R. Part 37, Appendix A, Accessible Elements and Spaces: Scope and Technical Requirements, Section 4.1.6.(1)(h) (Accessible Buildings: Alterations). SEPTA has provided that signage at the street level of the 15th Street Courtyard which directs disabled persons to the 16th Street accessible elevator. Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 2; Kloehn Affidavit, **Exhibit "50"** at Exhibit "1" at 3-4.

The Suburban Station renovations comply with these ADAAG guidelines. The renovations provide not one but *two* accessible entrances from the street level to the concourse level. Kloehn Affidavit, **Exhibit "50"** at Exhibit "1" at 2-5; Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 1-2; Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶¶ 42-45. One ADA-compliant entrance is located at the south side of 16th Street between JFK Boulevard and Market Street and provides elevator access from street level to the concourse level. Kloehn Affidavit, **Exhibit "50"** at Exhibit "A" at 2-5; Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 1-2; Heiser Affidavit, **Exhibit "29"** at ¶ 43. A second ADA-compliant entrance is located at the southeast corner of 17th Street and JFK Boulevard, and provides elevator access from street level to the concourse level and to one of the platforms. Kloehn Affidavit, **Exhibit "50"** at Exhibit "1" at 2-5; Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 1-2; Heiser Affidavit, **Exhibit "29"** at ¶ 44.

Exhibit "44" is an axonometric view of the Suburban Station Transit Facility which graphically depicts that wheelchair accessibility is available to all aspects of the Suburban Station concourse and that, from either street level elevator, a disabled person can access, barrier-free:

(1) all train platforms using four additional concourse level elevators; (2) all transportation functions; (3) all retail spaces, courtyards and public places. Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 1-2; Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶¶ 43-45; Wolfson Deposition, 2/15/06, **Exhibit "42"** at 62-63. The 15th Street Courtyard is accessible from the 17th Street elevator and from the 16th Street elevator. Kloehn Affidavit, **Exhibit "50"** at Exhibit "A" at 4; Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 1-2; Kloehn Deposition, **Exhibit "45"** at 78. The distance from the 16th Street elevator to the 15th Street Courtyard at concourse level is approximately *340 feet*. Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶ 10. Accordingly all of the ADA's applicable accessibility requirements have been met. See 49 C.F.R. Part 37, Appendix A, Accessible Elements and Spaces: Scope and Technical Requirements, § 4.1.6(1), (2) (Accessible Buildings: Alterations); BLT Concourse Level Axonometric View, **Exhibit "44."**

Any contention by DIA that the Project, and the close proximity of Suburban Station to 15th Street Station, triggered a requirement that 15th Street Station be made accessible misapprehends the renovation and accessibility provisions of the ADA and ADAAG. 15th Street Station and Suburban Station are two separate and distinct transit facilities demarcated by clear property lines. See BLT Structural Drawing - "Section Through 15th Street Corridor Looking East," **Exhibit "58**;" Zoning Plan, **Exhibit "48;"** See Architectural Schematic of Concourse Level, Suburban Station, **Exhibit "49;"** Putnam Affidavit, **Exhibit "59,"** at Exhibit "1" at 2, 3. In order to reach the 15th Street Station, an individual who enters the Suburban Station Transit Facility at the 15th Street Courtyard must travel south in the 15th Street corridor, exit Suburban Station, and travel over underground transit lines. Maier Deposition, **Exhibit "45"** at 67; Heiser

Affidavit, 5/3/05, **Exhibit "29"** at ¶ 64. BLT Structural Drawing - "Section Through 15th Street Corridor Looking East," **Exhibit "58."**

The scope of the renovations to the corridor adjacent to the 15th Street Courtyard did not extend beyond the Project's boundaries or the property line of Suburban Station. Heiser Deposition, **Exhibit "41**" at 45-49. SEPTA did not perform any renovations to the underground connection from Suburban Station to the 15th Street Station. Id.

There is nothing in the ADA or the ADAAG which provides that the renovation of one facility triggers a requirement that another facility in "proximity" be made accessible. Moreover, as a "key station," renovation of the Suburban Station Transit Facility did not require that the underground connections between these two stations be made accessible. See 49 C.F.R. Part 37, Appendix A, Transportation Facilities, § 10.3.2(2) (Existing Facilities: Key Stations) (accessible route requirements between facilities contained in § 10.3.1(3), which incorporates Section 4.3, is not applicable to key stations). See Kloehn Deposition, 2/14/06, **Exhibit "45"** at 68-69.

Multiple federal jurisdictions, including the Third Circuit, consistently and unequivocally have found that only one accessible entrance is required for a renovated transit facility. The Third Circuit, in a case brought under Section 504 of the Rehabilitation Act, addressed regulations for which design, construction, and alteration were to be in accordance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped, published by ANSI, Inc. (ANSI A 117.1-1961 (R1971)." Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113, 1119 (3d Cir. 1987), citing 49 C.F.R. § 27.67(d). In reaching its decision in Sykes, the Third Circuit applied the ANSI standard Section 5.2.1 -- for building entrances -- a guideline that required only "[a]t least one

primary entrance to each building shall be usable by individuals in wheelchairs." See Sykes, 833 F.2d at 1120-21 citing ANSI A 117.1-1961 (R-1971) at § 5.2.1.

The Sykes Court directly recognized that, under the plain language of ANSI § 5.2.1, only one altered entrance to a transportation facility is required to be made accessible, even when multiple entrances are altered. Sykes, 833 F.2d at 1120-21. ANSI § 5.2.1 is substantively identical to the ADAAG provisions for key stations and renovations of existing transit facilities requiring only one accessible entrance in order to be ADA-compliant. 49 C.F.R. Part 37, Appendix A, Transportation Facilities, Section 10.3.2(1) (Existing Facilities: Key Stations); 49 C.F.R. Part 37, Appendix A, Accessible Elements and Spaces: Scope and Technical Requirements, Section 4.1.6(1)(h) (Accessible Buildings: Alterations).

In Long v. Coast Resorts, Inc., 32 F.Supp.2d 1203 (D.Nev. 1999), affirmed in part, reversed in part on other grounds, 267 F.3d 918 (9th Cir. 2001), the Ninth Circuit recognized that accessibility to a place of public accommodation does not have to be identical for disabled and non-disabled persons. As stated by the District Court and affirmed by the Ninth Circuit, "[the ADA does not require every element of a place of public accommodation to be accessible" and *"[e]very entrance or exit is not required to be wheelchair accessible."* Long v. Coast Resorts, Inc., 32 F.Supp.2d at 1212. (Emphasis added).

Likewise, in Kasten v. Port Authority of New York & New Jersey, 2002 WL 31102689 (E.D.N.Y.), the court acknowledged that both DOT regulations and the ADAAG required only one elevator entrance to an airport terminal to meet the requirements of the ADA. Id. In a recent case dealing with access to a courthouse, the court held that "the existence of one ADA-compliant entrance necessarily renders the courthouse's services, programs, and activities

'readily accessible' to individuals with disabilities." County of Belknap v. Durante, 2004 WL 361540 (D.N.H.).

Vertical access is not required at the 15th Street Courtyard entrance to the Suburban Station concourse due to the two accessible entrances at 16th Street and 17th Street. See 49 C.F.R. Part 37, Appendix A, Transportation Facilities, Section 10.3.2(1) (Existing Facilities: Key Stations); 49 C.F.R. Part 37, Appendix A, Section 4.1.6(1)(f) and (h) (Accessible Buildings: Alterations). While SEPTA does not concede that the 15th Street Courtyard entrance was "altered" within the meaning of the ADA and its regulations, Section 4.1.6(1)(h) provides that an entrance being altered need not meet ADAAG's requirements for accessibility so long as there is one accessible entrance, and in this case there are two. Id. at Section 4.1.6(1)(f) and (h)(Accessible Buildings: Alterations).

The foregoing ADA and ADAAG provisions do not mandate that SEPTA provide vertical access to Suburban Station at the 15th Street Courtyard where accessible entrances exist at 16th Street and 17th Street. Manifestly, the ADA and ADAAG do not intend for the redundancy that DIA advocates where, as here, the Suburban Station elevator at 16th Street is 340 feet from the 15th Street Courtyard.

DIA contends that the work at the 15th Street Courtyard required SEPTA to place yet a third Suburban Station elevator despite the presence of Suburban Station elevators at 16th Street and 17th Street. DIA's contention runs afoul of the vertical accessibility requirements of key stations (one accessible route) and misapprehends the applicable ADAAG guidelines pertinent to stairs and escalators. The ADAAG general guidelines on alterations specifically address escalators and stairs. Pursuant to 49 C.F.R. Part 37, Appendix A, 4.1.6(1)(f), vertical access is

required only when "an escalator or stair is planned or installed *where none existed previously* and *major structural modifications are necessary for such installation*." (Emphasis added). The ADAAG does not mandate that SEPTA provide an elevator where it replaced an existing stair and no major structural modifications were undertaken to install the stair.

Work on the 15th Street Courtyard began in February, 2001 and included replacing a concrete stairway that was unsafe and in disrepair, renovating the head house at 15th Street and replacing planters, but no work was done to the escalators. Wolfson Deposition, 2/15/06, **Exhibit "42"** at 12; Wolfson Affidavit, **Exhibit "51"** at Exhibit "1" at 2; Heiser Affidavit, 5/3/05, **Exhibit "29"** at ¶¶ 56-59; Heiser Deposition, 10/6/05, **Exhibit "41"** at 88. No major structural modifications were necessary to install the replacement stairs. Id., 5/3/05, **Exhibit "29"** at ¶ 58. The new stairway at the 15th Street Courtyard brings an ambulatory person from street level to the same point within the Suburban Station as the former stairway. Id., 5/3/05, **Exhibit "29"** at ¶ 59; Wolfson Deposition, 2/15/06, **Exhibit "42"** at 12. The replacement of the stairway did not change the access from the street level to the Suburban Station concourse in any way. Id., 5/3/05, **Exhibit "29"** at ¶ 60.

The Third Circuit's decision in Sykes is consistent with ADAAG's provisions that vertical access need not be provided where existing stairs are replaced. In Sykes, the Court held that *only* the reconstruction of the northeast entrance to Columbia Station effected an "alteration" "in a manner that affects or could affect the accessibility of the facility." Sykes, 833 F.2d at 1121. The reconstruction of the northeast entrance consisted of the construction of two entirely *new* stairs and a *new* escalator. Id. at 1120. Notably, the reconstruction of two *existing* stairs on the southbound side of Columbia Station in Sykes was insufficient to trigger a vertical

accessibility requirement. In Sykes, the reconstructed southbound stairs lead "from the street to the southbound terminal at the Columbia Avenue Station." See Sykes, 833 F.2d at 1120. The Court pointedly declined to hold that reconstruction of two existing stairways on the southbound side of Columbia Station constituted "alterations." Id. at 1120, 1121. See also Kloehn Deposition, 2/14/06, **Exhibit "45"** at 73-74, 76 (replacing existing stairway not an ADA alteration and constitutes normal maintenance).

Sykes is instructive as (1) the Third Circuit only ordered vertical accessibility where *new* stairs and a *new* escalator were constructed, which is not the case here, and (2) did not order vertical accessibility where reconstruction of two *existing* stairways took place, which is twice the number of *existing* stairways at issue in this case. Standing on its own, the application of Sykes to the instant case compels the conclusion that no elevator is required in the 15th Street Courtyard.

Any argument that an elevator is required in the 15th Street Courtyard because the disabled will be inconvenienced by having to travel 340 feet to the elevator at 16th Street is unsupportable for both factual and legal reasons. Factually, the argument depends on where a disabled person is traveling from. If a disabled person is traveling from 18th Street, for instance, elevators at 17th Street and 16th Street are more convenient for that person than an elevator at 15th Street. Legally, if convenience was relevant, then every entrance to a facility, as opposed to just one, would have to be wheelchair accessible. The fact that the ADA and the Rehabilitation Act do not require such equal access for the disabled is evident in the plain language of those statutes, and their implementing regulations and their legislative histories. Our Courts recognize this underpinning of the ADA and the Rehabilitation Act especially where renovations to a facility

are undertaken. The Third Circuit held in Sykes that identical access to the same station is not required and that there will be times when a person in a wheelchair will have to travel farther distances and will be more inconvenienced than a person who does not use a wheelchair. Id. at 1117-1120.

Other courts have held likewise. In Hassan v. Slater, 41 F.Supp.2d 343 (E.D.N.Y. 1999), the plaintiff sued under the ADA because the Metropolitan Transit Authority closed the commuter rail station closest to his residence and using the next closest station would require him to walk a certain distance from his home. Id. at 345-6. In holding that plaintiff's ADA claim was insufficient as a matter of law, the Court found that the inconvenience of having to walk further to the next nearest station was not actionable under the ADA. Id. at 350-1. See also, Malloy v. Metropolitan Trans. Auth., 94 F.3d at 811 (2d Cir. 1996) (request for a preliminary injunction under the ADA to stop Metropolitan Transportation Authority from installing ticket vending machines was denied although the result would be that the visually impaired would be inconvenienced by having to purchase tickets on board the train and purchase weekly or monthly tickets by mail); Civic Association of the Deaf of New York City v. Giuliani, 970 F.Supp. 352, 362 (S.D.N.Y. 1997) (a 10%, 20% or even 50% reduction in the number of city emergency alarm boxes may still leave the alarm boxes 'readily accessible' to the deaf).

The ADA and the courts recognize that inconveniences are expected because identical access would lead to irrational results. See Id. at 362 ("... irrational results would follow from adoption of Plaintiffs' argument that any change that produces a system that is marginally less accessible to the deaf than the non-deaf violates the ADA."). In the present case, the alleged inconvenience would lead to the irrational result of forcing a third elevator from street level to

the Suburban Station concourse. The Suburban Station concourse is already wheelchair accessible from two existing elevators, one of which is 340 feet from the 15th Street Courtyard elevator to which DIA claims entitlement. Taking DIA's flawed arguments to their logical conclusion, elevators could then conceivably be ordered at every single one of the many entrances to Suburban Station, at all entrances to other transit facilities, and at all entrances to every building in the City. It is clear that such a result is not supported legally and is exactly the type of irrational result that courts have sought to avoid under the ADA. See generally Id.[18]

H. SEPTA'S REPLACEMENT OF THE ESCALATOR AT THE SOUTHEAST EXIT FROM THE CITY HALL TRANSIT FACILITY WAS IN FULL COMPLIANCE WITH THE ADA

The replacement of the escalator at the southeast exit from the City Hall mezzanine was simply the replacement of equipment that was no longer serviceable as part of an ongoing maintenance program. Performing normal maintenance or changing the mechanical or electrical systems are not alterations that trigger a requirement to provide an elevator. See 49 C.F.R. § 47.3. See also Disabled In Action v. Sykes, 833 F.2d at 1121. In Sykes, the Court recognized that normal maintenance of existing stairs does not trigger a vertical accessibility requirement. The Court specifically quoted from the preamble to the DOT "alterations" regulation, 49 C.F.R. § 27.67(b), enacted pursuant to the Rehabilitation Act, which governed the resolution of Sykes. The Court directly noted that:

> In the preamble to the final rule, the DOT explained: [49 C.F.R. § 37.67(b)] is based on the belief that alterations present opportunities to design and construct

[18] Even new construction does not mandate equal access under the ADAAG. See, e.g., 49 C.F.R. Part 37, Appendix A, Accessible Elements and Spaces: Scope and Technical Requirements, § 4.1.3(8) (Accessible Buildings: New Construction) (requiring only 50% of public entrances to be accessible).

> the altered portion or item in an accessible fashion ... The basic requirement in [49 C.F.R. § 27.67(b)] is simply to take the opportunities afforded by the alterations and, to the maximum extent feasible, use the alteration to make the facility accessible. Thus, *normal maintenance may take place in practically all cases without generating an accessibility requirement.* 44 Fed.Reg. 31442, 31449.

Id. at 1121, n.9 (emphasis added). The straightforward concept that normal maintenance does not trigger an accessibility requirement is firmly embedded in both the ADA and in the ADAAG. See, e.g., 42 U.S.C.A. § 12147(a) (Alterations of existing facilities), 49 C.F.R. § 37.43 (Alteration of transportation facilities by public entities) (transportation facility need not be made accessible in absence of alterations that affect usability); 49 C.F.R. Part 37, Appendix A, Accessible Elements and Spaces: Scope and Technical Requirements, § 4.1.6(1)(i) (Accessible Buildings: Alterations) (alteration work that is limited to electrical, mechanical, plumbing, hazardous material abatement, or automatic sprinkler retrofitting does not trigger accessibility requirement).

There is no disputed issue of material fact that the existing unsafe escalator in the City Hall Courtyard was replaced with another escalator providing the identical service. The existing escalator was removed from the wellway and a new escalator was installed in the same wellway. Brooke Deposition, **Exhibit "34"** at 50, 145-146. Although the wellway was extended at the top and bottom to accommodate the new ADA-compliant escalator, no major structural modifications were made. Id. at 113-114.

Furthermore, the usability of City Hall Station was not affected as the previous escalator ascended from the mezzanine, not City Hall Station. The replacement escalator also ascends from the mezzanine. Id. at 101-102. Even if an elevator were placed in the location of the escalator, it physically could not descend to City Hall Station. Id. at 114-116, 133; Brooke

Affidavit, **Exhibit "35"** at ¶¶ 23-26. Therefore, the usability of the station was not affected by the escalator replacement and there was no opportunity to provide greater access.

Furthermore, as discussed above regarding the 15th Street Courtyard, pursuant to 49 C.F.R. Part 37, Appendix A, § 4.1.6(f), vertical access is required only when "an escalator ... is planned or installed *where none existed previously* and *major structural modifications are necessary for such installations*." (Emphasis added).

Where an existing escalator is replaced and no structural modifications occur, as here, there is no vertical access requirement and judgment should be entered for SEPTA on DIA's claim regarding the City Hall Courtyard escalator replacement.

V. CONCLUSION

For all of the foregoing reasons, SEPTA respectfully requests the entry of summary judgment in its favor on both Count I and II of DIA's Fourth Amended Complaint.

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