

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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DISABLED IN ACTION OF  
PENNSYLVANIA

v.

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY  
"SEPTA"  
1234 Market Street  
Philadelphia, PA 19107-3780

CIVIL ACTION NO. 03-CV-1577

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ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 2003, upon consideration of Defendant's Motion to Dismiss and any response thereto, it is hereby ORDERED and DECREED that Defendant's Motion is GRANTED. Plaintiff's complaint against SEPTA is hereby DISMISSED.

BY THE COURT:

\_\_\_\_\_  
J.

CB

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION OF  
PENNSYLVANIA

CIVIL ACTION NO. 03-CV-1577

v.

FILED

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY  
"SEPTA"  
1234 Market Street  
Philadelphia, PA 19107-3780

APR 24 2003  
By MICHAEL B. KUNZ, Clerk  
Dep. Clerk

**DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION  
AUTHORITY'S RULE 12(b)(7) MOTION TO DISMISS PLAINTIFF'S COMPLAINT  
DUE TO PLAINTIFF'S FAILURE TO COMPLY WITH THE FEDERAL RULES  
REQUIREMENTS UNDER 19(a) OF COMPULSORY JOINDER**

Defendant Southeastern Pennsylvania Transportation Authority, ("SEPTA"), by and through its Counsel, hereby files this Rule 12(b)(7) Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 19(a) due to Plaintiff's failure to join the City of Philadelphia as a party to this litigation.

1. In this action, Plaintiff, Disabled in Action of Pennsylvania ("DIA") seeks an order from this Court requiring SEPTA to construct an elevator or perform some other alteration to property owned by the City of Philadelphia, not by SEPTA. See Plaintiff's Complaint attached as Exhibit A, Paragraph 1; Prayer for Relief C, D).

2. The lawsuit arises out of SEPTA's alleged failure to provide access to the Frankford-Market Elevated transportation services to persons with disabilities in connection with the ongoing restoration of Suburban Station.

3. SEPTA began the restoration of Suburban Station in the Fall of 2002 which, once complete, will include six elevators, two of which will provide access to Suburban Station from the street. The restoration is scheduled to take approximately three years. See Affidavit of Gerald Maier, ¶4, attached hereto as Exhibit B.

4. SEPTA began an accelerated phase of the Suburban Station renovation, in part, by performing renovations to one of the numerous entrances to Suburban Station, the one at the Northwest corner of 15<sup>th</sup> and Market Streets. Aff. of Maier at ¶5.

5. The property where the renovations were performed at the 15<sup>th</sup> and Market Streets entrance is owned by the City of Philadelphia, not by SEPTA. Aff. of Maier at ¶6.

6. Because SEPTA does not own the property, SEPTA is unable to begin additional construction of an elevator or make any new alterations to the property.

7. Federal Rule of Civil Procedure 19(a)(1) requires the joinder of a party to an action if, “in the person’s absence complete relief cannot be accorded among those already parties...”

8. Even if the Court ordered SEPTA to construct an elevator or perform other alterations at 15<sup>th</sup> and Market Streets, SEPTA would be unable to act.

9. Consequently, without the City of Philadelphia as a party to this lawsuit, this Court could not grant complete relief to the existing parties, and Plaintiff’s Complaint should be dismissed under Federal Rule of Civil Procedure 19(a)(1).

10. Additionally, Federal Rule of Civil Procedure 19(a)(2) requires the joinder of a party to an action if, “the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.”

11. Since it would be extremely prejudicial to the City of Philadelphia to have this Court decide whether or not there should be changes made to City property without the City’s presence in this litigation, Plaintiff’s Complaint should be dismissed under Federal Rule of Civil Procedure 19(a)(2)(i).

12. Furthermore, since the City has a claimed ownership in the subject matter of the litigation, i.e. the property located at 15<sup>th</sup> and Market Streets, this could lead to double, multiple or inconsistent obligations by reason of the City’s claimed interest in the property.

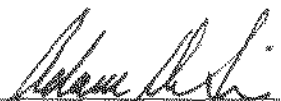
13. Therefore, pursuant to Fed. R. Civ. P. 19(a)(2)(ii), SEPTA’s Rule 12(b)(7) Motion to Dismiss should be granted and Plaintiff should be required to include the City of Philadelphia in this litigation.

14. Based upon Plaintiff’s failure to include a necessary party to this litigation, SEPTA’s Rule 12(b)(7) Motion to Dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 19(a)(1), 19(a)(2)(i) and 19(a)(2)(ii) should be granted.

WHEREFORE, Defendant SEPTA respectfully requests that this Court grant its 12(b)(7) Motion to Dismiss Plaintiff’s Complaint for failure to join a necessary party.

Respectfully submitted,

BY:



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SAUL H. KRENZEL, ESQUIRE  
ADAM A. DESIPIO, ESQUIRE  
SAUL H. KRENZEL & ASSOCIATES  
The Robinson Building, Suite 800  
42 South 15<sup>th</sup> Street  
Philadelphia, PA 19102  
(215) 977-7230

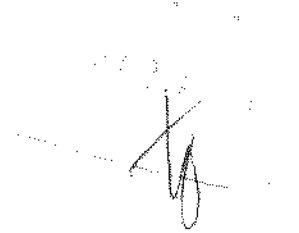
Attorneys for Defendant SEPTA

DATED: April 24, 2003

CERTIFICATE OF SERVICE

I, ADAM A. DESIPIO, ESQUIRE hereby certify that a true and correct copy of Defendant SEPTA's Motion to Dismiss Plaintiff's Complaint was served via first class mail upon:

Stephen F. Gold, Esquire  
125 South Ninth Street  
Suite 700  
Philadelphia, PA 19107



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SAUL H. KRENZEL, ESQUIRE  
ADAM A. DESIPIO, ESQUIRE  
SAUL H. KRENZEL & ASSOCIATES  
The Robinson Building  
42 South 15th Street, Suite 800  
Philadelphia, PA 19102  
(215) 977-7230

Attorneys for Defendant SEPTA

DATED: April 24, 2003

Exhibit  
A





**JURISDICTION AND VENUE**

2. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), and 42 U.S.C. § 12188(a). Plaintiffs' claims are authorized by 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201 and 2202.

3. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(b)(2) since all of the events that give rise to this Complaint occurred in this district.

**PARTIES**

4. Plaintiff Disabled in Action of Pennsylvania ("DIA"), a non-profit corporation, advocates for the civil rights of and services for persons with disabilities. DIA is an organization open to anyone who has a disability, including persons with mobility and/or visual impairments.

5. DIA's primary organizational function is to assist persons with disabilities achieve equality with nondisabled persons and to advocate on behalf of and with persons with disabilities to eradicate discrimination against people with disabilities in all aspects of community life, including accessible Frankford-Market Elevated transportation services.

6. Plaintiff DIA has existed since the mid 1970s. Participants use and want access to Septa's Frankford-Market Elevated transportation services. As defined by the ADA and Rehabilitation Act of 1973, persons who participate with DIA and who have these disabilities are "handicapped" with mobility and/or visual impairments, and are "otherwise qualified" to use SEPTA's Frankford-Market Elevated transportation services. Some persons who have mobility and/or visual impairments and who seek DIA's assistance and/or participate in DIA's meetings and other activities are and will continue to be injured by Defendants' refusal to comply with the ADA's federal regulations.

7. SEPTA's violation of its statutory and regulatory obligations directly and concretely injure

DIA, by requiring DIA to advocate for the development and improvement of nondiscriminatory transportation services, instead of spending its time and resources assisting persons with disabilities with other issues, including accessible and affordable housing, attendant care services, equal employment opportunities and access to places of public accommodation.

8. DIA is also directly and concretely harmed by SEPTA's failure to provide access to the 15<sup>th</sup> and Market Streets station because other persons with disabilities are unable to use this station to get to from meetings, programs and advocacy activities which further curtails the organizational activities and goals of DIA.

9. Defendant SEPTA is a public entity which receives federal funding and which operates a fixed route transportation system, including the Frankford Market Elevated transportation system.

#### FACTS

10. Based on information and belief, SEPTA altered the 15<sup>th</sup> and Market Streets entrance to the Frankford Market Elevated transportation system by building a new stairway and improving the escalator.

11. SEPTA did not make the altered entrance accessible to persons with mobility disabilities.

12. In Disabled in Action of Pennsylvania v. Sykes, 833 F. 2d 1113 (3<sup>rd</sup> Cir.1987), the Third Circuit held that the alteration of the Columbia Avenue subway station entrance without making it accessible violated Section 504 of the Rehabilitation Act and the federal regulations promulgated by the U.S. Department of Transportation which requires:

Each facility or part of a facility which is altered by, on behalf of, or for use of a recipient ... in a manner that affects or could affect the accessibility of the facility or part of the facility shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and useable by handicapped persons. 49 C.F.R. § 27.67(b)

13. The newly altered 15<sup>th</sup> and Market Street entrance to the Frankford-Market Street Elevated transportation system is inaccessible to and not usable by persons with disabilities.

### CLAIMS

14. DIA, a disability advocacy organization, is an aggrieved "persons" within the meaning of the ADA and § 504 of the Rehabilitation Act of 1973. 42 U.S.C. § 12133; 29 U.S.C. § 794a.

15. Defendant SEPTA's construction of the 15<sup>th</sup> and Market Street entrance to the Frankford-Market Elevated transportation services, without providing for accessible for persons with disabilities, violates the Americans with Disabilities Act, 42 U.S.C. § 12101, Subchapter II, Part B and the federal DOT regulations implementing the ADA and § 504 of the Rehabilitation Act of 1973, including 49 C.F.R. § 27.67(b).

### **PRAAYER FOR RELIEF**

To remedy Defendants' federal statutory violations, Plaintiffs respectfully request that this Court:

- A. Exercise jurisdiction over this matter;
- B. Declare that Defendants alteration to the 15<sup>th</sup> and Market Streets entrance to the Frankford-Market Elevated transportation system, without providing for access for persons with disabilities, violates the ADA and Section 504 and the federal regulations that implement those statutes.
- C. Issue preliminary and permanent injunctive relief to enjoin Defendant to begin construction immediately of a elevator at the 15<sup>th</sup> and Market Street entrance to the Frankford-Market Elevated transportation system to assure access for persons with disabilities, and
- D. Grant Plaintiffs such additional relief as this Court may deem just, proper and

equitable, including an award of reasonable attorneys' fees and costs.

Respectfully submitted,

By:



Stephen F. Gold  
Attorney I.D. No. 09880  
125 South Ninth Street  
Suite 700  
Philadelphia, PA 19107  
(215) 627-7100

Dated: March 11<sup>th</sup> 2003

Exhibit  
B

**AFFIDAVIT OF GERALD MAIER**

I, GERALD MAIER, being duly sworn, hereby depose and say:

1. I have been employed by SEPTA for the past 11 years and in that time I have held the position of Director of Real Estate.
2. As Director of Real Estate for SEPTA, my job responsibilities include the management of all of SEPTA's property which involves acquiring and disposing of SEPTA's property by lease or by sale. My job responsibilities also include working with various property owners in connection with SEPTA renovation projects.
3. As part of my duties as Director of Real Estate, I have been, and am, involved in the ongoing project to renovate Suburban Station in the City of Philadelphia.
4. SEPTA began the restoration of Suburban Station in the Fall of 2002 which, once complete, will include six elevators, two of which will provide access to Suburban Station from the street. The restoration is scheduled to take approximately three years to complete.
5. SEPTA began an accelerated phase of the Suburban Station renovation, in part, by performing renovations to one of the numerous entrances to Suburban Station, the one at the Northwest corner of 15<sup>th</sup> and Market Streets.
6. I have reviewed the Complaint filed against SEPTA (Civil Action No. 03-CV-1577) and the property identified in the Complaint at 15<sup>th</sup> and Market Streets is owned by the City of Philadelphia, not by SEPTA.
7. The relief sought in the Complaint is not the kind of relief that SEPTA could provide because it does not own the property that is the subject matter of the litigation, the City of Philadelphia does.

Gerald M. Maier  
GERALD MAIER

Sworn to and subscribed  
before me this 24<sup>th</sup> day  
of April, 2003.

Eugene J. Kuhn  
NOTARY PUBLIC

NOTARIAL SEAL  
Eugene J. Kuhn, Notary Public  
City of Phila., Philadelphia County  
My commission expires February 11, 2007

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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**FILED**  
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By MICHAEL E. KUNZ, Clerk  
Dep. Clerk

**DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION  
AUTHORITY'S RULE 12(b)(7) MOTION TO DISMISS PLAINTIFF'S COMPLAINT  
PURSUANT TO RULE 19**

Defendant Southeastern Pennsylvania Transportation Authority, ("SEPTA"), by and through its Counsel, hereby files this Memorandum of Law in Support of its Rule 12(b)(7) Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 19(a) due to Plaintiff's failure to join the City of Philadelphia to this litigation.

**I. FACTS**

In this lawsuit, Plaintiff seeks injunctive relief to enjoin Defendant SEPTA to immediately begin construction of an elevator on property not owned by SEPTA. The lawsuit arises out of the ongoing restoration project to Suburban Station in Philadelphia. As one of the initial, accelerated phases of the project, SEPTA renovated one of the numerous entrances to the Station, the one located at 15<sup>th</sup> and Market Streets (See Exhibit B of Motion to Dismiss, Affidavit of Gerald Maier at ¶5). The property where this portion of the renovation took place is owned by the City of Philadelphia, not by SEPTA (Affidavit of Gerald Maier at ¶6). It is at this City owned location that the Plaintiff seeks to have this Court order SEPTA to construct an elevator



or grant additional relief (Plaintiff's Complaint at pp. 4-5). Plaintiff, however, has not included the City of Philadelphia as a party to this lawsuit.

## II. DISCUSSION

Pursuant to Federal Rule of Civil Procedure 12(b)(7), the Plaintiff's Complaint should be dismissed for failure to join the City of Philadelphia as a party under Federal Rule of Civil Procedure 19. The Court of Appeals for the Third Circuit, in the case of Janney Montgomery Scott, Inc. v. Niles, 11 F.3d 399 (3d Cir. 1993) stated that "Federal Rule of Civil Procedure 19 determines when joinder of a particular party is compulsory. A court must first determine whether a party should be joined if 'feasible' under Rule 19(a). The Court further stated that:

"Rule 19(a) defines the parties who are 'necessary' in the sense that their joinder is compulsory 'if feasible.' It states, in pertinent part:

A person ... shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Clauses (1) and (2) of Rule 19(a) are phrased in the disjunctive and should be so treated. *Wood & Locker, Inc. v. Doran & Assocs.*, 708 F. Supp. 684, 690 (W.D. Pa. 1989). Thus, any party whose absence results in any of the problems identified in either subsections (a)(1) or (a)(2) is a party whose joinder is compulsory if feasible.

Janney Montgomery Scott, Inc. v. Niles at 404-405.

"The moving party has the burden of showing why an absent party should be joined pursuant to Rule 19. *Raytheon Co. v. Continental Cas. Co.*, 123 F. Supp. 2d 22, 33 (D. Mass. 2000). 'The moving party may present, and the Court may consider, evidence outside of the pleadings' with respect to this issue. Id." *National Organization on Disability, et al.*

v. Margaret M. Tartaglione, et al., 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001) (class certification granted by National Organization on Disability, et al. v. Margaret M. Tartaglione, et al., 2001 U.S. Dist. LEXIS 16932 (E.D. Pa. Oct. 22, 2001).

In the present case, the joinder of the City of Philadelphia to this case is compulsory under Federal Rules of Civil Procedure 19(a)(1), 19(a)(2)(i) and 19(a)(2)(ii) for the following reasons.

**A. Rule 19(a)(1)**

“Under Rule 19(a), we ask first whether complete relief can be accorded to the parties to the action in the absence of the unjoined party. Fed. R. Civ. P. 19(a)(1). A Rule 19(a)(1) inquiry is limited to whether the district court can grant complete relief to the persons already parties to the action. The effect a decision may have on the absent party is not material. *Field*, 626 F.2d at 301 (quoting 3A James W. Moore et al., Moore's Federal Practice P 19.07-1[2], at 19-128 (2d ed. 1979)).” Janney Montgomery Scott, Inc. v. Niles at 405.

In the present case, complete relief cannot be accorded to the parties to this action in the absence of the inclusion in this lawsuit of the City of Philadelphia. The Plaintiff in this case seeks an injunction requiring the Defendant to begin construction of an elevator on property owned by the City of Philadelphia, not by SEPTA, at the 15<sup>th</sup> and Market Streets entrance to Suburban Station. Therefore, even if this Court ordered SEPTA to construct an elevator, or perform other alterations, at that location, SEPTA could not act because it does not own the property.

The present case is analogous to a case filed in the U.S. District for the Eastern District of Pennsylvania under the Americans with Disabilities Act (ADA) and §504 of the

Rehabilitation Act of 1973 (Rehabilitation Act) challenging the City Commissioners' failure to provide talking voting machines and wheelchair accessible voting places. National Organization on Disability, et al. v. Margaret M. Tartaglione, et al., 2001 U.S. Dist. LEXIS 16731 (E.D. Pa. Oct. 11, 2001) (class certification granted by National Organization on Disability, et al. v. Margaret M. Tartaglione, et al., 2001 U.S. Dist. LEXIS 16932 (E.D. Pa. Oct. 22, 2001)). In that case, the Court granted Defendants' 12(b)(7) Motion to Dismiss pursuant to Rule 19(a) where voting machines had to be pre-approved by the Secretary of the Commonwealth and the Plaintiffs had not included the Secretary of the Commonwealth in the lawsuit.

The Court stated that if Plaintiffs "are successful in this action, approval of these voting machines would have to be sought from the Secretary of the Commonwealth and, if the Secretary does not approve electronic voting machines with audio output technology, a new proceeding would have to be initiated against the Secretary." National Organization on Disability, et al. v. Margaret M. Tartaglione, et al. at \*26. The Court went on to further state that "it is clear, under these circumstances, that the Court could not afford complete relief to the visually impaired Plaintiffs in this matter in the absence of the Secretary of the Commonwealth." Id.

Similarly, if Plaintiff is successful in the present action, permission to begin additional construction on City owned property would have to be sought from the City of Philadelphia and, if the City does not give such permission, a new proceeding would have to be initiated against the City. As in the National Organization on Disability case, it is clear that this Court cannot afford complete relief in the absence of the City of Philadelphia.

Accordingly, Defendant's Motion to Dismiss should be granted pursuant to Rules 12(b)(7) and 19(a)(1).

**B. Rule 19(a)(2)**

Likewise, Defendant's Motion to Dismiss should be granted pursuant to Rule 19(a)(2). "Unlike subsection (a)(1), subsection (a)(2) requires a court to take into consideration the effect that resolution of the dispute among the parties before it may have on an absent party. See Fed. R. Civ. P. 19(a)(2)." Janney Montgomery Scott, Inc. v. Niles at 404.

**1. Rule 19(a)(2)(i)**

"Subsection (a)(2)(i) requires a court to decide whether determination of the rights of the parties before it would impair or impede an absent party's ability to protect its interest in the subject matter of the litigation. Fed. R. Civ. P. 19(a)(2)(i). Janney Montgomery Scott, Inc. v. Niles at 406. In the present case, the City of Philadelphia clearly has an interest in the subject matter of the litigation since it owns the property where Plaintiff seeks to have the injunctive relief performed. It would be extremely prejudicial to the City of Philadelphia to have this Court deciding whether or not there should be changes made to City owned property without the City's presence in this litigation. See McCann v. Pierson, 78 F.R.D. 347, 350 (E.D. Pa. 1978). Since a determination by this Court would seriously affect the City's ability to protect the rights it has over its own property, this Court should grant SEPTA's Motion to Dismiss pursuant to Rule 19(a)(2)(i).

**2. Rule 19(a)(2)(ii)**

Under Rule 19(a)(2)(ii), the Court is required to decide whether continuation of this action in the absence of the City of Philadelphia would expose the present parties to the "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Fed. R. Civ. P. 19(a)(2)(ii).

Again, if Plaintiff is successful in the present action, permission to make any alteration to the property would have to be sought from the City of Philadelphia and, if the City does not approve the changes, a new proceeding would have to be initiated against the City. Since the City has a claimed ownership in the subject matter of the litigation, i.e. the property located at 15<sup>th</sup> and Market Streets, this could lead to double, multiple or inconsistent obligations by reason of the City's claimed interest in the property. See PLM Financial Services, Inc. v. Coast to Coast Trucking, Inc., 90 B.R. 664; 1988 U.S. Dist. LEXIS 9508 (E.D. Pa. Aug. 25, 1998).

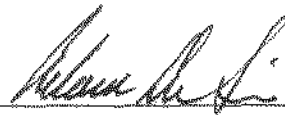
Therefore, pursuant to Fed. R. Civ. P. 19(a)(2)(ii), SEPTA's 12(b)(7) Motion to Dismiss should be granted and Plaintiff should be required to include the City of Philadelphia in this litigation.

**III. CONCLUSION**

Based upon the foregoing discussion, the authorities cited and the Affidavit of Gerald Maier, SEPTA's 12(b)(7) Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 19(a)(1), 19(a)(2)(i) and 19(a)(2)(ii) should be granted.

Respectfully submitted,

BY:



SAUL H. KRENZEL, ESQUIRE  
ADAM A. DESIPIO, ESQUIRE  
SAUL H. KRENZEL & ASSOCIATES  
The Robinson Building, Suite 800  
42 South 15<sup>th</sup> Street  
Philadelphia, PA 19102  
(215) 977-7230

Attorneys for Defendant SEPTA

DATED: April 24, 2003

CERTIFICATE OF SERVICE

I, ADAM A. DESIPIO, ESQUIRE hereby certify that a true and correct copy of Defendant SEPTA's Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Complaint was served via first class mail upon:

Stephen F. Gold, Esquire  
125 South Ninth Street  
Suite 700  
Philadelphia, PA 19107

APR 24 2003  
100 P.M.  
*[Handwritten signature]*

*[Handwritten signature]*  
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**SAUL H. KRENZEL, ESQUIRE**  
**ADAM A. DESIPIO, ESQUIRE**  
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Attorneys for Defendant SEPTA

DATED: April 24, 2003

