UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CIVIC ASSOCIATION OF THE DEAF OF NEWYORK CITY, INC. (also known as the New York City Civic Association of the Deaf) and STEVEN G. YOUNGER II, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

RUDOLPH GIULIANI, as Mayor of the City of New York, HOWARD SAFIR, as Commissioner of the Fire Department of the City of New York, CARLOS CUEVAS, as City Clerk and Clerk of The New York City Council, PETER VALLONE, as Speaker and Majority Leader of the New York City Council, THOMAS OGNIBENE, as Minority Leader of the New York City Council, and the CITY OF NEW YORK,

Defendants.

95 Civ. 8591 (RWS)

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO MODIFY OR VACATE PERMANENT INJUNCTION

PRELIINARY STATEMENT

Counsel for the Plaintiff-Class submit this Memorandum of Law in Opposition to Defendants' Motion to Modify or Vacate the Permanent Injunction in this action. The Court's Declaratory Judgment and Permanent Injunction was issued on January 19, 2000, granting relief

under the Americans with Disabilities Act of 1990 ("the ADA"), 42 U.S.C. Sections 12101 et seq., (Supp. II 1991) and the regulations thereunder, and the Rehabilitation Act of 1973 ("the Rehabilitation Act"), 29 U.S.C. Section 794 (1988). The Court granted class certification, a declaratory judgment and a permanent injunction against various municipal defendants, preventing them from (a) carrying out the removal of New York City's street emergency alarm boxes, which provide the only means by which the deaf and hearing impaired can access emergency services, and (b) replacing those boxes with notification alternatives which are not accessible to the deaf and hearing impaired. (See Declaration of Robert B. Stulberg ["Stulberg Dec."] at Exhibit ["Ex."] 1). The Court based the permanent injunction on its Opinions and Orders dated February 9, 1996, 915 F. Supp. 622 (S.D.N.Y. 1996) ("Civic Association I"), and July 28, 1997, 970 F. Supp. 352 (S.D.N.Y. 1997) ("Civic Association II").

Defendants now petition the Court to modify or vacate the permanent injunction, so that they can remove the City's entire street alarm box system and replace it with a system by which (a) hearing persons will be able to summon emergency services from the street through cellular telephones, but (b) deaf and hearing impaired persons, who cannot use cellular telephones, will have no way of accessing those services from the street. While defendants contend that, under their plan, the deaf and hearing impaired will be able to use public pay telephones to summon emergency services from the street, those privately-owned telephones, which have decreased dramatically in number since the parties were last before this Court, are not widely available, not maintained in good working order and, most importantly, not usable by a person who cannot hear. While defendants contend that public pay telephones (where available and operational) can be accessed by the deaf and hearing impaired through a tapping protocol, no such protocol has been developed, tested, used or disseminated for public pay telephones. Further, the record

demonstrates that the City's plan to use that tapping protocol on public pay telephones as a "notification alternative" for the deaf and hearing impaired was contrived shortly before the motion was filed, without study or consideration of its efficacy, in order to justify removing the street alarm boxes as a cost-cutting measure.

For the reasons set forth in this Memorandum of Law, the Court should not modify or vacate the injunction and should reject defendants' plan as unlawful.

First, Defendants have not met the criteria for modifying or vacating the injunction set forth in the Court's Judgment, Orders and Decisions. To wit, defendants have not demonstrated (a) that there exists an accessible notification alternative to the street alarm boxes for the deaf and hearing impaired, (b) that the depleted, damaged and unevenly distributed public pay telephone system would make E-911 operational and effective for the deaf and hearing impaired throughout the City, (c) that a protocol has been developed providing the deaf and hearing impaired with the ability to report emergencies form public pay telephones, and (d) that the fact of such a protocol has been disseminated to the deaf and hearing impaired.

Second, Defendants' proposed notification alternative for the deaf and hearing impaired would violate the Americans with Disabilities Act and its implementing regulations, as incorporated into the Order and Decisions in this action. This is so because that notification alternative would (1) remove an accessible emergency reporting service from the deaf and hearing impaired and replace it with an inaccessible emergency reporting service for the deaf and hearing impaired, and (2) create a two-tiered, discriminatory, unequal emergency reporting service that would be accessible to those who can hear, but inaccessible to those who cannot. Although defendants have not invoked an undue burden defense to their obligations under the ADA in this action (under 28 C.F.R. § 35.150), such a defense is unavailable to them because

neither the financial nor the administrative difficulties they cite rise to the high level required by that legal standard. Defendants' claim that false alarms justify vacating the injunction has been previously adjudicated, and rejected, in this action. Defendant's statistics comparing use of alarm boxes to report emergencies from the street with use of other devices to report emergencies from homes, offices and elsewhere are inapposite.

Third, defendants have not, and cannot, meet the standard for modification or vacatur of a permanent federal court injunction set by the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit, and this Court. Defendants have not demonstrated that they are "suffering hardships so extreme and unexpected as to justify [the Court] in saying that they are the victims of oppression," as required by the prevailing decisional law. Further, the modification proposed by defendants would thwart, rather than effectuate, the purpose behind the injunction – namely assurance of accessible and equal street emergency reporting services for the disabled. Moreover, equity requires that defendants' request be denied because defendants lack clean hands. Since the injunction was issued, defendants have not disseminated the tapping protocol for the street alarm boxes to the deaf and hearing impaired community, have not maintained the street alarm boxes in the condition they were in when the injunction issued (allowing out-of–service boxes to increase by 540 percent), and have made no effort to explore with the deaf and hearing impaired community what accessible notification alternatives to street alarm boxes might be developed.

For the foregoing reasons, defendants' motion should be denied in all respects and the injunction should remain intact.

STATEMENT OF FACTS

The pertinent facts and documents concerning this motion are set forth in the accompanying Declaration of Huberta G. Schroedel ("Schroedel Dec."), Declaration of Robert B. Stulberg ("Stulberg Dec."), Declaration of David J. Rosenzweig "Rosenzweig Dec."), and the exhibits annexed thereto. Accordingly, those facts will not be repeated here, and the Court is respectfully referred to those Declarations and exhibits.

PRIOR PROCEEDINGS, JUDGMENT AND ORDERS IN THIS ACTION

The Plaintiff-Class respectfully incorporates the prior proceedings in this matter by reference. The prior proceedings are set forth in Civic Association of the Deaf, et al. v. Giuliani, 915 F. Supp. 622, 625 et seq. (S.D.N.Y. 1996) (hereinafter "Civic Association I"), Civic Association of the Deaf, et al. v. Giuliani, 970 F.Supp. 354 et seq. (S.D.N.Y. 1997) (hereinafter "Civic Association II"), and the Judgment herein dated January 19, 2000 (Stulberg Dec. Ex. 1).

Among the relief granted by the Court were the following orders:

> ...a declaratory judgment is rendered that Defendants' removal or deactivation of the emergency street alarm boxes and their replacement with notification alternatives inaccessible to the deaf would violate the ADA and the Rehabilitation Act. A second declaratory judgment is rendered that the current notification alternatives to the existing street alarm box system violate the ADA, because public telephones do not enable the deaf and hearing impaired to request fire assistance directly from the street.
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> ...Defendants, their employees, agents, and those acting on their behalf are enjoined from carrying out any shutdown, deactivation, removal, elimination, obstruction, or interference with the existing street alarm box system, and from acting to replace the existing accessible street alarm box system with notification alternatives which are not accessible to the deaf...
>
> - - 915 F. Supp. at 639 (emphasis added)

The Court set forth a means for defendants to seek modification or dissolution

of the injunction:

> ...Defendants may apply at any time to dissolve or modify the injunction by demonstrating that an accessible notification alternative exists. Among the means by which Defendants can meet this burden will be by demonstrating that E-911 is in operation and effective throughout the City and that a protocol has been developed providing the deaf and hearing-impaired with the ability to report a fire.
>
> - - 915 F.Supp. at 639 (emphasis added)

The Court also discussed features that would be required to demonstrate that a system meets the requirements of the ADA. The Court used Defendants' E-911 system as an example:

> Defendants are correct in asserting that E-911, if operative and effective as proposed, could meet the requirements of the ADA. To do so, it would have to provide the hearing-impaired with a means of identifying not only their location, but also the type of emergency being reported. The default response currently proposed - - sending a police car to all silent calls – would cause needless delay in the case of a fire. A protocol similar to that currently used when calls are received from ERS boxes would provide a means of calling for fire assistance. It would serve to make public telephones serve a similar function to that currently served by the ERS and BARS boxes.
>
> Several factors, however suggest that the E-911 systems does not at present provide an adequate notification alternative. First, the evidence to date has not established that E-911 is in place and effective. Moreover, assuming that the system has one on-line as scheduled, there is no evidence that the system functions as projected to identify effectively the location of the telephone from which calls are reported.
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> Second, although Defendants alluded to a proposed protocol, no evidence has been offered that one has been effected. To comply with the ADA, Defendants would have to develop such a protocol and disseminate the fact of its existence to the deaf and hearing-impaired.
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> - - 915. F.Supp. at 638 (emphasis added).

In Civic Association II, the Court applied its standards for modifying or vacating the injunction on a motion by plaintiffs to extend the injunction to require restoration of two-button

Emergency Reporting Service ("ERS") street alarm boxes to parts of the City where defendants had installed one-button ERS alarm boxes. 970 F. Supp. at 354 et seq. This Court held that "The question is whether modifying the injunction in this manner is consistent with the purpose behind the original relief: ensuring that the City's emergency response system comports with the Plaintiffs' right to equal access under the ADA and the Rehabilitation Act." Id. at 358. The Court held that installation of one-button ERS alarm boxes violated the ADA because they did not enable a deaf or hearing impaired caller to designate the type of emergency service s/he needed, tests of the tapping protocol on one-button boxes were unsuccessful and, therefore, one-button boxes were "currently unusable by a hearing-impaired person." Id. at 359-360.

These rulings were incorporated into the Judgment in 2000. Among the relief granted by the Court were the following orders:

> 1. Class Certification. A class is hereby certified, pursuant to Rule 23(a), 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure, consisting of Persons who are deaf or hearing-impaired and who use a Telecommunications Device for the Deaf ("TDD") to communicate via telephone and who reside, work or are present in the City and use the walks, highways or public places of the City, and this action will proceed as a class action on behalf of the class. Civic Association I, 915 F. Supp. at 634;
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> 2. Declaratory Judgment. For the reasons set forth in the Opinions and Orders in Civic Association I and Civic Association II, and because a Declaratory Judgment will serve a useful purpose in clarifying the legal relations at issue in this action and will terminate and afford relief from uncertainty, the following Declaratory Judgments are rendered:
>
> a) Defendants' removal of or deactivation of the emergency street alarm boxes and their replacement with notification alternatives inaccessible to the deaf or hearing impaired would violate the ADA, regulations promulgated under the ADA, and the Rehabilitation Act, as set forth in Civic Association I, 915 F.Supp. at 635-36, 638-39;
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> b) The notification alternatives to the existing street alarm box system which are described in a two-volume report of defendant Fire Commissioner entitled 'Amended Report to the City Council: Planned Removal of Street Alarm Boxes & Notification Alternatives,' dated June 21, 1995, and in a report of

defendant Fire Commissioner entitled 'Modification to Planned Removal of Street Alarm Boxes & Notification alternatives, Dated June 21, 1995,' dated August 17, 1995 ('the August Plan'), and which were approved by Local Law 73 of 1995, passed by defendant New York City Council on September 6, 1996 and signed by defendant Mayor on September 21, 1995, violate the ADA and regulations promulgated under the ADA, as set forth in Civic Association I, 915 F.Supp. at 628, 635-36, 638;... ...

3. Permanent Injunction. For the reasons set forth in Civic Association I and Civic Association II, and because plaintiffs have demonstrated the potential for irreparable injury and have succeeded in the merits (Civic Association I, 615 F.Supp. at 639),

(a) Defendants, their employees, agents, and those acting on their behalf are enjoined from carrying out any shutdown, deactivation, removal, elimination, obstruction, or interference with the street alarm box system as it existed on February 9, 1996, and from acting to replace that existing accessible street alarm box system with notification alternatives which are not accessible to the deaf and hearing-impaired. Civic Association I, 915 F.Supp. at 639;

(c) Defendants may apply at any time to dissolve or modify this injunction by demonstrating that there exists an accessible notification alternative to the existing accessible street alarm box system. Civic Association I, 915 F.Supp. at 639. Among the means by which defendants can meet this burden will be by demonstrating that defendant City's Enhanced 911 System ("E-911") is in operation and effective throughout the City, that a protocol has been developed providing the deaf and hearing-impaired with the ability to use E-911 to report a fire, police or other emergency from the streets and that the fact of such protocol has been disseminated to the deaf and hearing impaired. Civic Association I, 915 F.Supp. at 638-39 and Civic Association II, 970 F. Supp. at 363;...

- - Judgment dated January 19, 2000

ARGUMENT

POINT I

THE MOTION SHOULD BE DENIED BECAUSE DEFENDANTS HAVE FAILED TO SATISFY THE STANDARDS FOR MODIFYING OR VACATING THE INJUNCTION SET FORTH IN THIS COURT'S JUDGMENT, ORDERS AND DECISIONS

As set forth above, this Court held in Civic Association I that removing the street alarm boxes and replacing them with notification alternatives inaccessible to the deaf and hearing

impaired would violate the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. 915 F. Supp. at 639. On that basis, the Court permanently enjoined defendants from effectuating any such shutdown or replacement. Id. The Court held that "defendants may apply at any time to dissolve or modify the injunction by demonstrating that an accessible notification alternative exists." Id. (emphasis added). The Court found that, among the means by which defendants can meet this burden will be to demonstrate that E-911 (the system by which the location of emergency calls can be identified) "is in operation and effective throughout the City" and that a protocol "has been developed providing the deaf and hearing-impaired with the ability to report a fire." Id. (emphasis added). In so holding, however, the Court cautioned that, "to comply with the ADA, Defendants would have to develop such a protocol and disseminate the fact of its existence to the deaf and hearing-impaired." Id. at 638. The Court also held that the notification alternatives that defendants were then proposing violated the ADA "because telephones do not enable the deaf and hearing impaired to request fire assistance directly from the street." Id. at 639. These holdings were incorporated into the January 19, 2000 Judgment. In Civic Association II, as set forth above, this Court directly addressed the standards for modifying the injunction and held that any modification would have to be consistent with the purpose behind the original relief: "ensuring that the City's emergency response system comports with the Plaintiffs' right to equal access under the ADA and the Rehabilitation Act." 970 F. Supp. at 358.

The record establishes that defendants have utterly failed to satisfy the standards set by this Court for modifying or vacating the injunction. As described in detail in the Stulberg Dec. and the documents and deposition testimony excerpts attached thereto, when defendants proposed in 2009 to remove the street alarm boxes as part of a plan to save money by cutting services it "had not previously thought to cut," it had no notification alternative to the alarm box

system for the deaf and hearing impaired. (Stulberg Dec. at 20). Instead, the officials who designed, presented and lobbied for that plan assumed that the deaf and hearing impaired would be able to use cell phones with TTY or texting capability to access emergency services from the street. (Stulberg par. 20). Some of those officials believed that the deaf and hearing impaired also would be able to use home telephones, pay telephones or rely upon hearing friends or loved ones to gain access to emergency services. (Stulberg Dec. at 20, 25). Others acknowledged in deposition testimony that they did not know what alternative to street alarm boxes defendants were proposing for the deaf and hearing impaired. (Stulberg Dec. at 23).

Defendants' motion, filed on June 23, 2010, did not state what accessible notification alternative to street alarm boxes existed for the deaf and hearing impaired, even though this Court's Judgment, Orders and Decisions made the existence of such an alternative a prerequisite to any motion to modify or vacate the injunction. Plaintiffs repeatedly requested, in interrogatories, that defendants disclose the accessible notification alternative that existed for the deaf and hearing impaired. It was not until May 10, 2011, in response to this Court's May 3, 2011 direction at a status conference, that defendants finally disclosed that the notification alternative to street alarm boxes that defendants claimed to exist are public pay telephones with a tapping protocol. (Stulberg Dec at 27-31).

As set forth in the Stulberg, Schroedel and Rosenzweig Declarations, however, public pay telephones were no more accessible to the deaf and hearing impaired in 2011 than they were when this Court ruled them inaccessible and, hence, unlawful notification alternatives in 1996. (Schroedel Dec. at 11; Rosenzweig Dec. at 26). Like one-button ERS boxes, public pay telephones do not enable the caller to designate the type of emergency service they are requesting (compare with 970 F.Supp @ 360). Unlike one-button ERS boxes, public pay

telephones have not been tested with a tapping protocol, and no tapping protocol has been developed for public pay telephones. (Rosenzweig Dec. at 33). Moreover, since the parties were last before the Court, the number of public pay telephones has declined dramatically, many of those that remain have not been maintained in good condition by their private owners, the City has no ability to determine the location or number of public pay telephones, the City is unable to police the maintenance and repair of public pay telephones as it has only a handful of inspectors, and neither the City nor the owners of public pay telephones controls whether those devices are provided with dial tones by third-party providers on any given day. Since public pay telephones are privately owned, their installation, removal, upkeep and location are subject to financial, not public safety, considerations. (Stulberg Dec. 37-39).

Most importantly, the record overwhelmingly establishes that public pay telephones are inaccessible to the deaf and hearing impaired. As explained in the Schroedel and Rosenzweig Declarations, if a deaf or hearing impaired caller can find a public pay telephone that is not damaged or missing parts, that caller has no way of knowing if the telephone has a dial tone, if his or her call has been answered by a recording, by an operator or at all, and has no way of communicating with the operator, in the absence of a tapping protocol that has been developed, disseminated and tested on such devices. (Schroedel Dec. at 11; Rosenzweig Dec. at 31, 33). As plaintiffs' expert on deaf communications, Alfred Sonnenstrahl, testified at deposition, for a deaf or hearing impaired person, using a public pay telephone is like "talking to a brick wall." (Stulberg Dec. at 33).

Because public pay telephones are not located on every other corner (like street alarm boxes) or otherwise distributed evenly throughout the City, it cannot be said that public pay telephones will make E-911 operational and effective "throughout the City" for deaf and hearing

impaired callers who will be required to rely on them. (915 F. Supp. at 639). In addition, as explained in the Rosenzweig Dec., E-911 for public pay telephones is less than reliable, since the City and its E-911 provider, Verizon, must rely on private owners to provide accurate, updated location information concerning their devices. (Rosenzweig Dec. at 34). In addition, as explained in the Stulberg Dec., defendants concede that they have no data allowing a reliable assessment of the overall accuracy of the E-911 system, and as explained in the Rosenzweig Dec., Fire Department dispatchers have encountered calls which identify a telephone's number but not location and calls which identify an incorrect location of a telephone.

For all of these reasons, defendants have not identified an existing accessible notification alternative to street alarm boxes for the deaf and hearing impaired. That fact, without more, establishes that defendants have not satisfied the standard set by this Court for modifying or vacating the injunction. Further, for the same reasons, defendant's proposed modification or vacatur of the injunction would be inconsistent with the purpose behind the original relief, in that it would not ensure that the City's emergency response system comports with plaintiffs' statutory rights to equal access. 970 F. Supp. at 358. Given that deaf and hearing impaired persons cannot use the notification alternative proposed for them, and cannot use the notification method proposed for hearing persons, i.e., cell phones, the two systems proffered as the replacement for the street alarm box system are demonstrably unequal and, hence, directly threatening to the health and safety of deaf and hearing impaired persons requiring fire, police or medical assistance from the street. As explained in Points II and III herein, that inequality not only is inconsistent with this Court's standards for modifying or vacating the injunction, but also Violates the ADA and its implementing regulations and the equitable standards for modifying or vacating a federal court injunction, as set forth in decisional law.

POINT II

THE MOTION SHOULD BE DENIED BECAUSE DEFENDANTS' PLAN TO REMOVE THE STREET ALARM BOXES WOULD VIOLATE THE ADA

As explained in Point I, defendant's motion seeks to withdraw a publicly maintained street emergency notification system that is accessible to deaf and non-deaf persons and replace it with a system that is only accessible to non-deaf persons. The City seeks to relegate deaf people to inaccessible public pay telephones on the street, as that system continues to contract, while hearing persons have access to a wide telephone network, which includes a thriving means of communications, including the rapidly growing number of cell phones. This disparity constitutes unlawful discrimination under the ADA and its implementing regulations.

A. Defendants' Plan Violates the ADA and its Implementing Regulations

Title II of the ADA, 42 U.S.C. § 12132, et seq. provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132; Civic Association I, 915 F. Supp. at 634. It is undisputed that plaintiffs are qualified individuals with disabilities. Removal of the street alarm box system would deprive the Class of the ability to participate in and benefit from a service, program or activity, i.e., access to summoning emergency service from the street, on an equal basis with hearing people, in violation of an explicit mandate of the ADA's regulations. 28 C.F.R. 35.130(b)(ii). As this Court held, a violation of Title II is established where qualified individuals with disabilities such as the plaintiff-class are excluded by reason of disability from participation in or being denied the

benefits of some service, program or activity provided by a public entity. 915 F. Supp. at 634-638.

Regulations promulgated by the United States Department of Justice to implement the ADA provide that a public entity may not:

> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
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> (ii) Afford a qualified individual with a disability an opportunity to participate In or benefit from the aid, benefit or service that is not equal to that afforded others;
>
> (iii) Provide a qualified in individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
>
> (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others; [or]
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> ***
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> (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

28 C.F.R. 35.130(b)(1). In addition, 28 C.F.R. § 35.130 provides that "a public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities...." 28 C.F.R. § 35.130(a); 915 F. Supp. at 635-36.

The Court held in Civic Association I that defendants would violate these regulations and the ADA if they remove street alarm boxes without replacing them with a "readily accessible" notification of alternative. 915 F. Supp. at 635-36. The Court held that, without a readily

accessible notification alternative in place, plaintiffs would have their participation in and benefit from emergency street reporting and emergency reporting as a whole limited quantitatively and qualitatively. 915 F. Supp. at 635.

Under 28 C.F.R. § 35.160(a), a regulation regarding communications, "a public entity shall take appropriate steps to ensure that communications with applicants, participants and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a)(quoted in 915 F. Supp. at 636). In Civic Association I, this Court held that "removing the street alarm boxes without providing plaintiffs with a means of reporting emergencies from the street would not constitute a means of communication as effective as that available to hearing people." Civic Association I, 915 F.Supp. at 636. This Court held further that removing the street alarm boxes would violate this regulation because it would leave the deaf, but not the hearing, without a means of reporting emergencies from the street. 915 F.Supp. at 636-37. As the Court further held in Civic Association II, 970 F.Supp. at 360, under the ADA,

> an alarm system that relies primarily on voice communication to ascertain and confirm the type of emergency services required should, to the maximum extent feasible, provide a reasonable alternative means by which hearing-impaired individuals can similarly signal and confirm the type of emergency assistance required.

970 F.Supp. at 360.

Similarly, the Rehabilitation Act provides:

> no otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794. In Civic Association I, the Court held that defendants would violate the Rehabilitation Act, by denying plaintiffs the benefit of reporting emergencies from the street if

the alarm boxes were removed and no notification alternative was put in place. Civic Association I, 915 F.Supp. at 638.

As explained in Point I and as detailed in the Schroedel, Stulberg and Rosenzweig Decs., and the documents and deposition excerpts attached thereto, defendants' proposal – to remove the accessible street alarm box system and replace it with a two-tier system consisting of an inaccessible public pay telephone system for the deaf and hearing impaired and a cell telephone system for the hearing is a per se violation of the above-cited statutes and regulations. As the street alarm box system remains the only means by which the deaf and hearing impaired can access emergency services from the street, the removal of that system, replacement of that system with a a public pay telephone system that the deaf and hearing impaired cannot access, and the creation of a system relying entirely upon cell telephones that the deaf and hearing impaired also cannot access, excludes the disabled from the essential public service at issue. As in 1996 and 1997, such discriminatory conduct cannot be sanctioned.

Defendants' reliance on Cerpac v. Health and Hospitals Corp., 147 F.3d 165 (2d Cir. 1998), is misplaced. Unlike in Cerpac, here, as in Civic Association I, removing the alarm boxes will leave able-bodied persons with access to 911 from the street throughout the City while depriving deaf and hearing impaired individuals from access to the City's emergency reporting system from the street. Thus, only able-bodied persons will be able to access the City's emergency reporting system from the street, in violation of the ADA and the Rehabilitation Act and their implementing regulations.

B. Defendants Have Not Shown that the Street Alarm Boxes Impose an Undue Burden Which Excuses Them from Compliance with the ADA

The City's motion asserts that the cost of maintaining the alarm box system is a burden warranting vacatur of the injunction. That argument is legally and factually erroneous.

ADA Regulations, 28 C.F.R. § 35.149 and 35.150, state that, for a public entity to be relieved from the obligation to make its facilities, services, programs or activities accessible to people with disabilities, the entity must prove that maintaining the service presents "undue financial and administrative burdens." The City must therefore prove that the alarm box system presents an "undue financial and administrative burden" within the meaning of the ADA to be excused from compliance with the statute. The City has not met that standard here.

28 C.F.R. § 35.149 provides:

> Except as otherwise provided in Section 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

28 C.F.R. § 35.150 provides, in pertinent part:

> (a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—
> . . .
>
> (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action…would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with Section 35.150(a) of this part would result in such …burdens. The decision that compliance would result in such…burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such…burdens, a public entity shall take any other action that would not result in such …burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

The City has not asserted that it is invoking this undue burden exemption, and there is no evidence in the record to support any attempt by the City to do so. Defendants have not

submitted a statement giving reasons for a conclusion that continuing to maintain the alarm box system would be an undue burden. Nor have defendants set forth other actions the City would take which would ensure that the deaf and hard of hearing would be able to summon emergency fire and police assistance from the streets as effectively as the current alarm box system allows them to do.

If defendants were to attempt to make such an argument, it would fail. The record establishes that the cost of maintaining the street alarm box system is less than one percent of the Fire Department's budget – a fact not mentioned in defendants' motion. (Stulberg Dec. at 72). Further, defendants were unable, in depositions, to attribute any financial shortfalls to the need to maintain the street alarm box system. As for false alarms, the record establishes that telephones, not street alarm boxes, account for the majority of malicious false alarms (RosenzweigDec. at 47) and, in any event, this Court rejected that concern as a basis for removing the street alarm box system in Civic Association I. 915 F. Supp. at 627. The record also establishes that the street alarm box system continues to perform a vital public safety function, having transmitted reports to the Fire Department alone of more than 276,000 incidents of fire and medical emergencies between 1997 and 2009 (Rosenzweig Dec. at 37). Thus, defendants have no basis to assert that the street alarm box system constitutes an undue burden justifying removal of that accessible system without provision of an accessible notification alternative.

POINT III

THE MOTION SHOULD BE DENIED BECAUSE DEFENDANTS HAVE NOT MET THE STANDARDS FOR MODIFICATION OR VACATUR OF A PERMANENT INJUNCTION ARTCULATED BY THE FEDERAL COURTS

In Civic Association II, this Court examined the legal standard for vacating or modifying the injunction. Beginning with a quote from Sierra Club v. United States Army Corps of Engineers, 732 F.2d 253, 256 (2d Cir.1984), this Court wrote:

> "An injunction is an ambulatory remedy that marches along according to the nature of the proceeding. It is executory and subject to adaptation as events may shape the need, except where the rights are fully accrued or facts are so nearly permanent as to be substantially impervious to change." *Sierra Club v. United States Army Corps of Engineers, 732 F.2d 253, 256 (*2d Cir.1984*)* (citing *United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932)). A court may modify a permanent or final injunction, such as the injunction in the present case, when there has been a "significant change in the law or facts," *Sierra Club*, 732 F.2d at 256, so as to make modification equitable.

970 F.Supp at 358.

As noted above, this Court then held that the question to be weighed is whether the proposed modification

> is consistent with the purpose behind the original relief: ensuring that the City's emergency response system comports with the Plaintiffs' right to equal access under the ADA and the Rehabilitation Act. *See id.* at 257 (test of court's discretion to modify injunction is "whether the requested modification effectuates or thwarts the purpose behind the injunction"). 970 F.Supp at 358. See also *Chrysler Corp. v. United States,* 316 U.S. 556, 562 (1942).
>
> 970 F. Supp at 358.

This Court's holding reflects the U.S. Supreme Court's and the U.S. Court of Appeals for the Second Circuit's longstanding jurisprudence. That jurisprudence begins with the test Justice Cardozo outlined in the Court's opinion in Swift:

> No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardships so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change [this decree]…

Swift, 286 U.S. at 119.

The Swift test would relieve a party of the conditions or restrictions imposed by tan original decree based on the harm suffered by the restrained party. The Supreme Court framed the test to be one where changed circumstances had turned the decree into "an instrument of wrong." Swift, 286 U.S. at 115.

Three decades later, the Supreme Court expanded the Swift test to require consideration not just of the harm suffered by the enjoined party, but also of the continuing need for the injunction. Justice Fortas writing for the Court said:

> *Swift* teaches that a decree may be changed upon an appropriate showing, and it holds that it may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree [the elimination of monopoly and restrictive practices] have not been fully achieved.

U.S. v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968).

Applying the expanded test, the Second Circuit in Sierra Club took the view that a permanent injunction granted after a hearing on the merits, such as the injunction here, may not be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved. Sierra Club v. U.S. Army Corps of Engineers, 732 F.2d 253, 256 (2d Cir. 1984). Thus the nature and effect of the injunction must be examined first when considering its modification. Id.

In the instant case, the equities, as assessed under Swift, United Shoe and Sierra Club, balance decidedly in favor of plaintiffs. Even if it could be said that defendants had developed and disseminated a tapping protocol for public pay phones (which they have not) and even if E-911 on public pay telephones could be deemed to be in operation and effective throughout the City (which it is not), and even if public pay telephones were accessible to the deaf and hearing impaired (which they are not), defendants' bare attainment of conditions which this Court

hypothesized fifteen years ago should not end this Court's review. Defendants have not suffered, or even asserted, any significant harm imposed by the injunction, let alone harm that has rendered them "victims of oppression" or that has rendered the injunction an "instrument of wrong." Plaintiffs, however, have demonstrated that removing the street alarm boxes will deprive them of their only means of access to the City's emergency reporting system – in direct contravention of the injunction's goal – and leave them in the same disadvantaged position they would have been left had this Court not issued the injunction originally. As such, modifying or vacating the injunction would thwart the purpose behind the injunction of assuring that deaf and hearing impaired people have equal access to emergency assistance from the City's streets as do hearing people. Indeed, the issue here goes well beyond equal access. Given that deaf and hearing impaired people cannot use public pay telephones to access emergency services, that no tapping protocol has been developed, tested or implemented for public pay telephones, and that the street alarm box system remains the sole means by which deaf and hearing impaired people can summon emergency assistance from the streets, modifying or vacating the injunction would leave that disabled community with no access to emergency reporting services at all – a result so dangerous that it must be avoided on equitable principles alone.

Finally, a party seeking relief from a judgment must be free from fault and have clean hands. The traditional rule in equity is that courts will set aside a judgment only when the party seeking relief sets forth grounds for relief that are "unmixed with any fault or negligence in himself or his agents," or when the party seeking relief shows "entire freedom from fault or neglect on the part of himself or his agents." See, e.g., Pickford v. Talbott, 225 U.S.651, 658, 32 S. Ct. 687, 56 L.Ed. 1240 (1911). Equity permits relief when enforcement of a judgment would be against conscience, and the party seeking relief is without fault.

West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F2d 702, 704 (5th Cir. 1954).

In the instant case, defendants have unclean hands. Although this Court emphasized the importance of disseminating the tapping protocol to the deaf and hearing impaired community, the record establishes that defendants have not done so, and only showed an interest in doing so after the instant motion was filed. Although this Court enjoined defendants from carrying out "any…obstruction, or interference with the street alarm box system as it existed on February 9, 1996," defendants have allowed the number of out-of-service alarm boxes to skyrocket by 540 percent. (Stulberg Dec. at 52). (Ironically, after failing to maintain the system in the condition it was at the time of the injunction, defendants now seek to use the fruits of that neglect to argue that the system is obsolete and underused). And although this Court has required defendants to provide the deaf and hearing impaired with an accessible notification alternative, defendants have not proposed to do so and have not taken steps to determine how such a notification alternative could be developed. Such conduct should render defendants ineligible for the equitable relief they now seek from this Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in all the other papers submitted in opposition to defendants' motion, plaintiffs respectfully request that the motion be denied in all respects.

Respectfully submitted,

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