UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK, a nonprofit organization, BROOKLYN CENTER FOR INDEPENDENCE OF THE DISABLED, a nonprofit organization, BRONX INDEPENDENT LIVING SERVICES, a nonprofit organization, HARLEM INDEPENDENT LIVING CENTER, a nonprofit organization, DISABLED IN ACTION OF METROPOLITAN NEW YORK, a nonprofit organization, NEW YORK STATEWIDE SENIOR ACTION COUNCIL, a nonprofit organization, SASHA BLAIR-GOLDENSOHN, an individual, and DUSTIN JONES, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, a public benefit corporation, VERONIQUE HAKIM, in her official capacity as interim executive director of the Metropolitan Transportation Authority, NEW YORK CITY TRANSIT AUTHORITY, a public benefit corporation, and DARRYL C. IRICK, in his official capacity as acting president of the New York City Transit Authority,

Defendants.

Case No. 1:17-cv-2990-GBD-VF

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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In a last-minute effort to plug fatal gaps in their record, Defendants filed three untimely declarations on reply and reasserted their fudged explanation of the proper burdens on their motion for summary judgment. Yet Defendants' new declarations do not withstand scrutiny and, instead, simply raise additional issues of disputed fact that further preclude summary judgment.

I. PROCEDURAL HISTORY

Plaintiffs respectfully refer the Court to the procedural history in Plaintiffs' opposition brief. ECF 261 at 2–9. In short, the only issue before the Court is whether Defendants have shown that the undisputed record demonstrates that they reasonably accommodate Plaintiffs when elevator outages prevent access to the subway. *Id.* On remand, the Court opened discovery on this issue, ECF 218, with fact witness declarations due on March 28, 2022. ECF 221.

Defendants filed their reply in support of summary judgment on May 5, 2023, including with it three new fact declarations executed the same day as their brief—from (1) a previously undisclosed witness Devon Rogers, NYCT Vice President of Transportation, (2) Rachel Cohen, the MTA's Deputy Chief Accessibility Officer, and (3) Diane McFarlane, NYCT's Eligibility and Compliance Officer for Access-a-Ride. ECF 264–267. Defendants' witnesses provided new representations regarding the purported availability of reasonable accommodations and critiques of Plaintiffs' proposed accommodations. ECF 265–267.

Plaintiffs moved to preclude the tardy declarations or for reopened discovery. ECF 274. The Court declined to strike the declarations but ordered a period of reopened discovery and an opportunity for Plaintiffs to submit a sur-reply, holding that the declarations "were produced well after the close of fact discovery," thereby denying Plaintiffs the chance to question the declarants on their assertions. ECF 302. The Court also denied Defendants' motion for summary judgment, with leave to renew following this sur-reply, and clarified there would be no further briefing on Defendants' motion. ECF 307, 309. Plaintiffs conducted limited discovery and deposed the three

declarants, with a new witness (John Pillartz, NYCT Vice President, Transportation) substituting for Mr. Rogers. Reopened discovery closed on February 29, 2024. ECF 307.

II. ARGUMENT

A. Defendants' Reply Brief Misrepresents the Applicable Burden for Their Motion.

Defendants' reply memorandum brazenly misstates the evidentiary burden for their motion, claiming in the second sentence of their brief that "[t]he burden is on Plaintiffs." ECF 264 at 1. That is incorrect as a matter of law, and so it bears repeating that on Defendants' motion for summary judgment, not only must Defendants show that there is no dispute of material facts regarding Plaintiffs' allegations under the ADA, Section 504, and NYCHRL, but Defendants also bear the burden of proof regarding the fact-specific question of the reasonableness of their purported accommodations, and are "entitled to summary judgment only if the undisputed record reveals that the plaintiff was accorded a plainly reasonable accommodation." *Brooklyn Ctr. for Indep. of the Disabled v. Metro. Transp. Auth.*, 11 F.4th 55, 62 (2d Cir. 2021). During the fact-specific inquiry about the reasonableness of Defendants' accommodations, they must demonstrate the accommodation overcomes "non-trivial temporal delays that limit access to programs, services, and activities." *Id.* at 65 (citing *Wright v. N.Y.S. Dep't of Corr.*, 831 F.3d 64, 73 (2d Cir. 2016)).

Defendants' attack on evidence regarding Plaintiffs' experiences, which they deride as "anecdotal," similarly fails. It is simply untrue that Plaintiffs merely "buttress anecdotal claims," ECF 264 at 8, as Plaintiffs proffer a host of systemic data, government reports, admissions from Defendants' witnesses, and admissible expert opinions that raise material disputes of fact regarding Defendants' claimed reasonable accommodations. ECF 260. Defendants also ignore the sheer number of class member complaints they have received regarding their purported accommodations. *See, e.g.,* Ex. 1. to Decl. of Chloe Holzman in Supp. of Pls.' Sur-reply

("Holzman Decl."), NYC Council AAR Oversight Briefing at 7 (noting safety concerns accessing buses) and 18 (safety and accessibility concerns with Access-a-Ride); Ex. 2 to Holzman Decl., AAR Complaints Overview (40,904 complaints in 2023). Further, Defendants do not, and cannot, cite a single case for the proposition that Plaintiffs must rely on statistical evidence for a reasonable accommodation, and not disparate treatment, Title II inquiry. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 276–77 (2d Cir. 2003). Finally, beyond unhelpful to their motion, the MTA's effort to expel class member experiences from the record is deeply unfortunate and undermines their claimed commitment to serving riders with disabilities.

B. Defendants' Untimely Declarations Raise Even More Disputes of Material Facts.

Defendants' untimely declarations only underscore their failure to demonstrate the existence of effective accommodations, as they have not considered, studied, or analyzed the actual delay and hardship experienced by customers with mobility disabilities forced to reroute. Moreover, far from showing undue hardship or infeasibility, the MTA has failed to seriously consider Plaintiffs' facially reasonable suggested accommodations, preferring to offer conclusory statements that do not hold up when examined.

1. Rachel Cohen's May 5, 2023 Declaration

Rachel Cohen's new declaration ultimately only reinforces the ubiquity of non-trivial delays and re-routing complications faced by subway riders who encounter elevator outages. Responding to Plaintiffs' observation that Defendants' motion cited only a single hypothetical of the time added by "back-riding" (which Ms. Cohen acknowledged could add more than double her cited time once real-world factors like wait time and transfer time are factored in, *see* ECF 261 at 6–7, 13), Ms. Cohen's new declaration offers four more hypothetical back-riding trips of supposedly "similar" duration to that original example. *See* ECF 261 at 13; ECF 265 at ¶ 7 (Kingsbridge Road (B/D) to Bedford Park Blvd.; 14 St/8 Av (A/C) to W. 4th St.; 14 St./8 Av.

(A/C) to Penn Station; and 21 St.–Queensbridge (F) to Roosevelt Island). But, again, real-world conditions reveal the flaws in these hypotheticals: according to the MTA's own data, on the day before her deposition, three-quarters of these trips (including the trips in both directions from 14th St.) actually did have at least one elevator outage at the target station. Ex. 3 to Holzman Decl., Tr. of Rachel Cohen Feb. 21, 2024 Dep. ("Cohen 2024 Dep.") at 41:19–42:3; 44:9–45:2; Ex. 4 to Holzman Decl., Elevator & Escalator Status. And three-quarters of the hypothetical stations Ms. Cohen suggests using to back-ride to those target stations also experienced elevator outages, a circumstance Ms. Cohen conceded made it "certainly possible" that her suggested back-riding would be affected (though she found it "difficult" to assess based on the information directly visible on the MTA's Elevator & Escalator status webpage). Cohen 2024 Dep. at 43:8–45:19; Elevator & Escalator Status. The MTA's cherry-picked examples, presumably intended to illustrate the ease of back-riding, thus only reaffirm the system's pervasive elevator outages and the difficulty for riders forced to reroute themselves to reach their destination. Further, Ms. Cohen's examples confirm that back-riding can add serious delays, Cohen 2024 Dep. at 16:7–17:12; 29:20–30:23; 31:9–39:10; Ex. 5 to Holzman Decl., Trip Planner Screenshots (revealing delays of 16 to 43 minutes, per Trip Planner, for Ms. Cohen's back-riding hypotheticals), something the MTA has chosen not to study, and that it ignores when proffering back-riding or the bus system as accommodations, *id.* at 47:8–48:15; 51:23–53:10; 167:13–:22.

In a similar vein, Ms. Cohen's deposition testimony raised new issues of disputed fact as well as uninformed and self-contradictory positions on outage notifications. For example:

- She critiques Plaintiffs' expert's analysis of bus complaints, ECF 265 ¶ 10, but confirmed that she had not looked at the underlying considered materials, Cohen 2024 Dep. at 152:13–153:18; and admitted that she did not analyze the complaint data or look at the underlying complaints, *id.* at 157:8–:21.
- Ms. Cohen contradicted Defendants' response to Plaintiffs' discovery request, which

stated that Customer Information Center ("CIC") digital screens in stations "do not share any time with advertisements," Ex. 6 to Holzman Decl., Defs.' Resp. to Pls.' 3d Set of Reqs. for Produc. of Docs. Req. No. 55, by testifying that CIC screens do show ads, Cohen 2024 Dep. at 135:14–136:12, 137:14–:19 138:7–139:8; and while she did not know what percentage of the time the screens show ads rather than customer service information, *id.* at 137:20–138:4, 139:9–:12, she noted that "[i]t is possible" that a screen could be devoted solely to ads, *id.* at 138:25–139:4.

- Though her declaration purports to address Plaintiffs' contention that CIC screens do not display enough information about elevator outages, ECF 265 ¶ 13, her testimony confirmed the limited elevator information available on the screens: elevator outage information is shown on a "station status screen," which provides the status for that station only, and may be paired with a "digital map" screen—the only type of screen showing elevator status at other stations, yet that status merely consists of a caution icon over stations with capital replacement outages, Cohen 2024 Dep. at 139:25–141:14; 142:24–143:5; to the extent elevator status is ever even visible on platform screens, she could not say with what frequency, but it is not "what appears like most regularly," *id.* at 141:15–:19; 141:23–142:04; CIC screens do not display specific alternate travel information for elevator outages, *id.* at 144:13–145:03, and digital maps are "not updated on a realtime or even daily basis," though she believes it would be technically possible to have maps reflect additional outages, *id.* at 143:8–144:06.

- Although Ms. Cohen stated that on-board train announcements about capital replacement of elevators are only possible because such long-term outages can be included in printed scripts before train crews begin their tour and "any announcement . . . must be known to persist through the whole shift," ECF 265 ¶ 16, she conceded at deposition that this was untrue, Cohen 2024 Dep. at 86:9–:11; a script *can* include an announcement that lasts only a few hours, or include conditional instructions "to make this announcement if it's these hours and you get this piece of information," *id.* at 76:5–77:11, 79:14–80:6, and a script can be produced for an elevator outage that is not a long-term capital replacement, *id.* at 86:21–87:5; Ex. 7 to Holzman Decl., Train Announcement Scripts.

- She acknowledged the fact, obvious to any subway rider, that train operators make on-board announcements that are not scheduled in advance, including delays, unplanned service changes, and unpredictable disruptions. *Id.* at 92:18–93:9; 108:12–:20; Ex. 8 to Holzman Decl., MTA Blue Book at 30–63.

- She contradicted her bizarre assertion that crews would need to be verbally provided with the exact script for unplanned elevator outage announcements and commit the script and alternative route information "instantly to memory to recite it back to the customer," ECF 265 ¶ 18, admitting that she does not know whether train crews "are expected to know alternate information" and admitting that crews are not actually required "to memorize every alternate for every potential service change," Cohen 2024 Dep. at 100:21–101:12.

- Despite leaning heavily on the supposed challenges of conveying information to train crews, Ms. Cohen admitted she does not understand how train communications happen, including via the rail control center, *id.* at 93:12–:21, 97:25–98:11 ("I don't know how

that happens and who has access to that system."). Nor did she understand how train communications occur with third parties like the NYPD, *id.* at 80:8–:21.

- Though she derides on-board announcements about elevator outages (besides those about capital replacements) as "confusing," and "of limited utility," ECF 265 ¶¶ 17–18, she did not know if the MTA had ever studied their utility, and was "aware from conversations with advocate riders over the years as well as public testimony at many MTA committee meetings that there are customers who would like to us provide detailed, realtime elevator outage information onboard our trains." Cohen 2024 Dep. at 120:10–121:21.

- She did not clarify why on-board train announcements about elevator outages would be any more "confusing" to customers than any of the other unplanned service change announcements the MTA already makes. *See id.* at 101:13–:17 (acknowledging that alternate routing information will not necessarily apply to every customer); 104:12–105:10 (acknowledging that the MTA directs operators to announce unplanned service changes even though the relevance of the announcement can vary by customer).

- Despite complaining that "there is no practicable metric or standard to decide when such an [on-board elevator outage] announcement should or should not be made," ECF 265 ¶ 17, Ms. Cohen revealed that the MTA has no such metric or standard for the service announcements currently provided to passengers, Cohen 2024 Dep. at 122:13–:25.

To Ms. Cohen's knowledge, the MTA has not studied how long it would take operators to announce unplanned or all planned elevator outages, *id.* 127:16–128:5, nor whether doing so would affect their ability to perform their job, *id.* at 128:2–129:4. In short, the MTA cannot back up its conclusory rejection of a very basic way to help riders avoid outages.

2. John Pillartz's January 11, 2024 Declaration

John Pillartz's vague and unsupported assertions regarding buses and shuttles also do not help Defendants meet their burden on summary judgment. His declaration does not even try to address, and he could not testify about, the issues that Plaintiffs have raised regarding the inaccessibility and inadequacy of buses for people with mobility disabilities who encounter elevator outages. *See generally* Ex. 9 to Holzman Decl., Decl. of John Pillartz ("Pillartz Decl."); *see* ECF 260 ¶¶ 4, 47–49, 51–53, 65, 74, 96–97; Ex. 10 to Holzman Decl., Tr. of John Pillartz Dep. ("Pillartz Dep.") at 91:19–92:3. And Mr. Pillartz did not support a single assertion with any data, documents, or conversations, Pillartz Dep. at 21:12–:16, 70:7–:16, 72:25–73:9, 79:6–:23,

85:18–:24, 86:17–87:6, 92:9–:16, 105:22–106:6, 107:9–:14, 112:6–:13, 120:3–18, 128:3–14, 141:10–17, 152:21–153:6, rendering his declaration *ipse dixit* against the copious evidence that the bus system is not a reasonable accommodation.[1] He asserts that passengers who encounter elevator outages can "often" take buses to the next accessible station, with "many" bus routes running "parallel" to subways. Pillartz Decl. ¶¶ 4–6. But he could not say how often, what "parallel" means or how many bus routes run "parallel," how many inaccessible stations there are between accessible ones, or how long it takes to reroute using the bus. Pillartz Dep. at 87:7–89:4, 89:15–90:13, 91:14–:18, 92:4–:8, 94:17–95:5, 95:22–96:10, 104:3–:11, 122:18–:25, 123:2–:6, 124:6–:11. Despite his claims about the supposed ease of rerouting using the bus system, he was at a loss to explain why NYCT offers shuttles at all rather than redirect subway riders affected by long-term capital projects to existing bus routes, the way Defendants redirect people with disabilities who encounter elevator outages. *Id.* at 150:25–151:9.

Mr. Pillartz's declaration also does not show that using shuttle service to accommodate Plaintiffs would pose an undue burden. He again offers only conclusory critiques, ignoring that other cities successfully use shuttles as an accommodation, ECF 260 ¶¶ 109, 116, and that even Defendants deploy shuttle buses for passengers affected by station outages and other unplanned events, such as derailments. Pillartz Dep. at 35:7–37:17, 46:21–47:19, 51:12–:19, 60:8–61:5, 64:2–:16. Though he acknowledged Defendants' use of shuttle buses to accommodate customers affected by these events, he did not know whether NYCT had even *considered* offering shuttles for passengers with disabilities encountering elevator outages. *Id.* at 80:19–81:20. Probing his

[1]As MTA Chair and CEO Janno Lieber recently put it, "Buses are moving like seven miles an hour in the central business district . . . This is not a viable transportation option for people." Jose Martinez, *Boosts to Bus Service Must Come with Congestion Pricing, State Pols Say*, The City (Feb. 8, 2024), https://www.thecity.nyc/2024/02/08/boosts-bus-service-congestion-pricing/.

assertions reveals yet more disputed facts:

- He could not say who at, when, or how NYCT decides to provide shuttle service. *Id.* at 77:17–:22, 79:24–80:17, 151:10–:25.

- He states that shuttle service would be "unrealistic and inefficient" and "entirely unnecessary and would greatly burden the system," Pillartz Decl. ¶ 4, 11, but clarified that he only meant a burden to the bus system, not the subway, Pillartz Dep. at 73:23–74:5, and that he had not, and did not know if NYCT had, analyzed whether shuttles would in fact be unnecessary, unrealistic, inefficient, or burdensome, *id.* at 70:24–72:13, 72:25–73:9, 73:16–:22, 141:18–142:6, 142:25–144:2.

- He states that shuttle service would pose an "undue burden," Pillartz Decl. ¶ 11, but struggled to define that term, Pillartz Dep. at 153:20–154:20, admitting that this was only *his* statement, and not that of NYCT, *id.* 74:13–:21, and that neither he nor, to his knowledge, anyone at NYCT had analyzed the issue, *id.* at 155:17–156:19.

- He states that shuttle buses would be less convenient than the bus system, Pillartz Decl. ¶ 9, but then testified that there were actually "too many variables" to know for sure, Pillartz Dep. at 104:18–105:21, 120:19–121:11, 124:12–20, and that he had not, and was not aware of NYCT having, studied the convenience of shuttle buses, *id.* at 123:7–:16, 124:21–125:9.

- He states that it would be "generally" faster to use existing buses than a shuttle bus, Pillartz Decl. ¶¶ 6-7, but admitted that this referred only to cases of unplanned outages, Pillartz Dep. at 92:24–93:5, and that he did not know, had not analyzed, and was not aware of NYCT ever analyzing the speed of rerouting using buses versus shuttle buses, *id.* at 9–95:5, 106:7–:20, 137:18–138:4.

- He states that shuttle buses would require a reduction in existing bus service, Pillartz Decl. ¶ 11, but equivocated about that claim at his deposition, Pillartz Dep. at 138:25–139:8, 170:18–171:6, admitting that he had not, and was not aware of NYCT having, assessed whether providing shuttle service would degrade passenger service, *id.* at 153:10–:19, 171:16–:24.

Significantly, while he complains that shuttle service would require diverting buses used for preexisting service, Plaintiffs have not proposed that shuttle service necessarily rely on buses, *see, e.g.*, ECF 150 ¶¶ 109–111; ECF 260 ¶¶ 104–105; ECF 261 at 10–11, and Mr. Pillartz did not know whether NYCT had assessed using paratransit or accessible taxis as shuttles, Pillartz Dep. at 113:17–22, 144:3–8, 156:2–19, 171:25–172:10.

3. Diane McFarlane's May 5, 2023 Declaration.

Finally, Diane McFarlane's declaration (ECF 267) does not show that Access-a-Ride ("AAR") serves as a reasonable accommodation for passengers who encounter elevator outages. She disregards the overwhelming evidence that AAR, in her words, is "not comparable" to the subways. ECF 261 at 18–19; ECF 260 ¶¶ 59–60. AAR requires repeated, time-consuming in-person assessments. ECF 260 ¶ 56; Ex. 11 to Holzman Decl., Tr. of Diane McFarlane Feb. 27, 2024 Dep. ("McFarlane 2024 Dep.") at 125:4–126:3 (next available assessment time "could be thirty days from now or it could be three months from now"), 124:12–125:3 (there is still no assessment center in Manhattan). Customers still must reserve trips in advance, limiting AAR's utility. ECF 260 ¶¶ 5, 54–55, 57; ECF 259-20, AAR Guide at 29; Ex. 12 to Holzman Decl., MY AAR User Manual at 14; Ex. 13 to Holzman Decl., On the Move Newsletter at 3 (noting that AAR "cannot provide same-day services"). Customers still may be given pickup times an hour earlier or later than requested and drivers can arrive up to 30 minutes late and be considered "on time." ECF 260 ¶ 5; AAR Guide at 29–30, 33. And AAR can still pick up an unknown number of people during a trip, including in other boroughs, without notice to the customer. ECF 260 ¶ 58; McFarlane 2024 Dep. at 21:20–22:4, 35:22–36:17. Her declaration does not even acknowledge that AAR takes significantly longer than the subway, subjecting customers to substantial delays. ECF 260 ¶¶ 5, 59; *see* McFarlane 2024 Dep. at 68:22–70:4 (she does not know whether MTA has analyzed length of AAR versus subway trips); AAR Complaints Overview (254 complaints of "long ride times" in December 2023); Ex. 14 to Holzman Decl., Ride Time Dashboard (roughly 20% of 2023 trips exceeded scheduled ride times).[2]

[2] McFarlane criticizes the age of ride-time data in the U.S. Attorneys' Office investigation, ECF 267 ¶ 9, but did not compare their data to more recent ride times, McFarlane 2024 Dep. at 15:10–:21, and the "trip distance bands" that they relied on when reaching their conclusion about excessive ride times have not changed. *Compare* ECF 259-21 at 5–7, *with* AAR Guide at 17.

Even the limited assertions offered in Ms. McFarlane's declaration regarding AAR's performance and customer service are undermined by record evidence:

- She cites data on various service metrics, such as ride time and on-time performance, ECF 267 ¶¶ 4, 7, 10, but admits that she does not know how these times are calculated (including whether it is manually recorded by drivers themselves), or how the data is collected by AAR, McFarlane 2024 Dep. at 20:7–:14, 22:20–27:4, 65:2–67:21, and ignored that, according to AAR, for some trips "data communication failures result in invalid or missing data," Ex. 15 to Holzman Decl., Customer Experience Dashboard.

- She discusses changes in driver "no show" rates, ECF 267 ¶¶ 7, 10, without noting that this issue continues to render AAR unreliable, AAR Complaints Overview (665 complaints in December 2023 regarding "carrier no-shows"), McFarlane 2024 Dep. at 47:19–49:19; and untimely pickups and drop offs continue to plague AAR. McFarlane 2024 Dep. at 15:22–16:8; *see also* AAR Complaints Overview (265 complaints in Dec. 2023 about "Carrier late pickup"); Ex. 16 to Holzman Decl., On-Time Performance Dashboard (showing majority of 2023 trips with appointments were not on time).

- She touts customer satisfaction rates, ECF 267 ¶ 10, but cannot answer questions about the surveys' methodology since she has no involvement in gathering or analyzing those data, McFarlane 2024 Dep. at 92:6–20, 99:19–101:2, 103:22–104:3; *compare* Ex. 17 to Holzman Decl., Feb. 2023 Monthly Pulse Survey (more frequent customers report more dissatisfaction). And AAR's own data shows worsening customer experience in 2023. Ex. 15 to Holzman Decl., Customer Experience Dashboard.

- She trumpets new timeframes for the MTA to handle complaints, but does not address whether the MTA adheres to those guidelines and has "no idea" if the MTA even tracks adherence. Defs' Resp. to RFPs Req. Nos. 79–80; McFarlane 2024 Dep. at 111:7–112:17, 113:24–114:10.

- She cites an increase in broker service capacity, ECF 267 ¶ 6, but disregards the corresponding decrease in dedicated carrier capacity, a shift aimed at cutting costs even though not all broker vehicles are wheelchair accessible, McFarlane 2024 Dep. at 73:17–74:2, 85:14–86:15, 88:6–:10; Ex. 18 to Holzman Decl., Dedicated Carriers; Ex. 19 to Holzman Decl., Dedicated Vehicles; *see also* McFarlane 2024 Dep. at 74:12–76:13.

Finally, Ms. McFarlane's declaration ignores the many reports from customers raising serious concerns regarding AAR's safety and efficiency. City Council Oversight Briefing at 18.

III. CONCLUSION

For the reasons stated above, and in Plaintiffs' opposition, ECF 261, Defendants' motion for summary judgment should be denied in its entirety.

Dated: March 21, 2024
New York, New York

Respectfully submitted,

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