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)

CORRECTED DECLARATION OF ROBERT B. STULBERG

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ROBERT B. STULBERG, under penalty of perjury, pursuant to 28 U.S.C. § 1746, declares that the following is true and correct:

1. I am a member of the firm Broach & Stulberg, LLP, attorneys for the plaintiff class in the above-captioned action, and a member of the bar of this Court. I make this declaration in support of the Plaintiffs' Opposition to Defendants' Motion to Vacate or Modify Injunction. I am familiar with the facts and circumstances herein.

2. Annexed hereto as Exhibit 1 is the Judgment issued by the Court on January 19,

2000.

A. ALARM BOXES

3. New York City's street alarm box system consists of approximately 15,077 alarm boxes. (See Transcript of Deposition of Henry Dingman, FDNY's Deputy Director of Fire Dispatch Operations ["Dingman Tr."], copies of relevant pages annexed hereto as Exhibit 2, at 16-17; accompanying Declaration of David Rosenzweig ["Rosenzweig Dec."] at ¶ 9). There is an alarm box approximately every second block throughout the City. (CAD I, 915 F.Supp. at 626; Rosenzweig Dec. at ¶ 10). Approximately 2,000 of the 15,077 alarm boxes are located on highways, terminals and bridges, and inside of public facilities, including approximately 1,020 in public schools, 80 in Veterans Administrations, City or private hospitals, 26 in City and State prisons, 21 in City daycare centers, 51 in federal buildings, and 6 in the United Nations. (Rosenzweig Dec. at ¶ 10).

4. There are two types of alarm boxes: (1) Box Alarm Read-out System ("BARS") boxes, which are electro-mechanical boxes, and (2) Emergency Response System ("ERS") boxes. (Rosenzweig Dec. at ¶ 9). There are approximately 4,918 BARS boxes. (Ex. 2 [Dingman Tr.] at 16-17; Rosenzweig Dec. at ¶ 9). BARS boxes telegraph a message in Morse code to the Fire Department when a handle on the box is pulled. (CAD 1, 915 F. Supp. at 626; Rosenzweig Dec. at ¶ 9).

5. There are approximately 10,159 Emergency Response System ("ERS") alarm boxes. (Rosenzweig Dec. at ¶ 9; Ex. 2 [Dingman Tr.] at 16-17). ERS boxes contain two buttons, a red button, which connects the caller to Fire Department dispatchers, and a blue button, which connects the caller to the New York City Police Department's 9-1-1 dispatchers. (Rosenzweig

Dec. at ¶ 9; CAD I, 915 F. Supp. at 626; Transcript of the Deposition of Paul Livingston, Engineering Department Manager, Purvis Systems Inc., which designs and manufactures ERS boxes, ["Livingston Tr."],copy annexed hereto as Ex. 3, at 8-10). ERS boxes also have an intercom speaker for voice through which the caller can communicate with the call-taker. (CAD I, 915 F. Supp. at 626). When either a BARS or ERS box is activated, the location of the alarm box is instantaneously signaled to a dispatcher. (Ex. 3 [Livingston Tr.] at 10; Rosenzweig Dec. at ¶ 11).

1. Alarm Boxes Are Accessible To the Deaf and Hearing-Impaired

6. As the Court found in its 1996 decision (CAD I, 915 F. Supp at 630, 636-37), the street alarm box system is accessible to deaf and hard of hearing persons who need to report an emergency from New York City's streets or from the public facilities referenced above.

7. When FDNY receives an alarm from a BARS box, it automatically sends one engine company and one ladder company to the location of the alarm box. (Ex. 2 [Dingman Tr.] at 19; Rosenzweig Dec. at ¶ 13). Consequently, BARS boxes are accessible to persons needing to report an emergency, regardless of their ability to hear or speak. (Rosenzweig Dec. at ¶ 13).

8. As the Court further found in its 1996 decision, because ERS boxes contain separate buttons for fire and police services, ERS boxes permit a deaf person to communicate the type of emergency services being requested regardless of their ability to hear or speak. CAD I, 915 F. Supp. at 626; Rosenzweig Dec. at ¶ 14). In addition, there are different Fire Department and Police Department protocols, which have remained in effect since 1996, which make the boxes accessible to the deaf.

9. As the Court found in the 1996 decision, between the hours of 11:00 p.m. and 8:00

a.m., when the Fire Department receives an alarm from the red fire button on an ERS box, even where the caller makes no sound, FDNY personnel are dispatched to the location of the box. (CAD I, 915 F. Supp. at 626). This is pursuant to the Fire Department's "ERS No-Contact" protocol, referenced in Section 6.2.3 of the Fire Department's Communications Manual. (Rosenzweig Dec. at ¶ 16).

10. Second, whenever a fire dispatcher receives a call from an ERS box and hears an unintelligible voice, the dispatcher sends a minimum of two engines, two ladders and one chief to the box. (Rosenzweig Dec. at ¶ 17). This protocol is referenced in Section 5.3 of the Fire Department's Fire Alarm Dispatcher Training Course. (Id.) Thus, a deaf or hearing impaired person who activates an ERS box and speaks into that box in any manner will receive immediate emergency assistance. Similarly, where a 9-1-1 police dispatcher receives a call from the blue police button on an ERS box and hears an unintelligible noise or commotion, a police response is dispatched to the location of the box. (See Transcript of Vincent Guerriera, New York City Police Department's Communications Section's Commanding Officer ["Guerrriera Tr."], copies of relevant pages annexed hereto as Ex. 4, at 153-54).

11. Third, when a fire dispatcher receives a call from an ERS box and hears a repeating tapping code consisting of two taps, followed by a pause, the dispatcher sends a minimum of two engines, two ladders and a chief to the box. (Rosenzweig Dec. at ¶ 18; CAD I, 915 F.Supp. at 627; Ex. 2 [Dingman Tr.] at 83-84). When a police (9-1-1) dispatcher receives a call from an ERS box (via the blue button) and hears a repeating tapping code consisting of a single tap followed by a pause, the call-taker dispatches a police unit to the location of the box. (Ex. 4 [Guerriera Tr.] at 77; Rosenzweig Dec. at ¶ 19).

2. ERS Boxes Are Designed in a Way that Lets Deaf Callers Know that a Call Has Been Made and Received.

12. As Paul Livingston, the Engineering Department Manager, for Purvis Systems Inc., which manufactures ERS boxes, explained, ERS boxes are designed in a way that lets callers who cannot hear that the box is working and that the call has been received. When an ERS box is activated (by either pressing the [red] fire or [blue] police button), the box automatically emits through the speaker a high frequency tone called a "ringback tone" for alternating periods of approximately 3.2 seconds, until a dispatcher answers the call. (Ex. 3 [Livingston Tr.] at 11-12; Rosenzweig Dec. at ¶ 21). The speaker grill and fire and police button flaps on the box are designed to vibrate when the ring back tone is emitted. (Ex. 3 [Livingston Tr.] at 11-14). The box is designed so that a user can feel the vibrations by placing his or her hand over the speaker grill or button flaps. (Ex. 3 [Livingston Tr.] at 13-14). Thus, ERS boxes are designed in a way that lets a deaf caller know that (1) a box is working, by feeling the vibration of the ring-back tone, and (2) a call has been answered, by feeling when that vibration stops. (Ex. 2 [Dingman Tr.] at 33; Ex. 3 [Livingston Tr.] at 13-14).

13. When a dispatcher answers the call, the dispatcher's voice is transmitted through the speaker grill on the alarm box. (Ex. 3 [Livingston Tr.] at 12-13). The alarm boxes are designed so that the speaker grill and button flaps also palpably vibrate when the dispatcher's voice is emitted through the box. (Ex. 3 [Livingston Tr.] at 13) . As a result, a caller who is deaf and cannot hear can tell whether a dispatcher has answered his or her call by feeling the vibration of the call-taker's voice on the alarm box. (Ex. 2 [Dingman Tr.] at 33; Ex. 3 [Livingston Tr.] at 11-13). When the vibration of the ringback tone and call-taker's voice stops, a deaf caller can use a tapping protocol, discussed below, to communicate with the call-taker (Ex. 2 [Dingman Tr.] at 34).

14. In an educational video produced by the City for deaf people about how to summon emergency assistance from the street, a deaf person is depicted, at least six times, in different scenes, activating an ERS box by pressing a red or blue button and then placing his hand on the box's speaker grill to feel the vibration of the ringback tone and/or speaker's voice. In the video, the narrator instructs that, after activating the blue or red button, "the caller either can place his or her hand on the speaker in order to feel the vibration of the 911 operator's voice, or count to 4 before tapping." (Rosenzweig Dec. at ¶ 21)

3. Activated Boxes Are Assured Of Receiving Response, and ERS Boxes Are Tested Daily.

15. To assure, so far as possible, that an activated street alarm box is answered and responded to promptly, the Fire Department requires that each call be answered within ten seconds or less, and that appropriate emergency equipment be immediately dispatched to the location of the alarm box, based upon the information received from the caller or pursuant to one of the above-referenced protocols. This is so both for hearing callers and for deaf or hearing impaired callers. (Rosenzweig Dec. at ¶ 23; Ex. 2 [Dingman Tr.] at 29). If for some reason, a call is not answered within ten seconds, a recommendation to dispatch a fire unit to the location of the box is automatically sent to a "decision dispatcher," who in the normal course of business accepts the recommendation and dispatches a unit to the location of the box. (Ex. 2 [Dingman Tr.] at 29). The only circumstances in which a fire unit would not be dispatched in those circumstances is where the Fire Department is first notified that the alarm has been resolved or is unnecessary. (Ex. 2 [Dingman Tr.] at 29).

16. To assure, so far as possible, that the street alarm box system will work when it is needed, the Fire Department conducts daily electronic tests of the ERS boxes to determine whether

any ERS box is inoperative. (Rosenzweig Dec. at ¶ 22; Ex. 2 [Dingman Tr.] at 23-24). The Supervising Fire Alarm Dispatcher ("SFAD") at each FDNY Borough Communications Center is assigned to conduct the test. (Rosenzweig Dec. at ¶ 22). If any ERS box is found not to be operating properly, then the SFAD immediately requests that a Communications Electrician from the Fire Department's Outside Plant Maintenance Unit inspect the ERS box in question. (Id.). If, upon inspection, the Communications Electrician determines that the ERS box is defective, then the box is removed and replaced and the defective box is returned to the manufacturer for repair. (Id.). If the box cannot be immediately replaced, a sign is placed on the box stating that it is temporarily out of service. If the box is found to be in good condition, but there is a problem with the circuitry, a sign is placed on the box stating that it is temporarily out of service. (Id). In order to maximize the availability of operative ERS boxes, the system is configured so that adjacent boxes are powered by different circuitry. (Rosenzweig Dec. at ¶ 22).

17. Upon information and belief, the Police Department also is organized and managed to assure, so far as possible, that a call it receives from an activated street alarm box is answered promptly and that appropriate assistance is dispatched to the location of the box, based upon the information received from the caller or pursuant to its protocols referenced above. (Rosenzweig Dec. at ¶ 24).

B. THE CITY SEEKS TO REMOVE ALARM BOXES WITHOUT ANY ACCESSIBLE NOTIFICATION ALTERNATIVE FOR DEAF PERSONS.

18. Discovery on defendants' Motion demonstrates that there are no changed circumstances that justify or accessible notification alternative that permit removal of the alarm boxes. The only changed circumstance prompting the City to seek to remove the alarm boxes is to try to save money by cutting budgetary items it "had not thought to cut before." (Ex. 6 [Kretz Tr.]

at 11, 13).

19. The New York City Office of Management and Budget ("OMB") is responsible for approving the Fire Department budget to be proposed to the New York City Council ("City Council"). (Transcript of the Deposition of Stephen Rush ["Rush Tr."], copies of relevant pages annexed hereto as Exhibit 5, at 11). In or around the spring 2009, OMB, in the course of reviewing the Fire Department's budget, asked the Fire Department's Assistant Budget Commissioner, Stephen Rush, through his staff, for statistics on use of the alarm boxes and alarm sources. (Ex. 5 [Rush Tr.] at 52-53, 55). Upon information and belief, because the Police Department does not calculate the number of calls made to the Police Department from ERS boxes (Ex. 4 [Guerriera Tr.] at 152-53, those statistics would not have included the number of calls made to the Police Department from ERS boxes. Between 1999 and that inquiry from OMB, Commissioner Rush had not communicated with anyone about the alarm boxes. (Ex. 5 [Rush Tr.] at 56).

20. Each year, OMB issues to the Fire Department a budget reduction target. (Ex. 5 [Rush Tr.] at 9). In or around the fall of 2009, in response to that annual target, FDNY decided to save money by cutting budget items it "had not previously thought to cut," including alarm boxes. (See Transcript of Deposition of Caroline Kretz ["Kretz Tr."], copy annexed hereto as Ex. 6, at 11, 13; Ex. 5 [Rush Tr.] at 11, 49, 55-56). Commissioner Rush proposed to then-New York City Fire Department Commissioner Nicholas Scopetta that the alarm box system be removed as part of FDNY's plan to meet OMB's budget reduction target. (Ex. 5 [Rush Tr.] at 10-11), and that proposal was submitted to OMB as part of the Fire Department's budget reduction plan. (Ex. 5 [Rush Tr.] at 8-9, 49-50). Commissioner Rush testified that this decision was based upon the availability of cell phones and the cell phone network in the tri-state area, the network of home

phones and street phones, the fact that usage of the alarm boxes has decreased, and that there are second sources for calls from alarm boxes. (Ex. 5 [Rush Tr.] at 12-14, 18).

21. In or around the beginning of the calendar year, the Mayor issues a preliminary budget and the City Council then conducts hearings on it. (Ex. 5 [Rush Tr.] at 32). In the normal course of business, after the Fire Department's proposed budget plan is submitted to OMB, OMB, in consultation with the Mayor's Office, reviews and decides which items and cuts will be approved for inclusion in the budget. (Ex. 5 [Rush Tr.] at 11). As part of that process, in or around early 2010, OMB reviewed the Fire Department's budget proposal to remove the alarm boxes. (Ex. 5 [Rush Tr.] at 48-49-50; Document bearing Bates nos. NYC7630-31, copy annexed hereto as Ex. 7). In communications with OMB about the proposal and the Court's prior decisions, Commissioner Rush communicated to OMB that the plan to remove alarm boxes "assumes we would need the Courts to buy the cell phone coverage + cell phone TTY availability, which I would guess if you are hearing impaired you might already have" (Ex. 5 [Rush Tr.] at 61-63; Ex. 7). Mr. Rush testified in deposition that, at the time, he assumed that deaf persons could use cell phones with TTY or texting capability to summon help. (Ex. 5 [Rush Tr.] at 61-63).

22. In or around March 2010, at a preliminary budget hearing, Fire Department Commissioner Salavatore Cassano submitted testimony to the City Council stating that the Fire Department's removal of the alarm boxes "would not jeopardize public safety" because of "vast" technological changes that had occurred over the last 15 years. (Ex. 5 [Rush Tr.] at 40-41; Ex. 6 [Kretz Tr.] at 63, Document bearing Bates nos. NYC1741-48, copy annexed hereto as Ex. 8, at NYC1744). Caroline Kretz, FDNY Associate Commissioner for Intergovernmental Affairs, who drafted that testimony, and Commissioner Rush, who edited Commissioner Cassano's City

Council testimony, testified in deposition that those "vast technological changes" referred only to cell phones. (Ex. 5 [Rush Tr.] at 40-41; Ex. 6 [Kretz Tr.] at 63; Ex. 8 at NYC1744). Ms. Kretz testified that she did not know whether or why public safety would not be jeopardized by the removal of alarm boxes. (Ex. 6 [Kretz Tr.] at 19, 65-66).

23. Commissioner Cassano's written City Council testimony further stated that the Court "expressly permitted the Department to apply to the Court to modify or lift the injunction at any time in the future, upon a showing that the deaf and hearing impaired had other adequate means to report a fire." (Ex. 8 at NYC1744; Ex. 5 [Rush Tr.] at 37-38). Commissioner Rush testified in deposition that, at that time, the Department believed that the deaf could use "cellular communications" to report fires and that "home phones and pay phones would be other means of reporting."(Ex. 5 [Rush Tr.] at 38). Ms. Kretz, who, as stated above, drafted that testimony, testified in deposition that she did not know whether FDNY contends that there are other adequate means for the deaf to report a fire. (Ex. 6 [Kretz Tr.] at 65-66).

24. On or about May 27, 2010, at a City Council hearing on the removal of alarm boxes, Daniel Shacknai, FDNY First Deputy Commissioner, also testified that "with passage of nearly 15 years and the introduction of changes in communications technology, we are confident that additional call boxes can be deactivated without jeopardizing public safety." (Document bearing Bates nos. NYC96-98, copy annexed hereto as Ex. 9). Ms. Kretz, who drafted Mr. Shacknai's testimony, testified in deposition that she understood that such technology changes referred to cell phones. (Ex. 6 [Kretz Tr.] at 67-70, 117). She further testified in deposition that she did not know why public safety would not be jeopardized by the removal of alarm boxes (Ex. 6 [Kretz Tr.] at 68-69), what alternative to alarm boxes the City proposes that deaf and

hearing-impaired persons use to report and confirm emergencies from the street (Ex. 6 [Kretz Tr.] at 13-14) or what alternative to alarm boxes the City proposes non-hearing impaired people use to confirm a request for emergency services from the street. (Ex. 6 [Kretz Tr.] at 21). Thus, the City drafted and provided testimony professing that the alarm boxes could be removed without jeopardizing public safety, without any regard to whether or how deaf or hearing-impaired persons might be impacted by that removal.

25. According to internal FDNY documents concerning the Fire Department's responses to City Council questions about the proposed removal of the alarm boxes, the Fire Department believed that the deaf do not need to rely upon alarm boxes and that removal of the boxes would not endanger deaf or hearing-impaired persons or public safety, because "the deaf or hearing impaired often will text or e-mail a friend or loved one that is not hearing impaired to ask that person to call 911." (Ex. 6 [Kretz Tr.] at 21-26, 36-37; Documents bearing Bates nos. NYC2119-21, copy annexed hereto as Ex. 10).

26. In or around May 27, 2010, the Fire Department asked the City Council to enact legislation permitting FDNY to remove, deactivate or otherwise render unusable any FDNY alarm box at the Mayor's discretion. (Document bearing Bates nos. NYC96-98, copy annexed hereto as Ex. 9). The City Council thereafter enacted the legislation authorizing the removal or deactivation of Fire Department alarm boxes.

1. The City's Motion Did Not Propose An Accessible Notification Alternative

27. On June 23, 2010, the City filed its Motion to Vacate or Modify the Injunction. Defendants' Motion does not identify the notification alternatives that the City is proposing for deaf and non-deaf persons if the existing street alarm box system is removed.

28. On September 14, 2011, Plaintiffs served interrogatories asking defendants to describe the notification alternatives to alarm boxes proposed in the Motion by which deaf and non-deaf persons would be able to report and confirm emergencies from the street. By Responses and Objections dated October 26, 2010 ("October 26, 2010 Responses"), defendants objected to that interrogatory (Interrogatory No. 4) but stated that, "notwithstanding these objections, documents containing information responsive to this interrogatory are being produced in connection with defendants' response to plaintiffs' Document Request 27." (Copies of the defendants' responses and objections to Interrogatory No. 4 are annexed hereto as Ex. 12). Those documents, some of which date back to the late 1990s and early 2000s, however, did not identify the notification alternatives that the City is proposing in its Motion.

29. In early February 2011, in a deposition, Commissioner Rush testified that the Fire Department proposes, that if alarm boxes are deactivated, deaf people use the following alternatives to report emergencies from the street: "text friends," use cellphones, use pay phones, "if they're available," and "talk to" or "signal" people on the street, because "usually people are out and about" when there's a fire. (Ex. 5 [Rush Tr.] at 19-20, 25-28). Commissioner Rush testified that a pay phone might not be "available" because "there may not be a [one] nearby" (Ex. 5 [Rush Tr.] at 19-20) and that the Fire Department had not conducted any studies about the availability of pay phones because "cell phone technology was available in greater levels" and response time is down. (Ex. 5 [Rush Tr.] at 20). Commissioner Rush testified however that he did not know whether pay phones or cellphones are usable by deaf people. (Ex. 5 [Rush Tr.] at 20-21).

30. In depositions in February and March 2011, none of the other Fire Department or Police Department witnesses, including Henry Dingman, FDNY's Deputy Director of Fire

Dispatch Operations, and Vincent Guerriera, the New York City Police Department's Communications Section's Commanding Officer, who are in charge of the emergency call-taking operations for the Fire and Police Departments, respectively, Ms. Kretz, who drafted the City Council testimony on the removal of alarm boxes, and Thomas Galvin, FDNY Chief of Training, knew what the notification alternative to alarm boxes the City is proposing in connection with the Motion for deaf persons. (Ex. 2 [Dingman Tr.] at 14; Ex. 4 [Guerriera Tr.] at 82-84; Ex. 6 [Kretz Tr.] at 13, 14, 21; Transcript of the Deposition of Thomas Galvin, FDNY Chief of Training, copies of relevant pages annexed hereto as Ex. 13, at 70). Inspector Guerriera further testified that the only technological reason which, to his understanding, would allow for the removal of call boxes without jeopardizing public safety is the proliferation of cell phones. (Ex. 4 [Guerriera Tr.] at 91-92).

31. In or around February 2011, defendants agreed to provide a written response to an altered version of Interrogatory No. 4 asking defendants to "identify" rather than "describe" the notification alternatives to alarm boxes for deaf persons and non-deaf persons proposed by defendants' motion. On April 14, 2011, defendants served Responses and Objections to Plaintiffs' Modified Interrogatories 4 and 5 ("April 14, 2011 Responses"), which objected to Modified Interrogatory No. 4 and offered a proposed stipulation of fact "if acceptable to plaintiffs" "in lieu of a response to" Modified Interrogatory No. 4. (See April 14, 2011 Responses, copy annexed hereto as Ex. 14, at 3). The April 14 Responses failed to provide any sworn answer to Modified Interrogatory No. 4, as required under Fed. R. Civ. P. 33. Thus, as late as April 14, the City refused to identify any notification alternative to alarm boxes for deaf and non-deaf people to report emergencies from the street. Upon plaintiffs' April 25, 2011 Motion to Compel, at a May

3, 2011 status conference, the Court ordered defendants to answer the modified interrogatory. On May 10, 2011, defendants served interrogatory responses ("May 10, 2011 Responses") stating that the notification alternative to alarm boxes for deaf and non-deaf persons are public pay telephones with the above-referenced tapping protocol. (Copies of the May 10, 2011 Responses are annexed hereto as Ex. 15).

32. That interrogatory response contradicted the above-referenced testimony of Commissioner Rush and other City officials who stated that the Fire Department believed that deaf people should and could report emergencies from the street via cell phones or friends "or pay phones, if available." FDNY did not conduct and has not conducted any studies or investigations of whether the deaf and hearing-impaired can use cell phones or pay phones to report and confirm emergencies from the street. (Ex. 2 [Dingman Tr.] at 15, 106; Ex. 5 [Rush Tr.] at 20-21; Ex. 6 [Kretz Tr.] at 89-91; Ex. 13 [Galvin Tr.] at 132). The May 10, 2011 Responses did not, as required, identify the alternatives to alarm boxes that will be available to the hearing if alarm boxes are removed.

C. PUBLIC PAY PHONES ARE NOT ACCESSIBLE BY THE DEAF

1. The Deaf Cannot Communicate Using Public Pay Phones

33. As explained by Plaintiffs' expert witness on deaf communications, Alfred Sonnenstrahl, deaf people are unable to communicate by pay phones and are unable to use public pay phones to report and confirm emergencies from the street. (Plaintiffs' Expert Report of Alfred Sonnenstrahl ["Sonnenstrahl Rep."], copy annexed hereto as Ex. 16, at 2; Transcript of the Deposition of Alfred Sonnenstrahl ["Sonnenstrahl Tr.], copy annexed hereto as Ex. 17, at 54, 57 and 59; the accompanying Declaration of Huberta Schroedel, Vice President of Plaintiff Civic

Association of the Deaf of New York City ["Schroedel Dec."] at ¶11; Transcript of the Deposition of Huberta Schroedel ["Schroedel Tr."], copy annexed hereto as Ex. 18, at 30, 46, 113). A deaf person cannot tell whether a public pay phone has a dial tone or whether a call placed through a public pay phone has been transmitted or received. (Ex. 16 [Sonnenstrahl Rep.]). As plaintiffs' expert on deaf communications described, for a deaf person, using a pay telephone is like "talking to a brick wall." (Ex. 16 [Sonnenstrahl Rep.]).

34. Indeed, Chief Galvin, agreed that profoundly deaf persons would "have difficulty using a pay phone" (Ex. 13 [Galvin Tr.] at 65) and said that he didn't know how a deaf or hearing impaired person would be able to communicate on a public pay phone the type of emergency services he needed. (Ex. 13 [Galvin Tr.] at 67). He further testified that a representative of the Community Emergency Planning Information Network, Neil McDevitt,told him that he wouldn't consider using a pay phone. (Ex. 13 [Galvin Tr.] at 122-123). None of the other City officials designated as having knowledge of the basis for the City's motion knew whether a deaf person could use a public pay phone or could tell whether a public pay phone was working or was aware of any studies done by the City to determine whether the deaf could use a public pay phone. (Ex. 2 [Dingman Tr.] at 14-15; Ex. 4 [Guerriera Tr.] at 79, 157; Ex. 5 [Rush Tr.] at 21; Transcript of the Deposition of Michael Vecchi, FDNY Associate Commissioner ["Vecchi Tr."], copies of relevant pages annexed hereto as Ex. 19, at 79.

35. Although NYPD has a tapping protocol for use on public pay phones, it has never tested it on a public pay phone. (Ex. 4 [Guerriera Tr.] at 98). The Fire Department's tapping protocol does not even currently apply to public pay phones and the Fire Department has never tested use of any tapping protocol on a public pay phone. (Ex. 2 [Dingman Tr.] at 14-15, 56). Thus,

the City has never tested whether 9-1-1 call-takers are able to recognize use of the tapping protocol on a pay phone or to differentiate between the different tapping protocols for fire and police services.

36. Moreover, the City has not conducted any analysis to determine whether working public pay phones are available in neighborhoods throughout the City. (Ex. 5 [Rush Tr.] at 19-20). Commissioner Rush, who testified that a public pay phone might "not be available" for a deaf person to use to report an emergency from the street, testified that, unlike in connection with the 1996 decision, the FDNY conducted no studies of the availability of pay phones because of the availability of cell phones and because FDNY's response time to fires has improved. (Ex. 5 [Rush Tr.] at 19-20).

2. Unavailability of Payphones

37. None of the pay phones on New York City streets are owned or maintained by New York City. (Transcript of the Deposition of Stanley Shor, Assistant Commissioner for Franchise Administration of New York City's Department of Information Technology and Telecommunications ["Shor Tr."], copies of relevant pages annexed hereto as Ex. 20, at 29-30). Since in or around 1999, the City has used a franchise system in which the City enters into franchise agreements with private companies to permit those companies to install and operate public pay phones on New York City streets. (Ex. 20 [Shor Tr.] at 28-29; Document bearing Bates nos. NYC2502-2584, copy annexed hereto as Ex. 21). The New York City Department of Information Technology and Telecommunications ("DoITT") manages those franchise agreements. (Ex. 20 [Shor Tr.] at 20).

38. The franchise agreements require the franchisee to own/install a minimum of 25

pay phones in New York City. (Ex. 20 [Shor Tr.] at 34-35). Beyond that number, the City cannot require the franchisees to install or keep any number of public pay phones on New York City streets or in particular locations. (Ex. 20 [Shor Tr.] at 34-35). Franchisees are not precluded from deactivating and removing public pay telephones. (Ex. 20 [Shor Tr.] at 162-63). Whether a franchisee decides to install or remove a public pay telephone depends on whether installing and maintaining the phone is profitable for the company. (Ex. 20 [Shor Tr.] at 157). Where a franchisee decides to remove its public pay phones the City is not required to replace those phones or that franchisee. (Ex. 20 [Shor Tr.] at 162).

39. The franchisees determine where to install the public pay telephones. (Ex. 20 [Shor Tr.] at 66). Where the franchisee decides to install a public pay phone depends in part upon whether the franchisees deems that location to be profitable. (Ex. 20 [Shor Tr.] at 157). The City does not require the franchisees to install public pay phones in any particular geographical area in particular numbers, such as relative to density population or according to any geographical pattern, such as every two blocks. (Ex. 20 [Shor Tr.] at 65). Thus, some areas of the City have lower densities of public phones than others. (Ex. 20 [Shor Tr.] at 69).

40. As has been widely reported, the number of public pay phones on New York City streets has declined precipitously. (See, e.g., Exs. 21A-23 hereto). In 1999, there were approximately 100 franchisees owning and operating public pay telephones on New York City streets (Ex. 20 [Shor Tr.] at 27). There are currently 15 franchisees. (Ex. 20 [Shor Tr.] at 27). As of 2001, there were approximately 30,000 public pay telephones covered by franchise agreements on the streets of New York City. In less than a decade, the number of public pay phones has decreased by over 50% to approximately 14,500 public pay phones (including operable and

inoperable phones) covered by franchise agreements (Ex. 20 [Shor Tr.] at 42, 47). This number is now less than the 15,077 street alarm boxes.

41. It is also widely reported that even if it is possible to locate a public pay phone, it is more likely than not to be inoperable. (See, e.g., Exs. 21A-23). Among the reasons that a phone can be inoperable are no dial tone. (Ex. 20 [Shor Tr.] at 83-84). For instance, some franchisees provide dial tones to the phones they own and others obtain dial tones from third parties (Ex. 20 [Shor Tr.] at 81). A franchisee that obtains dial tones for its public pay phones from a third party could lose those dial tones if the franchisee falls behind its financial obligations to the dial-tone provider (Ex. 20 [Shor Tr.] at 82-83). A public pay telephone that has no dial tone cannot be used to call 9-1-1. (Ex. 4 [Guerreira Tr.] at 78).

42. Although the franchise agreements require the franchisees to maintain the public pay phones they own in working order, the City has only three public pay phone inspectors and does not inspect each phone. [Ex. 20 [Shor Tr.] at 17-18, 58-59]. For instance, since 2001, the number of phones has decreased from 33820 to 14,500 but was not lower than 14,500. (Ex. 20 [Shor Tr.] at 42, 47, 122-123). In FY 2007, DoITT conducted only 12,460 inspections. (Document bearing Bates nos. NYC7669-7674, copy annexed hereto as Ex. 24). In FY 2008, DoITT conducted 10,069 inspections of public pay payphones. (Ex. 24). In FY 2009, DoITT conducted 8,643 inspections of public pay phones.(Ex. 24). In FY 2010, DoITT conducted 8,521 inspections. (Ex. 24).

43. Moreover, although the franchise agreements require franchisees to conduct daily electronic testing of the public pay phones they own to determine if the phones are working, the only way for the City to know whether the franchisee has complied with that requirement is to

audit the franchisee's records. (Ex. 20 [Shor Tr.] at 78-80). As a result, the City relies on a self-enforcement scheme by which the franchisees are penalized if the City later finds out that they haven't complied with their contractual obligations. (Ex. 20 [Shor Tr.] at 78).

44. As a result, the City does not know how many public pay phones are operable or not. (Ex. 20 [Shor Tr.] at 52, 77). Of the phones inspected in FY 2007, 17% were found inoperable. (Ex. 24). Of the phones inspected in FY 2008, 17% of the phones were deemed inoperable. (Ex. 24). Of the phones inspected in FY 2009, 25% were deemed inoperable. (Ex. 24). Of the phones inspected in FY 2010, 19% were deemed inoperable. (Ex. 20 [Shor Tr.] at 120-121; Ex. 24).

45. Where a public pay telephone is found inoperable, the franchisee is required to tag the phone as out of order, but there are franchisees who have violated that requirement. (Ex. 20 [Shor Tr.] at 157-58). The City does not tag public pay telephones as inoperable. (Ex. 20 [Shor Tr.] at 159). The City does not maintain any statistics regarding the number of calls made to 911 using public pay phones. (Ex. 20 [Shor Tr.] at 143).

D. THE STREET ALARM BOX SYSTEM HAS A VITAL PUBLIC SAFETY FUNCTION

46. The statistics the City presents in its motion regarding the use of the alarm box are severely flawed and misleading. (Rosenzweig Dec. at ¶ 45-46). Among other things, the City did not review and has not included in its statistics any calls made via ERS boxes to the Police Department using the blue button police notification button, and the Police Department does not maintain records regarding those statistics. (Rosenzweig Dec. at ¶ 45-46; Ex. 4 [Guerriera Tr.] at 152-53; Ex. 19 [Vecchi Tr.] at 45-46). Rather the record unequivocally shows that, since the permanent injunction was issued in this action, the City's street alarm box system has been used to

summon help in hundreds of thousands of emergencies, including structural fires, non-structural fires, medical emergencies, vehicular and pedestrian accidents, terror attacks, and other crimes. While the City does not currently maintain statistics (as it did when the parties were last before the Court) concerning the number of initial calls and subsequent calls made from street alarm boxes, the number of multiple alarm fires reported from street alarm boxes, and other indicia of the street alarm box system's utility, the available data demonstrates that the system continues to perform a vital public safety function.

47. The chart attached to the Rozenzweig Dec. as Exhibit G, based upon data set forth in 'Community Board Activity by Alarm Source" reports (provided by the City in discovery) shows that, between 1997 and 2009, 276,000 incidents of fire and medical emergencies were reported to the Fire Department from electro-mechanical and ERS alarm boxes. (Rosenzweig Dec. at ¶ 37). This total includes 228,063 medical emergencies, 25,984 non-structural fires, 17,580 structural fires, and 4,822 non-medical emergencies. (Id.) As stated above, this total does not include any of the incidents reported to the Police Department from activations of the blue button on street alarm boxes during the same period. (Plaintiffs' counsel requested data from the City concerning incidents reported to the Police Department from ERS boxes; none was provided). (Id.)

48. The large number of medical emergencies reported from the street alarm box system during this period (228,063) was attributable in part to the Fire Department's assuming responsibility, in or around 1997, for the City's Emergency Medical Service (EMS) and its ambulance dispatch operations – a responsibility that the Fire Department continues to exercise. (See, e.g., Rosenzweig Dec. at ¶ 38; Rosenzweig Ex. F [Mayor's Office for People with Disabilities video on alarm box use by deaf and hearing impaired persons], referenced in paragraph 20, in which the narrator instructs

callers to push "the red button" [i.e., the Fire Department] for medical assistance).

49. The chart attached to the Rosenzweig Declaration as Exhibit G shows a decline in the number of incidents reported to the Fire Department from the street alarm box system between 1997 and 2009. (Rosenzweig Dec. at ¶ 39). Several factors, wholly unrelated to the utility of the street alarm box system, contributed to this decline. First, the number of structural and non-structural fires in the City have dropped significantly since 1997, as a result of increased fire safety awareness, a decrease in arson, and fire-proof construction of new building stock. (See Fire Department excerpts from Mayor's Management Reports for 2002-2010, attached to the Rosenzweig Declaration as Exhibit H, referencing a 28 percent decrease in structural and non-structural fires between 1998 and 2010 (from 60,945 to 43,784). (Rosenzweig Dec. at ¶ 40).

50. Second, since the permanent injunction was issued in this action, the Fire Department and the Police Department have conducted an active campaign to urge the public to "call 911" (i.e., by telephone) for emergency assistance, posting that message on all fire equipment, police vehicles and other department facilities. (See also Id. at ¶ 41; Ex. 13 [Galvin Tr.] at 45).

51. Third, since the permanent injunction was issued in this action, the City has taken virtually no steps to advise the public that the street alarm box system has been functioning as an effective means of reporting emergencies and receiving assistance. (On those occasions when the City's 911 system and/or mobile telephone network has failed, such as after the September 11, 2001 attack on the World Trade Center or during the 2003 Northeast Blackouts, however, the City's Office of Emergency Management has made public announcements that the street alarm boxes were still working and should be used to report emergencies). (Rosenzweig Dec. at ¶ 42).

52. Fourth, since approximately 2003, the City's efforts to maintain the street alarm box

system have flagged, resulting in a dramatic increase in the percentage of street alarm boxes out of service from 1.9 percent (i.e., 317) in 2003 to 10.1% (i.e., 1,716) in 2008 and 9.4 percent (i.e., 1,591) in 2010. (See Fire Department document, entitled "Department-wide Indicators, First 6 Months Fiscal Year 2003 through First 6 Months Fiscal Year 2010," bearing Bates No. NYC 2138, attached to the Rosenzweig Declaration as Exhibit I). This decrease in maintenance of the street alarm box system not only has rendered significant numbers of alarm boxes unavailable, but also has left the public (especially in areas, like Brooklyn, where there have been a disproportionately large number of out-of-service boxes with the false impression that the street alarm box system is no longer functioning. (Rosenzweig Dec. at ¶ 43).

53. In contending that the permanent injunction in this action should be modified or vacated, the City relies primarily on two statistical arguments: (1) that the percentage of emergency calls made from street alarm boxes is much smaller than the percentage of emergency calls made from "telephone sources," and (2) that a very high percentage of calls made from street alarm boxes are malicious false alarms. (See e.g., Declaration of Michael Vecchi, dated June 22, 2010 at paragraphs 5-10, 18 – 20). Both arguments are incorrect.

54. The City's comparison of emergency calls made from street alarm boxes and from "telephone sources" is fatally flawed because the City (a) fails to count the number of emergency calls made from street alarm boxes to the Police Department via the ERS blue button (see Ex. 19 [Vecchi Tr.]] at 45-46; Ex. 4 [Guerriera Tr.] at 152-53) and (b) fails to disclose which portion of the calls from "telephone sources" were made from the street. (Ex. 4 [Guerriera Tr.] at 10). (See Rosenzweig Dec. at ¶ 44-45). Thus, the City has provided no basis on which to validly compare the percentage of emergency calls made from the street via street alarm boxes with the number of

emergency calls made from the street via telephones (whether public, private, cellular, or otherwise). Such a comparison necessarily requires accurate data as to all calls made from street alarm boxes, whether for fire or police assistance. And, as the street alarm boxes are used only to report emergencies from the street, their relative importance can only be determined by comparison with other reporting devices used from the street. (Id.)

55. Even if a valid comparison could be made between the incidence of emergency calls from street alarm boxes and emergency telephone calls made from the street, it logically would be expected that the percentage of such calls made from street alarm boxes would be higher in 1997 than in 2011, given the paucity of cell phone users in 1997 versus the prevalence of cell phone users now. Inasmuch as deaf and hearing impaired persons cannot use cell phones to report emergencies from the street (see Rosenzweig Dec. at ¶ 46; Schroedel Dec., at ¶ 14-15; Ex. 18 [Schroedel Tr.] at 29, 46); Schroedel Declaration at ¶ 11; Ex. 16 [Sonnenstrahl Rep.] at 2, Ex. 17 [Sonnenstrahl Tr.] at 35, 57, 59, 62) however, the increased prevalence of cell phones provides no support for the City's claim that the street alarm boxes can be removed without definitive consequences for the deaf and hearing impaired.

56. As for malicious false alarms, the City concedes that the majority of malicious false alarms called into the Fire Department in 2009 came from telephones or other non-street alarm box sources (14,381 of 25,377, or 56.7 percent). See Declaration of Michael Vecchi at Exhibit D ["FDNY Incidents by Alarm Box and Other Sources for CY 2009"]). Further, the City's calculation of the percentage of alarm box calls that were malicious false alarms in 2009 is inherently unreliable, as the City failed to consider any data concerning emergency calls to the Police Department from the blue buttons on ERS boxes. (Rosenzweig Dec. at ¶47; see Ex. 19 [Vecchi Tr.] at 45-46; Ex. 4

[Guerriera Tr.] at 152-153).

57. The City claims that 43.3 percent of malicious false alarms made to the Fire Department in 2009 were from street alarm boxes, and that 85 percent of calls made to the Fire Department from street alarm boxes in 2009 were malicious false alarms. (See Vecchi Declaration at Exhibit D). Both statistics, however, are inaccurate and misleading because the City counts as malicious false alarms "ERS No Contact" calls – for which the Fire Department elects, for purposes of public safety, to dispatch a minimum of one engine to an alarm box from which a silent call is received between 11 p.m. and 8 a.m. (Rosenzweig Dec. at ¶ 48). Such "ERS No Contact" events represent fully 54 percent of the malicious false alarms claimed by the City to have been made to the Fire Department from street alarm boxes in 2009 (i.e., 5,984 of 10,996). (Id.) If the City were to accurately deem dispatches made pursuant to that protocol as public policy choices (not malicious false alarms), then the percentage of malicious false alarms in 2009 made to the Fire Department from street alarm boxes would decrease to approximately 26 percent, and the percentage of 2009 street alarm box calls to the Fire Department deemed to be malicious false alarms would decrease to approximately 45 percent. (Id).

58. In sum, the City's selective and misleading use of statistical data to impugn the efficacy of the street alarm box system is flawed, as that system continues to provide a vital means by which "a significant number of rescues" are effected (915 F. Supp. at 635), and the only means by which deaf and hearing impaired persons can report emergencies from the City's streets (915 F. Supp. at 635-36). (Id.)

E. The City Has Not Disseminated The Tapping Protocol to the Deaf.

59. On the face of ERS boxes are instructions that state the caller must "speak" to

obtain assistance. (Ex. 2 [Dingman Tr.] at 31). There are no instructions on ERS boxes stating how deaf or hearing-impaired persons can activate the box using a tapping protocol. (Ex. 2 [Dingman Tr.] at 32-33). In his expert report, Sonnenstrahl stated that the absence of instructions for the deaf, and the instructions affirmatively telling the caller to "speak" actually discourages deaf or hard of hearing people from using the boxes in an emergency. (Ex. 16 [Sonnenstrahl Rep.] at 3).

60. In his expert report, plaintiff's expert, Mr. Sonnenstrahl, enumerated outreach efforts that would be required to effectively conduct outreach on the tapping protocol to the deaf and hearing-impaired community. (Ex. 16). The City has not met any of those standards.

61. According to the City's Motion, the only effort made by the City to notify the deaf community about the tapping protocol is its putting an instructional video about the tapping protocol on the website of the Mayor's Office for People with Disabilities. There was no affirmative dissemination of the tapping protocol to the deaf or hearing impaired communities until just before or after the time the City filed its Motion. (Ex. 13 [Galvin Tr.] at 18-19, 45-47, 51-53 and 112-113; Ex. 4 [Guerriera Tr.] at 129-30; Ex. 2 [Dingman Tr.] at 37-40).

62. Chief Galvin, who was designated by the City as the FDNY witness with knowledge of the City's alleged efforts to conduct outreach on the tapping protocol to the deaf and hearing-impaired, has been responsible since in or around 2005 for fire safety education that the Fire Department provides to the public. (Ex. 13 [Galvin Tr.] at 8). Before June 2010, when the City filed its Motion, Chief Galvin was not aware of the tapping protocol. (Ex. 13 [Galvin Tr.] at 110).

63. Before fall 2010, the Fire Safety Education department conducted no outreach to the deaf or hearing impaired community regarding the tapping protocol. (Ex. 13 [Galvin Tr.] at 18-19, 31, 46-47, 112-113). Before fall 2010, the only deaf fire safety education conducted by the

Department was at two to three children's schools as part of a basic fire safety program targeting children, which did not include information about the tapping protocol. (Ex. 13 [Galvin Tr.] at 29-30, 36, 80).

64. In or around May or June 2010, Elena Ferrara, Esq., an in-house lawyer for the Fire Department explained to Chief Galvin that there was "some litigation involving the alarm boxes and the tapping protocol" and asked whether the Fire Department had "dealt with anybody in the hard-of-hearing community" and for any records of outreach-related events. (Ex. 13 [Galvin Tr.] at 21-22). Before that conversation, Chief Galvin had never heard of the tapping protocol. (Ex. 13 [Galvin Tr.] at 86). In that conversation, Ms. Ferrara suggested to Chief Galvin that the tapping protocol be included in fire safety education programs. (Ex. 13 [Galvin Tr.] at 86). As a result, in an e-mail dated June 17, 2010, from Lieutenant Anthony Mancuso to Chief Galvin and John Errico, Executive Officer of the Fire Safety Education Unit, Chief Galvin stated, that they "will have to add tapping signals for the alarm boxes as part of the curriculum...." (Document bearing Bates no. NYC2096, copy annexed hereto as Ex. 25; Ex. 13 [Galvin Tr.] at 84-85). It is thus clear that at the time the City filed its motion to vacate or modify the injunction, it had not conducted any outreach or dissemination efforts about the tapping protocol.

65. Although starting in the fall of 2010, the Fire Safety Education department included information on the tapping protocol in presentations that it made to children in deaf schools, it did not do outreach to advocacy associations about the tapping protocol until 2011 (Ex. 13 [Galvin Tr.] at 105-106) and could only name one organization, Community Emergency Preparedness Information Network, with which it had "discussed" the tapping protocol. (Ex. 13 [Galvin Tr.] at 52-53). Although the Fire Safety Education Unit did a presentation in February 2011 to the

Manhattan Chapter of the Hearing Loss Association of America, there was no discussion in that presentation of the tapping protocol. (Ex. 13 [Galvin Tr.] at 58-60-61; Hearing Loss Association of America, Manhattan Chapter, "News & Views," March 2011), copy annexed hereto as Ex. 27). Moreover, although Chief Galvin testified in response to questions from the City's attorney that the fire safety education department covers the tapping protocol on alarm boxes and public pay phones as set forth in FDNY Dispatcher's Director 97-18 (Ex. 13 [Galvin Tr.] at 141-143), Chief Dingman testified that Dispatcher's Director 97-18 does not apply to public pay phones and that FDNY has no tapping protocol for public pay phones (Ex. 2 [Dingman Tr.] at 14-15, 56, 106).

66. Moreover, although the City publishes an "Official Accessibility Guide," it does not contain any mention of the tapping protocol. (Transcript of the Deposition of Matthew Sapolin, Commissioner of the Mayor's Office for People with Disabilities ["Sapolin Tr."], copies of relevant pages of annexed hereto as Ex. 28, at 35-37).

67. Commissioner Sapolin testified in a deposition that he had no knowledge of any City agency having informed the deaf of the tapping protocol (Ex. 28 [Sapolin Tr.] at Tr. 15). Although he testified that he mentioned the tapping protocol in meetings with deaf organizations, he was unable to identify any such meetings until in or around just before or at the time the City filed its Motion. (Ex. 28 [Sapolin Tr.] at 19-20, 36-37).

F. THE CITY HAS FAILED TO CONDUCT TESTS OF THE TAPPING PROTOCOL ON ALARM BOXES

68. The NYPD has not conducted any tests of the tapping protocol on calls from the blue button police alarm boxes to the NYPD E-911 system. (Ex. 4 [Guerriera Tr.] at 98). As the Court discussed in its 1997 decision, 970 F.Supp. 352 ("CAD II"), FDNY tests conducted in September 1996 of the tapping protocol in "pilot areas" then under review, and one-button boxes

the City created after one injunction was issued, resulted in a failure rate of 82%. CAD II, 970 F.Supp. at 357. Since CAD II, the Fire Department has conducted only two tests of the tapping protocol on calls from the red button fire side of the alarm boxes, none in the last seven years.

69. On March 16, 2000, the Fire Department tested the tapping protocol on two different alarm boxes, one in Brooklyn and one in Queens, between 8:00 a.m. and 11:00 p.m. (Ex. 2 [Dingman Tr.] at 51-54, 62, 71-72; Documents bearing Bates nos. NYC7616-7617 and 7612-13, copies annexed as Exs. 29 and 30, respectively). Different call-takers answered each of the activations of the Queens alarm box, and neither call-taker recognized the tapping protocol. (Ex. 2 [Dingman Tr.] at 53). Both call-takers canceled the call by designating it "closed due to fall back," and no units were assigned to respond to the call. (Ex. 2 [Dingman Tr.] at 53-54, 65-66, 72, Ex. 30). The call-taker responding to the first Brooklyn activation did not recognize the tapping protocol. (Ex. 2 [Dingman Tr.] at 72-74; Ex. 29). The call-taker responding to the second Queens activation did not recognize the call as a "deaf/hearing-impaired call" but designated the call as "unknown conditions at box" and assigned units to the box. (Ex. 2 [Dingman Tr.] at53, 62-5, 72-73; Ex. 29). Thus, none of the four test tapping calls made in 2000 were properly recognized by call-takers as such – a 100% failure rate – and only one of those tests resulted in any assignment of fire units.

70. In 2004, Mr. Dingman tested the tapping protocol on an ERS box in the Bronx. (Ex. 2 [Dingman Tr.] at 55). Mr. Dingman testified that he thought that the call-taker reacted properly to the 2004 test, but the Fire Department could not locate any documents to corroborate that. (Ex. 2 [Dingman Tr.] at 55-56). Thus, of the five activations, only one was (Mr. Dingman believes) properly designated as a deaf/hearing-impaired call - a mere 25% success rate. The City did not

conduct any tests of the tapping protocol between March 16, 2000 and 2004 or from 2004 to the present.

G. THE CITY'S PURPORTED BUDGETARY STATISTICS ARE MISLEADING AND FLAWED

71. The City attempts to assert that the cost of maintaining the alarm box system jeopardizes public safety by requiring the City to close fire companies, and layoff firefighters is so burdensome that it forego other resources. That is not the case.

72. The cost of maintaining the alarm boxes is less than 1% of the FDNY's budget. (Ex. 5 [Rush Tr.] at 41-42). The City omitted this fact from its motion. Commissioner Rush states in his declaration and Commissioner Cassano testified before the City Council that, effective July 1, 2010, 20 fire companies were scheduled to close, with a loss of 505 fire fighter positions by attrition. (Ex. 8; Rush Declaration in Support of City's Motion at ¶ 8). Commissioner Rush testified in deposition however that funding was restored, none of the fire companies were closed and none of those firefighting positions lost. (Ex. 5 [Rush Tr.] at 28, 34-35, 107.) He further noted that maintaining the boxes would not result in layoffs of any FDNY employees. (Ex. 5 [Rush Tr.] at 37). Thus, the potential closing of fire engine companies had nothing to do with the alarm boxes.

73. In addition, at paragraph 9 of his Declaration, Commissioner Rush asserts that the projected ten-year cost of the street alarm box is greater than the annual cost of five fire companies. That assertion is completely flawed. Commissioner Rush's Declaration asserts that the average annualized cost of the street alarm box system consists of $6.3 million in annual costs plus $2.5 million in annualized capital expenses. Rush Declaration at ¶ 9. Commissioner Rush states in paragraphs 3 through 5 of his Declaration that the $6.3 million in costs consists of (a) the

three-year cumulative costs in the amount of $2.9 million for the salaries of 19 Communications Electricians and supervisory staff who maintain the alarm boxes and (b) $3.4 million in the costs of a service contract that the City maintains with an outside vendor as well as supplies, equipment and cable for maintaining the alarm box network. (Rush Dec. at ¶ 3; Rush 75-76, 81,85, 89-92.

74. Commissioner Rush's Declaration at paragraph 8 states that the average annualized cost of a fire company is $1.7 million. He testified in deposition that the $1.7 million in fire company costs referenced in paragraph 8 of his declaration however represents the average annualized cost of the salaries of a four-firefighter company. (Ex. 5 [Rush Tr.] at 107-10). The $1.7 million in fire company costs thus does not include any equipment, service, supply or capital costs.

75. Thus, Commissioner Rush's purported calculation of the costs attributable to the alarm box system includes salaries, equipment, supplies, service contracts, and capital expenses, but his calculation of the annualized costs attributable to a fire company consists only of salaries. Consequently, Commissioner. Rush's comparison of the alarm box to the salary costs of a fire company in paragraph 9 of his declaration is statistically flawed.

H. THE ANI – ALI LOCATION FINDER IS NOT RELIABLE

76. According to Vincent Guerriera, E-911 became operational and effective in 1995 – i.e., before CAD I (Ex. 4 [Guerriera Tr.] at 31-32).

77. ANI-ALI refers to the telephone number and corresponding location information that is transmitted from a database to the NYPD when NYPD receives a call to 9-1-1. (Ex. 4 [Guerriera Tr.] at 15-16). More specifically, when a call comes into 911, the NYPD's computer SPRINT system electronically transmits the telephone number to one of several databases containing the ANI-ALI information, and the ANI-ALI information is sent back to the Police

Department and is displayed on a dispatcher's screen. (Ex. 4 [Guerriera Tr.] at 70-71). The databases containing the ANI-ALI information are owned and maintained by private telecommunications companies such as Verizon and Intrado. (Ex. 4 [Guerriera Tr.] at 15, 17). Each database contains ANI-ALI information for the telephone numbers owned by the database owner and may contain ANI-ALI information for telephone numbers owned by other telephone service providers. Thus, the data owned by Verizon may contain ANI-ALI information for telephone numbers owned by AT&T. (Ex. 4 [Guerriera Tr.] at 17, 20).

78. Inspector Guerriera assumed but could not confirm whether ANI-ALI information was available for public pay phones. (Ex. 4 [Guerriera Tr.] at 16). Moreover, Inspector Guerriera explicitly testified in deposition that the Police Department cannot attest to the accuracy of the information in the ANI-ALI databases (Ex. 4 [Guerriera Tr.] at 19, 39). All ANI-ALI information contained in the databases is provided by the telecommunications service providers. (Ex. 4 [Guerriera Tr.] at 17). The NYPD does not provide the ANI-ALI in those databases and does not maintain or otherwise test the accuracy of any of that information. (Ex. 4 [Guerriera Tr.] at 19, 25). Although the database owners have conducted tests of accuracy of information in their database, the NYPD is not apprised of and maintains no information on the results of those tests. (Ex 4 [Guerriera Tr.] at 23-25). Where there is a discrepancy between the ANI-ALI information and the address provided by a caller, the emergency response is sent to the address provided by the caller. (Ex. 4 [Guerriera Tr.] at 44-45).

79. Although public telephones in New York City are part of the E-911 system, which is supposed to identify the location of an emergency telephone call, that system, according to the experience of David Rosenzweig and other SFAD's and Fire Alarm Dispatchers ("FADs"), has been

less than reliable. (Rosenzweig Dec. at ¶ 34). Sometimes the E-911 system identifies a telephone number but not the telephone's street location. (Id.) Sometimes that system identifies a street location different from the actual location of the telephone from which a call is received. (Id.) Identifying the accurate location of a public telephone can be complicated by the fact that such telephones are owned by private vendors, not the City, so the City and its E-911 provider, Verizon, must rely upon the private vendors to provide correct, updated location data for all of their equipment. (Id.)

80. Although a call-taker who learns of a discrepancy, mistake or omission in ANI-ALI information, is supposed to prepare a form called a "Discrepancy Report," not all inaccuracies and omissions in ANI-ALI information are documented, whether in Discrepancy Reports or otherwise. NYPD does not monitor whether call-takers complete Discrepancy Reports for inaccuracies or omissions in ANI-ALI information. Mr. Guerriera also testified that call-takers are instructed to notify a supervisor of any anomalies in the ANI ALI system and that NYPD does not maintain written records of all such anomalies, including with respect to errors or omission in location information. (Ex. 4 [Guerriera Tr.] at 73-77). For instance, where the ANI-ALI system does not provide location information, call-takers can orally inform and have orally informed supervisors without making any written record of the omission. (Ex. 4 [Guerriera Tr.] at 70-75). The NYPD orally informs Verizon about the omission but does not maintain any written record of that notification. (Ex. 4 [Guerriera Tr.] at 70-73). Thus, the number of Discrepancy Reports does not reflect the number of inaccuracies in ANI-ALI information sent to the NYPD in response to a call to 9-1-1.

81. Inspector Guerriera's declaration states that the ANI-ALI database has a virtually

100% accuracy rate. That is not correct, and Inspector Guerriera testified in deposition that that statement in his declaration was not in fact a statement regarding the accuracy of the entire ANI-ALI database. (Ex. 4 [Guerriera Tr.] 38-39). Inspector Guerriera further testified in deposition that that statement was based upon the number of Discrepancy Reports provided by the NYPD and that he was unable to recall when NYPD started preparing Discrepancy Reports.

82. The City does not know and cannot determine the number of calls to 911 from the street. (Ex. 4 [Guerriera Tr.] at 8-10). The City cannot determine whether calls to 911 from cellular phones are made from street or from inside a house, building or other structure. (Ex. 4 [Guerriera Tr.] at 9-10). Although calls to 911 are categorized according to different classes of service, such as "residential" and "wireless," Mr. Guerriera did not know whether calls to 911 from public pay phones are categorized as such. (Ex. 4 [Guerriera Tr.] 9, 25). Thus, he did not know whether it is possible to determine the number of calls from public pay phones to 911. He did not know whether the NYPD has ever attempted to determine the number of calls made to 911 from public pay phones (Ex. 4 [Guerriera Tr.] at 9).

WHEREFORE, for the foregoing reasons and for the reasons set forth in the other papers filed in opposition to defendant's motion to modify or vacate the permanent injunction, I respectfully request that the Court deny the relief requested in defendants' motion in its entirety.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
May 27, 2011

ROBERT B. STULBERG