CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS
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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. TRACY MCKNIGHT,

Complaint Nos. M-P-D-20-86997 (NYCCHR);
M-P-D-17-26311 (McKnight)

Petitioner,

-against-

OATH Index No. 905/20

H & M HENNES & MAURITZ L.P.,
BJW REALTY LLC, BJW ASSOCIATES
LLC, BJW MANAGING LLC,
WINTER MANAGEMENT GROUP,
& BENJAMIN J. WINTER,

Respondents.
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DECISION AND ORDER

The Law Enforcement Bureau of the New York City Commission on Human Rights ("the Bureau") alleges that H & M Hennes & Mauritz L.P. ("H & M") and BJW Realty LLC, BJW Associates LLC, BJW Managing LLC, Winter Management Group, & Benjamin J. Winter ("Mr. Winter") (collectively, "Winter Entities" or "Winter Respondents") violated the New York City Human Rights Law, Title 8, Chapter 1 of the New York City Administrative Code ("NYCHRL" or "Law"). The Bureau alleges that H &M denied equal terms, conditions, and privileges of a public accommodation to Complainant Tracy McKnight ("Complainant" or "Ms. McKnight") and other individuals with a disability, in violation of Section 8-107(4) of the NYCHRL (ALJ Ex. 1); Winter Entities, along with H & M (together, "Respondents"), denied equal terms, conditions, and privileges of a public accommodation to patrons on the basis of disability in violation of Section 8-107(4) of the NYCHRL; and that Respondents failed to provide persons with disabilities with a reasonable accommodation in violation of Section 8-107(15) of the NYCHRL. (*Id.*) Trial was held before the Honorable Ingrid M. Addison, Administrative Law Judge of the New York City Office of Administrative Trials and Hearings ("OATH") on July 14, 15, 16, September 22, and October 8, 2021.

Presently before the Office of the Chair of the New York City Commission on Human Rights ("the Commission") are the March 2022 findings and recommendations, *Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. & BJW Realty LLC et. al*, Report and Recommendation, 2022 WL 2821672 (March 31, 2022) ("Report and Recommendation" or "R & R")[1] of Judge Addison for Decision and Order. For the reasons set

[1] The R & R is available at *https://archive.citylaw.org/wp-content/uploads/sites/17/oath/20_cases/20-905.pdf* (last accessed April 22, 2025.)

forth herein, the Commission adopts the R & R's findings of liability in full. To redress these violations, the Winter Entities are ordered to pay a $125,000 civil penalty and H & M is ordered to pay a $75,000 civil penalty. In addition, Respondents are ordered to provide full and equal enjoyment, on equal terms and conditions, to individuals with disabilities who use wheelchairs or have similar mobility needs, by making the 111 Fifth Avenue store entrance on the corner of 18th Street and Fifth Avenue fully and independently accessible via ramp as detailed in the Conclusion, Section VI of this Decision and Order. Respondents are also ordered to ensure all of their staff are aware of the NYCHRL's protections for persons with disabilities, including the right of patrons to request and be provided with reasonable accommodations, and to create and distribute to all current and future employees a written anti-discrimination policy that includes how to identify and respond to reasonable accommodation requests. Finally, Respondents are ordered to provide training on the NYCHRL to individually named Respondents, supervisors, and managers at the 111 Fifth Avenue location, and to post at 111 Fifth Avenue, New York, New York 10003 the Commission's "Equal Access" poster in building entrances to be visible to the public.

I. BACKGROUND

This matter was initiated by Ms. McKnight's reports of discrimination to the Commission, which led the Bureau to serve an initial verified complaint on Respondent H & M in January of 2018. After conducting an investigation, the Bureau issued a determination on January 25, 2019 pursuant to Section 8-116 of the NYCHRL, finding probable cause that Ms. McKnight, a patron with a disability, was denied full and equal enjoyment of the H & M store at 111 Fifth Avenue on equal terms and conditions, as well as a reasonable accommodation, and referred this matter to OATH on October 31, 2019. (ALJ Exs. 3, 6, 7.) The Bureau subsequently filed its Second Amended Complaint ("Complaint"), naming the Winter Entities as parties to the case and alleging the same violations of the NYCHRL as those against Respondent H & M.[2] Respondents submitted verified answers.

In answer to the Complaint, H & M generally denied the allegations of disability discrimination and also included as an affirmative defense that H & M consented to the Commission's proposal to install a ramp at the entrance of Fifth Avenue and 18th Street – which the Bureau sought in 2018. (ALJ Ex. 5, Pet. Ex. 39-E.) In their answer, the Winter Entities denied they violated the law and raised as affirmative defenses that, *inter alia*, they acted in good faith; they are legally entitled to have multiple main entrances and to choose which is the most suitable entrance to be made accessible; that construction of an exterior ramp at the corner location would detract from the historic nature of the building and would constitute an undue hardship;[3] and that if the Commission was asserting that all main entrances to a building must be

[2] The Bureau's initial complaint named H & M Group Inc. as respondent. (ALJ Ex. 2.) In a verified amended complaint dated March 20, 2018, the Bureau replaced "H & M Group Inc." with "H & M Hennes & Mauritz L.P." as respondent. (ALJ Ex. 2). In its Second Amended Verified Complaint, dated July 7, 2020, it added the Winter Entities. (ALJ Ex. 3). The Second Amended Verified Complaint is the final complaint and supersedes the previous complaints. *See*, *e.g.*, *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977) ("It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect.").

[3] Although the Winter Entities listed "undue hardship" as an affirmative defense in their answer, the Winter Entities neither submitted evidence of undue hardship at trial nor claimed undue hardship in their closing brief or comments on the Report and Recommendation. (*See* Winter Respondents' Post-Trial Brief and Brief in Further Support of

made accessible absent undue hardship or architectural infeasibility, establishing a rule in violation of the City Administrative Procedure Act (CAPA). (ALJ Ex. 5-1.)

Trial was held on July 14, 15, 16, September 22, and October 8, 2021. The Bureau's witnesses were Complainant Ms. McKnight and Sharon Lobo, a registered architect who served as an expert witness. H & M's witnesses were James Hennessy, a construction project manager, and Hampus Hubinette, the Regional Head of Expansion in the Americas. The Winter Entities' three witnesses were Mr. Winter, the managing member and agent of BJW Managing LLC and Winter Management Group;[4] Philip Habib, civil engineer and principal at the firm Philip Habib and Associates; and Douglas Anderson, a certified accessibility specialist and partner at LCM Architects, who served as an expert witness. At the trial, the witnesses gave testimony and documentary and recorded evidence were entered into the record. On December 13, 2021, all parties submitted post-trial briefing. The record was re-opened twice in January 2022 – first for the Winter Entities to submit *Van Vorst v. Lutheran Healthcare*, Case No. 21-4, 2021 WL 6101474 (2d Cir. Dec. 22, 2021) (summary order)[5] as supplemental authority, and second for the Winter Entities to introduce three new photographs of the H & M store, which were moved into evidence (R & R, 2). The record closed on February 1, 2022.

On March 31, 2022, Judge Addison issued her R & R, recommending that the Commission hold that (1) Respondents discriminated against Ms. McKnight and other disabled patrons by failing to provide access to a place of public accommodation on equal terms and conditions in violation of Section 8-107(4) of the NYCHRL, and (2) Respondents failed to provide Ms. McKnight and other patrons with a reasonable accommodation on the basis of disability in violation of Section 8-107(15) of the NYCHRL. (R & R, 53.) Judge Addison further recommended that the Commission order: H & M to pay $75,000 in civil penalties; the Winter Entities to pay $125,000 in civil penalties; and that the H & M store entrance located at the corner of Fifth Avenue and 18th Street in New York City be made accessible via a ramp. (R & R, 53-58). Additionally, Judge Addison recommended that Respondents and their managers take anti-discrimination training, implement anti-discrimination policies and procedures, and post the Commission's "Equal Access" poster in a place visible to the public at the store. (R & R, 58.)

Pursuant to 47 RCNY § 1-66, all parties submitted comments on the Report and Recommendation on June 8, 2022. The Bureau called for the adoption of Judge Addison's recommendations. *See* Comments on Report & Recommendation in *New York City Commission on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. & BJW Realty LLC et al.* (June 8, 2022) ("Bureau Comments"). The Winter Entities requested that the Commission reject the recommendations of the R & R by, inter alia, finding that they did not discriminate, that the modifications undertaken to the Side Entrance[6] in 2021 constitute a reasonable accommodation, that civil penalties are unwarranted, and that the Complaint be dismissed. *See* Winter Respondents' Comments and Objections to Administrative Law Judge Addison's Report and Recommendation to the Commission ("Winter Entities' Comments"). The Winter Entities also

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Their Trial Motions for Judgment as a Matter of Law (Dec. 13, 2021) ("Winter Entities' Closing Brief"); Winter Respondents' Comments and Objections to Administrative Law Judge Addison's Report and Recommendation to the Commission (June 8, 2022) ("Winter Entities' Comments"); Tr. 578.)

[4] Mr. Winter is also linked to BJW Realty, LLC and BJW Associates. BJW Managing, LLC is the sole managing member of BJW Associates, LLC, and BJW Associates the sole managing member of BJW Realty. (Tr. 550.)

[5] Second Circuit Summary Orders are non-precedential. *See* Second Circuit Local Rule 32.1.1.

[6] *See infra*, III.E.2.

asserted that adopting the R & R would create a new agency rule without following the procedural requirements of CAPA. (*Id.*) H & M asked the Commission to reject the recommendation that it pay civil penalties because, *inter alia*, it agreed to cooperate with the Bureau's proposal for resolution but was constrained by its lease agreement with the Winter Entities from doing so. *See* Comments Submitted on Behalf of Respondent H & M Hennes & Mauritz, L.P. to the Report and Recommendation of Ingrid L. Addison, ALJ (June 8, 2022) ("H & M Comments"). In addition, the New York Landmarks Conservancy ("Conservancy") and the Historical Districts Council ("HDC") submitted amicus comments. *See* The New York Landmarks Conservancy, Letter to the Chair of the NYC Commission on Human Rights submitting amicus comments on New York City Commission on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. & BJW Realty LLC et al., OATH Index No. 905/20 (Apr. 29, 2022); Historic Districts Council, Letter to the Chair of the NYC Commission on Human Rights submitting amicus comments on New York City Commission on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. & BJW Realty LLC et al., OATH Index No. 905/20 (Apr. 29, 2022). Both *amici* requested, *inter alia*, that the Commission reject the R & R's recommendations and find that Respondents have already provided a reasonable accommodation via modifications to the 18th Street door to the H & M store with the 111 Fifth Avenue address.[7]

II. STANDARD OF REVIEW

In reviewing a report and recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge inform the Commission's assessment of evidence, the Commission ultimately determines the credibility of witnesses, the weight of the evidence, and other findings of fact. *Comm'n on Human Rights ex rel. Cazares v. Ins Handbags, Inc.*, OATH Index No. 1075/20, Comm'n Dec. & Order, 2025 WL 897951 at * 3 (March 18, 2025); *Comm'n on Human Rights ex rel. Fernandez v. Gil's Collision Services Inc. d/b/a D & R Collision Corp.*, OATH Index No. 1245/19, Comm'n Dec. & Order, 2023 WL 3974499 at *3 (May 31, 2023); *Comm'n on Human Rights ex rel. Desir v. Empire State Realty Mgmt., LLC*, OATH Index No. 1253/19, Comm'n Dec. & Order, 2020 WL 1234455, at *3 (March 2, 2020); *Comm'n on Human Rights ex rel. Rodriguez v. A Plus Worldwide Limo, Inc.*, OATH Index No. 905/15, Comm'n Dec. & Order, 2019 WL 3225764, at *2 (Mar. 7, 2019); *Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Comm'n Dec. & Order, 2015 WL 7260567, at *2 (Oct. 28, 2015), *aff'd, Automatic Meter Reading Corp. v. N.Y.C. Comm'n on Human Rights*, No. 162211/2015, 2019 WL 1129210 (Sup. Ct. NY. Cty. Feb. 28, 2019); *Comm'n on Human Rights ex rel. Martinez v. Joseph "J.P." Musso Home Improvement*, OATH Index No. 2167/14, Comm'n Dec. & Order, 2017 WL 4510797, at *2 (Sep. 29, 2017); *Comm'n on Human Rights ex rel. Agosto v. Am, Constr. Assocs.*, OATH Index No. 1964/15, Comm'n Dec. & Order, 2017 WL 1335244, at *2 (Apr. 5, 2017); *Comm'n on Human Rights ex rel. Stamm v. E&E Bagels, Inc*., OATH Index No. 803/14, Comm'n Dec. & Order, 2016 WL 1644879, at *2 (Apr. 20, 2016).

The Commission also interprets the NYCHRL and ensures the NYCHRL is applied to the facts correctly. *Cazares*, 2025 WL 897951 at * 3; *Fernandez*, 2023 WL 3974499 at *2; *Desir*, 2020 WL 1234455, at *3; *Martinez*, 2017 WL 4510797, at *2; *Cardenas*, 2015 WL 7260567, at *2. The Commission reviews an administrative law judge's report and recommendation and the

[7] This Decision & Order references pertinent parts of the party and amicus comments herein.

parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Cazares*, 2025 WL 897951 at * 3; *Fernandez*, 2023 WL 3974499 at *2; *Desir*, 2020 WL 1234455, at *3; *Comm'n on Human Rights ex rel. Ondaan v. Lysius*, OATH Index No. 2801/18, Comm'n Dec. & Order, 2020 WL 7212457, at *2 (November 24, 2020); *Rodriguez*, 2019 WL 3225764, at *2; *Comm'n on Human Rights ex rel. Gibson v. N.Y.C. Fried Chicken Corp.*, OATH Index No. 279/17, Comm'n Dec. & Order, 2018 WL 4901030, at *2 (Sep. 28, 2018); *Martinez*, 2017 WL 4510797, at *3; *Stamm*, 2016 WL 1644879, at *2; *Cardenas*, 2015 WL 7260567, at *2.

III. THE EVIDENTIARY RECORD

Knowledge of the facts as described in the Report and Recommendation is assumed for purposes of this Decision and Order. The facts are derived from witness testimony, as well as documentary and recorded evidence submitted by the parties. Pertinent facts are discussed herein.

A. H & M Store Location and Lease with Winter Entities

Since 2005, Respondent H & M has operated a retail clothing store at 111 Fifth Avenue, New York. (R & R at 21; H & M Ex. A). H & M leases the space from Respondent BJW Managing LLC, and the Winter Entities own, operate, and manage the building. (R & R, 2; Tr. 550; H & M Ex. A).

The building that houses the H & M store is located at the corner of Fifth Avenue and 18th Street in Manhattan. (R & R, 2 (citing Pet. Ex 10)). It has 13 stories and was constructed around 1905. (*Id*.) H & M occupies the basement, mezzanine, and ground floor. (*Id*.) The building is located in the "Ladies' Mile Historic District," and is a landmark building, as designated by Landmark Preservation Commission ("LPC"). (R & R, 21, n. 14; Tr. 462-67; Winter Ex. OOOOO, PPPPP.) The upper floors contain office spaces. (R & R, 2) (citing Pet. Ex 10.) The building currently has three entrances: an entrance located at the corner of Fifth Avenue and 18th Street ("Corner Entrance"), an entrance on Fifth Avenue that goes through the lobby and leads to the above offices ("Lobby Entrance"), and an entrance along 18th Street ("Side Entrance"). (*Id*.)

B. Entrances to H & M Store Location

The property leased to H & M for retail use currently has three entrances – the third entrance to access H & M was added after the conclusion of the OATH trial. *See* Winter Entities' Comments. Ms. McKnight had occasion to use the two entrances that were available prior to trial at different times, and the experience was materially different each time.

1. Corner Entrance

The Corner Entrance sits at the intersection of 18th Street and Fifth Avenue and has large windows, neon H & M signs, and opens into an expansive double height space. (Winter Ex BB; Tr. 48, 157, 462). The entrance is marked by a large flag displaying the H & M logo. (Pet. Ex. 13, Winter Ex. BB). It has two sets of glass double doors on the outside between glass panels and then four additional glass doors inside the vestibule, which give a clear view into the store. (Winter Ex. BB; Pet. Exs. 10, 11; Tr. 48, 391-92). One set of the outer doors faces Fifth Avenue, the other set of outer doors faces 18th Street. (Winter Ex. BB; Pet. Exs. 10, 11; Tr. 48, 391-92.) The outer sets of doors have two steps going up to each door. (Winter Ex. BB; Pet. Exs. 9,10, 11;

Tr. 48, 391-92.) After ascending the stairs, the Corner Entrance leads patrons into a vestibule and then directly into a retail and merchandise display, where mannequins are in place to face patrons as they enter, and clothing is neatly stacked. (Pet. Ex. 14; Winter Exs. P, Q; Tr. 391-93.) This display area is the focal point of the store, and is well-lit with double height ceilings. (Tr. 156-60, 391-92.) In her testimony, Ms. McKnight described the Corner Entrance as the main entrance when discussing the first time she entered the store. ("Q: Where did you enter? A: Through the main entrance, which is in the corner of 18th and Fifth.") (Tr. 48.) Ms. McKnight also described the appeal of being able to enter through the Corner Entrance: "You'd be seen, recognized . . . You'd have the high ceilings, the lighting. You have the visual. You have the displays" and noted that "when you enter the store in a particular way, it draws your attention to certain things. It's like an aesthetic or a, a vision that's set up. And that's what you experience when you go through that main entrance. Things are geared towards the direction." (Tr. 112.) H & M's witness Hubinette also identified the Corner Entrance as the main entrance at the time of trial, citing that it is the most frequently used. (Tr. 391.) On cross examination, Mr. Hubinette agreed that its high ceilings, display of clothing and mannequins, and its eight glass doors between glass panels that give a clear view into the store add up to the Corner Entrance being "a pretty grand main entrance." (Tr. 391-92.) The Bureau's expert witness Lobo testified that when designing a main entrance of a store, businesses aim to

> make it grand . . . make the marketing impact as great as possible in the main entrance because, when you have a retail situation, . . .the whole point of it is to envelope the customer and to get them to spend money on things they don't need . . .the whole idea is that you have to use everything at your disposal, meaning bright lights, upbeat music, very, very well thought out marketing of the merchandise. And, you can't feel like it was an afterthought, you know. You must feel like you're the customer, you're being catered to . . . the grandeur or the point of focus or what we call the point of sale . . . always must be for the main entrance." (Tr. 154-55.)

2. Lobby Entrance

The Lobby Entrance[8] is reached by entering the 111 Fifth Avenue property through an office building lobby, going past a security desk, and then proceeding through a locked metal door in the rear of the building. (Tr. 56, 64-65, 69-71; Pet. Ex. 9 at LEB18.) Patrons who enter via the Lobby Entrance are required to ring a doorbell and wait for someone inside to hear the doorbell from inside the store so that person can open the metal door. (Tr. 58-59, 64-65, 69-71.) The Lobby Entrance is not independently operable, and must be opened by a person inside the store in order for a person to gain entry. (*Id*.) The door has a sign that is approximately the size of a piece of standard printer paper with the store's logo. (Pet Ex. 9 at LEB000015, 18.) An individual who is unable to navigate the Corner Entrance, because of the two steps or otherwise, would learn about the Lobby Entrance by following a decal affixed to the Corner Entrance that

[8] The description herein refers to the state of the Lobby Entrance when Ms. McKnight visited the store in 2017. Following the Bureau's Complaint, adjustments were made to the Lobby Entrance, including lowering the doorbell and smoothing the travel path from the lobby to the sales floor. (Tr. 268-76, 317-22, 329; 656-57; H & M Exs. K, L, N, P, R, S, T, U, W, X, Z, AA, CC.)

states "ADA[9] Compliant ACCESSIBLE ENTRANCE AT 111 FIFTH AVENUE LOBBY." (Tr. 50, 56-57, 91-92; Pet. Ex. 9 at LEB19.)

From 2007 through at least mid-2022, the Lobby Entrance was the only means by which a patron using mobility assistance devices could enter this H & M location, and the exit door to the store remained locked at the time of trial.[10] (Tr. at 312-13, 391.) A patron entering the store via the Lobby Entrance engages in a multi-step process, and does not have the same experience as most customers, does not encounter a flag, does not experience double height ceilings, and is not presented with the breadth of merchandise that greets someone who uses the Corner Entrance. (Pet. Ex. 9; Winter Exs. P, Q; Tr. 160-62, 391-93.)

3. Side Entrance

The Side Entrance is located on 18th Street, midway between Fifth Avenue and Park Avenue. (Tr. 479-80, 690.) Prior to the Winter Entities' commencing new construction,[11] the Side Entrance was not advertised and no signage was visible to patrons. (Pet. Ex. 12 at WINTER370.) There was vision blurring glass on the windows to the right of the doors, and the windows lacked illumination. (Pet. Ex. 13 at WINTER 476; Tr. 157-161.)

Following construction, there is an H & M logo displayed on a window above the doors as well as a small hanging sign that displays that logo. The windows to the right of the Side Entrance now emit light. (Winter Exs. AAAAAA, BBBBBB, ZZZZZ.) A patron who uses the Side Entrance is not greeted with a large flag waving the H & M logo, does not enter an area with double height ceilings, and is not presented with the breadth of merchandise that greets someone who uses the Corner Entrance (Tr. 160-162.) On the right side of the entrance, there is no visibility for patrons into the store. Window boxes containing mannequins were added, but had a solid backing rather than glass, as shown in pictures from January 2022. (Winter Exs. XXXXX, ZZZZZ, AAAAAA, BBBBBB; Tr. 160-61.) The Mannequins, however, have not been consistently present at the Side Entrance, beginning as early as August of 2022.[12]

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[9] The Americans with Disabilities Act, ("ADA") is a federal anti-discrimination law that prohibits discrimination on the basis of disability in various areas of public life, including employment and public accommodations.

[10] The Winter Entities began construction on the Side Entrance to the H & M store in 2021 to make it accessible, which they asserted was on track to be completed in 2022. As set forth below, this third entrance, or "Side Entrance," does allow entry into the store by patrons using a mobility device, but does not meet the requirements of the NYCHRL. *See, infra,* IV.C.3a.

[11] *Id.*

[12] The Commission takes notice there were no mannequins in the window boxes to the right of the Side Entrance along 18th Street during at least two distinct time periods, August of 2022 and Sept 2024. (*See* Google Street View, *6 East 18th Street, New York* (Aug. 2022), https://maps.app.goo.gl/xjfR9SDmqevoNWzU6 (last visited Apr. 28, 2025); Google Street View, *2 East 18th Street, New York* (Sept. 2024), https://maps.app.goo.gl/SuqczbE2f9Q995Ai7 (last visited Apr. 28, 2025); Google Street View, *8 East 18th Street, New York* (Sept. 2024), https://maps.app.goo.gl/B1PWLRVS1Cyb82qV7 (last visited Apr. 28, 2025)). This is despite Respondents' testimony and submission into evidence of photographs when the record was reopened in January 2022, that there would be mannequins in the window boxes. (*See* Winter Exs. AAAAAA, BBBBBB; Tr. 435) ("Q: And then, to the right of the 18th Street door, there's what we call a window box. Right? A: Correct. Q: And . . . [i]t's . . . an attractive place where you put mannequins. Right? A: Correct. 18 Q: And, you're happy to put nice mannequins in there to get people to go into your 18th Street entrance if it's installed. Correct? A: Correct.") (cross examination of Mr. Hubinette by Winter Entities). The presence or lack of mannequins in the window boxes at the 18th Street entrance are not dispositive to the findings that Respondents violated the NYCHRL. Regardless,

C. Leasing Agreement between H & M and Winter Entities

The lease between H & M and BJW Managing LLC was executed by Respondent Benjamin Winter in his capacity as Managing Member on August 23, 2005. As detailed in the R & R, the lease contains various terms addressing party obligations and allowances concerning work on the building. The lease refers expressly to compliance with the federal Americans with Disabilities Act (ADA), stating that it is the landlord's duty ensure that the entrance to the premises complies with the ADA, but also indicates that the tenant, at its own cost and expense must "promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local government departments, commissions." (H & M Ex. A at WINTER222, WINTER224, WINTER271, WINTER 294; Tr. 418-19.) The lease further articulates when alterations require consent from the landlord, when the landlord has discretion to withhold its consent, and when consent cannot be unreasonably withheld by the landlord. (H & M Ex. at WINTER294.)

D. Barriers to Entering the H & M Store Location for Wheelchair Users

As set forth above, the Lobby Entrance was the only entrance that patrons with mobility-assistance needs and mobility devices, such as wheelchairs, could use to enter the H & M Store from 2007 through the time of the trial. In contrast to using the Corner Entrance, accessing H & M via the Lobby Entrance was not a simple process.

1. Complainant's Experience with the H & M Store Location

Ms. McKnight is a New Yorker who loves to shop, and was particularly excited to shop at H & M when it featured "capsule collections" such as "Viktor Rolf" and "Madonna." (Tr. 47-49.) Ms. McKnight first visited the H &M location on 18th Street and Fifth Avenue in the early 2000s. During her first visit, she entered the store seamlessly, walking directly in via the Corner Entrance. (*Id*.) Ms. McKnight began using a wheelchair as a result of a 2005 cancer diagnosis, which led to the amputation of her right leg from just above the knee. After becoming a motorized wheelchair user, Ms. McKnight visited this store location three additional times, all in 2017. During each visit, she faced delay and difficulty entering H & M, and Ms. McKnight left feeling degraded.

a. June 2017 Store Visit

During Ms. McKnight's June visit, she was looking to purchase items to clip on bags, which were in style at the time, to gift to her cousins and friends. Instead of simply entering H & M and making a purchase, the experience was drawn out. As she attempted to enter the store using the Corner Entrance, which she had used without issue on her prior visit, Ms. McKnight observed a decal on the window that had an image of a wheelchair and stated that there was an

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the absence of mannequins in the window boxes at the subject store is noted because of the weight that the Winter Entities afforded this issue in their closing brief ("H&M intends to apply its marketing creativity to those windows—including by placing mannequins there—to improve the attractiveness of the 18th Street Entrance and to make it look and feel good for all customers (citing Tr. 435:1-436:3.") (Winter Entities' Closing Brief, 11) and its comments. *See* Winter Entities' Comments, 11-12 (raising that Ms. Lobo underestimated the size of the window boxes and their ability to fit a mannequin in her testimony).

"ADA Compliant ACCESSIBLE ENTRANCE AT 111 FIFTH AVENUE LOBBY" (Tr. 50, 56-57, 91-92; Pet. Ex. 9 at LEB19). In an attempt to gain entry, Ms. McKnight went to the Lobby Entrance, which looked like it led to an office building, and told the concierge that she was going to H & M. (Tr. 57; Pet. Ex. 9 at LEB18, 21.) She then proceeded past the front desk and elevator bank where she came upon a staircase and metal door with a doorbell and door placard that stated "Welcome to H & M." (Tr. 57, 62-63, 89, 93-97; Pet. Ex. 9 at LEB18, 19, 21) Ms. McKnight rang the bell. (Tr. 57). She received no response, so she banged on the door repeatedly. (Tr. 57). Ms. McKnight then enlisted the help of the concierge, a Winter Entity employee, by saying "I'm trying to get into the store, like, nobody's responding, could you please help me?" (Tr. 58, 552-54.) The concierge informed Ms. McKnight that "this happens all the time," and pounded on the door with more force for a while until it was ultimately opened by an H & M patron. (Tr. 58). It took McKnight about fifteen (15) minutes to gain entry to the store (Tr. 59.) This Lobby Entrance door led Ms. McKnight about two thirds of the way into the store, near the elevator banks and cash registers. (Tr. 104-105.)

Having her ability to enter the store impeded made Ms. McKnight "pretty upset," and she informed an H & M employee that she had "been in that lobby trying to gain access and no one, no one responded" and explained "I don't understand the system, like, what's the point? No one can even see me out there. You know, I just wanted to come in and shop . . ." (Tr. 60.) She informed the H & M employee that she was "totally overlooked." (*Id*.) The employee apologized and admitted that this has occurred repeatedly: "the employee was, like. . . I'm sorry, it happens. Or, you know, it's a bad system." (*Id*.) Ms. McKnight testified that she "felt ridiculous, like, just sitting there and ringing the bell and knocking on the door trying to gain entry." (*Id*.)

From within the store, Ms. McKnight saw that the door she came through was labelled as an Exit door with an Exit sign above it. (*Id*. at 61.) The door included a push bar in its center and fire extinguisher next to it. (*Id*.) It was "kind of shocking" to Ms. McKnight that this was the store's designated wheelchair accessible entrance. (*Id*.) Ms. McKnight stated "it's like, no thought or consideration at all went into it. It was pretty much . . .we'll use the fire exit off to the side and . . . the handicap door or wheelchair people can just, you know, come through that door. And you can see they can't see you cause you, you know, the door's not see through, it's metal . . . I was really put off by it." (*Id.*; Pet. Ex. 9 at LEB17.) Ms. McKnight exited through this door as well, using the push bar in order to leave. (Tr. 62.)

b. August 2017 Store Visit

Ms. McKnight returned to the same H & M location about two months later to get a black crewneck pullover long-sleeve shirt as a gift for a friend, and was again forced to enter through the door marked "Exit" inside the store. (Tr. 66.) Initially, she approached the Corner Entrance to see if any changes had been made. (Tr. 64). There were none. (*Id*.) She followed the same route and process as in June, which entailed informing the building concierge that she was going to H & M in case he wondered where she was headed, and moving through to the rear of the lobby. (*Id*.) She arrived at the metal door where she rang the bell, but she received no answer. (*Id*.) The music from the sales floor was audible through the door, compelling Ms. McKnight to hear what was happening in the store without being able to experience it, and she began to bang on the

door. Once there was a lull in the music, she continued banging on the door and proceeded to ring the bell repeatedly. Ms. McKnight testified that she was determined to get in the store that day: "I wouldn't be overlooked . . . someone was going to acknowledge that . . . I was there." (Tr. 64-65.) Ms. McKnight rang the bell and banged on the door. (*Id.*) Eventually, an H & M employee opened the door. (*Id*. at 65-67.)

Ms. McKnight told the employee how she had been waiting in the lobby trying to get in, and expressed to the employee that "it was like I didn't exist. I was like a non-entity . . . it seems like no one pays attention to that door inside to even know that somebody's trying to, to enter, you know." (Tr. 67.) The employee was apologetic, and similar to the staff member from June, the employee noted that Ms. McKnight was not the first person to raise concerns. (Tr. 68.) Ms. McKnight told the employee that something had to be done about the entry issue, and that a manager should be informed of the situation. (*Id.* at 67-68.) The H & M employee assured Ms. McKnight that a manager would be informed (*Id.*) McKnight then proceeded to the second floor via an elevator, and again exited the store by going through the Lobby Entrance. (*Id.* at 68.)

c. October 2017 Store Visit

In October 2017, Ms. McKnight made a final taxing trip to the H & M store, which was on par with her previous experiences. That day, she had wanted to shop, with no specific purchase in mind. (Tr. 69). She began by going to the Corner Entrance, observed the decal, and followed the same route through the Lobby Entrance. (*Id.*) She described her experience as "[o]nce again, [I] rang the doorbell, knocking, ring the doorbell, knocking, waiting, ringing the doorbell, knocking, waiting, pounding, pounding, and eventually, an employee opened the door." (*Id.*) Ms. McKnight "was determined that [she] was going to get, get inside, that someone would acknowledge [her] presence. . . [she] was determined that someone would open the door and allow [her] access so that [she] could shop like everybody else who could just go through the main entrance and, and shop at H & M." (*Id.* at 69-70) This time it took about 20 minutes for an H & M employee to let her into the store. (*Id.* at 69.) Once inside the store, Ms. McKnight told the H & M employee that it was "absolutely unacceptable" for her to wait that long for someone to open the door and that she would like to speak to a manager. (*Id.* at 70.) The employee first told her that the managers were very busy, but Ms. McKnight said she would wait. (*Id*.) After waiting, Ms. McKnight spoke to a manager. She told the manager about her "ridiculous experience of just trying to shop at a store and being a person in a wheelchair." (*Id*. at 70-71.) She told the manager that it was the third time this happened to her and that her complaint should be communicated to upper management. (*Id.* at 71.) The manager told her it would be. (*Id.* at 70-71.) After that, Ms. McKnight was so upset that she left the store. (*Id.* at 71.) To Ms. McKnight, it was "just like blatantly saying, you know what, you're behind a door, we can't hear you, we can't see you." (*Id.* at 73.) Due to the humiliation, it was her last visit to the H & M location. (*Id.* at 69-71,73, 98.)

Nearly two decades ago, McKnight walked to H & M, entered the store through the Corner Entrance, and perused merchandise without delay or obstacle. In contrast, during each 2017 visit, Ms. McKnight – now using a motorized wheelchair – was met with multiple barriers to entry. Ms. McKnight raised her negative experiences with H & M staff, and several staff

indicated they would report the issue to management or that management was already aware of the accessibility challenges at the location. As a result of her experiences at H & M throughout 2017, in January of 2018, Ms. McKnight made a report to the Commission, and a Bureau investigation followed.

2. 2015 Disability Discrimination Complaint Against Respondents H & M and BJW Realty LLC

Two years prior to Ms. McKnight's 2017 attempts to shop at H & M, a different individual that used a wheelchair filed a complaint in the Southern District of New York against H & M and BJW Realty LLC, both Respondents in the present matter. The 2015 complaint alleged violations of the federal Americans with Disabilities Act, the New York State Human Rights Law, and the NYCHRL. Specifically, the complaint alleged, *inter alia*, a "[f]ailure to provide an accessible entrance inside street level doors, due to barriers of steps at said entrances, and the failure to install a ramp with appropriate slope and signage, and/or otherwise provide accessible and properly designed entrance." (Pet. Ex. 20 at LEB83.) The complaint elaborated that "[t]hese steps represent an insurmountable barrier to independent entry by the Plaintiff and other individuals who use wheelchairs." (*Id.*) The plaintiff alleged that H & M and BJW Realty LLC violated the New York City Human Rights Law by "denying the Plaintiff full and safe access to all the benefits, accommodations, and services of the Subject facility." (*Id.* at LEB85.) Ms. McKnight was not the first to seek a legal remedy regarding the 111 Fifth Avenue H & M location or to put Respondents on notice that persons with disabilities faced barriers to entry. There is no evidence in the record that either H & M or the Winter Entities sought to make changes to the Corner Entrance in response to this prior 2015 lawsuit. There is also no evidence in the record of how the prior complaint was resolved. (Tr. 324-26; R&R at 17.)

E. Commission Investigation and Proposals for Store Accessibility

1. H & M Entrance Feasibility Study and Five Proposals

Following commencement of the Bureau's investigation, the Bureau conveyed to H & M that the Corner Entrance needed to be made accessible in order to resolve the disability discrimination claims. (Pet. Ex. 39-E). As the Bureau's investigation proceeded, in early August 2018, H & M initiated a feasibility study to identify alternative approaches to store accessibility and reached out to Kenneth Park Architects ("KPA"). (Tr. 259; H & M Ex. D; R&R at 15.)

On behalf of H & M, Mr. Hennessy had an August 16, 2018 email exchange with KPA, communicating his belief that the Bureau "will want [H & M] to focus on the Main Entry," but positing his belief that "the solution may be the side door on 18th [Street]" because "it goes straight on to the sales floor." (Pet. Ex 39-C.) Attached to the email, Mr. Hennessey also shared a draft timeline for H & M to address accessibility issues that he "back dated a bit so it looks like we [sic] been on this." (Pet. Ex. 39-C, Tr. 287-92.)

KPA proceeded with the feasibility study. An initial version included four options: one Corner Entrance ramp, two Side Entrance modifications, and one Lobby Entrance modification. (Pet. Exs. 39-C; 40-2.) Mr. Hennesey requested that KPA illustrate another Lobby Entrance

modification, reflecting H & M's preference for a modification for the 18th Street Lobby Entrance. (*Id*.; Tr. 261; H & M Ex. E.) KPA added this fifth option to the final study. (H & M Ex. E; Pet. Exs. 39-C, 40-3.) KPA's five proposals for modifications, captured in "Accessible Handicap Entry Options," included the following options: ramp installation at the Corner Entrance; two potential modifications to the Side Entrance, and two potential modifications to the Lobby Entrance. (H & M Ex. E; Pet. Ex. 40-3.)

a. Winter Entities' Side Entrance Preference

Although the Winter Entities were not yet named in the Bureau's complaint or under investigation by the Bureau, after receiving the results of the study, Mr. Hennesey presented all five (5) options to the Winter Entities on September 4, 2018 via email to Denis Muzio, the Property Owner's Director of Management (Tr. 264-65, H & M Exs. F, G; Pet. Ex. 39-C) because, as Hennessy testified he believed that "something like an exterior ramp" required approval from the Winter Entities. (Tr. 277.)

In the September 4 email, Mr. Hennessey also shared H & M's impressions from conversations with the Bureau:

> The investigator stated that it is the Commission's view that disabled persons should be treated equally with other customers when such treatment is architecturally feasible and does not cause undue hardship. This would require making the main entrance accessible to the disabled (by a ramp ?). [The Investigator] noted that approval by the Landmarks Commission might be necessary in this case and he conceded that the approval process could be lengthy. [The Investigator] said that the Landmark Commission maintains that it has never rejected an application for modification in order to make a building accessible to the disabled but the approval process must still be followed.

Mr. Hennessey also testified that, at this stage, he understood that the modification that would be accepted by the Bureau was one that provided access through the Corner Entrance.

The Winter Entities rejected the proposed modifications to the Corner Entrance. One week after receiving the KPA study, the Winter Entities expressed that a modification to the Side Entrance should be pursued, which they stated would entail "dropping the slab at the E 18th St entry and ramping up within [the Store] to meet floor height and thus eliminate the need for a lift or for an exterior ramp," and stating "[a]ll of the other alternatives would not be acceptable to the building owner." (Pet. Ex. 39-C.)

b. H & M's Lobby Entrance Preference from Feasibility Study and the Bureau's Probable Cause Finding

On October 24, 2018, H & M emailed the Bureau to propose a modification to the Lobby Entrance, following an October 17, 2019 phone call between same,[13] and consistent with the

[13] At this stage, H & M had not raised Winter Entities' preference for the Side Entrance modifications to the Bureau. (Tr. 299-304.)

preference H & M previously communicated to KPA. (Pet. Exs. 39-C, 39-E.) Mr. Hennessey confirmed H & M's preference differed from the Winter Entities' Side Entrance preference, which was more structurally complex. (Tr. 305.) In response to H & M's October 24, 2018 email, the Bureau communicated to H & M that the H & M proposal for a Lobby Entrance modification was not acceptable because "[a]s we previously discussed, unlike the ADA, the New York City Human Rights Law requires H & M to provide equal access (unless doing so would cause undue hardship)." (Pet. Ex. 39-E.) (emphasis added). The Commission added that "equal access means providing entry through H & M's main entrance," and reiterated that this would be achieved by ensuring entry to the store through the Corner Entrance. (Tr. 300-01, 357; Pet. Ex. 39-E.)

On January 8, 2019, H & M and the Bureau met in person. (Pet. Ex 39-E; Tr. 301-304.) The Bureau explained to H & M that "a separate but equal solution" was not acceptable. (Tr. 302.) H & M argued that its proposed Lobby Entrance modification would not be separate but equal, but would be "equal plus." (*Id.* at 302-304.) H & M followed up with a letter, summarizing the meeting, wherein H & M's counsel reiterated this position and again characterized the Lobby Entrance proposal as superior, and "equal plus" because it addressed "the challenges of the physically disabled while avoiding the creation of additional barriers to free movement of both the abled and disabled alike." (*Id*.; Pet. Ex. 39-E.)

On January 25, 2019, the Bureau issued a finding of Probable Cause against H & M. (ALJ Ex. 6). The Bureau added the Winter Entities to the Complaint on July 7, 2020. (ALJ Ex. 3.)

2. Winter Entities' Pursuit of Side Entrance Modifications

a. Winter Entities' Solicitation of Renderings

As set forth above, by the time they were formally added to the Complaint, the Winter Entities knew of the Bureau's Complaint against H & M, the five options from the KPA feasibility study, and that the Bureau required that the Corner Entrance be made accessible in order to resolve the Complaint. Additionally, Winter Entities had expressed their preference to modify the Side Entrance to address the Complaint in communications to H & M. (Tr. 377-82; Pet. Ex. 39-C.)

In early 2020, the Winter Entities, via Mr. Winter, commissioned a study of their own, hiring architects of the firm Beyer Blinder Belle ("BBB"), which specialize in historic structures. (Tr. 478.) The Winter Entities specifically instructed BBB "to determine if the 18th Street entrance could be made into a flush entrance into the building without the impediment of a ramp," as part of looking into Corner Entrance and Side Entrance options, and expressed to BBB that they preferred modifying the Side Entrance. (Tr. 478-79, 612-13.) BBB created a document entitled "111 Fifth Avenue, New York, NY - Proposed Accessibility Improvements at Retail Space," and labelled as "Preliminary LPC Presentation," dated April 24, 2020 (Winter Ex. MMM; Tr. 480-81.) This document displayed two alternatives – one on the exterior of the Corner Entrance, and one on the Side Entrance. (Winter Ex. MMM.) For the Side Entrance, BBB proposed sloping the sidewalk up towards the entrance so the entrance would be flush with the

sidewalk, which would alleviate the need for a ramp installation to make the Side Entrance accessible. (Tr. 480; Winter Ex. MMM.) For the Corner Entrance, BBB illustrated a ramp option, as due to its stairs at the entry way, the Corner Entrance could not be made flush to the sidewalk. (Tr. 479-80.)

b. Winter Entities' Aversion to a Ramp at the Corner Entrance

Although the Winter Entities requested design options for both the Corner Entrance and the Side Entrance, the Winter Entities continually expressed an aversion to building a ramp at the Corner Entrance from the time it was first raised. When Mr. Winter was asked about his reaction to H & M's proposal to install a ramp at the Corner Entrance, he did not mince words. Winter confirmed that the reason he chose the Side Entrance option when initially responding to H & M was that he did not want an exterior ramp because he was concerned about the effect the ramp would have on the historical character of the building, and that this was prior to engaging an architect or accessibility expert. (Tr. 585-86, 632-33.) Mr. Winter testified he had a "negative reaction" because he "values" the building's façade, the neighborhood, and the other "typically designed" buildings therein. (*Id.* at 477.) When asked if he was committed to a solution that did not involve a ramp, Mr. Winter responded "I have been committed to putting forth a solution which is the least offensive and accomplishes the goal of a reasonable level of accommodation in accordance with the Landmark Preservation Committee guidelines, which, as you've heard from the Community Board and the LPC itself, received rave commendation and unanimous approvals in both cases." (*Id.* at 609-10.) He emphasized that "[a ramp] would be an obstruction" and stated that there was "a more efficient and elegant way to treat the access issue." (*Id.* at 477.) Mr. Winter continued that he was concerned about the appearance, and the "juxtaposition of having that, that creation, that structure in front of, I think, a beautifully, elegant façade. It's long, it's got rails . . . blocks some of the grillwork. It blocks the lower articulation of the building." (*Id.*) In evaluating the concept of a ramp at the Corner Entrance with a ramp at the Side Entrance, Mr. Winter stated "there is no comparison. You have a . . . façade which is clean. It is unobstructed by . . . any disturbance of a ramp and it, it perfectly allows those disabled folks along with, with any- anyone, disabled or not, to enter directly from the street." (*Id.* at 486.) He stated the ramp at the Corner Entrance would be "totally out of context" in relation to the historic look of the building. (Tr. 486-87.)

c. Winter Entities' Side Entrance Modification Presentations to the Landmarks Preservation Commission and Community Board

Certain modifications to the exterior of a building in NYC that is either designated as a landmark property or in a historic district require an LPC permit in order to proceed with the construction. (*See* NYC Landmarks Preservation Commission, LPC Permit Guidebook, 10 (2019), *available at* https://www.nyc.gov/assets/lpc/downloads/pdf/LPC-Permit-Guidebook.pdf); Tr. 489-589; NYC Landmarks Preservation Commission, *Permit Types*, https://www.nyc.gov/site/lpc/applications/permit-types.page (last visited April 9, 2025); NYC Landmarks Preservation Commission, *Applications*, https://www.nyc.gov/site/lpc/applications/applications.page (last visited April 9, 2025); NYC Commission on Human Rights, Legal Enforcement Guidance on Discrimination on the Basis of Disability, 89 (April 2019), *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf ("Legal Enforcement Guidance on Discrimination on the Basis of Disability"); Pet. Ex. 39-C;

Title 25, Chapter 3, Sections 301 to 322 of the New York City Administrative Code; Title 63 of the Rules of the City of New York.) The LPC issues different permits depending on the nature of the proposed work. For work that affects "significant protected architectural features of the landmark property," which may include additions, demolitions, new construction, or removal of stoops, cornices, and other significant architectural features, the required permit is a Certificate of Appropriateness (COA). To obtain a COA, building owners must submit an application and undergo a formal approval process including a presentation before the local community board and then the LPC. The presentation typically includes "architectural drawings, photographs and/or material samples that explain the proposal," and is first made to the local community board and then followed by a public hearing on same before the full LPC. NYC Landmarks Preservation Commission, *Certificate of Appropriateness*, https://www.nyc.gov/site/lpc/applications/certificate-of-appropriateness.page. https://www.nyc.gov/site/lpc/applications/permit-types.page (last visited April 9, 2025); *see* LPC Permit Guidebook, NYC Landmarks Preservation Commission, *Public Presentation Guidelines*, https://www.nyc.gov/site/lpc/hearings/public-presentation-guidelines.page (last visited April 9, 2025). Community board recommendations are not binding, while LPC permit approvals and denials are binding. (*See id.*)

Mr. Winter testified that in spring 2020, he, along with Michael Wetstone, a principal at BBB,[14] had a call with "LPC staff."[15] Mr. Winter did not identify the names or number of LPC staff members present on the call, and the testimony did not elaborate on the circumstances under which the call was arranged. (Tr. 491-92.) The record is unclear as to whether BBB provided the plan labelled "Preliminary LPC Presentation" to the LPC.[16] The renderings in the "Preliminary LPC Presentation" propose potential modifications to both the Corner Entrance and to the Side Entrance. (Winter Ex. MMM.) Mr. Winter testified that on the initial call with LPC staff, Mr. Wetstone discussed two possibilities: a ramp at the Corner Entrance and modifications to the Side Entrance, and that the LPC staff said the proposed changes to the Side Entrance "was a far

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[14] Mr. Winter testified that Jack Beyer, a founding partner in BBB, may have been present, but he could not recall with certainty. (Tr. 492.)

[15] The R & R states that Michael Wetstone of BBB made a "preliminary presentation" to LPC on April 24, 2020. (R & R at 24.) However, as set forth above in Mr. Winter's testimony, he refers to a phone call with LPC staff in "spring," with no reference to a specific date. *See also* Winter Entities' Closing Brief, 15 ("Mr. Winter's view on this score was confirmed on a Spring 2020 call that he and BBB had with Landmarks staff."). The record is unclear as to whether the "preliminary presentation" referred to in the R & R is in reference to this phone call or another presentation. There is a document in evidence titled "Preliminary LPC Presentation to the LPC," Ex. MMM, but there is no evidence in the record stating that a presentation was actually made to the LPC on this date using this document. Thus, the Commission does not find that a presentation was made to LPC using this document on April 24, 2020. See *also infra* n. 16.

[16] During his direct examination, Mr. Winter testified the Preliminary LPC presentation, dated April 24, 2020, was provided to the LPC around that date. (Tr. 491- 92.) However, on cross examination, the Bureau demonstrated that in Mr. Winter's January 26, 2021 deposition, he expressed uncertainty as to whether the Preliminary LPC Presentation had been shared with the LPC. (Tr. 599-602, Pet. Ex. 26 at 81 ("[the Preliminary LPC Presentation] may have been [shared with the LPC], I don't know this. So I'm speculating, but I strongly suspect that it was shared with Landmarks in discussions between BBB and the Landmark staff, which is a normal process. That's how these things evolve. And as a refinement to those discussions, the December presentation became the final presentation.")). There was no corroborating evidence proffered for Mr. Winter's claim at trial that the Preliminary LPC Presentation was provided to the LPC, and no explanation provided as to why Mr. Winter's testimony changed from his deposition to trial regarding this issue. (Tr. 600-602.) Accordingly, and as set forth in *supra* note 15, the Commission does not find that the Preliminary LPC presentation dated April 24, 2020 was provided to the LPC.

better solution." (Tr. 492.) At trial, Mr. Winter indicated that the notion that LPC "preferred" modifying the Side Entrance informed "carrying out" his plans. (*Id*.) After that call, the Winter Entities "began . . . to design in a more final form the [Side Entrance modification plan] because we had run it by them, they seemed to approve it and, therefore, we thought we would be successful in getting their final approval." (Tr. 493.) There is no indication that Mr. Winter or BBB representatives informed the LPC that the Bureau was alleging violations of the NYCHRL at the subject H & M store, or that the NYCHRL was taken into account. BBB proceeded to revise plans to present to the LPC as part of the prescribed approval process, and created a new document dated December 14, 2020, with the title "111 Fifth Avenue, New York, NY - Proposed Accessibility Improvements at Retail Space," with the labels "LPC Submission" and "Revision 1." ("December LPC Submission") (Winter Ex. NNN.) The December LPC Submission did not include any reference to the possibility of a Corner Ramp, and solely identified proposed modifications to the Side Entrance, which the document labeled as the "Area of Work" in the LPC Submission. (*Id*.) Mr. Winter conceded that the Preliminary LPC Presentation was the only rendering he sought that contemplated the work that would be required to install a ramp at the Corner Entrance. (Tr. 675-76.)

On January 5, 2021, Winter Entities and BBB, via Mr. Wetstone, presented the December LPC Submission to the Community Board, and on January 21, 2021, made the same presentation to the full LPC in the required hearing. (Tr. 494, 512.) Neither body was presented with an alternative Corner Entrance ramp proposal or any other options, despite the fact that Winter Entities knew that the Bureau's position was that compliance with the NYCHRL required a ramp at the Corner Entrance. (*See* supra, III.E.; Pet. Ex. 17) (Mr. Hennessey relaying to another representative of Winter Entities, Doug Layton, that the Bureau "[was] not open to any option except for a corner ramp" in a January 18, 2019 email following a meeting between the Bureau and H & M.) Both the Community Board and the LPC ultimately approved BBB's sole proposed option – a Side Entrance modification. (Winter Exs. III, OOO, PPP.) In the presentation to the Community Board, Mr. Winter put forth that the reason for his application was to provide an ADA accessible entrance to the H & M store, and Mr. Winter was explicit about the goal of implementing an ADA solution that did not require a ramp. (Pet. Ex. 24.) At trial, Mr. Winter testified that if he applied to install a ramp at the Corner Entrance, that would also require approval from the LPC and Community Board. (Tr. 537.) In the Community Board presentation seeking approval for Side Entrance modification, Mr. Wetstone framed the project as aiming to provide ADA accessibility, stating that the building had "one ADA entrance through the lobby" that was not "as accessible or easily recognizable" as the Side Entrance, and that he believed the proposal would be in "complete harmony" with the building and the block, and would not be "disruptive," noting that it will "create an ADA accessible public accommodation." (Pet. Ex. 24.) Mr. Winter further noted he was not interested in additional work or resources, stating that "the amount of investment that we have put into the facade of this building for three years . . . therefore . . . it is worth it to me to make the investment on this entrance, rather than have a sidewalk ramp, which was the other alternative, and would destroy the facade after having spent as much time and money as I did." (*Id*.) The Community Board's approval notice specifically highlighted that the proposal was to create an ADA compliant entrance, and did not reference the NYCHRL. (Winter Ex. PPP.) In the LPC public hearing, where the Side Entrance proposal was presented by Mr. Wetstone, he stated that the aim of the project was to provide "accessible entrances" into the building, that they were seeking an accessible entrance with minimum impact on the architecture, and referred to the Lobby Entrance merely as "not suitable." (Pet. Ex. 25.)

Neither Mr. Winter nor Mr. Wetstone made mention of the NYCHRL, which has different standards and requirements than the ADA, or the Bureau's active case against the Winter Entities, in either presentation. (Pet Exs. 24, 25.) Following the presentations, the LPC ultimately issued the Winter Entities a Certificate of Appropriateness, which served as a permit to allow the Winter Entities to start implementing the changes to the Side Entrance. (Winter Exhibit III, OOO.)[17]

d. Winter Entities' Implementation of Side Entrance Modifications

At the time of trial, Mr. Winter stated that construction on the Side Entrance modifications had already begun, and described changes to both the interior and exterior of the Side Entrance. (Tr. 663-65, 672-75.) In the Winter Entities' December 13, 2021 post-trial brief, they stated that the construction on the Side Entrance would be completed by the end of 2021. (Winter Entities' Comments, 1.)

1. Bureau's and Winter Entities' Expert Testimony

In addition to commissioning BBB, the Winter Entities also retained Douglas Anderson, certified accessibility specialist and partner at LCM architects, to evaluate for accessibility proposed modifications for entrances to the H & M store, including installation of a ramp at the Corner Entrance and the lowering of doors on 18th Street at the Side Entrance to the same grade as the sidewalk via a sloped interior route into the store. (Tr. 718, 744, 843-44.) Mr. Anderson assessed the H & M store in October of 2020 and issued his expert report that month. (Pet. Ex. 11.) Anderson returned to assess the store again in July of 2021. (Tr. 746.) The Bureau independently hired Sharon Lobo, a registered architect to examine accessibility options for the H & M store. (Tr. 130-31.) Ms. Lobo assessed the H & M store on December 15, 2020, and issued her expert report on December 30, 2020. (Pet. Ex. 10.)

Mr. Anderson concluded that the Side Entrance modification was preferable because, *inter alia*, the slope would be less steep than it would be for a ramp at the Corner Entrance. Anderson posited that this would be more accessible for people with a broader range of disabilities, such as those with less strength in their arms or those using a manual wheelchair. (Tr. 745, 765-66; Winter Ex. NNNNN; Pet. Ex. 11.) Mr. Anderson also stated that what constitutes the main entrance to a building is subjective, and that ADA accessibility may be more beneficial at other entrances (Tr. 818.) Ms. Lobo reviewed Mr. Anderson's expert report as part of her assessment and concluded that a ramp at the Corner Entrance was preferable to Side Entrance modifications because, *inter alia*, the sloping of the floor for the Side Entrance proposal would conflict with ADA requirements and lacked an ADA "maneuvering clearance."[18] (Tr. 143-145.) Ms. Lobo put forth that the Side Entrance proposal would not provide a shopper or retail experience that is equal to what is provided to patrons that are able to use the Corner Entrance. (Pet. Ex. 10; Tr. 156-64.) She indicated as well that the work to achieve the Side Entrance proposal would be more expensive and involved due to sidewalk demolition. (Tr. 148-

[17] For the Side Entrance construction, the Winter Entities also needed approval from the NYC Department of Buildings and the NYC Department of Transportation, which they received in 2021. (Tr. 536-37; Winter Exs. LLL, VVVVV.) Winter Respondents' civil engineer witness, Mr. Habib, provided testimony on progress related to approvals for construction on the sidewalk, which required attention because of electricity transformers below the sidewalk. (Tr. 688-96; Winter Ex. 3Fs). Mr. Habib testified that the work was scheduled to be completed, and that a permit had been issued by DOT. (Tr. 696-97, Winter Ex. VVVVV.)

[18] For a detailed discussion of the expert witness testimony, see pages 7-14 and 28-38 of the R & R.

49.) Although expressing a preference for modifications to the Side Entrance, Mr. Anderson agreed that the ramp depicted in the Corner Entrance rendering would be ADA compliant, and that it may be possible to construct a ramp at the Corner Entrance that would satisfy ADA best practices for slope and length. (Tr. 744, 854.) Although Mr. Anderson and Ms. Lobo differed in their perspectives on which entrance would preferable, neither expert concluded that the Corner Entrance could not be constructed or caused an undue hardship.

IV. DISCUSSION

A. Legal Standard

The New York City Human Rights Law prohibits discrimination and requires covered entities, including businesses, employers, and housing providers to provide patrons full and equal enjoyment, on equal terms and conditions, of public accommodations regardless of disability. The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of [the NYCHRL] have been so construed." N.Y.C. Admin. Code § 8-130(a). Pursuant to the Local Civil Rights Restoration Act of 2005, "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Law No. 85 § 1 (2005). *See also* Local Law No. 35 § 1 (2016).

Moreover, "case law interpreting analogous anti-discrimination statutes under state and federal law, though perhaps persuasive, is not precedential in the interpretation of the NYCHRL." *Cazares*, 2025 WL 897951 at * 9; *Fernandez*, 2023 WL 3974499 at *11; *Ondaan*, 2020 WL 7212457, at *6 (citing *Albunio v. City of New York*, 23 N.Y.3d 65, 77, n.1 (2014) ("the [the Local Civil Rights Restoration Act of 2005] was, in part, an effort to emphasize the broader remedial scope of the NYCHRL in comparison with its state and federal counterparts and, therefore, to curtail courts' reliance on case law interpreting textually analogous state and federal statutes.")). Ultimately, "an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness." *Stamm*, 2016 WL 1644879 at *4; *Cardenas*, 2015 WL 7260567, at *6 (quoting *Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 322 (2003) (citing *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998))).

B. Respondents Discriminated Against Ms. McKnight and Patrons Based on the Basis of Disability in Violation of NYCHRL § 8-107(4) by Failing to Provide Equal Terms, Conditions and Privileges

1. The Right to Full & Equal Enjoyment Under the NYCHRL

The Bureau bears the burden of establishing *a prima facie* case of disparate treatment by a public accommodation based on a disability under Section 8-107(4). *Rodriguez*, 2019 WL 3225764, at *5; *Gibson*, 2018 WL 4901030, at *4; *Stamm*, 2016 WL 1644879 at *4; *Comm'n on Human Rights ex. rel. Jordan v. Raza*, OATH Index No. 716/15, 2016 WL 7106070, at *6 (July 7, 2016); *Comm'n on Human Rights ex. rel. Spitzer v. Dahbi*, OATH Index No. 883/15, Comm'n Dec. & Order, 2016 WL 7106071, at *4 (July 7, 2016); *Romo v. ISS Action Sec*, OATH 674/11, Rep. & Rec, 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011).

Respondents do not dispute that they constitute places of public accommodations, with obligations under the NYCHRL. (*See* Winter Entities' Closing Brief; H & M Closing Brief.)

Turning to the elements of a prima facie case, the Bureau must establish that: (1) complainant is a member of a protected category as defined by the NYCHRL; (2) respondent(s) directly or indirectly refused, withheld, or denied the full and equal enjoyment, on equal terms and conditions, of an accommodation, advantage, facility, or privilege thereof based, in whole or in part, on membership in a protected group; and (3) respondent acted in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(4). NYC Admin Code § 8-107(4)(a)(1)(a); *see Gibson*, 2018 WL 4901030, at *5; *Stamm*, 2016 WL 1644879 at *4; *Raza*, 2016 WL 7106070, at *6; *Spitzer*, 2016 WL 7106071, at *4; *Romo*, 2011 WL 12521359, at *5.[19]

2. Prima Facie Case Established

In the matter at hand, the Commission adopts Judge Addison's findings that the Bureau established a *prima facie* case that Respondents discriminated against Ms. McKnight on the basis of her disability, as well as against similarly situated individuals.

a. Protected Category

The Bureau met the first element, membership of a protected category, because Ms. McKnight has a disability as defined by Section 8-102 of the NYCHRL (Tr. 46-47), and it is evident that other individuals with disabilities, that use a wheelchair or other mobility device, have been or may be patrons of the store. (*See, e.g.,* Pet. Ex. 20.)

b. Denied Full and Equal Enjoyment on Equal Terms and Conditions

The Bureau also met the second element, that respondent(s) refused, withheld, or denied the full and equal enjoyment, on equal terms and conditions, of an accommodation, its services or privileges based, in whole or in part, on the status of being persons living with disabilities. Specific recognition that the NYCHRL requires "full and equal enjoyment" and "equal terms and conditions" was codified 2016 by Local Law 34.[20]

The New York City Council amended the text of the NYCHRL to state explicitly that it is illegal to for places and providers of public accommodation to deny - or fail to provide - the same benefits, services, or privileges to individuals who are or are perceived to be the member of a protected class, and must offer 'the full and equal enjoyment' of benefits on "equal terms and conditions," confirming the broad scope of the Law's protections in places of public accommodation. (New York City Council Committee on Civil Rights, Committee Report of the Governmental Affairs Division (March 8, 2016), at 6-7.) The amendment "entitle[s] any person to full and equal enjoyment of public accommodations, on equal terms and conditions." (*Id.* at 6.) This change to the Law was complemented by new statutory recognition, enacted at the same

[19] These cited cases are based on facts that took place prior to a 2016 amendment to Section 8-107(4) of the NYCHRL. *See infra* IV.B.2.b. Thus, the standard used herein has been updated to reflect the amendment.
[20] Prior to July 26, 2016, the NYCHRL provided that it was unlawful for "any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation, because of the actual or perceived . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . ." (*See* Local Law 34 of 2016.)

time, that "[e]xceptions to and exemptions from the provisions of [the NYCHRL] shall be construed narrowly in order to maximize deterrence of discriminatory conduct," and reflect the "broad and remedial purposes of [the NYCRL]." (*See* LL 35 of 2016).[21]

Prior to needing a wheelchair, Ms. McKnight was able to access 111 Fifth Avenue via H & M's Corner Entrance and fully experience the store and its amenities without issue. As set forth in the R & R, McKnight's testimony demonstrated that on three different occasions in 2017, she was forced to use a separate entrance and faced challenges attempting to access the store that are not present for patrons using the Corner Entrance. In each of these instances, Ms. McKnight's only means of entering the store was through the Lobby Entrance because the Corner Entrance stairs were insurmountable with her wheelchair. The Lobby Entrance was actually an Exit door that was kept locked, and to enter the patron needed to ring a doorbell and wait for H & M staff. Ms. McKnight was unable to use this door to enter the store on her own, and was required to seek assistance from the Winter Entities' concierge at the front desk. (*Id.*) Even with assistance, Ms. McKnight was subjected to fifteen to twenty minute wait times just to enter the store. Each time, she complained to H & M staff about her experiences, and saw no improvement between visits. This made McKnight feel like she "didn't exist" and was a "non-entity."

Requiring patrons with disabilities to use a separate entrance from that of all other patrons, particularly one that is markedly different, constitutes a failure to provide full and equal enjoyment of a public accommodation on equal terms and conditions on its face. *See Rose v. Co-op City of New York*, OATH Index No. 1831/10, Comm'n Dec. & Ord., 2010 WL 8625897, at *3 (Nov. 2010), *modified on penalty sub nom. Riverbay Corp. v. NYC Comm'n on Human Rights*, Index No. 260832/10 (Sup. Ct. Bronx Co. Sept. 21, 2011) ("The idea of 'separate but equal' is a relic that was discounted in this country over 50 years ago. . . the purpose of the [NYCHRL] is to ensure that all people, regardless of their membership in a protected class, be able to fully enjoy all of the rights, privileges and advantages that this great city has to offer in a manner that is equal and unsegregated."). The NYCHRL accounts for circumstances where a particular structural change, such as a modification to a building, presents an undue hardship, which includes architectural infeasibility, and cannot therefore be implemented.[22] (*See id.*)("[T]he Commission interprets the New York City Human Rights Law as requiring that . . . public accommodations . . . make the main entrance to a building accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then, should an alternative entrance be considered. In the instant case there was no evidence of financial hardship or architectural infeasibility; therefore, the law requires that the front door be made accessible.").

As set forth above, the Corner Entrance of H & M is designed to invite and welcome shoppers. After viewing a bright, neon H&M logo sign, under the store flag, the shopper is greeted with glass doors that look into the store from different angles, double height ceilings, enticing lighting, and curated mannequin and clothing displays. In contrast, when a patron was

[21] In its report on the bill that became Local Law 35, City Council emphasized that the NYCHRL "is to be interpreted liberally and independently of similar federal and state provisions to fulfill the 'uniquely broad and remedial' purposes of the law." (Comm. Rep. at 8 (citing 2005 Restoration Act).)

[22] When assessing a covered entity's claim of undue hardship, the statute requires that "[e]xceptions to and exemptions from the provisions of [the Law] shall be construed narrowly in order to maximize deterrence of discriminatory conduct." NYC Admin Code § 8-130.

relegated to the Lobby Entrance, they were not welcomed with any of these features, and had to go down an office building hallway, ring a doorbell for service and then wait to be let in through an Exit door. The Lobby Entrance was devoid of any of the allure or appeal designed to welcome shoppers at the Corner Entrance. Accordingly, the Bureau met this element of the claim.

c. Manner and Circumstances Give Rise to Inference of Discrimination

The Bureau also established that Respondents acted in a way that gives rise to the inference of discrimination. Respondents were on notice that there were barriers to accessibility for patrons with disabilities at this store location, and these were left unaddressed. As set forth in the R & R, Ms. McKnight raised concerns repeatedly with H & M staff, who admitted to having already received multiple complaints about store accessibility. The Winter Entities' concierge also witnessed Ms. McKnight's struggles entering the H & M store, and stated to Ms. McKnight that this "happens all the time." Nevertheless, it does not appear that any of the Respondents made changes until Ms. McKnight made a report to the Bureau.[23] Respondents were aware that entry to the store for patrons with disabilities was severely hindered, and took no action.

Ignoring an individual's complaints gives rise to an inference of discrimination. This conclusion is supported by the fact that reports of accessibility limitations at the store were made in 2015 against Respondents H & M and BJW Realty LLC through a federal lawsuit. (*See supra* III.D.2.)[24]

d. Burden Shifting

Once the Bureau establishes a *prima facie* case of discrimination, a respondent may advance a legitimate, non-discriminatory reason for its actions. *See Gibson*, 2018 WL 4901030, at *5; *Stamm*, 2016 WL 1644879 at *4; *Jordan*, 2016 WL 7106070, at *6; *Spitzer*, 2016 WL 7106071, at *4; *Howe*, 2016 WL 1050864, at *5 (citing *Lukasiewicz v. Cutri*, OATH 2131/10, Rep. & Rec., 2011 WL 12472971, at *7 (Dec. 8, 2010), modified on penalty, Dec. & Ord. (Feb. 17, 2011)); *Romo*, 2011 WL 12521359, at *5.

Here, the Bureau has made out a *prima facie* case for discrimination, and Respondents failed to articulate a non-discriminatory reason for their actions. Accordingly, the Commission

[23] Mr. Hennessey's decision to backdate H & M's timeline for addressing accessibility at the store, can be read to indicate that H & M realized that its inaction regarding accessibility issues at the store was something to obscure. (*See supra*, III.E.1.)

[24] Winter Entities submit that the 2015 summons and complaint do not support an inference of discrimination because, *inter alia*, the filing is "replete with legal conclusions" and note that that they denied the allegations in the 2015 complaint, and that the record does not show that the matter was ever adjudicated. (Winter Entities' Comments, 7-8). First, as set forth above, Respondents were on notice based on Ms. McKnight's own experiences, witnessed by their staff, regardless of the federal complaint. Second, the 2015 complaint here is not being used to prove the facts contained therein. Rather, it is evidence showing that Respondents were on notice that the Lobby Entrance potentially posed a barrier to accessibility for individuals with disabilities using mobility devices in violation of the NYCHRL. *See, e.g. Olson v. Ford Motor Co.*, 410 F. Supp. 2d 855, 861-62 (D.N.D. 2006) (finding in a product liability case that "customer complaints are admissible to show that [the manufacturer] received such complaints and was on notice of the allegations set forth in the complaints" when the evidence is " 'substantially similar' to the case at bar."); *Guild v. Gen. Motors Corp.*, 53 F. Supp. 2d 363, 368 (W.D.N.Y. 1999) (finding that customer complaints regarding product failure may be admissible for the non-hearsay purpose of demonstrating notice where the complaint evidence being offered was substantially similar to the circumstances at issue in the case). The 2015 complaint is being used acceptably to demonstrate notice in this matter, and lends further support to the third element of the Bureau's *prima facie* case.

adopts Judge Addison's conclusion that Respondents discriminated against Ms. McKnight and other patrons on the basis of disability in violation of section 8-107(4)(a) of the Human Rights Law.

C. Respondents Failed to Provide a Reasonable Accommodation on the Basis of Disability to Ms. McKnight and other Patrons in Violation of NYCHRL § 8-107(15)

1. Reasonable Accommodations in Places of Public Accommodation

It is an unlawful discriminatory practice for "[any person] prohibited by the [NYCHRL] from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." NYC Admin. Code § 8-107(15)(a). To establish a viable failure to accommodate claim under Section 8-107(15)(a) of the NYCHRL, there must be a showing that a respondent failed to "make [a] reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity." *Rodriguez*, 2019 WL 3225764, at *6; *Stamm*, 2016 WL 1644879 at *5. The term "reasonable accommodation" means "such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business." N.Y.C. Admin, Code § 8-102; *Rodriguez*, 2019 WL 3225764, at *6; *Stamm*, 2016 WL 1644879 at *5. Reasonable accommodations that effectively meet the needs of persons with disabilities can include physical modifications to structures, changes in policies and practices, the provision of technology or assistive devices, among others. (*See* Legal Enforcement Guidance on Discrimination on the Basis of Disability, 105-107). The NYCHRL obligates covered entities to provide reasonable accommodations in housing, employment, and public accommodations.[25]

Under the NYCHRL, a requested accommodation is presumed to be reasonable and the covered entity has the burden of establishing unreasonableness. *See Rodriguez*, 2019 WL 3225764, at *6; *Stamm*, 2016 WL 1644879 at *6; *Phillips v. City of N.Y.*, 66 A.D.3d 170, 185 (1st Dep't 2009) ("Under the City HRL . . . the concepts of 'reasonable accommodation' and 'undue hardship' are inextricably intertwined. An accommodation under [NYCHRL] cannot be considered unreasonable unless the covered entity proves that the accommodation would cause undue hardship."), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014). Reasonable accommodations under the NYCHRL are fact-specific inquiries, and covered entities must assess reasonable accommodations on a case-by-case basis. *See id.* at 182; *Forgione v. New York*, No. 11 Civ. 5248, 2012 WL 4049832, at *9 (E.D.N.Y. Sept. 13, 2012).

[25] The NYCHRL has broader protections than the ADA in places of public accommodation. For example, under Title III of the ADA, private sector places of public accommodation are required, *inter alia*, to make "reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182.

A *prima facie* case for failure to accommodate under Section 8-107(15) of the NYCHRL in the context of public accommodations requires a showing that: (1) a patron has a disability; (2) respondent(s) knew or should have known of the disability; (3) an accommodation would enable a patron to use or enjoy the rights in question; (4) and [respondent(s)] refused to provide an accommodation. NYC Admin Code § 8-107(15)(a); *see Rodriguez*, 2019 WL 3225764, at *5; *Stamm*, 2016 WL 1644879 at *6. The respondent(s) may then, as a defense, establish that the sought accommodation causes an undue hardship. *See Rodriguez*, 2019 WL 3225764, at *5; *Stamm*, 2016 WL 1644879 at *6.[26]

Providing a reasonable accommodation that enables a person to enjoy the rights in question in a place of public accommodation includes full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation. NYC Admin Code 8-107(4); *see infra*, Section IV.B.

2. Respondents Did Not Provide a Reasonable Accommodation to Ms. McKnight and Other Patrons with Disabilities as Required by the NYCHRL

The Commission agrees with Judge Addison's findings that Respondents failed to provide a reasonable accommodation to Ms. McKnight and other similarly situated patrons with disabilities that use wheelchairs or mobility devices that cannot traverse the Corner Entrance in violation of section 8-107(15) of the NYCHRL. Specifically, the Commission agrees with the R & R that neither the Lobby Entrance, nor the proposed Side Entrance modifications, which were put in place between 2021 and 2022, met the requirements for reasonable accommodations under the NYCHRL. Both entrances fail to enable patrons with disabilities who are unable to use the steps at the Corner Entrance to exercise their statutory right to the full and equal enjoyment, on equal terms and conditions, of the advantages, privileges, and services that the public accommodation offers to other patrons. *See Rose v. Co-Op City of New York,* OATH Index No. 1831/10 (A.L.J. June 16, 2010), *rev'd*, 2010 WL 8625897 (N.Y.C. Comm'n on Human Rights Nov. 18, 2010) *aff'd sub nom. Riverbay Corp. v. N.Y.C. Comm'n on Human Rights*, 2011 N.Y. Misc. LEXIS 7105 (Sup. Ct. Bronx Cty. Sept. 9, 2011) (holding that a housing provider discriminated against a resident by requiring the resident to use a side entrance and failing to make the main entrance of an apartment building accessible; ordering the housing provider to make the front entrance accessible; and stating "the purpose of the New York City Human Rights Law is to ensure that all people, regardless of their membership in a protected class, be able to fully enjoy all of the rights, privileges and advantages that this great city has to offer in a manner that is equal and unsegregated." The Commission also agrees that accessibility via the Corner Entrance of 111 Fifth Avenue is required to fulfill the NYCHRL's reasonable accommodation obligations and there has been no showing of an undue hardship, such as a conflict of law or architectural infeasibility.

[26] The NYCHRL has additional requirements surrounding reasonable accommodations. For example, as codified in the law in 2018, covered entities are required to engage in a cooperative dialogue, which is "the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity. NYC Admin Code §§ 8-102;107(28).

a. Respondents Knew of Patron Disabilities

As was established in Section IV.B.2, for Complainant and other similarly situated patrons with disabilities that are users of wheelchairs or other mobility devices, the first two elements of a reasonable accommodation claim are met. For Complainant's part, she is a patron of the H & M store at 111 Fifth Avenue, has a disability, and uses a wheelchair. Ms. McKnight reported to H & M about her difficulties accessing the store using the Lobby Entrance on multiple occasions, and the challenges she faced were witnessed by Winter Entities' concierge as well.

b. A Corner Entrance Ramp Would Enable Full Use and Enjoyment of the Public Accommodation for Complainant and Similarly Situated Individuals

A reasonable accommodation that would enable Ms. McKnight and similarly situated patrons with disabilities to enjoy their right to full and equal enjoyment of the place of public accommodation at 111 Fifth Avenue on equal terms and conditions with other patrons is available. Since the outset of this proceeding, such modification was discussed among the parties. Thus, the third element is established.

The fourth and final element is a respondent's failure to provide a reasonable accommodation. Taking into account the facts and circumstances in this case, including the context provided below, the Commission adopts Judge Addison's finding that access through the Corner Entrance at this H & M location is required to comply with the NYCHRL. There is no showing by Respondents of undue hardship, such as architectural infeasibility, that negates Judge Addison's conclusion that the accommodation is reasonable and available. A Corner Entrance modification was proffered early in the proceedings with the Bureau and was ultimately discarded by Winter Entities in light of their preferences. Accordingly, the Commission adopts Judge Addison's recommendation that Respondents build a ramp and orders same.

c. The Lobby Entrance Does Not Meet the Requirements of the NYCHRL

The Lobby Entrance never constituted a reasonable accommodation under the NYCHRL. This was true in 2017 when Ms. McKnight made several fraught visits to H & M, and was forced to use a separate entrance that, *inter alia*, took time and effort to use, and was virtually unattended. The Winter Entities' expert witness Mr. Anderson stated that this entrance was insufficient to meet ADA standards, even after adjustments were made to it. (Tr. 752). Mr. Hennesey corroborated this when he testified that changes were recently made to the doorbell at the Lobby Entrance as a result of "our understanding" that the doorbell needed to be lowered since the prior height did not comply with ADA requirements. (Tr. 318.) Regardless, there are no modifications that could be made to the Lobby Entrance to transform it into an entrance that enables equal use and enjoyment of the rights in question. As detailed in Section III.B.1., this H & M location was designed with an array of alluring and welcoming features at its Corner Entrance, complete with glass doors that give a clear view into the store, and a vestibule that opens into a well-lit, double-height ceiling space with a merchandise display including mannequins facing patrons as they enter and neatly stacked clothing. Even if it is true that the modified Lobby Entrance meets the accessibility standards of the federal ADA, compliance with the NYCHRL's reasonable accommodation provisions is measured independently in light of the requirement of equal enjoyment on equal terms and conditions of the rights in question. This is

an instance of separate and unequivocally divergent options and experiences where persons with disabilities bore the burden of time and work to even enter the store location. Reasonable accommodations under Section 8-107(15) of the NYCHRL are meant to enable a person's full and equal enjoyment, on equal terms and conditions, of any of the advantages, services, facilities or privileges of a public accommodation, unless the public accommodation demonstrates an undue hardship. No Respondent here has provided a reasonable accommodation that does so.

Accordingly, and as set forth in the R & R, the Lobby Entrance at 111 Fifth Avenue is not a reasonable accommodation under the NYCHRL, and Respondents are liable for failing to provide a reasonable accommodation.

d. The Side Entrance Does Not Constitute a Reasonable Accommodation Under the NYCHRL and Entry Through the Corner Entrance is Required to Comply with the NYCHRL

The Side Entrance also fails to fulfill the NYCHRL's reasonable accommodation requirements. Prior to the Bureau's investigation, the Side Entrance was not accessible for wheelchair users due to having two steps, although the Winter Entities were already in the process of seeking to make the entrance ADA accessible by the time they were added to the Complaint. After the trial, Respondents completed the modifications, which included removing the steps and adding the H & M logo to the door, along with a small hanging sign. (Winter AAAAAA.) While the modifications to the Side Entrance are an improvement over the Lobby Entrance, they nonetheless fail to comply with the Sections 8-107(4) and 8-107(15) of the NYCHRL.

First, as elucidated above, a reasonable accommodation must enable a patron to enjoy the rights in question. These rights *include full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation*. NYC Admin. Code § 8-107(4) (emphasis added). In contrast, the ADA only requires modifications that "*afford* such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities," and does not require that the entity enable the patron to "enjoy the rights in question," or require that said goods and services be provided in the manner of full and equal enjoyment, on equal terms and conditions. *See* 42 U.S.C. § 12182; NYC Admin Code §§ 8-107(4), (15) (emphasis added). Even in circumstances where the statutory language is similar, New York courts have made clear that per the NYCHRL's statutory mandate, that the NYCHRL be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" and that the NYCHRL requires "an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City Human Rights Law's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws." *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 66, 872 N.Y.S.2d 27, 31 (2009); *see also Phillips*, 66 A.D.3d at 184-85 (stating in an employment discrimination case that "[w]hen the dissent discusses the nature of what constitutes reasonable accommodation, it fails to include the fact that 'reasonable accommodation' is defined differently under the ADA than it is under the City HRL").

Applying the NYCHRL framework discussed herein to the store location at issue in this matter, a reasonable accommodation entails more than enabling a person to ultimately make a purchase, but includes being able to enter and experience the full curated shopping experience provided to other patrons by virtue of store's design and merchandising.[27] "Equal terms and conditions" under the NYCHRL encompass the patron experience provided at the Corner Entrance, and is not limited to offering access to goods and services. Here, the record demonstrates that at this H & M location, one entrance, the Corner Entrance, was specifically designed to enhance the user experience and to invite and entice a shopper with its glass doors giving shoppers the ability to look into the store from different angles, double height ceilings, and selected merchandise displays. Ms. McKnight's testimony demonstrates how well the store achieved these aims, noting the "experience" of entering the store to see high ceilings, good lighting, and the aesthetics of the displays. (Tr. 112.) H & M's testimony also illustrates this fact. In his testimony, Mr. Hubinette agreed that its high ceilings, display of clothing and mannequins, and its eight glass doors between glass panels that give a clear view into the store add up to the Corner Entrance being "a pretty grand main entrance." (Tr. 392.) This also aligns with Lobo's testimony, that aspects like bright lights, upbeat music, and merchandise displayed are used at a main entrance for the "marketing impact" and to "cater to the customer."[28]

Second, the record shows that despite Respondents' efforts to add some elements of the Corner Entrance at the Side Entrance in response to the Bureau's case, the Corner Entrance and user experience at this H & M location could not be replicated at a separate entrance on side of the building. The space, the size, the lighting, and the decor are quintessential elements of the services and facilities that comprise the unique retail experience that H & M provides to patrons using the Corner Entrance. Mr. Hubinette agreed in his testimony that H & M was limited in its ability to create a comparable customer experience at the Side Entrance, and that it would not be equally inviting, since they cannot duplicate the ceiling heights at the Corner Entrance. (Tr. 400.) Failing to enable full use and enjoyment of these services and facilities on equal terms and conditions, in the absence of an undue hardship, denies patrons with disabilities their rights under the NYCHRL.

Accordingly, the Commission adopts the R & R's finding that Respondents failed to provide a reasonable accommodation to Complainant and similarly situated individuals with disabilities in violation of Section 8-107(15) of the NYCHRL.

3. The Winter Entities' Objections to the R & R

[27] In their closing brief, the Winter Entities correctly state that "[a] reasonable accommodation is one that allows a person with a disability to 'enjoy the right or rights in question,'" but then proceed to state that "'*access* to the rights in question' means access to the goods and services provided by that retail store." (Winter Closing Brief at 33.) (emphasis added). The "rights in question" under the NYCHRL extend beyond "access," and require "full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation" on the basis of disability." NYC Admin. Code. § 8-107(4)(a)(1)(a).

[28] In their comments on the R & R, Winter Entities put forth that it was inappropriate for the R &R to rely on Ms. Lobo's testimony for "any opinion she offered outside of her recognized areas of expertise," including merchandise, shopper values. (Winter Entities' Comments, 4.) The Winter Entities provide no citation to applicable evidentiary rules for this claim, and did not object to this line of questioning, nor Ms. Lobo's responses, during the trial. (*Id.*; Tr. 154-155.). Moreover, despite not deeming herself to be an expert in retail marketing (Tr. 174), she did testify that she had experience designing main entrances of retail spaces (Tr. 154.) Accordingly, the Commission declines to disregard her testimony as discussed in the R & R.

The Winter Entities object to the R & R's recommendations and ask the Commission to reject them, and to dismiss the Complaint. For the reasons set forth below, the Commission declines these requests, and adopts the R & R's recommendations.

a. Modified Side Entrance Falls Short of Requirements of NYCHRL

The Winter Entities contend that the Commission should deem the modification to the Side Entrance as meeting their obligation to provide a "reasonable accommodation" under the NYCHRL because "it provides access to the property's goods and services," and assert that "there is simply no basis to order the Winter Respondents to build another accessible entrance at the site." (Winter Entities' Comments, 2.) The Winter Entities posit that they are entitled to choose between building a ramp at the Corner Entrance and modifying the Side Entrance, relying on language in the Commissions Disability Enforcement Guidance, which states "[i]f more than one accommodation is effective, the preference of the individual with the disability should be given primary consideration, but the covered entity has the ultimate discretion to choose between effective accommodations."[29] (Tr. 67.)

These assertions misunderstand fundamental provisions of the NYCHRL's disability anti-discrimination protections, and seek to rely on a misapplication of language in the Disability Enforcement Guidance instead.

[29] The Commission agrees with the R & R that the *Van Vorst v. Healthcare*, No. 21-4, 2021 WL 6101474 (2d Cir. Dec. 22, 2021) summary order is inapposite. Winter Entities put forth that *Van Vorst* "affirmed that a covered entity has the discretion to select between available accommodations." (Winter Entities' Comments, 18.) This is not correct. The *Van Vorst* summary order affirmed the district court's denial of motions for judgment as matter of law and a new trial after a jury decided against plaintiffs alleging violations of Sections 8-107(4) and 8-107(15) of the NYCHRL. The plaintiffs were people that were deaf who brought claims against a hospital relating to their interpretation needs, specifically their seeking of a live interpreter. The district court decision, which the *Van Vorst* summary order affirmed, focused on credibility issues with the plaintiffs, the framing of the standard of whether they were treated "less well" than others in the jury instructions, and if proper jury instructions were provided. *See Van Vorst v. Lutheran Healthcare*, No. 15CV1667, 2020 WL 7343799 (E.D.N.Y. Dec. 14, 2020), *aff'd*, No. 21-4, 2021 WL 6101474 (2d Cir. Dec. 22, 2021.) In addition to these distinguishing factors, which are not present here, the underlying allegations of discrimination in *Van Vorst* took place from 2012-2014, prior to the NYC Council's 2016 amendment to the NYCHRL requiring full and equal enjoyment, on equal terms and conditions, by places of public accommodation. See *Complaint*, Van Vorst v. Lutheran Healthcare, No. 15-cv-1667, 2015 WL 13827733 (E.D.N.Y March 27, 2015). Thus, its potential bearing on the case at hand is limited by the fact that the relevant NYCHRL language was updated between the facts of *Van Vorst* and the facts of this matter. Turning back to the summary order, the court in *Van Vorst* is critical of plaintiffs advancing "a new legal theory" in the case after the jury verdict, which the court frames as an argument that the "NYCHRL required the Hospital not merely to provide 'reasonable accommodations' necessary for effective communication between plaintiffs and their treatment providers, but to provide every deaf patient with a live American Sign Language ("ASL") interpreter on every visit, regardless of the patient's fluency in English or facility in lipreading and writing, and regardless of whether the patient requested an interpreter." The court put forth that "no state or federal court has interpreted the NYCHRL as creating such a strict liability standard for healthcare providers serving deaf individuals, and we decline to do so here." *Van Vorst v. Lutheran Healthcare*, No. 21-4, 2021 WL 6101474, at *2 (2d Cir. Dec. 22, 2021). In light of these procedural issues, the timing of the *Van Vorst* allegations, and the Second Circuit's framing of its decision specifically relating to healthcare providers serving deaf individuals, which is highly distinguishable from a retail establishment providing full and equal access to shoppers with mobility limitations, the Commission agrees with the R & R that *Van Vorst* does not support Winter Entities' claim that the summary order "affirm[s] that a covered entity has the discretion to select between available accommodations," framing that directly conflicts with the statutory text of the NYCHRL's reasonable accommodation requirements.

"Providing access" is one element of a reasonable accommodation in public accommodations, but it is not the only requirement. As set forth in Section IV.C., a reasonable accommodation must "enable a person with a disability to . . . enjoy the right or rights in question," NYC Admin. Code § 8-107(15), which here includes "full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation." NYC Admin. Code § 8-107(4). The NYCHRL aims for public accommodations to provide equal and independent access to persons with disabilities, (*see* Legal Enforcement Guidance on Discrimination on the Basis of Disability, 105-106), which the New York City Council made clear was the intent when adding "the full and equal enjoyment" and "equal terms and conditions" language to the Law in 2016.

In addition to providing access, a reasonable accommodation in a place of public accommodation must also enable a patron with disabilities to fully enjoy the services and facilities in question, in the absence of an undue hardship. As explained in Section IV.C.2.d., the Side Entrance does not do so, and cannot be made to offer an equivalent experience for patrons. On the facts in the case at hand, compliance with the NYCHRL requires Winter Entities to enable shoppers with mobility disabilities to enter the store using the Corner Entrance, regardless of whether the modifications to the Side Entrance allow some measure of "access." Access is necessary, but not always sufficient, for public accommodations to comply with the NYCHRL's "reasonable accommodation" and "full and equal access, on equal terms and conditions" provisions.[30] The Side Entrance does not enable full and equal enjoyment of the rights in question, it does not constitute an "effective" reasonable accommodation. Thus, this case does not present a circumstance where there are multiple effective reasonable accommodations available.[31]

Additionally, Respondents have maintained that they were justified in seeking approval from the LPC and community board for only one option - the Side Entrance modifications - and proceeding to make those modifications, rather than seeking approval for a ramp that would allow access to the Corner Entrance for patrons with disabilities, or presenting any other options for Corner Entrance accessibility. (Winter Entities' Comments, 10.) For this assertion, Respondents rely in part on Mr. Winter's testimony that prior to submitting a formal application

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[30] The *amici* also state their objections to the R & R through the framework of accessibility, without acknowledging the Law's requirement of full and equal enjoyment on equal terms and conditions. For example, the HDC states that it "embraces the goal of providing *equitable access* for everyone to our city's historic buildings and spaces," and puts forth its belief that "accessibility is about function, access, and equity." (HDC Comments at *2, *4.) (emphasis added). The NYLC also "wholeheartedly support[s] the goal of providing *equitable access* for all to our City's historic buildings," and refers to the Side Entrance modifications as providing "dignified accessibility." (NYLC Comments at *1, *2) (emphasis added) Neither the HDC nor the NYLC make reference to the NYCHRL's Section 8-107(4) statutory requirement that places of public accommodation provide "full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges."

[31] In the legal guidance, the proposition that covered entities have discretion to choose among effective accommodations is based on a citation to a guidance document prepared by the Equal Employment Opportunity Commission (EEOC), which enforces federal anti-discrimination employment law. (Guidance at 67.) The underlying EEOC guidance language is more generally tailored to workplace reasonable accommodations, which are treated differently in some respects than reasonable accommodations in places of public accommodation. For example, because of their differing contexts, the NYCHRL institutes additional formal steps in the employment context, requiring the covered entity to provide a written determination regarding the reasonable accommodation. (NYC Admin. Code § 8-107 (28); Legal Enforcement Guidance on Discrimination on the Basis of Disability, 66-67.))

that only included modifications to the Side Entrance, he had a call with staff at LPC and that LPC staff expressed a preference[32] for modifications to the Side Entrance over any ramp at the Corner Entrance (Tr. 491-92.) Respondents further claim that the R & R "dismisses undisputed record evidence that LPC staff advised the Winter Respondents of LPC's preference for the New Entrance over the Corner Ramp because the communication was not 'recorded.'" (Winter Entities' Comments, 9-10) (citing R &R, 52.) This claim is incongruent with the record and the R & R. The evidence is that an LPC staff person said the Side Entrance was the "far better solution" – there is no indication that this statement is attributed to the LPC as a whole. In addition, the R & R specifically acknowledges that "[i]n so far as the LPC is concerned, there is strong support for the 18th Street entrance being the preferred entrance." (*Id.*) And regardless, the circumstances surrounding that meeting between Winter Entities and the LPC staff are ancillary to the ultimate findings and the conclusion that Respondents must make the Corner Entrance accessible. As the R & R aptly highlights, the Winter Entities never demonstrated that the LPC would have rejected a ramp at the Corner Entrance. As Judge Addison noted, "expressing a preference for one entrance does not mean disapproval of another," and it was unsurprising that the LPC approved "the single option with which it was presented." (R & R 52.)

The LPC has a formal public process for entities seeking permits to make the exterior modifications to the landmark designated building at issue in this case. Notably, permits for some more minor types of modifications to landmark designated buildings, such as some types of exterior work that does not need a permit from DOB, (LPC Guidance at 12), can be awarded via LPC staff approval without the full LPC. However, the COA needed for the potential modifications to the Side and Corner Entrances require full LPC approval. These distinctions in the processes for permits further underscore that an off-the-record conversation where staff from LPC indicated that one proposal was better than another does not carry the weight or significance of a formal LPC presentation, review, and approval. Furthermore, the record does not establish which materials or statements were presented to LPC staff in the Spring 2020 meeting, and it is possible that LPC staff never actually viewed the Preliminary LPC Presentation, which contains a detailed rendering of the Corner Entrance and Side Entrance modification proposals, before saying that the Side Entrance modification was a better solution. And even if LPC staff did in fact review this presentation prior to making this statement, there is no indication in the record that any member of the LPC was informed at any stage that the H & M store was under investigation for violations of the NYCHRL, and that the enforcement agency's position was that compliance with the NYCHRL required that patrons with disabilities be able to enter through the Corner Entrance.

What the record does show is that the Winter Entities' community board and LPC presentations framed their goal as making the Side Entrance "accessible," with no mention of the NYCHRL's provisions requiring full and equal enjoyment, and no use of the term "reasonable accommodation," or what that means under the NYCHRL.

[32] Winter Entities assert that "the LPC applauded the Winter Respondents for not submitting a corner ramp proposal," and cite to Winter Ex. HHHHH, a recording of the January 2021 LPC presentation. (Winter Entities Comments, 10). However, there was no discussion of the Corner Entrance ramp proposal at that presentation by LPC, and no statement about the Corner Ramp proposal was made by the Winter Entities at that presentation, as explained above. (Winter Ex. HHHHH.) Other than the Spring 2020 call Mr. Winter had with LPC staff, there is no evidence in the record that the full LPC was ever aware of a proposal to modify the Corner Entrance.

The record also shows that Respondents chose to only seek permit approval for the Side Entrance modifications. (R & R 52.) The fact that the Winter Entities chose not to seek a permit to modify the Corner Entrance ramp to the LPC belies their professed concern that they are being "caught between conflicting guidance from two City agencies." (Winter Entities' Comments, 1.) The NYCHRL recognizes and accounts for circumstances when there is a conflict of law. The Disability Legal Guidance discusses that when another agency's regulations are in conflict with NYCHRL reasonable accommodation requirements, that may constitute a successful undue hardship defense. (Legal Enforcement Guidance on Discrimination on the Basis of Disability, 89) ("In some instances, a requested accommodation may conflict with federal, state or local law or regulations. In such circumstances, the covered entity must make inquiries about the possibility of a waiver from the requirements of other laws that would allow it to make the requested accommodation. If a waiver is unavailable, the potential conflict of providing an accommodation that would violate another law may be an undue hardship.") The R & R acknowledges this. (R & R 50-51.) The Winter Entities' choice to not even attempt seeking a permit from the LPC for construction of a Corner Entrance ramp is at odds with any legitimate concern about regulatory conflicts. Moreover, Winter Entities have not pointed to a single law, rule, or LPC regulation that suggests that LPC takes a rigid oppositional stance against the construction of ramps on landmark buildings.[33] In fact, the R & R identifies that this is discussed in the Disability Legal Guidance as well, "[t]he NYC Landmarks Preservation Commission has a long history of approving proposals for work that accommodates barrier-free access at landmark properties, including *ramps*, lifts, and associated fixtures." (*Id.* (citing Disability Legal Guidance at 89.))

Respondents have presented no conflict of law. This fact, coupled with Winter Entities' repeated indications that they did not want to – and would not agree to – build a ramp at the Corner Entrance, weigh against finding that the Winter Entities acted in compliance with the requirements of the NYCHRL in seeking to make the Side Entrance accessible in lieu of the Corner Entrance, the latter of which would meet the requirements of Sections 8-107(4) and 8-107(15) of the NYCHRL.

Ordering Respondents to make the Corner Entrance accessible, and to move forward with constructing the ramp, is an appropriate remedy in this matter. *See Kreisler v. Second Ave. Diner Corp.*, No. 10-civ-7592, 2012 WL 3961304, at *9 (S.D.N.Y. Sept. 11, 2012), aff'd, 731 F.3d 184 (2d Cir. 2013), *cert. denied*, 572 U.S. 1115 (2014) (Ordering a diner to initiate the formal process for seeking permission to install a ramp and build the ramp upon receiving permission in a place of public accommodation ADA, NYS Human Rights Law (NYSHRL), and NYCHRL case because "[w]hile [the diner] established that it is possible that City authorities will not permit them to build a ramp, they have provided no explanation as to why they should be excused from

[33] In their closing brief and comments on the R & R, the Winter Entities refer to a fact sheet document created by the LPC which states: "[i]f proposing a ramp, select a primary entrance closest to grade to minimize the length and height of the ramp and to reduce the requirements for landings and associated railings" to support of their position. (Winter Ex. AAAAA; Winter Entities' Closing Brief, 3, 34; Winter Entities Comments, 21.). This fact sheet, which as acknowledged in the R & R, indeed indicates that LPC may have a preference for making entrances accessible without ramps, certainly does not preclude or forbid ramps. (R & R at 52.) In addition, as the R & R notes, the LPC does approve of ramp construction on landmark designated building exteriors in the Ladies' Mile Historic District. (Tr. 240-42, 588-90; Pet. Ex. 15.)

trying" and the diner has "fallen far short of their burden to establish that a ramp is not readily achievable.")

b. Applying Statutes and Ordering Remedies for a Specific Set of Facts is Not Rulemaking and Does Not Fall within the Purview of CAPA

Respondents insist that requiring that the Corner Entrance at H & M's 111 Fifth Avenue store location be made accessible equates to promulgation of a "one-size-fill all" agency rule that the "main entrance" of all places of accommodation be made accessible, and should be subject to the requirements of the City Administrative Procedure Act ("CAPA"). (Winter Entities' Comments, 2, 18, 19.) This argument misconstrues the NYCHRL and ignores that the R & R specifically and appropriately disposes of this argument. [34]

The R & R's recommendation that Respondents build a ramp at the Corner Entrance of this H & M store location does not constitute establishment of a new rule that all "main entrances" in NYC places of public accommodations be made accessible. As set forth above, the NYCHRL has flexibility written into the statute and elaborated on in agency guidance. Indeed, the R & R explicitly notes how different circumstances could have yielded different outcomes in this very matter. *See* R & R 51 ("Winter Entities have not asserted hardship by showing that the installation of a ramp at the [Corner Entrance] would be architecturally infeasible. Nor have they shown that such installation would conflict with any other laws, for which they were denied a waiver.") The NYCHRL requires places and providers to offer full and equal enjoyment to patrons. When that is not possible – because doing so creates an undue hardship or because no accommodation to achieve that objective is available – covered entities must pursue alternatives that effectively allow patrons to use and enjoy goods and services. The NYCHRL anticipates differential outcomes based on the varying circumstances of public accommodations and the rights in question. Further, the NYCHRL text explicitly states that when entities are found to be liable for violations of the statute, injunctive relief and other remedies may be appropriate and can include "[t]he extension of full, equal and unsegregated accommodations, advantages, facilities, and privileges." NYC Admin. Code § 8-120(5). The R & R's analysis and recommendation in this matter reflect a standard application of the NYCHRL to a specific set of facts, where one specific entrance to a store was uniquely designed to be substantially more inviting to shoppers than any other entrances, and excluded patrons with mobility disabilities. Moreover, the R&R recommends a remedy tailored to fit those facts squarely within a remedy provision enumerated in the statute: extending equal and unsegregated accommodations to patrons with disabilities. Requiring that a ramp be constructed at a place of public accommodation to resolve a disability discrimination claim is not a unique means of case resolution by an adjudicatory body. *See, e.g., Kreisler*, 2012 WL 3961304, at *9, *14 (ordering a diner to initiate the process for obtaining a permit to build a permanent ramp and build the ramp

[34] The *amici* echo this argument that requiring Respondents to make the Corner Entrance accessible is akin to requiring all NYC building "main entrances" to be made accessible via agency rulemaking, without accounting for scenarios where this would cause an undue hardship (*See* HDC Comments at *1-5; NYLC Comments at *1-2.) As set forth in Section IV.3.b., this misinterprets the R & R.

to resolve a claim of disability discrimination by a place of public accommodation under the ADA, NYSHRL, and NYCHRL); *Norris v. RPC Rest. Corp.*, No. 21-CV-8956, 2025 WL 314353, at *4 (S.D.N.Y. Jan. 27, 2025), *report and recommendation adopted*, No. 1:21-CV-08956, 2025 WL 522591 (S.D.N.Y. Feb. 18, 2025) (directing covered entity in a place of a public accommodation case to "make the entrance and exit to the Facility readily accessible to and useable by individuals with disabilities" and noting that "[i]nstalling a ramp with handrails on both sides or a wheelchair lift . . . would satisfy this recommendation.")

The R & R's evaluation of the present NYCHRL disability discrimination claims assessed the totality of the circumstances in light of the NYCHRL's provisions, including considerations of the defenses available for all covered places and providers of public accommodation under the governing statute. It is clear that this analysis of the NYCHRL contemplates different outcomes for different places of public accommodations, in line with the "case by case" assessment required under the NYCHRL. There is nothing "one-size fits all" about the R & R's recommendation that the H & M store located at 111 Fifth Avenue install a ramp at the Corner Entrance, and the Commission adopts same as an order.

V. DAMAGES, CIVIL PENALTIES, AND AFFIRMATIVE RELIEF

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order both that respondents cease and desist from such practices, and that they take actions that effectuate the purposes of the NYCHRL, which includes "the extension of full, equal and unsegregated accommodations, advantages, facilities, and privileges. N.Y.C. Admin. Code § 8-120(a)(5). The Commission may also award damages to complainants, *see id.* § (a)(8), and impose civil penalties of up to $125,000 per discriminatory act and $250,000 per discriminatory act where the Commission determines that the unlawful conduct is willful, wanton, or malicious. N.Y.C. Admin. Code § 8-126(a). *See Fernandez*, 2023 WL 3974499 at *17*; Automatic Meter Reading Corp. v. New York City*, 63 Misc.3d 1211(A) (N.Y. Sup. Ct. 2019) (upholding $250,000.00 civil penalty issued by the Commission upon a finding that respondent engaged in willful and wanton sexual harassment over a three-year period).

In this matter, Ms. McKnight received compensatory damages for emotional distress via settlement prior to the trial, and the Bureau does not seek such damages here. (R & R at 6, Tr. 75, 89-90.) Judge Addison did assess civil penalties for the Respondents after considering "the egregiousness of the violations, their pervasiveness, whether they were committed over a period of time, whether there are any previous findings of discrimination against the respondent[s], respondent[s'] financial situation, and the potential impact of respondent[s'] discrimination on the public," (R & R at 54) (collecting cases), and recommend that H & M pay a civil penalty of $75,000, and the Winter Entities pay a civil penalty of $125,000. Both the Winter Entities and H & M object to the civil penalty recommendations. For the reasons set forth below, the Commission orders that H & M pay a $75,000 civil penalty, and the Winter Entities pay a $125,000 civil penalty.

Respondent H & M argues, *inter alia*, that Judge Addison conflated lease terms, and claims that the R & R disregards a provision that H & M argues controls and gives Winter Entities full discretion to deny changes to the exterior of the building, which includes a ramp at the Corner Entrance, rather than a provision that would prohibit the Winter Entities from unreasonably withholding approval. (H & M Comments, 3.) Respondent H & M also argues that

Judge Addison did not properly weigh H & M's position in light of the lease between H & M and BJW Managing LLC and its relationship with Winter Entities, and that the $75,000 penalty should be rejected. (*Id.* at 3-4.)

The R & R and NYCHRL refute Respondent H & M's objections. To start, H & M, as with the Winter Entities, violated the NYCHRL when it required Ms. McKnight to use the Lobby Entrance. H & M violated the Human Rights Law by making Ms. McKnight wait to enter the store multiple times, and failing to take action in response to the complaints she made to H & M employees. Thus, a civil penalty is warranted here, regardless of H & M's claims regarding the lease. Turning to H & M's lease-related claims, the R & R explicitly states that "H & M is constrained by its lease with the landlord, whose authorization it needs in order to proceed with structural modifications, which an exterior ramp would constitute," and acknowledged that without action against the landlord to enforce the lease, it is unlikely that H & M would have been able to install a ramp. (R & R at 49, 56.) Thus, the R & R acknowledges and accounts for the fact that Respondent H & M was constrained in its ability to unilaterally construct a ramp at the Corner Entrance, as Winter Entities had the authority to withhold permission. Respondent H & M's objection to the $75,000 penalty on the grounds that the R & R did not properly consider the lease terms lacks support. As Respondent H & M acknowledges, (*see* H & M Comments, 3-4), the R & R recognizes the H & M lease terms with the Winter Entities, and notes that there was "no indication that H & M has discriminated at any of its other stores," in shaping the penalty. (R & R 56.)

Turning to the NYCHRL, regardless of the lease, Respondent H & M is a place of public accommodation that is required to comply with the Law, and is liable for violations of same. (R & R 45.) No provision of the NYCHRL authorizes a place of public accommodation to contract around NYCHRL obligations through lease terms. The Commission applies the principle, also present in the ADA context,[35] that for entities that constitute places of public accommodation, both the landlord and tenant are fully responsible for complying with the governing NYCHRL's provisions, regardless of how they have bargained compliance responsibility in a lease – the terms of which are only effective between the parties. (R & R, 38 (citing Pet. Ex. 44 at 6/66, "Title III Technical Assistance Manual of the ADA")).

Winter Entities' objections to Judge Addison's civil penalty recommendation focus on weight that was given to the various factors on which the recommendation is based, and their position that ordering a higher civil penalty for the Winter Entities than for H & M is unwarranted.

As set forth above and noted in the R & R, a civil penalties assessment includes a number of "relevant considerations," and a "'principle of proportionality' is to be applied; the civil penalty must be narrowly tailored to the particular facts and circumstances of the case at hand." (R & R at 54) (citing *119-121East 97th St. Corp. v. Comm'n on Human Rights*, 220 A.D.2d 79, 88 (1st Dep't 1996)). Several of the considerations are elaborated upon here.

[35] As set forth in IV.A., "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Law No. 85 § 1 (2005).

Regarding considerations of pervasiveness and the period of time, the Winter Entities had been on notice of potential non-compliance with the NYCHRL related to Corner Entrance store access since 2015, their concierge-employee was aware of the barriers Ms. McKnight faced attempting to enter the store since 2017, and since 2018, knew that they were being investigated by the Bureau for same. As of the date of this Decision & Order, the Corner Entrance to the H & M store at 111 Fifth Avenue in Manhattan remains inaccessible. This violates both Section 8-107(4) and 8-107(15) of the NYCHRL, and given the length of time they had been on notice, between eight and ten years, weighs in favor of the civil penalty assessed.[36]

Turning to the egregiousness of the violations, Ms. McKnight's experience using the Lobby Entrance was harrowing each of the three times she was forced to use that entrance to gain access to the store and made her feel like she "didn't exist" and was a "non-entity." This also supports a substantial civil penalty.

Winter Entities assert in their comments, *inter alia*, that they engaged in a good faith cooperative dialogue with the Commission since being contacted in 2020, and that the R & R fails to properly consider their steps taken related to modifications. First, the record raises questions as to whether the Winter Entities meaningfully participated in a NYCHRL cooperative dialogue in good faith. Mr. Winter testified that he rejected the idea of a ramp at the Corner Entrance, prior to engaging any architects, a position supported by emails dating back to 2018 between H & M and representatives of the Winter Entities. In addition, the Winter Entities chose to only present the Side Entrance modification option to the LPC, with no context offered relating to the NYCHRL. Second, as acknowledged in the R & R, the adopted recommendation is for a penalty of $125,000. This recommendation is half of the $250,000 maximum civil penalty that the statute authorizes the Commission to impose where unlawful conduct is determined to be willful, wanton, or malicious, N.Y.C. Admin. Code § 8-126(a). Judge Addison considered the egregiousness of Winter Entities' conduct, and explicitly referenced another case, *Comm'n on Human Rights ex rel. Politis v. Marine Terrace Assocs.*, OATH Index Nos. 1673/11 & 1674/11 (Nov. 25, 2011), *rejected*, Comm'n Dec. & Order (Apr. 24, 2012), *modified on penalty sub nom. Marine Holding LLC v. NYC Comm 'n on Human Rights*, 10951/2012 (Sup. Ct. Queens Co. Mar. 14, 2013), rev'd, 137 A.D.3d 1284 (2d Dep't 2016), *rev'd*, 31 N.Y.3d 1045 (2018), where she deemed the named respondents' violations as more egregious than Winter Entities' violations in the present matter.[37] Thus, although the R & R did not specifically discuss

[37] The Winter Entities put forth that the penalty assessment against them is arbitrary because some of the cases cited in support of the penalty assessment had sets of facts that differed from those present here. (Winter Entities' Comments, 20-21.) However, a penalty assessment under the NYCHRL weighs a variety of considerations. For example, the Winter Entities claim that *Politis* demonstrates that a $125,000 penalty is arbitrary because the penalty ultimately upheld in *Politis* was also for $125,000, despite the R & R characterizing the covered entities' behavior in *Politis* as more egregious. (Winter Entities' Comments, 21.) However, "potential impact of respondent's discrimination on the public" is another relevant factor in a penalty assessment. Here, Winter Entities' discrimination prevents many patrons with mobility limitations from accessing the store via the Corner Entrance, and the trial record establishes that more than one patron complained about accessing this H & M store through the Corner Entrance. This consideration is distinguishable from *Politis*, where the covered entity's discrimination on the basis of disability focused on *one* individual by failing to provide her a reasonable accommodation so she could access her apartment. *See Comm'n on Human Rights ex rel. Politis v. Marine Terrace Assocs.,* OATH Index Nos. 1673/11 & 1674/11 (Nov. 25, 2011), *rejected,* Comm'n Dec. & Order (Apr. 24, 2012), *modified on penalty sub nom. Marine Holding LLC v. NYC Comm 'n on Human Rights,* 10951/2012 (Sup. Ct. Queens Co. Mar. 14, 2013), *rev'd,*

every factor raised by Winter Entities in its penalty assessment sections, the Commission's order of $125,000 in civil penalties reflects an analysis of relevant factors, tailored to each respondent's circumstances and actions.

Relatedly, the Winter Entities express concern that the R & R recommends a higher penalty for them than H & M on the grounds that they did not immediately capitulate to the Bureau's position following investigation that a ramp must be installed at the Corner Entrance. (Winter Entities' Comments, 21.) The Winter Entities elaborate that they believe they are facing enhanced penalties because of their efforts to "exercise their right under the [NYCHRL], to challenge the [Bureau's] pursuit of a new 'main entrance' rule, and their rights to due process to be heard and present evidence at trial, a point for which the R & R cites no legal authority." (*Id.* at 22.) The Commission is indeed ordering a higher penalty against the Winter Entities than H & M, but not for these reasons.

First, as set forth in Section IV.C.3.b, the Bureau's case and this Decision and Order, do not constitute rulemaking. Second, the Commission is not ordering increased penalties against the Winter Entities because it chose to litigate this case. The Winter Entities' penalty assessment reflects that they were out of compliance with the NYCHRL for years, and remain so through the date of the Decision and Order. The Commission has also considered in its penalty assessment that the Winter Entities were not constrained by the existing lease, and refused to seek approval for modifications from LPC to ensure equal access as required by the NYCHRL. The fact that the Bureau was seeking compliance with the NYCHRL throughout the course of this matter does not change this. The Winter Entities are not entitled to a penalty reduction because their position did not prevail and their actions were deemed not to comply with the NYCHRL.

Accordingly, the Commission adopts the R & R civil penalty recommendations. H & M is ordered to pay $75,000 in civil penalties, and the Winter Entities are ordered to pay $125,000 in civil penalties.

F. Affirmative Relief

The NYCHRL authorizes the Commission to require affirmative measures, including trainings to prevent further discrimination. Admin. Code § 8-120(a)(4). *See, e.g., Desir*, 2020 WL 1234455 at *13-14; *Ondaan*, 2020 WL 7212457, at *18, *Martinez*, 2017 WL 4510797, at *5; *Cardenas*, 2015 WL 7260567 at *15-16, which includes, inter alia "the extension of full, equal and unsegregated accommodations, advantages, facilities, and privileges."

Accordingly, the Commission orders Respondents to:

1. Enable full and independent access for patrons with disabilities who use wheelchairs or have similar mobility needs at the Corner Entrance of the H & M Store located at the intersection of Fifth Avenue and 18th Street in New York, New York via installation of a ramp;

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137 A.D.3d 1284 (2d Dep't 2016), *rev'd,* 31 N.Y.3d 1045 (2018), Thus, even if one consideration in a multi-factor analysis supports a higher penalty amount for one covered entity, another consideration may support a higher civil penalty for another covered entity. It is not arbitrary for the Winter Entities and the covered entities in other cases to face the same penalty when taking into account all of the factors and circumstances, even if there are distinguishing factors present, such as the conduct in *Politis* being more egregious.

2. Ensure all of their staff are aware of the NYCHRL's protections for persons with disabilities, including the right of patrons to request and be provided with reasonable accommodations, and to create and distribute to all current and future employees a written antidiscrimination policy that includes how to identify and respond to reasonable accommodation requests;

3. Provide training on the NYCHRL to individually named Respondents, as well as supervisors, and managers of 111 Fifth Avenue, New York, NY 10003 and the H & M store therein; and

4. Post the Commission's "Equal and Independent Access for all New Yorkers" poster in the entrances of 111 Fifth Avenue, New York, New York 10003 and the H & M store therein so that the poster is visible to the public.

VI. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that Respondents complete construction of a ramp at the Corner Entrance within three hundred and sixty-five (365) calendar days.

Winter Entities are ordered to initiate the process for obtaining a Certificate of Appropriateness (https://www.nyc.gov/site/lpc/applications/certificate-of-appropriateness.page) for construction of a ramp at the Corner Entrance by submitting an application for proposed work through Portico (https://www.nyc.gov/site/lpc/applications/apply.page) no later than sixty (60) calendar days after service of this Order. H & M is ordered to participate as necessary so as not to impede the process set forth in this paragraph and as permitted by law.

Further, Winter Entities are ordered to begin construction of a ramp at the Corner Entrance within ninety (90) calendar days of receiving such Certificate of Appropriateness, or, in the event that Respondents are required by law or regulation to obtain any permits in addition to a Certificate of Appropriateness before commencing construction of a ramp, Winter Entities are ordered to commence construction of a ramp at the Corner Entrance within thirty (30) calendar days of receiving the last of such additional permits. Upon learning that any permit in addition to the Certificate of Appropriateness is required by law or regulation for construction of the ramp, Winter Entities are ordered to apply for such permits within fifteen (15) calendar days of learning of the permit(s). In the event that Respondents are prohibited from constructing a ramp at the Corner Entrance due to law or regulation, Winter Entities are ordered to seek a waiver from the issuing authority within fifteen (15) calendar days of learning of such prohibition. If granted the waiver, Winter Entities are ordered to continue the process of ramp construction within fifteen (15) calendar days of being granted the waiver. H & M is ordered to participate as necessary so as not to impede the process set forth in this paragraph and as permitted by law.

Respondents are ordered to report to General Counsel Anne Meredith at ameredith1@cchr.nyc.gov when construction of the ramp is complete, within five (5) calendar days of completion.[38]

IT IS FURTHER ORDERED that no later than thirty (30) calendar days after service of this Order, Respondent H & M pay a fine of $75,000 to the City of New York, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: General Counsel, a bank certified or business check made payable to the City of New York, including a written reference to Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. et al., OATH Index No. 905/20.

IT IS FURTHER ORDERED that no later than thirty (30) calendar days after service of this Order, Winter Entities pay a fine of $125,000 to the City of New York, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: General Counsel, a bank certified or business check made payable to the City of New York, including a written reference to Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. et al., OATH Index No. 905/20.

IT IS FURTHER ORDERED that no later than thirty (30) calendar days after service of this Order, individually named Respondents, as well as supervisors, and managers of 111 Fifth Avenue, New York, NY 10003 and the H & M store therein must participate in the Commission's free "Rights of People with Disabilities in Housing and Public Accommodations" training. The trainings can be arranged by calling the Director of Training Development and Evaluation at (212) 416-0193 or emailing trainings@cchr.nyc.gov, with written reference to Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. et al., OATH Index No. 905/20.

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondents post the "Equal and Independent Access for all New Yorkers" poster at 111 Fifth Avenue, New York, NY 10003 and the H &M store therein available here, https://www.nyc.gov/assets/cchr/downloads/pdf/publications/EqualAccess_Poster11x17-Eng.pdf, on 11 x 17 inch paper in a conspicuous location where it will be visible to both employees and members of the public for a period of at least three (3) years after the date of this Order. Respondents are ordered to provide proof of the posting to General Counsel Anne Meredith at ameredith1@cchr.nyc.gov within thirty (30) calendar days of this Order. The email shall include written reference to Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. et al., OATH Index No. 905/20.

IT IS FURTHER ORDERED that no later than thirty (30) calendar days after service of this Order, Respondents shall ensure all of their staff are aware of the NYCHRL's protections for persons with disabilities, including the right of patrons to request and be provided with reasonable accommodations, by creating and distributing to all current employees a written anti-discrimination policy that includes how to identify and respond to reasonable accommodation

[38] Should Respondents be denied the necessary permits and/or waivers to build a ramp, or are unable to complete construction of the ramp within 365 days despite following all required steps in this Order, Respondents are free to move to amend the final judgment in this case pursuant to NYC Admin. Code § 8-121 and 47 RCNY §1-06 in order to achieve full and independent access to the Corner Entrance at 111 Fifth Avenue for persons with disabilities that use mobility devices.

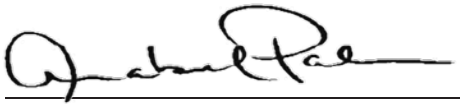
requests in compliance with the NYCHRL. Respondents must provide such policy to all future employees at the commencement of their employment. The policy must also be provided as an electronic copy to General Counsel Anne Meredith at ameredith1@cchr.nyc.gov no later than sixty (60) calendar days after Service of this Order. The email shall include written reference to Comm'n on Human Rights ex rel. McKnight v. H & M Hennes & Mauritz L.P. et al., OATH Index No. 905/20.

Failure to timely comply with any of the foregoing provisions shall constitute non-compliance with a Commission Order. In addition to civil penalties that are assessed against Respondents pursuant to this Order, Respondents shall pay a civil penalty of $100.00 per day for every day the violation continues. N.Y.C. Admin. Code § 8-124. Furthermore, failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Civil penalties are paid to the general fund of the City of New York.

Dated: New York, New York
April 30, 2025

SO ORDERED:
New York City Commission on Human Rights



Annabel Palma
Commissioner/Chair