UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MAYNARD BAKER, DOUGLAS K. IRISH, MARK SCHUMAKER, RONALD W. DIXON, SR, and RICHARD KENNY,

Plaintiffs,

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; PETE GRANNIS, sued herein in his official capacity as Commissioner of the New York State Department of Environmental Conservation; JOSEPH MARTENS, sued herein in his official capacity as Commissioner of New York State Department of Environmental Conservation; NEW YORK STATE ADIRONDACK PARK AGENCY; CURT STILES, sued herein in his official capacity as Chairman of New York State Adirondack Park Agency; LEILANI CRAFTS ULRICH, sued herein in her official capacity as Chairwoman of the New York State Adirondack Park Agency; DAVID PATERSON, sued herein as Governor of the State of New York; and, STATE OF NEW YORK,

Defendants.

10-CV-1016 (GLS) (RFT)

REPLY BRIEF OF THE STATE OF NEW YORK IN SUPPORT OF ITS MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs now seek access to 38 "truly wild," float plane accessible, water bodies in areas classified as Wilderness by the State Land Master Plan. The Americans with Disabilities Act does not entitle plaintiffs to use float planes to reach a strategically-chosen subset of Wilderness lakes when they can reach other Wilderness lakes by non-motorized means. Plaintiffs concede that entire areas of Wilderness are accessible to individuals with disabilities and do not claim that they themselves cannot reach those areas. Accordingly, they have failed to state a reasonable accommodation claim pursuant to Title II. And even if they had stated a claim, plaintiffs have again failed to allege sufficient facts to support their claim of injury in fact. Accordingly, plaintiffs have not met their burden of demonstrating standing and the Court therefore lacks subject matter jurisdiction. For these reasons, the amended complaint should be dismissed.

I

PLAINTIFFS HAVE FAILED TO STATE A CLAIM

In a significant admission, plaintiffs have made clear that they can, in fact, access many Wilderness locations, including water bodies in areas classified as Wilderness. *See* Pls.' Mar. 1, 2012 Mem. of Law in Opp. to Defs.' Motion to Dismiss and for Judgment on the Pleadings (Mar. 1, 2012 MOL) at 22. "Plaintiffs are not alleging that they cannot access all lands that are classified as Wilderness. Plaintiffs acknowledge that there are Wilderness areas that border public roads (*e.g.* Sentinel Range Wilderness area) and some lakes that allow use of non-motorized and motorized vessels (*e.g.* Lake Placid lake borders McKenzie Mountain Wilderness

area)." *Id.* Because access to a program, service or activity offered by a public entity must be "viewed in its entirety" in determining whether it is readily accessible to individuals with disabilities, plaintiffs' demand for access by float plane to 38 of 860 Wilderness water bodies fails to state a reasonable accommodation claim.[1] *See* Pls.' Mar. 1, 2012 MOL at 9; *see also* 28 C.F.R. § 35.150(a).

> Program accessibility requires that each service, program, or activity be operated "so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities," 28 CFR 35.150(a), subject to the undue financial and administrative burdens and fundamental alterations defenses provided in 28 CFR 35.150.

75 Fed. Reg. 56164, 56208 (Sept. 15, 2010) (italics added).

In *Baker v. New York State Dept. of Envtl. Conserv.*, 634 F. Supp. 1460, 1465-66 (N.D.N.Y. 1986) (*Baker I*), a group of citizens with disabilities challenged the ban on float planes in lands (and on water bodies surrounded by such lands) classified as Wilderness, Primitive and Canoe. The *Baker I* plaintiffs brought suit pursuant to the Rehabilitation Act, whose "substantive standards for determining liability are the same" as the ADA. *Christopher v. Laidlaw Transit, Inc.*, 899 F. Supp. 1224, 1227 & n.2 (S.D.N.Y. 1995). Acknowledging that people with disabilities might even find it "extraordinarily difficult to reach" Wilderness areas, Judge McCurn nevertheless dismissed plaintiffs' claim because individuals with disabilities "do have meaningful access to the Adirondack Park as a whole. Motorized vehicles, vessels and aircraft are permitted in most of the Park." 634 F. Supp. at 1465. As is clear from the Department's website, Forest Preserve lands as a whole are now even more accessible than in

[1]ADA claims may be premised on any of three theories, including the government's alleged failure to make a "reasonable accommodation." *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003). Plaintiffs have apparently abandoned their disparate impact and intentional discrimination claims, which are not addressed in their submission in opposition to the State's motion to dismiss, and which should be dismissed for the reasons set forth in the State's Feb. 3, 2012 MOL at 21-22.

1986. *See, e.g.*, *http://www.dec.ny.gov/outdoor/34035.html* (outdoor recreation opportunities for people with disabilities); http://www.dec.ny.gov/outdoor/31539.html (list of accessible fishing sites); http://www.dec.ny.gov/outdoor/42324.html (list of regional access coordinators); http://www.dec.ny.gov/permits/30419.html (permits for hunters with disabilities).

Plaintiffs demand an accommodation to permit them to reach "Wilderness water bodies accessible by float plane." *See* Am. Compl. ¶¶ 108-109 (plaintiffs have identified 38 "truly wild" water bodies that could safely accommodate a float plane). There is no such program, service or activity, just as there is no program or activity called "High Peaks by helicopter." Plaintiffs rely on *Galusha v. New York State Dep't of Envtl. Conserv.*, 27 F. Supp.2d 117 (N.D.N.Y. 1998), in which Judge Kahn held that the ban on public use of motorized vehicles deprived disabled individuals of "meaningful access" to some of the "crown jewels" of the Forest Preserve. *Galusha*, 27 F. Supp.2d at 124. Even assuming that meaningful access to the public lands within the Adirondack Park must be analyzed, as plaintiffs imply, by its classifications (Wilderness versus less protective categories), plaintiffs have conceded that they have access to large swaths of areas classified as Wilderness. *See* Mar. 1, 2012 MOL at 22. Plaintiffs' demand states no claim under Title II.

In *Ramos v. Louisiana Dep't of Health and Hosps.*, 2010 WL 4363957 (E.D. La. Oct. 25, 2010), a district court granted a motion for summary judgment because the injury of which plaintiff complained was not due to her disability and she therefore did not make a *prima facie* case under Title II. After Hurricane Katrina, plaintiff was not placed in a group home near her family because none could accommodate her wheelchair. She was, however, placed in a group home that could meet her needs. "Plaintiff does not claim that Anna Ramos was deprived of services as compared to non-disabled people, but rather that her group home options are more

limited than the options available to disabled people who do not use wheelchairs." *Id.* at *4. The court determined that, "viewed in its entirety, the group home program did not discriminate against Anna Ramos due to her wheelchair use. The group home program does not guarantee placement in a particular area, nor do the ADA and Rehabilitation Act require that all disabled persons be provided with identical benefits." *Id.* Similarly, in *Greer v. Richardson Ind. School Distr.*, 752 F. Supp.2d 746, 754 (N.D. Tex. 2010), a parent who used a wheelchair failed to make a *prima facie* case under Title II because the high school stadium as a whole was wheelchair accessible, even if its bleachers were not. *See also Parker v. Universidad de Puerto Rico*, 225 F.3d 1, *6 (1st Cir. 2000); *California ex rel. Lockyer v. County of Santa Cruz*, 2006 WL 3086706 (N.D. Cal. 2006) (att. 1). *Accord Williams v. Bankert*, 2007 WL 3053293, *12 (D. Utah 2007) (Travel Plan that provided some but not total access by motorized vehicle to persons with disabilities did not violate the Rehabilitation Act) (att. 2). Plaintiffs are entitled to "meaningful," not total, access to the resources of the Forest Preserve lands of the Adirondack Park. Their concession that many Wilderness area resources are available to them dooms their reasonable accommodation claim and distinguishes this case from *Galusha*, *Rothschild v. Grottenthaler*, 907 F.2d 286 (2d Cir. 1990) (school district did not disputed that deaf parents were injured) and *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (visually impaired users of guide dogs were injured when dogs were quarantined).

Plaintiffs' accommodation claim is doomed for a second reason: they failed to seek an accommodation. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003). Plaintiffs do not distinguish or even address the relevant cases that establish that the failure to allow the government entity an opportunity to provide an accommodation is "fatal." *See Williams v. New York City Housing Auth.*, 2010 WL 4027654, *2 (2d Cir. Oct. 15, 2010)

(affirming dismissal pursuant to Rule 12(b)(1), (6) on ground that failure to seek accommodation was "fatal") (att. 3). *See also Smith v. New York City Housing Auth.*, 410 Fed. Appx. 404, 406 (2011); *Davis v. Pallito*, 2011 WL 4443026, *9 (D. Vt. June 16, 2011) (att. 4); *Getso v. City University of New York*, 2009 WL 4042848, *4-5 (S.D.N.Y. Nov. 18, 2009) (att. 5); *Woodfield Equities, LLC v. Village of Patchogue*, 357 F. Supp.2d 622, 636 (E.D.N.Y. 2005).

Moreover, *Turner v. City of Englewood*, 195 Fed. Appx. 346, 352 (6th Cir. 2006), upon which plaintiffs rely, was not a reasonable accommodation case. There, a plaintiff had standing to challenge a rezoning action that precluded her from renting her property to those who would provide services to disabled persons. Even absent a denial of a request for a certificate of occupancy, plaintiff suffered an injury. She alleged that the city rezoned "because it harbored the unlawful discriminatory purpose of keeping out disabled persons," not because it failed to accommodate her. *See id.* at 353. Here, plaintiffs allege that the State failed to accommodate them, not the State Land Master Plan intentionally discriminates against them. Similarly, in *Cornell Companies v. Borough of New Morgan*, 512 F. Supp.2d 238 (E.D. Penn. 2007), which plaintiffs also cite, a district court held that "it would be 'an exercise in futility' to require Cornell to jump through the hoop of having the Borough rule that the Academy is a prohibited use" under the challenged zoning rule. 512 F. Supp.2d at 264 & n.17. As in *Turner*, however, the claim was that the municipality intentionally discriminated, not that it failed to make an accommodation. Were that plaintiffs' theory, they might, in fact, be injured by the Plan itself. But because plaintiffs complain that the State failed to accommodate them, *Turner* and *Cornell Companies* do not aid them.

Plaintiffs continue to rely on *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008) (blind plaintiff had standing because she was frequent visitor to restaurants located near her home that

had repeatedly failed to accommodate her inability to read menu) and *Shaywitz v. American Bd. of Psychiatry and Neurology*, 675 F. Supp.2d 376 (S.D.N.Y. 2009) (physician was "excused from any requirement of actually registering for the Part I and Part II exams again because it would be futile for him to do so"). As does *Hargrave v. State of Vermont*, 340 F.3d 27, 33 (2d Cir. 2003), *see* Mar. 1, 2012 MOL at 21, *Camarillo* and *Shaywitz* address whether a plaintiff has established the likelihood of future injury. The State does not dispute that plaintiffs have a sincere desire to fly into Wilderness lakes. But *Tsombanidis* and its progeny make plain that plaintiffs must give the State the opportunity to address what accommodation, assuming one is necessary, might grant each plaintiff meaningful access to the Forest Preserve and its Wilderness resources. *Camarillo*, *Hargrave*, and *Shaywitz* do not say otherwise.

The cases make clear that plaintiffs must give the State the opportunity to provide a "reasonable" accommodation, through CP-3 or the Universal Access program. Because the ADA does not necessarily entitle a plaintiff to the accommodation of his or her choice, plaintiffs are not excused by the alleged "futility" of their demand that they be permitted to use float planes to reach the 38 water bodies they have selected from the many accessible water bodies in Wilderness areas. A government entity must have the opportunity to make a "reasonable" accommodation, not necessarily the one that plaintiffs would prefer.[2]

[2] Whether plaintiffs' preferred accommodation would fundamentally alter the Adirondack Park or its Wilderness areas is not before the Court on this pre-answer motion. For that reason, plaintiffs' allegations and arguments related to able-bodied users of the Park are not relevant to this motion.

II

PLAINTIFFS LACK STANDING

Even if plaintiffs had stated a claim, or sought an accommodation, they have still not pleaded factual allegations that show an injury in fact. Plaintiffs seek access by float plane to 38 remote water bodies surrounded by lands classified by the State Land Master Plan as Wilderness, rather than to all lands within the Wilderness classification. *See* Mar. 1, 2012 MOL at 22; *see also* Am. Compl. Wherefore Clause.[3] They concede that they can reach plenty of Wilderness areas, including several water bodies. Mar. 1, 2012 MOL at 22. But they maintain that they have standing because the ban on public use of float planes keeps them from "truly wild" lakes and ponds located "deep in the interior of Wilderness lands." *Id.* at 15, 22. In other words, plaintiffs have strategically chosen 38 Wilderness lakes that they allege are accessible to them only by float plane. Even if Title II invested plaintiffs with the power to demand a particular accommodation, which it does not, plaintiffs must make factual allegations that show with some level of detail that, in fact, none of them can reach these 38 lakes by non-motorized means.

Plaintiffs bear the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). If a plaintiff lacks constitutional standing, the court has no subject matter jurisdiction to hear the claim, *Central*

[3] They also seek "Judgment declaring N.Y. Environmental Conservation Law §§ 1-0101, 3-0301, 9-0105 and N.Y. Executive Law §816 and 6 N.Y.C.R.R. §§190.13(f)(iv) and (v), 190.33(b)(2), 196.4 and 196.8 and defendants' enactment, adoption, administration, enforcement and application of the foregoing statutes and rules or regulation violate the ADA and to that extent are unlawful and null and void." *Id.*

States Southeast and Southwest Areas Health and Welfare Fund v. Merck–Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005), and "[a] dismissal for lack of standing is generally brought pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)." *Murtaugh v. State of New York*, 810 F. Supp.2d 446, 464 (N.D.N.Y. 2011). *See* Mar. 1, 2012 MOL at 15 (plaintiffs can only guess as to basis of State's 12(b)(1) motion). Further, "[o]nce a plaintiff establishes Article III standing, there remains the question of the scope of his standing." *Chapman v. Pier 1 Imports, Inc.* 631 F.3d 939, 950 (9th Cir. 2011) (*en banc*).

The amended complaint sets forth no facts in support of the conclusory claim that plaintiffs cannot reach even any of the "truly wild" water bodies by non-motorized means. Plaintiffs point to Am. Compl. ¶¶ 19, 22-23, 27-28, 31-32, 36-37, 112-117, which collectively aver that plaintiffs Schumaker and Baker cannot walk long distances without relying on a wheelchair or other assistive device while plaintiffs Kenny, Irish and Dixon either walk with the aid of a prosthesis or use a wheelchair or other device. Paragraph 118 alleges that, as a consequence of "the remote location of said 38 lakes and ponds, the rugged, rocky, forested terrain separating the lakes and ponds from highways and other access points, and the impact of plaintiffs' disabilities preventing them from walking or hiking to the bodies of water, there is no feasible or possible way for plaintiffs to access these bodies of water by non-motorized means."

The statement that "there is no feasible or possible way for plaintiffs to access these bodies of water by non-motorized means" lacks the detail necessary to establish that each plaintiff is in fact unable to reach any of the 38 "truly wild" lakes plaintiffs have identified. Taking as true the allegations in the amended complaint, each plaintiff can walk at least short or moderate distances and no plaintiff alleges any other limitation, including any inability to paddle. In *Public Lands for the People, Inc. v. United States Dep't of Agriculture*, 733 F. Supp.2d 1172,

1198-99 (E.D. Cal. 2010), which plaintiffs have ignored, a district court dismissed a complaint that lacked sufficiently specific allegations in support of standing. *See Public Lands for the People*, 733 F. Supp.2d at 1197-99 (dismissing for lack of standing on motion pursuant to Fed. R. Civ. P. 12(b)(1) where plaintiffs did not plead injury with sufficient particularity and also did not claim that they needed time to discover facts that would support their claims pursuant to Fed. R. Civ. P. 56(f)); *see also Daubert v. City of Lindsay*, 2010 WL 4829643, *3 (E.D. Cal. Nov. 22, 2010) (plaintiff must "show how the narrowness of the doorway prevented him access"). Plaintiffs' broad and conclusory claim that none of them can reach any of the 38 water bodies by any means other than a float plane is not sufficiently specific.[4] *Public Lands*, 733 F. Supp.2d at 1198 ("[P]laintiffs will ultimately be required to specify particular mining claims and particular road closures that limit plaintiffs' ability to access those claims. Plaintiffs have not done so"). Even on their third attempt, plaintiffs have not pleaded facts to support injury-in-fact with sufficient particularity. Plaintiffs have not carried their burden of showing that they are, in fact, injured.

[4]Nor is it sufficient for plaintiffs to plead their standing collectively. *Chapman*, 631 F.3d at 950-52 ("Injunctions do not extend to barriers not affecting persons with the plaintiff's particular disability"); *Disabled in of Metropolitan New York v. Trump Int'l Hotel & Tower*, 2003 WL 1751785, *29-30 (S.D.N.Y. Apr. 2, 2003) (plaintiffs seeking to remove barriers to access have standing to challenge only violations affecting their particular disabilities).

CONCLUSION

For these reasons, the amended complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Dated: March 12, 2012
Albany, New York

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