UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----------X

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

Case No. 1:10-cv-1016 (GLS/RFT)

Plaintiffs,

Against

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; PETE GRANNIS, sued herein in his official capacity as Commissioner of 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 New York State Adirondack Park Agency; DAVID PATERSON, sued herein as Governor of the State of New York; ANDREW M. CUOMO, sued herein as Governor of the State of New York; and, STATE OF NEW YORK,

Defendants.

----------X

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

Matthew D. Norfolk, Esq.
Briggs Norfolk LLP
2296 Saranac Avenue
Lake Placid, New York 12946
518.523.5555
Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Rules and Regulations

Reported Cases

Unreported Cases
(Copies provided in Appendix)

Other

PROCEDURAL HISTORY

The above-captioned action was commenced with the filing of the Complaint on August 23, 2010 (Dkt. No. 1). The defendants filed and served an Answer on October 22, 2010 (Dkt. No. 13). Plaintiffs moved to amend the Complaint (Dkt. No. 19) on or about February 4, 2011. Defendants cross-moved for judgment on the pleadings (Dkt. No. 24) and also opposed plaintiffs' motion to amend. By Summary Order (Dkt. No. 35), the Honorable Gary L. Sharpe denied plaintiffs' motion to amend, but allowed and ordered plaintiffs to file an Amended Complaint to cure the deficiencies of the original Complaint. In the same Summary Order, Judge Sharpe also denied defendants' motion for judgment on the pleadings with leave to renew after plaintiffs filed their Amended Complaint. Notably, as set forth in the Summary Order, Judge Sharpe found the deficiencies in the Complaint (and the proposed 2011 Amended Complaint) to be "minimal" and that plaintiffs had cured the deficiencies in their response to defendants' first motion for judgment on the pleadings.

On January 6, 2012, plaintiffs filed and served their Amended Complaint (Dkt. No. 37). Included in the Amended Complaint were the theories of recovery and allegations of fact that were contained in plaintiffs' opposition papers filed in response to defendants' first motion for judgment on the pleadings.

On February 3, 2012, defendants filed their latest motion to dismiss and for judgment on the pleadings (Dkt. No. 41) seeking dismissal of the Amended Complaint. In support of their second dispositive motion, defendants abandoned some arguments they initially raised, but for the most part simply repeat the same arguments they asserted in their first motion for judgment on the pleadings, to wit: (1) that plaintiffs have not alleged an injury-in-fact; and, (2) that plaintiffs have failed to ask for a reasonable accommodation. As a consequence of this,

plaintiffs' opposition papers are in large part the same as their opposition papers previously filed with the Court in connection with defendants' first motion. Plaintiffs apologize to the Court for the redundancy.

INTRODUCTION

Like able-bodied people, disabled Americans want to use and enjoy wilderness parks and areas. But, physical challenges substantially limit the disabled's use and enjoyment of wilderness areas throughout the United States, including New York State. The accessibility impediments vary from a mere inconvenience to a complete barrier to the outdoors.

Modifications of different levels are needed to allow disabled Americans access to the outdoors, especially wilderness areas. For example, a smooth path or trail to accommodate a wheelchair, or bridges over brooks and ravines, float plane or other motorized vehicle access in an otherwise restricted wilderness area may be necessary for disabled people to gain access to the outdoors, especially those remote, pristine wild areas not found along the side of a highway or adjacent to a busy boat launch or a noisy children's camp. "Depending on the needs of each user group and individual tastes for challenge, modifications which are made for the mere convenience of some may be absolutely crucial for access by others." Skidmore, Martha, Esq., *Disabled Rights to the Wilderness: Whose Waterfall is it Anyway?* (200_).

Notably, there are many modifications already in place in the Adirondack Park for the able-bodied recreational users and State administrative personnel to access wilderness areas--some, if not all, for mere convenience. In the Adirondack Park, particularly in lands classified as Wilderness, trails each year are cut and re-cut and widened for able-bodied hikers, snowshoeing enthusiasts, portaging canoeists, and cross-country skiers to gain access into remote and pristine, wild lands of the Park. *See, e.g., In the Matter of the Alleged Violation of Article 9 of the En.*

Con. Law and Part 196 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by James W. McCulley, Department of Environmental Conservation ("DEC") Case No. R5-2005061 3-505, 2009 N.Y. ENV. LEXIS 26 (May 19, 2009) (DEC deemed a road in the Sentinel Range Wilderness to be abandoned and classified as Wilderness land under Adirondack Park State Land Master Plan (the "SLMP"), yet it permitted, and assisted a private cross-country skiing organization with, extensive trail maintenance and allowed the operation of motorized vehicles, including bulldozers and trucks, on the land, the cutting of trees, the installation of culverts, and the blasting of boulders using State-supplied dynamite, to keep trails in the Wilderness area clear for the convenience of able-bodied recreational users); *see also McCulley v. N.Y S. Dept. of En. Con.,* 593 F. Supp.2d 422, (N.D.N.Y. April 26, 2006), *accepted in part, rejected in part,* 593 F. Supp.2d 422 (N.D.N.Y. May 17, 2006) (related civil rights action); *People v. McCulley,* 7 Misc.3d 1004A (County Ct. Essex Co. Mar. 23, 2005) (related criminal action). Bridges, lean-tos and privies are regularly installed, repaired and maintained for the mere convenience of the able-bodied recreational user to extend their stay in the wild and gain access deep into the interior or remote areas of the Park classified by the SLMP as Wilderness. The State regularly and unnecessarily uses aircraft and motorized vehicles to install these modifications for the able-bodied to access the Adirondack Park in Wilderness classified lands. *See id.* Indeed, as found by this Court in the case of *Galusha v. N.Y.S. Dept. of En. Con.,* 27 F. Supp.2d 117, 125 (Kahn, J.) (N.D.N.Y. 1998), and as plaintiffs allege in the Amended Complaint, it is the State's policy or practice to allow a variety of State and non-State personnel to stream into protected lands with the use of motorized means without necessity, while persons with disabilities are prohibited from utilizing the same or less obtrusive motorized means to gain access to, and enjoy, those very same lands.

Plaintiffs suffer from mobility impairment of one form or another preventing them from accessing truly unique and special areas located in remote parts of the Adirondack Park. Plaintiffs commenced the above-captioned action, in part, to stop the discrimination against them by defendants because of their disability, and to gain the same access the able-bodied have to remote, primeval lakes and ponds and their surrounding lands in New York State's Adirondack Park located in areas classified by the SLMP as Wilderness. As plaintiffs allege, the use of float planes would provide plaintiffs access they are presently being denied to those remote lakes and ponds and surrounding lands in the Adirondack Park. *See* Amended Complaint, ¶¶37-38. Such use of float planes would not fundamentally alter the Adirondack Park program. *See* Amended Complaint, ¶¶ 91-104; *compare Galusha,* 27 F. Supp.2d at 125 (Adirondack Park program would not be fundamentally altered by motorized access because State already uses motorized means to access restricted state land for non-emergencies). If allowed to proceed with this lawsuit, plaintiffs will present substantial proof supporting their allegations that defendants are systematically and regularly permitting State and non-State personnel to unnecessarily use aircraft and other motorized means to gain access to lands classified as Wilderness, Primitive or Canoe for non-emergency purposes (typically) under DEC's Commissioner Policy 17, *Administrative Use of Motor Vehicles and Aircraft in the Forest Preserve* ("CP-17"). DEC's policy CP-17 can be found at DEC's website at http://www.dec.ny.gov/docs/landsforestspdf/cp I 7policy.pdf (last visited May 5, 2011). *See* Declaration of Matthew D. Norfolk, Esq. ("Norfolk Declaration"), Ex. A (copy of CP-17 and related forms). Such evidence of unnecessary aircraft and motor vehicle use in Wilderness, Primitive and Canoe lands will strongly support plaintiffs' allegations that the access they seek via float plane will not fundamentally alter the Adirondack Park program.

Plaintiffs also intend to present evidence to support their allegation that defendants have administered and operated the Park program in such a way, allowing, if not promoting, hundreds of thousands[1] of able-bodied recreationalists to invade by foot those lands classified by the SLMP as Wilderness. This necessitates a massive State-funded support effort that involves continual installation, reparation and maintenance of manmade structures, such as lean-tos, helipads, ranger stations, privies, culverts, bridges, gates and dams, to accommodate the able-bodied, and the regular and sometimes daily use of aircraft and other motorized vehicles for emergency purposes to rescue the able-bodied who defendants have invited to the Park to enjoy the Wilderness lands. A reasonable jury may find, given (1) the extensive permitted use by the masses of able-bodied members of the public of these restricted areas, namely Wilderness lands, (2) the State's significant manmade infrastructure to support and accommodate the able-bodied there, and (3) the State's regular and systematic use of aircraft and other motorized vehicles to rescue and remove the able-bodied from these areas, that the float plane access plaintiffs seek would not fundamentally alter the Park program.

Pursuant to CP-17 and 6 N.Y.C.R.R. §196.4(b)(l)-(5), State personnel are not to use motor vehicles or aircraft for day-to-day administration, maintenance, or research. However, use of aircraft, but not motor vehicles, may be permitted for a specific **major** administrative maintenance, rehabilitation or construction project **if** that project involves conforming structures or improvements, or the removal of non-conforming structures or improvements, upon written approval of the Commissioner of the DEC. To that end, pursuant to CP-17, State personnel are

---

[1]According to the latest draft of the High Peaks Unit Management plan, at p. 47, in 1998 over 140,000 people entered the High Peaks Wilderness area alone. *See* http://www.dec.ny.gov/docs/landsforestspdf/hpw_unip.pdg (last visited May 27, 2001). The number of users increases every year. *See id.*

required to complete and submit a permission application form to the DEC Commissioner or his or her delegate for approval to use aircraft in Wilderness lands. The CP-17 application forms list six 'justifications" for using aircraft in these lands, as follows: (1) "Transportation of goods and materials in excess of 40 pounds for a distance greater than 1/4 mile"; (2) "Transportation of personnel for a distance greater than 1 mile"; (3) "Transportation of mobility impaired personnel"; (4) "Multiple ingress and egress (two or more trips) to site destination during single day/each day"; (5) "Transportation to a site where timing is critical to a successful resolution of an ongoing violation and/or to protect the resource"; (6) "Other". If plaintiffs are allowed to have their day in Court, they also intend to prove as part of their case that the policy "justifications" of CP-17 that defendants use to determine whether aircraft may be permitted to be used in Wilderness lands by State personnel, in many instances, do not justify the need for aircraft and motorized vehicles in the restricted lands. Indeed, it is conceivable that a reasonable jury may conclude that the use of float planes by plaintiffs to access remote lakes and ponds in Wilderness lands would not fundamentally alter the Park program considering defendants already allow aircraft to be used in those areas by State personnel whenever they are going to be entering those lands on foot with a backpack weighing over 40 pounds for a distance of more than a quarter of a mile, or will simply be walking a distance over a mile, without carrying anything. *See* Norfolk Declaration, Ex. A (CP-17).

While plaintiffs would like to be able, and should be entitled, to access all lakes and ponds and lands classified as Wilderness in the Adirondack Park, they recognize that it simply is not feasible considering the disabled plaintiffs' physical disabilities and the limitations of motorized vehicles, vessels and aircraft *(e.g.,* float planes may only safely land and take off on a certain sized body of water, sufficient in length, and four-wheel drive vehicles cannot pass all

mountainous terrain). As contained in the detailed allegations within the Amended Complaint, the crux of plaintiffs' lawsuit and claims is that they are being denied access to the singular and unique remote lakes and ponds of the Adirondack Park and the surrounding lands, which are found only in those areas of the Adirondack Park classified by the SLMP as Wilderness. *See, e.g.,* Amended Complaint, ¶¶ 80, 108-112. These areas undeniably offer fantastic aesthetic characteristics, bountiful wildlife, solitude and other recreational benefits found nowhere else in the Park or New York State. *Id.*

Plaintiffs have identified 38 remote lakes and ponds located in lands classified as Wilderness, which, again, posses those unique, wilderness characteristics that plaintiffs herein claim they have been denied access to, and which are of sufficient size and have the appropriate dimensions for a float plane to safely land and takeoff. *See* Amended Complaint, ¶¶ 108-112. The 38 remote lakes and ponds plaintiffs are seeking and/or proposing to be open to float plane access to enable them and other disable persons to enjoy the vast and truly wild and pristine portions of the Adirondack Park are as follows:

1. West Lake (West Canada Wilderness area) (242 acres);
2. South Lake (West Canada Wilderness area) (91 acres);
3. Cedar Lake (West Canada Wilderness area) (364 acres);
4. Whitney Lake (West Canada Wilderness area) (105 acres);
5. Mud Lake (West Canada Wilderness area) (137 acres);
6. Metcalf Lake (West Canada Wilderness area) (79 acres);
7. Horn Lake (West Canada Wilderness area) (44 acres);
8. Pillsbury Lake (West Canada Wilderness area) (83 acres);
9. Spruce Lake (West Canada Wilderness area) (165 acres);
10. Shallow Lake (Pigeon Lake Wilderness area) (266 acres);
11. Lower Sister Lake (Pigeon Lake Wilderness area) (93 acres);
12. Queer Lake (Pigeon Lake Wilderness area) (141 acres);
13. Constable Pond (Pigeon Lake Wilderness area) (53 acres);
14. Terror Lake (Pigeon Lake Wilderness area) (68 acres);
15. Pigeon Lake (Pigeon Lake Wilderness area) (44 acres);
16. Cascade Lake (Pigeon Lake Wilderness area) (102 acres);

17. Cage Lake (Five Ponds Wilderness area) (45 acres);
18. Salmon Lake (Five Ponds Wilderness area) (111 acres);
19. Negro Lake (Five Ponds Wilderness area) (120 acres);
20. Rock Lake (Five Ponds Wilderness area) (55 acres);
21. Sunshine Pond (Pepperbox Wilderness area) (66 acres);
22. Lyon Lake (Five Ponds Wilderness area) (80 acres);
23. Witch Hopple Pond (Five Ponds Wilderness area) (92 acres);
24. Big Deer Pond (Five Ponds Wilderness area) (60 acres);
25. Lake Lila (William C. Whitney Wilderness area) (1,461 acres);
26. Clear Pond (Five Ponds Wilderness area) (74 acres);
27. Crooked Lake (Five Ponds Wilderness area) (120 acres);
28. Sand Lake (Five Ponds Wilderness area) (72 acres);
29. Upper Siamese Pond (Siamese Ponds Wilderness area) (26 acres);
30. Lower Siamese Pond (Siamese Ponds Wilderness area) (95 acres);
31. Round Pond (Siamese Ponds Wilderness area) (142 acres);
32. Puffer Pond (Siamese Ponds Wilderness area) (41 acres);
33. Cascade Pond (Blue Ridge Wilderness area) (35 acres);
34. Stephen's Pond (Blue Ridge Wilderness area) (65 acres);
35. Silver Lake (Silver Lake Wilderness area) (74 acres);
36. Pharaoh Lake (Pharaoh Lake Wilderness area) (413 acres);
37. Crane Pond (Pharaoh Lake Wilderness area) (157 acres); and,
38. Round Pond (1-ugh Peaks Wilderness area) (223 acres).

These 38 lakes (and/or ponds) identified are representative of what a Wilderness area truly is: primeval in character, where the earth and its community of life are untrammeled by man and his habitation, and where man himself is only a visitor who does not remain. *See* SLMP, definition of "Wilderness," p. 20.

There is a total of 5,821,282 acres in the Adirondack Park. Of that amount, 2,962,780 acres or 50.90% of the entire Park is private land. *See* Asst. Attorney General Taylor's Declaration ("Taylor Declaration"), Ex. 2 (*Adirondack Park* Agency *Adirondack Park Land Use Classification Statistics,* March 2009). Thus, approximately half of the Park is already off-limits to plaintiffs as it is private land. The remainder of the Park is State-owned land (2,524,088 acres or 43.36% of the Park) and public water (334,415 acres or 5.74% of the Park). *Id.* Of the 2,524,088 acres of State land, 1,095,454 acres or 43.4% of it is Wilderness. *Id.* Accordingly, of

the 2,524,088 acres of State land in the Adirondack Park, 1,095,454 acres or 43.4% of it is Wilderness. *See id.* As alleged by plaintiffs, it is within the 1,095,454 acres of lands classified as Wilderness that uniquely wild and pristine lakes and ponds are situate, in remote back-country settings.

Furthermore, in the Adirondack Park, there are a total of 1,838 lakes and ponds in or entirely surrounded by State land. *See* Adirondack Park Agency ("APA") website at http://www.apa.state.ny.us/gis/index.html (click on hyperlink *Lakes and Ponds Entirely Surrounded by Forest Preserve)* (lasted visited on May 5, 2011). Of those 1,838 lakes and ponds in or on State land in the Park, 860 are located in Wilderness lands. *See id.* As mentioned above, plaintiffs have identified 38 truly wild lakes and ponds located in the interior of Wilderness lands in the Adirondack Park where float planes may safely land and take off from. That is only 2.06% of all of the 1,838 lakes and ponds in the Park located entirely in or on State land, and only 4.4% of such lakes and ponds located in lands classified as Wilderness.

Finally, there are 578 lakes listed in 6 N.Y.C.R.R. §196.4 where aircraft access or use is now prohibited. The lakes listed in 6 N.Y.C.R.R, §196.4 are found in Wilderness, Primitive or Canoe areas. The 38 lakes plaintiffs have identified as suitable for float planes make up only 6.57% of these restricted lakes.

Defendants would have the Court believe that DEC has in place a mechanism offering plaintiffs and other disabled people a reasonable accommodation of their disabilities in the Adirondack Park other than at the 38 identified lakes and ponds, or similar remote lakes in Wilderness areas. Defendants point to DEC Commissioner Policy 3, *Motorized Access Program for People with Disabilities* ("CP-3"), as the mechanism for this supposed accommodation.

However, CP-3 does not in any way, shape or form permit disabled people to gain access

to back-country or remote, wild areas in the Park, such as those classified as Wilderness. In fact, CP-3 expressly prohibits its motorized access program from permitting disabled people to use motorized means to gain access to or in Wilderness (and Primitive and Canoe) lands. *See* Taylor Declaration, Ex. 3 (CP-3, p. *5).* CP-3 only permits disabled persons to travel on designated roads in Wild Forest and Intensive Use lands. This is one of the reasons why plaintiffs allege that defendants have failed to make a reasonable accommodation of their disabilities. *See* proposed Amended Complaint ¶¶ 121-124.

Defendants and plaintiffs do agree on one thing; that is, lands classified as Wilderness are very much different than Wild Forests and Intensive Use lands (where one can get a CP-3 permit to gain motorized access). *See* SLMP; Amended Complaint, ¶108-112, 121-124. No palatable argument can be made that roads in Wild Forests and Intensive Use lands available under the CP-3 program offer the same wilderness experience, and solitude and exposure to wildlife and the natural environment, untarnished by man, as the lands classified as Wilderness do, especially in the interior portions of these areas, which plaintiffs are being unlawfully denied access to. Plaintiffs are confident that a reasonable jury would agree with this too.

In the instant motion, defendants seek dismissal of plaintiffs' claims for lack of standing and for failure to state a claim. As discussed below, defendants' grounds for dismissal are without merit. Plaintiffs ask the Court to deny defendants' motion in its entirety and allow plaintiffs the opportunity to prove their case and stop the discrimination against them by defendants because of their physical disabilities.

ARGUMENT

POINT I. STANDARD OF REVIEW

Courts evaluate a motion for judgment on the pleadings pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") Rule 12(c) under the same standard as a motion pursuant to Fed. R. Civ. P. Rule 12(b)(6) for failure to state a claim. *Nicholas v. Goord,* 430 F.3d 652, 658 n.8 (2d Cir. 2005). In reviewing a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enters.,* 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.,* 421 F.3d 96, 100 (2d Cir. 2005). The plaintiff must satisfy "a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Iqbal v. Hasty,* 490 F.3d 143, 157-58 (2d Cir. 2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). The Court does not, therefore, require "heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face." *Id.*

The burden undertaken by a party requesting dismissal of a complaint under Rule 12(b)(6) is very substantial. *Baker v. Clinton County,* 1:08-cv-1252 (LEK/DRI-I), 2010 U.S. Dist. LEXIS 58284 (N.D.N.Y. June 24, 2010). A motion to dismiss for failure to state claim should not be granted simply because plaintiff fails to respond. *McCall v. Pataki,* 232 F.3d 321 (2d Cir. 2000) (the sufficiency of a complaint is a matter of law that the District Court "is capable of determining based on its own reading of the pleading and knowledge of the law"); *Carver v. Bunch,* 946 F.2d 451(6th Cir. 1991). If the complaint is sufficient to state claim on which relief

can be granted, plaintiff's failure to respond to a Rule 12(b)(6) motion does not warrant dismissal. *Id.; see also De Jesus v. Sears-Roebuck & Co., Inc.*, 87 F.3d 65 (2d Cir. 1996).

Rule 12(d) gives District Courts two options when matters outside the pleadings are presented on a 12(b)(6) motion: the Court may exclude the additional material and decide the motion on the complaint alone or it may convert the motion to one for summary judgment under Fed. R. Civ. P. Rule 56 and afford all parties the opportunity to present supporting material. *See* Fed. R. Civ. P. Rule 12(d); *see generally 5 C.* Wright & A. Miller, Federal Practice and Procedure §1366 (1969 & Supp. 1986); *Kopec v. Coughlin*, 922 F.2d 152, 154-55 (2d Cir. 1991); *see also Fonte v. Board of Managers of Continental Towers Condominium,* 848 F.2d 24, 25 (2d Cir. 1988). While plaintiffs recognize that a defendant may submit extrinsic evidence in support of a motion to dismiss for lack of subject matter jurisdiction, the Court is authorized to take such evidence only when the jurisdictional facts are not intertwined with the merits of the case, but rather are separate and apart. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Furthermore, it is well-established that a court may rely on matters of public record in deciding a Rule 12(b)(6) motion to dismiss. *See Pani, M.D. v. Empire B.C.B.S.*, 152 F.3d 67, 75 (2d Cir. 1998).

POINT II. SUBJECT MATTER JURISDICTION EXISTS HERE

In their memorandum of law, defendants set forth two grounds of why they think plaintiffs' claims must be dismissed, to wit: (1) plaintiffs lack standing; and, (2) plaintiffs have failed to state a claim. Defendants do not present any argument that the Court lacks subject matter jurisdiction over plaintiffs' claims and the above-captioned action. Nonetheless, in their Notice of Motion defendants provide notice, *inter alia,* that they are moving to dismiss the action pursuant to Rule 12(b)(1), which provides a mechanism for dismissal for lack of subject matter

jurisdiction.

There are two different types of subject matter jurisdictional challenges: (1) a facial challenge, which challenges whether the Court's subject matter jurisdiction was properly pleaded; and, (2) a factual challenge, which contests the truth of the allegation(s) supporting subject matter jurisdiction. *See Kerns v. U.S.*, 585 F.3d 187, 192-93 (4th Cir. 2009); *O'Bryan v. Holy SEE*, 556 F.3d 361, 375-76 (6th Cir. 2009), *cert. denied*, 2009 WL 3161919 (2009). In deciding a facial challenge, the Court accepts the jurisdiction in the complaint as true, asking only whether those allegations sufficiently establish a basis for subject matter jurisdiction. *See Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009). In determining a factual challenge, the Court does not accept the jurisdiction allegations as true, but, instead must determine whether its subject matter jurisdiction has been properly invoked. *See E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 776 (6th Cir. 2010), *petition for cert. filed.* (Oct. 22, 2010). Said another way, a factual challenge denies that there is a proper basis for federal subject matter jurisdiction and contests the Court's authority to adjudicate the case on the merits. When resolving a factual challenge, the Court may consider any undisputed facts and any jurisdictional facts that it determines. *See Kerns*, 585 F.3d at 193. If the jurisdictional facts are separate from the merits of the case, then the Court is authorized to take evidence and decide the jurisdictional facts. *See Arbaugh*, 546 U.S. at 514. The Court has discretion regarding the procedure it will use for the gathering and presentation of evidence relating to the jurisdictional facts. *See Alliance for Environmental Renewal, Inc. v. Pyramid Cross-gate Co.*, 436 F.3d 82, 88 (2d Cir. 2006). But, if the jurisdictional facts are

intertwined with the merits and a jury trial has been properly demanded,[2] then the Court must leave their resolution for the jury. *U.S. Ex Rel. Vuyyuru v. Jadha,* 555 F.3d 337, 348 (4th Cir. 2009), *cert. denied*, 2009 WL 2010689 (2009); *Alliance for Environmental Renewal,* 436 F.3d at 88. In such a case, the Court must process and resolve the motion to dismiss according to summary judgment procedure under Rule 56. *See Torrez-Negron v. J & N Records, LLC,* 504 F.3d 151, 163 (1st Cir. 2007). If the undisputed jurisdictional facts do not allow the Court to rule on jurisdiction as a matter of law, then a jurisdictional fact must be tried to the jury. *See Alliance for Environmental Renewal,* 436 F.3d at 88. A dismissal for lack of subject matter jurisdiction under Rule 12(b)(l) does not operate as an adjudication on the merits. *See* Fed. R. Civ. P. Rule 41(b); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216-17 (10th Cir. 2006) (discussing Rule 41(b) and the nature of jurisdictional dismissals); *County of Mille Lacs v. Benjamin,* 361 F.3d 460,464 (8th Cir. 2004) ("a district court is generally barred from dismissing a case with prejudice if it concludes subject matter jurisdiction is absent").

District Courts in the Second Circuit have dismissed for lack of standing under both Fed. R. Civ. P. Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim). *See, e.g., Thompson v. County of Franklin,* No. 92-cv-1258, 1992 U.S. Dist. LEXIS 18109, at *35 (N.D.N.Y. Nov. 30, 1992) (dismissing under 12(b)(6)); *Grimes v. Cavazos,* 786 F. Supp. 1184, 1188 (S.D.N.Y. 1992) (dismissing under l2(b)(1)). However, standing and subject matter jurisdiction are separate issues of justiciability. *Flast v. Cohen,* 392 U.S. 83, 98-99 (1968); *Rent Stabilization Assoc. of the City of New York v. Dinkins, 5* F.3d 591, 594 n. 2 (2d Cir. 1993). Standing addresses the question whether a federal court may grant relief to a party in the *plaintiff's position,* while subject matter jurisdiction addresses the question whether a federal

[2]Notably, at the case at bar, plaintiffs have demanded a jury trial.

court may grant leave to *any* plaintiff given the claim asserted. *See Dinkins, 5* F.3d at 594 n.2. "Thus, although subject matter jurisdiction and standing (as well as other questions of justiciability) act to limit the power of federal courts to entertain claims, that is, act to limit the courts' 'jurisdiction' in the broadest sense of the term, the two must be treated distinctly." *Id.*

In the above-captioned action, it is alleged that the disabled plaintiffs qualify as individuals with a disability under the Americans with Disabilities Act ("ADA") who have been, are presently and will be, excluded from participation in, or denied benefits of, services programs and activities of the State of New York, DEC and APA (public entities) and/or are being subjected to discrimination by such entities. Plaintiffs' claims are actionable under Title II of the ADA, a federal law securing equal rights for the disabled (42 U.S.C. §§12131-12133). Thus, as alleged in the Amended Complaint, plaintiffs' ADA claims invoke the jurisdiction of the Court pursuant to 28 U.S.C. §1331 and 1343.

Notwithstanding the foregoing, in the absence of an argument supporting defendants' motion to dismiss, in part, for lack of subject matter jurisdiction, plaintiffs can only guess that defendants are claiming a lack of subject matter jurisdiction based on their argument that plaintiffs lack standing. The separate issue of whether plaintiffs have standing *(see Dinkins, supra.)* will be addressed in the next section hereinbelow.

POINT III. PLAINTIFFS HAVE STANDING

Defendants argue that plaintiffs are without "Constitutional" standing to assert a cause of action under the ADA. Specifically, defendants complain that plaintiffs failed to explain how their mobility impairments prevent them from reaching Wilderness areas. Thus, as defendants argue, plaintiffs have not alleged an injury-in-fact and, therefore, have no standing. To satisfy the injury-in-fact requirement and, thus, maintain an ADA cause of action seeking injunctive relief

to prevent future injury, "a plaintiff must allege[] facts giving rise to an inference that he will suffer future discrimination by the defendant." *Shotz v. Cates,* 256 F.3d 1077, 1081 (11th Cir. 2001).

"The requirement of standing . . . has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751 (1984) As defendants correctly point out, plaintiffs need not show prudential standing. *See Fulton v. Goord,* 591 F.3d 37, 42 (2d Cir. 2009). Plaintiffs asserting ADA claims must only meet the Constitutional standing requirements. *See Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 46 n.13 (2d Cir. 1997). The "irreducible constitutional minimum" of standing contains three elements: (1) the plaintiff must have suffered an "injury-in-fact," meaning an invasion of a legally-protected interest which is concrete and particularized, as well as actual or imminent, and not conjectural or hypothetical; (2) there must be a "causal connection" between the injury and the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable ruling. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Hargrave v. State of Vermont,* 340 F.3d 27, 22-34 (2d Cir. 2003); *Innovative Health Systems,* 117 F.3d at 46 n.13; *Shaywitz,* 675 F. Supp.2d at 382-83. Here, plaintiffs have sufficiently alleged the necessary facts to have standing in this case.

A. Plaintiffs Are Being Irreparably Harmed

As an initial matter, it is important to note that federal courts have acknowledged that "the deprivation of a source of personal satisfaction and tremendous joy constitutes an irreparable injury." *See, e.g., Ft. Funston Dog Walkers v. Babbitt,* 96 F. Supp.2d 1021, 1039-40

(N.D.Ca. 2000) *citing Chalk v. U.S. Dist. Ct,* 840 F.2d 701, 709 (9th Cir. 1988) and *Galusha v. N.Y.S. Dept. of En. Con.,* 27 F. Supp.2d 117, 122, (N.D.N.Y. 1998). In *Galusha,* this Court found that the plaintiffs, people with disabilities requiring motorized vehicles for mobility, would be irreparably harmed by enforcement of regulations prohibiting any non-emergency use of motorized vehicles in the Adirondack Park. This Court reasoned that every day the plaintiffs missed the Park constituted irreparable harm because no amount of money could compensate them for the loss. *Id.* This Court further found that "plaintiffs' access to a naturally ever-changing environment is impermissibly limited" and "absent preliminary relief, they will suffer an injury that is present, actual and not calculable." *Id.* Like the plaintiffs in *Galusha,* plaintiffs here allege they are being irreparably harmed each day they continue to be shutout from the singular and unique, remote Wilderness areas of the Adirondack Park because of defendants' prohibition of aircraft.

B. The Prohibition of Access Via Float Plane to Remote Wilderness Lakes and Ponds, Itself, Is the Injury about Which Plaintiffs Are Complaining - Plaintiffs Do Not Need to Allege They Asked for, and Were Denied, Such Access Prior to Filing Suit

The lack of any formal pre-suit request by plaintiffs to gain access to those remote lakes and ponds and the surrounding lands at issue is not a valid basis to find a lack of standing. Said another way, to have standing, plaintiffs do not need to allege that they asked or applied for some form of permission to gain access to the remote lakes and ponds by float plane and that same was denied. The reason for this is that the on-going prohibition of aircraft use in Wilderness lands is, itself, the injury about which plaintiffs are complaining. *See Turner v. City of Englewood,* 195 Fed. Appx. 346, 2006 U.S. App. LEXIS 20602 (6th Cir. 2006) (plaintiff did not need to ask or file application for certificate of occupancy and then be denied same to have standing under

ADA since the rezoning of her property as a consequence of a new city law, itself, was the injury complained of by plaintiff *(i.e.,* the action of rezoning effectively (and already) prohibited plaintiff from leasing her property to those who would service disabled)); *see also Cornell Cos. v. Borough of New Morgan,* 512 F. Supp.2d 238, *44 n. 17 (ED. Pa 2007) (ADA claim was ripe and plaintiff had standing to challenge decision to prohibit a certain use of a facility as the prohibition was the injury and any request would have been futile.). N.Y. Executive Law, N.Y. Environmental Conservation Law, the SLMP and the DEC regulations cited herein and in the Amended Complaint already deny or prohibit plaintiffs access to the remote lakes and ponds in the Adirondack Park (via float plane or motorized vehicle or vessel). Thus, plaintiffs are already suffering the injury *(i.e.,* the prohibition) that forms the basis for their claims. Plaintiffs need not be denied again by defendants. *See id.*

C. *A Request to Gain Access Via Float Plane to the Remote Lakes and Ponds Would Have Been Futile*

Setting aside plaintiffs' position that they already are injured and have been (are being) denied or prohibited access to remote lakes and ponds, plaintiffs still were not required to request float plane access to those bodies of water prior to suit as such request would have been futile. *See Camarillo v. Carrols Corp.,* 518 F.3d 153 (2d Cir. 2008); *Shaywitz R American Bd. of Psychiatry and Neurology,* 675 F. Supp.2d 376, 383 (S.D.N.Y. 2009).

Defendants all but admit in their Answer, at ¶¶41, 42 and 139 (Fifteenth Affirmative Defense), and in their memorandum of law, at pp. 2-3, that they are mandated by State law to enforce and adhere to the intentions and policies of the SLMP and the rules contained in 6 N.Y.C.R.R. §§190.13(iv) and (v), 190.33(b)(2), 196.4 and 196.8. Since the filing of the above-captioned action, defendants also have unequivocally admitted that plaintiffs are prohibited

access to remote lakes and ponds in Wilderness lands. *See, e.g.*, Answer, ¶65. Furthermore, it is indisputable that the SLMP and DEC regulations (6 N.Y.C.R.R. §§190.13(f)(iv) and (v), 190.33(b)(2), 196.4 and 196.8) and the statutes under which they were created or promulgated were and are all in effect, and followed, administered and enforced by defendants, thereby denying plaintiffs access to those remote lakes and ponds within Wilderness areas via aircraft and other motorized means. Thus, no matter how many times prior to the filing of this lawsuit plaintiffs were to request access to those remote and unique parts of the Park by float plane, defendants would have denied the request time and time again.

In the context of ADA Title III cases involving public accommodations, courts considering such ADA claims have found that disabled plaintiffs who encountered barriers to public accommodations prior to filing their complaints have standing to bring claims for injunctive relief if they show a plausible intention or desire to return to the place but for the barriers to access. *See Camarillo v. Carrols* Corp., 518 F.3d 153 (2d Cir. 2008); *Access 4 All v. G&T Consulting, Co.*, 458 F. Supp.2d 160 (S.D.N.Y. 2006). The same rule of law and reasoning should be applied here in this Title II action.

Plaintiffs all live in New York State, in counties making up the Adirondack Park. *See* Amended Complaint, ¶ 15-24. Given plaintiffs' presence in the Park, it can be inferred that future discrimination will occur. *See Camarillo,* 518 F.3d 153.

In *Camarillo v. Carrols Corp.,* 518 F.3d 153 (2d Cir. 2008), a legally-blind plaintiff who frequented fast food restaurants sued the owners and operators of a smorgasbord of individual fast food restaurants (including the owners and operators of franchises of Burger King, McDonald's, Taco Bell, and Wendy's) under Title III of the ADA for their failure to accommodate her disability-related inability to read their menus. The plaintiff could read

enlarged-text menus and could understand the content of the menus when read to her, but the defendants refused to provide enlarged-text menus or a reader. *Id.* The defendants argued that the plaintiff had no standing to sue for an injunction under Title III of the ADA because she was not facing real and immediate future discrimination by defendants. *Id.* The Second Circuit disagreed. It ruled that "it is also reasonable to infer, based on the past frequency of [plaintiffs] visits and the proximity of defendants' restaurants to [plaintiff's] home, that [plaintiff] intends to return to these restaurants in the future." *See id.* (*citing Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1137-38 (9th Cir. 2002) for the proposition that "a plaintiff possesses standing to obtain injunctive relief under Title III of the ADA if she is aware of the defendant's discriminatory conditions; those conditions, and the plaintiffs awareness of them, are continuing; and the plaintiff plausibly intends to return to the place of discrimination").

Moreover, with the filing of this lawsuit plaintiffs are, as a matter of fact, requesting access to those remote lakes and ponds described in the Amended Complaint via float plane. *See,* Amended Complaint, ¶ 4, p. 24 ("Wherefore" clause asks for permanent injunction prohibiting defendants from preventing plaintiffs from using aircraft to access said lakes and ponds)). In turn, defendants are actively defending against this lawsuit and in doing so are continuing to deny plaintiffs' request. It is plausible, if not evident, with the filing of this lawsuit that it is plaintiffs' intention or desire to gain future access to said remote lakes and ponds. *See Shaywitz v. American Rd. of Psychiatry and Neurology,* 675 F. Supp.2d 376, 383 (S.D.N.Y. 2009) (Court considered filing of ADA lawsuit seeking injunction to be a request for board certification and defendant's opposition to the request was a denial and sufficient to give rise to the inference of future discrimination); *see also Camarillo,* 518 F.3d 153.

Like the legally blind plaintiff in *Camarillo,* 518 F.3d 153, and the dyslexic plaintiff in

Shaywitz, 675 F. Supp.2d 376, who were both aware of the discriminatory conditions at issue in those cases, plaintiffs here are (and have been) aware of the alleged discriminatory acts of defendants, the discriminatory policies governing access to, and use of, the Adirondack Park, and the prohibition of using aircraft and motorized vehicles or vessels in Wilderness lands. Plaintiffs' awareness continues and so do the discriminatory conditions. Plaintiffs know all too well that it would have been futile for them to make a formal request to defendants to gain meaningful access to the remote lakes and ponds listed herein above and described in the Amended Complaint because of the SLMP (which defendants believe has the effect of law) and the DEC regulations in place promulgated by statute. There are sufficient facts here to give rise to the inference that plaintiffs will (continue) to suffer real and immediate future discrimination by defendants as they will continue to be denied meaningful access to the remote lakes and ponds in the Park.

Under the circumstances, the threat of enforcement by defendants of the SLMP and 6 N.Y.C.R.R. §§190.13(f)(iv) and (v), 190.33(b)(2), 196.4 and 196.8, is not "conjectural or hypothetical" (*see Lujan*, 504 U.S. at 560), but rather real and constitutes an injury-in-fact at the time of commencement of the above-captioned action. *Compare Hargrave v. State of Vermont*, 340 F.3d 27, 34 (2d Cir. 2003) (plaintiff had standing to bring ADA claim under the **threat of future** enforcement of a Vermont state law the validity of which was coincidentally being challenged in State court). Accordingly, plaintiffs have sufficiently alleged (and have) standing to bring their ADA claims.

D. Plaintiffs Have Alleged the Impacts of Their Disabilities on Their Mobility

Again, as mentioned above, defendants argue that plaintiffs have not explained how their mobility impairment prevents them "from reaching Wilderness areas." *See* defendants'

memorandum of law, p. 13. In support of this argument, defendants assert without submitting any evidence, that there are other ways to access "Wilderness areas" besides by float plane. This contention at the very best raises a triable issue of fact to be decided by a jury. But, it should be noted that in making this argument defendants are careful not to argue that there are non-motorized ways to access the 38 unique and singular, remote lakes and ponds plaintiffs seek access to. The reason for this is that it is not realistic or possible for plaintiffs to kayak, canoe, hike, or ride on horses or in horse-drawn vehicles to these remote lakes and ponds given plaintiffs' impairments and the vast, rugged, and heavily forested mountainous terrain that isolates these lakes and ponds.

On the other hand, perhaps, defendants have missed the point that plaintiffs are only alleging that they cannot access remote, unique and singular lakes and ponds that are in the interior of Wilderness areas. 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). But, these areas that defendants suggest are open to plaintiffs are not anything like the remote wild and pristine lakes and ponds deep in the interior of Wilderness lands. If they were the same, plaintiffs would have never filed this lawsuit.

Notwithstanding the foregoing, a simple review of the Amended Complaint will reveal that plaintiffs do, indeed, explain how they cannot access the 38 lakes and ponds they have identified. In the Amended Complaint, plaintiffs allege in detail their disabilities and how they affect their mobility. *See id.* at ¶¶ 19, 22-23, 27-28, 31-32, 36-37, 38, 112-117. Plaintiffs also allege that because the 38 lakes and ponds are remote and separated from civilization by

"rugged, rocky, forested terrain," there is "no feasible or possible way for plaintiffs to access these bodies of water by non-motorized means." *Id.* at ¶118.

POINT IV. PLAINTIFFS HAVE STATED A CAUSE OF ACTION UNDER THE ADA

Defendants argue in support of their motion to dismiss that plaintiffs have neither asked for nor been denied access to Wilderness areas via float plane and, therefore, have been denied no benefit. As discussed above addressing defendants' challenge of plaintiffs' standing, plaintiffs were not required to make a pre-suit request for access to the remote lakes and ponds which are the subject of this lawsuit. Plaintiffs have been and are already suffering an actual, irreparable injury in being prohibited to gain access to those remote lakes, ponds and surrounding lands in the Wilderness classified areas with the float plane and motorized vehicle restrictions in place. Moreover, it is undeniable that even if the plaintiffs had made a pre-suit request for access to those lands via float plane, such a request would have been futile as the defendants are mandated by law to follow the rules and regulations promulgated under N.Y. Executive Law and N.Y. Environmental Conservation Law and the SLMP that prohibit (or call for the prohibition of) float plane access to Wilderness classified lands.

Defendants also argue that plaintiffs' cause of action under the ADA must fail because plaintiffs failed to seek an accommodation available under DEC's policy, CP-3. As in *Galusha,* defendants here are suggesting that there is sufficient acreage currently accessible by motorized vehicle for plaintiffs and, therefore, plaintiffs already have meaningful access to the Adirondack Park. However, as alleged in the Amended Complaint and discussed above in the Introduction, the CP-3 does not provide plaintiffs access to the singular and unique wilderness parts of the Park, such as the remote lakes and ponds and surrounding lands plaintiffs seek access to with the filing of this lawsuit. Again, borrowing from the *Galusha* case, "the amount of access plaintiffs

have to the Park as measured in acres is not dispositive as whether 'meaningful access' is present." *Galusha* at 27 F. Supp.2d at 124. Plaintiffs allege in the Amended Complaint that without the assistance of float planes they effectively will have zero access to the singular and unique remote areas of Wilderness lands, which are truly the forest preserve crown jewels of the Adirondack Park. *Compare Galusha,* 27 F. Supp.2d at 124. With these allegations of depravation to such essential areas of the Park, plaintiffs have demonstrated, for purposes of deciding defendants' motion to dismiss, a denial of "meaningful access." *See Galusha,* 27 F. Supp.2d at 125; *see also Rothchild v. Grottenthaler,* 907 F.2d 286, 293 (2d Cir. 1990) (finding that meaningful access includes access to essential but not extra services); *Crowder v. Kitagawa,* 81 F.3d 1480 (9th Cir. 1996) (holding 120-day animal quarantine denied visually disabled meaningful access to state services and activities).

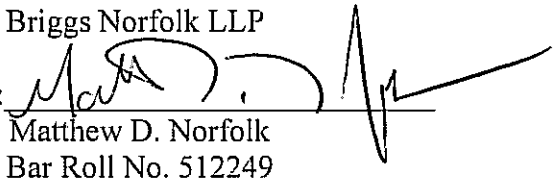
Based upon the foregoing, plaintiffs have stated a cause of action under the ADA and defendants' (second) motion to dismiss that claim should be denied.

CONCLUSION

WHEREFORE, it is respectfully requested that defendants' motion to dismiss and for judgment on the pleadings be denied in its entirety, and that the Court grant plaintiffs such other and further relief as it deems just and proper.

Dated: February 29, 2012
Lake Placid, New York

Briggs Norfolk LLP

By: 

Matthew D. Norfolk
Bar Roll No. 512249
2296 Saranac Avenue
Lake Placid, New York 12946
518.523.5555
Attorneys for Plaintiffs