UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL FLORIO, individually and on behalf of all others similarly situated, Plaintiff, -vs.- CITY OF NEW YORK, NEW YORK and JANETTE SADIK-KAHN, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, Defendants.	No. 06 CV 6473 (SAS) **SECOND AMENDED CLASS ACTION COMPLAINT** **ECF** **JURY TRIAL DEMANDED**

Plaintiff DANIEL FLORIO ("Florio" or "plaintiff"), individually and on behalf of all others similarly situated, by his undersigned attorneys, alleges for his Second Amended Class Action Complaint against defendant City of New York, New York ("New York City") and defendant Janette Sadik-Kahn, Commissioner of the New York City Department of Transportation ("DOT") (collectively with New York City referred to as "defendants"), upon personal information as to himself and upon information and belief as to all other allegations, as follows:

NATURE OF THE CASE

1. New York, New York – world center of commerce, culture, medicine and the best to be offered by civilized man – is indisputably among the very few of the greatest cities on earth. That is, unless you happen to be among those unlucky persons whose disability severely limits their mobility and ability to travel down even one of the city's blocks independently. For these unfortunate individuals, including plaintiff and thousands of other similarly situated mobility disabled persons, New York City is a nightmare of navigation, and

presents such insurmountable barriers solely from the need to traverse minimal distances that it can be substantially impossible to visit the city to take in any (let alone all) of the greatness it has to offer.

2. New York State makes it clear that access by all persons, regardless of disability, to the many incredible commercial, cultural, medical and other benefits available in New York City is to be the *rule*, not the exception. As clearly stated in the in the introduction to the New York State Department of Motor Vehicles ("DMV") online brochure posted on the DMV website (currently available at www.nydmv.state.ny.us/broch/c34.htm) and entitled "Parking for the Disabled:" "Reserved parking for people with disabilities ensures safe and equal access to goods and services, access which most of us take for granted. . . . Reserved parking for people with disabilities is a legal requirement, not just a courtesy."

3. Similarly, at least since the decision of the United States Supreme Court in *Olmstead v. Zimring*, 527 U.S. 581 (1999), it has been the law of the land under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and the regulations promulgated thereunder, that government entities *must* make reasonable accommodations to provide access to public goods, services and institutions to persons with disabilities and to avoid discrimination against the disabled (as defined in the controlling regulations), so long as that access can be achieved by a reasonable accommodation.[1] *Olmstead* and the ADA regulations further confirm that the discrimination prohibited by the ADA includes providing preferential or favorable treatment to only certain members of the *same protected class*.

[1] According to the Congressional findings of purpose for the ADA articulated in 42 U.S.C. § 12101(a)(3): "[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."

Consistent with this broad, remedial understanding of the true nature of "discrimination" suffered by the disabled, the Second Circuit has squarely held with respect to a "failure to reasonably accommodate" claim:

> Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation.

Henrietta D. v. Bloomberg, 331 F.3d 261, 277 (2d Cir. 2003).

4. One would think that a progressive city like New York, which leads the world in so many areas evidencing mankind's march for progress, would have entered the 21st Century regarding its mobility disabled visitors – but, alas, that is not the case. In this regard, New York City simply has stagnantly adhered to its extremely limited disabled parking program originally adopted in the *sixties – before passage of the ADA* -- and declined to comply with the legal requirements of controlling federal law, which require New York City to provide reasonable public parking accommodations to its mobility disabled visitors from both within and without New York State.

5. Ironically, New York City has affirmatively recognized in papers previously filed with this District Court why parking spaces are a necessary accommodation to the mobility disabled. As observed in candor in the October 22, 1997 Affidavit of Felice Morris submitted by defendants in connection with the prior *Lai* litigation (emphasis added)[2]:

> The extensive public transportation system in New York City provides non-disabled individuals and those individuals with disabilities who do not require a private automobile for transportation the opportunity to most often be dropped off only a few yards from their destination. There are, however, individuals with certain disabilities who cannot use public transportation. *For these individuals, certain programs have been created to assist them in obtaining equal access to facilities and activities throughout the City.* (¶ 7)

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[2] *See Lai v. New York City Government*, 991 F. Supp. 362 (S.D.N.Y.) (Scheindlin, J.), *aff'd*, 163 F.3d 729 (2d Cir. 1998) ("*Lai*").

> . . . [T]he City of New York has developed the Special Vehicle Identification Permit program that focuses on a specific group of disabled individuals. The New York City Special Vehicle Identification Permit program *is designed to place individuals with disabilities who require a private automobile on an equal footing with those disabled and non-disabled* New York City residents *who can utilize public transportation to move around the city.* (¶ 21)
>
> The main purpose of the New York City Special Vehicle Identification Permit program for individuals with disabilities is *to ensure that accessible parking options are available for those disabled individuals who truly need them and do not have any realistic transit alternatives.* (¶ 22)
>
> As New York City Special Vehicle Identification Permittees are allowed to park in "No Parking" zones including those marked "Except Authorized Vehicles," any "No Standing Except Authorized Vehicles" zones, at parking meters without making the required payment, and in "No Standing except Trucks Loading and Unloading" zones, *these individuals are most often able to park only a few yards from their destination. The New York City Special Vehicle Identification Permit program offers those disabled individuals whose ability to walk is severely affected and who cannot use public transportation the same benefit that other New Yorkers gain from use of the public transportation system. A New York City Special Vehicle Identification Permittee is therefore placed on an equal footing with non-disabled and unqualified individuals who can utilize public transportation.* (¶ 23)

6. Notwithstanding defendants' recognition of the importance of parking spaces in order to provide the mobility disabled with *access* to the services, benefits and institutions New York City has to offer, New York City has drawn the line unacceptably and illegally short, by electing to accommodate *only* its mobility disabled residents and a limited number of mobility disabled non-residents who work or attend school full-time in New York City. Under New York City's discriminatory and illegal disabled public parking policy, disabled persons displaying New York City disabled parking permits can park for free in any public parking space with a meter or any space which allows prescribed authorized commercial or other vehicles to park. However, if a mobility disabled person not included in this defined group (like plaintiff) "merely" seeks access to the city's multitude of cultural, educational,

commercial, medical and professional offerings on a less than full-time basis, the disabled person can be out of luck – because the barriers existing on account of the circumstances of his or her disability substantially preclude that person from independently and self-sufficiently taking advantage of all of the services, benefits and institutions New York City has to offer.

7. (a) Although defendants represented to the Court in the Morris Affidavit submitted in *Lai, inter alia,* that the eligibility requirements for the Special Vehicle Identification Permit program "are essential and necessary to maintain the viability of the [program]," and that "[i]ncreasing the number of qualified applicants for [Permits] would wreak havoc with already congested traffic patterns" (¶¶ 25-27), it turns out based on the discovery to date in this action that these sworn factual assertions were nothing more than *rank speculation*, because defendants have *never* conducted any study or analysis to evaluate the impact on New York City traffic and parking of providing even a limited, short-term accommodation to the mobility disabled who do not qualify for the 24/7/365 Special Vehicle Identification Permit under present guidelines.

(b) In fact, it appears that the *principal* cause of problems with the lack of available parking spaces in New York City (at least in lower Manhattan) has little or nothing to do with accommodations for the disabled, but instead is a direct result of the extraordinary number of authorized parking permits issued by defendant New York City to city employees, including city police and agency employees, thereby providing these city employees with the immensely valuable perquisite of virtually guaranteed daily parking near their offices. The *New York Times* has recently run a number of stories about these permits, which may number in excess of 140,000, and render weekday public parking in downtown Manhattan

substantially unavailable. *E.g.*, "No Parking Spot? Here Are About 142,000 Reasons," March 6, 2008 *New York Times.*

(c) A follow-up story in the March 15, 2008 *New York Times* entitled "Study Quantifies the Frustrations of Parking" provides statistical analyses confirming the extent of the problem caused by defendants' "authorized" permits and the accompanying "authorized designated space" restrictions currently in place. The article actually provides a link, at http://graphics8.nytimes.com/packages/pdf/nyregion/20080314_PARKING.pdf, to the recent 187 page study by the DOT in conjunction with the New York City Economic Development Corporation concerning "Placard Parking Usage in Lower Manhattan" (the "Study"). The Study describes in detail all of the authorized parking placards issued by defendants that provide parking benefits or accommodations (including the Special Vehicle Identification Permit). Nowhere does the Study suggest that disabled parking has materially contributed to the severe problems with parking limitations in Manhattan, and the Study, in fact, affirmatively asserts to the contrary (at page 25):

> These two groups [Law Enforcement Permits and Agency Business Permits] constitute 92% of the total number of vehicles observed possessing a legally-issued permit. The third group constitutes all of the remaining 8%, belonging to the other eight legally issued permit types [including the Special Vehicle Identification Permit]. In order to keep the discussion manageable, and because the number of observations of some of the permits available are modest, the discussion of the parking usage of these minor permit types is kept to a minimum.

(d) The Study is closely related to Mayor Bloomberg's current, ongoing attempt to reduce New York City traffic congestion through the implementation of a "congestion pricing" plan. As reported in an article entitled "Revisions Made to Ease Congestion Pricing Concerns" in the March 31, 2008 edition of *The New York Sun*, http://www2.nysun.com/article/73894, the revisions to the "congestion pricing" plan "exempt New Yorkers with disabled parking

permits from paying congestion pricing fees." According to a spokesman for Mayor Bloomberg quoted in the Sun article, the revenue impact of the disability exemption is expected to be "minimal."

(e) Even if there ever was any evidence for Defendants' prior representations to the Court that the prescribed eligibility requirements for the Special Vehicle Identification Permit program "are essential and necessary to maintain the viability of the [program]," and that "[i]ncreasing the number of qualified applicants for [Permits] would wreak havoc with already congested traffic patterns" – and no such evidence has been produced to date in this litigation – those representations are now substantially undermined by the most recent studies and conclusions by Defendant New York City and the DOT, and Mayor Bloomberg himself, that reasonably accommodating the disabled is not genuinely a substantial material factor with respect to defendants' parking and traffic management concerns. Thus, there is no good reason that defendants cannot undertake the kind of reasonable accommodations for the severe-mobility disabled which this lawsuit seeks to achieve, particularly when such accommodations are required by federal law.

8. By this action, plaintiff, on his own behalf and on behalf of all those similarly situated, seeks to bring the City of New York into compliance with the ADA, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the "Rehabilitation Act"),[3] so that persons with mobility disabilities who require a private vehicle to drive to New York City for less

[3] In light of the prior agreement on behalf of the original plaintiff not to pursue the previously asserted claim under New York State law, and in light of the Court's recent Opinion dismissing the constitutional claims asserted in the prior complaint, *see Meekins v. City of N.Y.*, 524 F. Supp. 2d 402 (S.D.N.Y. 2007), plaintiff has determined for the purposes of amendment only to assert his claim for reasonable accommodations under the ADA and Rehabilitation Act. Plaintiff reserves the right, however, to challenge dismissal of the constitutional claims on appeal, if necessary.

than full-time commercial, cultural, medical, educational, professional and other legitimate activities -- and not just those residing, or working or studying full-time therein -- may have a reasonable assurance of access to on-the-street parking, and thus take advantage of the services, benefits and institutions New York City has to offer on the same basis as everyone else. Plaintiff also seeks damages on behalf of himself and all similarly situated persons.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the federal constitutional and statutory claims pursuant to 28 U.S.C. §§ 1331 and 1343.

10. Venue is proper before this Court under 28 U.S.C. § 1391(b), in that defendant New York City resides in this district, and a substantial part of the events or omissions complained of occurred in this District.

PARTIES

11. Plaintiff Daniel Florio is, and at all relevant times has been, a resident of Maplewood, New Jersey. As further described herein, plaintiff is an individual who is disabled under the ADA and the Rehabilitation Act, and who has been discriminated against by the conduct of defendants described herein.

12. Defendant New York City is a municipal entity organized under the laws of the State of New York. Under the New York City DOT Special Vehicle Identification Permit disabled parking policy in effect at all times relevant hereto, only disabled persons residing, or working or attending school full-time, in New York City are entitled to obtain a New York City disabled parking permit, and thereby receive the benefits of the New York City disabled parking policy. Generally, vehicles displaying New York City disabled parking permits are allowed to park without cost in any metered spot, and without cost in all public spaces

prescribed as "no parking except for authorized vehicles" (including "commercial vehicle" and "truck" parking zones). No disabled public parking benefits or accommodations of any sort have been implemented for disabled persons not residing, or working or attending school full-time, in New York City.

13. Defendant Janette Sadik-Kahn, in her official capacity, is the Commissioner of the New York City DOT, an agency of defendant New York City responsible for development and promulgation of the discriminatory and illegal disabled parking policy complained of herein.[4]

CLASS ACTION ALLEGATIONS

14. Plaintiff brings this lawsuit pursuant to Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3) on behalf of a class consisting of all mobility disabled persons with disabled parking permits issued either by the State of New York or any other governmental entity subject to the laws of the United States who otherwise meet the mobility disability requirements of the Special Vehicle Identification Permit Program but neither reside, nor work or attend school full-time, within New York City, and thus are not eligible for any disabled public parking accommodations or benefits within New York City (the "Class").

15. The members of the Class are so numerous that joinder of all members of the Class is impracticable. Although the precise number of Class members is unknown to plaintiff at this time and can only be determined during the appropriate discovery, it is reasonably estimated that the Class consists of at least several thousands of members who are

[4] Commissioner Sadik-Kahn is named as the successor to defendant Iris Weinshall, who was the Commissioner of the DOT at the time this action originally was commenced. *See* Fed. R. Civ. P. 25(d).

geographically dispersed throughout the States of New York, New Jersey and Connecticut, as well as the rest of the United States.

16. Because plaintiff is a disabled person as defined under the relevant laws who has been subjected to and has been injured by defendants' discriminatory and illegal conduct complained of herein, plaintiff's claims are typical of the claims of the members of the Class. The harm suffered by plaintiff and all other Class members is caused by the same conduct by defendants, *viz.*, defendants' failure to effect *any* reasonable accommodation for the Class, and instead uniformly denying plaintiff and all other members of the Class any disabled public parking accommodations, even on a limited basis, consistent with the accommodations and benefits accorded to disabled persons who reside, or work or attend school full-time, within New York City.

17. Plaintiff will fairly and adequately represent and protect the interests of the Class, in that plaintiff is committed to the active pursuit of this action and has no interests antagonistic to or in conflict with the Class. Plaintiff has retained competent counsel, experienced in class action litigation, to further ensure such protection and who intend to prosecute this action vigorously.

18. Common questions of law and fact exist as to all members of the Class that predominate over any questions which may affect individual Class members. Among the questions of law and fact common to the Class are the following:

a. whether defendants have violated the ADA by failing to make any reasonable public parking accommodation for plaintiff and the Class, and/or by excluding plaintiff and the Class from any disabled public parking accommodations, even on a limited

basis, consistent with the accommodations and benefits accorded to disabled persons who reside, or work or attend school full-time, within New York City;

b. whether defendants have violated the Rehabilitation Act by failing to make any reasonable public parking accommodation for plaintiff and the Class, and/or by excluding plaintiff and the Class from any disabled public parking accommodations, even on a limited basis, consistent with the accommodations and benefits accorded to disabled persons who reside, or work or attend school full-time, within New York City;

c. whether defendants should be enjoined from their ongoing discriminatory and illegal conduct, and should be required to bring their disabled public parking policy into compliance with the various laws described herein; and

d. whether plaintiff and the Class are entitled to damages on account of defendants' conduct, and the appropriate measure of those damages and/or other relief.

19. With respect to Fed. R. Civ. P. 23(b)(3), a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class members will be relatively small, the expense and burden of individual litigation make it virtually impossible for individual Class members to seek redress for the wrongful conduct alleged. Additionally, the Class is readily ascertainable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Plaintiff knows of no difficulty which will be encountered in the management of this litigation that would preclude its maintenance as a Class action.

20. A class action also is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because, as further alleged herein, defendants have acted or refused to act on grounds generally

applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

SUBSTANTIVE ALLEGATIONS

21. Plaintiff Daniel Florio, a New Jersey resident, suffers from Type II Spinal Muscular Atrophy ("SMA"). SMA is a recessive genetic motor neuron disease, affecting the voluntary muscles that are used for activities such as crawling, walking, head and neck control, and swallowing. SMA is a "relatively common" "rare disorder," affecting approximately 1 in 6000 babies born, with about 1 in 40 persons being genetic carriers.

22. SMA affects muscles throughout the body, although the proximal muscles (those closest to the trunk of one's body – *i.e.*, shoulders, hips and back) are often most severely affected. Weakness in the legs is generally greater than in the arms. Sometimes feeding and swallowing can be affected. Involvement of respiratory muscles (those involved in breathing and coughing) can lead to an increased tendency for pneumonia and other problems. Intellectual activity is normal and it is often observed that persons with SMA are unusually bright and sociable. Those with SMA are usually grouped into one of four categories, based on certain key motor milestones.

23. In plaintiff's case, his Type II SMA is considered to be at the severe end of the Type II spectrum. Plaintiff was diagnosed in his infancy, and as a result of his disease is a quadriplegic, experiencing substantial paralysis of all four limbs. With positioning assistance, plaintiff can sit in a seated position, although his balance is variable and any irregularity in the surface while moving can cause him to lose his physical orientation. Plaintiff requires total physical assistance on a limited basis with all of his basic daily functions, including eating, bathing and transportation. Notwithstanding his physical disabilities, plaintiff has earned a

Bachelor of Arts degree from Rutgers University (1991), and his Juris Doctor degree from Boalt Hall School of Law at U.C. Berkeley (in 1997). He is admitted to the bars both of New Jersey and New York (though presently inactive in New York), and is employed as Staff Attorney at Legal Services of New Jersey, a position he has retained since January, 2003.

24. In order to cover other than the most limited of distances with a modicum of independence and self-sufficiency, plaintiff relies on a powered wheelchair manufactured by Invacare Corporation. Among other things, the wheelchair is specifically designed to relieve certain pressure points and allow plaintiff to sit more comfortably for longer periods of time. Plaintiff is able to independently cause the Invacare wheelchair to move by using the extremely limited remaining independent motion of his left thumb to move a "joystick" which controls both direction and speed. Because it is electrical, however, plaintiff's powered wheelchair is not recommended for use in heavy rain or snow conditions, and snow also mechanically impedes its movement. Cold weather also impairs plaintiff's ability to use his left thumb, which further impairs his ability to drive his wheelchair properly.

25. To transport and use his Invacare powered wheelchair outside the home, plaintiff owns a Ford Windstar van modified by Liberty Motors of Ontario, Canada with a manually operated rear entrance and exit ramp. The exit ramp requires approximately six feet of rear clearance in order to maneuver plaintiff's Invacare wheelchair out of the van and into the street before negotiating a (hopefully) nearby and existing curb cut-out to get onto the sidewalk and then travel to plaintiff's (hopefully) nearby destination.

26. In light of plaintiff's disability, he requires and generally employs one person on a part-time basis (or occasionally relies on friends or family) to (i) assist plaintiff with getting into his van, (ii) drive plaintiff to his destination and help him disembark his van, and

(iii) then ensure that plaintiff can successfully maneuver his wheelchair to his final destination – as well as the reverse for plaintiff's trip back to New Jersey. However, because of the current uneven and/or unrepaired condition of many New York City sidewalks and the many corners still lacking curb cut-outs, plaintiff cannot travel more than a short distance without his driver present, because of the very real possibility – and all too frequent occurrence – that his Invacare wheelchair will become stuck at an uneven sidewalk or impassable curb corner lacking a cut-out, and that plaintiff, therefore, will require the assistance of his driver – unless his driver is parking plaintiff's van somewhere in the distance, in which case plaintiff will require the assistance of a second individual or else risk being stuck in the elements outdoors short of his final destination.

27. Because plaintiff's Invacare wheelchair is not designed to safely travel up or down steep grades and plaintiff's balance in his chair is so tenuous, and because the vast majority of private indoor parking lots in Manhattan do not have elevators, plaintiff usually cannot use these private lots for parking near his New York City destinations. Furthermore, many of these parking facilities descend directly from the street entrance, and there is nowhere safe for plaintiff to exit his van without illegally blocking both pedestrian and vehicle traffic while he enters or disembarks his van.

28. Additionally, plaintiff weighs more than 200 pounds, and the possible use of a non-motorized wheelchair is not feasible because of the inability of plaintiff's driver to push plaintiff up the steep grades of the private indoor parking lots in Manhattan lacking elevators. A manual wheelchair also deprives plaintiff of the independence and self-sufficiency – not to mention the greater seating comfort – of his specially designed Invacare powered wheelchair.

29. In light of plaintiff's disability resulting from his Type II SMA, plaintiff is qualified for and has obtained disabled parking license plates from New Jersey which are permanently affixed to his Windstar van. Plaintiff's use of his van and powered wheelchair is all that enables him to travel with a modicum of independence and self-sufficiency into and out of New York City. Specifically, virtually no taxis or public buses are equipped to transport plaintiff's Invacare wheelchair. Furthermore, although plaintiff is certified to use New Jersey Paratransit (and to a limited extent New York Paratransit) services which do involve buses equipped to transport plaintiff's Invacare wheelchair, the extraordinarily wide advanced scheduling windows (as much as 3-5 hours) required to coordinate between the New Jersey and New York Paratransit services, and the limited circumstances (including favorable weather) under which they can be used, render them entirely impracticable and unfeasible for plaintiff's trips to New York City. Thus, like the other disabled individuals entitled to the benefits of the Special Vehicle Identification Permit parking program, plaintiff does "not have any realistic transit alternatives" other than using his modified van.

30. Although plaintiff has applied for and received New Jersey disability parking plates, those plates are not recognized in New York City. In fact, plaintiff first learned this when he received a parking ticket in New York City in August 2005 while attending an international symposium of the Ad Hoc Committee on the Rights of the Disabled at the United Nations that resulted in the United Nations Convention on the Rights of Persons with Disabilities (which ultimately went into effect in 2007). Plaintiff was able to park in a restricted spot very close to the United Nations, and even specifically confirmed with a policeman or DOT employee that his disabled plates allowed him to park in that space. The confirmation, however, was mistaken, because plaintiff had not indicated in his inquiry that

he was from out of state – assuming, wrongly, that this was irrelevant. Plaintiff begrudgingly paid that ticket when he learned the reality of defendants' improperly narrow accommodation.

31. Plaintiff's receipt of a parking ticket presumes, of course, that plaintiff actually located a public parking space. However, throughout the City, substantial public parking is available during prescribed hours only to authorized vehicles, and trucks and commercial vehicles (and non-commercial vehicles displaying New York City's disabled parking permit), but no accommodation whatsoever is made for all of the other disabled persons comprising the Class. Thus, a Ford Windstar commercial van with all except the front passenger seats removed can park in the authorized commercial spots throughout the City, but plaintiff cannot park his substantially similar van in that spot for even a limited amount of time in order to engage in a professional, cultural, commercial or medical activity. Furthermore, the limits to plaintiff's limb mobility create a substantial barrier to something as straight-forward for non-disabled persons as placing another coin in the public meter on a timely basis. And when plaintiff is occasionally able to take advantage of private rather than public parking, the costs incurred are many, many multiples of the costs that a non-disabled person incurs taking advantage of public transportation and/or parking.

32. (a) Plaintiff likes to come to New York City regularly for professional as well as cultural, educational and commercial purposes, but the barriers to access significantly impede his ability to do so.

(b) For example, although plaintiff is a member of the Museum of Modern Art ("MOMA"), the lack of accessible disabled public parking inhibits his ability to visit the museum as regularly as he would like. In fact, it is not the lack of available parking, but only the lack of any disabled parking, which subjects plaintiff to barriers to access with respect to

MOMA. Substantially all of the southern curb side of 53rd Street directly across from MOMA's front entrance between Fifth Avenue to Sixth Avenue, and at least 65% of the comparable northern curb side of 54th Street directly across from MOMA's rear entrance, are comprised of parking that is restricted Monday through Friday from 9am to 6pm to "commercial vehicles" subject to a six hour paid meter limit. These spaces open to the public but continue to be metered after 6pm each evening Monday through Friday, and from 8am till midnight on Saturday, with no meter requirements or parking restrictions on Sunday. Similar restricted daytime parking limited to paying "commercial vehicles" is available on all of the nearby blocks except for directly on Fifth and Sixth Avenues.

(c) Additionally, while there is "no standing" from 7am to 6pm Monday through Friday on the northern curb side of 53rd Street directly next to the MOMA front entrance between Fifth Avenue to Sixth Avenue, and on the comparable southern curb side of 54th Street directly next to the MOMA rear entrance, those spaces open up for paid metered parking at night and on Saturday as well.

33. (a) Plaintiff intends to attend the "disTHIS" disability film series (http://disthis.org) on a monthly basis if possible, but the lack of any disability parking accommodations makes this much more difficult for him than non-disabled persons. The "disTHIS" series is offered each month at the DCTV Documentary Video and Community Center on Lafayette Street in downtown Manhattan. The DCTV Center (http://www.dctvny.org) is non-profit media center whose facility and programs are sponsored and funded, *inter alia*, by the New York City Department of Cultural Affairs and the National Endowment for the Arts. During a recent visit to attend the "disTHIS" series, the lack of any public disability parking could have effectively prevented plaintiff from safely attending if he

had not been accompanied by an additional person (other than his van driver) who was present when the uneven sidewalks and lack of curb cut-outs between where plaintiff left the van and where he was going required him to travel a maze like route into and out of the street to avoid and maneuver around all the sidewalk barriers confronting him. But additional persons to accompany plaintiff are neither always available nor should be required for plaintiff to travel with a modicum of independence, self-sufficiency and dignity. Had plaintiff been allowed to legally park in the same spaces as those disabled persons residing, or working or attending school full-time, in New York City with a New York City disabled parking permit, or had plaintiff even been entitled as an accommodation to park for a limited time in the public authorized truck/commercial parking spaces liberally distributed throughout the City, the barriers and uncertainty he faced would have been eliminated.

(b) In fact, at least 85 % of the potential Monday through Friday, 9am to 6pm, weekday parking for several blocks in all directions near the DCTV Documentary Video and Community Center Monday is comprised of restricted authorized parking limited to specified agency permits (with the remainder comprised of metered parking). As the DCTV Center is located at the intersection of 87 Lafayette Street and White Street (less than three blocks from the Pearl Street Federal Courthouse), the Court could take a leisurely fifteen minute stroll and take judicial notice of all of the many potentially available parking spaces for which an even modest enlargement in the current Special Vehicle Identification Permit program to accommodate plaintiff and other similarly situated disabled persons would substantially eliminate the barriers to access about which plaintiff complains.

34. Additionally, plaintiff also comes to the City intermittently for professional and educational visits to such New York City institutions as the New York Public Library,

which is located near the New York City law office of his aunt whom he assists with her family law practice. Upon information and belief, this geographic location also has substantial restricted parking similar to the MOMA and DCTV Center which could reasonably be made available on a limited basis to plaintiff and other similarly situated disabled persons who do not otherwise qualify for the 24/7/365 Special Vehicle Identification Permit.

35. As noted *supra*, plaintiff is employed as Staff Attorney at Legal Services of New Jersey, a position he has retained since January, 2003. Plaintiff also is admitted to the bar of New York State, although his registration has not presently been brought current (something he intends to address shortly). However, because the budgets of legal service providers tend to be hit hard in difficult economic times, it is at least possible (if not likely) that the severe economic dislocation the country is currently undergoing as a result of the sub-prime mortgage crisis will substantially limit legal services funding and plaintiff's ability to continue in his existing employment. Even if funding does not become an issue, plaintiff's continuing career growth as an attorney makes it likely that at some point he will seek new employment in New York City, the largest legal market in the United States. However, the absence of any limited accommodation by defendants creates a significant barrier to access that impedes plaintiff's ability to come into New York City for something as fundamental as a job interview. Whether plaintiff begins his search for a legal position in New York City in several months or several years, these barriers exist now, and will continue for plaintiff and all other similarly situated disabled persons unless and until defendants provide the kind of reasonable accommodation that federal law requires and this lawsuit seeks to achieve.

36. Although plaintiff has not recently traveled to New York City on a regular basis for medical care, he has had to do so in the past, and his SMA makes it likely that he will be required to do so again in the future. Furthermore, many members of the proposed Class do regularly travel to New York City for medical care, and are confronted by the same barriers as plaintiff on account of their disabilities. For example, the former plaintiff in this action regularly used Memorial Sloan-Kettering Cancer Center, one of the outstanding medical centers nationwide with a particular expertise in tumor treatment, for the care and treatment of his tumor disorder, and additionally used the related pharmacy services of Memorial Sloan-Kettering for filling the prescriptions of his multiple drug regimen, some of which prescriptions could only be picked up in person. Plaintiff and his counsel are also aware of other persons included in the Class who regularly come to New York City for medical care, including at least one other person with severe multiple sclerosis who cannot independently travel to her medical treatment at Columbia Presbyterian Hospital because of her inability to get from the distant hilly parking lot to the hospital entrance on account of the absence of any available nearby disabled parking accommodations.

37. (a) The same barriers present themselves to all similarly disabled residents of the greater New York metropolitan area, whether within or without New York State, whether their reasons for coming to the City are medical, cultural, professional, educational, employment-related, or something as fundamental as visiting loved ones or meeting or making new friends. The same barriers present themselves to elderly disabled former residents traveling from distant states with their disabled permits and driving into New York City for a visit. And the same barriers present themselves to all other similarly disabled persons, regardless of residency or former residency, by reason of their disabilities and

defendants' complete and indefensible refusal to provide them with any accommodation whatsoever.

(b) All defendants would have to do for plaintiff and other similarly disabled individuals to substantially eliminate the barriers to access defendants concede exist would be to provide them with a more restricted version of the Special Vehicle Identification Permit for weekday parking, and some limited number of designated "blue spaces" reserved for the severely mobility-disabled at night and on weekends when the City's most pressing parking demands are no longer present.

COUNT I

Violations of the ADA and the Rehabilitation Act

38. Plaintiff adopts and incorporates each and every allegation in this second amended complaint as if set forth fully herein.

39. Defendants New York City and Janette Sadik-Kahn, in her official capacity, are public entities within the meaning of Title II of the ADA.

40. Plaintiff is a "qualified individual with a disability" within the meaning of Title II of the ADA.

41. Title II of the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

42. Although Title II does not specifically describe what constitutes "discrimination" prohibited by Title II, Reg. 28 C.F.R. § 35.130 promulgated under Title II by the U.S. Department of Justice includes, generally, the same prohibitions against

discriminatory activities by public entities that are specifically identified by Congress in Title III of the ADA, 28 U.S.C. § 12182, including, *inter alia:*

(a) "Deny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service";

(b) "Provid[ing] different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others"; and

(c) " Otherwise limit[ing] a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service." *See* 28 C.F.R. § 35.130(b)(1).

(d) "[I]mpos[ing] or apply[ing] eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." *See* 28 C.F.R. § 35.130(b)(8); and

(e) "[D]eny[ing] a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities." *See* 28 C.F.R. § 35.130(b)(2).

43. Consistent with these regulations, the United States Supreme Court made clear in *Olmstead v. Zimring*, 527 U.S. at 598, that preferential or disparate treatment of similarly

situated individuals among the same protected class also constitutes discrimination prohibited by the ADA. *See also Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

44. The ADA regulations upheld by the Supreme Court in *Olmstead* also affirmatively require reasonable accommodations of disabled persons by public entities to comply with the ADA: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *See* 28 C.F.R. § 35.130(b)(7).

45. Along with the ADA, the Rehabilitation Act, 29 U.S.C. § 794 *et seq.*, prevents discrimination in connection with the operations of any instrumentality of a State or local government that has received federal funding. Defendants and their institutions receive such federal financial assistance from the U.S. Department of Transportation and other federal agencies.

46. Defendants have implemented a disability parking program that has the effect of subjecting plaintiff and other similarly situated persons with disabilities to discrimination, and excluding plaintiff and the Class from public parking spaces and the access they provide, in violation of the ADA and the regulations promulgated thereunder, and in violation of the Rehabilitation Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for relief and judgment as follows:

A. An order certifying this action as a class action pursuant to Fed. R. Civ. P. 23, with plaintiff certified as representative of the Class;

B. A judgment declaring, pursuant to 28 U.S.C. § 2201, that defendants' conduct as alleged herein is in violation of the ADA and the Rehabilitation Act;

C. An injunction and/or writ, pursuant to 28 U.S.C. § 1651 and other grants of equitable authority, that defendants immediately cease and refrain from further violations of such federal laws, and take such affirmative action as is necessary to achieve this result and redress past violations, including, but not limited to according reasonable public parking privileges, benefits and accommodations to those disabled persons displaying disabled parking permits issued outside of New York City who would otherwise be entitled to the benefits of the Special Vehicle Identification Permit Program if they resided, or worked or attended school full-time, within New York City;

D. An award of nominal damages to plaintiff and the Class in the amount of one dollar for each parking ticket illegally issued to disabled drivers in violation of federal law;

E. An award of economic damages to plaintiff and the Class in an amount to be proven at trial for injuries caused by the unlawful conduct of defendants, including economic injuries, such as the payment of parking tickets or excessive private parking fees;

F. An award of reasonable attorneys' fees, costs and other expenditures resulting or incurred in connection with the prosecution of this action, pursuant to, *inter alia*, 42 U.S.C. § 12205, 29 U.S.C. § 794a(b);

G. An award of pre-judgment and post-judgment interest; and

H. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff requests a trial by jury on all counts.

Dated: New York, New York
April 2, 2008

Respectfully submitted,

SANFORD WITTELS & HEISLER LLP

By: _____
William R. Weinstein (WW-4289)
950 Third Avenue, 10th Floor
New York, NY 10022
(646) 723-2947

ATTORNEYS FOR PLAINTIFF
AND THE CLASS

CERTIFICATE OF SERVICE

WILLIAM R. WEINSTEIN, a member in good standing admitted to practice before the bar of this Court, hereby certifies that on the 2nd day of April, 2008, he caused the foregoing Second Amended Class Action Complaint to be served by email on counsel for defendants, as follows:

Michael A. Cardozo
Corporation Counsel of the City of New York
Attorney for City Defendants
By: Sherrill Kurland
100 Church Street, Room 5-167
New York, NY 10007
Email: skurland@law.nyc.gov

Dated: April 2, 2008

WILLIAM R. WEINSTEIN (WW-4289)