UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALECHEA TONEY-DICK, X.T., RENEE MOORE, SHERRY HANAN, individually and on behalf of all others similarly situated,

Plaintiffs,

-v-

ROBERT DOAR, in his official capacity as Commissioner of the New York City Human Resources Administration, and THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Defendants.

12 Civ. 9162 (KBF)

MEMORANDUM
DECISION & ORDER

KATHERINE B. FORREST, District Judge:

As Hurricane Sandy swept up the Atlantic seaboard in late October 2012, New Yorkers prepared for a bad storm. Many, however, did not anticipate the level of destruction and devastation Hurricane Sandy would cause throughout the City.

On October 30, 2012, President Barack Obama declared New York City (otherwise referred to as "New York" or the "City") a major disaster area due to the impact of Hurricane Sandy. Indeed, not since September 11, 2001, had the City or its residents faced such an emergency situation as the hurricane. From the devastation in Breezy Point, to the emergency evacuations at Bellevue Hospital, to flooded train tunnels across the East River, to the crane dangling above 57th street, to the widespread electricity losses and gas shortages--and all the other affected people and property--it was and is long in anyone's memory the last time the City faced such a broad-scale set of emergencies on such an immense geographical scale all at once.

Among the emergency situations listed above, and the countless others--omitted not because they were any less devastating to the individuals involved, but because there is only so much space in this document--was the terrible plight of the City's indigent disabled. Indeed, their lives were--if possible--thrown into even more chaos than those of the average New Yorker. This litigation attempts to address some part of the chaos facing that group in the wake of the storm.

Plaintiffs here seek to represent a class of indigent, disabled New Yorkers who (A) allegedly were qualified to receive government assistance in purchasing food pursuant to the government's Disaster Supplemental Nutrition Assistance Program ("D-SNAP"); but who (B) allegedly were unlawfully denied access to that assistance due to the mechanisms of the specific D-SNAP employed after the storm. Plaintiffs sue the New York City Human Resources Administration ("NYCHRA") and its commissioner, Robert Doar, claiming that the D-SNAP that NYCHRA administered after Hurricane Sandy violated the Americans With Disabilities Act, 42 U.S.C. §§ 12131, et seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. §§ 794 et seq., the Food Stamp Act, 7 U.S.C. §§ 2011 et seq., and state and city local law.

Now before the Court are plaintiffs' motion for a preliminary injunction and for class certification; and defendants' motion to dismiss. First, as pleaded, it is impossible for plaintiffs to obtain any of the relief requested in the complaint without the Court finding that the post-Hurricane Sandy D-SNAP violated one or more of the listed statutes. Such a determination necessarily and directly implicates the legality of actions of New York State (otherwise referred to as the "State") and the federal government--in addition to those of the City. Accordingly, the City's motion to dismiss is granted; and the complaint is dismissed, without prejudice, for failure to join necessary parties under Federal Rules of Civil Procedure 12(b)(7) and 19. However, even if the complaint were not dismissed, plaintiffs' preliminary injunction request would still be denied. On the current record, plaintiffs have made an insufficient showing of irreparable harm.

For these reasons, as more fully explained below, defendants' motion is GRANTED IN PART and plaintiffs' motion is DENIED.

## BACKGROUND

The following facts are drawn from the "First Amended Class Action Complaint; Injunctive and Declaratory Relief" (the "Complaint" or "Compl."), from the documents attached thereto and incorporated by reference therein, as well as from the parties various affidavits, declarations, and exhibits submitted--as is appropriate--on the parties' various motions. See Makarova v. United States, 201 F.3d 110, 113 (2000) (court may consider matters outside the pleadings on motion pursuant to Federal Rule of Civil Procedure 12(b)(1)); Dunmann Realty, LLC v. Faust, 267 F.R.D. 101, 101 n.1 (S.D.N.Y. 2010) (Rule 12(b)(7) motion); City of

Newburgh v. Sarna, 690 F. Supp. 2d 136, 141 (S.D.N.Y. 2010) (preliminary injunction motion).[1]

**Hurricane Sandy and the Named Plaintiffs**

Hurricane Sandy hit New York on October 29, 2013. By the next day, President Obama declared New York a "major disaster area." (Compl. ¶ 44.)[2] The storm caused $20 billion in economic damages to the City's residents, businesses, and agencies. (Id. ¶ 45.) The practical effects of the storm were widespread, both in form and geographic location. To name but a few: the storm caused the closure of the City's subway systems, railroads, bridges, tunnels, ferries, airports, schools, and parks; required the City to administer the delivery of food and essential survival goods through the National Guard and other organizations; caused power plant explosions; necessitated the evacuation of hospitals; caused fires that completely destroyed neighborhoods; shut down gas, heat, and electricity services, and closed

[1] As these citations indicate, and as made clear, infra, in analyzing that aspect of defendants' motion based on Federal Rule of Civil Procedure 12(b)(7), the Court may consider matters outside the pleadings in ruling on whether parties are necessary to a litigation. Much of the factual material related to defendants' Rule 12(b)(7) motion is based on declarations and other documents not included in plaintiffs' Complaint. However, this is properly considered on this motion. See Dunmann Realty, 267 F.R.D. at 101 n.1.

[2] The following documents are cited to in this recitation of the facts relevant to this Order: the Complaint (ECF No. 10); the Declaration of Susan Dooha in Support of Plaintiffs' Motion, dated Jan. 5, 2013 (ECF No. 19) ("Dooha Decl."); the Declaration of Catherine F. Bowman, dated Jan. 7, 2013 (ECF No 22) ("Bowman Decl."); the Declaration of Sherry Hanan, dated Jan. 7, 2013 (ECF No. 18) ("Hanan Decl."); and the Second Supplemental Declaration of Roy Esnard in Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief, dated Jan. 17, 2013 (ECF No. 29) ("2d Supp. Esnard Decl."). The Court also cites later to the parties' briefs on these motions: Plaintiffs' Memorandum of Law in Support of Their Motion for a Preliminary Injunction and Class Certification, dated Jan. 7, 2013 (ECF No. 15) ("Pls.' Mem."); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Injunction and Class Certification and in Support of Their Cross-Motion to Dismiss the First Amended Complaint, dated Jan. 17, 2013 (ECF No. 30) ("Defs.' Mem. and Opp'n"); Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion to Dismiss Plaintiffs' First Amended Class Action Complaint and in Further Support of Plaintiffs' Motions for a Preliminary Injunction and Class Certification, dated Jan. 31, 2013 (ECF No. 32) ("Pls.' Opp'n and Reply"); and Defendants' Reply Memorandum of Law in Further Support of Their Cross-Motion to Dismiss the First Amended Complaint, dated Feb. 7, 2013 (ECF No. 35) ("Defs.' Reply").

gas stations; flooded the World Trade Center site; caused environmental devastation across the metropolitan area; caused cranes to collapse; severely damaged and/or flooded homes across the region; led to looting and burglaries; and necessitated the evacuation of people across the metropolitan area.

Along with many others in New York, individuals with disabilities--and especially indigent individuals with disabilities--suffered dearly. (Dooha Decl. ¶ 6.) Following Hurricane Sandy many such individuals lacked shelter, food, and medical care. (Id. ¶ 7.) Indeed, the City's indigent disabled suffered particularly due to the extreme and "unprecedented" (Pl.'s Mem. at 4) transportation obstacles in the storm's wake--including limited shuttle bus services, bus stations whose elevators were powerless, difficult scheduling issues, and general chaos within the City's public transport system. (See Dooha Decl. ¶ 9.)

The named plaintiffs in this action are indigent disabled New Yorkers whose lives were thrown into turmoil by Hurricane Sandy. Plaintiffs' claims are essentially that, in addition to the difficulties they already faced due to the storm and their disabilities, the D-SNAP administered by the City in the wake of the storm--described below--unlawfully inhibited their access to supplemental nutrition benefits to which they were entitled. Each plaintiff is in one or several ways disabled, and each was financially eligible for D-SNAP benefits. Plaintiff Alechea Toney-Dick suffers from multiple sclerosis, hyperthyroidism, chronic arthritis, chronic weakness, fatigue, and chronic obstructive pulmonary disease, all restricting her ability to breathe or move. (See Compl. ¶¶ 77-85.) Plaintiff X.T. suffers from acute pulmonary hypertension, receives intravenous medication twenty-four hours each day, and must carry an oxygen tank. (See id. ¶¶ 86-93.) Plaintiff Renee Moore has multiple dislocated discs and damaged nerves, asthma, high-blood pressure, is on prescription pain medication, and cannot very well stand or move without great pain. (See id. ¶¶ 94-102.) Plaintiff Sherry Hanan has seizure disorders, rheumatoid arthritis, chronic irritable bowel syndrome, and gastroesophageal reflux disease, and cannot function in crowded situations except with extreme difficulty. (See id. ¶¶ 103-110.)

**The Disaster Supplemental Nutrition Assistance Program**

After a natural disaster, and a declaration from the President that a region is a "major disaster area," the United States Department of Agriculture ("USDA") provides nutrition assistance to victims through a D-SNAP. (2d Supp. Esnard Decl. ¶¶ 2, 4.) Although USDA is involved in planning, organizing, training personnel, and providing technical support for a D-SNAP--and although USDA funds the D-SNAP's benefits and half of its administrative costs--the administration and operation of the program falls to state or local agencies. (Id. ¶¶ 2, 5, 6.) For New York City to operate a D-SNAP, (1) NYCHRA and the State's Office of Temporary and Disability Assistance ("OTDA") must draft a D-SNAP plan, in accordance with USDA's guidance and consultation; (2) OTDA must submit the plan to USDA; and (3) USDA must approve, and then fund, the planned D-SNAP. (Id. ¶ 6.) Once approved and operating, the D-SNAP provides a one-time payment equal to one month of nutritional assistance benefits to eligible households on criteria relaxed from that required for eligibility for the normal non-disaster supplemental nutritional assistance program ("SNAP"). (Id. ¶ 3.)

Beginning on November 6, 2012, NYCHRA, OTDA, and several New York counties--sometimes also in consultation with USDA, the City's Office of Emergency Management, and the City's Housing Authority--held daily teleconferences to discus, inter alia, planning and implementing a D-SNAP for New York. (Id. ¶¶ 7, 8, 11, 13.) For example, various City and State authorities (including many City agencies other than NYCHRA) consulted on, and consulted with USDA about, inter alia, what locations to administer the D-SNAP out of; what the logistical requirements of D-SNAP centers would be; the D-SNAP eligibility requirements; and projections of the number of likely D-SNAP applicants. (Id. ¶¶ 8, 14, 16, 18, 19, 23.) These discussions culminated in OTDA submitting a D-SNAP plan to USDA on November 28, and USDA's approval of that plan on December 3. (Id. ¶ 9.)

The D-SNAP approved by USDA began on December 12, 2013 and ran for seven days, terminating on December 18, 2013. (Id. ¶ 22.) Although the D-SNAP was administered mainly by NYCHRA, OTDA and USDA were "on site" at both of the centers from which the D-SNAP was run (in Brooklyn and in Staten Island). (Id. ¶ 29; see also Compl. ¶ 49.) Nobody disputes that the D-SNAP terminated on December 18, 2013, and that there is, at present, no D-SNAP. Indeed, there cannot be another D-SNAP until there is another declaration by the President of certain regions as major disaster areas. (See 2d Supp. Esnard Decl. ¶ 4.)

Plaintiffs allege that the decision to operate only two D-SNAP sites made travel to the sites so burdensome as to be discriminatory under, inter alia, the ADA. (See Compl. ¶ 66.) Plaintiffs further allege that the D-SNAP's requirement of in-person applications--subject to the sole exception of application through an authorized representative willing to attest under penalty of perjury to the application's truth--also violated the ADA because of (1) plaintiffs' transportation burdens; (2) the need created by the requirement to disclose personal, sensitive, and embarrassing information to others; (3) the lack, for many, of any potential authorized representative; and (4) the unwillingness of potential authorized representatives to subject themselves to penalty of perjury. (See id. ¶¶ 66-73; see also Dooha Decl. ¶ 10-12; Bowman Decl. ¶¶ 25-28.)[3] Plaintiffs allege that in a normal, non-disaster-related SNAP, applications may be made through home visits, and by phone, fax, the internet, and mail, and are accepted in person at several locations across the City. (See Compl. ¶¶ 57, 58.) If such accommodations had been in place post-Hurricane Sandy, plaintiffs argue, those accommodations might have reasonably accommodated plaintiffs' disabilities in satisfaction of the ADA's requirements. (See Pls.' Opp'n and Reply at 22-26.)

The named plaintiffs, likely like many other indigent disabled New Yorkers, had trouble accessing the benefits the D-SNAP was meant to provide. Toney-Dick was unable to apply because her disabilities essentially prevent her from moving without assistance, her husband works full-time, her son attends school full-time, and she lives a long distance away from any D-SNAP center. (See Compl. ¶¶ 78-81, 84-85.) Similarly, X.T. and Moore's disabilities severely limit their abilities to travel, and neither could make it to any D-SNAP center or identify friends or family

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[3] Plaintiffs' allegation that authorized representatives would have to attest under penalty of perjury to the truth of their principals' applications is based on a December 6, 2013 teleconference during which NYCHRA's general counsel, Roy Esnard, allegedly stated as much. (Bowman Decl. ¶ 26.) The Court notes that Esnard himself denies ever having made any such statement. (See 2d Supp. Esnard Decl. ¶ 32.)

members to apply as their representatives. (See Compl. ¶¶ 90, 98.) Hanan is similarly limited and could not make it to any D-SNAP site, but was, in fact, able to send her brother to apply as her authorized representative. (See Hanan Decl. ¶ 8.) However, because of long lines and delays at the site, Hanan's brother was unable to complete any application for Hanan. (See id.)

Although they allegedly failed to obtain D-SNAP benefits during the period of the D-SNAP's operation, Toney-Dick, Moore, and X.T. have--claim defendants--since retroactively received all D-SNAP amounts to which they might have been entitled. (See 2d Supp. Esnard Decl. ¶¶ 33-39; Defs.' Reply at 4 n.2.) There is no dispute that Hanan has not received any D-SNAP payments.

**The Current Motions**

Plaintiffs filed the current Complaint on December 21, 2013, after the Court had denied their initial requests for injunctive relief. (See ECF Nos. 7, 10.) In their Complaint, plaintiffs seek to represent a class consisting of:

> all individuals in New York City who (a) have a physical or mental impairment that substantially limits one or more major life activities within the meaning of the ADA and have a record of such an impairment, (b) are eligible to apply for D-SNAP benefits, (c) reside in the covered zip codes for [NYCHRA's] D-SNAP program [sic]; and (d) need reasonable accommodations to enable them to apply for D-SNAP benefits.

(Compl. ¶ 29.) The complaint also seeks (1) a declaration that defendants' actions in administering the D-SNAP violated the ADA, the Rehabilitation Act, the Food Stamp Act, and state and local law; (2) a mandatory injunction either (a) requiring defendants to permit members of the proposed class to apply for D-SNAP benefits through the application procedures generally available for the normal SNAP, or alternatively (b) allowing retroactive applications; and (3) court orders prohibiting defendants from discriminating against the proposed class and/or requiring defendants to make reasonable accommodations for the class. (See id. ¶¶ 137-140.)

In connection with filing their complaint, plaintiffs also moved for class certification and for a preliminary injunction. (See generally Pls.' Mem.) As plaintiffs' papers make abundantly clear, the preliminary, mandatory injunction sought is only for a court order compelling defendants to "request that [OTDA] permit" the City to administer a non-discriminatory D-SNAP. (Id. at 1.) In other words, plaintiffs seek only an order requiring defendants to ask OTDA to ask USDA for a non-discriminatory D-SNAP if and when the next D-SNAP is implemented. (See Pls.' Opp'n and Reply at 12-13 ("[T]he injunction would merely require Defendants to apply[4] for a D-SNAP program [sic]--and does not direct that specific benefits be issued or eligibility decisions be made . . . ."); id. at 14 ("Plaintiffs seek only an injunction requiring Defendants to request approval from OTDA and USDA to provide meaningful access through reasonable accommodations in applying for D-SNAP benefits. Plaintiffs do not ask--let alone seek to require--OTDA or USDA to respond to defendants' request in any particular manner.") (emphasis in original and added).)

Defendants have since moved to dismiss the Complaint--and have opposed the preliminary injunction motion--on various grounds, including, most importantly

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[4] It is, of course, not defendants who would apply for any D-SNAP, but ODTA. (See 2d Supp. Esnard Decl. ¶ 6.)

to the discussion below, that the Complaint fails to name necessary parties under Federal Rule of Civil Procedure 19--to wit, OTDA and USDA.

DISCUSSION

**Mootness**

Defendants initially argue that the claims of three of the four named plaintiffs--Toney-Dick, Moore, and X.T.--are moot, and that therefore dismissal of those plaintiffs' claims is required. Because mootness raises issues of the Court's subject matter jurisdiction, the Court addresses that issue first--and finds that these claims are not moot.

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova, 201 F.3d at 113; see Williams v. Skyline Auto. Inc., 11 Civ. 8318, 2012 WL 1965334, at *2 (S.D.N.Y. May 24, 2012). To survive a Rule 12(b)(1) challenge to the Court's subject matter jurisdiction, the plaintiff must "allege facts that affirmatively and plausibly" suggest that jurisdiction exists. Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011); see GMA Accessories, Inc. v. Dorfman-Pacific Co., Inc., 11 Civ. 3731, 2012 WL 899385, at *3 (March 16, 2012) (dismissal is proper "when the complaint fails to allege sufficient allegations to support subject matter jurisdiction"). The Court draws on both the well-pleaded facts from the complaint--and the documents attached thereto and incorporated therein, assuming such facts to be true, and construing reasonable inferences in the plaintiffs' favor--and on relevant evidence from outside the pleadings. Amidax, 671 F.3d at 145; Makarova, 201 F.3d at 113; City of Newburgh, 690 F. Supp. 2d at 141.

"Pursuant to Article III of the [United States] Constitution, federal courts may only entertain actual cases or controversies." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "That requirement has two components: . . . whether the plaintiffs who have brought the action have standing, and whether over the course of the litigation the matter has been rendered moot." Hedges v. Obama, ___ F. Supp. 2d ___, 2012 WL 3999839, at *21 (S.D.N.Y. Sept. 12, 2012) (internal citation omitted).

Standing--which requires an "actual or imminent" injury to "a legally protected interest"; a causal connection between defendants' alleged conduct and plaintiffs' injury; and redressability from a favorable judicial decision--is determined as of the outset of the litigation. Id. (citing Lujan, 504 U.S. at 561, 569 n.4). Mootness, on the other hand--which requires that an action be "real and live, not feigned, academic or conjectural"--can arise at any stage during the litigation's course. Id. (citing Powell v. McCormack, 395 U.S. 486, 489 (1969); Russman v. Bd. of Educ. of the Enlarged City Sch. Dist. of the City of Watervliet, 260 F.3d 114, 118 (2d Cir. 2001)). "However, a case is not moot when there is a reasonable expectation that the alleged violation may recur." Id. (citing Murphey v. Hunt, 455 U.S. 478, 482 (1982)). Nor is a case moot "if the underlying dispute . . . is 'capable of repetition, yet evading review.'" Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 647 (2d Cir. 1998) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976)).

Defendants do not contest plaintiffs' standing to bring this action; however, they do argue that plaintiffs Toney-Dick, Moore, and X.T.'s claims have been rendered moot by their receipt of D-SNAP funds to which they were entitled. (See Defs.' Mem. and Opp'n at 16; Defs.' Reply at 4.)[5] However, defendants' argument--and the parties' disagreements concerning the applicability of the so-called "voluntary cessation doctrine"--misunderstands the nature of plaintiffs' claims. It is true that any claims plaintiffs make for unpaid D-SNAP entitlements[6] might be--if those amounts have in fact been paid--moot. However, the crux of plaintiffs' complaint--and the entire issue in this lawsuit--is plaintiffs' attempt to prevent a situation similar to the post-Hurricane Sandy D-SNAP, which plaintiffs allege violated several statutes, from occurring again. This requested declarative and injunctive relief has not been mooted by plaintiffs' receipt of D-SNAP funds. Indeed, the entire point is that, in the next Hurricane Sandy, the proposed class need not use litigation and/or wait until the program ends to receive D-SNAP funds to which they are entitled, but instead will receive those funds during the emergency and when they are most needed. This dispute is "real and live," and is not "academic or conjectural"--it is just the type that would repeat and evade review were the City to administer another week-long D-SNAP after the next natural

[5] In fact, defendants argue that this purported mooting of plaintiffs' claims relieves plaintiffs of standing. (See Defs.' Mem. and Opp'n at 16.) However, this assertion misunderstands the fundamental differences between standing and mootness--explained briefly supra. Because defendants are not arguing that plaintiffs had no redressable injury at the time their claims arose, and instead that their receipt of D-SNAP funds has made their claims obsolete, the Court analyzes defendants' argument pursuant to mootness principles, not standing principles.

[6] For example, plaintiffs' "in the alternative" prayer for relief that members of the purported class be allowed to apply now for D-SNAP benefits, even though no one disputes that the program terminated on December 18, 2012. (See Compl. ¶ 138; 2d Supp. Esnard Decl. ¶ 22.)

disaster. Therefore, plaintiffs' claims are not moot simply because they may, or may not, have received D-SNAP funds.[7]

**Food Stamp Act**

The City next argues that dismissal of plaintiffs' claims brought pursuant to the Food Stamp Act is warranted because the statutory provisions plaintiffs invoke do not provide for a private right of action. Like mootness, whether a certain statute can properly be sued upon in order to confer jurisdiction in the Court under 28 U.S.C. § 1331 is an issue going to the Court's subject matter jurisdiction. It is therefore considered prior to defendants' other arguments.

Defendants' position that no private right of action exists under the provisions of Section 10 of the Food Stamp Act invoked by plaintiffs, 7 U.S.C. § 2020(e)(2)(B)(i)[8] and (e)(14),[9] need not detain the Court for long. Even if it is true,

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[7] Defendants also argue that plaintiff Hanan fails to state a claim--and that therefore dismissal is warranted under Federal Rule of Civil Procedure 12(b)(6)--because it was Hanan's brother's decision not to stand in line all day, and not the D-SNAP program's administrative mechanisms, that caused Hanan not to receive her benefits. (See Defs.' Mem. and Opp'n at 17.) This chicken-and-egg argument is, of course, without merit. It was the D-SNAP program and its purported reasonable accommodations--including allowing a representative to stand on line for a beneficiary--that caused Hanan's brother to stand on line for Hanan's benefits. It was the alleged unreasonableness of that procedure--coupled with the purported reasonableness of alternative procedures--that forms the basis of Hanan and the other plaintiffs' claims. The City cannot, of course, implement certain procedures and then defend those procedures against purported civil rights challenges by arguing that plaintiffs have availed themselves precisely of the procedures implemented.

[8] "The State plan of operation for the [supplemental nutrition assistance program] shall provide, among such other provisions as may be required by regulation . . . that the State agency shall establish procedures governing the operation of supplemental nutrition assistance program offices that the State agency determines best serve households in the State, including households with . . . disabled members . . . . In carrying out that [directive], a State agency shall provide timely, accurate, and fair service to applicants for, and participants in, the supplemental nutrition assistance program." 7 U.S.C. § 2020(e), (e)(2)(A) and (e)(2)(B)(i).

[9] "The State plan of operation for the [supplemental nutrition assistance program] shall provide, among such other provisions as may be required by regulation . . . that the State agency shall specify a plan of operation for providing supplemental nutrition assistance program benefits for households that are victims of a disaster; that such plan shall include, but not be limited to, procedures for informing the public about the disaster program and how to apply for its benefits, coordination with

as defendants suggest, that there exists not "a single case finding a private right of action under Sections 2020(e)(14) and 2020(e)(2)(B)(i) of the [Food Stamp] Act" (Defs.' Reply at 6),[10] there do exist myriad cases, not only allowing private rights of action under other sections of the Food Stamp Act, but articulating the permission of such actions generally under the act. (See Pls.' Opp'n and Reply at 15-16); see also Briggs v. Bremby, 12 CV 324, 2012 WL 6026167, at *6 (D. Conn. Dec. 4, 2012) (collecting cases); id. at *10; M.K.B. v. Eggleston, 445 F. Supp. 2d 400, 428-29 (S.D.N.Y. 2006); Williston v. Eggleston, 379 F. Supp. 2d 561, 575-79 (S.D.N.Y. 2005).

Like the other sections of the Food Stamp Act the courts have found provide for a private right of action, Sections 2020(e)(2)(B)(i) and (e)(14) set forth provisions for the how and when private individuals and households may obtain the supplemental nutrition assistance generally provided by the statute. Defendants provide no reason to deviate from this line of cases, and the Court will not do so. Plaintiffs therefore may bring actions under 7 U.S.C. § 2020(e)(2)(B)(i) and (e)(14).

**Failure to Join a Party under Rule 19**

Necessary Parties under Rule 19(a)

"Under [Federal Rule of Civil Procedure] 12(b)(7), an action must be dismissed for failure to join a party under [Federal Rule of Civil Procedure] 19." Federal Ins. Co. v. SafeNet, Inc., 758 F. Supp. 2d 251, 257 (S.D.N.Y. 2010). "Such a

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Federal and private disaster relief agencies and local government officials, application procedures to reduce hardship and inconvenience and deter fraud, and instruction of caseworkers in procedures for implementing and operating the disaster program." 7 U.S.C. § 2020(e) and (e)(14).

[10] Indeed, plaintiffs do not identify any such case, and the Court can find none.

ruling is within th[e] Court's discretion." Walker v. Eggleston, 04 Civ. 369, 2006 WL 2482619, at *6 (S.D.N.Y. Aug. 29, 2006) (citing Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 725 (2d Cir. 2000)). "When reviewing a motion to dismiss under Rule 12(b)(7), the Court may consider documents and facts outside the pleadings." Dunmann Realty, 267 F.R.D. at 101 n.1.

On a Rule 12(b)(7) motion, the Court first determines "whether an absent party belongs in the suit." SafeNet, 758 F. Supp. 2d at 257 (citing Viacom, 212 F.3d at 724). A party may so belong if, inter alia, "that person claims an interest relating to the subject of the action[11] and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i); see id. 1966 Amendment (rule "protect[s] the person . . . against the practical prejudice to him which may arise through a disposition of the action in his absence").

An absent party's ability to protect its interests may be impeded or impaired if, inter alia, the court's rulings in the litigation before it might affect the party's rights in other possible litigations to which it is or could be party, by principles of estoppel or otherwise. See, e.g., Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 700-01 (2d Cir. 1980) (party was necessary when disposition of litigation at bar would affect absent party's contract rights); Dunmann Realty, 267 F.R.D. at 103-04 (rights under loans); Delcon Const. Corp. v. U.S. Dep't of Housing & Urban Dev., 205 F.R.D. 145, 147-48 (S.D.N.Y. 2002); Smith v. Kessner, 183 F.R.D. 373, 375

[11] Although plaintiffs argue that OTDA and USDA will suffer no prejudice due to their awareness of the current litigation and their failure, so far, to intervene (Pls.' Opp'n and Reply at 14), "an absentee is not obliged to intervene" for Rule 19 to be effective. SafeNet, 758 F. Supp. 2d at 259.

(S.D.N.Y. 1998) ("If [plaintiff] is unsuccessful, it is possible that claims by [the absent party] would be barred by principles of res judicata and collateral estoppel."); Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 708 (S.D.N.Y. 1997) (Sotomayor, J.) (even when court's disposition would only be persuasive, and not binding, authority on court hearing absent party's litigation, court's disposition of action would "undoubtedly have a practical effect on any subsequent action") (emphasis in original).

Similarly, an absent party's ability to protect its interests may be impeded or impaired if the court's ruling would eventually require payment of funds by that party. See Walker, 2006 WL 2482619, at *6. Finally, when "equitable relief is sought in addition to monetary damages, the presence of all parties [who might be affected by an order of relief] is necessary" for Rule 19(a) purposes. Kermanshah v. Kermanshah, 08 Civ. 409, 2010 WL 1904135, at *3 (S.D.N.Y. May 11, 2010).

If the person has not been joined to the action, "the court must order that the person be made a party." Fed. R. Civ. P. 19(a)(2); id. 1966 Amendment ("if he has not been joined, the court should order him to be brought into the action"). If this will not eliminate a court's jurisdiction, it is often done through the filing of an amended complaint.[12] See Dunmann Realty, 09 Civ. 7651 (S.D.N.Y.) ECF Nos. 27,

[12] An action is only dismissed under Rules 12(b)(7) and 19 if all of the following are true: (1) the absent party belongs in the litigation as discussed supra (that is, that it is "necessary"); (2) the absent party cannot be joined to the litigation for jurisdictional or other reasons; and (3) the court "determine[s] whether, in equity and good conscience," that the action cannot proceed only among the existing parties (requirements (2) and (3) meaning that the absent party is "indispensable"). Fed. R. Civ. P. 19(a), (b); Dunmann Realty, 267 F.R.D. at 103. Because it appears that the absent parties here, OTDA and USDA, could be joined without eliminating the Court's jurisdiction--indeed, defendants do not even argue that this would be the case--the Court does not dismiss this action, but instead dismisses the operative complaint and directs plaintiffs to file an amended version naming all necessary parties.

31; Walker, 04 Civ. 369 (S.D.N.Y.) ECF Nos. 63, 65; Delcon Const., 01 Civ. 3295 (S.D.N.Y.) ECF Nos. 20, 24.

OTDA and USDA are Necessary Parties and Must be Joined

As set forth above, the procedure for implementation of a D-SNAP is essentially the following: (1) a disaster occurs creating the need for a D-SNAP; (2) the relevant City and State agencies--respectively, NYCHRA and OTDA--discuss, and agree upon, an appropriate D-SNAP; (3) OTDA requests the agreed-upon D-SNAP from USDA; (4) USDA approves the D-SNAP, and provides funding for it; and (5) the City authorities administer the D-SNAP on the ground, with advice and input from OTDA and USDA--and with half of the administration costs paid by the City and half by USDA.

The D-SNAP at issue here was submitted to USDA by OTDA on November 28, 2012, which approved the D-SNAP on December 3. It was the procedures in this very plan--discussed with, and approved by, OTDA and USDA--that form the basis of plaintiffs' action here. To cite a few examples, all of the government bodies discussed: (1) the decision to administer the D-SNAP out of only two locations--which is the very root of plaintiffs' case; (2) the pros and cons of running the D-SNAP out of the existing SNAP locations; (3) logistical efforts necessary for the D-SNAP; (4) the D-SNAP's eligibility requirements; and (5) D-SNAP application projections. These decisions go to the heart of the practices plaintiffs allege to have been discriminatory.[13]

[13] Indeed, plaintiffs' own papers concede that the D-SNAP, planned through consultations among all the government entities involved, must be applied for by OTDA, not NYCHRA. Plaintiffs write that

Moreover, plaintiffs' prayer for relief effectively requests that the Court hold OTDA and USDA's actions to be violative of the federal statutes plaintiffs invoke. Plaintiffs ask the Court to "[a]djudge and declare that the policies, practices, omissions and conditions described" in the Complaint "are in violation of the rights of the plaintiffs and the class they seek to represent under" the ADA, the Rehabilitation Act, the Food Stamp Act, and state and local law. (Compl. ¶ 137.) The remainder of plaintiffs' prayer is entirely based on that ruling--in other words, if the Court cannot find that the D-SNAP violated federal law, then plaintiffs would not be entitled to the relief they request springing from that violation.

The problem for plaintiffs is that the "policies, practices, omissions and conditions" alleged are not those of just the City--they are those of the State and the federal government as well. It would simply be impossible to declare that the City has acted in any unlawful manner without simultaneously declaring that the State and federal government have likewise done so. This is not, for example, the case of a City entity simply implementing a federal government- or State-funded program, without any input from the federal or State government and without the federal or State agencies involved in the creation, funding, planning, or decision-making processes involved. Such a case, based purely and solely on the implementing acts of the City authorities, might survive a Rule 12(b)(7) motion. Instead, this is a case where all levels of government are in an intertwined and active manner putting

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their preliminary injunction, discussed infra, "would merely require Defendants to apply for a D-SNAP program [sic]--and does not direct that specific benefits be issued or eligibility decisions be made . . . ." (Pls.' Opp'n and Reply at 12-13.) But, as discussed supra, defendants would and could never be the entities "apply[ing]" for any D-SNAP--that entity would be OTDA.

together a comprehensive plan to help those who need help in times of disaster--and then tasking the City to administer that plan.[14] Any unlawful acts taken in the case pleaded before the Court are not acts only of the City authorities, but are acts of the State and federal governments as well.

But the State and federal governments are not before the Court. And, as such, Rule 19 requires that plaintiffs bring those entities in front of the Court before the Court can issue any ruling disparaging of their rights--which a ruling that their actions violated federal law would do.

OTDA and USDA are therefore necessary parties to this litigation. Accordingly, plaintiffs must join OTDA and USDA as defendants to this action if it is to proceed.[15]

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[14] Plaintiffs' reliance on Arthur v. Starrett City Assocs., 89 F.R.D. 542 (E.D.N.Y. 1981) is thus entirely inapposite. As a preliminary matter, that case's holding was not--as forms the foundation of defendants' argument here--based on the level of involvement or interdependence between Starrett (the City analog) and HUD (the OTDA and USDA analog). The Court's holding was based instead on the fact that the Arthur plaintiffs challenged Starrett's tenant-selection policies, not its marketing policies (which were the policies HUD allegedly approved under defendants' Rule 19 theory). 89 F.R.D. at 545-46. However, even if the case's holding were on point--which it is not--the case still would not support plaintiffs' position here. In Arthur, the entire process of coming up with the policies and plan allegedly requiring HUD's participation in the litigation were the product of Starrett. HUD had no involvement itself except and until having to approve the plans submitted by Starrett. Id. at 546-47. As discussed supra, that does not describe the interactions between the City, the State, and the federal government at issue in this case.

[15] Having determined that plaintiffs' complaint must be dismissed for failure to join necessary parties--parties whose interests cannot be protected without the Court hearing their arguments concerning plaintiffs' claims--the Court will not and cannot rule on defendants' further grounds to dismiss this action.

Irreparable Harm

Even if the Complaint named all required parties, plaintiffs' request for preliminary injunctive relief would nonetheless be denied.

Irreparable harm is the single most important prerequisite to the Court's issuance of preliminary injunctive relief.[16] Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009). Indeed, a party must first prove irreparable harm before the Court should even consider the other requirements. Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005). The injury alleged to be irreparable must be actual and imminent, not merely possible. Id. Moreover, the injunction must address the injury alleged to be irreparable--the Court should not grant the injunction if it would not so prevent that injury. Faiveley, 559 F.3d at 118 ("We have explained that to satisfy the irreparable harm requirement, plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.") (internal quotation marks and alterations omitted) (emphasis added). Finally, the fact that an alleged harm can be remedied in money damages is the antithesis of irreparable harm, and such a fact requires that the Court not find an irreparable injury. Synergy Advanced Pharm., Inc. v. CapeBio, LLC, 10 Civ. 1736, 2010 WL 2194809, at *4 (S.D.N.Y. June 1, 2010) ("irreparable harm by definition 'cannot be

[16] The requirements for preliminary injunctive relief are: (1) irreparable harm in the absence of the specific relief requested; (2) a balance of hardships favoring the plaintiffs; (3) the preliminary injunction being in the public's interest; and (4) either (a) a likelihood of success on the merits, or (b) serious questions going to the merits and the balance of hardships decidedly favoring the plaintiffs. See WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 601 (S.D.N.Y. 2011).

remedied by an award of monetary damages'") (quoting Hoblock v. Albany Cnty. Bd. of Elections, 422 F.3d 77, 97 (2d Cir. 2005); see also Faiveley, 559 F.3d at 118 ("Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances."); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) ("If an injury can be appropriately compensated by an award of money damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief."). Thus, "[m]ere injuries, however substantial, in terms of money, time and energy . . . are not enough." Jayaraj v. Scappini, 66 F.3d 36, 39 (2d Cir. 1995) (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)). "Where monetary damages may provide adequate compensation, a preliminary injunction should not issue." Id.

The current Complaint, and the arguments plaintiffs assert in support of their preliminary injunction motion, fail these requirements.

First, and most importantly, the relief sought in plaintiffs' preliminary injunction application would not remedy the harm alleged. Plaintiffs' claims are that they were unlawfully prevented from obtaining D-SNAP payments during the period of the D-SNAP due to defendants' discriminatory D-SNAP procedures. But the injunctive relief plaintiffs here request does not remedy that injury: "Plaintiffs seek only an injunction requiring Defendants to request approval from OTDA and USDA to provide meaningful access through reasonable accommodations in applying for D-SNAP benefits. Plaintiffs do not ask--let alone seek to require--OTDA or USDA to respond to defendants' request in any particular manner." (Pls.' Opp'n and Reply at 14 (emphasis in original and added); see also id. at 12-13 ("[T]he injunction would merely require Defendants to apply for a D-SNAP program [sic]--and does not direct that specific benefits be issued or eligibility decisions be made . . . .").) In other words, plaintiffs ask the Court to compel the City to ask the State to ask the federal government for a better plan when it comes to a future D-SNAP--all without an order compelling any party involved to actually implement a better plan when it comes to that future D-SNAP. But not only would this relief not address plaintiffs' injury, it is in fact not judicial relief at all. It neither provides plaintiffs with the amounts they allegedly should have received, nor actually provides them with a D-SNAP that addresses their concerns. Injunctive relief is an extraordinary remedy; the requested relief is not appropriate injunctive relief.

Second, plaintiffs concede that their injuries are remediable by money damages:

> Plaintiffs who ordinarily had enough resources to purchase necessities have, in the wake of Hurricane Sandy, had to pay significant out-of-pocket costs for food. Such out-of-pocket expenses have diverted their scant resources from other essential needs, such as shelter. D-SNAP benefits would ease their unexpected hardship with resources to provide for themselves and their families . . . .

(Pls.' Mem. at 11 (internal citation omitted).) But the "D-SNAP benefits" that "would ease [plaintiffs'] unexpected hardship" would not be D-SNAP payments, per se. They would be damages ordered by the Court. No one disputes that the D-SNAP, which could and did only run for one week, is terminated. As stated above, plaintiffs' claims are that they were unlawfully prevented from obtaining D-SNAP payments during the period of the D-SNAP due to defendants' discriminatory D-SNAP procedures. To the extent plaintiffs are here seeking those very same payments, those are claims for money damages, and accordingly a preliminary injunction is unavailable. See Faiveley, 559 F.3d at 118; Jayaraj, 66 F.3d at 39.[17]

Finally--and to the extent plaintiffs are not seeking payment of D-SNAP amounts they allegedly were entitled to but could not obtain due to the D-SNAP procedures, and are only seeking a ruling that would inform the implementation of the next D-SNAP--plaintiffs concede that there is no present irreparable harm: "New York state and city officials, along with experts, have stressed that catastrophes can ravage New York again; if Defendants' discriminatory practices are not enjoined, Defendants will likely impose a similarly discriminatory and insufficient structure in any future D-SNAP program [sic], causing irreparable harm . . . ." (Pls.' Mem. at 9 (emphasis added).) But the "irreparable harm" supporting injunctive relief must be harm now, not harm in the future resulting from the next superstorm that does not exist and is indeed not yet even on the radar screen (literally). Indeed, should this case be resolved at trial or otherwise, it will be that ruling that prevents defendants from--allegedly--discriminating against

[17] Plaintiffs cite several cases for the proposition that, although couched in dollars-lost terms, claims for government or public welfare benefits made unlawfully unavailable due to discriminatory practices have long been recognized to support the irreparable harm requirement for preliminary injunctions. (See Pls.' Mem. at 10; Pls.' Opp'n and Reply at 18.) But the cases cited are distinguishable on the key issue involved in this case. Here, the D-SNAP is terminated--there is no more D-SNAP; any amounts paid pursuant to any order of this Court would be retroactive damages, not payments made under an ongoing program; and, contrawise, any D-SNAP amounts to be paid would be paid not under the post-Hurricane Sandy D-SNAP, but under the next D-SNAP implemented after the next disaster. Unlike this case, the cases cited by plaintiffs all concern ongoing government assistance programs, the benefits of which were allegedly unlawfully deprived plaintiffs due to discriminatory practices. See Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 203, 209 (S.D.N.Y. 2000) (ongoing AIDS-related benefits); Reynolds v. Giuliani, 35 F. Supp. 2d 331, 336-37, 339-40 (S.D.N.Y. 1999) (challenge to newly-implemented application procedures for ongoing nutritional assistance benefits); Morel v. Giuliani, 927 F. Supp. 622, 635 (S.D.N.Y. 1996) ("protracted denial of aid continuing benefit"); Brown v. Giuliani, 158 F.R.D. 251 (E.D.N.Y. 1994) (ongoing welfare benefits).

disabled indigent New Yorkers through an unlawful D-SNAP. The Court is mindful of the plight of plaintiffs in this action. But the Court is likewise mindful of the legal requirements for issuance of a preliminary injunction, which require a present irreparable injury.

For all these reasons, even if the Court were not dismissing the Complaint and ordering plaintiffs to file a second amended complaint, the Court would still deny plaintiffs' motion for a preliminary injunction.

## CONCLUSION

For the reasons stated above, defendants' motion to dismiss is GRANTED IN PART, and plaintiffs' Complaint is dismissed without prejudice to the filing of a second amended complaint. Without an operative complaint, plaintiffs' motion for preliminary injunctive relief and class certification is DENIED, without prejudice, as moot.

Plaintiffs are hereby ORDERED to file their second amended complaint, with--or without--any application for preliminary injunctive relief, on ECF not later than Friday, March 29, 2013.

The Court emphasizes that although plaintiffs' motion for preliminary injunctive relief is denied and their Complaint dismissed, plaintiffs have not lost this case. Indeed--and putting aside the technical litigation aspects of this case--it is clear that the D-SNAP applied for by the State, authorized by USDA, and administered by the City did not reach as many of its intended beneficiaries <u>as it could have</u>. Whether as a matter of law the program was unlawfully discriminatory and/or whether alternative reasonable accommodations existed--taking into account the various and extreme exigencies facing the City authorities in the wake of Hurricane Sandy--is a question left for another day.

The Clerk of the Court is directed to terminate the motions at ECF Nos. **14** and **28**.

SO ORDERED.

Dated: New York, New York
March 18, 2013

K. B. Forrest

KATHERINE B. FORREST
United States District Judge