2240/19-7571.DU

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEFINA LOZANO, ROBERT PIERCE, DORICE PIERCE, and DELLA SIMS,	)	
Plaintiffs,	)	
v.	)	No. 1:19-cv-06411
CITY OF ZION, a municipal corporation, et al.,	)	Judge Mary M. Rowland
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants, CITY OF ZION, BILLY MCKINNEY, JACQUELINE HOLMES, RICHARD IANSON, and WARREN FERRY, by and through one of their attorneys, MICHAEL J. ATKUS of KNIGHT HOPPE KURNIK & KNIGHT, LTD., submit this Reply Memorandum of Law in Support of their Motion to Dismiss Plaintiff's Second Amended Complaint, and state as follows:

ARGUMENT

In their response, Plaintiffs argue that the Court should deny Defendants' motion to dismiss for lack of Article III standing for three (3) reasons. First, they contend that the SAC demonstrates that they face a substantial risk of injury and that is all the immanence inquiry under Article III requires. Second, they contend that Defendants ignore the weight of rental-inspection authority which they claim supports their theory of standing. Finally, they posit that the SAC pleads damages

sufficient to confer standing for monetary relief. As fully discussed in turn below, none of Plaintiffs' arguments on any of these reasons carry their burden to establish standing or justify the denial of the Defendants' motion to dismiss.

I. THE SAC FAILS TO ALLEGE AN IMMANENT INJURY UNDER ANY STANDARD.

Plaintiffs contend that in order to demonstrate an immanent injury they need not plead facts to show a "certainly impending" injury under *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013), but may survive Defendants' motion to dismiss under the "alternative standard [of] whether there is a 'substantial risk' that the harm will occur" under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). See Resp. Mem. p. 8. Implicit in Plaintiffs' argument is the contention that *Clapper* and *Driehaus* set forth distinct tests, and that *Driehaus*' test imposes a less demanding burden upon them. Neither in *Clapper,* nor *Driehaus,* nor any other subsequent case has the Supreme Court held that there was two distinct tests for injury-immanence under Article III. *See Clapper*, 568 U.S. at 441, n.5 ("*to the extent* that the 'substantial risk' standard *is* … *distinct* from the 'clearly impending' requirement, respondents fall short of even that standard.…")(emphasis added). Moreover, even if the Court intends two distinct tests, it has not provided any guidance from which one could determine which test should apply under any given set of facts. For that matter, neither have the Plaintiffs here. *Clapper*'s footnote 5 does teach us that where an "attenuated chain of inference" is "necessary to find harm," then, there is no immanent injury under whatever standard. Plaintiffs' theory of standing relies upon exactly such an attenuated chain. The Ordinance as amended

no longer authorizes the Defendants to suspend or revoke an owner's certificate of compliance in the event that an owner or tenant refuses to consent to a residential inspection. See Amd. Ord. 10-180-5(g). Thus, there is no immediate, unfettered discretion under the Ordinance to impose an unconstitutional condition on the attainment of a certificate. Additionally, Plaintiffs' theory of standing rests on an attenuated chain of inference that the Lake County Courts will deny requests for administrative warrants if the Defendants seek them. *Clapper* specifically rejected any theory of standing predicated upon speculation about what a Court might do in the future. 568 U.S. at 413-414 (no standing where plaintiffs speculate that FISA court will authorize surveillance).

To support their position that they have plead a 'substantial risk' of injury, Plaintiffs rely upon the Seventh Circuit's decision in *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688 (7th Cir. 2015). Given the factual context in which *Remijas* arose, that case certainly does not compel a finding of standing here, nor does it provide the Court with meaningful guidance on the issues presented. *Remijas* concerned whether the defendant's customers had standing to sue as a result of a data breach that resulted in the compromise of hundreds of thousands of the defendant's customers' credit card numbers. There, the Court found that the plaintiffs had standing to sue on two injuries: (1) increased risk of future fraudulent charges and (2) greater susceptibility to identity theft. *Id.* at 692. Although the Court characterized its decision in terms of immanence, the injuries involved were actual, in that they had already occurred. The data breaches had already occurred, so while the threats of future fraudulent

charges and identity theft by hackers may not have been certainly impending, the plaintiffs were currently and actually suffering from *increased risk* of and *greater susceptibility* to those harms. This framework makes sense when the injuries involve a defendant culpably increasing the risk of harm to plaintiffs from third parties, but that is not the case here. Here, there is only Plaintiffs' hypothetical fears that the Defendants will run afoul their own recently amended ordinance by revoking or suspending certificates of compliance of compliance where owners or tenants have refused consent to search. See 10-180-5(g)(removing option to suspend or revoke COC as a remedy for non-consent) and 10-180-9(c)(stating that non-consent "shall not result in the issuance of any fines or penalties").

II. THE WEIGHT OF THE RENTAL-INSPECTION AUTHORITY SUPPORTS DISMISSAL BASED ON ARTICLE III "CASE-OR-CONTROVERSY" GROUNDS.

To support their contention that "rental-inspection jurisprudence makes clear that Plaintiffs have standing," (Resp. p. 10), Plaintiffs direct the Court to three decisions: (1) *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998); (2) *Thompson v. City of Oakwood*, 307 F. Supp. 3d 761 (S.D. Ohio 2018), and; (3) *Dearmore v. City of Garland*, 400 F. Supp. 2d 894 (N.D. Tex. 2005). None of these cases support Plaintiffs' theory of standing here.

In *Black*, the Court entertained a motion for summary judgment on the substantive Fourth Amendment issues involved in the plaintiffs' challenge to the portions of the defendant's housing code. The defendant did not raise Article III standing as a grounds for dismissal or judgment and the Court did not discuss

standing or any other justiciability issues relating to plaintiffs' action. Thus, *Black* remains entirely inapposite and unhelpful here.

Similarly in *Thompson*, the Court does not address or raise any Article III issues.

Dearmore, on the other hand does address Article III issues in the context of a rental inspection ordinance, but remains distinguishable from this case on the facts. There the Court found that the plaintiff had standing because although the city had not issued any fines for renting without a permit, the ordinance allowed fines up to $2,000 per day for renting without a permit or refusing an inspection. The Amended Ordinance here specifically states that refusal to consent will not result in fines or penalties. 10-180-9(c). So the immediate non-conjectural threat at issue in *Dearmore* is not present here.

Meanwhile, Plaintiffs' attempts to distinguish the cases upon which Defendants rely remain superficial and unpersuasive. Plaintiff attempts to distinguish *Hometown Co-op* based on a difference in the language of the ordinances, positing that the ordinance in *Hometown Co-op* mandated a warrant where the language here does not. That difference in language, however, does not affect the similar chain of attenuated events that would need to occur under both ordinances before the plaintiffs suffered harm. Under both ordinances, the Court would have to assume the defendants would refuse to seek an ordinance or fail to obtain one if sought. Plaintiffs' attempt to distinguish *Tobin* similarly falls flat, focusing on a narrow difference in the statute (notice of right to refuse requirement) that does not

pertain in any way to the distance between the present state of affairs and actual injury.

III. THE SAC FAILS TO ALLEGE ANY DAMAGE THAT IS NOT SELF-INFLICTED.

In their response, Plaintiffs correctly note that Section 1983 creates a species of tort liability under which a plaintiff may recover for compensatory damages for out-of-pocket harms, other monetary loss, impairment of reputation, personal humiliation, and mental anguish and suffering. Resp. Mem. pp. 14-15. However, Plaintiffs misapprehend Defendants' argument that Plaintiffs lack standing to pursue such claims here. They posit that "Zion … disputes instead whether the facts here are severe enough to cause those injuries." Resp. Mem. p. 15. Defendants understand that the severity of the claimed injuries remains irrelevant for the purpose of establishing standing under Article III. What is relevant though, is whether the injuries are "fairly traceable to the challenged conduct of the defendant." *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Under *Clapper*, a plaintiff "cannot manufacture standing by incurring costs in anticipation of non-imminent harm." 568 U.S. at 422. Such costs are, *ipso facto*, not fairly traceable to the defendants' conduct, no matter how severe they may be. The injuries that Plaintiffs claim give them standing to sue for money damages (fear and lost time spent conferring with their lawyers) are traceable, not to the Defendants, but to their own anticipatory and speculative anxieties.

CONCLUSON

For all the above-argued reasons, and for those reasons argued in their initial Memorandum, the Defendants respectfully request that this Honorable Court dismiss this action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully Submitted,

/s/ Michael J. Atkus

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on February 25, 2020 the foregoing **DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants.

Robert Andrew Peccola, rpeccola@ij.org, paralegal@ij.org

Benjamin E. Waldin, bwaldin@eimerstahl.com, fharvey@eimerstahl.com

James W. Joseph, jjoseph@eimerstahl.com, erogers@eimerstahl.com, fharvey@eimerstahl.com

Michael Aaron Albert, albert@dlglawgroup.com

Cynthia Sara Grandfield, grandfield@dlglawgroup.com

K. Austin Zimmer, zimmer@dlglawgroup.com, docketing@dlglawgroup.com

Michael Jude Atkus, matkus@khkklaw.com, lgreenberg@khkklaw.com

William W. Kurnik, bkurnik@khkklaw.com

/s/ Michael J. Atkus

KNIGHT, HOPPE, KURNIK & KNIGHT, LTD.
Attorneys for All Defendants CITY OF ZION,
BILLY McKINNEY, JACQUELINE HOLMES,
RICHARD IANSON, and WARREN FERRY
5600 North River Road, Suite 600
Rosemont, Illinois 60018-5114
Telephone: 847/261-0700
Facsimile: 847/261-0714
E-Mail: matkus@khkklaw.com