UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EAST END ERUV ASSOCIATION, INC., MARVIN TENZER, MORRIS TUCHMAN, CLINTON GREENBAUM, ALAN H. SCHECHTER and CAROL SCHECHTER, JEFFREY LEAN, ALEXA LEAN, DEBORAH POLLACK, and SIMCHA POLLACK,

CV 11-0213 (LDW)(ETB)

Plaintiffs,

-against-

THE VILLAGE OF WESTHAMPTON BEACH, THE VILLAGE OF QUOGUE, and THE TOWN OF SOUTHAMPTON,

Defendants.

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MEMORANDUM OF LAW IN FURTHER SUPPORT OF
OF DEFENDANT WESTHAMPTON BEACH'S MOTION TO DISMISS

SOKOLOFF STERN LLP
Attorneys for Village of
Westhampton Beach Defendants
355 Post Avenue, Suite 201
Westbury, NY 11590

Of Counsel:
Brian S. Sokoloff
Leo Dorfman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

For all the papers plaintiffs have submitted to the Court in the course of this litigation, they have not been able to cite to a single case where a court has done what plaintiffs ask this Court to do: hold a village liable under 42 § 1983, RLUIPA, and state law because of: (1) campaign and press statements by some village officials, (2) a letter expressing a village's understanding of a private company's position, or (3) a village's defense of a civil action. This is not surprising; such a paltry set of factual allegations is insufficient to create Article III standing, much less to show that Westhampton Beach has taken some unlawful official action. Nothing in plaintiffs' opposition papers can cure this foundational infirmity of the Amended Complaint. The Court should dismiss the amended complaint against the Village of Westhampton Beach.

ARGUMENT

POINT I: PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

A. The Complaint Does Not Allege Any Pre-Suit Action by the Village to Which Plaintiffs' Alleged Injuries Can Fairly Be Traced

"[S]tanding is to be determined as of the commencement of suit." Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992); see also Keene Corp. v. United States, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[T]he jurisdiction of the Court depends on the state of things at the time of the action brought."). Here, plaintiffs filed suit when they lacked standing to sue. As set forth fully in defendants' moving papers, the Complaint does not allege any official Village action in opposition to the eruv. See Def. Memo, pp. 7-13. There is just no standing hook on which plaintiffs can hang their complaint. Neither the alleged campaign statements of some Village officials nor the Village letter stating what the Village believes *Verizon*'s position to be, all occurring before plaintiffs contracted with Verizon and LIPA, create

standing.[1] Plaintiffs have no case law to suggest that public statements by individual officials and an "I think that you think" letter of this sort can create a lawsuit.

Plaintiffs attempt to draw attention away from its pleading deficiencies by arguing that injury alone is sufficient to create standing. See Pl. Memo., p. 9 ("… 'official action' need not be shown. Plaintiffs must simply allege that they have suffered an injury…"). This argument runs contrary to clearly established case law, which holds the injury must be fairly traceable to some action by the defendant. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Plaintiffs have failed to identify any Village action that predates the Complaint to which their injuries can fairly be traced, and, for this reason, lack standing.

B. Allegations of Conduct that Post-Dates the Filing of This Action Cannot Give Rise to Standing

Since plaintiffs cannot cobble a justiciable case or controversy from any Village action before they filed the Complaint, they turn to the Village's subsequent defense of this action and its *inaction* – its refusal to answer hypothetical questions in the midst of a federal suit – as evidence that there is some justiciable opposition or controversy. The Supreme Court's holding in Lujan, however, prohibits courts from looking to post-Complaint facts to establish standing. See Fenstermaker v. Obama, 354 F. App'x 452, 455 (2d Cir. 2009) (refusing to examine

[1] In a footnote, plaintiffs attempt to distinguish this case from X-Men Sec., Inc. v. Pataki, 196 F.3d 56 (2d Cir. 1999) and Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983). In those cases the Second Circuit held that public statements by government officials are entitled to First Amendment protections and cannot be the subject of litigation, so long as those statements do not intimate "that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." See Pl. Memo, p. 13, n. 9. Plaintiffs conclusorily argue Village officials have made such statements, but they do not and cannot cite any specific statement by a Village official that actually threatened or intimated some form of government action. Mr. Balcerski's "impression" that the Village "needed to approve the application for an eruv," does not affect this analysis. Since the statement referenced the Village's May 18, 2009 letter to Mr. Balcerski, and not Village officials' public statements, it does not address defendants' argument that the public campaign statements of Village officials cannot form the basis of this suit. Additionally, Mr. Balcerski did not say that he was left with the impression that the Village threatened any consequences – no one has said so. And in any event, the Village letter to Mr. Balcerski did not threaten, suggest any consequences, or even set forth the Village's opinion on the matter. It merely expressed the Village's understanding of Verizon's position.

documents reflecting facts that arose after suit was filed where those facts were submitted to argue for standing); Comer v. Cisneros, 37 F.3d 775, 791 (2d Cir. 1994) (issue of whether plaintiff has a current desire to live outside the City of Buffalo is irrelevant because standing is measured as of the time the suit is brought).[2]

Because standing is measured at the time the action is filed, it is entirely irrelevant to the standing inquiry that the Village is defending this lawsuit, that the Village now argues Verizon and LIPA lack authority to place lechis on its poles, or that counsel for the Village has refused to speculate about how the Village might react should Verizon and LIPA issue lechi licenses. In other words, plaintiffs cannot bootstrap their way to standing by goading defense counsel in court, over the telephone, and through letters into saying something that might create a controversy. As the Seventh Circuit put it, "It is not enough for [the plaintiff] to attempt to satisfy the requirements of standing as the case progresses. The requirements of standing must be satisfied from the outset." Perry v. Vill. of Arlington Heights, 186 F.3d 826, 830 (7th Cir. 1999). Plaintiffs failed to meet the standing requirement at case initiation, the instant when the measurement is taken.

POINT II: THE CASE IS NOT RIPE FOR JUDICIAL REVIEW

Plaintiffs argue, also, that the case is ripe and they need not obtain a "final government decision" because any application to the Village would be futile. See Pl. Memo., pp. 14-15. It is not entirely clear why plaintiffs make this argument. The Village does not argue in its motion to

[2] See also Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993) (for a plaintiff to have standing to request injunctive or declaratory relief, the injury alleged must be capable of being redressed through injunctive relief "at that moment."); Rothe Dev. Corp. v. Dep't of Def., 413 F.3d 1327, 1334 (Fed. Cir. 2005) (post-complaint evidence--including events that occurred between the filing of the original and amended complaint – is irrelevant to the standing issue); Park v. Forest Serv. of U.S., 205 F.3d 1034, 1038 (8th Cir. 2000) (injury-in-fact cannot be established after the suit is filed, and the adoption of post-Complaint rules is irrelevant to standing).

dismiss that defendants must avail themselves of an application process to ripen the case. Therefore, the futility exception argument is futile here.

The Village argues, instead, that the case is not ripe on the grounds that the case rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. United States, 523 U.S. 296, 300 (1998). Indeed, it is still unclear where precisely plaintiffs intend to build their eruv; plaintiffs' plans in this regard are subject to frequent and unexpected change. Def. Memo., p. 15. It has recently come to defendants' attention, for instance, that plaintiffs' seek to construct their allegedly "Westhampton Beach-Only Eruv" using several poles located over the Village boundary in the unincorporated portion of the Town of Southampton. See Sokoloff Decl., Ex. E. Southampton has its own regulatory scheme, the running of which this Court has endorsed in denying plaintiffs a preliminary injunction against Southampton. Thus, even with their post-Amended Complaint eruv, plaintiffs have created unaddressed issues and questions.

Additionally, as more fully set forth in the Village's Motion to Dismiss the complaint in Verizon and LIPA v. Westhampton Beach, et al., Docket No. CV-11-0252 (LDW)(ETB), Verizon lacks the authority to grant the licenses plaintiffs seek; their rights to operate poles in Westhampton Beach are founded on early 1900's franchise agreements that did not grant any authority to divert the poles for a private purpose.[3]

[3] In November 1938, two months after the fierce 1938 hurricane destroyed most of the homes and other structures on Dune Road in the Village, the United States Coast Guard, a federal agency, in recognition of the Village's jurisdiction over Dune Road, requested a franchise agreement with the Village to construct poles on Dune Road in order to maintain the circuits for the Coast Guard. The Village granted the Coast Guard a franchise to construct the poles, and, in doing so, it imposed several conditions, including a limitation on the entities that could use the poles.[3] See Sokoloff Decl., Ex. A. This franchise limited the use of the poles to the Coast Guard, New York Telephone Company and Long Island Lighting Co. The agreement makes no mention of any other entity authorized to use the poles, including any private entity for private purpose.

In 1952, at the request of the New York Telephone Company, the Village granted New York Telephone Company a franchise to take over and operate the poles on Dune Road. See Sokoloff Decl., Ex. B. Nothing in this agreement gave additional or greater rights to New York Telephone beyond the rights originally granted to the Coast

POINT III: PLAINTIFFS HAVE NOT ALLEGED MUNCIPAL ACTION TO SUPPORT A § 1983 CLAIM AGAINST THE VILLAGE

Plaintiffs acknowledge that Monell requires them to allege "a policy statement, ordinance, regulation, or decision officially adopted by that [governmental] body's officers," Pl. Memo., p. 20, yet they fail to do so. Plaintiffs do not identify any actual policy, ordinance, regulation, or decision that the Village officially adopted. Instead, plaintiffs continue to cite only (1) individual Village officials' campaign and press statements and (2) Village opposition to this suit for declaratory and monetary relief. Neither can support a claim for municipal §1983 liability.[4]

Under New York law, statements of individual Village officials cannot bind the Village and cannot constitute official Village action. See Hungerford v. Village of Waverly, 125 App.Div. 311, 109 N.Y.S.2d 438 (3d Dep't 1908) ("[o]ne of several trustees has no authority to speak for or to bind [a] municipality…."). Additionally, these statements are themselves protected by the First Amendment. See X-Men Sec., Inc. v. Pataki, 196 F.3d 56 (2d Cir. 1999); Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983). To penalize either the

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Guard. Nothing in the 1938 or 1952 franchise agreements with the Village permits Verizon, now, to enter into the sublicense agreement at issue, *i.e.*, one that allows the EEEA, a private entity, to attach anything to the Verizon utility poles for private purposes.

LIPA's telephone poles in the Village are subject to franchise agreements as well. In 1910, the Town of Southampton granted a franchise to Riverhead Electric Light Company ("Riverhead") to erect and maintain poles for the purpose of supplying electricity to the town residents west of Quantuck Creek. See Sokoloff Decl., Ex. C. Nothing in the 1910 franchise agreement permitted Riverhead or its successors to sublicense its utility poles to private entities for private purposes, such as the EEEA. Riverhead was subsequently acquired by LILCO, which, in turn, was acquired by LIPA. LIPA is bound by the franchise agreement with Riverhead and it does not have the authority to grant a sublicense to EEEA.

In 1911 the Town of Southampton granted a franchise to Patchogue Electric Light Company, with the easterly boundary being the Speonk River and the westerly boundary being the westerly boundary of the Town of Southampton. See Sokoloff Decl., Ex. D.

These franchise agreements are still in existence with the utilities, and these agreements do not allow the utilities to sublicenses the use of the poles for private purposes.

[4] A municipality could oppose a lawsuit of this type even if it agreed with the aims of plaintiffs. Rolling over and playing dead, as plaintiffs apparently demand, could create attorneys fees or damages liability against the Village. See 42 U.S.C. § 1988. It is ridiculous – and anathema to our judicial system – to create liability for simply opposing a preliminary injunction, filing a motion to dismiss, or filing an allegation-denying answer.

speaking officials or the Village for officials' exercise of their First Amendment rights would be a First Amendment violation itself. Thus, plaintiffs cannot rely on these statements to show an unconstitutional policy or practice.

To the extent that the decision to defend this suit is an official Village act, plaintiffs have not cited to and defendants have not found any case law – none at all - that suggests such that the defense of a suit can give rise to §1983 liability in that very same suit. The notion that the act of defending against allegations of constitutional violations can itself be unconstitutional is unfounded and patently absurd.

Plaintiffs have failed to offer anything other than conclusory allegations of unconstitutional policy and practice to support their §1983 First Amendment claim. They cannot hold the Village liable under this theory. The Court should dismiss their First Amendment claims.

POINT IV: PLAINTIFFS FAIL TO STATE A FIRST AMENDMENT CLAIM

The Village does not seek to belittle the sincerity of plaintiffs' religious beliefs or to have this Court delve into their religious bona fides, as plaintiffs claim. The Village does not ask the Court to "judge the particular devotional significance of," for instance, attending synagogue on Shabbat. There is a line, however, between activities that are motivated by the strictures of one's religion and those that are secular, such as pushing strollers, and carrying high-heeled shoes, bottles of water, and tissues. It does not "belittle" plaintiffs' religious beliefs to suggest that carrying tissues and high-heeled shoes are not mandates of the Jewish faith. It is, thus, entirely appropriate for this Court to distinguish between burdens on secular and religiously motivated activities. See American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293, 1296 (D.N.J. 1987) ("The eruv merely permits them to participate in such secular

activities as pushing a stroller or carrying a book while observing the Sabbath."). Since the burden plaintiffs allege is on secular activities like pushing strollers and carrying books, they cannot sustain a First Amendment claim.

To the extent plaintiffs allege a burden on activity that is, in fact, religiously motivated, the Court may, and indeed, under Supreme Court precedent, *must* examine the extent to which the Village's conduct has burdened those beliefs. An incidental, rather than substantial, burden does not trigger free exercise protection under the Free Exercise Clause (or RLUIPA). See Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 878, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876 (1990); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Bowen v. Roy, 476 U.S. 693 (1986); Bob Jones University v. United States, 461 U.S. 574 (1983). Here, plaintiffs have not alleged any action by the Village, and certainly not any action that has substantially burdened their religious activities. Plaintiffs who live in the Village, like all other observant Jews who do not live within an eruv, remain free to carry out the mandates of their religious beliefs.

POINT V: PLAINTIFFS FAIL TO STATE AN RLUIPA CLAIM

Plaintiffs ask the Court to set aside the law of the case doctrine and ignore its own ruling that plaintiffs cannot sustain an RLUIPA claim in this case because, "the revocable "sub-licenses" offered by Verizon and LIPA to plaintiffs do not rise, as a matter of law, to an interest in real property." November 3, 2011 Memorandum and Order, p. 23. Plaintiffs acknowledge that RLUIPA requires that they have an "ownership, leasehold, easement, servitude, or other property interest" in the subject property. See Pl. Memo., p. 22 citing 42 U.S.C. § 2000cc-5(5)). Plaintiffs show no such interest.

It is undisputed that plaintiffs do not have an ownership, leasehold, easement, servitude interest in the utility poles in question by virtue of their agreements with LIPA and Verizon. Plaintiffs argue, however, that the Court should expand the meaning of "property interest" to include plaintiffs' licenses to place lechis on utility poles.[5] Pl. Memo., p. 22. ("Plaintiffs' licenses here are such a 'property interests [sic].'"). This argument goes against the established rule of interpretation that the plain text of a federal statute determines the meaning of the statute. See Caminetti v. U.S., 242 U.S. 470, 485 (1917); Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004). Additionally, the law on this point is settled: a license is not an interest in real property. See Millbrook Hunt, Inc. v. Smith, 249 A.D.2d 281, 282 (App. Div. 2d Dep't 1998) ("A license does not imply an interest in land, but is a mere personal privilege to commit some act or series of acts on the land of another without possessing any estate therein."); Henry v. Malen, 263 A.D.2d 698, 702 (App. Div. 3d Dep't 1999); Simmons v. Abbondandolo, 184 A.D.2d 878, 879 (App. Div. 3d Dep't 1992). Plaintiffs cite no law to the contrary, even as they ask the Court to redefine the term "property interest" to include non-property interests. The Court should decline to take this definitional leap, and should reaffirm its earlier holding that plaintiffs fail to state an RLUIPA claim for lack of a property interest.

POINT VI: PLAINTIFFS FAIL TO STATE A TORTIOUS INTERFERENCE CLAIM

Plaintiffs argue that they have alleged sufficiently that the Village has "intentionally procured the breach of the contracts," because, they claim, that (1) Village officials made public

[5] To the extent plaintiffs argue that Verizon and LIPA's interest in their poles can satisfy RLUIPA's "property interest," this argument fails as well. First, RLUIPA only applies "if the claimant has an ownership, leasehold, easement, servitude, or other property interest…." 42 U.S.C. § 2000cc-5(5) (emphasis supplied). Thus, the interest must be personal to plaintiffs and cannot belong to another, such as Verizon or LIPA. Second, even if Verizon or LIPA's interest could stand in for plaintiffs', Verizon and LIPA do not have the necessary property interest in their polls. See New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 691 (1977) (placement of maintenance of telephone poles in a municipal street is a license or privilege and is not an interest in real property).

statements about the eruv, (2) the Village is defending this lawsuit, and (3) counsel for the Village has not responded to certain questions from counsel for Verizon and LIPA. Pl. Memo., p. 23. Statements by public officials cannot be deemed "intentional interference" by the Village because, as argued more fully above, they do not constitute official Village action and are protected by the First Amendment. The Village's defense of this action is not "without justification," since the Village has ample reason to defend this suit for damages. See Sokol Holdings, Inc. v. BMB Munai, Inc., 726 F.Supp.2d 291, 304 (S.D.N.Y. 2010) (plaintiff must plead that defendant procured a breach "without justification."). As for Village counsel not responding to questions by Verizon counsel, the law imposes no duty on litigation counsel to respond to hypothetical questions in the midst of litigation.

Further, plaintiffs have not alleged that Verizon and LIPA actually breached their agreements with plaintiffs. Plaintiffs do allege that "LIPA has not issued licenses to EEEA as provided for in the License Agreement," and that, "Verizon has not issued licenses to EEEA as provided for in the Lechi-Stave Agreement." Amend. Compl. ¶¶ 154, 155. The complaint does not allege specifically that this conduct constitutes an actual breach. See Kirch v. Liberty Media Corp., 449 F.3d 388, 402 (2d Cir. 2006) (pleading that JP Morgan "walked away, and Project Galaxy fell apart," insufficient to show that JP Morgan actually breached its contract). Plaintiffs all but concede this point in their moving papers, admitting that, "Verizon and LIPA have acknowledged that they are willing to perform under [the agreements.]" Pl. Memo., p 23, n. 22. Indeed, if plaintiffs truly believed that Verizon and LIPA were in breach of their agreements with plaintiffs, they would be pursuing legal action against Verizon and LIPA to enforce those agreements. Since plaintiffs cannot assert a breach of contract claim against Verizon and LIPA,

they cannot claim that the Village tortiously caused a breach. See Sokol Holdings, 726 F.Supp.2d at 304 (tortious interference claim requires "actual breach").

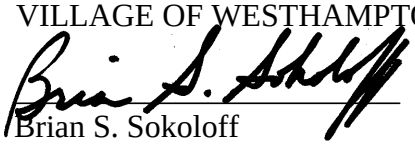
Finally, while plaintiffs insist that their tortious interference claim primarily seeks injunctive relief, Pl. Memo., pp. 24-25, they have not addressed the argument that a claim for an injunction cannot lie where, as here, there is an adequate remedy at law. Winter Brothers Recycling Corp. v. Jet Sanitation Service Corp., 23 Misc.3d 1115(A), 885 N.Y.S.2d 714 (Sup. Ct. Nassau Cty. 2009) citing EdCia Corp. v. McCormack, 44 A.D.3d 991, 994 (2d Dep't 2007) (monetary damages for tortious interference are not difficult to calculate and, therefore, can be remedied at law).

CONCLUSION

For all the foregoing reasons, this Court should grant defendant's motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and dismiss the complaint in its entirety, with costs, disbursements, and such other and further relief as to this Court is just, proper, and equitable.

Dated: Westbury, New York
May 4, 2012

SOKOLOFF STERN LLP
Attorneys for the Defendant
VILLAGE OF WESTHAMPTON BEACH

By: 
Brian S. Sokoloff
Leo Dorfman
355 Post Avenue, Suite 201
Westbury, New York 11590
(516) 334-4500
Our File No. 110004