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

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 14-cv-9851
VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation	)	Judge: Honorable Edmond E. Chang Magistrate Judge: Honorable Young B. Kim
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

NOW COMES Defendant, VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation, by and through its attorneys, DAY & ROBERT, P.C., and for its Reply in support of its Motion to Dismiss Count I and its Motion to Dismiss the as-applied constitutional claims within Counts II, III and IV of Plaintiffs' Verified First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), states as follows:

I. STATUTE OF LIMITATION

To avoid any confusion, the Village in no way contests the two year statute of limitation applicable to Plaintiffs' § 1983 First Amendment free speech claims. As set forth in its underlying motion, however, the Village does reiterate that Plaintiffs' § 1983 claims do not incorporate challenges to either the Village Council's denial of the text amendment or the Village Zoning Board of Appeals' denial of the variations sought by Plaintiffs. The statutes of limitation applicable to these denials (90 and 35 days, respectively) have run, and as a result,

they are time barred and beyond the purview of this Court's review. Thus, Plaintiffs inclusion of as-applied constitutional challenges does not broaden this case into a judicial review of the Village's denial of relief to Plaintiffs.

II. COUNT I – STANDING

A. Standing At The Pleading Stage - Generally

In *Clark v. McDonald's Corporation*, 213 F.R.D. 198, 205-207 (D.N.J. 2003), the court reviewed in detail the law applicable to a standing challenge made on the sufficiency of the pleadings, as is the case here with the Village's motion to dismiss Count I. In so doing, the *Clark* court noted that **at the pleading stage**, a plaintiff must allege facts sufficient to establish standing to invoke the court's jurisdiction. *Clark*, 213 F.R.D at 205. In citing to *Warth v. Seldin,* 422 U.S. 490, 517–518 (1975), the *Clark* court reaffirmed that, "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Thus, [plaintiffs] in this case must allege facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *Clark*, 213 F.R.D. at 205.

As further acknowledged by the *Clark* court, while at the pleading stage the court may allow some degree of latitude and "presume that the general allegations in the complaint [as to standing] encompass the specific facts necessary to support those allegations", it is nevertheless "proper" and "within the trial court's power, even on a motion to dismiss, to require the [plaintiff] to go beyond ... general allegations in the complaint and allege particularized facts supportive of its standing." *Clark*, 213 F.R.D. at 206, citing to *Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 104-105 (1998) and *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.,* 907 F.2d 1408, 1415 (3d Cir. 1990).

Lastly, in analyzing Plaintiffs' allegations concerning standing, the court will not accept as true bare statements of opinions, conclusory allegations or unwarranted inferences of fact. *Leopoldo Fontanillas, Inc. v. Luis Ayala Colon Sucesores, Inc.*, 283 F.Supp.2d 579 (D.P.R. 2003). Nor will the court accept as true facts which are legally impossible. *Henthorn v. Department of Navy*, 29 F.3d 682 (D.C. Cir. 1994).

Based on the foregoing law, Plaintiffs must adequately plead the factual basis for standing to assert a recognized claim in Count I, and failure to do so subjects Count I to dismissal **both** under Rule 12(b)(6) (for failure to state a claim) and 12(b)(1) (lack of jurisdiction).

B. Plaintiff, Robert Peterson ("Peterson") Lacks Standing As The Shareholder Of Plaintiff, Leibundguth ("Leibundguth")

A corporation is an entity separate and distinct from its stockholders, and its separate entity will generally be recognized. *Bankers Life and Cas. Co. v. Kirtley,* 338 F.2d 1006, 1013 (8th Cir. 1964). Generally, if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim based on that harm. *Potthoff v. Morin*, 245 F.3d 710, 716 (8th Cir. 2001). This shareholder standing rule applies even if, as is alleged in this case, Peterson is the sole owner and shareholder of the corporation. *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.,* 862 F.2d 597, 603 (6th Cir. 1988).

The shareholder standing rule applies to civil rights actions brought pursuant to 42 U.S.C. § 1983 by shareholders claiming injury to their corporation. *Gregory v. Mitchell,* 634 F.2d 199, 202 (5th Cir. 1981); *Erlich v. Glasner,* 418 F.2d 226, 228 (9th Cir. 1969).

Based on the foregoing precedent, Plaintiffs have not, and cannot, plead facts which give Peterson individual standing to assert any free speech claims against the Village in Count I.[1] The claims (those that have been adequately plead) belong exclusively to the corporation, Leibundguth, as possessing the free speech rights allegedly injured by the Village sign regulations at issue.

C. Leibundguth Lacks Standing To Bring Count I

Leibundguth has properly plead facts to establish standing to challenge each of the three specific commercial sign regulations which prohibit the commercial signs Leibundguth wants to maintain, and has done so within Counts II, III and IV of the First Amended Complaint. Contrary to Plaintiffs' assertion, this does not establish standing to bring a general constitutional challenge to the **entire** Village sign ordinance as is attempted in Count I.

Plaintiffs' argument is relatively simple. They assert that because the Village sign regulations for political signs, memorial signs, governmental signs and other **non-commercial** signs are more liberal than the time, place and manner restrictions that prohibit Plaintiffs' **commercial** signs, one must necessarily look at the content of the sign to see if the more liberal rule applies, thus making the entire sign ordinance "content based" by operation of law. Plaintiffs then seek strict scrutiny of the Village's entire sign ordinance, despite the fact that only three specific commercial sign regulations prohibit their commercial signs. Taken to its logical conclusion, a municipality could never have "content neutral" sign regulations unless both commercial speech and non-commercial speech sign regulations were identical; for if not, they would be *per se* "content based" under the analysis advocated by Plaintiffs.

[1] Nor does Peterson have individual standing to bring Counts II – IV. Notwithstanding, and without waiving this argument, for ease of reference and because Peterson is currently a party to this case, the Village will continue at times to refer to "Plaintiffs" hereafter.

Fundamentally, Plaintiffs' argument fails to comprehend the well-recognized distinction between commercial vs. non-commercial speech. The U.S. Supreme Court expressly acknowledged this distinction, "indicating that the former could be forbidden and regulated in situations where the latter could not be". *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981).

In no uncertain terms, non-commercial speech is afforded a higher degree of First Amendment constitutional protection than commercial speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). As a result, the Village's sign ordinance may constitutionally provide stricter regulation of commercial speech while providing more liberal regulation of non-commercial speech. As the U.S. Supreme Court expressly recognized in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978):

> To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

This law is pivotal in establishing that a municipal sign ordinance such as the Village's which liberally permits non-commercial political, memorial or government signs (non-commercial speech), while also having more restrictive time, place or manner regulations for commercial signs (commercial speech), does not automatically render the commercial speech regulations to be "content based". Critically also, alleging that the entire sign ordinance is content based does not plead a sufficient factual basis to establish standing to **generally** challenge the entire sign ordinance, as Plaintiffs cannot leverage their injury under certain

specific provisions of the sign ordinance to state an injury under the sign ordinance **generally**. *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 892 (2007).

In defense of their position, Plaintiffs cite to the Seventh Circuit precedent of *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002) and *Brandt v. Village of Winnetka*, 2007 WL 844676 (N.D. Ill. Mar. 15, 2007), in which standing was recognized to assert facial challenges to speech regulations which did **not** directly impact the plaintiffs. What Plaintiffs fail to recognize, however, is that these cases are both factually and legally distinguishable. They both turn on application of what is known as the "overbreadth doctrine" **which does not apply to commercial speech.** *Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497 (1981). And contrary to Plaintiffs' assertions, Seventh Circuit precedent **does deny** standing to a plaintiff who seeks to constitutionally challenge time, place and manner sign regulations which do not impact that plaintiff's specific sign. *Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge, Illinois*, 9 F.3d 1290 (1993).

In summary, Plaintiffs have failed to plead **any** facts giving Peterson individual standing separate from Leibundguth. Plaintiffs' Response fails to recognize the legal distinction between commercial and non-commercial speech sign regulation, and the fact that the "overbreadth doctrine" has no application to a constitutional challenge to commercial speech regulations, as is the case here. Leibundguth's standing to challenge the three specific Village sign provisions at issue does not create standing to challenge the sign ordinance **"generally"**, and notably, Plaintiffs have not cited a single case wherein a plaintiff has been awarded standing to facially challenge an entire sign ordinance. The Village also believes it is telling that Plaintiffs' Response fails to even address or contest the fact that no relief is sought specific to Count I.

Count I fails to plead a factual basis for either Peterson or Liebundguth to have standing to assert a general challenge to the entire Village sign ordinance. Count I should therefore be dismissed for failure to state a claim upon which relief can be granted.

III. COUNTS II - IV

In ruling upon the Village's motion to dismiss the as-applied claims within Counts II – IV, the question is not whether certain courts have at times recognized both facial and as-applied challenges to commercial speech. The question is whether there is any difference between a facial and as-applied challenge in this context, and how the court evaluates the government interest underlying the challenged regulations. As detailed at length in the Village's underlying motion, under the *Clark* decision and its progeny, the test and judicial scrutiny is the same for both facial and as-applied challenges. This Court will not conduct an analysis of the Village's governmental interest as it relates to Plaintiffs' individual business or property. Rather, under both constitutional challenges, this Court will evaluate the Village's governmental interest only in the context of how the disputed restrictions relate to the overall problems (traffic safety, aesthetics, property values, competitive balance, etc.) the Village seeks to address as **generally** applied to all properties in the Village. As a result, Plaintiffs combined assertion of both as-applied and facial constitutional challenges in Counts II – IV is a complete redundancy without substantive difference.

Stated another way, the Village's content neutral time, place and manner regulations at issue could never be found to be facially constitutional under the *Clark* test, and yet in violation of the First Amendment as-applied to Plaintiffs' specific commercial speech. The Court's ruling on one necessarily dictates the ruling on the other, as the same level of intermediate scrutiny and test are applied. Critically also, even if this Court were to somehow rule that the restrictions at

issue are "content based" commercial regulations, the Court would again undertake intermediate scrutiny and apply the same four part "*Central Hudson* test" to both the facial and as-applied challenges.[2] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). In so doing, the Court would again look only at how the disputed restrictions relate to the overall problems the Village seeks to address as generally applied to all properties within the Village. *Central Hudson,* 447 U.S. at 569-570.

Plaintiffs advocate that the U.S. Supreme Court's decision in *Edenfield v. Fane*, 507 U.S. 761 (1993) which concerned the constitutionality of a state-wide commercial speech regulation effecting all CPAs, somehow contradicts the decision issued just two months later by the same court in *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) which addressed the constitutionality of a time, place and manner sign restriction. Plaintiffs appear to argue that *Edenfield* stands for the proposition that not only is an as-applied constitutional challenge **allowed** in commercial speech cases, but an as-applied challenge permits individual judicial analysis of how the governmental interest is served in a specific factual setting. This argument should be rejected, as even a cursory review of *Edenfield* reveals that in upholding the regulation at issue, the U.S. Supreme Court looked not at how the regulation impacted the individual plaintiff, but rather whether the regulation served a valid governmental interest for all CPAs throughout the State of Florida. *Edenfield*, 507 U. S. at 769-772.

In summary, while Seventh Circuit precedent clearly exists to support dismissal of an as-applied challenge tagged onto a facial challenge to a sign ordinance (*Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999)), the Village's motion to dismiss is not predicated on an

[2] From their Response, it is unclear whether Plaintiffs concede that the three sign restrictions at issue in Counts II – IV are time, place and manner restrictions subject to the *Clark* test as argued by the Village.

argument that *Edge* and *Lavey* automatically prohibit an as-applied challenge. (*See also, Ward v. Rock Against* Racism, 491 U.S. 781 (1989)). Rather, these cases stand for the proposition that when commercial speech is the subject of a First Amendment constitutional challenge, there is no substantive difference between a facial challenge and an as-applied challenge because the level of scrutiny and test are identical for both. *Edenfield* does nothing to permit the as-applied fact specific, sign specific judicial inquiry Plaintiffs clearly request.

The *Edge*, *Lavey* and *Ward* decisions cited by the Village render Plaintiffs' as-applied challenges to be a complete redundancy of their facial challenges, thus making the as-applied challenges subject to dismissal. To this end, a claim that merely recasts the same elements under the guise of a different theory may be stricken as redundant (*Sioux Biochem., Inc. v. Cargill, Inc.*, 410 F.Supp.2d 785, 804 (2005)), and this Court is vested with the power to do so, *sua sponte*. *Munie v. Stag Brewery, Div. of G. Heileman Brewing Co., Inc.*, 131 F.R.D. 559, 560 (1989).[3]

IV. CONCLUSION

For the reasons set forth above, the Village respectfully requests that this Court grant its Motion to Dismiss Count I and its Motion to Dismiss the as-applied constitutional claims within Counts II, III and IV of Plaintiffs' Verified First Amended Complaint, and for whatever further relief this Court deems just and equitable.

[3] The Village is aware that in these cases the redundant claims were disposed of by being stricken under Fed. R. Civ. P. 12(f).

Respectfully Submitted,

VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation, Defendant

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CERTIFICATE OF SERVICE

I, Scott M. Day, an attorney, certify that on March 12, 2015, I filed a Reply in Support of Defendant's Motion to Dismiss with the Clerk of the Court, United States District Court for the Northern District of Illinois using the CM/ECF System, which also served same upon all parties of record by the CM/ECF System.

/s/ Scott M. Day
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