IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Z STREET, Plaintiff, v. JOHN KOSKINEN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE, Defendant.	)	Civil No. 1:12-cv-401-KBJ

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

On October 19, 2016, the Defendant filed a notice informing the Court that the Internal Revenue Service ("Service") had processed Z Street's application for recognition of exempt status and determined that Z Street was exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. (ECF No. 98, Def.'s Notice at 1-2.) The next day, the Court issued a minute order requiring Z Street to show cause why this action should not be dismissed as moot. Both parties made filings, with Z Street arguing that this action was not moot and the Defendant arguing that it was. (ECF 99, Pl.'s Response to Show-Cause Order; ECF 100, Def.'s Response to Show-Cause Order.) On December 1, 2016, the Court ordered the parties to file a joint status report that included "a proposed schedule for the filing of dispositive motions, including any motions that the parties intend to file related to the issues discussed in the parties' [ECF] 99, 100 Responses." The Defendant now moves to dismiss Z Street's Amended Complaint pursuant to the dispositive motion schedule proposed by the parties and approved by the Court. (ECF 102, 103, 106.)

It is axiomatic that a plaintiff seeking declaratory or injunctive relief must establish standing, including that it is suffering ongoing or imminent harm that a court can redress. Z Street cannot now do so. Z Street filed suit alleging an ongoing injury, namely that the Service was unconstitutionally delaying its processing of Z Street's application for recognition of exempt status pursuant to an "Israel Special Policy." (ECF No. 10, Am. Compl. ¶ B.) Z Street sought "only declaratory and injunctive relief" including, *inter alia*, an injunction barring the Service from applying the alleged policy to its then-pending application and requiring that its application be processed in a different manner. *Z Street v. Koskinen*, 44 F. Supp. 3d 48, 62-65 (D.D.C. 2014); (ECF No. 10, Am. Compl., Prayer for Relief ¶¶ A-B.) Z Street has made clear that its

only basis for bringing suit was delay. *Z Street v. Koskinen*, 791 F.3d 24, 31 (D.C. Cir. 2015) (citing Oral Arg. Rec. 41:57-42:57, 51:14-38) ("The 'only thing we're suing about,' Z Street's counsel told us at oral argument, 'is delay.'"). But the Service has since granted Z Street's application for recognition of exempt status. (ECF No. 99-1, 11/11/2016 Lori Lowenthal Marcus Decl. ¶ 8, Exs. 2-3.) Assuming *arguendo* that Z Street was subjected to an Israel Special Policy during the processing of its application in violation of its First Amendment rights, the violation has ended and is not likely to recur in the immediate future.[1] Z Street cannot continue an action seeking declaratory and injunctive relief when it has, at most, suffered a past injury. In the absence of a justiciable controversy, no further relief can be awarded and the Court should dismiss Z Street's Amended Complaint.

BACKGROUND

I. Z Street's original claim

In December 2009, Z Street submitted an application for recognition of tax-exempt status. (ECF No. 1, Compl. ¶ 4; Marcus Decl. ¶ 4.) In August 2010, Z Street filed this suit, alleging that the Service had a so-called "Israel Special Policy" under which it applied heightened scrutiny to all applications connected with Israel. (Compl., Intro.) Z Street alleged that the policy resulted in delay and potential denial of tax-exempt applications, and constituted viewpoint discrimination in violation of the First Amendment. (*Id.*) Z Street sought a declaratory judgment that the alleged policy was unconstitutional. (*Id.*, Prayer for Relief.) Z Street also sought injunctive relief (1) barring the Service from applying the Israel Special Policy to its application; (2) requiring that its application be processed in a different manner; and

[1] The Defendant continues to deny that the so-called Israel Special Policy exists, much less was applied to Z Street's application. Assuming that this case moves forward, the Defendant intends to renew its challenge to Z Street's standing to file this suit (as opposed to its standing to continue this suit) at an appropriate stage of the litigation.

(3) requiring the Service to publicly disclose the origin, development, approval, substance, and application of the policy. (*Id.*) As previously explained, until August 2016, the Service suspended its processing of Z Street's application. (Notice at 1-2.)

II. The present controversy

On August 5, 2016, the D.C. Circuit issued an opinion in *True the Vote, Inc. v. Internal Revenue Serv., et al*. and *Linchpins of Liberty, et al. v. United States of America, et al. ("True the Vote")*, 831 F.3d 551 (D.C. Cir. 2016). In light of that opinion, the Service decided that it would process the applications of litigants whose applications remain pending. (Notice, Ex. B.) The Service informed the undersigned attorneys that it would also review Z Street's application, and the Defendant informed Z Street's counsel of that fact in a letter dated August 16, 2016. (*Id.*) Based on its review of Z Street's application using current procedures, (*e.g.*, I.R.M. 7.20.2 (last revised Oct. 22, 2015)), the Service determined that Z Street was exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code. (Marcus Decl. ¶ 8, Exs. 2-3.) As a result, Z Street has no matter pending before the Service that would entitle it to the relief it seeks.

ARGUMENT: THE COURT SHOULD DISMISS Z STREET'S AMENDED COMPLAINT FOR LACK OF STANDING

I. An ongoing or imminent injury is a prerequisite to establishing standing to pursue equitable relief

Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). A plaintiff must present a live case or controversy at the time it files suit and maintain a live case or controversy throughout the proceeding. *True the Vote*, 831 F.3d at 555; *Grant v. Vilsack*, 892 F. Supp. 2d 252, 256 (D.D.C. 2012) (citations omitted) (". . . a plaintiff must demonstrate that a case or controversy exists at all stages of the litigation"). Because standing is a "threshold

jurisdictional requirement," a court may not assume standing and proceed to the merits. *Bauer v. Marmara*, 774 F.3d 1026, 1031 (D.C. Cir. 2014). Standing is "designed not merely to serve the convenience of the courts by assuring adversarial presentation of the issues to be decided . . . but is a constitutional limitation upon the jurisdiction of the courts importantly related to the doctrine of separation of powers." *Safir v. Dole*, 718 F.2d 475, 479 (D.C. Cir. 1983). The initial burden to establish standing rests plainly on the plaintiff. *Lujan*, 504 U.S. at 561. Once the plaintiff has established standing, the burden shifts to the defendant to show that a case is moot. *True the Vote*, 831 F.3d at 561.

As the Supreme Court has explained, "the irreducible constitutional minimum of standing contains three elements." *Lujan,* 504 U.S. at 560. To have standing, a plaintiff must first suffer "an 'injury in fact'—an invasion of a legally protected interest"—which is concrete and particularized, as well as actual or imminent. *Id.* Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* (quoting *Simon v. Eastern Ky. Rights Org.*, 426 U.S. 26, 41–42 (1976)). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (quoting *Simon*, 426 U.S. at 38, 43).

In the absence of an ongoing or imminent injury, plaintiffs seeking declaratory or injunctive relief can establish neither the first element of standing, injury in fact, nor the third element of standing, redressability. *DeSilva v. Donovan*, 81 F. Supp. 3d 20, 24 (D.D.C. 2015); *Holt v. American City Diner*, No. 05-1745, 2007 WL 1438489, at *4 (D.D.C. May 15, 2007). Plaintiffs cannot establish the first element because past harm, "unaccompanied by any continuing, present adverse effects," is not an injury-in-fact for purposes of a suit seeking equitable relief (as opposed to money damages). *Holt*, 2007 WL 1438489, at *4 (citing *O'Shea*

v. Littleton, 414 U.S. 488, 495 (1974); *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 336 (D.C. Cir. 2003)). Plaintiffs cannot establish the third element because declaratory and injunctive relief are, by their nature, forward-looking remedies that do not redress past harm. *DeSilva*, 81 F. Supp. 3d at 24-25 (citing *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2011)). Accordingly, the D.C. Circuit has held that "where the plaintiffs seek declaratory and injunctive relief, past injuries alone are insufficient to establish standing." *Dearth*, 641 F.3d at 501. Plaintiffs seeking to invoke the court's equitable jurisdiction must, therefore, show that—absent declaratory or injunctive relief—the defendant's "actions or inactions threaten to injure them again." *DeSilva*, 81 F. Supp. 3d at 25.

A court must dismiss a case seeking solely declaratory or injunctive relief absent "a demonstration of imminent, future injury" to the plaintiff. *Holt,* 2007 WL 1438489, at *4. This is true even if the plaintiff was suffering a concrete injury in fact at the time the suit was filed. *Han v. Lynch*, 223 F. Supp. 3d 95, 104-06 (D.D.C. 2016) (Jackson, J.). It is also true even if the plaintiff is challenging an ongoing government policy that may continue to affect other litigants not before the court: if a plaintiff seeks equitable relief with respect to an ongoing government policy, "but lacks standing to attack future applications of that policy, then the mooting of the plaintiff's specific claim obviously leaves the court unable to award relief." *City of Houston, Tex. v. Dep't of Housing and Urban Development*, 24 F.3d 1421, 1430 (D.C. Cir. 1994).

II. Z Street is not suffering an ongoing or imminent injury

Z Street has made clear that the only injury at issue is an allegedly unconstitutional delay in the processing of its application for recognition of exempt status. *Z Street*, 791 F.3d at 31. Any such delay ended when the Service acted on Z Street's application and approved it. Z Street is now entitled to rely on that recognition and hold itself out as exempt.

For Z Street to again have a tax-exempt application potentially subjected to delay, multiple speculative events would have to occur, including events outside the Service's control. Specifically, the Service would have to revoke its recognition of Z Street's exempt status, which Z Street could contest both administratively and in federal court. *See* 26 U.S.C. § 7428(a)(1), (b)(2) (an organization can seek administrative and judicial review of the Service's determination with respect to the organization's "initial qualification or continuing qualification" for exempt status). If a district court, the Tax Court, and/or a court of appeals affirmed the revocation, only then would Z Street be in a position to again apply for recognition of exempt status. Thus, assuming *arguendo* the existence of a policy that delays applications for recognition of exempt status connected to the filing organization's viewpoint regarding Israel, Z Street—which neither has a pending application nor would likely have occasion to submit another application—is unlikely to be subjected to such a policy in the future.

Consequently, any threat to Z Street from the alleged policy is neither "real and immediate" nor "realistic[ ]." *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Nat'l Sec. Counselors v. C.I.A.*, 931 F. Supp. 2d 77, 91–92 (D.D.C. 2013); *accord Haase v. Sessions*, 835 F.2d 902, 910–11 (D.C. Cir.1987) (quoting *Lyons*, 461 U.S. at 109) (plaintiff challenging alleged policy of government agency must demonstrate it is "'realistically threatened by a repetition of [its] experience'"). To the contrary, a scenario in which Z Street could be subjected to the alleged policy is speculative and conjectural, and thus does not give rise to a present case or controversy. *See Clapper v. Amnesty Intern. USA,* 568 U.S. 398, 410 (2013) ("respondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending"); *Lyons*, 461 at 111 (plaintiff subjected to arrest-related chokehold lacked standing to enjoin police from using chokeholds

because he had no reasonable likelihood of harm from chokeholds in the future); *Munsell v. Dep't of Agric.,* 509 F.3d 572, 581 (D.C. Cir. 2007) ("even if Munsell could establish that agency officials violated his First Amendment rights by retaliating against him in the past, neither he nor MQF demonstrated a real and immediate threat that they would be subject to the same conduct in the future"); *Haase*, 835 F.2d at 911 (to establish "threat of repetition," plaintiff must not only show that policy exists but that he is "likely to be subjected to the policy again"); *Tipograph v. Dep't of Justice,* 146 F. Supp. 3d 169, 174–75 (D.D.C. 2015) (after receiving records responsive to Freedom of Information Act ("FOIA") request at issue, plaintiff lacked standing to challenge agency's alleged policy regarding processing of FOIA requests; although requester claimed she intended to make future FOIA requests, she provided only "generalized plans to file unspecified requests for information at some uncertain point in the future"); *Coleman v. Drug Enf't Admin.,* 134 F. Supp. 3d 294, 306 (D.D.C. 2015) (absent pending FOIA request or claims that plaintiff will "make FOIA requests to the [agency] in the future," any "claim of future injury is simply too speculative and remote to give him standing" to challenge agency's policies). To the extent that Z Street had standing to bring this case in the first instance, it no longer does and the case is moot.

The D.C. Circuit's decision in *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013), is instructive. There, the Fish and Wildlife Service ("FWS") failed to timely process applications to import hunting "trophies." *Id.* at 1204-05. The plaintiffs alleged that FWS's unreasonable delay constructively deprived them of their property interests, in violation of their Fifth Amendment due process rights. *Id.* at 1205. After the suit was filed, FWS denied plaintiffs' pending applications. *Id.* The district court dismissed the constitutional claims on the merits, holding that the plaintiffs had not established a property interest in the trophies. *Id.* The

D.C. Circuit vacated the district court's merits decision and dismissed the claims for lack of standing. *Id.* at 1207. In doing so, it held that the plaintiffs' constitutional claims regarding unreasonable delay were rendered moot when the applications were denied, because "any constructive deprivation [of property interests] that the delay generated has also necessarily ceased." *Id.* at 1205-07. The D.C. Circuit rejected the plaintiffs' claim that they remained entitled to declaratory relief regarding an ongoing policy of delay. *Id*. It held that because no plaintiff had either a pending application or a concrete plan to submit an application, the plaintiffs' constitutional claims were either unripe or moot. *Id*. The same result follows here, where any delay in processing Z Street's application has ended and any potential future delay is speculative and conjectural. *See also Lyons*, 461 at 111; *Tipograph,* 146 F. Supp. 3d at 174–75; *Coleman,* 134 F. Supp. 3d at 306.

III. A favorable decision would not redress Z Street's alleged injury

As discussed below, none of the declaratory or injunctive relief requested in Z Street's Amended Complaint would redress its alleged injury, *i.e.*, unconstitutional delay in the processing of its application. *See Abulhawa v. U.S. Dep't of Treasury*, 239 F. Supp. 3d 24, 36 (D.D.C. Mar. 4, 2017) ("The starting point in the redressability analysis is necessarily the relief sought."), *appeal docketed*, No. 17-5158 (D.C. Cir. July 13, 2017). This further illustrates the inappropriateness of allowing Z Street's suit to proceed. *Id.* at 27-28, 35-37 (dismissing complaint seeking order requiring government to investigate tax-exempt entities that transfer at least $20,000 to foreign countries each year and prosecute entities found to be in violation of the law; plaintiffs alleged only past injuries or speculative future injuries, neither of which were likely to be redressed by favorable decision).

First, Z Street seeks a declaratory judgment that the alleged policy was unconstitutional. (Am. Compl., Prayer for Relief.) But such a declaration would not alter the present or future

relationship between Z Street and the Defendant, given that Z Street has neither a pending application nor a more than speculative chance of submitting another application that could be subjected to the alleged policy.[2] *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937) (justiciable controversy must "touch[ ] the legal relations of parties having adverse legal interests"); *Qassim v. Bush,* 466 F.3d 1073, 1076-77 (D.C. Cir. 2006) (Guantanamo detainees' release from custody mooted claim for declaratory relief regarding detention, as detainees failed to allege any "collateral consequence of their past detention that we can now redress"). Second, Z Street seeks an injunction barring the Service from applying the alleged policy to Z Street's application and requiring that the Service process the application in a different manner. (Am. Compl., Prayer for Relief ¶¶ A-B.) But Z Street has no pending application and is unlikely to have a pending application in the future. Consequently, such an injunction would be of no effect. Finally, Z Street seeks an injunction requiring that the Service disclose information about the alleged policy. (*Id.*, Prayer for Relief ¶ C.) But given that Z Street's application has now been granted, disclosure of how its application—or other applications connected with Israel in some way—was/were processed would do nothing to remedy any inappropriate delay in the now-concluded processing of Z Street's application. Indeed, Z Street has stated that its request for disclosure was primarily intended to assist in drafting an injunction requiring that the Service process Z Street's application in a particular

[2] *Compare Conservation Force*, 733 F.3d at 1205-07 (final action on applications to import trophies mooted claim for declaratory relief regarding alleged ongoing policy of delaying processing thereof, where plaintiffs failed to produce evidence that they were likely to submit additional applications in future) *with Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324-26 (D.C. Cir. 2009) (final action on application for license to sell food products to Iran did not moot claim for declaratory relief regarding allegedly unlawful and unreasonable delay in processing thereof, where plaintiff submitted evidence that sale of food products to Iran was part of its business plan, that it would "definitely" apply for such licenses "in the future, on a continuing basis," and that it would likely experience similar delays again).

manner—an injunction that would now be of no effect. (*See* ECF 44, Transcr. at 34-35 (request for disclosure of alleged policy was "really very much subordinated to the substantive relief we want, which is a constitutionally untainted procedure").)

Because the equitable relief that Z Street seeks would not redress any improper delay in the Service's processing of its application, the Court lacks jurisdiction to award that relief. Accordingly, the Court should dismiss Z Street's Amended Complaint.

IV. *True the Vote* supports dismissal of Z Street's Amended Complaint

The Defendant anticipates that Z Street will argue that the D.C. Circuit's recent opinion in *True the Vote*, 831 F.3d 551 (D.C. Cir. 2016), shows that this case is not moot and should continue. (*See* ECF 99, Pl.'s Response to Show-Cause Order at 6-7.) In fact, the opinion shows the opposite.

In *True the Vote*, multiple organizations filed suit, alleging that the Service applied viewpoint discrimination in its review of their applications for recognition of exempt status, some of which remained pending. 831 F.3d at 555. The plaintiffs sought, *inter alia*, declaratory and injunctive relief to stop the allegedly ongoing harm. *Id.* The district court found that the plaintiffs' claims for declaratory and injunctive relief were moot. *Linchpins of Liberty v. United States*, 71 F. Supp. 3d 244-47, 251 (D.D.C. 2014); *True the Vote v. Internal Revenue Serv.*, 71 F. Supp. 3d 219, 226-29 (D.D.C. 2014). In doing so, the court observed that the Service had acted on many of the pending applications. *Linchpins*, 71 F. Supp. at 236, 251; *True the Vote*, 71 F. Supp. 3d at 226. Moreover, the court found that there was little risk of recurrence with respect to the remaining applications given that the Service had, in response to a report from the Treasury Inspector General for Tax Administration, "publicly released a memorandum on its website stating the challenged IRS scheme had been suspended" and "implemented changes to

the tax-exempt review process to assure the public that the conduct will not recur." *Linchpins*, 71 F. Supp. at 240-41, 245-46.

On appeal, the D.C. Circuit reversed the district court's order dismissing the plaintiffs' claims for declaratory and injunctive relief, and it remanded those claims for further proceedings. *True the Vote,* 831 F.3d at 564. The D.C. Circuit explained that where mootness depends on the government's voluntary cessation of conduct, the government bears a heavy burden of showing that (a) the conduct has ceased; (b) "there is no reasonable expectation that the conduct will recur"; and (c) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 561. The D.C. Circuit found that, on the record before it, the government had not satisfied any of these three elements. *Id.* at 561-63. First, it found that the conduct at issue had not ceased because two of the plaintiffs' applications remained pending. *Id.* at 561-62. Second, it found that the government had failed to establish that there was no reasonable expectation of recurrence because the Service had only "suspended" the conduct in question. *Id.* at 563 (expressing concern that the record before it showed the Service had suspended, rather than permanently discontinued, certain practices). Third, it found that the government had not shown that the effects of the alleged violations had been eradicated because two of the plaintiffs' applications remained pending. *Id.* Finally, the D.C. Circuit noted that the plaintiffs' "complaints alleged extensive discriminatory conduct" that extended beyond mere delay. *Id.*[3]

[3] On remand, the plaintiffs have continued to argue that the conduct at issue extends beyond delay. (*Linchpins*, No. 1:13-cv-00777-RBW (D.D.C.) ECF No. 120, Opp'n to Mot. for Summ. Judgment at 11-29; *True the Vote*, No. 1:13-cv-00734-RBW (D.D.C.) ECF No. 119, Opp'n to Mot. for Summ. Judgment at 20-33.)

This case is readily distinguishable. First, it is beyond cavil that any delay in the processing of Z Street's application has ceased. And because an organization generally applies for recognition of exempt status only once in its lifetime, the rationale underlying the voluntary cessation exception to mootness is inapplicable. *See id.* at 561 (voluntary cessation exception is intended to prevent defendant from returning to its old ways and "subjecting the plaintiff to the same harm") (citations and internal quotations omitted). Second, as explained in Section II, *supra*, any scenario in which Z Street would again be subjected to allegedly unconstitutional delay is speculative at best, as it depends on: the Service revoking Z Street's exempt status; the Service and the courts affirming the revocation; Z Street submitting a new application for recognition of exempt status; the alleged policy remaining in place at the time of Z Street's reapplication; and the alleged policy being applied to Z Street's new application. Third, as explained in Section III, *supra*, none of the relief requested in Z Street's Amended Complaint would redress—much less eradicate—the alleged delay in processing its application. *See Qassim,* 466 F.3d at 1077. Finally, in contrast to the allegations of "extensive discriminatory conduct" in *True the Vote,* 831 F.3d at 563, this case is only about delay. *Z Street*, 791 F.3d at 31.

As the D.C. Circuit made clear, without conduct to be enjoined there is no case or controversy and jurisdiction "expires" under Article III. *True the Vote,* 831 F.3d at 558, 561. "Even where a case once posed 'a live controversy when filed, the [mootness] doctrine requires' the Court 'to refrain from deciding it if events have so transpired that the decision will neither presently affect the *parties'* rights nor have a more-than-speculative chance of affecting them in the future." *Id.* at 558 (quoting *Linchpins of Liberty,* 71 F. Supp. 3d at 244; *Clarke v. United States,* 915 F.2d 699, 701 (D.C. Cir. 1990)) (emphasis added). This is consistent with long-

standing circuit precedent requiring that plaintiffs seeking equitable relief be themselves subject to ongoing or imminent injury, rather than asserting an ongoing or imminent injury on behalf of others. *Compare Qassim,* 466 F.3d at 1074-78 (release of Guantanamo detainees rendered challenge to their detention moot, notwithstanding that government continued to detain other prisoners at Guantanamo) *with Ukrainian-Am. Bar Assoc., Inc. v. Baker*, 893 F.2d 1374, 1376-80 (D.C. Cir. 1990) (bar association's challenge to government's policy of denying asylum seekers access to association's lawyers not rendered moot by particular merchant seaman's decision to discontinue pursuit of asylum; association had ongoing and imminent injury stemming from deprivation of access to other asylum seekers under policy).[4] Here, Z Street's application is no longer pending, there are no other plaintiffs with pending applications, and it is unlikely that Z Street will submit another application in the near future. As a result, it is impossible for the alleged Israel Special Policy to "presently affect [Z Street's] rights nor have a more-than-speculative chance of affecting [it] in the future." *True the Vote*, 831 F.3d at 558.

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[4] See also Clark v. Library of Congress, 750 F.2d 89, 92-93 (D.C. Cir. 1984) (discussing Laird v. Tatum, 408 U.S. 1 (1972)) (plaintiff only has standing under Article III to challenge policy that is (or will likely be) applied to it, not policy that is (or will likely be) applied to others).

CONCLUSION

Based on the foregoing, the Court should dismiss Z Street's Amended Complaint for lack of jurisdiction.

Dated: September 15, 2017

Respectfully submitted,

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