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

JACK BEAM and RENEE BEAM, Plaintiffs, v. MATTHEW S. PETERSEN, FEDERAL ELECTION COMMISSION CHAIRMAN, Defendant.	Civil No. 07cv1227 Judge Rebecca R. Pallmeyer Magistrate Judge Cole DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO RULE 52(c)

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO RULE 52(c)

Defendant Federal Election Commission ("Commission" or "FEC") moves this Court for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c) on plaintiffs' claim under the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 ("RFPA"). Plaintiffs have presented their case-in-chief at trial, but they have failed to prove their claim by a preponderance of the evidence. First, the evidence does not show that the FEC obtained plaintiffs' private financial records from the Department of Justice ("DOJ"). Second, even assuming the FEC obtained plaintiffs' financial records from DOJ, the evidence does not demonstrate that the transfer alleged would violate the RFPA, which does not apply to records originally obtained pursuant to a grand jury subpoena, or to records not originally obtained from a "financial institution." Thus, the FEC respectfully requests that the Court grant judgment on partial findings and dismiss plaintiffs' RFPA claim pursuant to Rule 52(c). Because the FEC presents this motion during trial, it files no accompanying notice of presentment.

I. BACKGROUND

On March 24, 2008, plaintiffs filed a Second Amended Complaint (Doc. #91) claiming that they and other associates of the Michigan-based law firm Fieger, Fieger, Kenney & Johnson, P.C. ("Fieger law firm") were subjects of a DOJ investigation into alleged criminal violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 ("FECA"). Among other claims, the Second Amended Complaint alleges that DOJ and the FEC violated the RFPA when DOJ "secretly obtained plaintiffs' private banking records" from "Merrill Lynch," and "transmitted such illegally gathered documents to the [FEC]." (Second Am. Compl. ¶¶ 15-16, 18 (Doc. #91).)

On October 15, 2008, the Court dismissed plaintiffs' RFPA claim against DOJ because DOJ obtained plaintiffs' records by grand jury subpoena, a method that is "exempted from the reporting requirements" of the RFPA. (Mem. Op. and Order dated Oct. 15, 2008 at 12-13 (Doc. #108).) Nevertheless, the Court allowed plaintiffs' RFPA claim to proceed against the FEC, explaining that if the FEC had "obtained the records from [DOJ] without following the procedures outlined in § 3412," it could be liable under 12 U.S.C. § 3417 for "obtaining financial records or information" in violation of the RFPA, "even if [DOJ] obtained the documents legally." (*Id.* at 13-14.)

On February 4, 2010, the Court denied the FEC's first motion for summary judgment, finding that a genuine issue of fact existed as to whether the FEC obtained plaintiffs' private financial information from DOJ. (Mem. Op. and Order dated Feb. 4, 2010 at 4-5 (Doc. #148).) In so ruling, the Court identified an ambiguity in the deposition testimony of FEC attorney Phillip Olaya as to whether he had seen plaintiffs' financial records. (*Id.* at 5.) On May 27, 2010, the Court denied the FEC's second motion for summary judgment, finding that Merrill

Lynch was a financial institution covered by the RFPA. (Minute Order dated May 27, 2010 (Doc. #181).)

II. RULE 52(c) STANDARD

Rule 52(c) states that

> [i]f a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim . . . that, under the controlling law, can be maintained . . . only with a favorable finding on that issue.

Judgment on partial findings "streamlines bench trials by authorizing the judge, having heard all the evidence the plaintiff has to offer, to make findings of fact adverse to the plaintiff, including determinations of credibility, without waiting for the defense to put on its case." *Wsol v. Fiduciary Mgmt. Assocs., Inc.*, 266 F.3d 654, 656 (7th Cir. 2001). Because the district court "is acting in the capacity of a finder of fact" on a Fed. R. Civ. P. 52(c) motion, *Pinkston v. Madry*, 440 F.3d 879, 890 (7th Cir. 2006), the plaintiff is not entitled to any favorable inferences nor is the court to view the evidence in a light most favorable to the plaintiff, *see Ortloff v. U.S.*, 335 F.3d 652, 660 (7th Cir. 2003). *See also Neopost Industrie B.V. v. PFE Int'l, Inc.*, 403 F. Supp. 2d 669, 675 (N.D. Ill. 2005) (explaining that under Rule 52(c), "the court is within its prerogative to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies" (citations omitted)). On appeal, the Court's legal conclusions are reviewable de novo, and its factual findings for clear error. *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004).

III. PLAINTIFFS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE FEC VIOLATED THE RFPA

Judgment on partial findings for the FEC is proper because plaintiffs have failed to prove their RFPA claim by a preponderance of the evidence, as they must at this stage of the case.

A. Plaintiffs Have Not Shown That the FEC Obtained Their Financial Records from DOJ

At a minimum, plaintiffs must prove by a preponderance of the evidence that the FEC obtained their financial records in a transfer from DOJ in order to prove a violation of 12 U.S.C. § 3412(a) or § 3417. *See* § 3412(a) (barring certain financial records from being "transferred to another agency or department" in certain circumstances); § 3417 (specifying liability of agencies "obtaining . . . financial records" in violation of the RFPA).

Plaintiffs have fallen far short of meeting this burden. Indeed, they have failed to even identify specifically what financial records of theirs were allegedly transferred from DOJ to the FEC. There is no credible evidence that plaintiffs' *private financial records* were transferred from DOJ to the FEC. Indeed, though plaintiffs appear to contend that the FEC must have received their financial records because the agency found reason to believe they were reimbursed or because the agency opened an investigation, none of plaintiffs' evidence suggests the FEC *actually did* receive any of their financial records from DOJ.[1]

Wassom Bayes Deposition. Former FEC attorney Audra Wassom Bayes was primarily responsible for the FEC's investigation of contributions to the Edwards campaign by people associated with the Fieger law firm from early 2006 to August 2008 (Wassom Bayes Dep. 11:22-13:1), which includes the period in which plaintiffs allege an RFPA violation occurred. Any

[1] Citations to the trial transcript are not included because the transcript is not yet available, except for the depositions of Audra Wassom Bayes and Colleen Sealander, who are unavailable to attend the trial. If the Court so requests, the FEC will provide further information about the testimony upon which it relies.

documents DOJ might have sent to the FEC relating to MUR 5818 would have been directed to Ms. Wassom Bayes, as she was the FEC's primary contact with DOJ for this matter. (*Id.* at 34:7-10.) Ms. Bayes credibly testified that DOJ gave the Commission FBI "302" reports in 2006 (*id.* at 38:2-22), and public criminal trial materials in 2008 (*id.* at 48:10-50:8), but no private financial information relating to plaintiffs (*id.* at 62:16-21; 64:11-65:1; 67:19-68:2; 70:1-8.).[2]

Shonkwiler Trial Testimony. Mark Shonkwiler of the FEC was Ms. Wassom Bayes's supervisor during the time period relevant to this case. He testified that based on his knowledge in supervising Ms. Wassom Bayes's work on MUR 5818, the Commission received no personal financial information relating to plaintiffs from DOJ.

Olaya Trial Testimony. FEC attorney Phillip Olaya assisted Ms. Wassom Bayes on MUR 5818 starting in July 2008, and assumed primary responsibility for the matter upon Ms. Wassom Bayes's promotion. In their case-in-chief, plaintiffs presented only Mr. Olaya's deposition testimony of March 11, 2009. (Joint Trial Exh. 21.) In this deposition, Mr. Olaya mistakenly recalled seeing plaintiffs' records included on the compact disc of Fieger-Johnson trial testimony and exhibits. (*Id.* at 21:3-28:14.) The Court denied the FEC's first motion for summary judgment on the basis of this "somewhat ambiguous" testimony. (Mem. Op. and Order dated Feb. 4, 2010 at 5 (Doc. #148).) However, even if Mr. Olaya had in fact seen plaintiffs' financial information on the compact disc, plaintiffs' claim would still fail. As the Court has recognized, the materials on the compact disc are not protected by the RFPA since they were public trial exhibits. (Mem. Op. and Order dated Feb. 4, 2010 at 4 (citing *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009)) (Doc. #148).)

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[2] Ms. Wassom Bayes was primarily responsible for Matter Under Review ("MUR") 5818 until her promotion in August 2008. (Wassom Bayes Dep. 48:5-9; 68:5-14.)

Mr. Olaya's "ambiguous" deposition testimony cannot support judgment against the Commission. This Court has acknowledged that Mr. Olaya simply must have been mistaken in his deposition testimony. (*Id.* at 4-5 (Doc. #148).) The record is clear that plaintiffs' financial records were not used as Fieger-Johnson trial exhibits (*see id.*), and the deposition transcript indicates that Mr. Olaya was discussing those materials (Olaya Dep. at 21:3-28:14 (Joint Trial Exh. 21)). When the Court was reviewing the FEC's motion for summary judgment, it viewed Mr. Olaya's deposition testimony in a light most favorable to plaintiffs, and allowed the inference that Mr. Olaya did in fact view plaintiffs' non-public financial records. (Mem. Op. and Order dated Feb. 4, 2010 at 5 (Doc. #148).) On a Rule 52(c) motion, however, plaintiffs must carry their burden and are no longer entitled to the benefit of the doubt. *See Ortloff*, 335 F.3d at 660. The Court may weigh the evidence, resolve competing conflicts and inferences, and "decide for itself where the preponderance lies." *Neopost Industrie B.V.*, 403 F. Supp. 2d at 675 (internal quotations and citations omitted). Mr. Olaya's mistaken deposition testimony alone cannot satisfy plaintiffs' burden. This is particularly true in light of the consistent testimony of every other FEC witness that DOJ never transferred plaintiffs' financial records to the FEC.

Trial Testimony of Jack and Renee Beam and Letters Regarding the FEC's "Reason to Believe" Finding as to Plaintiffs. Plaintiffs testified that they believe the Commission received their private financial records from DOJ, but there is no credible evidence to support their claim. Plaintiffs introduced into evidence letters dated September 26, 2006, from the FEC informing them that the six-member Commission had found "reason to believe" they violated 2 U.S.C. § 441f. (Joint Trial Exhs. 2, 2a.) These letters each included an attached "factual and legal analysis" explaining the Commission's decision. (*Id.*) Plaintiffs also introduced their October

2006 letters responding to the reason to believe findings, in which plaintiffs denied being reimbursed for their contributions to the Edwards presidential campaign. (Joint Trial Exh. 4.)

None of these letters suggest that the FEC obtained plaintiffs' private financial records from DOJ. This Court has previously rejected, as "unsubstantiated speculation," plaintiffs' assertion that the September 26 letters show that the FEC must have obtained plaintiffs' bank records, and pointed out other ways the agency might have reached its "reason to believe" determination. (Mem. Op. and Order dated Mar. 7, 2008 at 9-10 (Doc. #90); *see also* Def.'s Reply Mem. in Supp't of its Mot. in Limine at 4 (Doc. #193).) Plaintiffs have offered no new proof here. On the contrary, plaintiffs' claims appear to rest mainly on the records that DOJ received from Merrill Lynch after service of a grand jury subpoena in May 2007 — some seven months *after* the FEC's reason to believe finding. (*See* Second Am. Compl. ¶¶ 15-16, 18 (Doc. #91); Pls.' Opp'n to Def.'s Mot. to Dismiss, Exh. B (Merrill Lynch Grand Jury Subpoena dated Apr. 24, 2007) (Doc. #100-2).) Mr. Beam's unsupported claim that the FEC must have gotten plaintiffs' private financial records in 2006 because Merrill Lynch refused to discuss the matter with him is clearly insufficient, and he admitted he had only circumstantial evidence.

Indeed, the factual and legal analysis attached to the September 26 "reason to believe" letter indicates that the FEC had *not* seen plaintiffs' financial records, since it indicates that the FEC did not know whether Mr. Beam had in fact accepted reimbursements for his contributions. (Joint Trial Exh. 2, Attachment at 2 ("*If [plaintiffs] accepted reimbursement* for [their] contribution to the Edwards committee, then [they] may have violated the Act." (emphasis added))). Instead, to support the inference that Mr. Beam may have violated 2 U.S.C. § 441f, the analysis relied upon public newspaper reports that the Fieger law firm had been generally reimbursing its associates and their spouses for their Edwards campaign contributions. (*Id.*)

FEC witnesses Shonkwiler and Wassom Bayes confirmed that the FEC Office of General Counsel generally reviews the various sources of public information available to it, including FEC disclosure records, in considering whether to recommend that the Commission find reason to believe a violation has occurred. (Wassom Bayes Dep. 20:20-22:15.) Both witnesses, as well as FEC witness Colleen Sealander, testified that the Commission may seek to obtain financial records to prove reimbursement in certain cases (Wassom Bayes Dep. 77:15-78:22; Joint Trial Exh. 22, Sealander Dep. 11:19-12:14), but there remains no evidence that the agency did so with regard to plaintiffs in violation of the RFPA.

Hearron Trial Testimony. Roger Hearron, an FEC investigator who worked on MUR 5818, testified that he had never seen any of plaintiffs' private financial information while working on the matter. Plaintiffs have argued that Mr. Hearron's deposition testimony suggests that he may have received an additional group of documents from DOJ and that he therefore saw their private financial records, but this Court has already rejected that claim (*see* Mem. Op. and Order dated Feb. 4, 2010 at 4 (Doc. #148)), and Mr. Hearron's trial testimony provides no new support for plaintiffs' claim. Plaintiffs also questioned Mr. Hearron about the accuracy of certain statements in the September 2006 "reason to believe" materials they received, but none of Mr. Hearron's testimony shows that the FEC received plaintiffs' private financial records.

Andersen Trial Testimony. Thomas Anderson, a staff attorney in the FEC's enforcement division, testified that he was considered as a potential witness regarding the FECA's requirements in the Fieger-Johnson criminal trial, and that in preparation for this potential role he recalled receiving a CD with some contribution data provided by DOJ. However, he did not testify that this material included any financial information about plaintiffs. Once again, this Court has already rejected plaintiffs' argument that Mr. Andersen's deposition testimony could

support a finding of an RFPA violation (*see* Mem. Op. and Order dated Feb. 4, 2010 at 3-4 (Doc. #148)), and Mr. Andersen's trial testimony provides no support for plaintiffs' claim. Mr. Andersen also testified that he recalled being shown some kind of financial exemplar, but his testimony was clear that he saw no indication that it related to plaintiffs.

In summary, plaintiffs have failed to satisfy their burden of demonstrating by a preponderance of the evidence that the FEC obtained their private financial information from DOJ.

B. Plaintiffs Failed to Present Evidence Concerning a Transfer of Financial Records That Would Be Subject to the RFPA

Even assuming, *arguendo*, that plaintiffs met their burden of proving the FEC obtained plaintiffs' financial records from DOJ, the FEC's motion should still be granted because plaintiffs' evidence concerns only records obtained through a grand jury subpoena from a securities broker-dealer — a process and source not covered by the RFPA.

1. Plaintiffs Presented No Evidence That DOJ Obtained Their Financial Records Other Than by Grand Jury Subpoena

As the Court has previously noted, plaintiffs have alleged that DOJ obtained their financial records using a grand jury subpoena. (Mem. Op. and Order dated Oct. 15, 2008 at 5-6, 11-13 (Doc. #108).) Plaintiffs presented no evidence at trial suggesting that DOJ obtained their financial records using another method. Therefore, if the FEC had received any of plaintiffs' financial records from DOJ, those records would have been originally obtained by DOJ using a grand jury subpoena. This alone is fatal to plaintiffs' claim under 12 U.S.C. §§ 3412(a) and 3417. Under the RFPA's grand jury exemption, "[n]othing in th[e RFPA] . . . shall apply to any subpena or court order issued in connection with proceedings before a grand jury." § 3413(i). As a result, where, as here, "[i]t is undisputed that plaintiffs' bank records were received in

response to a grand jury subpoena[, p]ursuant to § 3413(i), the statutory penalties provided by § 3417 *are inapplicable to plaintiffs' claim for violation of § 3412*." *Taylor v. Dep't of the Air Force*, 18 F. Supp. 2d 1184, 1188 (D. Colo. 1998) (emphasis added), *aff'd*, 176 F.3d 489, 1999 WL 270405, at *2 (10th Cir. 1999) (Table) (affirming that "the district court correctly noted" that under the grand jury exemption, defendants "were not subject to the notice requirements of § 3412").[3]

This Court has already relied upon the grand jury exemption to dismiss DOJ from this case. (Mem. Op. and Order dated Oct. 15, 2008 at 11-13 (Doc. #108).) The Court also held that the FEC could still be liable for receiving the exempted records from DOJ in the event that DOJ did not comply with the certification requirement in section 3412(a). (*Id.* at 13-14.) The Commission respectfully suggests that this conclusion was incorrect. As other courts have explained, the grand jury exemption categorically exempts grand jury records from the *entire RFPA*, including section 3412(a). *See* § 3413(i) ("*Nothing in this chapter* . . . shall apply . . . ." (emphasis added)); *In re Grand Jury Proceedings*, 636 F.2d 81, 84 (5th Cir. 1981) ("Under 3413(i), . . . disclosure pursuant to issuance of a subpoena or court order respecting a grand jury proceeding is exempted from *all provisions of the Act* except Section 3415 . . . and Section 3420 . . . ." (emphasis added and footnote omitted)); *Taylor*, 18 F. Supp. 2d at 1188 ("The grand jury exemption is categorical and bars recovery by plaintiffs under § 3412."), *aff'd*, 176 F.3d 489,

[3] In *Taylor*, DOJ obtained the plaintiff's financial records pursuant to a grand jury subpoena, and then shared those records with the Air Force Office of Special Investigations ("AFOSI"), which was conducting a parallel civil investigation into the plaintiff's activities. *See* 18 F. Supp. 2d at 1187. Just as alleged here, the plaintiff claimed that the transfer violated section 3412(a), and the plaintiff sought damages against DOJ and AFOSI under section 3417. *Id.* The district court dismissed the claim — as to both DOJ *and AFOSI* — explaining that "[t]he grand jury exemption is categorical and bars recovery by plaintiffs under § 3412." *Id.* at 1188. The Tenth Circuit affirmed the district court's ruling. *See* 176 F.3d 489, 1999 WL 270405, at *2.

1999 WL 270405 at *2 ("[T]he RFPA does not apply 'to any subpoena or court order issued in connection with proceedings before a grand jury.' 12 U.S.C. § 3413(i)."). Thus, the grand jury exemption exempts both DOJ's alleged initial receipt of plaintiffs' records and the alleged subsequent transfer of those records to the FEC.[4]

In sum, because plaintiffs have failed to demonstrate that DOJ obtained any of their financial records through a source other than a grand jury subpoena, plaintiffs have not met their burden of proof under the RFPA.

2. Plaintiffs Presented No Evidence That DOJ Obtained Their Financial Records from a "Financial Institution" Under the RFPA

The RFPA applies only to financial records the government obtains from a "financial institution." 12 U.S.C. § 3402. Plaintiffs alleged in their operative complaint that the records the FEC obtained from DOJ were their "private banking records" that DOJ obtained from "Merrill Lynch." (Second Am. Compl. ¶¶ 15-16, 18 (Doc. #91); Mem. Op. and Order dated Oct. 15, 2008 at 5-6 (Doc. #108).). At trial, plaintiffs provided no evidence in their case-in-chief that "Merrill Lynch" qualifies as a "financial institution" under the RFPA or that DOJ obtained any of their financial records from another source that is a financial institution under the RFPA.

The FEC has previously explained that the "Merrill Lynch" entity to which plaintiffs refer appears to be a securities broker-dealer and that this kind of entity is not a "financial

[4] Moreover, the language of section 3412(a)'s certification requirement itself removes any doubt about whether it applies to records originally obtained by grand jury subpoena. The provision states that only "[f]inancial records originally obtained pursuant to th[e RFPA]" must be transferred in accord with the certification requirement. *See* § 3412(a). Since records obtained by grand jury subpoena are exempt from the RFPA, *see* § 3413(i), they are not "records originally obtained pursuant to th[e RPFA]" under section 3412(a).

institution" under the RFPA.[5] Although the Court did not accept the Commission's argument on this point (*see* Minute Order dated May 27, 2010 (Doc. #181)), plaintiffs presented no evidence at trial that demonstrates that the arm of Merrill Lynch that provided documents to DOJ is a "financial institution" within the meaning of the RFPA. That statute defines "financial institution" as "any office of a bank, savings bank, card issuer . . . , industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in [the United States]," and does not mention broker-dealers. *See id.* § 3401(1). This definition includes only the specified entities — there is no general category or "catch-all" provision, and the definition should not be interpreted broadly to encompass broker-dealers. Where Congress wanted parts of the RFPA to apply to documents obtained from broker-dealers, it said so explicitly. The RFPA's definition of "financial institution" notes that it does not apply to section 3414 — a special provision of the RFPA that only applies to documents the government obtains pursuant to national security interests. *See* §§ 3401(1), 3414. A special, broader definition of "financial institution" borrowed from another statute applies to this section, *see* § 3414(d), and it explicitly includes "a broker or dealer registered with the [SEC]" and a "broker or dealer in securities or commodities," *see* 31 U.S.C. § 5312(a)(2)(G) & (H). In contrast, the narrower RFPA definition of "financial institution" that applies to this case does not explicitly include broker-dealers, *see* § 3401(1).

Plaintiffs' evidence concerned records obtained solely from Merrill Lynch. Because plaintiffs failed to prove that this broker-dealer is a "financial institution" under the RFPA, and

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[5] (*See* Def.'s Mem. in Supp't of its Second Mot. for Summ. J. at 4-9 (citing, among other things, documents indicating DOJ subpoenaed records from the "*brokerage arm* of Merrill Lynch" during the Fieger criminal matter) (Doc. #161).)

because plaintiffs presented no evidence that their financial records were obtained from any other entity, they have failed to meet their burden of proof.

CONCLUSION

For the foregoing reasons, the Court should grant the Federal Election Commission judgment on partial findings pursuant to Rule 52(c), and dismiss plaintiffs' RFPA claim.

Respectfully submitted,

Phillip Christopher Hughey
Acting General Counsel

David Kolker
Associate General Counsel

/s/ Harry J. Summers
Harry J. Summers
Assistant General Counsel

Benjamin A. Streeter III
Attorney

Holly J. Baker
Attorney

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FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
AND ITS CHAIRMAN

999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650