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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE

The Federal Election Commission ("FEC" or "Commission") makes three basic points in this reply in support of the FEC's motion *in limine*: (1) plaintiffs' opposition brief itself shows the need for an order clearly defining what evidence is relevant and otherwise admissible regarding plaintiffs' claim under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 *et seq*., to prevent overreaching and ensure an efficient trial, regardless of the absence of a jury; (2) plaintiffs have failed to show that the Court should reverse its prior ruling that certain documents the Commission has withheld are privileged; and (3) plaintiffs fail even to address the FEC's request that the Court exclude evidence that plaintiffs suffered actual damages beyond any pecuniary harm caused by the alleged RFPA violation.

I. AN ORDER DEFINING WHAT EVIDENCE IS RELEVANT AND NON-PRIVILEGED WILL HELP ENSURE AN EFFICIENT TRIAL

Plaintiffs' opposition shows that they have no intention of limiting themselves to evidence relevant to their one remaining claim under the RFPA. Plaintiffs admit that they plan

to elicit "testimony concerning the Justice Department's investigating and ultimately unsuccessful prosecution of Mr. Geoffrey Fieger" (Pls.' Resp. in Opp'n to Def.'s Mot. *in Limine* ("Pls.' Resp.") at 2 (Doc. #192)), which has no relevance to plaintiffs' RFPA claim. Plaintiffs also repeatedly refer to their pending "claims" in the plural (*id.* at 2-3), and assert that "whether Defendant FEC illegally obtained . . . Plaintiffs' bank records . . . from the Justice Department" is "*one of the claims* before this Court," (*id.* at 3 (emphasis added)). To the contrary, this is the *only* claim before the Court. Plaintiffs' continued refusal to recognize this — 20 months after the last of their other claims was dismissed — shows why an order granting the FEC's motion is necessary, even though this will be a bench trial. Without such an order, plaintiffs will continue their effort to re-litigate their rejected claims and turn this narrow trial into a wide-ranging attack on the Department of Justice's ("DOJ") past enforcement of federal campaign finance law. An order *in limine* will help ensure an efficient trial that will conserve the time of the Court, the witnesses, and the parties by focusing solely on plaintiffs' RFPA claim.

A timely order defining the scope of permissible inquiry will help to focus this case on what matters both at trial and before trial. Although plaintiffs' overall view of what evidence is relevant to their RFPA claim is far too broad, they do propose at one point a list of topics for their potential cross examination of DOJ trial attorney M. Kendall Day that could be refined in a manner consistent with the Commission's proposed order. (*See* Pls.' Resp. at 4 (Doc. #192).) The Commission would not object to an order that limited Mr. Day's testimony to the following topics, to the extent they can be addressed without breaching grand jury secrecy or other privileges:

- Mr. Day's knowledge of plaintiffs' financial records;
- Mr. Day's communications with FEC employees about plaintiffs;

- Mr. Day's knowledge of the categories of information shared with FEC employees; and

- Mr. Day's knowledge of information about plaintiffs' financial records shared with FEC employees.

Plaintiffs' discovery requests have typically sought a far broader range of information than what is covered by these topics, and in part for that reason, DOJ rejected plaintiffs' November 2008 request to depose Mr. Day, citing its *Touhy* regulations. (FEC's Mem. in Supp't of its Mot. *in Limine* ("FEC Mem."), Exh. C (Doc. #185-3).) Absent a ruling *in limine* that properly limits the scope of Mr. Day's testimony to non-privileged topics relevant to the RFPA claim, it is not clear that DOJ will change its decision and allow Mr. Day to testify. In addition, a ruling from the Court now would provide guidance to the parties should plaintiffs depose Mr. Day in advance of trial, as they appear to wish to do. (*See* Final Pretrial Order ¶ (2)(d) (Doc. #175).)

In their opposition, plaintiffs seem to claim that DOJ's criminal prosecution of Mr. Fieger and what plaintiffs describe as "dozens" of other persons is relevant here, despite conceding that such evidence is "minor to the claim[] before this Court." (Pls.' Resp. at 3 (Doc. #192).) However, the relevance of whether DOJ transferred plaintiffs' private financial records to the FEC during the course of that investigation does not make anything else about the investigation relevant. Plaintiffs fail to explain how the actual evidence they seek to admit, such as the acquittal of Mr. Fieger, makes it more or less probable that the FEC violated the RFPA.[1]

[1] Plaintiffs do not appear to dispute that it would be improper to admit evidence breaching the secrecy of the Fieger grand jury investigation (*see* FEC Mem. at 6-7 (Doc. #185)), yet plaintiffs' brief suggests they may seek to pursue such evidence, (Pls.' Resp. at 2 ("[T]he Court will hear testimony concerning [DOJ's] investigating . . . of Mr. Geoffrey Fieger.") (Doc. #192)).

The only evidence plaintiffs specifically address in their opposition are the letters they wrote to the FEC in October 2006 disputing that they served as straw donors for federal campaign contributions. (Pls.' Resp. at 2-3 (Doc. #192); FEC Mem., Exhs. A, B (Doc. ##185-1, 185-2).) Plaintiffs assert that these letters are relevant because during an investigation the FEC allegedly "*must* generally obtain and review bank records to determine whether an individual serves as a 'conduit' for campaign contributions." (Pls.' Resp. at 2 (emphasis added) (Doc. #192).) That is incorrect. As this Court has recognized, this information could be obtained from other sources, such as "the Fieger law firm's financial records." (Mem. Op. and Order dated Mar. 7, 2008 at 9-10 (Doc. #90).) The FEC stated that it relied upon newspaper articles in finding that there was reason to believe plaintiffs were reimbursed.[2] The Commission later decided to take no further action and closed its investigation as to plaintiffs.[3]

Limiting admissible evidence as the FEC has requested will promote an efficient trial that focuses on plaintiffs' RFPA claim, rather than broad, irrelevant issues about the Fieger investigations.

II. PLAINTIFFS FAIL TO SHOW THAT THE COURT SHOULD REVERSE ITS CORRECT PRIOR RULING THAT THE COMMISSION DOCUMENTS PLAINTIFFS SEEK ARE PROTECTED FROM DISCLOSURE

Plaintiffs seek to introduce certain documents at trial, despite the fact that this Court, after an *in camera* review, found that the documents are protected by the "'attorney work product'"

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[2] (FEC, Factual and Legal Analysis, Respondent Jack Beam, MUR 5818 at 2 (Sept. 26, 2006) (Exh. A); FEC, Factual and Legal Analysis, Respondent Renee Beam, MUR 5818 at 2 (Sept. 26, 2006) (Exh. B).) In accord with 2 U.S.C. § 437g(a)(2), the Commission sent these factual and legal analyses to plaintiffs to explain why it found there was reason to believe they violated the Federal Election Campaign Act. The Commission made these documents public after closing its investigation in October 2009.

[3] (Letter from FEC to Jack Beam (Nov. 5, 2009) (Exh. C); Letter from FEC to Renee Beam (Nov. 5, 2009) (Exh. D).)

and "'law enforcement privilege[s]'" and contain "no evidence of any shared financial data." (Minute Order, dated July 7, 2009 (Doc. #141).)[4] Plaintiffs rely on the fact that the Commission's enforcement action has ended, but the Court's ruling remains correct.

First, even though the Court found that the documents contain "no evidence of any shared financial data," plaintiffs nevertheless argue that the documents should be disclosed because they are "directly relevant (at least circumstantial evidence) as to the ultimate fact questions to be decided." (Pls.' Resp. at 3-5 (Doc. #192).) But even if the documents were relevant, they would still be privileged, and privilege does not give way merely because a protected communication is relevant (directly or circumstantially) to a plaintiff's case. *See United States v. Farley*, 11 F.3d 1385, 1389-90 (7th Cir. 1993) (holding that "relevance alone is an insufficient reason for breaching the deliberative process privilege" and the work product privilege).

Second, plaintiffs incorrectly claim that because "the FEC's civil enforcement action is now concluded, it has no claim to 'law enforcement' privilege since the matter has resolved." (Pls.' Mot. for Relief from J. and/or Order ¶ 11 (Doc. #187).) But as the Commission explained (*see* FEC Mem. at 14 (Doc. #185)), "[a]n investigation . . . need not be ongoing for the law enforcement privilege to apply as the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information is revealed to the public," *see In*

[4] The Final Pretrial Order in this case states that plaintiffs may attempt to introduce 69 pages of documents that the FEC has withheld on privilege grounds, and which are marked with Bates numbers 45-51, 52-57, 58-59, 60-63, 64-65, 162-63, 164-69, 177, 180-81, 193, 194, 196-97, 206-09, 221-24, 239-44, and 311. (Final Pretrial Order ¶ 2(c)(5) (Doc. #175); FEC Privilege Log, dated Jan. 28, 2009 (Doc. #130-4).) Plaintiffs' opposition to the FEC's motion *in limine* and their separate, pending motion for relief from the Court's July 7, 2009 ruling request disclosure of a 20-page subset of these 69 pages, which are marked with Bates numbers 58-59, 61-63, 169, 180-81, 193, 206-09, 221-24, 239-41. (Pls.' Resp. at 3-4 (Doc. #192); Pls.' Mot. for Relief from J. and/or Order at 3 (Doc. #187).)

re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010) (Cabranes, J.) (internal quotation marks omitted).

Finally, even if the law enforcement privilege no longer applied, the documents would remain protected by the work-product doctrine. Plaintiffs appear to concede that any work-product protection the documents had would remain, since they do not argue to the contrary, but merely claim that "it is unclear which objection applied was sustained as to which documents that were reviewed by the Court." (Pls.' Mot. for Relief from J. and/or Order ¶ 6 (Doc. #187).) In fact, the Court's ruling is not unclear. The Court "sustain[ed] the FEC's 'attorney work product' and 'law enforcement privilege' objection" to the production of the documents at issue. (Minute Order, dated July 7, 2009 (Doc. #141).) The Court was aware that the FEC had objected to disclosure of all the documents on *both* grounds, since plaintiffs attached a copy of the FEC's privilege log to their motion to compel. (Pls.' Mot. to Compel Produc. of Docs. and for *in Camera* Inspection, Exh. C at 1-2, 6-10 (FEC Privilege Log) (Doc. #130-4[5])). But the Court's order contains no limit on the scope of the work-product ruling.

III. PLAINTIFFS HAVE NOT RESPONDED TO THE FEC'S ARGUMENT THAT THE COURT SHOULD EXCLUDE EVIDENCE OF ACTUAL DAMAGES BEYOND ANY PECUNIARY HARM CAUSED BY THE ALLEGED RFPA VIOLATION

In its opening brief, the Commission requested an order excluding any evidence that plaintiffs suffered actual damages resulting from DOJ's or the FEC's campaign finance investigations, as opposed to the alleged RFPA violation, as well as any damages resulting from any alleged non-pecuniary harm, such as emotional distress. (FEC Mem. at 9-13 (Doc. #185).)

[5] In its opening brief, the FEC mistakenly stated that its privilege log was located at docket number 130-2 instead of 130-4. (*See* FEC Mem. at 13-14 (Doc. #185).) We apologize for the error.

Plaintiffs do not respond to these arguments, so any objection should be deemed waived. *See, e.g., In re H & R Block Mortg. Corp., Prescreening Litig.*, No. 2:06-MD-230 (MDL 1767), 2007 WL 325351, at *4 n.5 (N.D. Ind. Jan. 30, 2007) ("Plaintiff['s] . . . failure to address in his response brief Defendant['s] . . . relevance argument . . . waives any objection as to that argument.") (citing *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 1015 (N.D. Ill. 2005) (holding that a plaintiff waives an argument he fails to raise in opposition to a motion for sanctions)).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court issue an order excluding from trial the categories of evidence described in the Commission's opening brief and in the proposed order submitted to the Court.

Respectfully submitted,

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