IN 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 REPLY IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT

In their response to the Federal Election Commission's ("Commission" or "FEC") motion for summary judgment, plaintiffs have still submitted no evidence to support their remaining claim: no evidence to show which of their financial records were allegedly transferred, to demonstrate what institution allegedly provided them to the government, or to prove that any such institution is a financial entity subject to the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq*. ("RFPA"). Plaintiffs' short opposition thus fails to meet their burden to show that the Court has jurisdiction over this case.

In particular, plaintiffs fail to refute the Commission's showing that the brokerage arm of Merrill Lynch that administered the Cash Management Account ("CMA") that appears to be the subject of plaintiffs' claim is not a "financial institution" covered by the RFPA, 12 U.S.C. § 3401(1), because that entity is not a "bank" and the CMA is not a bank account. Indeed, plaintiffs do not even respond to, much less dispute, the

Commission's demonstration of the precise nature of the Merrill Lynch entity apparently at issue or the limited reach of the RFPA as interpreted by federal courts. Instead, plaintiffs merely argue generally that "Merrill Lynch" provides "investment banking services" and that plaintiffs had a "money market checking account." However, those general arguments do not establish that the Department of Justice ("DOJ") received records from a "financial institution" covered by the RFPA. Merrill Lynch is simply not such an institution. Accordingly, this Court has no subject-matter jurisdiction and it should dismiss this case, Fed. R. Civ. P. 12(h)(3), or alternatively grant summary judgment in favor of the Commission.

I. THE COURT SHOULD DISMISS THIS CASE FOR LACK OF JURISDICTION

A. Plaintiffs Have Provided No Evidence to Show That the Conduct They Allege Violated the RFPA

Plaintiffs have presented no evidence that any of their records were obtained by DOJ from an institution covered by the RFPA. Therefore, there is no evidence that there could have been an RFPA violation even if DOJ had provided plaintiffs' financial records to the Commission (which it did not). Accordingly, the Court has no subject-matter jurisdiction and it must dismiss this case. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). "[I]t has been the virtually universally accepted practice of the federal courts to permit any party to challenge or, indeed, to raise *sua sponte* the subject-matter jurisdiction of the court at any time and at any stage of the proceedings." *Sadat v. Mertes*, 615 F.2d 1176, 1188 (7th Cir. 1980). "Subject-matter jurisdiction is so central to the district court's power to issue any orders whatsoever that it may be inquired into at

any time, with or without a motion, by any party or by the court itself." *Craig v. Ontario Corp.* 543 F.3d 872, 875 (7th Cir. 2008). Moreover, *plaintiffs* bear the burden of establishing that a suit is properly brought in federal court. *See In re Repository Technologies, Inc.* 601 F.3d 710, ___, 2010 WL 1427524, at *10 (7th Cir., April 12, 2010) (citing *Craig*, 543 F.3d at 876).

Here, plaintiffs have produced no evidence at all, let alone any that establishes that the Court has jurisdiction over their RFPA claim.[1] Instead, in their Opposition to the FEC's Second Motion for Summary Judgment filed May 4, 2010 ("Pls' Opp.") (Doc. #178), plaintiffs merely make the unsubstantiated claim that they "deposited money into their Merrill Lynch money market checking account (interest bearing) and received deposit notices and financial statements just like any other bank." *Id.* at 2. Plaintiffs have provided no exhibits, affidavits, or other evidence that might demonstrate the existence of any such accounts, what specific institution they mean by "Merrill Lynch," or which specific records were allegedly received by DOJ.

The only relevant evidence before this Court is the three checks that the Commission received as part of its audit of the Edwards for President campaign as

[1] "Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008), (quotation marks omitted), *cert. denied*, 129 S. Ct. 1349 (2009); *see* Fed. R. Civ. P. 56(e)(2). Summary judgment is the "put up or shut up" moment in a lawsuit. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). This evidentiary requirement is fully applicable to a plaintiff's burden of demonstrating that the court has jurisdiction, and each element of that burden must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). In response to a summary judgment motion, the plaintiff must set forth by affidavit or other evidence specific facts which will be taken as true. *Id.*

mandated by 26 U.S.C. § 9038. These checks state that they relate to a Cash Management Account ("CMA") at "Merrill Lynch," and the checks also contain the name "Bank One." *See* Memorandum in Support of Defendant FEC's Motion for Summary Judgment ("FEC SJ Mem.") at 9-11 and Exh. 8 (Doc. #142). Plaintiffs do not contend that these three checks themselves were the subject of any RFPA violation. In fact, plaintiffs have never even confirmed that their RFPA claim is about records related to this CMA — though plaintiffs do not dispute the Commission's suggestion to that effect. *See* FEC's Memorandum in Support of Its Second Motion for Summary Judgment ("FEC 2nd SJ Mem.") at 6 n.3 (Doc. #161). As we explain below, assuming the records at issue do relate to this account, plaintiffs fail to counter the Commission's showing that accounts of this type were offered by Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPF&S"), which has never been a bank but has always been a broker-dealer. MLPF&S was a subsidiary of the holding company Merrill Lynch & Co., Inc. during the period in 2003 when plaintiffs wrote their checks to the Edwards campaign.[2]

Plaintiffs offer no excuse for why they would lack proof of basic facts about their own finances. Plaintiffs and their counsel would also appear to have access to records related to plaintiffs that DOJ received during the Fieger criminal case, *see* Letter from DOJ to Fieger attorneys, with courtesy copy to Michael Dezsi, dated Oct. 4, 2007 (Doc. #67-3 at 2-3). Thus, not only have plaintiffs failed to meet their burden to establish jurisdiction, but their failure to produce evidence within their control also warrants this

[2] *See* 2003 10-K filing of Merrill Lynch with the Securities and Exchange Commission, Exh. 21, available at http://www.sec.gov/Archives/edgar/data/65100/000095012304003030/y94583e10exv21.htm (visited May 5, 2010); Dunn & Bradstreet report, FEC Exh. 11 at 25.

Court to infer that no evidence exists that would support plaintiffs' claim that their financial records were obtained from a "financial institution" covered by the RFPA. *See Overnite Transp. v. NLRB*, 140 F.3d 259, 266 n.1 (D.C. Cir. 1998) (adverse inference rule is based on theory that "a party will of his own volition introduce the strongest evidence available to prove his case"). *See also International Union (UAW) v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) ("If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it . . . . Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.").

B. Plaintiffs Have Failed to Refute the Commission's Showing That Merrill Lynch Is Not a Bank Under the RFPA

As the Commission explained in its opening brief (FEC 2nd SJ Mem. at 5-6), "Merrill Lynch" is a trade name of certain entities owned at the relevant time by Merrill Lynch & Co., Inc., a holding company.[3] One of those subsidiary entities, MLPF&S, created the Cash Management Account service in 1977 and still offers it to clients.[4] MLPF&S is a "registered broker-dealer" of securities, and it is "not a bank." FEC Exh. 12 at 2. [5]

---

[3] Since 2009, Merrill Lynch & Co., Inc. has been owned by Bank of America Corporation. *See* Dunn & Bradstreet report, FEC Exh. 11 at 4, 19, 25.

[4] *See Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 564 F. Supp. 1358, 1361-62 (D. Del. 1983) ("*Paine Webber*"); FEC Exh. 12, CMA Financial Service, FEC Exh. 13, Cash Management Account, from www.totalmerrill.com, at 1-5 (visited May 10, 2010).

[5] The United States Federal Reserve System website lists MLPF&S as a "Securities Broker/Dealer," and defines such entities as ones "primarily engaged in acting as agents (i.e., brokers) between buyers and sellers in buying or selling securities on a commission or transaction fee basis." FEC Exh. 14, available at National Information Center of the

Plaintiffs rely on a page from the Merrill Lynch website and on *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), to argue that "Merrill Lynch" is a bank under the RFPA because it offers "investment ***banking*** services." Pls' Opp. at 1-2 (quoting Merrill Lynch web site, www.ml.com; italics and bold added by plaintiffs). But Merrill Lynch has also categorically stated, in distinguishing MLPF&S from affiliated FDIC-insured entities, that "Merrill Lynch, Pierce, Fenner & Smith Incorporated *is not a bank*." FEC Exh. 12 at 2, 29; FEC Exh. 13 at 4 n.2 (emphasis added). In fact, the sentence from *Dabit* on which plaintiffs rely does not suggest that Merrill Lynch is a "bank," but merely that it "is an investment banking firm that offers research and brokerage services to investors." *Dabit*, 547 U.S. at 74.

Moreover, even the provision of investment banking services does not make an entity a "bank" under the RFPA, which applies only to a limited category of institutions and their disclosure of personal records of individuals. *See* 12 U.S.C. §§ 3401(2), (4), and (5). "Investment banking" is a term of art within the financial services industry; it does not concern personal banking services for individuals but is instead the

> sale and distribution of a new offering of securities, carried out by a financial intermediary (an investment banker), who buys securities from the issuer as principal, and assumes the risk of distributing the securities to investors. The process of purchasing and distributing securities is known as underwriting. . . . The Glass-Steagall [Act of 1933] restrictions were finally removed by the Gramm-Leach-Bliley Act of 1999, which authorized commercial banks to engage in investment banking activities

---

Federal Reserve System, http://www.ffiec.gov/nicpubweb/Content/HELP/Institution%s 20Type%20Description.htm (visited May 10, 2010).

> through affiliated companies, underwriting commercial paper, corporate debt, and equity securities. . . .[6]

In short, MLPF&S is *not* "just like any other bank," as plaintiffs claim, *see* Pls' Opp. at 2; on the contrary, it is not a bank at all, as the Commission has demonstrated. *See* FEC 2nd SJ Mem. at 5-6. And plaintiffs have not disputed the Commission's showing that DOJ had subpoenaed records from the *brokerage arm* of Merrill Lynch. *Id.*

Plaintiffs allege, without evidentiary support, that they have a "money market checking account," Pls' Opp. at 2, but that unsupported claim cannot transform MLPF&S into a bank covered by the RFPA. Plaintiffs evidently had check-writing features in connection with their CMA, but an institution such as MLPF&S does not itself become a bank simply because it has affiliations with banks that issue checks, such as Bank One. *Cf. Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 64, 72 (2008) (investment banks not within definition of "bank" for purposes of the Bank Holding Company Act ("BHCA") even if affiliated with banks that are); *Flintridge Station Assoc. v. Am Fletcher Mortgage Co.*, 761 F.2d 434, 437 (7th Cir. 1985) (citing 1970 U.S. Code Cong. & Admin. News 5541) (mortgage company not a bank under the BHCA: "This narrow definition was purposefully provided by Congress.").

Plaintiffs fail even to address the Commission's showing that the key, threshold issue about the RFPA's scope is whether the financial institution in question is a "bank," not whether the institution has provided a certain type of records to the government. *See*

---

[6] Business Glossary, Business Dictionaries from AllBusiness, Dunn & Bradstreet. Available at http://www.allbusiness.com/glossaries/investment-banking/4944573-1.html (visited May 7, 2010).

FEC 2nd SJ Mem. at 6-9. In particular, plaintiffs provide no authority to refute the Commission's demonstration that the definition of "financial institution" in 12 U.S.C. § 3401(1) is narrowly construed, and it does not include broker-dealers like MLPF&S because they are not among the entities enumerated in the statute. The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'Judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254-55 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (other citations omitted in original).

In sum, plaintiffs have failed to counter the Commission's showing that Merrill Lynch is not a "financial institution" under the RFPA.

C. The Merrill Lynch CMA Is Not a Bank Account

Plaintiffs have still failed to state clearly what records are the subject of their RFPA claim, but to the extent the records relate to the Merrill Lynch CMA reflected in the three checks plaintiffs wrote to the Edwards campaign in 2003, that account is a central asset account maintained by a broker-dealer, not a bank account. MLPF&S started the Cash Management Account service in 1977 as an integrated asset management account, and the CMA consists of several core components: securities trading, checking account services, money market investment services, and a debit (Visa) card.[7] As Merrill Lynch itself explains, the CMA is essentially a securities account:

[7] Business Glossary, Business Dictionaries from AllBusiness, Dunn & Bradstreet. Available at http://www.allbusiness.com/glossaries/cash-management/4950369-1.html (visited May 14, 2010); FEC Exh. 12 at 2-4. *See also Paine Webber*, 564 F. Supp. at 1361-62; *Krinsk v. Fund Asset Management, Inc.* 875 F.2d 404, 406-08 (2d Cir. 1989).

> [The] Beyond Banking and CMA accounts are *securities accounts* with Merrill Lynch, Pierce, Fenner & Smith Incorporated. The accounts provide access to services and products offered by licensed banks, including checking and FDIC-insured deposits that are held at the banks. Securities, mutual funds and other nondeposit investment products available through the accounts are not FDIC-insured, not guaranteed by a bank and may lose value.

FEC Exh. 13 at 4 (emphasis added). Thus, while the CMA provides access to bank deposit accounts, the CMA itself is not a bank account. In 2003, when the plaintiffs wrote the checks to the Edwards campaign, Merrill Lynch's CMA apparently provided access to an account held at Bank One. *See Paine Webber*, 564 F. Supp. at 1361-62. MLPF&S requires affiliation with FDIC-insured deposit banks for the deposit components of the CMA because as a broker-dealer, it does not itself accept deposits; if it did, it would not need to be affiliated with those banks. Because the CMA is not a deposit bank account, the "money funds" component of the CMA is not FDIC-insured:

> Only clients with assets of $250,000 or more are eligible for the money funds. . . . Before investing, carefully consider the investment objectives, risks, and charges and expenses of the fund. . . . Investments in the money market funds are not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although the funds seek to preserve the value of your investment at $1 per share, it is possible to lose money by investing in the funds.

FEC Exh. 13 at 4.

In accord with CMA's status as a securities account, the CMA is covered by the Securities Investor Protection Corporation of 1970 ("SIPC"), of which MLPF&S is a member. FEC Exh. 12 at 3, 29; FEC Exh.15, SIPC Information at 1. The SIPC describes itself as "a nonprofit, membership corporation, funded by its member securities broker-dealers," and although created by the Securities Investor Protection Act (15 U.S.C. § 78aaa *et seq.*), it is "neither a government agency nor a regulatory authority." FEC Exh.

15 at 4. The SIPC explains that "[w]hen a brokerage firm is closed due to bankruptcy or other financial difficulties and customer assets are missing, SIPC steps in as quickly as possible and, within certain limits, works to return customers' cash, stock and other securities." *Id.* at 2.

Plaintiffs seem to argue that because they were able to make deposits, write checks, and receive statements on their CMA, that service is a bank account. *See* Pls' Opp. at 1-2. But plaintiffs offer no support for that proposition, and there is none. On the contrary, as Merrill Lynch itself notes:

> As central asset accounts, the CMA and Beyond Banking Accounts are investment and money management vehicles. The Visa Card and checking features are intended to provide you with easy access to the assets in your accounts. The CMA and Beyond Banking Accounts are not bank accounts.

FEC Exh. 12 at 29.

II. CONCLUSION

Plaintiffs have failed to meet their burden to provide evidence to show that the conduct they allege would establish a claim within this Court's jurisdiction under the RFPA. Even if any documents were provided to DOJ by a brokerage arm of Merrill Lynch regarding plaintiffs' CMA, that broker-dealer is not a bank or other institution subject to the RFPA, and the CMA is not a bank account. Thus, this Court lacks subject-matter jurisdiction and should dismiss the case.

Respectfully submitted,

Thomasenia P. Duncan*
General Counsel

David Kolker*
Associate General Counsel

Harry J. Summers*
Assistant General Counsel

/s/ Holly J. Baker
Holly J. Baker*
Attorney

*Admitted pro hac vice
COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
AND ITS CHAIRMAN

999 E Street, N.W.
Washington, DC 20463
202-694-1650

May 18, 2010