

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JACK and RENEE BEAM,

Plaintiffs,

Civil Action No. 07-cv-1227

Honorable Rebecca R. Pallmeyer

vs.

FEDERAL ELECTION COMMISSION,

Defendant.

/

PLAINTIFFS' MEMORANDUM OF LAW

By and through counsel, Plaintiffs Jack and Renee Beam, respectfully request that this Honorable Court enter judgment in their favor on their claims that Defendant Federal Election Commission violated their rights under the Right to Financial Privacy Act. In support of their request for judgment, Plaintiffs offer the following memorandum.

In their Second Amended Complaint, Plaintiffs allege that Defendant Federal Election Commission violated their rights under the Right to Financial Privacy Act (RFPA) by obtaining and/or exchanging with the Justice Department their private financial records without following the procedures required by the RFPA.

Specifically, the RFPA prohibits “any agency or department of the United States . . . [from] obtaining financial records or information contained therein in violation of [the RFPA].” 12 U.S.C. § 3417. Section § 3412 provides that financial records “originally obtained pursuant to this title shall not be transferred to another agency or department unless the transferring agency or department certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry . . .” 12 U.S.C. § 3412(a).

Plaintiff Jack Beam serves *of counsel* to the Fieger Law Firm. The Justice Department was investigating whether members and/or employees of the Fieger Law Firm violated federal campaign finance laws after being reimbursed for their campaign contributions. As part of its investigation, the DOJ had obtained the bank records for nearly all of the employees, spouses, and in some instances the children, of Fieger Firm employees and associates including Jack and Renee Beam.

During the same time that the DOJ was conducting its criminal investigation, the Federal Election Commission opened a civil investigation of many of the Fieger Firm employees and their families including Jack and Renee Beam. Both the DOJ and FEC's cases were focused on whether Fieger Firm employees were reimbursed for their federal campaign contributions in violation of 2 U.S.C. § 441f.

The evidence at trial showed that the DOJ and FEC were working together on their respective cases and that the agencies were sharing and exchanging their investigative files. The evidence at trial revealed that the DOJ met with FEC attorney Tom Andersen who was going to possibly serve as expert witness and requested that FEC investigator Roger Hearron prepare charts and graphs for use in the DOJ criminal prosecution of Mr. Geoffrey Fieger. The evidence also revealed that the DOJ provided dozens of bank records to the FEC that were gathered for the DOJ's criminal investigation. The question in this case is whether the FEC obtained from the DOJ the private financial records of Plaintiffs Jack and Renee Beam in violation of the Right to Financial Privacy Act.

During the trial on this matter, Plaintiffs presented prima facie evidence that Defendant FEC violated the RFPA, and therefore the Court should enter judgment in favor of Plaintiffs.

Trial Testimony

During trial, DOJ attorney Kendall Day testified that the DOJ was investigating members of the Fieger Law Firm as early as April 2005 (Vol. II, Tr. 251). According to Day, the DOJ obtained Plaintiff Jack and Renee's bank records from Merrill Lynch (Vol. II, Tr. 252). Day also testified that he was aware in early 2006 that the FEC had begun a parallel civil investigation involving members of the Fieger Law Firm (Vol. II, Tr. 254). Day's primary person of contact from the FEC was Audra Wassom (Vol. II, Tr. 255). Day shared with the FEC FBI 302 reports and possibly IRS field memoranda of interviews (Vol. II, Tr. 256-57).

As shown on Joint Exhibit 2, the FEC sent letters to Plaintiffs Jack and Renee Beam in September 2006 asking them to respond to allegations of campaign finance violations. In support of its allegations, the FEC indicated that neither Jack or Renee Beam had previously contributed to a federal campaign. During trial, FEC investigator Roger Hearnon testified that he worked as an investigator on the FEC's civil investigation. According to Hearnon, he found evidence of "Jack Beam" having contributed to several federal campaigns, but he didn't know whether any of those contributions were made by the instant Plaintiff Jack Beam. Hearnon could not explain why or how the FEC decided to include the erroneous factual allegation that Plaintiff Jack Beam had never contributed to a federal campaign.

Hearnon also testified that he prepared charts or summaries for the DOJ's use in its criminal case (Vol. I, Tr. 52-53). Day doesn't recall asking Hearnon to prepare charts or summaries for the DOJ (Vol. II, Tr. 266-67). During his deposition, Hearnon also testified that he received documents from the DOJ on two occasions, once shortly after the FEC's reason to believe letter dated September 2006 was sent to the Beams, and another time after the DOJ's criminal trial against Mr.

Fieger in the summer of 2008 (Vol. I, Tr. 55-60). At trial, Hearron said his deposition testimony was “incorrect” and that he received only a CD from the DOJ after the criminal trial in June 2008 (Vol. I, Tr. 55-56).

Plaintiffs’ also offered the deposition transcript of Audra Wassom-Beyes who was the lead staff attorney on the FEC’s civil investigation until her departure from the FEC after which Philip Olaya took over primary responsibility of the FEC’s civil investigation. During her deposition, Wasson-Beyes testified that nobody at the FEC issued administrative subpoenas to obtain Plaintiffs’ financial records (Vol. II, Tr. 226-27). She also testified that at some point she believes she asked Day to share with the FEC some of the DOJ’s investigative files (Vol. II, Tr. 231, 240). Beyes testified that she discussed “ground rules” with the DOJ as to how they would share and/or exchange information between the agencies (Vol. II, Tr. 238).

Beyes testified that she received two to four CDs from the DOJ (Vol. II, Tr. 241) see also Vol II, Tr. 243 (“I recall more than one CD being provided by DOJ.”).

When asked how the FEC would go about proving a violation of 441f (which was the allegation against Plaintiffs), Beyes testified that one way would be to look at an individual’s financial statements to “track the source of the money” (Vol. II, Tr. 242-43). Ms. Sealander, former FEC attorney, also testified that in her experience at the FEC, “if the Commission wants to prove that somebody has violated Section 441f, it frequently uses bank records to prove that fact or not.” (Tr. I, Tr. 36-37).

Mr. Shonkwiler, who was the supervisor who oversaw the FEC’s civil investigation, also testified during the trial the FEC never issued any administrative subpoenas during their civil investigation (Vol. I, Tr. 162-64). Shonkwiler testified that the DOJ had provided to the FEC a CD

that contained financial records, but he wasn't sure of the contents of the disc (Vol. I, Tr. 164). Shonkwiler also testified that one way in which the FEC could prove a violation of § 441f is to look at an individual's bank records to determine if he or she was reimbursed by another individual for a federal campaign contribution (Vol. I, Tr. 165-66). Shonkwiler testified that the FEC's need to look at an individual's bank records would be greater if the person "denied" having been reimbursed for his campaign contribution (Vol. I, Tr. 165). In this case, Shonkwiler testified that the Beams' filed with the FEC written responses denying that they were ever reimbursed for their campaign contributions (Vol. I, Tr. 162).

Before the DOJ's trial against Mr. Fieger, the DOJ asked the FEC to provide them with an expert witness (Vol. II, Tr. 257-58). Day was referred to Mr. Tom Andersen as a possible expert witness *Id.* In March 2008, Day met with Andersen before the Fieger criminal trial, and testified that it was his standard practice to show a potential witness "exhibits that we intended to show . . . at trial." (Vol. II, Tr. 257-58)(Vol. I, Tr. 126-28). Although Day could not recall specifically what exhibits he showed Andersen (Vol. II, Tr. 258), Andersen testified that Day showed him financial records belonging to Fieger Firm employees (Vol. I, Tr. 129-30). Andersen believed that the bank statements shown to him by Day contained individual line item entries, like debits and credits (Vol. I, Tr. 130). Day testified that there was no certification prepared as set forth in the RFPA before the financial records in question were shared with the FEC (Vol. II, Tr. 274-275).

As to the amount of bank records, Andersen testified that "there were lots more than just one." (Vol. I, Tr. 130-31). Andersen testified that he could not recall with specificity whose bank records he saw (Vol. I, Tr. 131-32).

Andersen testified that he met with Kendall Day a second time after which Day sent to him

a compact disc which he believed contained “some papers . . . along with a CD that [he] believed had the same contents as those papers.” (Vol. I, Tr. 133-34). Andersen doesn’t know what happened to the CD that he received from Day (Vol. I, Tr. 142-44). Day doesn’t recall sending to Andersen a compact disc (Vol. II, Tr. 276).

Following the conclusion of the Fieger criminal trial, Day testified that he and Ms. Wassom met pursuant to their agreement to share documents “that were public.” (Vol. II, Tr. 259). Day believes he gave Ms. Wassom a compact disc, and “may have” also sent her more things by e-mail (Vol. II, Tr. 259). Day testified that the only materials he gave to the FEC were “things that [they] introduced at trial” including “bank records to show the flow of money” (Vol. II, Tr. 261). Day testified that the documents and financial records that were provided to the FEC were redacted as to address information, among other things (Vol. II, Tr. 262-63).

Day testified that the DOJ did not use the Beams’ financial records during the Fieger criminal trial (Vol. II, Tr. 263-64) and that the DOJ found no evidence that the Beams’ contributions were reimbursed based on a review of the Beams’ bank records (Vol. II, Tr. 282).

Plaintiffs also offered the deposition testimony of FEC staff attorney Philip Olaya who testified that during his course of working on the FEC civil investigation he saw both Jack and Renee Beams financial records (Vol. I, Tr. 29-31). Olaya testified that there was no certification accompanying such records as described and set forth in § 3412 of the RFPA. When asked to describe the disc on which Olaya saw such records, he indicated that the CD contained “more than 10, less than 20” PDF files.

The FEC later called Mr. Olaya as a witness during their case in chief at which time Olaya indicated that he made a “mistake” about seeing the Beams bank records (Vol. II, Tr. 304). Olaya

testified that he realized his “mistake” only after this Court issued its summary judgment order and opinion (Vol. II, Tr. 304). Olaya said he made the mistake because the question during the deposition was “more general, in terms of whether or not [he] had seen any summaries of financial documents relating to [Plaintiffs]” (Vol. II, Tr. 304).

During his cross-examination, Olaya testified that he had counsel who prepared him for his deposition, and acknowledged that his counsel never sought to clarify his answer that he saw Jack and Renee Beams’ financial records (Vol. II, Tr. 311, 320-323). Olaya also testified during trial that the only CD he ever saw was one provided by the DOJ and entered into evidence as Exhibit 1. Exhibit 1 contains more than 100 PDF files, many of which are bank records of Fieger Firm employees. During his deposition, Olaya said the CD that he saw containing Jack and Renee Beams’ bank records contained “more than 10, less than 20” PDF files. When asked to describe the discrepancy between his deposition testimony and his trial testimony on this point, Olaya simply indicated that his deposition testimony was “not accurate.” (Vol. II, Tr. 327-28).

ARGUMENT

Based on the evidence presented, Plaintiffs propose that this Court find that the FEC obtained Plaintiffs’ financial records in violation of the RFPA. FEC staff attorney Olaya testified that he saw Plaintiffs’ financial records. At trial, Olaya said he made a mistake, but could not articulate any sound reasons as to how he made the mistake other than he did not understand the question during his deposition even though he was represented by counsel, and his counsel failed to follow up during his deposition cross-examination on this point. In fact, at no time during his deposition did Olaya’s counsel attempt to rehabilitate his damaging admissions that he saw Plaintiff Jack and Renee Beams bank records.

At trial, Plaintiffs' counsel impeached Olaya by relying on his deposition testimony which showed, unequivocally, that Olaya knew and understood exactly the question being asked of him; that is, whether he saw Plaintiffs' financial records. Olaya's counsel even followed up with this line of questioning which only further solidified his understanding and his testimony.

Olaya also said that he saw Plaintiffs' financial records on a compact disc that contained "more than 10, less than 20" PDF files. The only compact disc from the DOJ to the FEC that has ever produced was offered as Exhibit 1 during the trial. Exhibit 1 contains more than 100 PDF files, including the bank records for dozens of Fieger Law firm employees. This is a major discrepancy from which the Court should draw the reasonable inference that there was another compact disc provided to the FEC from the DOJ which contained Plaintiffs' financial records. This inference is supported by other evidence in this case.

First, FEC investigator Roger Hearnon testified during his deposition that the FEC received two productions of documents from the DOJ, one shortly after the FEC's reason to believe letter dated September 2006, and another after the Fieger criminal trial concluded in June 2008. Hearnon testified that he was aware of the FEC receiving both an e-mail with files attached, and also a compact disc. Hearnon couldn't remember if the e-mail or the compact disc came first.

FEC staff attorney Audra Wassom-Beyes also testified that she recalls receiving more than one compact disc from the DOJ. Vol II, Tr. 243 ("I recall more than one CD being provided by DOJ."). Wassom testified that she entered into agreements, at her request, for the DOJ to provide some of its investigative files to the FEC. Wassom also testified that the FEC never issued any administrative subpoenas to obtain Plaintiffs' bank records. Wassom's testimony corroborates the testimony of Hearnon that the FEC received at least two productions of documents from the DOJ.

This testimony contradicts the FEC's argument that it received only one compact disc from the DOJ, Exhibit 1, and that this compact disc does not contain the Beams' financial records. There is no dispute that the Beams' financial records were not used by the DOJ in the Fieger criminal trial, therefore, the Beams' bank records were never publicly filed documents (Vol. II, Tr. 263-64).

Tom Andersen also testified at trial that he met twice with DOJ attorney Kendall Day *before* the Fieger criminal case and that he received a compact disc from Mr. Day via fedex. Andersen testified that during his meeting with Mr. Day, he was shown financial records for an employee of the Fieger law firm. Andersen couldn't recall whose name he saw, but recalled that he did indeed see financial records for at least one employee/associate of the Fieger law firm.

The disc sent to Mr. Andersen has never been produced nor withheld under a claim of privilege. During his deposition, Mr. Andersen testified that the disc was perhaps lost or destroyed. During trial, Mr. Andersen testified that he did not know what happened to the disc. Based on these facts, the Court should find fault on the part of Defendant FEC for its ineffective preservation policies. *See Larson v. Bank One Corp.*, 2005 WL 4652509 (N.D. Ill. 2005)(Docket No. 00-2100, Report and Recommendation dated Aug. 18, 2005)(finding that spoliation of evidence may give rise to adverse inference against party where spoliation occurred not as a result of willfulness or bad faith, but rather ineffective preservation policies that give rise to fault).

Based on the testimony of Wasson-Beyes, Hearn, Andersen, and Olaya, the Court should infer a spoliation of evidence on the part of the FEC. Specifically, the Court should find that, other than Exhibit 1, the FEC obtained from the DOJ more than one compact disc that it failed to preserve and/or produce for purposes of this litigation.

The Court should also find that the FEC obtained Plaintiffs' bank records based on other

circumstantial evidence offered at trial. For instance, Joint Exhibit 20 shows a list of all of the respondents, including Plaintiffs Jack and Renee Beam, who were being investigated by the FEC. Of those listed respondents, the FEC had nearly all of their bank records contained on compact disc provided by DOJ and offered as Exhibit 1. This comparison alone provides a strong inference that the FEC had in its possession the bank records of Jack and Renee Beam, which is exactly what Mr. Olaya admitted during his deposition.

The FEC's own attorneys testified that in a case involving allegations of "conduit" contributions, the FEC generally looks at bank records to prove such a violation. Former Assistant to the General Counsel for Litigation Collean Sealander testified that "if the Commission wants to prove that somebody has violated Section 441f, it frequently uses bank records to prove that fact or not." (Tr. I, Tr. 36-37). Here, the FEC was accusing Plaintiffs Jack and Renee Beam of violating § 441f, and Mr. Olaya admitted to seeing their bank records. Thus, Olaya's testimony is entirely consistent with the testimony of a former FEC Assistant to the General Counsel.

The Court should also find that the FEC and DOJ exchanged Plaintiffs' financial records without executing the required certification as set forth under the RFPA. Both Wassom-Beyes and Shonkwiler testified that they were aware of and have utilized the certification process set forth in the RFPA relating to a transfer of records between federal agencies. However, Wassom-Beyes, Shonkwiler, and Olaya each testified that they saw no certification accompanying any of the documents provided for by the DOJ. Olaya, who admitted to seeing Plaintiffs bank records, testified that he saw no certification.

Mr. Day, on the other hand, testified that he was unaware of the certification requirements of the RFPA until he had been shown that provision of the statute during his deposition (Vol. II, Tr.

274-75). Day testified that there was no statutory certification prepared at the time he had met with FEC attorney Tom Andersen during which, according to Andersen, Day showed him the financial records of Fieger Firm employees (Vol. II, Tr. 275). At the time that Andersen met with Day, the financial records in question were not publicly filed because the Fieger criminal case had not yet begun. These facts demonstrate that the FEC and DOJ had, in fact, violated the RFPA by sharing and/or exchanging the private financial records of Fieger Firm employees and/or associates without following the proper certification process as set forth under § 3412.

PROPOSED FINDINGS

Based on the evidence and testimony in this case, the Court should find that (1) the FEC accused Plaintiffs of violating § 441f by being reimbursed for their campaign contributions; (2) Plaintiffs denied, in writing that they had been reimbursed; (3) FEC attorneys admitted that the FEC generally looks at an individual's bank records to prove a violation of 441f, especially where the individual denies having been reimbursed; (4) that the DOJ had gathered Plaintiffs' bank records; (5) that agents from the FEC, by agreement, engaged in cooperative discovery with the DOJ including the sharing and exchanging of their investigative files; (6) that FEC staff attorney Wassom-Beyes testified that the FEC received more than one compact disc from the DOJ; (7) that FEC investigator Hearron testified that he received two productions of documents from the DOJ; (8) that the FEC has claimed that it received only one compact disc from the DOJ; (9) that FEC staff attorney Olaya admitted to seeing Plaintiffs Jack and Renee Beams' bank records on a compact disc that contained "more than 10, less than 20" PDF; (10) that Plaintiffs Jack and Renee Beams' financial records were not used by the DOJ during the Fieger criminal trial and therefore were never publicly filed or made public; (11) that the compact disc produced by the FEC which it claims is the

only disc provided to it by the DOJ contained more than 100 PDF; (12) that the FEC has failed to preserve and/or produce all of the documents given to it by the DOJ; (13) that the FEC never issued any administrative subpoenas to obtain Plaintiffs' bank records; (14) that there was no certification prepared as required under 12 U.S.C. § 3412 before the FEC obtained from the DOJ Plaintiffs' bank records; and (15) that Plaintiffs are entitled to statutory damages in the amount of \$100 per person, total of \$200, in addition to any other amount the Court deems appropriate under the law.

For the reasons contained herein, Plaintiffs respectfully request that this Honorable Court enter judgment in its favor and award them damages as set forth in the RFPA.

Respectfully submitted,

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Dated: September 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this matter.

s/ Michael R. Dezsi
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