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

JACK and RENEE BEAM,	)	
	)	
Plaintiffs,	)	No. 07 CV 1227
	)	
v.	)	Hon. Rebecca R. Pallmeyer
	)	
MICHAEL B. MUKASEY, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANT ATTORNEY GENERAL'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

As the Attorney General demonstrated in his opening memorandum, Plaintiffs' Second Amended Complaint must be dismissed as a matter of law. As this Court has previously held, Plaintiffs' claims should be dismissed on jurisdictional grounds under Fed. R. Civ. P. 12(b)(1) because they are not ripe for judicial determination, nor have Plaintiffs suffered a judicially cognizable injury. Even if Plaintiffs could overcome the jurisdictional hurdles to maintaining their lawsuit, their claims fail as a matter of law under Fed. R. Civ. P. 12(b)(6). Count I alleges a violation of the Right to Financial Privacy Act ("RFPA"), even though it is apparent from the statutory text that the RFPA does not apply to the grand jury subpoena about which Plaintiffs complain. Count II alleges a claim of retaliation for constitutionally protected activity based on a Department of Justice investigation (which led to the indictment of two individuals at Plaintiff Jack Beam's law firm), even though the Supreme Court has not recognized a constitutional tort based on a retaliatory criminal investigation, and even though Plaintiffs fail to meet the criteria for a claim of retaliation. Count III alleges a claim of selective and vindictive prosecution, even though Plaintiffs have not been prosecuted in conjunction with the alleged investigation.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' original Complaint focused on alleged violations of the Federal Election Campaign Act ("FECA"). Defendants filed motions to dismiss, which the Court granted. After the Court dismissed the Complaint, Plaintiffs amended their Complaint to add new claims: an alleged violation of the RFPA and retaliation for engaging in constitutionally protected activity. Defendants again filed motions to dismiss, which the Court granted. After the Court dismissed the Amended Complaint for lack of ripeness and injury, Plaintiffs filed a Second Amended Complaint, which alleges the following counts: (1) a violation of the RFPA; (2) retaliation for constitutionally protected activity; and (3) selective and vindictive prosecution. Defendants have again filed motions to dismiss.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

This court has already ruled that Plaintiffs' claims are not ripe for disposition. Specifically, the Court determined that the three criteria under *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) have not been met because: (1) the issue was not purely legal; (2) there has been no final agency action because "the decision to investigate is preliminary and not subject to judicial review;" and (3) Plaintiffs "failed to demonstrate any direct and immediate impact that the alleged investigation has had on their rights and interests." Mem. Op. & Order at 10-13 (Doc. #90). Each of these factors remains present in this case. Because Plaintiffs' allegations involve the government's actions during a criminal investigation, and because Plaintiffs have not been indicted or suffered any other injury as a result of this alleged investigation, Plaintiffs' claims remain unripe for review. Plaintiffs argue that the statute of limitations has passed to indict them

for their campaign contributions to the John Edwards presidential campaign and that, therefore, their current lawsuit is ripe for disposition.[1] Pls.' Opp. at 12-13. This argument, however, merely points out Plaintiffs' lack of injury.

In order to meet Article III standing requirements, Plaintiffs must show that they "personally" have suffered an actual or threatened injury. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Plaintiffs' first claim – a violation of the RFPA – involves the alleged injury of the government's access of their bank records without notice to them. Plaintiffs have produced evidence of the government's subpoena for their bank records – a subpoena that was issued in conjunction with the federal criminal investigation of Geoffrey Fieger and Vernon Johnson in the Eastern District of Michigan. *See* Pls.' Opp. Ex. B. "[A] federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). As Plaintiffs now demonstrate, their bank records were requested through a grand jury subpoena, and "a grand jury subpoena issued through normal channels is presumed to be reasonable." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991). The mere fact that Plaintiffs' records were accessed through a grand jury subpoena as part of a criminal investigation that led to the indictment of others (but not Plaintiffs), does not lead to a cognizable injury to Plaintiffs. *See Matter of Grand Jury Subpoena Issued to Chesnoff*, 62 F.3d 1144, 1146 (9th Cir. 1995) (dismissing appeal for lack of standing because litigant who was not the subject of the challenged criminal investigation had not suffered injury adequate to satisfy

[1] FECA contains a five year statute of limitations for criminal proceedings. 2 U.S.C. § 455(a).

Article III's case-or-controversy requirement).

Plaintiffs' second and third claims are based on the alleged government attempts to "chill" Plaintiffs' constitutional rights. *See* Second Am. Compl. ¶¶ 27, 33; Pls.' Opp. at 13. Plaintiffs cannot feel "chilled" due to any imminent prosecution, as they point out that the statute of limitations for bringing an indictment against them due to the alleged investigation has lapsed. In any event, the Supreme Court has held, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). *See also United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) ("All of the Supreme Court cases employing the concept of 'chilling effect' involve situations in which the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself."). Rather than rest on bare allegations of chill, Plaintiffs must come forward with objective evidence to substantiate their claim that the government's conduct acted as a deterrent to constitutionally protected activity. *Meese v. Keene*, 481 U.S. 465, 473-74 (1987). *See also Bordell v. General Elec. Co.* 922 F.2d 1057, 1061 (2d Cir. 1991) (dismissing case for lack of standing when allegations of chill were unsubstantiated). At no point in their Second Amended Complaint, or their opposition memorandum, do Plaintiffs explain whether and how they have been deterred from exercising any rights due to government activity, let alone proffer any objective evidence to that effect. In fact, they do not allege that they have been chilled; only that government actions were designed to chill their rights. *See* Second Am. Compl. ¶¶ 27, 33. Instead, they seek to raise claims on the mere invocation of "chill," which is insufficient to confer standing.

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM

Even if Plaintiffs could overcome the jurisdictional defects with the Second Amended Complaint, Plaintiffs' claims must be dismissed because they fail to state a claim.

A. Plaintiffs Have Not Stated a Claim Under the Right to Financial Privacy Act

As explained in the Attorney General's opening memorandum, Plaintiffs' claim under the RFPA is based on a mis-reading of the statute. By its own language, the RFPA does not apply to grand jury subpoenas. Section 3413(i) of the RFPA states:

> *Nothing in this subchapter (except sections 3415and 3420 of this title) shall apply to any subpena [sic] or court order issued in connection with proceedings before a grand jury*, except that a court shall have authority to order a financial institution, on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury, under the circumstances and for the period specified and pursuant to the procedures established in section 3409 of this title.

12 U.S.C. § 3413(i) (emphasis added). Because a grand jury subpoena was issued for Plaintiffs' bank records, *see* Pls.' Opp. Ex. B, the RFPA does not apply.

Plaintiffs argue that, because Section 3413 contains a provision through which a court may order a financial institution not to notify a customer of the existence of a subpoena, that the government must apply to a court for such an order if it wants to keep a grand jury subpoena secret. Pls.' Opp. at 7. This reading of the statute is belied by the statute's plain language, which explicitly states that the RFPA does not apply to grand jury proceedings, and Plaintiffs' interpretation has been rejected by the courts. When counsel raised the same argument in the criminal *Fieger* case, the court stated:

> Defendant Fieger avers that § 3413 provides that the government must seek under § 3409 to get the 'gag order' and to keep the bank from disclosing information. However, § 3413 expressly states that no section (save §§ 3415 and 3420) of the

> statute is applicable in connection with grand jury subpoenas, which includes § 3409. The fact that § 3413 imports the circumstances and time limit of § 3409 does not mean that § 3409 applies in situations involving grand jury subpoenas. Further, nothing in § 3413(i) indicates that a financial institution or the government is obligated to disclose the grand jury subpoena to the customer.

United States v. Feiger, et al., No. 07-CR-50906, 2007 WL 4181570 at *3 (E.D. Mich. Nov. 27, 2007) (footnote omitted). Likewise, other courts have concluded that Section 3413(i) exempts grand jury subpoenas from the reach of RFPA. *See In re Grand Jury Proceedings*, 636 F.2d 81, 84 (5th Cir. 1981) (concluding that,"[u]nder 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, the reimbursement section, and Section 3420 which controls the nature of the search"); *Taylor v. United States Air Force*, 176 F.3d 489, 1999 WL 270405 at *2 (10th Cir. 1999) (Table) ("generally, the RFPA does not apply 'to any subpoena or court order issued in connection with proceedings before a grand jury'") (quoting 12 U.S.C. § 3413(i)).[2]

While Defendants are clearly entitled to judgment as a matter of law on Plaintiffs' claim under the language of the RFPA, Defendants are also entitled to judgment based on the subpoena itself. Contrary to Plaintiffs' characterization of the language in the subpoena, the government simply *requested* Merrill Lynch to maintain the secrecy of the subpoena, and Merrill Lynch was

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[2] In his motion to dismiss, the Attorney General pointed out in a footnote that 18 U.S.C. § 1510(b)(2) makes it a crime for financial institutions to disclose grand jury subpoenas to customers. *See* Def.'s Mem. at 9 n.4; *Fieger*, 2007 WL 4181570 at *2. While that is an accurate statement of the law as it applies to FDIC insured financial institutions, the anti-disclosure provision of section 1510(b)(2) does not apply to Merrill Lynch because it is not within the meaning of "financial institution" as that term is defined in the criminal code. *Compare* 18 U.S.C. § 20 (defining "financial institution" for Title 18) to 12 U.S.C. § 3401(1) (defining "financial institution" for the RFPA). In any event, the Court need not reach this issue, as it is unrelated to Plaintiffs' arguments under the RFPA.

fully informed that the RFPA did not require secrecy.[3] The cover letter accompanying the subpoena stated:

> The government requests that your institution not provide any information about this grand jury subpoena to any third party – including the affected accountholder(s) – for a period of 90 days. *Federal law permits but does not require you to comply with this request for nondisclosure*. *See* 12 U.S.C. § 3413(i). However, any disclosure to third parties could impede the investigation being conducted and thereby interfere with the enforcement of federal criminal law.

Pls.' Opp. Ex. B at 2 (emphasis added). This plain language fully disclosed to the bank that, while the government requested secrecy of the subpoena for law enforcement purposes, the bank maintained discretion with respect to its treatment of the subpoena.[4]

B. Plaintiffs Cannot State a Claim for Retaliation for Constitutionally Protected Activity

Plaintiffs' second count is one of retaliation for engaging in constitutionally protected activity. *See* Second Am. Compl. at 5-6. The Attorney General noted that Plaintiffs had not cited a waiver of sovereign immunity applicable to this claim, Def.'s Mem. at 11 n.5, and Plaintiff countered that this suit is not against the sovereign, but is a *Bivens* action against federal officers for a constitutional violation. Pls.' Opp. at 8-9. However, "[a] *Bivens* action may not be maintained against [] federal employees in their official capacities." *Neville v. True*, 900 F. Supp. 972, 978 (N.D. Ill. 1995), citing *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d

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[3] The Court should not consider Plaintiffs' allegations that the prosecutor illegally included a "gag order" threatening a different financial institution, Paychex, during the criminal investigation. *See* Pls.' Opp. at 3 & Ex. A. That subpoena has nothing to do with the Plaintiffs in this case. Additionally, the court flatly rejected this argument when it was raised in the *Fieger* case, finding it to be "without merit or support." 2007 WL 4181570 at *4.

[4] Therefore, even if Plaintiffs could state a claim under the RFPA, it would lie against the bank, not the government.

113, 116 (6th Cir. 1998). Plaintiffs have not sued the Attorney General or the Chairman of the Federal Election Commission in their individual capacities (and the caption on Plaintiffs' Second Amended Complaint explicitly names them solely in their official capacities).[5] Therefore, a *Bivens* action is not available against them. While the caption of the Second Amended Complaint lists "unknown agents of the Federal Bureau of Investigation, in their individual and official capacities" as defendants, Plaintiffs have not included these individuals as parties in the body of the Second Amended Complaint, nor have they attempted to serve such agents in either their official or individual capacities. To the extent Plaintiffs are bringing a *Bivens* action, they clearly have not stated a claim against anyone in their individual capacities, as the Second Amended Complaint is devoid of *any* specific allegations of actions taken by FBI agents in their individual capacities that deprived Plaintiffs of any constitutional rights. To the contrary, Plaintiffs assert that all actions taken by the FBI were taken on behalf of and under the direction of the Attorney General. *See* Second Am. Compl. ¶¶ 22, 23. Because there can be no *Bivens* action against the government itself, and because Plaintiffs allege no facts regarding actions taken in individual capacities, Plaintiffs' second claim must fail.

In any event, Plaintiffs have not met the prima facie elements of sustaining a tort for retaliation. Plaintiffs do not counter the Attorney General's arguments that: (1) the Supreme Court has not yet recognized a claim for a retaliatory investigation, *Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006); and (2) that Plaintiffs have not pled all of the elements of a claim of

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[5] In fact, Michael B. Mukasey was not Attorney General at the time of the factual allegations at issue. *See* Second Am. Compl. ¶ 3 ("At the time of the facts giving rise to Plaintiffs' complaint, Alberto R. Gonzales was the United States Attorney General who served at the pleasure of President George W. Bush.").

retaliation for engaging in a constitutionally protected activity, most notably by alleging the absence of probable cause. *Id.* at 252 ("We hold that want of probable cause must be alleged and proven.").

Plaintiffs cite no cases where a court has held that a claim may be brought for a retaliatory *investigation*, as opposed to a retaliatory prosecution. Given the fact that the Supreme Court, as recently as 2006, questioned whether such a tort could exist*, see Moore*, 547 U.S. at 262 n.9, and Plaintiffs' complete lack of factual allegations supporting such a claim, this claim should be dismissed.[6] The only action Plaintiffs allege was taken by the Attorney General against them during the investigation was accessing their bank account without notifying them that their bank records were taken.[7] *See* Second Am. Compl. ¶ 24. Plaintiffs' conclusory allegations that this action taken against them acted to chill their speech rings false in light of the fact that they did not even know their bank records had been subpoenaed by the grand jury at the time of the investigation. *See* Second Am. Compl. ¶ 15 ("Initially, Merrill Lynch refused to disclose to Plaintiffs whether federal agents had accessed their financial records."); ¶ 17 ("After secretly obtaining Plaintiffs Jack and Renee Beam's private financial records, federal agents sought to

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[6] The prima facie elements of a constitutional tort for retaliation are: (1) participation in constitutionally protected activity; (2) defendant's action injured the plaintiff in a way likely to chill a person of ordinary firmness from further participation in that activity; and (3) in part, defendant's adverse action was motivated by plaintiff's protected activity. *Ctr. for Bio-Ethical Reform, Inc., et al. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007).

[7] Plaintiffs' statement that "Defendants have engaged in a systemic pattern, custom, practice and official policy of retaliating against Plaintiffs for no legitimate or valid reason but instead based on their political support of past and present Democratic candidates for political office," Pls.' Opp. at 11; Second Am. Compl. ¶ 25, constitutes conclusory, factually-unsupported rhetoric. The only fact alleged against the Attorney General that directly relates to Plaintiffs was the access of their bank records as part of the investigation that led to the indictment of Geoffrey Fieger and Vernon Johnson. *See* Second Am. Compl. ¶ 24.

conceal their misconduct in violation of federal law."), ¶ 18 ("sometime after Gonzales and his agents secretly obtained Plaintiffs' private banking records . . ."). Nor do Plaintiffs allege that they were actually deterred from engaging in constitutionally-protected activity; they allege only that government actions were "attempts" to chill Plaintiffs' free speech rights. Second Am. Compl. ¶¶ 27, 33. This is insufficient to state a claim, as Plaintiffs "must proffer some objective evidence to substantiate [their] claim that the challenged conduct has deterred [them] from engaging in protected activity." *Bordell*, 922 F.2d at 1061 (dismissing case where alleged chill was "wholly unsubstantiated"). Therefore, the second prima facie element of a retaliation claim – that defendant's action injured Plaintiffs in a way likely to chill a person of ordinary firmness from further participation in that activity – has not been met.

Nor have Plaintiffs met the third prong of the prima facie case of retaliation – that defendant's adverse action was motivated by plaintiff's protected activity. The complained-of investigation focused on the law firm of Fieger, Fieger, Kenney and Johnson (where Plaintiff Jack Beam is of counsel) and its employees. The subsequent indictment of Messrs. Fieger and Johnson demonstrates that the investigation was not motivated by Plaintiffs' activity at all, let alone a protected activity; it was motivated by the activities of the principals of the Fieger law firm and a pattern of suspicious campaign contributions.

The Supreme Court has held in retaliatory prosecution cases that it is the plaintiff's burden to plead and prove that there was no probable cause for its actions. *Hartman*, 547 U.S. at 252. After the investigation at issue, Geoffrey Fieger and Vernon Johnson were indicted for knowingly and willfully using conduit contributions from their associates as "straw donors" to circumvent the federal election laws capping contributions to political campaigns. *See* Pls.' Opp. to Mot. to

Dismiss Am. Compl. Ex. A (Doc. #61). The indictment details 64 contributions by straw donors to John Edwards' presidential campaign that were subsequently reimbursed by the criminal defendants for the exact amounts as the straw donors' donations. *Id.* at 9-17. The indictment itself is a statement by the grand jury that there is probable cause to believed that the criminal defendants committed these crimes using the straw donors identified in the indictment. Therefore, Plaintiffs cannot demonstrate a lack of probable cause.

C. Plaintiffs Cannot State a Claim for Selective and Vindictive Prosecution

In their opposition, Plaintiffs do not acknowledge the legal standard that they must meet to raise a selective or vindictive prosecution claim, other than to characterize as "absurd" the fact that an indictment must issue for this claim to proceed. Pls.' Opp. at 12. However, the fundamental element of a claim for either selective or vindictive prosecution is, in fact, a prosecution. *See United States v. Cyprian*, 23 F.3d 1189, 1195-96 (7th Cir. 1994). Plaintiffs themselves state that, not only has there been no prosecution of them, but there will be no prosecution of them based on the alleged investigation due to the five-year statute of limitations for FECA violations. Pls.' Opp. at 13; 2 U.S.C. § 455(a).

There is a presumption of regularity regarding charging decisions by law enforcement officials. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). A litigant is not even entitled to move forward with discovery on a selective prosecution claim until he has demonstrated that there is both: (1) a prosecution of him when similarly situated persons are not prosecuted; and (2) a discriminatory intent in the prosecution. *See id.* at 465-66; *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002). This standard is "rigorous." *Armstrong*, 517 U.S. at 468. Plaintiffs do not come close to meeting these standards in the Second Amended Complaint. Plaintiffs

proffer no allegations of other, similarly situated individuals who have been treated differently. Nor are there any facts alleged at all that would support a discriminatory intent. Indeed, the only individuals actually prosecuted as a result of this investigation – Geoffrey Fieger and Vernon Johnson – raised this claim in their criminal case, and a court rejected it. *See United States v. Fieger, et al.*, No. 07-CR-20414, March 20, 2008 Order (E.D. Mich.) (Doc. #225).

CONCLUSION

For the foregoing reasons, the Attorney General's motion to dismiss the Second Amended Complaint should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum was served on July 15, 2008 in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing ("ECF") pursuant to the district court's system as to ECF filers.

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