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

JACK BEAM and RENEE BEAM,	)	
	)	Civil No. 07cv1227
Plaintiffs,	)	
	)	Judge Rebecca R. Pallmeyer
v.	)	
	)	
MATTHEW S. PETERSEN, FEDERAL ELECTION COMMISSION CHAIRMAN,	)	MEMORANDUM IN SUPPORT OF PETITION FOR INTERLOCUTORY APPEAL, MOTION TO AMEND ORDER, AND MOTION TO STAY PROCEEDINGS PENDING APPEAL
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF COMBINED PETITION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND MOTIONS TO AMEND ORDER AND STAY PROCEEDINGS PENDING APPEAL

I. INTRODUCTION

Although the federal courts do not routinely grant petitions for interlocutory appeals, the Seventh Circuit has explained that "[i]t is equally important . . . to emphasize the duty of the district court and of [the Seventh Circuit] as well to allow an immediate appeal to be taken when the statutory criteria are met." *Ahrenholz v. Board of Trustees of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000). *See* 28 U.S.C. § 1292(b). Those criteria are met here because whether a securities broker-dealer registered with the Securities and Exchange Commission is a "financial institution" within the meaning of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401-3422, is a controlling and contestable question of law. The answer to that question determines whether this Court has subject-matter jurisdiction over this litigation, and an immediate appeal from the Court's Order of May 27, 2010, will materially advance the ultimate termination of the litigation. The Federal Election Commission ("Commission") is filing this

section 1292(b) petition and related motions within a reasonable time — seven days (including a holiday and a weekend) — after the Court issued its ruling. The Court should therefore certify this important question for an interlocutory appeal to the Seventh Circuit.

I. BACKGROUND

The facts underlying the question of law that the Commission seeks to present to the Seventh Circuit are undisputed. The Commission set out those facts in arguing that this Court lacks subject-matter jurisdiction. *See* Doc. ##161, 180; *see also* Doc. #162 ¶ 6 (FEC's Statement of Material Facts as to which There Is No Genuine Issue). In brief, the plaintiffs do not deny that the financial records allegedly disclosed came from the brokerage arm of "Merrill Lynch," a trade name of certain entities owned at the time relevant to this litigation by Merrill Lynch & Co., Inc., whose primary business was as a broker-dealer of securities. (Doc. #161 at 6.) Although the plaintiffs had money in a Merrill Lynch Cash Management Account ("CMA"), according to Merrill Lynch, a CMA "is an investment and money management vehicle. The VISA card and checking features are intended to provide clients with easy access to the assets in their accounts, but the [CMA] is not a bank account." (Doc. #161 at 6 n.3.) And the Merrill Lynch subsidiary that offers the Cash Management Account service is not a bank, but a securities broker-dealer. (Doc. #180 at 5; *see id*. at 5-8.)

The RFPA defines "financial institution" in relevant part as "any office of a bank, savings bank, card issuer [as defined elsewhere], industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution." 12 U.S.C. § 3401(1).

In its Order of May 27, 2010 (Doc. #181), the Court denied the Commission's second motion for summary judgment (Doc. #161). The Court stated that "the Right to Financial

Privacy Act defines 'financial institution' broadly" and concluded that "the financial services furnished by Merrill Lynch place it comfortably within that category."

II. THE CRITERIA FOR AN IMMEDIATE INTERLOCUTORY APPEAL HAVE BEEN MET

A. Legal Standard

Section 1292(b) provides that a litigant may take an interlocutory appeal if the underlying order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Under the Seventh Circuit's interpretation of section 1292(b), an interlocutory appeal is appropriate if "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief and Development,* 291 F.3d 1000, 1007 (7th Cir. 2002).

B. The Appeal Presents a Controlling Question of Law

Under the first factor specified in section 1292(b), a litigant may take an interlocutory appeal if the underlying order "involves a controlling question of law." The Seventh Circuit has concluded that a "question of law" as used in section 1292(b) refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz,* 219 F.3d at 676. The question raised here concerns the meaning of the statutory term "financial institution" in the RFPA: Does that term include a securities broker-dealer even though that kind of company is not listed in the term's definition? This question of law is "controlling." If the Seventh Circuit finds that a securities broker-dealer does not come within

the RFPA's definition of "financial institution," this Court will lack subject-matter jurisdiction over the litigation.

C. There is Substantial Ground for Differing Opinions on Whether a Securities Broker-Dealer Comes within the RFPA's Definition of "Financial Institution"

The issue of whether a securities broker-dealer is a "financial institution" under the RFPA also satisfies section 1292(b)'s requirement that there be substantial ground for a difference of opinion on the issue raised or, under the Seventh Circuit's interpretation, that the issue be "contestable." *Boim,* 291 F.3d at 1007. Moreover, to the best of our knowledge, whether a securities broker-dealer is a "financial institution" under the RFPA is an issue of first impression. *See id.* at 1007-1008 ("As these are questions of first impression, the application of these statutes to the facts alleged here is certainly contestable.").

The RFPA's definition of "financial institution," *supra* p. 2, does not specify that securities broker-dealers of any kind fall within its coverage. 12 U.S.C. § 3401(1). Under the statutory construction doctrine "*inclusion unius, exclusion alterius*" — the listing of some things implies that other things were purposefully excluded — securities broker-dealers are not covered by the RFPA. *Compare* 31 U.S.C. § 5312(2) (Bank Secrecy Act treats brokers and dealers separately from other entities). In addition, the courts must narrowly interpret the scope of the entities listed in the statutory definition of "financial institution" because the RFPA waives the federal government's sovereign immunity; as the Commission explained in opposing the plaintiffs' jury demand, waivers of sovereign immunity are strictly construed. *See* Doc. ##160, 179. The Supreme Court has repeatedly explained that the federal courts may not extend a waiver beyond what the statutory language requires. *See, e.g., Lane v. Pena,* 518 U.S. 187, 192 (1996); *Lehman v. Nakshian,* 453 U.S. 156, 170 (1981). *Cf. SEC v. Jerry T. O'Brien, Inc.,*

467 U.S. 735, 745 (1984) ("The most salient feature of the [RFPA] is the narrow scope of the entitlements it creates."); Doc. #161 at 6-9 (demonstrating the narrow construction of RFPA provisions).

These arguments evidence "substantial ground" for differing opinions on whether securities broker-dealers are within the scope of the RFPA.

D. An Immediate Appeal from the Order Will Materially Advance the Ultimate Termination of the Litigation

Finally, in determining whether to certify an interlocutory appeal, a court considers whether an immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Here, an immediate appeal will satisfy this statutory factor. The Court has set a trial date for July 6. *See* Doc. #181. As we have noted, if the appellate court finds that a securities broker-dealer does not come within the RFPA's definition of "financial institution," this Court will lack subject-matter jurisdiction over the litigation. The case will end without the expense and effort of pre-trial preparation and a trial; the Court would either dismiss the case for lack of jurisdiction, *see* Fed. R. Civ. P. 12(h)(3), or grant the Commission summary judgment on that ground. If the appellate court holds that a securities broker-dealer does come within the definition, that holding will simplify the issues to be resolved at the bench trial.

III. AMENDING THE MAY 27 ORDER AND STAYING FURTHER PROCEEDINGS IN THIS COURT ARE NECESSARY TO MAKE THE SECTION 1292(b) APPEAL EFFECTIVE

Section 1292(b) provides that when a district judge makes an interlocutory order appealable under the statutory factors, "he shall so state in writing in such order." The May 27 Order does not include that statement. However, Federal Rule of Appellate Procedure 5(a)(3) authorizes a district court to amend an order to add the findings required for interlocutory

appeal.[1] Thus, if the Court grants the Commission's section 1292(b) petition, it should also grant the Commission's motion to amend the May 27 Order.

An application for an appeal under section 1292(b) "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." A stay of proceedings in this Court is necessary to preserve one of the benefits of an interlocutory appeal — saving this Court's and the parties' resources.

IV. CONCLUSION

The criteria for an interlocutory appeal under 28 U.S.C. § 1292(b) are satisfied. The Commission requests, therefore, that the Court certify an interlocutory appeal from the May 27 Order denying in part the Commission's second motion for summary judgment. The Commission also requests that the Court effectuate the appeal by amending the May 27 Order to add the necessary findings and by staying the district court proceedings pending the Seventh Circuit's disposition of the appeal.

Respectfully submitted,

Thomasenia P. Duncan*
General Counsel

David Kolker*
Associate General Counsel

Harry J. Summers*
Assistant General Counsel

---

[1] (a) Petition for Permission to Appeal

. . .

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

/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, D.C. 20463
(202) 694-1650

June 3, 2010