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

JACK BEAM and RENEE BEAM, Plaintiffs, v. MICHAEL B. MUKASEY, et al., Defendants.	Civil No. 07cv1227 Judge Pallmeyer Mag. Judge Cole MEMORANDUM OF LAW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Defendant Federal Election Commission ("Commission" or "FEC") files this brief in support of its Motion to Dismiss Plaintiffs' Second Amended Complaint ("2nd Am. Comp.") on the grounds that this Court lacks subject matter jurisdiction and that plaintiffs have failed to state a claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Following this Court's dismissal of plaintiffs' first two complaints, plaintiffs have filed a third effort that repeats claims already presented, in Counts I (Right to Financial Privacy Act) and II (retaliation for exercise of First Amendment rights), and in Count III adds a new Fifth Amendment selective prosecution claim.

This Court lacks jurisdiction over plaintiffs' Second Amended Complaint. Plaintiffs have not "cure[d] the deficiencies identified" (Minute Order; Docket # 89) in this Court's March 7, 2008 Memorandum Opinion and Order ("Mem. Op.") (Docket # 90) with regard to standing or ripeness. Thus, plaintiffs' repeated Counts I and II should be dismissed under the law of the case doctrine. In any event, plaintiffs have again failed to demonstrate any injury in fact or a reason for this Court to intervene in any ongoing federal investigation. Plaintiffs' new selective

prosecution claim should likewise be dismissed for lack of ripeness. In addition, plaintiffs' retaliation and selective prosecution claims are barred by sovereign immunity.

Plaintiffs have also failed to state a claim. There is no set of facts under which plaintiffs can recover on Counts I or II, since plaintiffs continue to make essentially the same speculative and conclusory claims about alleged ongoing investigations under the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 ("FECA" or "Act"), including plainly untenable claims about improprieties in connection with the alleged seizure of their financial records. Plaintiffs' new selective prosecution claim also fails to state a claim because it fails to allege that the Commission has singled out plaintiffs for prosecution based on an improper motive. Accordingly, plaintiffs' entire Second Amended Complaint should be dismissed with prejudice.

I. BACKGROUND

On March 2, 2007, attorney Jack Beam and his spouse, Renee Beam, filed their Application for Writ of Mandamus and Complaint (Docket #1) in this case. The plaintiffs alleged that they were the targets of an ongoing grand jury investigation centering on the Michigan law firm with which Mr. Beam is affiliated (Fieger, Fieger, Kenney & Johnson) and involving allegedly illegal contributions during the 2004 Presidential election campaign. Plaintiffs also alleged that the Department of Justice ("Department") cannot enforce the FECA unless and until the Commission refers the relevant matter to the Department.

This Court issued a Minute Order (Docket # 46) on June 22, 2007, granting defendants' motions to dismiss without prejudice. Plaintiffs then filed their Amended Complaint ("Am. Comp.") (Docket # 47) on June 29, 2007. The Amended Complaint alleged that defendants had violated the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq., by "secretly accessing Plaintiffs' financial records and/or suppressing the existence of [their]

acts" (Am. Comp. ¶ 26) and failing to inform plaintiffs of the alleged access (id. ¶ 12). The Amended Complaint also alleged that defendants had "conspired to retaliate" (id. ¶¶ 32, 40) against plaintiffs for exercising their First Amendment rights. Plaintiffs also renewed their claims that defendants had failed to comply with the alleged referral requirement.

On March 7, 2008, the Court dismissed the Amended Complaint, ruling that plaintiffs had "not pleaded a violation of FECA's referral provision." Mem. Op. at 18. See id. at 13-22. With respect to plaintiffs' other claims, the Court held that it lacked subject matter jurisdiction because plaintiffs lacked standing and because their claims were not ripe. Id. at 6-13. Plaintiffs filed their Second Amended Complaint on March 24, 2008.[1]

II. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' SECOND AMENDED COMPLAINT

This Court's March 2008 opinion explained (Mem. Op. at 4-13) why the Court lacked subject matter jurisdiction over plaintiffs' First Amended Complaint, and the same reasoning applies here to plaintiffs' third meritless attempt to invoke the Court's jurisdiction. In particular, the Court held (id. at 6-13) that plaintiffs lacked standing to pursue their claims and that the claims were not ripe for judicial review. Plaintiffs' newest complaint still fails to cure the deficiencies the Court identified; plaintiffs have reiterated the same basic RFPA and constitutional retaliation claims, and any minor changes in their allegations cannot establish

[1] Because Plaintiffs' Second Amended Complaint renews issues that have already been fully briefed by the parties, the Commission additionally relies on the following earlier pleadings: August 24, 2007, Memorandum in Support of Defendant Federal Election Commission's Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim ("FEC Brief") (Docket # 56); August 23, 2007, Defendant Attorney General's Memorandum in Support of His Motion to Dismiss ("DOJ Brief") (Docket # 51); October 19, 2007, Defendant Federal Election Commission's Reply Brief in Support of Its Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim ("FEC Reply") (Docket # 65); and October 19, 2007, Defendant Attorney General's Reply Memorandum in Support of His Motion to Dismiss ("DOJ Reply") (Docket # 66).

standing or ripeness. Plaintiffs' new selective prosecution claim also suffers from the absence of ripeness, and should likewise be dismissed. In addition, plaintiffs' retaliation and selective prosecution claims are barred by sovereign immunity.

In a motion to dismiss under Fed. R. Civ. P. 12(b)(1), plaintiffs bear the burden of demonstrating the Court's subject matter jurisdiction. As the Supreme Court explained in Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (citations omitted):

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.

When confronted with a motion to dismiss for lack of subject matter jurisdiction, "the plaintiff has the obligation to establish jurisdiction by competent proof." Sapperstein v. Hager, 188 F.3d 852, 855 (7th Cir. 1999). Because plaintiffs here have failed to meet that obligation, their Second Amended Complaint should be dismissed.

A. Plaintiffs Still Cannot Demonstrate an Injury in Fact and Thus Continue to Lack Standing to Pursue Counts I and II

As the Court previously explained (Mem. Op. at 6-7), plaintiffs have the burden of demonstrating standing. To make this showing, plaintiffs must demonstrate an "injury in fact" that is "actual or imminent, not conjectural or hypothetical"; a "causal relation between the injury and the challenged conduct"; and a "likelihood that the injury will be redressed by a favorable decision." Wisconsin Right to Life, Inc. v. Schober, 366 F.3d 485, 489 (7th Cir. 2004) (citation omitted). Plaintiffs still cannot meet their burden.

Plaintiffs' RFPA and retaliation claims are substantially the same as those this Court dismissed previously for lack of standing. See Mem. Op. at 6-10. The Court's holding on these issues is now the law of the case, and the Court need not reexamine these claims. "The doctrine

of the law of the case creates a presumption against a court's reexamining its own rulings in the course of a litigation." Marseilles Hydro Power LLC v. Marseilles Land & Water Co., 481 F.3d 1002, 1004 (7th Cir. 2007) (emphasis in original). The "doctrine of law of the case precludes reexamining a previous ruling (unless by a higher court) in the same case unless it was manifestly erroneous." Starcon Int'l, Inc. v. NLRB, 450 F.3d 276, 278 (7th Cir. 2006). "This presumption against reopening matters already decided reflects interests in consistency, finality, and the conservation of judicial resources, among others." Minch v. City of Chicago, 486 F.3d 294, 301 (7th Cir. 2007).[2]

Even if Counts I and II were not subject to the law of the case doctrine, plaintiffs have failed to "cure the deficiencies" in their claims (Minute Order; Docket # 89), and they again cannot demonstrate standing. The Attorney General previously showed (DOJ Brief at 10-12) that plaintiffs failed to demonstrate that they personally have "suffered some actual or threatened injury as a result of the putatively illegal conduct." Valley Forge Christian Coll. v. Ams United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). Plaintiffs failed to do so in part because they were seeking review of allegedly improper conduct that affected others — the employees and associates of the Fieger law firm who were the target of the allegedly illegal investigatory raids — not themselves. In their current complaint, plaintiffs have again failed to allege that they have been indicted or brought before a grand jury, or that any governmental

[2] While the Court's standing analysis focused on plaintiffs' RFPA claim, it appears to have encompassed the retaliation claim as well. In its discussion, the Court described (Mem. Op. at 7) the many allegations plaintiffs made about what plaintiffs call a "politically motivated investigation." 2nd Am. Comp. ¶ 2. The Court's discussion of all plaintiffs' claims together in reaching the conclusion that plaintiffs suffered "no harm" (Mem. Op. 8) establishes a presumption that the standing issue was decided against plaintiffs as to all claims in the previous complaint. See In re Soybean Futures Litigation, 892 F. Supp. 1025, 1042 (N.D. Ill. 1995).

agent raided their own home or subjected them to harassment. In the standing context, the third party standing rule "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Warth v. Seldin, 422 U.S. 490, 509 (1975). Third party standing is proper only when a litigant has a "sufficiently concrete interest" in the outcome of the dispute and a close relation to the third party, and when something prevents that third party from protecting his or her own interests. Powers v. Ohio, 499 U.S. 400, 411 (1991) (citation omitted). Plaintiffs have not shown that these conditions obtain here.

The Court determined that plaintiffs' "assumption that the government must have obtained their bank records" is not enough to establish an injury in fact. Mem. Op. at 8. Plaintiffs now claim to have "documentary proof" (2nd Am. Comp. ¶ 16) that Department agents obtained their private financial records illegally, but plaintiffs still do not demonstrate how they have been harmed, and they do not supply these putative documents. Reliance upon unspecified documentary proof is insufficient to establish an injury in fact. As the Court observed:

> Where the factual basis for plaintiff's standing is challenged, the plaintiff must present "competent proof," or a showing by the preponderance of the evidence, of standing. Lee v. City of Chicago, 330 F.3d 456, 468 (7th Cir. 2003).

Mem. Op. at 8. Plaintiffs do not meet this standard.

Even if plaintiffs were to demonstrate that Department agents possess their private financial records, that fact alone would not establish that plaintiffs have been harmed. In particular, with respect to their renewed RFPA claim against the Commission, plaintiffs fail to meet the competent proof standard.[3] Plaintiffs acknowledge that their claim that the Department transmitted their financial records to the Commission is based upon only "information and

[3] Although plaintiffs now allege that the Department or the FBI unlawfully obtained their financial records (2nd Am. Comp. ¶ 16), they do not allege that the Commission had any role in obtaining any records in violation of the RFPA.

belief." (2nd Am. Comp. ¶ 18). As this Court previously observed:

> According to the statements in the September 26 letter [the September 26, 2006 "reason to believe" letter from Commissioner Toner], however, the FEC came upon the information regarding Mr. Beam's alleged FECA violations while conducting its ordinary responsibilities. Plaintiffs offer no basis for their assumption that the FEC could only have come upon this information by seizing the Beams' bank records. And Plaintiffs themselves emphasize the investigation of Fieger's or the Fieger law firm's financial records. The court assumes that the FEC could have uncovered information in those records, or in the Edwards campaign's public filings, that might have generated suspicion that Mr. Beam violated § 441f. Plaintiffs thus offer no more than unsubstantiated speculation that the FEC actually obtained their bank records illicitly. This falls far short of establishing injury in fact by a preponderance of the evidence. The court concludes Plaintiffs have not met the requirements of Article III standing.

Mem. Op. at 9-10. Because plaintiffs still rely upon their "unsubstantiated speculation" that the Commission improperly obtained their bank records and not upon competent proof, they have failed to cure the defects that compelled this Court to dismiss their prior Complaint for lack of standing. Their renewed RFPA claim should be dismissed.

Count II of the Second Amended Complaint renews plaintiffs' claim that the defendants have investigated them "under color of law to harass and discourage Plaintiffs from asserting and attempting to assert their constitutional rights to freely engage in the political process" (2nd Am. Comp. ¶ 26). To the extent that plaintiffs allege that defendants' conduct affected others, they again have failed to allege any injury in fact to themselves. The Second Amended Complaint does not allege that plaintiffs have been indicted or compelled to appear before a grand jury, that their home was raided, or that they have been subjected to related harassment. Even if such events could be considered acts of retaliation, plaintiffs cannot state a claim of personal injury based on actions taken by the defendants against third parties. And in any event, plaintiffs have not alleged that the Commission caused any such events to occur.

To the extent plaintiffs allege a violation of their own constitutional rights, the Attorney General showed (DOJ Brief at 15-18) that plaintiffs fail to meet the standards for such claims. In particular, plaintiffs fail to plead an absence of probable cause for the underlying investigations, and such a showing is "an element of a plaintiff's case." Hartman v. Moore, 547 U.S. 250, 266 (2006). Plaintiffs allude to the absence of probable cause with their new allegation (2nd Am. Comp. ¶ 28) that defendants "have engaged in acts of bad faith by invoking … criminal process without any ultimate success, but only to discourage Plaintiffs' civil rights activities." However, Count II fails to show that plaintiffs are actually the subject of such "criminal process," much less to demonstrate any injury as a result of any action by the Commission, which has no criminal jurisdiction.

B. Sovereign Immunity Bars Plaintiffs' Claims of Retaliation and Selective Prosecution

We showed (FEC Brief at 8-11) that federal courts lack jurisdiction over a claim against a federal agency unless Congress, by statute, expressly and unequivocally waives the United States' immunity to suit. Such a waiver will not be implied, Lane v. Pena, 518 U.S. 187, 192 (1996), and must be construed strictly in favor of the sovereign, United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992). "[S]overeign immunity shields the Federal Government and its agencies from suit[,]" and "is jurisdictional in nature." Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994). See also 14 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3654 (3d ed. 1998 & 2007 Supp.). Thus, "[t]o maintain an action against the United States in federal court, a plaintiff must identify a statute that confers subject matter jurisdiction on the district court and a federal law that waives the sovereign immunity of the United States to the cause of action." Clark v. United States, 326 F.3d 911, 912 (7th Cir. 2003).

Counts II and III of plaintiffs' Second Amended Complaint state no statutory or other basis for the Court's jurisdiction, and 28 U.S.C. § 1331, upon which plaintiffs generally rely (2nd Am. Comp. ¶4), does not waive the government's sovereign immunity. Under 28 U.S.C. § 1331, the district courts have jurisdiction of "all civil actions arising under the Constitution [or] laws … of the United States." "But the analysis of jurisdiction cannot stop with § 1331," North Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir. 1985), because that federal question jurisdictional grant "may not be construed to constitute [a] waiver[ ] of the federal government's defense of sovereign immunity." Beale v. Blount, 461 F.2d 1133, 1138 (5th Cir. 1972). Accord, e.g., Clark v. United States, 596 F.2d 252, 254 (7th Cir. 1979). "Consequently, district court jurisdiction cannot be based on § 1331 unless some other statute waives sovereign immunity." Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 961 (10th Cir. 2004). Plaintiffs also rely on 28 U.S.C. §§ 2201 and 2202, but as we explained (FEC Brief at 10-11), these statutes do not waive sovereign immunity and thus do not alone create an independent basis for jurisdiction. See White v. Administrator of GSA, 343 F.2d 444, 445-46 (9th Cir. 1965); Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft, 360 F. Supp.2d 64, 66 n.3 (D.D.C. 2004).

Because plaintiffs allege no valid basis for a waiver of sovereign immunity, Counts II and III should be dismissed with prejudice for lack of subject matter jurisdiction.

C. Plaintiffs' Claims Are Unripe

None of plaintiffs' current claims is ripe for review. As this Court explained, "the ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" Mem. Op. at 10 (quoting Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808 (2003)). "Cases are unripe when the parties point

only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts. In this regard, ripeness is closely related to its justiciability cousins, the doctrines of finality and standing." Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992). In reviewing plaintiffs' previous complaint, the Court applied the ripeness standard enunciated in Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), which requires a court to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

The Court found (Mem. Op. at 10-13) that plaintiffs' claims were not fit for judicial decision because they raised factual, and not purely legal, issues; because they would compel the court to review government action that is not final; and because they called for a judicial decision that would result in no immediate impact on plaintiffs. Those findings apply equally to plaintiffs' current allegations. Because any investigations into the plaintiffs' activities are not complete, there is no final action, and any court decision could not materially affect plaintiffs. The Court also found that plaintiffs had failed to identify any hardship they would suffer if the Court delayed adjudication of their claims, since an ongoing criminal (or administrative) investigation does not ordinarily impose sufficient hardship to warrant pre-indictment judicial review. Plaintiffs have articulated no new hardship they would suffer while awaiting the results of any pending investigations. Thus, the "Beams will not be forced to endure hardship simply because the dispute is deemed not ripe for adjudication." Mem. Op. at 13. Because the Court's prior ripeness conclusions are the law of the case, see supra p. 5, and because plaintiffs' new claims are unripe in any event, all of the claims in the Second Amended Complaint should be dismissed.

III. PLAINTIFFS' SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM

A motion to dismiss for failure to state a claim should be granted pursuant to Fed. R. Civ. P. 12(b)(6) if "no relief could be granted under any set of facts that could be proved consistent with the allegations," Christensen v. County of Boone, Illinois, 483 F.3d 454, 458 (7th Cir. 2007), or if "plaintiff could prove no set of facts in support of his claims that would entitle him to relief," Alper v. Altheimer & Gray, 257 F.3d 680, 684 (7th Cir. 2001). See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

A claimant must provide "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (citations and ellipsis omitted). Thus, a complaint must contain a "statement of circumstances, occurrences, and events in support of the claim presented" and not mere conclusory statements. Id. at 1965 n. 3 (citing 5 Wright & Miller, Federal Practice and Procedure § 1202, at 94 (2008)). A plaintiff must provide the "grounds" for an entitlement to relief, which "requires more than labels and conclusions [or] formulaic recitation of the elements of a cause of action." Id. at 1965 (citations and brackets omitted); see also Walker v. S.W.I.F.T., 491 F. Supp. 2d 781, 787 (N.D. Ill. 2007).

A. Plaintiffs' RFPA and Retaliation Allegations Fail to State a Claim

We showed (FEC Brief at 5-8 and FEC Reply at 3-9) that plaintiffs failed to state a claim against the Commission for any violation of the RFPA in their previous complaint, and their Second Amended Complaint does no more to explain how the Commission has allegedly violated that statute. Indeed, their newest complaint does not even allege that the Commission played any role whatsoever in allegedly obtaining plaintiffs' financial records from their bank.

We have also explained (FEC Brief at 7-8) that subpoenas or court orders issued pursuant to grand jury proceedings are exempt from the RFPA. 12 U.S.C. § 3413(i). Accordingly, plaintiffs must present competent proof that the Commission obtained their financial records in an unlawful manner and not through grand jury proceedings. They have not done so. Indeed, as we have shown (supra p. 7), plaintiffs proffer only "information and belief" to support their claim that the Commission ever possessed their private banking information. Plaintiffs' RFPA claim, therefore, is on its face "speculative," Bell Atlantic, 127 S. Ct. at 1965, and a speculative pleading "which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." Jackson v. E.J. Brach Corp., 176 F.3d 971, 978 (7th Cir. 1999) (citations omitted). The RFPA claim must be dismissed.[4]

The same is true of plaintiffs' retaliation claim. As we showed (FEC Brief at 11-13), plaintiffs fail to allege any factual grounds that could support a claim that the Commission has committed a retaliatory constitutional tort. Plaintiffs again allege that the Commission received their bank records, but as we showed (FEC Brief at 11), the RFPA does not apply to DOJ's accessing of records pursuant grand jury subpoena, and it explicitly permits the transfer of such information to another agency for a legitimate law enforcement inquiry. Plaintiffs' current

[4] In fact, as we explained (FEC Reply at 4), the Michigan district court supervising the conduct of DOJ's grand jury investigation (and now a resulting trial) rejected the same arguments plaintiffs have made here. *See* Transcript of August 15, 2007, In Camera Hearing before Judge Gerald Rosen (E.D. Mich.), attached to DOJ Reply as Exh. A (transcript now unsealed). Plaintiffs' counsel argued in that case (as he has here) that DOJ violated the RFPA by "secretly obtain[ing] bank records … by serving subpoenas." Id. at 5. During a lengthy colloquy, Judge Rosen carefully parsed the meaning of §§ 3404(c), 3409, and 3413(i) of the RFPA, and concluded: "Given the very limited nature of the disclosure[s] in 3404(a) that are initially authorized and those set forth and further illuminated in 3404(c), it would be a perverse reading of the statute, Mr. Dezsi, to impose upon the government some affirmative obligation to automatically go under 3409 to a court to get a gag order before those subpoenas were disclosed. It's simply a nonsensical, frankly, reading of these statutes." Id. at 58.

claims against the Commission are even more vague and insufficient than those in their previous complaint: They no longer even mention any Commission investigation.

In any event, the fact that the Fieger law firm itself asked the Commission to open an investigation belies any claim that the Commission has targeted plaintiffs for retaliation. See FEC Brief at 11-12. On February 1, 2006, Thomas A. Cranmer wrote to then-FEC Chairman Toner on behalf of the Fieger law firm to "demand that the FEC convene pursuant to section 437g(a) to determine whether there is any reason to believe, … that the firm or members thereof have committed any campaign funding violations…." Plaintiffs' March 22, 2007 Memorandum in Support of Motion for Declaratory Judgment and Writ of Mandamus (Docket # 10, Ex. A.). Mr. Cranmer asked that the Commission "determine whether there is reason to believe" that his client violated the FECA. Id., Ex. A at 3. Plaintiffs have thus failed to provide any specific basis for a claim of retaliation by the Commission, and Count II should be dismissed.

B. Plaintiffs' New Selective Prosecution Allegation Fails to State a Claim

Plaintiffs claim in their new Count III that the Commission violated their Fifth Amendment rights to be free from selective prosecution because it allegedly "acted with discriminatory purpose and intent by selectively and vindictively targeting Jack and Renee Beam with frivolous and demonstrably false claims of campaign finance violations." (2nd Am. Comp. ¶ 31). Their new claim is based primarily on the Commission's September 2006 "reason to believe" letter, which plaintiffs claim was "designed to threaten, intimidate, and chill the exercise of Plaintiffs' First Amendment rights." (Id. ¶¶ 32-33).

These allegations fail to state a claim. Selectivity in the enforcement of laws, without more, offends no constitutional rights. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," so long as the selection was not

"deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962). "Selectivity is not the same as applying the law to one person alone. A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance." Falls v. Town of Dyer, Ind., 875 F.2d 146, 148 (7th Cir. 1989). Plaintiffs here must show that the Commission's sending of a "reason to believe" letter to them — after the Fieger firm itself requested that an investigation be opened — "had a discriminatory effect and that it was motivated by a discriminatory purpose." United States v. Darif, 446 F.3d 701, 708 (7th Cir. 2006). Further, "[t]o make out a prima facie case of selective prosecution,... [a plaintiff] must show that he (1) … [was] singled out for prosecution while other violators similarly situated were not prosecuted; and (2) the decision to prosecute was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights." Id. (internal citations and quotation marks omitted). Indeed, a defendant claiming selective prosecution

> must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of government actors. This is a high threshold.

United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992).

Here, plaintiffs have alleged that the prosecution about which they complain was motivated by the exercise of their First Amendment rights. 2nd Am. Comp. ¶ 36. But this allegation alone is insufficient to state a prima facie case against the Commission. By definition, the Commission regulates the financing of election campaigns and advocacy. Thus, virtually all of the Commission's enforcement activity is against persons engaged in First Amendment activity, and plaintiffs could hardly establish a discriminatory or selective motive or effect on this basis alone. More specifically, plaintiffs fail to allege or present any facts showing that the

Commission consciously "singled [them] out for prosecution while other violators similarly situated were not prosecuted," Darif, 446 F.3d at 708, or otherwise acted because of plaintiffs' particular First Amendment activity. To the contrary, as we have shown, see supra p. 13, plaintiffs are complaining about a Commission investigation that was requested by the Fieger firm itself — a request that belies any suggestion that the Commission unlawfully singled out plaintiffs for investigation.[5] Finally, because plaintiffs point to no similarly situated persons who were not prosecuted or investigated, they have failed to allege that defendants' law enforcement activity "had a discriminatory effect and that it was motivated by a discriminatory purpose." Id. at 708. (citations omitted)

The selective prosecution doctrine does not permit collateral attacks against legitimate investigations and prosecutions based on mere allegations and speculation, and accordingly Count III of the Second Amended Complaint should be dismissed.

CONCLUSION

For the reasons stated above, this Court lacks jurisdiction and plaintiffs have failed to state a claim upon which relief can be granted. The Federal Election Commission respectfully requests that the Court dismiss the Second Amended Complaint with prejudice.

Respectfully submitted,

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[5] Plaintiffs allege that the September 2006 "reason to believe" letter makes "frivolous and demonstrably false claims of campaign finance violations." 2nd Am. Comp. ¶ 34. However, the letter merely states that the Commission has found a reason to believe a violation has occurred and indicates that an investigation is underway. See Docket # 10, Ex. B.

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