

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

MEMORANDUM IN SUPPORT
OF SECOND MOTION
FOR SUMMARY JUDGMENT

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

Defendant Federal Election Commission (“Commission” or “FEC”) hereby submits this memorandum in support of its motion for summary judgment pursuant to Fed. R. Civ. P. 56 on the single remaining issue in this case, whether the Commission received private financial information of the plaintiffs from the Department of Justice (“DOJ”) in violation of the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (“RFPA”). This Court denied the Commission’s prior motion for summary judgment (Doc. #142) solely because of one portion of the deposition testimony of FEC staff attorney Phillip Olaya that the Court found to be ambiguous. *See* Mem. Opinion and Order of Feb. 4, 2010, at 4-5 (“Feb. 2010 Mem. Op.”) (Doc. #148).

This motion is based on two grounds, each of which independently requires that judgment be entered for the Commission. First, no RFPA violation could have occurred here because plaintiffs’ allegations concern only records that DOJ obtained from “Merrill Lynch,”

and the available evidence indicates that any records DOJ obtained were from a broker-dealer arm of that company. Broker-dealers are not among the “financial institution[s]” covered by the RFPFA, which applies only to records obtained from banks or other specified entities. *See* 12 U.S.C. § 3401(1). At a minimum, plaintiffs have not shown that the records in question came from an entity that is subject to the RFPFA. Thus, even if DOJ had transferred such records to the FEC — which it did not — no RFPFA violation could have occurred here.

Second, there is no credible evidence that the Commission received any of plaintiffs’ private financial records from DOJ. In a new declaration, FEC attorney Phillip Olaya confirms that the relevant testimony at his deposition concerned only the public trial materials contained on a CD the Commission received from DOJ — materials whose transfer could not constitute a violation of the RFPFA, as this Court has suggested. *See* Declaration of Phillip Olaya (“Olaya Decl.”) ¶¶ 4-12, attached as Exh. A; Deposition of Phillip Olaya (“Olaya Dep.”), March 11, 2009, at 21-29, attached as Exh. B; Feb. 2010 Mem. Op. at 4 (Doc. #148). Mr. Olaya further clarifies that he was mistaken when he affirmed at his deposition that he had seen financial information of the plaintiffs on that CD. Mr. Olaya’s declaration removes any ambiguity as to the sole remaining factual issue in this case. Accordingly, this Court should enter summary judgment for the Commission.¹

¹ In the alternative, regarding plaintiffs’ failure to show that the records at issue here were disclosed by a “financial institution” covered by the RFPFA, the Court could dismiss this case for lack of subject-matter jurisdiction or for failure to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(1) or 12(b)(6). *See, e.g., Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1429-30 (7th Cir. 1996) (case dismissed under Fed. R. Civ. P. 12(b)(6)). “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

I. BACKGROUND

As the Commission explained in its prior motion for summary judgment, this case began more than three years ago with a claim, now long dismissed, that the Commission had violated the Federal Election Campaign Act, 2 U.S.C. §§ 431-55, because DOJ had pursued a criminal investigation of a law firm with which Mr. Beam is affiliated (Fieger, Fieger, Kenney, & Johnson) without first receiving a referral from the Commission. *See* FEC Memorandum in Support of Its Motion for Summary Judgment, dated July 10, 2009 (“FEC SJ Mem.”), at 2-3 (Doc. #142-2). Plaintiffs later made other claims, but since March 2008, only one has remained: that the Commission violated the RFPA because it allegedly received private financial records of the plaintiffs in a situation in which the transferring agency (not the FEC) had failed to make and provide notice of a certification as required by 12 U.S.C. § 3412. In early 2009, plaintiffs deposed eight current or former FEC staff members as to this alleged transfer, including Mr. Olaya. *See* FEC SJ Mem. at 7 n.3. The Commission moved for summary judgment in July 2009.

In February 2010, this Court denied the Commission’s motion for summary judgment solely on the grounds that one part of Mr. Olaya’s deposition testimony constituted “sufficient evidence from which a jury could find that the FEC received [the Beams’] financial information in violation of the RFPA.” Feb. 2010 Mem. Op. at 4-5. The Court noted that all parties agreed that the Beams’ financial records had *not* been used as trial exhibits. *Id.* at 5. However, because Mr. Olaya had testified that he had seen the Beams’ financial records on a CD containing testimony and exhibits from the Fieger criminal trial that DOJ provided to the Commission after the trial, the Court stated that “Olaya must be mistaken, and two inferences are possible: either he saw some records that were not trial exhibits or he did not see the Beams’ financial records at

all.” *Id.* In a declaration executed on March 11, 2010, Mr. Olaya has clarified that he was mistaken in affirming during the deposition that materials related to the Beams were on the CD, and he further declared that he has never seen any financial information about the Beams that was received from DOJ. Olaya Decl. ¶¶ 4-12.

II. THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO SUFFICIENT LEGAL OR FACTUAL BASIS TO SUPPORT A FINDING THAT THE AGENCY VIOLATED THE RFPA BY RECEIVING PLAINTIFFS’ FINANCIAL RECORDS

A. Summary Judgment Standards

Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c); *Nat’l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008)). “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), cert. denied, 129 S.Ct. 1349 (2009)(quoting Fed. R. Civ. P. 56(e)). “The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists.” *Id.*

B. No RFPA Violation Could Have Occurred Here Because the Broker-Dealer Arm of Merrill Lynch That Provided Plaintiffs’ Records to DOJ Is Not Among the Entities Covered by the Statute

Plaintiffs’ claim against the Commission must fail because Merrill Lynch is not a “financial institution” within the meaning of the RFPA. Thus, regardless of what kind of documents Merrill Lynch may have released pursuant to DOJ’s grand jury subpoena, because the

RFPA covers only financial records obtained from a “financial institution” as narrowly defined in that statute, plaintiffs’ allegations do not state a claim under the RFPA.

1. The Plaintiffs’ RFPA Claims Are Based on Materials Allegedly Obtained from a Broker-Dealer Arm of Merrill Lynch

Plaintiffs claim that the Commission violated the RFPA because the agency allegedly received from DOJ some “private banking records” relating to the Beams’ accounts at “Merrill Lynch.” Specifically, the Beams allege:

15. Initially, Merrill Lynch refused to disclose to Plaintiffs whether federal agents had accessed their financial records.
16. Subsequently, Plaintiffs Jack and Renee Beam obtained documentary proof that federal agents of the Justice Department and/or FBI had, in fact, obtained their financial records by engaging in acts and/or omissions that violate the Right to Financial Privacy Act. * * *
18. Upon information and belief, sometime after Gonzales and his agents secretly obtained Plaintiffs’ private banking records, Gonzales and his agent(s) transmitted such illegally gathered documents to the Federal Election Commission.

Second Amended Complaint (“2d Am. Compl.”) (Doc. #91).²

“Merrill Lynch” is a trade name of certain entities owned at the time relevant to this lawsuit by Merrill Lynch & Co., Inc., whose primary business was as a broker-dealer of

² As far as the Commission has been able to determine, in the more than 150 docket entries in this case, the only specific description of the records the Beams allege led to an RFPA violation occurs in paragraphs 15-18 of the Second Amended Complaint (Doc. #91) and in the Plaintiffs’ Motion to Compel Compliance with Third Party Subpoena (Doc. #67). That motion references “Merrill Lynch” and “bank records,” ¶¶ 1-6, and its memorandum uses similar terms. Plaintiffs subpoenaed “Merrill Lynch” at a Chicago address. (Doc. #67-1 at 2-3). Merrill Lynch, Third Party Services, acknowledged receipt of the Beams’ subpoena, but stated that “[n]o such records have been found.” (Doc. #67-2 at 2). A letter from DOJ to defense attorneys in the Fieger criminal trial stated that it enclosed, *inter alia*, a copy of a “CD-ROM from Merrill Lynch.” (Doc. #67-3 at 2). Moreover, in its response to a motion to compel in the Fieger criminal case, DOJ indicated that it had subpoenaed records from the “brokerage arm of Merrill Lynch.” United States’ Response to Motion to Compel, dated Nov. 26, 2007, *United States v. Fieger*, Case No. 2:07-cr-20414 (E.D. Mich.) at 2 n.3 (Doc. #108). Thus, the alleged violations

securities. *See* AMERICA’S CORPORATE FAMILIES, Dunn & Bradstreet, Vol. 1 (2008) at 1135-36. At that time 15 entities, owned by the corporate parent or one of its subsidiaries, used the trade name “Merrill Lynch.” Of these 15 entities, only one, along with one of its subsidiaries, was a “bank,” namely, Merrill Lynch Bank USA and its subsidiary Merrill Lynch Business Financial Services, Inc., and both listed their business as “national commercial banks.” *Id.* at 1135. In short, the name “Merrill Lynch” by itself overwhelmingly refers to securities brokers and dealers, *see id. at 1135*, and DOJ’s response to a motion to compel in the related Fieger criminal case noted that DOJ had subpoenaed records from the “*brokerage arm* of Merrill Lynch.” United States’ Response to Motion to Compel, dated Nov. 26, 2007, *United States v. Fieger*, No. 2:07-cr-20414 (E.D. Mich.), at 2 n.3 (Doc. #108) (emphasis added). Thus, plaintiffs have provided no evidence to suggest that their claims about “Merrill Lynch” mean anything other than Merrill Lynch & Co., Inc., or its broker-dealer subsidiaries.³

2. Broker-Dealers are Not “Financial Institutions” Under the RFPFA, So No Violation of That Statute Could Have Occurred Here

The Supreme Court has noted that “[t]he most salient feature of the [RFPFA] is the narrow scope of the entitlements it creates.” *SEC v. Jerry T. O’Brien, Inc.*, 467 US 735, 745 (1984); *see*

of the RFPFA here concern documents DOJ obtained from a brokerage arm of Merrill Lynch. Plaintiffs do not allege that the FEC obtained any records directly from Merrill Lynch.

³ The Beams’ three “CMA” checks made payable to Edwards for President that the FEC’s Audit Division received from that campaign committee, as part of the mandatory audit under 26 U.S.C. § 9038, appear to have been drawn on a Cash Management Account administered by Merrill Lynch. *See* FEC SJ Mem. at 9-11 and Exh. 8. On its website, Merrill Lynch describes its “CMA” or “Cash Management Account” as follows: “As a central asset account, [the 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.” *See* Merrill Lynch Direct Cash Management Account Program Description, https://olui2.fs.ml.com/publish/content/PDF/GWMOL/Direct_Cash_Management_Account_Program_Description.pdf, at 9-10 (visited Mar. 25, 2010). Of course, these three checks were not received from DOJ, and as products of a statutorily-mandated audit, the checks cannot constitute an RFPFA violation. Plaintiffs have never argued to the contrary.

Walker v. S.W.I.F.T. SCRL, 491 F. Supp. 2d 781, 792 (N.D. Ill. 2007) (“*SWIFT*”). By its own terms, the RFPA applies only to “financial records” obtained by the government “*from a financial institution.*” 12 U.S.C. § 3402 (emphasis added). The RFPA defines “financial institution” 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, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

12 U.S.C. 3401(1); *see also SWIFT*, 491 F. Supp. 2d at 792. Because the RFPA does not cover broker-dealers, there is no evidence that DOJ ever obtained any records from a covered entity, so there is no genuine issue of fact that could support a finding of an RFPA violation. The “starting point in any case involving the meaning of a statute is the language of the statute itself.” *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Section 3401(1) does not specify that broker-dealers of securities fall within the definition of “financial institution” covered by the RFPA. Thus, under the familiar statutory construction doctrine “*inclusio unius, exclusio alterius*” — the listing of some things implies that other things were purposefully excluded — broker-dealers are not covered by the RFPA.

The legislative history of the RFPA provides no indication that Congress was targeting securities brokers and dealers. *See* H.R. Rep. 95-1383, 1978 U.S. Code Cong. & Adm. News p. 9273. Broker-dealers play a major role in the nation’s economy, and if Congress had intended that those entities be covered by this significant privacy legislation, it would have said so clearly. “[Congress] does not . . . hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Indeed, if the RFPA applied to records obtained from entities other than

those listed in section 3401(1), a wide range of persons, including individuals, might be subject to RFPFA liability without meaningful notice.

In accord with these principles, the RFPFA's definition of "financial institution" has been construed narrowly. In *SWIFT*, a court in this district held that a supplier of messaging services to financial institutions was not itself a "financial institution" subject to the RFPFA. *SWIFT*, 491 F. Supp. 2d at 792 ("Plaintiffs' conclusory statement that SWIFT 'acted as a financial institution' is not enough to make it so."). See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions") (internal quotation marks omitted). Similarly here, though arms of Merrill Lynch obviously provide financial services and do business with banks, that is not enough to make Merrill Lynch or any particular part of it a "financial institution" within the meaning of section 3401(1) of the RFPFA.

Courts have consistently construed the definitions provisions of the RFPFA narrowly. See, e.g., *O'Brien*, 467 U.S. at 745 (illustrating that the RFPFA limits kinds of "customers" to whom it applies and types of records under its protection); *Collins v. Commodity Futures Trading Comm'n*, 737 F. Supp. 1467, 1478 (N.D. Ill. 1990) (corporation not a "customer" under the RFPFA); *Spa Flying Service, Inc. v. United States*, 724 F.2d 95, 95 (8th Cir. 1984) (per curiam) (same); *Rosiere v. SEC*, 2010 WL 489526 (D. Nev. 2010) (same); *Lee v. McClellan*, No. 3:97-355-P, 1997 WL 882907 (W.D.N.C. 1997 *4) (RFPFA does not apply to corporations or trusts); *In re Porras*, 191 B.R. 357, 359 (Bankr. W.D. Tex. 1995) (trust not a "customer" under the RFPFA); *Donovan v. U.A. Local 38 Plumbers and Pipe Trades Pension Fund of San Francisco*, 569 F. Supp. 1488, 1490 (N.D. Cal. 1983) (pension fund trust records not "financial records" protected by the RFPFA); *Young v. U.S. Dept. of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) (RFPFA

does not apply to court-appointed commissioners, who would otherwise qualify as “government authorities” under the RFPA, when they seek information from financial institutions with court-ordered subpoenas).

When Congress does intend to include broker-dealers within the definition of “financial institution” in privacy laws, it typically makes that inclusion clear. For example, in the Bank Secrecy Act, Congress enumerated many entities under the definition of “financial institution.” In that statute, Congress specifically listed brokers and dealers as a separate category, and distinguished them from various kinds of banks. *See* 31 U.S.C. § 5312(2). Congress has thus demonstrated that it is quite able to make clear that broker-dealers are covered by such statutes when it so intends. The RFPA was enacted 32 years ago, and we are aware of no authority suggesting that Congress intended the statute to include broker-dealers as “financial institutions.”

In sum, plaintiffs have provided no evidence that their allegations about Merrill Lynch involve a “financial institution” under the RFPA, or, indeed, any evidence at all about the financial materials plaintiffs claim were transferred to the Commission. Plaintiffs have failed to meet their burden at the summary judgment stage to show that there is a genuine issue for trial. *See Harney*, 526 F.3d at 1104. Because there is no evidence that an RFPA violation could have occurred in this case, summary judgment should be granted to the Commission.⁴

⁴ The FEC respectfully disagrees with the Court’s earlier conclusion (Oct. 15, 2008 Mem. Op. at 14 (Doc. #108)) that the FEC could be liable under the RFPA because of another entity’s alleged failure to make and provide notice of a certification as required under 12 U.S.C. § 3412. That provision places certain obligations on the agency *transferring* private financial information to another agency. But here, plaintiffs have alleged only that the Commission improperly obtained their private financial records from DOJ. Since section 3412 does not require the receiving agency to take any action, the FEC would have had no obligations under that provision.

C. It Is Now Clear That the Sole Testimony That Prevented a Grant of Summary Judgment to the FEC Referred to a CD Containing Public Trial Materials Whose Transfer Could Not Constitute an RFPA Violation, and Plaintiffs' Records Indisputably Do Not Appear on That CD in Any Event

The Court's recent denial of summary judgment to the Commission was based solely on the ambiguity the Court identified in the deposition testimony of FEC staff attorney Phillip Olaya about whether he had seen plaintiffs' financial information. *See* Feb. 2010 Mem. Op. at 4-5. However, Mr. Olaya has now executed a declaration that makes clear that, when he affirmed during his deposition that he had seen the Beams' financial records, he was discussing the CD from DOJ that contains exhibits from the Fieger criminal trial. Olaya Decl. ¶¶ 4-9, 11 (Attachment A). *See* Olaya Dep. at 21-29 (testimony regarding CD containing Fieger criminal trial exhibits)(Attachment B). Such trial exhibits, as this Court suggested in its recent ruling, Feb. 2010 Mem. Op. at 4, do not contain private financial information, and this CD contained only public trial material, as the Court itself can readily confirm by consulting its copy. *See* Letter from Benjamin A. Streeter III to Judge Pallmeyer, dated April 14, 2009 (Doc. #143) (enclosing CD for Court's review). Mr. Olaya also clarifies in his declaration that he erred in stating that the Beams' financial records were on that CD. Olaya Decl. ¶ 11. And Mr. Olaya testifies that he saw no private financial information from DOJ relating to the Beams in any other form or context. *Id.* ¶¶ 9, 13. His declaration thus confirms that the Commission did not in fact receive any financial records from DOJ in violation of the RFPA.⁵

As explained in Section I above, the Court in its recent decision found that the deposition testimony of Mr. Olaya left open to question whether the Commission had in fact received plaintiffs' private financial information. *See* Feb. 2010 Mem. Op. at 4-5. The Court cited the

testimony at pages 21 and 28 of Mr. Olaya's deposition, particularly the testimony at page 28, where Mr. Olaya eventually responds in the affirmative to counsel's questions as to whether he saw the plaintiffs' names in the "other financial documents" contained on the CD of trial materials that the Commission received from DOJ. *See* Olaya Dep. at 26-28; *see also id.* at 21-29. This testimony, when viewed in context and in light of Mr. Olaya's clarifying declaration, concerns only the contents of the CD that indisputably contains no private financial information of any kind. Because the testimony concerns only that CD, it would be unreasonable to interpret it as suggesting that the Commission received the plaintiffs' financial information from DOJ on some other occasion or in some other form, much less that the agency received plaintiffs' *private financial information in violation of the RFP*A — particularly since the unchallenged testimony of the most knowledgeable witnesses, DOJ's Kendall Day and former FEC attorney Audra Wassom, clearly shows that no such transfer ever occurred. *See* FEC SJ Mem. at 5-6. Indeed, it is important to recognize that Mr. Olaya never stated in his deposition that he had seen *private* financial information of the Beams; he merely responded affirmatively to counsel's questions whether he had seen plaintiffs' information among the "other financial documents" on the CD of trial materials. Nevertheless, in order to remove any possible doubt, Mr. Olaya has now executed a detailed declaration to explain what materials he has seen and to clarify his deposition testimony.

In his declaration, Mr. Olaya explains that he saw two types of information from DOJ related to this matter: summaries of non-grand jury law enforcement interviews ("302" interviews), and public trial materials (testimony and exhibits) from the Fieger criminal trial that

⁵ The Commission offered counsel for plaintiffs an opportunity to depose Mr. Olaya about the testimony in his new declaration, but counsel declined. *See* Letter to Michael Dezsai dated March 12, 2010, attached as Exh. C.

DOJ provided to the Commission on a CD *after the trial concluded*. Olaya Decl. ¶¶ 4-5. Mr. Olaya explains that the trial exhibits consisted of two categories of information, specifically summaries of the timeline of relevant events for each conduit reimbursed by the criminal defendants, and financial records reflecting each conduit's relevant contributions and reimbursements. *Id.* ¶¶ 7-8. Mr. Olaya confirms that none of this material contains any financial information about the Beams. *Id.* ¶¶ 4-9. Mr. Olaya forthrightly explains that in his deposition, he mistakenly stated that he had seen financial information related to the Beams on the CD of Fieger trial exhibits, but that he did so due to a lapse in concentration after having answered in the affirmative to questions about two other individuals' information, and "without fully considering Counsel's questions." Olaya Decl. ¶¶ 11-12. Of course, regardless of whether information about the Beams did appear on that CD, there is no dispute that nothing on the CD is private financial information of anyone. Mr. Olaya also categorically states that "[t]he records DOJ transmitted to the Commission do not include any financial information that related to Jack or Renee Beam." *Id.* ¶ 13.⁶ As this Court correctly recognized in its recent ruling denying summary judgment, which identified only Mr. Olaya's testimony as presenting a triable issue of fact, there is no other evidence to support a finding of RFPA liability here.

Mr. Olaya's declaration, in combination with the evidence presented in the FEC's previous motion for summary judgment, *see* FEC SJ Mem. at 4-11, demonstrates that there is no evidence that the Commission received any private financial records of the Beams from DOJ. Thus, there is no genuine issue of material fact as to whether a violation of the RFPA occurred,

⁶ Mr. Olaya also explains that he saw copies of the three checks from the Beams procured by the FEC's Audit Division pursuant to the audit of the Edwards for President committee required by 26 U.S.C. § 9038. Olaya Decl. ¶ 10. As we have explained, these checks did not come from DOJ. *See supra* p. 6 n.3.

and the Court should grant summary judgment to the Commission. “If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party.” *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996).

III. CONCLUSION

Because the broker-dealer arms of Merrill Lynch are not “financial institutions” covered by the RFPA, and because the Commission has removed any remaining ambiguity as to the one isolated portion of deposition testimony that was found to suggest (contrary to fact and all other evidence) that the Commission received private financial information regarding the Beams, there is no basis to find that Commission has violated the RFPA. The Commission respectfully requests that the Court grant it summary judgment and dismiss this case.

Respectfully submitted,

Thomasenia P. Duncan*
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David Kolker*
Associate General Counsel

Harry J. Summers*
Assistant General Counsel

/s/ Holly J. Baker
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March 29, 2010

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

DEFENDANT'S SECOND MOTION
FOR SUMMARY JUDGMENT

**DEFENDANT'S SECOND MOTION
FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission ("Commission") moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the grounds that there is no legal or factual basis to support a finding that the Commission violated the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et seq.* In support of this motion, the Commission relies on its memorandum of law and its statement of material facts as to which there is no genuine issue, pursuant to Northern District of Illinois LR56.1(a)(3).

PLEASE TAKE NOTICE that Defendant Federal Election Commission's Second Motion for Summary Judgment will be presented to the Honorable Rebecca R. Pallmeyer on Tuesday, April 6, 2010, at 9:00 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

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Harry J. Summers*
Assistant General Counsel

/s/ Holly J. Baker
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March 29, 2010

Phillip Olaya

March 11, 2009

Washington, DC

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THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK AND RENEE BEAM,

Plaintiffs,

v.

CA No. 07-cv-1227

MICHAEL B. MUKASEY, UNITED STATES:
ATTORNEY GENERAL, in his official:
Capacity; FEDERAL ELECTION
COMMISSION CHAIRMAN DAVID M.
MASON, in his official capacity;
UNKNOWN AGENTS OF THE FEDERAL
BUREAU OF INVESTIGATION, in their:
individual and official
capacities,

Defendants.

Washington, D.C.

Wednesday, March 11, 2009

Deposition of

PHILLIP OLAYA, called for examination by
counsel for Plaintiffs, pursuant to notice, at the
Offices of the Federal Election Commission, 999 E
Street, NW, Washington, D.C., commencing at 9:35
a.m., before Barbara A. Huber, Notary Public in and
for the District of Columbia, when were present on
behalf of the respective parties:

1 APPEARANCES:

2 On behalf of Plaintiffs:

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7 On behalf of Defendants:

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* * * * *

1 C O N T E N T S

2	EXAMINATION BY:	PAGE
3	Counsel for Plaintiffs	4
4	Counsel for Defendants	40

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1 PROCEEDINGS

2 Whereupon,

3 PHILLIP OLAYA,

4 was called as a witness by counsel for Plaintiffs,

5 and having been duly sworn by the Notary Public,

6 was examined and testified as follows:

7 EXAMINATION BY COUNSEL FOR PLAINTIFFS

8 BY MR. DEZSI:

9 Q Good morning, Mr. Olaya.

10 A "Olaya." Good morning.

11 Q "Olaya." Good morning. I'm Michael

12 Dezsi. I'm the attorney representing the

13 Plaintiffs, Jack and Renee Beam, in this matter.

14 Mr. Olaya, could you please spell -- say

15 and spell your full name for the record?

16 A Sure. It's Phillip Olaya,

17 P-H-I-L-L-I-P, Olaya, O-L-A-Y-A.

18 Q Okay. And Mr. Olaya, before we get into

19 some substantive matters, if we could just do some

20 housekeeping.

21 Can you tell me when you began your

22 employment at the Federal Election Commission?

1 A Late June 2008.

2 Q Late June 2008. Okay.

3 And can you tell me where were you
4 employed prior to the Federal Election Commission?

5 A Prior to that I was at the U.S.
6 Department of Veterans Affairs, general counsel's
7 office.

8 Q Okay. And that would be from what years
9 to what years, approximately?

10 A June 2006 to June 2008.

11 Q Okay. And how about before that?

12 A Before that I was at the Asian American
13 Legal Defense and Education Fund. And that was in
14 November 2005 to June 2006.

15 Q Okay. And how about before that?

16 A Before that I was doing some contract
17 work here in D.C.

18 Q And you graduated from law school when?

19 A May 2004.

20 Q Okay. And can you tell me, what is your
21 title at the Federal Election Commission?

22 A I'm an attorney in the enforcement

1 division.

2 Q Would that be like a staff attorney?

3 A Staff attorney, that's correct.

4 Q And can you tell me, it's my
5 understanding that you were hired and you worked
6 with Ms. Audra Wassom; is that correct?

7 A That's correct.

8 Q And did you work with her on several
9 different matters, or on any one particular
10 matter?

11 A I worked with her on two matters.

12 Q Okay. And can you tell me, when was the
13 first time you heard of the names Jack or Renee
14 Beam?

15 A Must have been early when I started
16 here. I think this was one of the first cases
17 that I was assigned to, to help out with, so --

18 Q Okay. And when you say cases, are you
19 referring to the general universe of the matter on
20 review 5818?

21 A Right. Correct.

22 Q Okay. Which includes Jack and Renee

1 Beam?

2 A That's correct.

3 Q Okay. And can you just describe to me
4 what exactly your role versus what Audra Wassom's
5 role was in the beginning, when you began working
6 on this?

7 A Okay. Well, when I started, I was
8 basically I guess assigned to take over the case
9 from Audra. So for the first few weeks, you know,
10 she had just briefed me, kept me up-to-date on
11 what was going on in the case, what had happened
12 in the -- in the matter. And keep in mind, you
13 know, this was my first matter that I had handled
14 at the FEC, so I was just learning about the
15 procedure here, how -- how things worked, and at
16 the same time learning about the particulars of
17 this matter.

18 So while she was generally in charge of
19 the -- the matter at the time, my responsibility,
20 as it was explained to me, was to start writing a
21 general counsel's brief. So there was no
22 particular timeline given or anything like that at

1 the time. It was just basically, you know, catch
2 up to speed, look at the file, read some of the
3 reports that have already been filed with the
4 Commission. And then, you know, we kind of moved
5 on from there, so --

6 Q And if I could just have you take a look
7 at these. These were marked yesterday as
8 Plaintiff's Exhibit A and B. This is a letter --

9 A Sure.

10 Q -- from Michael Toner to Jack Beam, and
11 the second one from Michael Turner to Renee
12 Beam --

13 A Okay.

14 Q -- dated September 26th of 2006. You
15 can just take a moment and look at those.

16 A (Witness examined document). Okay.

17 Q Have you seen these before?

18 A Oh, during the course, I -- I must have.
19 I think these are standard --

20 Q Uh-huh.

21 A -- RTB letters that we send out.

22 Q Yes. Okay.

1 You mentioned going through the file and
2 getting up to speed.

3 As part -- as part of that process, did
4 you physically go through the entire -- the actual
5 physical file, the papers, the documents contained
6 in the file?

7 A At -- at some point I had to do that
8 related to these cases. But at first, I mean, the
9 file was with Audra in her office. Some of it was
10 with Peter Blumberg, I believe. So I didn't
11 really have any physical files to work with. I
12 just had to go on the computer and read briefs,
13 reports, that type of thing.

14 MR. STREETER: You weren't asking about
15 the CED document? You're talking --

16 MR. DEZSI: I'm going to ask about the
17 CED document.

18 MR. STREETER: Oh, okay, okay. So my
19 follow was really broadly speaking?

20 MR. DEZSI: Yes.

21 MR. STREETER: All right.

22 BY MR. DEZSI:

1 Q So could you just give me an idea of
2 what this -- what this file looks like?

3 I mean would it cover this whole table?
4 Is it just a couple files, or, I mean, how -- what
5 is it --

6 A Umm --

7 Q -- in terms of its volume?

8 MR. STREETER: Could you ask him to
9 define what he means by file? Because I think you
10 guys are talking about different things, or --

11 MR. DEZSI: Sure.

12 BY MR. DEZSI:

13 Q I'm talking about any papers that may
14 have been generated, reports, any exhibits,
15 documents that the FEC relied upon in this matter,
16 when that all gets collected together --

17 A Uh-huh.

18 Q -- along with any reports that you guys
19 my write, memos.

20 What does it look like, this file?

21 A People's personal notes --

22 Q Yes.

1 A -- that type of research? In like a
2 single file cabinet, in one of those deep drawers,
3 maybe three-quarters of that drawer.

4 Q And all of that file was essentially --
5 was in Audra's possession, not -- it was in the
6 possession of the FEC, of course, but Audra was
7 the one that was using that file or had it in --

8 A Audra had -- eventually when the case,
9 you know, was transferred to me in whole, both
10 Audra and Peter had parts of the file to give to
11 me, so --

12 Q Okay. Now, the -- there's also, I
13 understand, a system at the FEC called the central
14 enforce -- the central enforcement --

15 MR. STREETER: Docket.

16 BY MR. DEZSI:

17 Q -- docket?

18 A Uh-huh.

19 Q Could you explain to me what -- how you
20 used the central enforcement docket, and how you
21 found items docketed in that system --

22 A Okay.

1 Q -- also related to this file?

2 A Actually, don't think I ever used the
3 central -- the CED. Everything that I needed from
4 the case I either found in our computer system or
5 I had, you know, physical hard copies that were
6 previously in the possession of Audra or Peter
7 Blumberg.

8 Q Okay.

9 A Who I also think received -- Peter
10 received some of those files from -- from Audra,
11 so --

12 Q Okay. At any time during your work on
13 this file have you issued any administrative
14 subpoenas to obtain any financial records?

15 A I have not, no.

16 Q Okay. Are you aware of anybody else
17 from the FEC who would have or did issue
18 administrative subpoenas?

19 A I want to say I have seen them in the
20 file, or in the electronic system. I can't say
21 who issued them, because I -- I don't really
22 remember opening them, those documents.

1 Q Okay. Mr. Olaya, I'm going to have you
2 take look at a particular code section of a
3 statute --

4 A Okay.

5 Q -- which is 12 United States Code
6 Section 3412. And I'm referring specifically to
7 paragraph A. If you could just take a moment and
8 read that to yourself.

9 A (Witness examined document). Okay.

10 Q Okay. Have you seen that statute
11 before?

12 A I have not.

13 Q You've had no occasion to read that?

14 A I have not, no.

15 Q Okay. Have you had any occasion, during
16 your employment with the Federal Election
17 Commission, to either share, transfer, or obtain
18 any financial records from other federal agencies,
19 any other federal agencies?

20 A I have not.

21 Q Okay. In that statute, that paragraph
22 A, it refers to certifications that have to be

1 made if there are transfers of financial records.

2 Could you just take a second to review
3 that?

4 A (Witness examined document). Okay.

5 Q Okay. Have you ever seen any such
6 certification during your employment with the FEC,
7 on any matters?

8 A Umm --

9 Q Without disclosing any --

10 A Sure.

11 Q -- particular matter.

12 A None -- none that I can remember off the
13 top of my head.

14 Q Okay. Have you ever -- have you heard
15 of anybody at the FEC talk about or refer to
16 that -- to those certifications that are issued
17 when transferring or sharing financial records?

18 A I -- I don't think so.

19 Q Okay. Thank you. I'll take that back.

20 A Sure.

21 (Handing document).

22 Q Thank you.

1 A Sure.

2 Q During your -- during the course of your
3 work on this file that we're referring to
4 involving Jack and Renee Beam, did you have
5 occasion to communicate or talk to anybody from
6 the Department of Justice?

7 A I did not personally have any contact
8 with anyone from DOJ.

9 Q Okay. No face-to-face meetings with
10 anybody that --

11 A I was involved in a face-to-face
12 meeting, but --

13 Q And do you remember approximately the
14 date of that meeting --

15 A I think --

16 Q -- just approximate?

17 A -- it must have been, yeah, August or
18 September of 2008.

19 Q Okay. And can you tell me who was
20 present at that meeting?

21 A I was there, Audra, Mark Shonkwiler,
22 Peter Blumberg, Ben.

1 Q Okay. And we're referring to Ben --
2 Mr. Ben Streeter?

3 A Correct.

4 Q How about Department of Justice
5 employees or agents or --

6 A There was. And --

7 Q -- attorneys?

8 A -- I can't remember his name right now.
9 But there was one DOJ attorney there who was the
10 one we met with who tried the criminal case.

11 Q Would that be Kendall Day, do --

12 A Kendall Day --

13 Q -- you recall?

14 A -- right.

15 Q Kendall Day. Okay.

16 Okay. And during that meeting, were
17 there -- was there an exchange of any documents or
18 files or compact disks?

19 A At that meeting, I don't believe there
20 were any exchanges of any files.

21 Q Okay. Are you aware of any exchange of
22 files or documents or compact disks between

1 members of your team and the FEC and the
2 Department of Justice with Mr. Kendall Day?

3 A We have a copy of the transcript of the
4 criminal trial. But that was in the file when I
5 inherited it. So I'm not sure how it got there,
6 but --

7 Q Okay.

8 A It's from the DO -- or, you know, the
9 DOJ, who tried the case.

10 Q At any time during your work on this
11 case have you had occasion to read FBI 302
12 reports?

13 A I have. I write 302 reports.

14 Q And were any grand jury subpoenas
15 attached or included with those 302 reports?

16 MR. STREETER: Objection, law
17 enforcement privilege, 2 U.S.C. 437g(a)(12).
18 Instruct the witness not to answer.

19 BY MR. DEZSI:

20 Q During your work on this file, did you
21 have any occasion to read any IRS field memoranda
22 reports, which are similar to FBI 302 reports

1 except that they're prepared by IRS agents instead
2 of FBI agents?

3 A I think the only ones I've read were the
4 FBI 302's.

5 Q Okay. And how about grand jury
6 transcripts? Have you had occasion to see or
7 review or read any grand jury transcripts?

8 MR. STREETER: Objection, law
9 enforcement privilege. It violates 2 U.S.C.
10 437g(a)(12), as well. Instruct the witness not to
11 answer.

12 BY MR. DEZSI:

13 Q Mr. Olaya, were you aware or did you
14 know that the Department of Justice had gathered
15 the financial records for the Fieger firm
16 employees, Geoffrey Fieger, Jack Beam, Renee Beam,
17 during the course of their criminal investigation?

18 A Yes. You know, at some point I
19 recognized that.

20 Q Okay. Yesterday Mr. Roger Hearnon
21 testified that he had reviewed the financial
22 records. And he also testified that he was

1 provided those financial records by the Department
2 of Justice.

3 Did you also have occasion to see those
4 financial records?

5 MR. STREETER: Let me object to the form
6 of that question because it contains facts not in
7 evidence. Also, it mischaracterizes the testimony
8 of Mr. Hearnon.

9 If the witness understands the question,
10 you can answer the question.

11 THE WITNESS: Okay. Can -- can you
12 please repeat it?

13 BY MR. DEZSI:

14 Q Sure. I'll -- first I'll tell you --
15 I'll make a statement, so that you don't have to
16 make this assumption.

17 Yesterday, Mr. Roger Hearnon testified
18 that he had seen financial records for Fieger firm
19 employees that were provided by the Department of
20 Justice.

21 Did you have occasion to see those
22 financial records, also?

1 MR. STREETER: Could we go off the
2 record?

3 (Discussion off the record)

4 BY MR. DEZSI:

5 Q Mr. Olaya, did you understand my
6 previous question?

7 A If you could repeat that one more time.

8 Q Sure.

9 I first asked you if you were aware that
10 the Department of Justice had gathered the
11 financial records for Fieger firm employees,
12 Mr. Geoffrey Fieger, Plaintiff Jack and Renee
13 Beam, during its civil investigation. And you
14 said yes, you were aware of that. And I also told
15 you that yesterday Mr. Roger Hearnon testified
16 that he had seen these financial records, and that
17 they were provided to him by the Department of
18 Justice.

19 Did you also see any financial records,
20 similar financial records?

21 MR. STREETER: Object to the form of the
22 question because the term "financial records" is

1 vague. The witness can answer if the witness
2 knows.

3 THE WITNESS: The financial records I
4 saw were part of the exhibits at trial that
5 were -- that were on the CD that had the
6 transcript of the trial.

7 BY MR. DEZSI:

8 Q And can you just describe for me in
9 general what those financial records looked like?

10 A I -- I can't recall. For the most part,
11 I believe they were summaries of financial
12 records.

13 Q Summaries prepared by the Department of
14 Justice, or summaries prepared by the financial
15 institutes?

16 A I'm assuming the Department of Justice.

17 Q And did those summaries contain line
18 item entries showing the dates that checks were
19 either written or the dates that checks were
20 cleared from the financial institutes for payment?

21 A I believe -- I believe they included
22 those dates, yes.

1 Q Okay. And did those summaries include
2 dates of payments from the Fieger firm to the
3 individuals' accounts?

4 A They did, yes.

5 Q Okay. And you referred to a compact
6 disk which contained these records.

7 Do you know where that -- how did the
8 FEC obtain that disk?

9 How did it come into your hands?

10 A It came into my hands, it was part of
11 the files that were left with me when the case was
12 transferred to me, so --

13 Q Okay. And did that disk have a marking
14 or a label? Do you recall?

15 A It must have. It -- I think it's
16 handwritten, just maybe trial transcripts or DOJ
17 transcripts, or -- I -- I don't know specifically.

18 Q Okay. And do you know how -- who from
19 the DOJ sent that disk over to the FEC?

20 A I -- I don't.

21 Q Okay. Do you know who at the FEC
22 received the disk?

1 A I don't.

2 Q Okay. There was not a -- sort of a
3 receipt signature or something like that or --

4 A Not that I know of.

5 Q Okay. Was there a cover letter
6 accompanying this disk?

7 A I don't think so.

8 Q Okay. And did you see physical hard
9 copies of these summaries and these reports that
10 you're referring to, or did you look at them on
11 electronic format, on a computer screen?

12 A I saw them in both formats, hard copy
13 and a computer screen.

14 Q Okay. Can you tell me, was there some
15 sort of index or scanned cover letter that
16 preceded the actual files, either on the hard copy
17 or in -- let's start with the hard copy -- on the
18 hard copy?

19 MR. STREETER: Objection, the question
20 is still compound. If you could just break it out
21 a little bit more.

22 MR. DEZSI: Sure.

1 BY MR. DEZSI:

2 Q Did you see a cover letter preceding the
3 hard copies of these files?

4 A I didn't -- did not see a cover letter.

5 Q Okay. How about another document, like
6 an index?

7 A I believe I saw an index, but the --
8 yeah.

9 Q Can you describe that index to me?

10 A I think one column said exhibits, and
11 another column said description or maybe file
12 numbers something or file folder and a
13 description.

14 Q Okay. And was there a name that you
15 recall anyone as someone who prepared that, or --

16 A I -- I don't remember seeing a name.

17 Q And how about sometimes you see these
18 footer lines on documents which indicate where it
19 was stored in -- in its original server?

20 A Uh-huh.

21 Q And is there any footer or header line
22 like that?

1 A Not that I can remember.

2 Q At any time did you send any documents
3 or files to anybody at the Department of Justice
4 related to this case?

5 MR. STREETER: Objection, that question
6 violates a law enforcement privilege. That
7 question also violates 2 U.S.C. 437g(a)(12), and
8 even the attorney work product doctrine. Instruct
9 the witness not to answer.

10 BY MR. DEZSI:

11 Q Mr. Olaya, during your time at the FEC,
12 have you had occasion to work with the Department
13 of Justice on any other matters?

14 A No, I have not.

15 Q Okay.

16 MR. DEZSI: Give me just a minute.

17 BY MR. DEZSI:

18 Q Can you tell me, Mr. Olaya, where that
19 CD would be found at this time?

20 A It's in my file cabinet.

21 MR. STREETER: Michael, there are
22 multiple copies floating around, too.

1 MR. DEZSI: Okay.

2 BY MR. DEZSI:

3 Q And if we could go back to the summaries
4 of financial records that you had referred to.

5 Can you give me an idea of how many --
6 or how many summaries or pages were contained in
7 those files?

8 A At most, it was a five-page document
9 maybe, the one that I'm thinking of in particular.
10 I mean, it was just a summary, so --

11 Q Okay. And that was -- and there were
12 multiple summaries, or five pages and that's it,
13 that's the total that's contained in that CD file,
14 either?

15 A No, I believe there are probably other
16 financial types of documents. I thought the one
17 we were talking about was the one, you know, that
18 summarized some of that information.

19 Q And can you describe to me these other
20 financial documents?

21 A I think they showed the individual --
22 informations about the individuals involved.

1 MR. STREETER: Let me pose a standing
2 objection to this line of questioning about the
3 content of the public Government exhibits in the
4 criminal trial that were transferred to us,
5 because Mr. Dezsi was also counsel at that trial
6 and has seen all these exhibits.

7 And I don't understand the point in
8 trying to interrogate Mr. Olaya on the content of
9 the documents that's already in the possession of
10 Mr. Dezsi. But just a standing objection. You
11 can continue.

12 MR. DEZSI: Okay.

13 BY MR. DEZSI:

14 Q Mr. Olaya, these other financial records
15 that you're referring to, were these financial
16 records that were generated by financial
17 institutes?

18 A I honestly can't remember.

19 Q Okay. Did these records show individual
20 line items for balances and debits and credits?

21 A I think some of them did, yes.

22 Q Okay. And do you recall any of the

1 names on these financial records?

2 A It's been awhile since I worked on the
3 case. But if you said a name, it might ring a
4 bell, so --

5 Q Do you recall seeing, for instance,
6 Geoffrey Fieger's name?

7 A Right.

8 Q Do you recall seeing, for instance, Paul
9 Brochay's name?

10 A Yes.

11 Q And Jack Beam?

12 A Yes.

13 Q And Renee Beam?

14 A Yes.

15 Q Perhaps Jeff -- Jeff Danzig, Jeffrey
16 Danzig?

17 A I do.

18 Q Okay. And when you -- these other
19 financial records that you're referring to, not
20 the summaries, can you tell me approximately how
21 many pages you're referring to, like a hundred,
22 or --

1 A Well --

2 Q -- 500?

3 A Certainly not 500, I don't think. Maybe
4 a few pages per person, so -- if I had to guess, a
5 hundred to 200 or something maybe.

6 Q Okay.

7 A This was all electronic, so --

8 Q Uh-huh. And Mr. Olaya, just to -- to
9 ask you to follow up with an earlier question.

10 Did you see any sort of certification
11 accompanying those records that would have been
12 referred to that we looked at in the statute
13 earlier?

14 MR. STREETER: Let me object to that
15 question. Because that question assumes that
16 there's a need to have a certification for
17 exhibits that are used in the public criminal
18 trial. And I think that that's a false
19 assumption.

20 MR. DEZSI: Okay. Are you --

21 MR. STREETER: If you can answer, you
22 can answer.

1 THE WITNESS: I don't recall whether or
2 not there was one.

3 BY MR. DEZSI:

4 Q Okay. Mr. Olaya, can you also tell me
5 or just tell me a list of all of the individuals
6 from the FEC with whom you worked on this file?

7 I know earlier we --

8 A Right.

9 Q -- we many talked about Audra Wassom, of
10 course.

11 A There's Audra, Mark Shonkwiler, Peter
12 Blumberg, Ben Streeter, Roger Hearnon. And that's
13 it on my end.

14 Q And can you tell me what -- tell me what
15 Mr. Blumberg's role was in this matter?

16 A When I came into it, I think he was
17 supposed to be the kind of supervising more senior
18 attorney helping me out with the -- with the
19 matter. As you know, Audra had been temporarily
20 promoted to a supervisory role and -- or a
21 management role. And Peter was kind of the senior
22 attorney on -- on my team. So he was --

1 Q Okay. So did you have to seek his
2 concurrence or approval before taking certain
3 steps in the file?

4 MR. STREETER: I'll object to that one
5 on 2 U.S.C. 437g(a)(12).

6 Instruct you not to -- not to answer.

7 BY MR. DEZSI:

8 Q Mr. Blumberg, could you -- could you
9 tell me what his title is? He is he a supervising
10 attorney, or --

11 MR. STREETER: Currently, or back then?

12 BY MR. DEZSI:

13 Q At the time.

14 A At the time, he was staff attorney, as
15 well.

16 Q Okay. But do you know -- how long had
17 he been employed by the FEC?

18 I -- I'm just curious.

19 A He's been here awhile I believe. I -- I
20 don't know, I mean.

21 Q He's been here a few years; you came in
22 as the new guy, and --

1 A Right.

2 Q -- so he sort of was your supervisor in
3 this regard?

4 A Well, Mark Shonkwiler was my supervisor,
5 but -- on -- on this case he was I think supposed
6 to serve that role.

7 Q Okay. Thank you.

8 Mr. Olaya, can you tell me, do you know
9 Lois Lerner?

10 A I don't.

11 Q You do not. Okay.

12 Were you aware that the FEC had provided
13 an expert witness to testify in the DOJ's criminal
14 case against Mr. Fieger?

15 A I was not aware.

16 Q You weren't. Okay.

17 And so -- and you've never heard of Lois
18 Lerner as a former Federal Election Commission
19 employee?

20 A Right. It doesn't ring a bell.

21 Q Okay. How about Mr. Tom Andersen? Are
22 you -- do you know Mr. Andersen?

1 A I do know Mr. Andersen.

2 Q Okay. Did you know that for a time he
3 was -- he was intended to serve as an expert
4 witness for the Department of Justice's criminal
5 case against Mr. Fieger?

6 A I was not aware of that.

7 Q Okay. Did you have any meetings with
8 Mr. Andersen?

9 MR. STREETER: On this case?

10 BY MR. DEZSI:

11 Q On this case. Excuse me.

12 A I did not.

13 Q Did not. Okay.

14 How about do you know Ms. Madelynn Lane?

15 A I -- I know the name.

16 Q Okay. If I -- if I represent to you
17 that she works in the audit division of the
18 Federal Election Commission, you wouldn't have any
19 reason to -- to disagree with that?

20 MR. STREETER: It's the RAD division.

21 MR. DEZSI: The RAD division, the
22 reports and --

1 MR. STREETER: Analyst division.

2 MR. DEZSI: -- and analyst division.

3 MR. STREETER: Analysis division, I
4 guess.

5 MR. DEZSI: Okay.

6 BY MR. DEZSI:

7 Q All right. You don't know Ms. Lane
8 personally, or you haven't worked with her on this
9 matter?

10 A I have not.

11 MR. DEZSI: Do you mind if we take a
12 quick break?

13 MR. STREETER: Your dime.

14 MR. DEZSI: We'll take a quick break.

15 (Recess)

16 BY MR. DEZSI:

17 Q Okay. Mr. Olaya, if we could go back to
18 that CD you were referring to earlier that had the
19 documents on it.

20 A Uh-huh.

21 Q Can you tell me how many PDF's or how
22 many different files were contained on that CD,

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1 about?

2 A More than ten, less than twenty.

3 Q Okay. And were the -- the individual
4 PDF's, were they labeled in some fashion, or --

5 A They indicated who was on the witness
6 stand, whose -- whose transcript it was.

7 Q Okay. And the financial records that
8 you were referring to, those were also contained
9 on PDF's on that same CD?

10 A On that same CD I believe, yes.

11 Q Okay. And were those in PDF's, or those
12 were also within the ten to twenty that you
13 mentioned --

14 A I think they were --

15 Q -- associated with the --

16 A -- one of the folders that -- maybe
17 labeled trial exhibits.

18 Q Okay. Okay. Also, Mr. Olaya, if I
19 could just have you take a look at -- this is the
20 sub -- the notice of deposition for your testimony
21 today.

22 A (Witness examined document).

1 Q And if you could flip to Exhibit A
2 that's attached, which requests you to produce
3 documents.

4 Are you familiar with that?

5 A (Witness examined document). I am.

6 Q Okay. Prior to the deposition today,
7 did you search for documents within your
8 possession --

9 A I did.

10 Q -- related to those exhibits, that
11 exhibit?

12 A I did.

13 Q Okay. And did you find any responsive
14 documents?

15 A (Witness examined document). Give me
16 one second.

17 Q Okay.

18 A (Witness examined document). I -- I
19 did. I found a few e-mails.

20 Q Okay. Okay. And once you located those
21 documents, what did you do with them?

22 A I believe I had copied them and sent

1 them to Audra, or maybe made a list and pointed
2 out which e-mails contained correspondence between
3 the two, and sent it to Audra.

4 Q Okay. And do you know what would have
5 happened with your documents or your
6 correspondence or that list after it was provided
7 to Audra?

8 A I believe we probably sent it to
9 litigation to respond.

10 Q Okay. Would that be Mr. Streeter, or --

11 A I would imagine it would go to the --

12 Q All right.

13 A -- Mr. Streeter.

14 Q Okay. And can you just describe for me,
15 tell me how you went about searching for those
16 documents?

17 A Audra had provided me with her e-mail
18 correspondence regarding this case. Everything
19 she could find, she forwarded to me via e-mail.
20 And then I scrolled through the e-mails to see if
21 any of them were responsive, the e-mails she
22 forwarded.

1 Q Okay. And how about your own, how did
2 you --

3 A Oh.

4 Q -- search for your own e-mails?

5 A For my -- well, I had no correspondence
6 with -- with the Justice Department, so --

7 Q Okay.

8 A -- nothing that really involved a
9 search.

10 Q How about any of your own communications
11 between members of the FEC, related to this
12 matter?

13 A Related to this matter.

14 MR. STREETER: I don't think there's a
15 request for any of that stuff.

16 MR. DEZSI: Can we go off the record a
17 second?

18 (Discussion off the record)

19 BY MR. DEZSI:

20 Q Okay. Mr. Olaya, again, could you
21 describe for me how you searched for your own
22 documents that would have been responsive to these

1 requests attached to your notice of deposition?

2 A Okay. My own documents, I know for a
3 fact that I did not correspond with the Justice
4 Department. So there was really no search
5 involved.

6 Q Okay. And, similarly, you don't recall
7 having any e-mails in which you were included as
8 cc's between, for instance, Audra or other FEC
9 individuals and the Department of Justice?

10 A I guess leading up to that meeting with
11 Kendall Day in August or September 2008, I would
12 have been cc'd on the e-mails at that point.

13 Q But do you recall the primary -- the
14 sender and the receiver of those e-mails?

15 Do you recall the sender and the
16 receiver?

17 A I believe the sender would have been
18 Audra and the receiver would have been Kendall, or
19 vice versa.

20 Q Okay.

21 MR. DEZSI: Okay. I have nothing
22 further for the witness.

1 MR. STREETER: I just have a few
2 questions.

3 But let's go off the record for just a
4 second.

5 (Discussion off the record)

6 EXAMINATION BY COUNSEL FOR DEFENDANTS
7 BY MR. STREETER:

8 Q Mr. Olaya, you were asked a series of
9 questions about the exhibits that had been sent to
10 you by DOJ that you had an occasion to review.

11 Do you recall that testimony?

12 A I do.

13 Q And you recall that you were asked some
14 specific questions about the nature of various
15 financial information that you reviewed as part of
16 that process? Do you recall that, those answers
17 and questions?

18 A I do.

19 Q Do you recall whether or not the
20 financial information that you saw, however
21 broadly defined, contained any redactions of any
22 sort?

1 A I can't recall specifically.

2 Q Okay. Do you recall whether or not you
3 saw what would appear to be actual bank statements
4 as sent out by the various financial institutions
5 themselves to the various individuals?

6 A Yes, I -- I do think I remember seeing
7 that.

8 Q And you said you also saw what appeared
9 to be summaries of that kind of information?

10 A Correct.

11 Q Okay. Approximately when was the last
12 time that you had the occasion to review documents
13 that -- no, strike that.

14 Approximately when is the last time that
15 you had an occasion to actually perform any work
16 on the MUR 5818?

17 A The last time I did any substantive work
18 on this was late October. By early November I had
19 handed in what I was responsible for, which was
20 the general counsel's brief --

21 Q All right.

22 A -- to my supervisor.

1 Q You also make reference to -- to viewing
2 various files and documents electronically.

3 Would it be correct to say that that
4 meant you were reviewing files on what's referred
5 to as our PC DOCS system?

6 A That's accurate.

7 Q Could you give a brief explanation for
8 the record of what the PC DOCS system is or is
9 supposed to be?

10 A It's supposed to be I guess our shared
11 drive for -- I'm -- I'm not sure, maybe -- I know
12 all of enforcement uses it. I don't really know
13 if other division have access to it. But it's the
14 system where we can save files or documents we're
15 working on, and drafts of those files. And
16 anyone -- you know, you can secure the documents.
17 But most anyone -- you can unlock it and make it
18 available to other attorneys.

19 Q So the idea is that a document that's
20 being worked on would be stored electronically;
21 and the author could work on a document and, as
22 well, other people responsible or working in the

1 same manner would also have access to the
2 document; is that correct?

3 A Everyone has access to the -- the
4 document, actually. I mean -- yeah.

5 Q And the files, the -- the documents
6 would be organized according to author, and could
7 also be organized according to the matter under
8 review; is that fair?

9 A That's fair.

10 Q So when you would go electronically to
11 review what I'll call the index of available
12 documents, is it possible that you would view not
13 only documents on say MER 5818, but also be able
14 to review at the same time documents from other
15 matters?

16 A That's true. That's accurate.

17 Q So when you say that you saw -- when you
18 said earlier that you saw administrative subpoenas
19 while reviewing files electronically, do you have
20 any recollection as to whether or not those
21 administrative subpoenas pertained to MUR 5818, or
22 to other cases, or do you have any recollection at

1 all?

2 A Again, I'm not sure about the
3 recollection, if it was specifically for that, or
4 other matters.

5 Q All right. That's fine.

6 MR. STREETER: That's all I have.

7 MR. DEZSI: Okay. I don't have anything
8 else.

9 But I think I would like to reserve the
10 witness, only because we have some privilege
11 issues.

12 Just so you're aware, Mr. Olaya, because
13 there were some privileges asserted by
14 Mr. Streeter directing you not to respond to
15 certain questions, and in the event that I end up
16 challenging or contesting those privileges, we'll
17 have to have that resolved by our judge in
18 Chicago, after which I might have additional
19 questions for you.

20 So at this time, I'm going to pass on
21 any further questions, but I would like to reserve
22 your testimony in the event that I have to come

Phillip Olaya

Washington, DC

March 11, 2009

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1 back and continue the deposition.

2 MR. STREETER: And, of course, we won't
3 waive.

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7 (Whereupon at 10:46 p.m., the
8 deposition of PHILLIP OLAYA
9 was adjourned.)

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Phillip Olaya

March 11, 2009

Washington, DC

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1 A C K N O W L E D G E M E N T O F D E P O N E N T

2

3

4 I, PHILLIP OLAYA, do hereby acknowledge I
5 have read and examined the foregoing pages of
6 testimony, and the same is a true, correct and
7 complete transcription of the testimony given by
8 me, and any changes or corrections, if any, appear
9 in the attached errata sheet signed by me.

10

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Date

_____ PHILLIP OLAYA

16

17 Subscribed and Sworn to before me this

18 ____ day of _____, 2009.

19

20

21 Notary Public

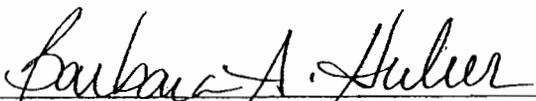
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My Commission Expires:

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CERTIFICATE OF NOTARY PUBLIC

I, BARBARA A. HUBER, CSR, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotypy and thereafter reduced to print under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



BARBARA A. HUBER, CSR
Notary Public, in and for the
District of Columbia

My Commission Expires:
March 14, 2012

4. The Commission received two categories of materials from DOJ related to MUR 5818. The first consisted of hard copy summaries of non-grand jury interviews, commonly known as 302 interviews, which were prepared by law enforcement officials who had interviewed witnesses with knowledge of the activities of the Fieger law firm. These documents did not include an interview of either Jack or Renee Beam.
5. The second category of materials consisted of (a) trial testimony and (b) trial exhibits related to the criminal trial against Geoffrey Fieger. These materials are all part of the public record in *United States v. Fieger*, No. 07-02414, 2008 WL 996401 (E.D. Mich. June 2, 2008) and were transmitted by DOJ on a CD-ROM after the criminal trial had concluded. The CD-ROM had not been in my physical possession until I was asked to search the materials transmitted by DOJ, at which point Ms. Wassom provided me the CD-ROM along with hard copies of the files on the CD-ROM. I likewise received and reviewed additional files from Peter Blumberg, then a Staff Attorney with the Division, who provided assistance in MUR 5818. Mr. Blumberg's files were duplicates of the files contained in the CD-ROM. My review of the trial testimony and exhibits confirmed that the Commission did not have in its possession any financial information related to Jack or Renee Beam.
6. The hard copy materials I received included an index of the trial exhibits admitted in the criminal trial. In one column, the index specified "Ex. #" while the next column included a "Description" of the trial exhibit. The index did not include any financial information about any of the individuals with knowledge of the activities of the Fieger law firm, including Jack or Renee Beam. On March 11, 2009, counsel for Jack and Renee Beam deposed me at the Commission's office in Washington, D.C. and asked me about this index. (Olaya Dep. 24:7, Mar. 11, 2009).
7. The trial exhibits consisted of two categories of information. The first category summarized the timeline of events for a specific conduit, namely, the date a conduit contributed to the Edwards Committee; the date the Fieger law firm issued the reimbursement; and the date the conduit deposited the reimbursement into his or her personal bank account. These trial exhibits were labeled, "Ex. # 500a-506a." There was no conduit page for Jack or Renee Beam among these exhibits. Further, these summaries did not include any financial information that related to any of the conduits involved, including Jack or Renee Beam.
8. The second category of information in the trial exhibits included (a) records from the Edwards Committee that reflect the conduit's contribution; (b) records from the conduit's personal bank account that reflect a deposit of funds from the Fieger law firm; and (c) records from the Fieger law firm's bank account that reflect a disbursement of funds to the conduit. These

records did not include any financial information that related to Jack or Renee Beam and were all part of the public record in *United States v. Fieger*.

9. I also reviewed all email communications between Commission employees, including Ms. Wassom, and DOJ employees. These communications did not include any attachments or references to any financial information that related to Jack or Renee Beam and did not refer to any grand jury material.
10. The Commission did have copies of three checks written by Jack and Renee Beam to the Edwards for President Committee: a \$1,000 check issued January 20, 2003 by Jack Beam (check # 375), a \$1,000 check issued January 28, 2003 by Jack Beam (check # 377), and a \$2,000 check issued January 30, 2003 by Renee Beam (check # 195). We obtained copies of those checks from the Commission's Audit Division, which had conducted an audit of the Edwards for President Committee pursuant to 26 U.S.C. § 9038.
11. During my deposition on March 11, 2009, counsel for Jack and Renee Beam questioned me about the contents of the CD-ROM that DOJ transmitted to the Commission. (Olaya Dep. 26:11-22; 27:14-28:14). I acknowledged to have seen the financial information of Jack and Renee Beam. (Olaya Dep. 28:11-14, Mar. 11, 2009). However, as I detailed above, *see supra* ¶¶ 4-9, and as confirmed upon reviewing the same materials to prepare this Declaration, the DOJ materials I reviewed did not include any financial information that related to Jack or Renee Beam.
12. In reviewing my deposition, the acknowledgment that I saw any financial information that related to Jack or Renee Beam was a result of a lapse in concentration and occurred only because I had answered in the affirmative to the two previously identified individuals without fully considering Counsel's questions.
13. The records DOJ transmitted to the Commission do not include any financial information that related to Jack or Renee Beam.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 11th day of March 2010.


Phillip A. Olaya
Attorney, Enforcement Division
Office of General Counsel
Federal Election Commission



FEDERAL ELECTION COMMISSION

Washington, DC 20463

March 12, 2010

Michael Dezsi, Esq.
FIEGER, FIEGER, KENNEY,
JOHNSON & GIROUX. P.C.
19390 West 10 Mile Road
Southfield, MI 48075-2463

RE: *Beam v. FEC*, No. 07-cv-11227 (N.D. Ill.)

Dear Mr. Dezsi:

As you know, in her recent ruling, Judge Pallmeyer found the deposition testimony of FEC Staff Attorney Phillip Olaya unclear as to whether Mr. Olaya had seen private financial information of Jack and Renee Beam.

Mr. Olaya has reviewed all the relevant documents and concluded that none of the materials he reviewed, including the CD the FEC received from the Department of Justice containing exhibits from the Fieger criminal trial, contained any private financial information relating to the Beams. Consequently, Mr. Olaya has prepared a declaration explaining what materials he actually saw and how a lapse in concentration caused him to answer in the affirmative at his deposition as to whether the Beams' information appeared on that CD, which, as you know, contains no private financial information in any case. A copy of the declaration is attached.

We intend to submit Mr. Olaya's declaration to the Court because this testimony removes any doubt that, in fact, the FEC received no financial information about the Beams from DOJ, and in effect, the declaration makes clear that there is no basis for a trial in this matter.

We, of course, will make Mr. Olaya available to you if you wish to depose him on the matters in his declaration. You may contact me at 202-694-1650 if you wish to schedule Mr. Olaya's deposition or if you have any questions about his declaration.

Sincerely,

A handwritten signature in black ink, appearing to read "Holly Baker". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Holly Baker
Attorney

Enclosure: Olaya Declaration