

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

REPLY

**DEFENDANT FEDERAL ELECTION COMMISSION’S REPLY TO PLAINTIFFS’
OPPOSITION TO THE FEC’S MOTION TO DISMISS THE
SECOND AMENDED COMPLAINT FOR LACK OF
SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM**

Defendant Federal Election Commission (“Commission” or “FEC”) files this Reply to plaintiffs’ Opposition (Docket #100) to the Commission’s 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). That Opposition (“Opp.”) fails to rebut or even address squarely the major arguments made in the FEC’s Motion to Dismiss. As a result, plaintiffs still fail to demonstrate either standing to pursue Counts I (Right to Financial Privacy Act) and II (retaliation for exercise of First Amendment rights), or to articulate a viable selective prosecution cause of action in Count III against the Commission.

Plaintiffs’ Opposition primarily attempts to persuade this Court that the Department of Justice (“Department”) violated the Right to Financial Privacy Act (“RFPA”), 12 U.S.C. §§ 3401 *et seq.*, by performing “an end-run around the law.” (Opp. at 7.) They allege that the

Department compelled subpoenaed financial institutions to not give notice to account holders under pain of being “charged with obstruction of justice,” *id.* at 6, rather than applying to the appropriate court for a so-called “gag order” pursuant to 12 U.S.C. § 3413(i). Despite plaintiffs’ careless use of the term “defendants,” this argument is directed solely to the Department and not the FEC, since the Commission was not involved in the underlying criminal investigation and in any event has no authority to issue grand jury subpoenas. The Commission accordingly adopts the Department’s substantive response to these arguments and will not address them separately here.¹

As to the Commission, with the exception of a few issues discussed below, plaintiffs’ Opposition fails to respond to the following arguments raised in the Commission’s Memorandum in Support of its Motion to Dismiss (“FEC Br.”):

- That the law of the case doctrine requires a finding that plaintiffs still lack standing to pursue Counts I and II (FEC Br. at 4-5);
- That plaintiffs have suffered no injury in fact themselves and thus cannot advocate the claimed rights and interests of others who may have been injured in Counts I and II (FEC Br. at 5-6);
- That plaintiffs’ claims are unripe since they have not yet been charged with any criminal violations of law or any administrative violations (FEC Br. at 9-10);

¹ The Commission previously addressed this issue in its Reply Brief supporting the FEC’s Motion to Dismiss the First Amended Complaint (Docket # 65). We explained (at 4-6) how section 3413(i) of the RFPA was amended in 1986 to add language permitting a court to issue a gag order and how several courts have explained that this amendment does not require banks, in the absence of such a gag order, to notify their customers of grand jury subpoenas; rather, the amendment merely clarifies the authority of courts to delay such notification if deemed desirable.

- That Counts I and II do not state a cause of action because plaintiffs fail to allege that the Commission played any role whatsoever in the facts underlying either their RFPA claim or the retaliatory constitutional tort claim (FEC Br. at 11-13).² Plaintiffs' conclusory assertion that they have a "statutory cause of action" is woefully inadequate to state a viable cause of action for a violation of the RFPA;
- That the sovereign immunity doctrine bars plaintiffs' constitutional tort and selective prosecution claims (FEC Br. 8-9); and
- That a claim for selective prosecution must present specific facts demonstrating a discriminatory intent based upon an unjustifiable standard such as race or religion (FEC Br. at 13-15).

Plaintiffs' failure to make even a minimal effort to address the deficiencies detailed in the Commission's opening brief is tantamount to a waiver and illustrates the manifest weakness of their claims. In any event, by leaving these arguments unanswered, plaintiffs have failed to "cure the deficiencies" (Minute Order, Docket # 89) that led this Court to dismiss their First Amended Complaint.

The few FEC-specific arguments that plaintiffs advance in their Opposition can be disposed of swiftly. They assert, for example, that their RFPA claim is not barred by sovereign immunity. (Opp. at 8.) But that assertion attacks a straw man, because the FEC never argued that sovereign immunity barred this statutory claim; their RFPA claim fails because it does not

² Even if there were any merit to plaintiffs' new argument that the Department illegally circumvented the requirements of 12 U.S.C. § 3413(i), plaintiffs cannot maintain any claim that the *Commission* was responsible for any such violation since the alleged proof upon which they rely consists solely of the Department's grand jury subpoenas and accompanying cover letters.

allege that the Commission played any role in obtaining their bank records. (*See* FEC Br. at 11-13.) The Commission's sovereign immunity defense (FEC Br. at 8-9) was properly directed at plaintiffs' retaliation and selective prosecution claims. Regarding the former, although plaintiffs have asserted that their Count II *Bivens* action is considered a suit against individual federal agents, and not the United States, and thus is not barred by sovereign immunity, they make no claim that any of the agents involved in the so-called "raid" during which the grand jury subpoenas were served were agents of or had any connection to the Commission. Regarding the selective prosecution claim, plaintiffs still have not articulated a cause of action that includes any express waiver of sovereign immunity. Thus, both of these alleged causes of action against the Commission are barred by sovereign immunity and should be dismissed.

Plaintiffs attack a second straw man when they argue (Opp. at 9-10) that "this Court should reject Defendant FEC's argument that Plaintiffs have failed to sufficiently state a conspiracy claim." *Id.* at 10. In fact, the FEC had no occasion to argue against a conspiracy claim in support of its motion to dismiss the Second Amended Complaint because *plaintiffs failed to make any allegations regarding the existence of any conspiracy*. The term "conspiracy" appears nowhere in the eight paragraphs that make up plaintiffs' Count II. *See* 2nd Am. Comp. ¶¶ 21-28. Although plaintiffs alleged in Count II of their *First* Amended Complaint that "the Attorney General and the FEC have conspired to retaliate against Plaintiffs for no crime other than exercising their constitutional rights" (Docket # 47 ¶ 40), this allegation was dropped in plaintiffs' Second Amended Complaint, and the Commission therefore did not address any such

claim in its opening brief.³ Our opening brief instead explained that plaintiffs' retaliation claim is not ripe and fails to state a claim; as noted above, plaintiffs have failed to respond to our showing (FEC Br. at 12-13) that the Fieger law firm itself asked the Commission to open an investigation and that RFPA explicitly permits the transfer of information between law enforcement agencies.

Plaintiffs also argue that the defendants' ripeness arguments must be rejected because the five-year statute of limitations for criminal liability has run. Opp. at 12-13. However, plaintiffs may still face potential *civil* liability for violations of the Federal Election Campaign Act (FECA). We have already supplied this Court with an overview of the Commission's detailed enforcement process (*see* Docket # 28, FEC Motion to Dismiss Br. at 2-5) and explained that any investigations into the plaintiffs' activities are not complete. Hence, for the reasons we have already detailed in our prior briefs (FEC Br. at 9-10), and which are now the law of this case, this matter still is not ripe for judicial intervention.

Finally, plaintiffs respond (Opp. at 10) to the Commission's defense that their constitutional retaliation claim fails to state a claim by relying on *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142 (N.D. Ill. 2001). What plaintiffs ignore, however, is that this case — as well as the Supreme Court's seminal decision in *Elrod v. Burns*, 427 U.S. 347 (1976), cited in ¶ 28 of their Second Amended Complaint — included no claim against the United States. The defendants in both cases were county and local officials, sued pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988 for alleged violations of the First and Fourteenth Amendments. No officer or agency of the United States was a defendant in these actions. Neither case considered the

³ In any event, the Commission has previously shown in its Motion to Dismiss plaintiffs' First Amended Complaint (Docket # 56, at 13) how their conclusory allegations pertaining to the alleged conspiracy between the FEC and the Department are insufficient as a matter of law.

impact of the sovereign immunity doctrine and each one is thus irrelevant here; plaintiffs do not even attempt to rely upon sections 1983, 1985, 1986, or 1988. Thus, plaintiffs have still failed to provide a specific statutory basis for their retaliation claim, and it should therefore be dismissed.

In sum, this Court lacks jurisdiction over plaintiffs' Second Amended Complaint. Plaintiffs have not "cure[d] the deficiencies identified" (Docket # 89) in this Court's March 7, 2008 Memorandum Opinion and Order (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 any of their counts against the Commission, since plaintiffs continue to make essentially the same speculative and conclusory allegations, concede that the Commission was not involved in any alleged grand jury investigation, and fail to allege that the Commission has singled out plaintiffs for prosecution based on an improper motive. Accordingly, because they have cured none of these defects, plaintiffs' entire Second Amended Complaint should be dismissed with prejudice.

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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July 15, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2008, I electronically filed the foregoing Defendant Federal Election Commission's Reply to Plaintiffs' Opposition to the FEC's Motion to Dismiss Plaintiffs' Second Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim. The Court's Commission/ECF system will send notification of such filing to the following e-mail addresses:

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