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

JACK BEAM and RENEE BEAM, Plaintiffs, v. ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL, and ROBERT LENHARD, FEDERAL ELECTION COMMISSION CHAIRMAN, Defendants.	Civil No. 07cv1227 Judge Pallmeyer Mag. Judge Cole MEMORANDUM

MEMORANDUM IN SUPPORT OF
DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM

Defendant Federal Election Commission ("Commission" or "FEC") files this brief in support of its Motion to Dismiss Plaintiffs' First Amended Complaint on the grounds that plaintiffs have failed to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Following this Court's dismissal of the original complaint, plaintiffs have filed an amended complaint that includes new claims but also repeats claims presented in the original complaint. However, plaintiffs' original complaint relied on the incorrect premise that the Department of Justice ("Department") cannot enforce the Federal Election Campaign Act ("FECA" or "Act"),

2 U.S.C. §§ 431-55, until the FEC refers the relevant matter to the Department.[1] See 2 U.S.C. § 437g(a)(2)(C). To the extent plaintiffs' current claims rely on this same incorrect referral theory and related arguments under the Administrative Procedure Act, 5 U.S.C. §§ 701-05, and the federal mandamus statute, 28 U.S.C. § 1361 — arguments this Court has already rejected — those claims should be dismissed now for the same reasons, as well as under the law of the case doctrine.

Plaintiffs' new claims should also be dismissed. The claims that the FEC violated the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq., and unconstitutionally retaliated against plaintiffs rely on speculative, conclusory allegations that are insufficient to support a claim that plaintiffs have been harmed by any unlawful actions of the Commission.[2] The new claims also constitute an improper collateral attack upon an alleged ongoing grand jury investigation being conducted in another jurisdiction. Therefore, the entire Amended Complaint should be dismissed with prejudice.

I. BACKGROUND

On March 2, 2007, attorney Jack Beam and his spouse, Renee Beam, filed an Application for Writ of Mandamus and Complaint ("Compl.") (Docket #1), naming as defendants Alberto Gonzales, United States Attorney General, and Robert Lenhard, Federal Election Commission Chairman. The plaintiffs alleged that they were the targets of an ongoing grand jury investigation centered on the Michigan law firm with which Mr. Beam is affiliated (Fieger, Fieger, Kenney & Johnson) involving alleged illegal contributions made during the 2004

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[1] See Brief in Support of FEC's Motion to Dismiss and in Opposition to Plaintiffs' Motion for Declaratory Judgment at 7-14 ("FEC Opp.") (May 10, 2007, Docket # 28).

[2] The Court also lacks subject-matter jurisdiction over plaintiffs' retaliation claim, which should therefore be dismissed under Fed. R. Civ. P. 12(b)(1). See infra pp. 8-13.

Presidential election campaign. Plaintiffs asserted that the defendant Attorney General had issued "numerous subpoenas to compel testimony and the production of documents before a grand jury." (Compl. ¶ 15).

Plaintiffs also claimed to be respondents in an ongoing administrative enforcement action being conducted by the Commission concerning these same activities. (Id. ¶ 17). They further claimed that because the FECA purportedly delegates to the Commission the exclusive authority to conduct an administrative investigation in the first instance, the Attorney General and the Department were precluded from instituting a criminal investigation into the same alleged campaign finance violations until the Commission completed its investigation and voted to refer a matter to the Department. (Id. ¶¶ 11, 13). Plaintiffs sought declaratory relief against the Commission and the Department, as well as a writ of mandamus against the Commission.

Following full briefing by the parties, this Court issued a Minute Order (Docket # 46) on June 22, 2007, granting defendants' motions to dismiss without prejudice, staying discovery, and giving plaintiffs leave to file an amended complaint. Plaintiffs filed their Amended Complaint ("Am. Compl.") (Docket # 47) on June 29, 2007. Count I of the Amended Complaint alleges that defendants violated the RFPA by "secretly accessing Plaintiffs' financial records and/or suppressing the existence of its [sic] acts" (Am. Compl. ¶ 26), and by failing to provide any notice to plaintiffs of the alleged access (id. ¶ 12). Count II alleges that the Commission and the Department "conspired to retaliate" (id. ¶¶ 32, 40) against plaintiffs for exercising their First Amendment rights. In Counts III, IV, and V, the Amended Complaint effectively renews the three claims against the Commission that this Court previously dismissed (two of the claims are copied almost verbatim from the original Complaint).

II. LEGAL STANDARDS FOR A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) should be granted 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 claim that would entitle him to relief." Alper v. Altheimer & Gray, 257 F.3d 680, 684 (7th Cir. 2000); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The Supreme Court recently clarified the requirements for pleading facts sufficient to survive a motion to dismiss. 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). The Court emphasized that a complaint must contain a "statement of circumstances, occurrences, and events in support of the claim presented" and not mere conclusory statements. Id., 127 S. Ct. at 1965 (citing 5 Wright & Miller, Federal Practice and Procedure § 1202, at 94-95 (2004)). "Factual allegations must be enough to raise a right to relief above the speculative level ...." Id. (citing 5 Wright & Miller § 1216, at 235-236). The Court stated that it sought to dispel the misconception that the federal rules did not require complaints to plead facts, noting that although a claimant need not set out in detail the facts underlying his claim, Fed. R. Civ. P. 8(a)(2) "still requires a 'showing' … of entitlement to relief." Id. A plaintiff must provide the "grounds" for that showing, which "requires more than labels and conclusions [or] formulaic recitation of the elements of a cause of action." Id. at 1964-65 (citations and brackets omitted); see also Walker v. SWIFT,

__ F. Supp. 2d __, 2007 WL 1704293, at *2 (N.D. Ill. 2007) (explaining application of the pleading standards following the Supreme Court decision in Bell Atlantic).

The Seventh Circuit has recognized the requirement that plaintiffs plead facts that show they are entitled to relief. "A complaint 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) (citation omitted). See County of McHenry v. Insurance Co. of the West, 438 F.3d 813, 818-819 (7th Cir. 2006) (citations omitted) ("Although the district court is required to consider whether a plaintiff could prevail under any legal theory or set of facts it will not invent legal arguments for litigants and is not obliged to accept as true legal conclusions or unsupported conclusions of fact."); see also Tal v. Hogan, 453 F.3d 1244, 1252 (10th Cir. 2006) (mere "conclusory allegations" in a complaint do not constitute well-pleaded factual allegations).

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM AND SHOULD BE DISMISSED WITH PREJUDICE AS TO THE COMMISSION

As we demonstrate below, plaintiffs' new claims against the Commission are based on unsupported and conclusory allegations that fail to meet the applicable pleading requirements. Moreover, plaintiffs' new claims are based upon legal theories for which no set of facts could be proven that would entitle plaintiffs to relief against the Commission. Indeed, plaintiffs' reiterated claims based on their referral theory should be dismissed again because they are plainly wrong and because of the law of the case doctrine.

A. Plaintiffs Fail to State a Claim That the Commission Violated the Right to Financial Privacy Act

Count I of the Amended Complaint raises the new claim that "defendants" violated the RFPA, 12 U.S.C. §§ 3401 et seq., but this claim against the Commission must fail for at least

two independent reasons. First, plaintiffs fail to allege that the Commission has done anything that violates the RFPA. Second, even if the Commission were involved with the actions allegedly taken by the Department, those actions still do not state a valid claim under the RFPA.

Plaintiffs offer speculative and conclusory statements, but they fail to allege any facts sufficient to support an RFPA claim against the FEC. See Bell Atlantic, 124 S. Ct. at 1964. Plaintiffs claim in the Facts section of their Amended Complaint (at 3-4) that:

- Attorney General Gonzales, "by and through the Department of Justice and the FBI," embarked on a politically motivated investigation. Am. Compl. ¶ 7;
- Attorney General Gonzales "personally" authorized a "nighttime raid" on the offices of the Fieger law firm. Id. ¶ 8;
- Attorney General Gonzales also authorized raids on the homes of Fieger law firm associates and employees. Id. ¶ 9;
- "Federal agents" harassed individuals during these raids. Id. ¶ 11.

Plaintiffs' original Complaint alleged that the Attorney General had initiated a grand jury investigation into the activities of the Fieger law firm (Compl. ¶ 12), and that the Attorney General had issued numerous subpoenas in that investigation (id. ¶ 15), but plaintiffs did not accuse the Commission of participating in this supposed misconduct. Plaintiffs recast their factual allegations in the Amended Complaint in an apparent effort to sweep the Commission into a broad dragnet of supposedly illegal investigatory activities by the "government," but they still fail to allege any facts to suggest that the Commission actually committed any act that could be considered a violation of law. In paragraph 31 (part of Count II) of their Amended Complaint, plaintiffs specifically allege that Department employees "secretly obtained Plaintiffs' private banking records" and then "transmitted" them to the FEC; on its face, the Amended Complaint does not even claim that the Commission played any role in allegedly obtaining records from any bank.

Thus, plaintiffs have failed to allege with any specificity that the Commission played any role in the alleged RFPA violation. To withstand a motion to dismiss for failure to state a claim, a complaint must "outline or adumbrate a violation of the statute or constitutional provision upon which plaintiff relies and connect the violation to the named defendants." Christensen, 483 F.3d at 459. However, Count I fails completely to "connect the violation" to the Commission. Plaintiffs have thus failed to allege "the bare minimum facts necessary to put [the Commission] on notice of the claim so that [it] can file an answer." Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002). The allegations of Count I are insufficient to state a claim against the Commission because "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic, 127 S. Ct. at 1965.[3]

In any event, the RFPA contains a critical exception to the notice requirement for grand jury proceedings:

> Nothing in this title … shall apply to any subpena or court order issued in connection with proceedings before a grand jury, except that a court shall have authority to order a financial institution on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information that has been furnished to the grand jury….

12 U.S.C. § 3413(i). "The RFPA does not apply to any subpoena or court order issued in connection with proceedings before a grand jury." Taylor v. United States Air Force, 176 F.3d 489 (10th Cir. 1999), 1999 WL 270405 (table) (unpublished). "Under Section 3413(i), []

[3] Even if it were true, as plaintiffs allege, that the FEC indirectly received private financial records, plaintiffs have failed to connect this claim to any specific violation of law. On the contrary, the RFPA specifically permits financial records obtained pursuant to its terms by the Department (such as pursuant to a grand jury investigation) to be transferred to another agency, such as the FEC, for use in a "legitimate law enforcement inquiry." 12 U.S.C. § 3412(a). One example of such an inquiry is the confidential FEC investigation that the law firm with which plaintiff Jack Beam is associated originally requested in 2006. See Plaintiffs' Memorandum in Support of Motion for Declaratory Judgment and Writ of Mandamus ("Pl. Mot. for Judgment") (Mar. 22, 2007, Docket #10) Ex. A.

disclosure pursuant to issuance of a subpoena or court order respecting a grand jury proceeding is exempt from all provisions of the [RFPA]…. This special exemption for grand jury subpoenas was created to protect the grand jury system." In re Grand Jury Proceedings, 636 F.2d 81, 84 (5th Cir. 1981). Cf. 12 U.S.C. § 3409(a) (setting out the applicable standard when the government seeks a court order to prevent a financial institution from giving customer notice). Thus, these provisions on their face authorize the very actions about which plaintiffs complain: the government allegedly accessing their private financial records without notice during the course of a grand jury investigation.[4] In sum, this grand jury exception eviscerates Count I of the Amended Complaint because, even if plaintiffs' allegations are assumed to be true, plaintiffs cannot prevail as a matter of law.

B. The Court Lacks Subject-Matter Jurisdiction Over Plaintiffs' Retaliation Claim in Count II, Which Also Fails to State a Claim

Federal courts lack jurisdiction over a claim against an agency of the federal government 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

[4] Plaintiffs' original Complaint emphasized their desire to terminate the alleged ongoing grand jury investigation. (Compl. ¶ 15). However, plaintiffs' Amended Complaint does not allege anything about a grand jury until paragraph 35 in Count II. Plaintiffs' apparent effort to distance themselves from their prior allegations merely highlights the fact that the grand jury exception to the RFPA is fatal to their new Count I.

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).[5]

Count II of plaintiffs' Amended Complaint does not state any statutory or other basis for the Court's jurisdiction, and none of the sections in Title 28 upon which plaintiffs generally rely (see Am. Compl. ¶¶ 4, 5) waives the government's sovereign immunity or creates federal question jurisdiction. 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) (sovereign immunity barred suit brought under section 1331 by private pensioners challenging federal pension consumer price index increases unless suit was brought in the Court of Claims under the Tucker Act, 28 U.S.C. §§ 1346, 1491); Neighbors for Rational Dev., Inc. v. Norton, 379 F.3d 956, 960-61 (10th Cir. 2004) (section 1331 does not waive the government's sovereign immunity); Randall v. United States, 95 F.3d 339, 345 (4th Cir. 1996) (the general federal question jurisdiction statute is not a waiver of sovereign immunity but merely establishes

[5] Although plaintiffs have captioned their suit as one against, among others, "Robert Lenhard, Federal Election Commission Chairman," the Amended Complaint does not allege a single action taken by Mr. Lenhard. Rather, the Amended Complaint speaks in terms of actions that the "FEC" allegedly did or failed to do. See, e.g., Am. Compl. ¶¶ 19, 31, 32, 34, 40, 42-45, 47-49, 51. In addition, because the FECA requires a majority vote of the Commission for all decisions "with respect to the exercise of its duties and powers under the provisions of th[e] Act," 2 U.S.C. § 437c(c), no single Commissioner, including its Chairman, has the authority to make the kinds of decisions alleged in the Amended Complaint on his or her own.

a subject matter that is within the competence of federal courts to entertain). "Consequently, district court jurisdiction cannot be based on § 1331 unless some other statute waives sovereign immunity." Neighbors for Rational Dev., 379 F.3d at 961. Accord, e.g., Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999); Clinton County Comm'rs v. U.S. EPA, 116 F.3d 1018, 1021 (3d Cir. 1997).[6]

Plaintiffs also rely on 28 U.S.C. §§ 1361, 2201, and 2202, but these statutes do not waive sovereign immunity and thus do not alone create an independent basis for jurisdiction. It is well-settled that 28 U.S.C. § 1361, the federal mandamus statute, does not constitute a waiver of sovereign immunity. See Coggeshall Development Corp. v. Diamond, 884 F.2d 1, 3-4 (1st Cir. 1989); White v. Administrator of GSA, 343 F.2d 444, 447 (9th Cir. 1965); Foreman v. General Motors Corp., 473 F. Supp. 166, 181 (E.D. Mich. 1979). Moreover, the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201, 2202, "does not waive sovereign immunity, … and does not constitute an independent basis for jurisdiction. Rather, the statute merely creates a remedy in cases otherwise within the Court's jurisdiction." 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) (internal citations omitted). See White, 343 F.2d at 445-46 (28 U.S.C. §§ 2201 and 2202 do not waive sovereign immunity). The DJA "is procedural in nature and does not enlarge the jurisdiction of the district courts or waive the sovereign immunity of the United States." Foreman, 473 F. Supp.

[6] Although plaintiffs also generally rely upon (Am. Compl. ¶ 5) the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-05, they make no attempt to suggest that it provides jurisdiction for, or is remotely relevant to, Count II.

at 181. Because plaintiffs have no basis for asserting a waiver of sovereign immunity regarding Count II, the Court should dismiss that claim for lack of subject-matter jurisdiction.[7]

Even if the Court had jurisdiction over Count II, the Count fails to state a claim against the Commission. Count II alleges that the Commission and the Department "conspired to retaliate" (Am. Compl. ¶¶ 32, 40) against plaintiffs for exercising their First Amendment free speech rights. The elements of this alleged conspiracy appear to consist of: (1) obtaining plaintiffs' private bank records (id. ¶¶ 32, 39), (2) making frivolous allegations of campaign finance law violations (id. ¶ 34), and (3) compelling unspecified "individuals" to appear before a grand jury (id. ¶ 35). None of these elements can support plaintiffs' claim in Count II against the Commission.

First, plaintiffs do not allege that the Commission obtained records directly from any banks, see supra p. 6, but simply that the Commission received them from the Department. (Am. Compl. ¶ 31). However, as we showed, supra pp. 7-8, the RFPA does not apply to the Department's accessing of plaintiffs' private financial records pursuant to a grand jury subpoena, and it explicitly permits the Department to transmit this financial information to another agency for use in a "legitimate law enforcement inquiry," 12 U.S.C. § 3412(a).

Second, there is no basis for plaintiffs' claim (Am. Compl. ¶ 34) that the Commission has made "frivolous allegations of campaign finance abuse" against plaintiffs. To the contrary, to the extent that plaintiffs are complaining about an FEC investigation, it is one initiated at the request of plaintiff Jack Beam's own law firm. On February 1, 2006, Thomas A. Cranmer wrote to then-FEC Chairman Michael E. Toner on behalf of the Fieger law firm to "demand that the

[7] Nor can plaintiffs assert a Bivens-type action against a federal agency. FDIC v. Meyer, 510 U.S. at 483-86 (citing Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)); Wilkie v. Robbins, 127 S. Ct. 2588, 2597-98 (2007).

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…." (Pl. Mot. for Judgment Ex. A at 2). Mr. Cranmer's letter further stated that the FBI had already executed a search of his client's office and served numerous subpoenas. He asked that the Commission "determine whether there is probable cause to believe" that his client violated the FECA. (Id. at 3). Moreover, plaintiffs rely upon a letter from the Commission informing them that it had initiated the investigation that Mr. Beam's law firm requested (Pl. Mot. for Judgment Ex. B at 1). In sum, plaintiffs can hardly claim now that the Commission's investigation is the result of unlawful retaliation.[8]

Third, the Commission — which has no criminal enforcement authority of its own — cannot compel grand jury appearances, and the Amended Complaint does not even allege that plaintiffs were personally compelled to appear before a grand jury. Even if a required appearance before a grand jury could be considered an act of retaliation, plaintiffs cannot state a claim of personal injury by alleging actions taken by the defendants against third parties. In the standing context, the third party standing rule "normally bars litigants from asserting 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 some hindrance adversely affects the ability of that third party to protect his or her own interests. Powers v. Ohio, 499 U.S. 400, 411 (1991) (internal citations omitted). However, the Amended

[8] In addition, the conclusory and speculative accusations in the Amended Complaint about the Commission's alleged retaliatory motives are particularly insufficient to state a claim, given the normal presumption that the Commission performs its duties in good faith. Cf. Starr v. FAA, 589 F.2d 307, 315 (7th Cir. 1978) ("normal presumption of good faith that, in courts of law, government officials still enjoy, … must be refuted by well-nigh irrefragable proof").

Complaint fails to establish the required relation to those involved in the grand jury proceeding, and the multiplicity of suits in different forums brought by associates of the Fieger firm attacking the alleged grand jury investigation belies any claim that such third parties cannot protect their own interests in court. This is yet another reason why Count II fails to state a claim.

Finally, in Count II plaintiffs allege a conspiracy between the Department and the Commission, but they fail to provide the required specificity as to the alleged improper acts of the Commission. "At a minimum, a complaint must contain facts sufficient to state a claim as a matter of law, and mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss." Fries v. Helsper, 146 F.3d 452, 457 (7th Cir. 1998) (citing House v. Belford, 956 F.2d 711, 721 (7th Cir. 1992)). A complaint that merely implies, with the conclusory allegation of a conspiracy, that a defendant is responsible for someone else's fraudulent acts is insufficient. Frymire v. Peat, Marwick, Mitchell & Co., 657 F. Supp. 889, 895-96 (N.D. Ill. 1987) (citing Adair v. Hunt International Resources Corp., 526 F. Supp. 736, 745 (N.D. Ill. 1981)). Any plaintiff alleging conspiracy must identify the nature of the conspiracy and the defendant's role in it with some particularity. Frymire, 657 F. Supp. at 896-97 (citing cases). Above all, since conspiracy rests on agreement, the plaintiff must allege with some particularity facts sufficient to show an agreement between the parties to inflict the alleged wrong. Id. at 895-96 (citing Koch v. Schneider, 550 F. Supp. 846, 850 (N.D. Ill.1982)). Plaintiffs' vague and conclusory claims against the Commission satisfy none of these standards.

Accordingly, because the Court lacks jurisdiction over plaintiffs' claim of alleged retaliation for the exercise of their free speech rights, and because Count II also fails to state a claim upon which relief may be granted, the Court should dismiss with prejudice Count II of the Amended Complaint.

C. Counts III, IV, and V of the Amended Complaint Rely on Plaintiffs' Referral Theory and Related Claims That This Court Has Already Rejected

In Counts III (Violation of FECA), IV (Administrative Procedure Act), and V (Mandamus) of the Amended Complaint, plaintiffs assert claims premised on the notion that the Department cannot prosecute criminal violations of the FECA absent a Commission referral, a premise already considered and rejected by this Court in the June 22, 2007, Minute Order. Indeed, Counts IV and V are copied almost verbatim from the original complaint. Counts III, IV, and V should be dismissed under the law of the case doctrine. Moreover, for the reasons stated in the Commission's previous motion to dismiss, those counts also fail to state a claim.

The doctrine of the law of the case promotes judicial economy by avoiding repeated litigation of issues such as these decided during the course of the same case. "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). Indeed, 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 International, Inc. v. National Labor Relations Board, 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). Even though the Court did not issue a written opinion specifying its reasons for its earlier dismissal, the fact that the Order dismissed all three of these claims establishes by "necessary implication" a very strong presumption that all three issues were actually decided adversely to plaintiffs; indeed, no other conclusion is possible for an order dismissing an entire complaint. See In re Soybean Futures

Litigation, 892 F. Supp. 1025, 1042 (N.D. Ill. 1995). Because nothing about this Court's previous dismissal of these three recycled claims is "manifestly erroneous," and plaintiffs have made no materially different allegations to support these new claims, plaintiffs should be precluded from relitigating issues the Court has already resolved.

Even if this Court were to re-examine plaintiffs' claims based on the FECA referral provision, those claims should plainly be dismissed. Indeed, the claims were recently raised and firmly rejected by the courts in Fieger v. Gonzales, No. 07-cv-10533 (E.D. Mich. Aug. 15, 2007), and Bialek v. Gonzales, No. 07-cv-321 (D. Col. June 28, 2007), two of the three other cases filed by plaintiffs' associates in their broad-based collateral assault on the alleged grand jury investigation underlying all this litigation. Copies of the opinions in those cases are attached to this brief as Exhibits A and B. Just last week, the Fieger court rejected the argument that a Commission referral is a prerequisite to the Department's criminal enforcement of the FECA. See Fieger, Ex. A, slip op. at 8-14. The Fieger court also dismissed the claims that the Commission has failed to investigate properly the activities of the Fieger law firm and its associates, finding no legal basis for the court to grant the relief plaintiffs there (like those here) seek under the APA and the mandamus statute. See id., slip op. at 14-18.

Regarding plaintiffs' flawed referral theory, nothing in the FECA constitutes a "clear and unambiguous" restriction of the plenary power of the Attorney General to investigate and prosecute violations of criminal law. United States v. International Operating Engineers, Local 701, 638 F.2d 1161 (9th Cir. 1979). As the Commission has explained previously, nothing in the text of the FECA (FEC Opp. at 7-8), its legislative history (id. at 8-13), or relevant case law (id. at 10-12) supports plaintiffs' position that the Attorney General and the Department

must receive a formal referral from the Commission before initiating a criminal investigation into campaign finance violations. See Fieger, Ex. A, slip op. at 8-14.

Plaintiffs' original second and third counts, which are nearly identical to Counts IV and V of the Amended Complaint, alleged that the Commission has improperly delayed its investigation into the activities of plaintiffs and their associates. (Compl. ¶ 26-32). Relying upon the APA and the mandamus statute, 28 U.S.C. §1361(a), plaintiffs again ask this Court pursuant to section 706 of the APA to order the Commission to proceed with an investigation of their activities. However, as the Commission has already shown (FEC Opp. at 14-19), these claims lack any merit. See Fieger, Ex. A, slip op. at 14-18. Because the FECA does not specify any "discrete action" that the Commission is "required" to take in a particular time frame, there is nothing here that is subject to review under the APA or the mandamus statute. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). We have also shown (Opp. at 16-17) that it is well-settled that an agency like the Commission has broad authority to control the timing and conduct of its investigations in the absence of non-discretionary, statutory requirements.

The Commission has also demonstrated that a claim under section 706 of the APA is precluded by section 701(a)(1), which permits judicial review "except to the extent" that relevant statutes preclude such review. We explained (Opp. at 17) that courts are required "to determine whether and to what extent the Campaign Act precludes judicial review of a particular claim [by looking] to the express language of the statute, as well as the structure of the statutory scheme, its legislative history, and the nature of the administrative action involved," Stockman v. FEC, 138 F.3d 144, 152 (5th Cir. 1998). We also noted (Opp. at 18) that the express congressional delegation to the Commission of exclusive jurisdiction over civil enforcement of the FECA,

2 U.S.C. § 437c(b)(1), § 437c(d)(1), and § 437d(a)(6), deprives federal courts of general jurisdiction to review the handling of the Commission's administrative complaints except as expressly permitted in the Act, Stockman, 138 F.3d at 153. The only FECA provision that permits such review is 2 U.S.C. § 438g(a)(8), which permits an administrative complainant to file a suit against the Commission for failure to act on an administrative complaint within 120 days or following the dismissal of such a complaint. But because such suits may be brought only in the District of Columbia, and only by administrative complainants (not administrative respondents like plaintiffs), see FEC Opp. at 18, plaintiffs' APA and mandamus claims must be dismissed.

Finally, plaintiffs' reliance on 2 U.S.C. § 437g(a) for the related claim that the Commission is under a duty to "not disclose any information regarding the targets of its investigation" (Am. Compl. ¶ 43) is misplaced. Section 437g(a)(12), the specific provision upon which plaintiffs rely, is intended solely to prevent the public disclosure of the existence of a Commission investigation and the targets of such an investigation.[9] In this case, plaintiffs themselves publicly disclosed the Commission investigation by attaching documents generated in that investigation to their original complaint. Moreover, nothing in section 437g(a)(12) prohibits the Commission from sharing information with the Department with which the Commission shares responsibility for enforcing the FECA. Such inter-agency sharing of information is clearly not a disclosure to the "public." In addition, plaintiffs' exclusive reliance on section 437g(a) ignores 2 U.S.C. 437d(a)(9), under which the Commission has broad, general

[9] That provision states (emphasis added): "Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."

authority to "report apparent violations to the appropriate law enforcement authorities." Thus, even if plaintiffs' vague allegations of information sharing between the Department and the Commission were true, such confidential sharing between two government agencies would be entirely lawful under the FECA.

CONCLUSION

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

Respectfully submitted,

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