

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 PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

**DEFENDANT FEDERAL ELECTION COMMISSION'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant Federal Election Commission ("FEC" or "Commission") submits its proposed findings of fact and conclusions of law following the Court's August 25 and 26, 2010, bench trial on plaintiffs' claim under the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401-22. Under the RFPA, "[f]inancial records originally obtained pursuant to [the RFPA] shall not be transferred to another agency or department unless the transferring agency or department certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry." 12 U.S.C. § 3412(a). For the reasons stated below, plaintiffs failed to prove by a preponderance of the evidence that the FEC violated section 3412(a), and, accordingly, the Court should enter judgment for the FEC.

**I. PROPOSED FINDINGS OF FACT**

**A. The Parties**

1. Plaintiff Jack Beam, a resident of Illinois, is an attorney who is “of counsel” to the law firm Fieger, Fieger, Kenney, Johnson & Giroux, P.C. (“Fieger law firm”). (Jack Beam, Trial Transcript (“Tr.”) 181:14-16; 195:16-18; Second Am. Compl. ¶ 1 (Doc. #91).)  
Plaintiff Renee Beam, also a resident of Illinois, is married to Jack Beam. (Renee Beam, Tr. 109:17-18; Second Am. Compl. ¶ 1 (Doc. #91).)
2. Defendant Federal Election Commission is an independent agency of the United States government with exclusive civil jurisdiction over the administration, interpretation, and enforcement of the Federal Election Campaign Act (“FECA”), 2 U.S.C. §§ 431-57.

**B. The Department of Justice’s Grand Jury Investigation**

3. In 2005, the Department of Justice (“DOJ”) began to investigate whether the Fieger law firm reimbursed its employees and their family members for their campaign contributions to John Edwards’s 2004 presidential campaign, in violation of FECA’s ban on contributions in the name of another, 2 U.S.C. § 441f. (Joint Trial Exhibit (“Exh.”) 24 (Audra Wassom Bayes, Second Deposition (“Dep.”) 13:14-15:13; 20:4-10); Mark Shonkwiler, Tr. 159:6-21; M. Kendall Day, Tr. 251:11-23.)

**C. The FEC’s Initial Consideration of Allegations About the Fieger Firm**

4. In February 2006, the Fieger law firm requested that the FEC begin a civil investigation of the allegations of FECA violations. (Exh. 24 (Wassom Bayes, Dep. 15:14-16:19).) In response, the FEC began to consider whether there was “reason to believe” the Fieger law firm and its associates had violated section 441f and the agency should open an investigation. (Exh. 24 (Wassom Bayes, Dep. 16:20-17:3; 20:20-21:13; 22:5-23:2).) If

at least four of the FEC's six commissioners find that there is "reason to believe" FECA was violated, the FEC will open an investigation into the alleged wrongdoing. *See* 2 U.S.C. § 437g(a)(2); Shonkwiler, Tr. 153:21-25; 157:9-158:13. "Reason to believe" is a minimal standard which is generally assessed on the basis of publicly available information. (Shonkwiler, Tr. 158:15-23; Exh. 24 (Wassom Bayes, Dep. 40:4-13).) Audra Wassom Bayes was the primary FEC staff attorney assigned to the matter regarding the Fieger law firm. (Exh. 24 (Wassom Bayes, Dep. 12:19-13:1.); Shonkwiler, Tr. 154:20-23.)

5. In considering the Fieger law firm matter, FEC staff examined publicly available information for evidence that associates of the firm violated section 441f. (Roger Hearron, Tr. 45:16-46:8.) The FEC obtained the names of people associated with the Fieger firm from the firm's website, and found from an FEC database of federal campaign contributors that many of them and their relatives had made contributions in the largest amount allowed by FECA to the 2004 Edwards campaign on one of three days. (Exh. 2 (Letter from FEC to Jack Beam dated Sept. 26, 2006 ("J. Beam RTB letter") at p. 3); Exh. 2a (Letter from FEC to Renee Beam dated Sept. 26, 2006 ("R. Beam RTB letter") at p. 3); Hearron, Tr. 75:15-76:2; 77:21-78:1.) In addition, FEC staff discovered that many of the contributors had never made federal campaign contributions before. (Exh. 2 (J. Beam RTB letter at pp. 3-4); Exh. 2a (R. Beam RTB letter at pp. 3-4); Hearron Tr. 75:15-76:2.)
6. FEC staff found a newspaper article reporting that a former Fieger firm attorney claimed that the firm had instructed him and his wife to make contributions to the Edwards campaign in 2003 in return for later reimbursement. (Exh. 2 (J. Beam RTB letter at p. 4);

Exh. 2a (R. Beam RTB letter at p. 4); Hearron, Tr. 46:13-20.) FEC staff also found that the Fieger firm's principal partner, Geoffrey Fieger, had not denied the reimbursement allegations, but had publicly admitted to giving "bonuses" to "civic-minded employees." (Exh. 2 (J. Beam RTB letter at p. 4); Exh. 2a (R. Beam RTB letter at p. 4); Shonkwiler, Tr. 160:7-22.)

7. FEC investigator Roger Hearron found Jack Beam's name on the Fieger firm's website. (Hearron, Tr. 77:21-24.) The FEC database indicated that Jack Beam and his wife, plaintiff Renee Beam, each contributed \$2,000 to the Edwards campaign in early February 2003. (Exh. 2 (J. Beam RTB letter at p. 4); Exh. 2a (R. Beam RTB letter at p. 4); Hearron, Tr. 68:23-69:2; 77:21-78:1; J. Beam, Tr. 187:18-21.)
8. In June 2006, Jack Beam called his broker, Merrill Lynch, to inquire whether any government agency had accessed his account records as part of the ongoing investigations. (J. Beam, Tr. 199:22-200:4; 211:18-212:1.) Merrill Lynch responded that it could not provide this type of information. (J. Beam, Tr. 356:5-9.)

**D. The FEC's "Reason to Believe" Finding**

9. In August 2006, the FEC's Office of General Counsel recommended that the Commission find "reason to believe" that the Fieger law firm, Fieger, and over 50 suspected conduits associated with the firm — including plaintiffs — violated section 441f. (Exh. 24 (Wassom Bayes, Dep. 13:21-14:1; 25:6-13; 26:16-27:6); Shonkwiler, Tr. 156:20-157:8.)
10. The Commission determined by a vote of its members that "reason to believe" existed. (Exh. 2 (J. Beam RTB letter at p. 1); Exh. 2a (R. Beam RTB letter at p. 1); Shonkwiler, Tr. 156:20-157:8.) On September 26, 2006, the respondents, including plaintiffs, were

informed of the FEC's decision by letter and invited to submit responses. (Exh. 2 (J. Beam RTB letter); Exh. 2a (R. Beam RTB letter); Exh. 24 (Wassom Bayes Dep. 27:19-28:10); J. Beam, Tr. 188:10-23.) Each letter was accompanied by a "factual and legal analysis" explaining the Commission's reasoning. (Exh. 2 (J. Beam RTB letter at pp. 3-5); Exh. 2a (R. Beam RTB letter at pp. 3-5); Hearn, Tr. 44:15-21; Shonkwiler, Tr. 161:15-23.)

11. The factual and legal analysis attached to the FEC's letters to plaintiffs described the evidence FEC staff had found, and stated that "[i]f [plaintiffs] accepted reimbursement for [their] contribution[s] to the Edwards committee, then [they] may have violated the Act." (Exh. 2 (J. Beam RTB letter at pp. 3-5); Exh. 2a (R. Beam RTB letter at pp. 3-5).)
12. In response, plaintiffs denied that they were reimbursed for their contributions. (Exh. 4 (Letters from J. Beam and R. Beam to FEC dated Oct. 6, 2006 ("Beam response letters"))); R. Beam Tr. 116:23-117:2; J. Beam Tr. 193:16-24.)

**E. FEC Interaction with DOJ Begins**

13. Members of the FEC staff interacted periodically with DOJ attorneys involved in the Fieger grand jury investigation to share information and coordinate their parallel investigations. (Exh. 24 (Wassom Bayes, Dep. 32:22-33:22); Day, Tr. 254:17-255:4.)
14. M. Kendall Day, a trial attorney with the Public Integrity Section of DOJ's Criminal Division, served as Wassom Bayes's primary DOJ contact. (Exh. 24 (Wassom Bayes, Dep. 34:1-5); Day, Tr. 250:25-251:3; 255:18-24.) Wassom Bayes served as Day's primary FEC contact. (Exh. 24 (Wassom Bayes, Dep. 34:7-10); Day, Tr. 255:15-17.) Information about the Fieger investigations transmitted between the two agencies was transmitted between Day and Wassom Bayes. (Day, Tr. 269:7-13.)

15. DOJ informed the FEC that it could not share any grand jury materials from its Fieger investigation due to Federal Rule of Criminal Procedure 6(e). (Exh. 24 (Wassom Bayes Dep. 36:4-11; 89:6-12).)
16. In late 2006 or early 2007, DOJ gave the FEC non-grand jury investigative reports (called “302 reports”) drafted by agents of the Federal Bureau of Investigation, and possibly comparable reports by agents of the Internal Revenue Service, related to the Fieger investigation. (Exh. 24 (Wassom Bayes, Dep. 38:2-22); Day, Tr. 256:3-257:5.)

**F. The FEC Investigation During the Course of the DOJ Investigation**

17. The Commission’s “reason to believe” finding in September 2006 triggered a formal civil investigation, called Matter Under Review (“MUR”) 5818, of the Fieger law firm’s alleged conduit contribution scheme. (Exh. 24 (Wassom Bayes, Dep. 22:16-23:2); Shonkwiler, Tr. 153:14-19, 24-25.) During an investigation, the FEC can engage in administrative discovery to determine whether there is enough evidence to support a finding that “probable cause” exists to believe that FECA has been violated, a standard that is higher than the “reason to believe” standard. *See* 2 U.S.C. § 437g(a)(4); Exh. 24 (Wassom Bayes, Dep. 10:7-21; 40:14-20); Shonkwiler, Tr. 158:5-20; 163:15-18.
18. Although each section 441f case presents unique circumstances, more often than not the FEC does not need to obtain the bank records of the alleged conduits to determine if they were reimbursed for their federal campaign contributions. (Shonkwiler, Tr. 165:8-22; 167:4-15.) Often, the alleged reimbursers or conduits admit to the reimbursements. (Shonkwiler, Tr. 167:7-12.) Where evidence of reimbursement is needed, the FEC will first attempt to obtain the records of the alleged source of the reimbursement (the “principal”), which is more efficient than obtaining the records of multiple alleged

conduits. (Exh. 24 (Wassom Bayes, Dep. 76:18-77:7); Shonkwiler, Tr. 162:14-24; 165:17-166:14; 167:4-12.)

19. In MUR 5818, the Commission did not conduct administrative discovery, pending the resolution of DOJ's criminal investigation. (*See, e.g.*, Exh. 24 (Wassom Bayes, Dep. 40:14-41:14).) Many of the MUR 5818 respondents requested and received agreements to toll the statute of limitations during this period. (Exh. 24 (Wassom Bayes, Dep. 41:11-42:16); Shonkwiler, Tr. 163:3-9; 168:21-169:10.) Although plaintiffs were not among the respondents who requested that the FEC toll the statute, the FEC deferred conducting an active investigation as to MUR 5818 generally, including as to plaintiffs. (Shonkwiler, Tr. 170:11-24.) The FEC had initially prepared subpoenas for the records of the alleged principals in the case: the Fieger law firm, Fieger, Vernon Johnson, and possibly their spouses. (Exh. 24 (Wassom Bayes, Dep. 40:21-41:10.) However, those subpoenas never issued, and the FEC did not otherwise attempt to obtain evidence of reimbursement from the respondents. (Exh. 24 (Wassom Bayes, Dep. 40:21-42:16); Shonkwiler, Tr. 163:3-14; 168:21-169:10.)
20. On March 2, 2007, plaintiffs filed suit against DOJ and the FEC, claiming that DOJ's investigation was unlawful in the absence of an FEC referral pursuant to 2 U.S.C. § 437g(a)(5)(c), and that the FEC illegally conspired with DOJ to delay its civil investigation in order to allow DOJ to pursue its own allegedly unlawful criminal investigation. (*See generally* Compl. (Doc. #1).)

**G. The Merrill Lynch Grand Jury Subpoena**

21. DOJ's grand jury investigation continued in the spring of 2007. (Day, Tr. 280:20-281:7.) In May 2007, DOJ served a grand jury subpoena, dated April 24, 2007, on Merrill Lynch

to obtain plaintiffs' records relating to the Cash Management Accounts from which they wrote their Edwards campaign contribution checks. (Exh. 18 (Merrill Lynch subpoena dated April 24, 2007 ("Merrill Lynch subpoena")); Day, Tr. 252:8-253:12; J. Beam, Tr. 207:14-17.) DOJ found no evidence in the Merrill Lynch records or from any other source that plaintiffs were reimbursed for their Edwards contributions. (Day, Tr. 263:16-21; 282:7-283:4.) As a result, DOJ did not use any of plaintiffs' financial records at the Fieger-Johnson criminal trial. (Day, Tr. 263:22-264:1.)

22. On June 29, 2007, after their original complaint was dismissed, plaintiffs amended their complaint and added, among other claims, the instant RFPA claim. (Am. Compl. ¶¶ 14-29 (Doc. #47).) In their Second Amended Complaint, filed on March 24, 2008 after their first Amended Complaint was dismissed (*see* Mem. Op. and Order dated March 7, 2008, (Doc. #90)), plaintiffs alleged more specifically that DOJ and the FEC had violated the RFPA when DOJ "secretly obtained plaintiffs' private banking records" from "Merrill Lynch," and "transmitted such illegally gathered documents to the [FEC]." (Second Am. Compl. ¶¶ 15-16, 18 (Doc. #91).) As a result, plaintiffs' RFPA claim is based on an alleged transfer that must have occurred, if at all, before March 24, 2008. (J. Beam, Tr. 207:6-13.)

#### **H. Fieger-Johnson Indictment and Trial**

23. In August 2007, a grand jury indicted Fieger and his law firm partner Vernon Johnson for violating section 441f. (Day, Tr. 281:18-19; Hearn, Tr. 88:17-24.) The indictment alleged that Fieger and Johnson reimbursed various conduits, but plaintiffs were not among them. (Day, Tr. 269:14-18; 282:7-11.) About a week after the indictment, Day sent a copy of the indictment to the FEC. (Hearn, Tr. 79:2-7.)



24. In the spring of 2008, Day worked with FEC attorney Thomas Andersen to determine whether Andersen might testify as an expert witness at the criminal trial regarding the functions of the FEC and the operation of section 441f. (Thomas Andersen, Tr. 126:24-127:20; Day, Tr. 257:7-22.) During their first meeting in March 2008, Day showed Andersen a sample of the anticipated trial exhibits, which included the checks and bank statements of one alleged conduit. (Andersen, Tr. 129:4-13; Day, Tr. 257:23-258:19.) These records did not belong to Jack or Renee Beam. (Andersen, Tr. 132:6-133:2.) DOJ had only prepared trial exhibits for suspected conduits. (Day, Tr. 258:7-19.) And because it had found no evidence that plaintiffs were reimbursed, DOJ did not use plaintiffs' financial records at trial or prepare any exhibits specifically about the Beams. (Day, Tr. 263:16-264:1.) Any personal financial information in the anticipated trial exhibit that Andersen saw was likely redacted. (Day, Tr. 275:11-18.) Andersen did not take these documents from his meeting with Day. (Andersen, Tr. 133:3-6.)
25. In April 2008, Andersen received a FedEx envelope of materials, including a compact disc, from Day. (Andersen, Tr. 133:7-18.) The materials contained publicly available information on contributors to the Edwards campaign, including their names, addresses, occupations, employers, and the date and amount of their contributions. (Andersen, Tr. 133:9-134:13; 136:19-137:18.)
26. Fieger and Johnson's trial started in April 2008 and concluded in June 2008, when the jury acquitted both defendants. (Exh. 24 (Wassom Bayes, Dep. 48:3-13); Day, Tr. 251:15-23; 258:20-22; 288:16-189:3.)
27. At trial, Fieger conceded that he and his firm had reimbursed many of the firm's employees and their relatives for their campaign contributions to the Edwards campaign,

so the Commission had no need to obtain financial records showing those reimbursements for its civil investigation. (Shonkwiler, Tr. 162:5-163:14.)

**I. The DOJ Compact Disc Containing Fieger Trial Materials**

28. Soon after the Fieger-Johnson trial, at the FEC's request, Day sent Wassom Bayes publicly available trial transcripts and exhibits in a compact disc format. (Exh. 24 (Wassom Bayes, Dep. 48:16-50:8; 83:16-84:1); Shonkwiler, Tr. 179:22-180:1; Day, Tr. 259:2-23.) The trial exhibits included redacted financial records of suspected conduits, but no financial records of the plaintiffs. (Exh. 24 (Wassom Bayes, Dep. 62:16-21); Day, Tr. 261:8-262:22; 263:22-264:1.) Wassom Bayes recalled receiving more than one compact disc of this public trial material. (Exh. 24 (Wassom Bayes, Dep. 49:19-50:8).) She testified that her memory of the precise number may have been based on copies that the FEC made after receiving the materials. (Exh. 24 (Wassom Bayes, Dep. 82:16-83:1).)
29. Hearron obtained this compact disc of Fieger-Johnson trial materials in June 2008. (Hearron, Tr. 52:5-22.) During his deposition, Hearron said he recalled receiving a second compact disc from DOJ sometime after the FEC sent its "reason to believe" letter to plaintiffs; however, at trial Hearron credibly testified that he had been mistaken at his deposition, and that the only disc he had received from DOJ was the trial materials disc from June 2008. (Hearron, Tr. 55:15-58:10.)
30. In July 2008, Wassom Bayes was promoted, and FEC staff attorney Phillip Olaya assumed primary responsibility for MUR 5818, along with the matter's staff attorney file, which included the DOJ compact disc. (Exh. 24 (Wassom Bayes, Dep. 68:5-17); Shonkwiler, Tr. 155:4-11; Phillip Olaya, Tr. 294:4-25; 295:16-19; 299:8-300:4; 303:7-13; 331:2-6; 331:21-332:2.) Olaya did not see plaintiffs' financial records on that

compact disc or in any other material that came from DOJ while working on MUR 5818, although he mistakenly stated in a deposition that he saw plaintiffs' materials on that compact disc. (Olaya, Tr. 304:6-16; 309:12-17.)

**J. The FEC Concludes Its Investigation, Deciding to Take No Further Action As to Any of the Alleged Conduits, Including Plaintiffs**

31. By the time Olaya took over for Wassom Bayes in July 2008, the FEC's Office of General Counsel had decided to focus its investigation only on the alleged principals, and not the alleged conduits (including plaintiffs), in MUR 5818. (Olaya, Tr. 297:4-298:8; 340:20-341:4.)
32. Once the FEC entered into a conciliation agreement with the the Fieger law firm in the fall of 2009, the agency sent letters to all of the alleged conduits, including plaintiffs, informing them that the FEC had decided to take no further action against them. (Shonkwiler, Tr. 168:6-18; Olaya, Tr. 332:4-16; 340:8-15.)

**K. DOJ Did Not Transfer Plaintiffs' Private Financial Records to the FEC**

33. There is no direct evidence that a transfer of plaintiffs' financial records between DOJ and the FEC took place. Plaintiffs have put forth no documentary evidence showing that the FEC obtained their records from DOJ. Likewise, no witness testified that they observed DOJ transfer plaintiffs' financial records to the FEC. Renee and Jack Beam have no personal knowledge of any illicit transfer, and Jack Beam testified that his evidence of such a transfer was circumstantial. (R. Beam, Tr. 121:10-15; J. Beam, Tr. 205:12-16; 208:16-22.) Day and Wassom Bayes, the principal contacts between the FEC and DOJ in this matter, testified that DOJ never transferred plaintiffs' private financial records to the FEC. (Exh. 24 (Wassom Bayes Dep. 70:1-8); Day, Tr. 264:2-22.) All other witnesses also testified that they had no personal knowledge of such a transfer

- between DOJ and the FEC. (Exh. 22 (Sealand, Dep. 26:6-27:14); Hearron, Tr. 72:11-73:4; Andersen, Tr. 140:2-4, 9-11; Shonkwiler, Tr. 176:17-177:6; Olaya Tr. 309:12-21.)
34. Plaintiffs' circumstantial evidence also fails to demonstrate the alleged transfer. While DOJ transferred certain materials to the FEC regarding the Fieger case, there is nothing in the record that suggests any of those materials included plaintiffs' financial records.
35. The investigative reports Day shared with the FEC in late 2006 or early 2007 were not grand jury materials, and there is no evidence they contained financial information of plaintiffs. (Exh. 24 (Wassom Bayes, Dep. 38:2-22); Day, Tr. 256:3-257:5.)
36. The Fieger-Johnson indictment that Day sent to the FEC in August 2007 does not reference plaintiffs, let alone contain their financial information. (Day, Tr. 269:14-18; 282:7-11.)
37. Day showed Andersen an anticipated trial exhibit containing an alleged conduit's financial records during a meeting in March 2008, but it is undisputed that the records related to someone other than plaintiffs. (Andersen, Tr. 132:6-133:2) Indeed, DOJ never prepared trial exhibits relating to plaintiffs, since DOJ no longer suspected they were conduits as of mid-2007. (Day, Tr. 258:7-19; 263:16-264:1; 282:7-283:4; Exh. 18 (Merrill Lynch subpoena).)
38. Plaintiffs have not put forth any evidence disputing Andersen's testimony that the FedEx package of materials he received from Day in April 2008 consisted only of publicly available contributor information, and not plaintiffs' financial records. (Andersen, Tr. 133:9-134:4; 134:8-13; 137:9-15.) In any event, this transfer took place in April 2008 — after plaintiffs' filed their operative complaint on March 24, 2008 (*see* Second Am. Compl. (Doc. #91)).

39. Day transferred a compact disc of Fieger-Johnson trial exhibits and transcripts to the FEC after the trial ended in June 2008, but that was well after plaintiffs filed their complaint, and in any case the compact disc contains only publicly available trial materials and no financial records relating to plaintiffs. (Exh. 1 (DOJ compact disc); Exh. 24 (Wassom Bayes, Dep. 48:16-50:8; 62:16-21; 83:16-84:1); Day, Tr. 258:20-22; 259:2-23; 261:8-262:22; 263:22-264:1.)
40. In view of the testimony of Day and Wassom Bayes, as well as other evidence indicating that no transfer of plaintiffs' private financial records occurred, FEC attorney Phillip Olaya's deposition testimony that he saw plaintiffs' financial records on the compact disc the FEC received from DOJ containing public Fieger-Johnson trial materials was mistaken, and is insufficient to prove a transfer. (Olaya, Tr. 31:11-24.) Moreover, Olaya credibly testified at trial that he had erred in stating that plaintiffs' financial records were on this compact disc. (Olaya, Tr. 304:6-305:18; 309:12-17.) In any event, the Court has reviewed the disc and confirmed that it contains no financial records of the plaintiffs (Exh. 1 (DOJ compact disc)), and plaintiffs put forth no evidence showing that Olaya received or saw plaintiffs' financial records from DOJ in any other way or viewed any other compact disc related to MUR 5818.
41. Hearron's deposition testimony indicated that he received a second compact disc, but Hearron credibly testified at trial that he received only the one disc of public Fieger-Johnson trial materials from DOJ. (Hearron, Tr. 52:5-22; 54:21-58:10.) Plaintiffs put forth no evidence at trial demonstrating the existence of a second disc, or that this supposed second disc contained plaintiffs' financial records.

42. The only evidence that the FEC possessed any of plaintiffs' financial records is the contribution checks that plaintiffs sent to the Edwards campaign; however, it is undisputed that the FEC received those checks directly from the Edwards for President Committee during a mandatory audit the agency performed pursuant to 26 U.S.C. § 9038, and not from DOJ. (Exh. 22 (Sealander, Dep. 23:22-25:20).)
43. The evidence does not show that the FEC must have obtained plaintiffs' financial records from DOJ in order to carry out the agency's investigatory duties.
44. Nothing in the record suggests that the publicly available evidence the FEC collected in 2006 was insufficient for the Commission to find "reason to believe" that plaintiffs violated section 441f. Indeed, it is the FEC's practice to rely upon publicly available evidence at that stage. (Exh. 24 (Wassom Bayes, Dep. 40:4-13).) The claim that Merrill Lynch informed Jack Beam in June 2006 that it could not confirm whether a government agency had accessed his personal financial records (J. Beam, Tr. 192:13-193:15; 355:14-356:9) does not show that his records were in fact accessed, or that they were accessed by DOJ, or that DOJ then transferred those records to the FEC.
45. Although DOJ obtained plaintiffs' financial records with an April 2007 grand jury subpoena while the FEC's investigation was ongoing (Exh. 18 (Merrill Lynch subpoena); Day, Tr. 252:8-253:12), the existence of this subpoena does not prove that DOJ in fact transferred any records obtained pursuant to it to the FEC.
46. The evidence shows that the FEC had methods of determining whether the alleged conduits were reimbursed without relying on financial records obtained by DOJ. (Shonkwiler, Tr. 165:8-22; 167:4-15.) The FEC could have relied upon Fieger's admissions, both in the media and at trial, that he reimbursed his employees (Exh. 2 (J.

Beam RTB letter at p. 4); Exh. 2a (R. Beam RTB letter at p. 4); Shonkwiler, Tr. 163:10-12; 167:7-12), or upon Fieger's records or the Fieger law firm's records (Shonkwiler, Tr. 162:14-24; 165:17-166:14; 167:4-12). Moreover, the FEC, after reason to believe was found, could have used its own administrative subpoena power to obtain evidence. (Exh. 24 (Wassom Bayes, Dep. 10:7-21; 40:14-20); Shonkwiler, Tr. 158:5-20; 163:15-18.)

47. The evidence suggests that the FEC did not take any significant investigative steps to determine whether plaintiffs were reimbursed for their Edwards contributions. After finding reason to believe, the FEC took no significant investigative steps in MUR 5818, pending DOJ's criminal investigation. (Exh. 24 (Wassom Bayes Dep. 41:11-42:16); Shonkwiler, Tr. 163:3-14; 168:21-169:10; 170:15-24.) By the time the criminal trial ended in June 2008, the FEC had decided to focus its investigation on the principals rather than the conduits, and plaintiffs were notified of this in November 2009, soon after the FEC had entered into a conciliation agreement with the Fieger law firm and ended the investigation. (Shonkwiler, Tr. 168:6-18; Olaya, Tr. 332:4-16; 340:8-15.)
48. There is no evidence that an RFPA certification was prepared in connection with the transfers of information from DOJ to the FEC that are relevant to this matter, but there is also no evidence that any transfer took place that would have required such a certification.

## **II. PROPOSED CONCLUSIONS OF LAW**

1. To prove a violation of 12 U.S.C. § 3412(a), the plaintiffs must demonstrate that (1) there was a transfer of their private financial materials between federal agencies without a certification; (2) the transferred materials were "financial records" covered by the RFPA; and (3) the records were "originally obtained pursuant to [the RFPA]."

2. Plaintiffs have failed to meet their burden to prove all three elements of their RFPA claim by a preponderance of the evidence.

3. Because the RFPA does not prohibit “the disclosure of financial records in accordance with procedures authorized by Title 26,” 12 U.S.C. § 3413(c), the FEC’s receipt of the plaintiffs’ contribution checks from the Edwards for President Committee during a mandatory audit pursuant to 26 U.S.C. § 9038 cannot be an RFPA violation.

**A. Plaintiffs Failed to Prove That DOJ Transferred Their Private Financial Records to the FEC**

4. Plaintiffs have failed to prove by a preponderance of the evidence that DOJ transferred any of their financial records to the FEC. (*See supra* ¶¶ 33-48.)

5. Because there is no evidence that DOJ transferred plaintiffs’ financial records to the FEC, it is irrelevant that there is no evidence of an RFPA certification.

**B. Plaintiffs Failed to Prove DOJ Obtained Their “Financial Records” from a “Financial Institution”**

6. Plaintiffs also failed to prove their RFPA claim because they did not present evidence that the records DOJ possessed were “financial records” under the RFPA.

7. The evidence shows that DOJ obtained plaintiffs’ financial records pursuant to a grand jury subpoena DOJ served on Merrill Lynch in May 2007. (Exh. 18 (Merrill Lynch subpoena); Day, Tr. 252:8-253:12.) There is no evidence that DOJ obtained plaintiffs’ records at any other time or in any other manner. Jack Beam testified that these were records of plaintiffs’ Cash Management Account. (J. Beam, Tr. 207:14-17.)

8. The RFPA is violated only if “[f]inancial records” are transferred improperly. 12 U.S.C. 3412(a). The RFPA defines “financial record” as “any record held by a *financial institution* pertaining to a customer’s relationship with the financial institution,” or any



copy of, or information derived from that record. 12 U.S.C. § 3401(2) (emphasis added). “Financial institution” is defined as “any office of a bank, savings bank, card issuer . . . , industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in [the United States].” 12 U.S.C. § 3401(1).

9. Plaintiffs put forth no evidence at trial that Merrill Lynch qualifies as a “financial institution” under § 3401(1). Plaintiffs must offer more than mere assumption or bald assertion that Merrill Lynch qualifies. *See Walker v. S.W.I.F.T. SCRL*, 491 F. Supp. 2d 781, 792 (N.D. Ill. 2007) (“Plaintiffs’ conclusory statement that [defendant] ‘acted as a financial institution’ [under the RFPA] is not enough to make it so.”).

**C. Plaintiffs Failed to Prove DOJ Possessed Any Records Originally Obtained Pursuant to the RFPA**

10. Records obtained by grand jury subpoena are exempt from the RFPA, and plaintiffs presented no evidence at trial that DOJ obtained any of their financial records other than by grand jury subpoena.
11. Under the RFPA’s grand jury exemption, “[n]othing in th[e RFPA] . . . shall apply to any subpoena or court order issued in connection with proceedings before a grand jury.” 12 U.S.C. § 3413(i).
12. Where “[i]t is undisputed that Plaintiffs’ bank records were received in response to a grand jury subpoena[, p]ursuant to § 3413(i), the statutory penalties provided by § 3417 are inapplicable to Plaintiffs’ claim for violation of § 3412.” *Taylor v. Dep’t of the Air Force*, 18 F. Supp. 2d 1184, 1188 (D. Colo. 1998) (emphasis added), *aff’d*, 176 F.3d 489 (10th Cir. 1999) (Table).

13. Because plaintiffs failed to prove that DOJ ever obtained their financial records in a way that could lead to an RFPA violation, plaintiffs failed to prove such a violation.

Based on the foregoing proposed findings of fact and conclusions of law, the Commission respectfully requests that the Court enter judgment for the Commission.

Respectfully submitted,

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