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

JACK and RENEE BEAM,	)	
	)	
Plaintiffs,	)	No. 07 CV 1227
	)	
v.	)	Hon. Rebecca R. Pallmeyer
	)	
MICHAEL B. MUKASEY, *et al.*	)	
	)	
Defendants.	)	

DEFENDANT ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs have filed two previous complaints that have not withstood motions to dismiss. Plaintiffs' Second Amended Complaint alleges three causes of action, all related to an investigation regarding violations of the Federal Election Campaign Act ("FECA"). This investigation has led to a criminal indictment, and subsequent trial, of Geoffrey Fieger and Vernon Johnson, but it has not resulted in the indictment of Plaintiffs. This Court previously ruled that Plaintiffs' claims were not ripe because Plaintiffs themselves had not been indicted. There is still no indictment of Plaintiffs and, therefore, their claims regarding an alleged criminal investigation remain unripe for judicial determination. This fact alone warrants dismissal of the Second Amended Complaint. Additionally, Plaintiffs have not demonstrated a legally-cognizable interest sufficient to meet standing requirements for this Court's jurisdiction. Finally, even if this Court were to have jurisdiction over Plaintiffs' claims, each of them fails to state a claim under which relief can be granted. Because Plaintiffs' Second Amended Complaint suffers

from the same flaws as the previous complaints, it should be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs initially filed suit against the Attorney General and the Chairman of the Federal Election Commission, seeking a declaratory judgment that the defendants had violated FECA. Plaintiffs' claims stem from a criminal investigation centering on the law firm of Fieger, Fieger, Kenney and Johnson regarding contributions to the 2004 presidential election campaign of John Edwards. On June 22, 2007, the Court dismissed Plaintiffs' complaint and granted Plaintiffs leave to file an amended Complaint. Doc. #46.

On June 29, 2007, Plaintiffs amended their complaint, which retained the original claims and added two new claims: a violation of the Right to Financial Privacy Act and retaliation for engaging in constitutionally protected activity. Doc. #47. Plaintiffs also added unknown FBI agents in their official and individual capacities to the caption, although they did not serve the FBI.

On March 7, 2008, the Court dismissed Plaintiffs' Amended Complaint. The Court determined that Plaintiffs lacked standing to bring suit because they lacked the requisite injury. Mem. Op. and Order at 6-10 (Doc. #90). As an initial matter, the Court concluded that Plaintiffs lacked injury because, "even assuming they have been targeted for investigation, Plaintiffs fail to identify any harm they have suffered, or are in immediate danger of suffering, as a result of this investigation." *Id* at 7. Specifically, Plaintiffs never alleged that their home was raided, that they were harassed by federal agents, or that their financial records were seized. *Id.* The Court further determined that Plaintiffs had not met any of the three criteria for ripeness under *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). *Id.* at 10-13. It found that (1) the issue was not purely

legal; (2) there was no final agency action because "the decision to investigate is preliminary and not subject to judicial review;" and (3) Plaintiffs "failed to demonstrate any direct and immediate impact that the alleged investigation has had on their rights or interests." *Id.* at 11. The Court determined that, even if the *Abbott* criteria were satisfied, Plaintiffs' claim would still not be ripe because there has been no criminal indictment of Plaintiffs; "[b]ecause the Attorney General and FEC have not yet made decisions about whether or how to enforce applicable laws, the court cannot assess the impact of any agency misconduct on the Beams." *Id.* at 12. The Court acknowledged that, "as a general rule, authorities note that courts should not intrude during the investigatory stage of an adjudicatory proceeding," which "reflects a broad understanding that the decision to prosecute is particularly ill-suited to judicial review." *Id.* (internal quotations and citations omitted). The Court further noted that Plaintiffs identified no hardship they would suffer if the Court were to delay adjudication of their claims.[1] *Id.* at 13.

On March 24, 2008, Plaintiffs filed a Second Amended Complaint. Counts I and II reiterate two of the claims previously dismissed for lack of subject matter jurisdiction. Count I alleges a claim for violation of the Right to Financial Privacy Act, and Count II alleges a claim for retaliation and deprivation of the First Amendment right to free speech. Count III contains a new claim of selective and vindictive prosecution.[2]

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[1] In addition, the Court dismissed on the merits Plaintiffs' claims of FECA violations under the Administrative Procedure Act and the mandamus statute. *Id.* at 13-22. Plaintiffs do not seek to revive these claims in their Second Amended Complaint.

[2] Plaintiffs have again named "Unknown Agents of the Federal Bureau of Investigation, in their individual and official capacities" in the caption of the Second Amended Complaint. To date, Plaintiffs have not properly served the FBI Defendants.

ARGUMENT

None of Plaintiffs' claims can survive a motion to dismiss. As with Plaintiffs' previous complaint, this Court lacks subject matter jurisdiction because the claims are not ripe for review and because Plaintiffs lack standing to bring their claims. Even if Plaintiffs were able to overcome the jurisdictional hurdles (which they cannot), Plaintiffs' Second Amended Complaint must be dismissed for failure to state a claim on the merits of each of their claims.

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE SECOND AMENDED COMPLAINT

The Second Amended Complaint should be dismissed for lack of subject matter jurisdiction for the same reasons Plaintiffs' previous complaint failed to establish subject matter jurisdiction: Plaintiffs' claims are not ripe for review, and Plaintiffs have suffered no legally cognizable injury. The Court's prior determination that the case was not ripe because there had been no criminal indictment of Plaintiffs remains true today. Because Plaintiffs are in the same position today as they were when the Court initially determined that Plaintiffs' claims were not ripe, Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction. In addition, Plaintiffs still lack a legally cognizable injury. While Plaintiffs allege in their Second Amended Complaint that the government accessed their bank records as part of its investigation (an allegation lacking in their previous complaint), such an allegation does not rise to the level of an injury sufficient to confer standing.

A. This Case Does Not Present a Ripe Dispute

As this Court has recognized, the Supreme Court case of *Abbott Labs* sets forth the governing ripeness doctrine in cases of administrative review. Mem. Op. at 10. The Court recognized in *Abbott Labs* that "injunctive and declaratory remedies are discretionary, and courts

traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. *Abbott Labs*, 387 U.S. at 148. Under *Abbott Labs*, the Court must examine "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. The fitness inquiry focuses on whether the issue to be decided is "purely legal" and whether the challenged action is final. *Id.* Even if a party demonstrates that a case is fit for judicial review, it must demonstrate hardship, which is a "sufficiently direct and immediate" impact on the plaintiff's "day-to-day business." *Id.* at 152.

The Attorney General explained in his previous motion to dismiss why Plaintiffs' claims were not ripe. They are not fit for judicial review because there has been no indictment of Plaintiffs with respect to the alleged criminal investigation. *See Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting the process leading to a decision to prosecute is "particularly ill-suited to judicial review"); *In re Stanford,* 68 F. Supp. 2d 1352, 1359 (N.D. Ga. 1999) (finding issues unripe for judicial decision because grand juries conduct investigations in secrecy and no indictments were issued yet); *North v. Walsh*, 656 F. Supp. 414, 420 (D.D.C. 1987) ("The Supreme Court has routinely rejected collateral challenges which impede ongoing criminal investigations."); *Rankins v. Winzeler*, No. 02 C 50507, 2003 WL 21058536, at *6 (N.D. Ill. May 9, 2003) ("A criminal defendant may not utilize constitutional tort litigation to supplement – or side-track – the criminal proceedings."). In addition, the Attorney General explained that Plaintiffs did not, and could not, demonstrate hardship from waiting to challenge an indictment against them, if one is forthcoming. *See North*, 656 F. Supp. at 420 ("Courts have almost never found that an ongoing criminal investigation imposes a sufficient hardship to the person

investigated to warrant judicial review prior to his or her indictment.").

Plaintiffs' addition of a selective and vindictive prosecution claim does not alter the ripeness analysis. In denying an interlocutory appeal of a criminal defendant's claim of vindictive prosecution for lack of subject matter jurisdiction, the Supreme Court has rejected the idea that such a claim must be resolved before a criminal trial. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) ("The right asserted by respondents is simply not one that must be upheld prior to trial if it is to be enjoyed at all."). As one court has noted:

> [I]n no case that we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment. Of course, a federal prosecutor typically brings cases only in federal court, thereby affording defendants, after indictment, a federal forum in which to assert their defenses – including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors.

Deaver v. Seymour, 822 F.3d 66, 69-70 (D.C. Cir. 1987).

The Court found that Plaintiffs' claims were not ripe for judicial review. In particular, the Court emphasized the fact that there was no indictment of Plaintiffs that would make their claim ripe for review. Mem. Op. at 11-12. The Court recognized that "the decision to investigate is preliminary and not subject to judicial review." *Id.* at 11, citing *Univ. of Med. & Dentistry v. Corrigan*, 347 F.3d 57, 69 (3d Cir. 2003). Plaintiffs are in the same position now as they were when the Court dismissed their case on ripeness grounds, and there are no intervening factual events to alter the Court's analysis and decision in this area. No indictments of Plaintiffs have issued, and, therefore, Plaintiffs' claims, which all stem from an alleged investigation, remain unripe. Because Plaintiffs' claims are not ripe for review, the Court lacks subject matter jurisdiction over them and they should be dismissed.

B. Plaintiffs Do Not Have Standing

In addition to finding that Plaintiffs' claims were not ripe, the Court determined that Plaintiffs did not have standing to pursue their claims in their previous complaint because they lacked a cognizable injury. Mem. Op. at 8 ("[Plaintiffs'] assumption that the government must have obtained their bank records is not enough to establish an injury in fact."). In the Second Amended Complaint, Plaintiffs now allege that the government has accessed their financial records. Second Am. Compl. ¶ 16. In order to have an injury to maintain standing for their claims, however, Plaintiffs' injury must be "an invasion of a *legally-protected* interest." *Plotkin v. Ryan*, 239 F.3d 882, 885 (7th Cir. 2001) (emphasis added).

Plaintiffs do not allege that they are the target of an investigation; their allegations focus on the criminal investigation of Geoffrey Fieger. *See* Second Am. Compl. ¶¶ 8-11. Plaintiffs allege no harm that has a resulted to themselves from this investigation. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" that forms the basis of the complaint. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citation and quotation omitted). *See also Matter of Grand Jury Subpoena Issued to Chesnoff*, 62 F.3d 1144, 1146 (9th Cir. 1995) (dismissing appeal for lack of standing because litigant who was not the subject of the challenged criminal investigation had not suffered injury adequate to satisfy Article III's case-or-controversy requirement).

Moreover, Plaintiffs have no legally protected interest in preventing the government from accessing their bank records in conjunction with a criminal investigation. *Cf. Nat'l Council of La*

Raza v. Gonzales, 468 F. Supp. 2d 429, 444 (E.D.N.Y. 2007) (finding no injury for fear of unlawful arrest due to government's data-gathering activities for immigration files, and no injury based on plaintiff's privacy interest when there was no indication those files were accessed by private citizens or commercial entities). Even if Plaintiffs alleged that they were under investigation, they would lack standing to pursue their claims. *See Fieger v. Thomas*, 125 F.3d 855, 1997 WL 618793, at *2 (6th Cir. Oct. 6, 1997) (concluding that there was no injury-in-fact for a pending investigation) (unpublished opinion). Indeed, Plaintiffs would not even necessarily be injured by a criminal indictment, let alone a criminal investigation, as "being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather 'one of the painful obligations of citizenship.'"[3] *Stolt-Nielson v. United States*, 442 F.3d 177, 184 (3d Cir. 2006).

II. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM

Even if Plaintiffs did not face jurisdictional barriers to bringing a case at this time, the Second Amended Complaint should be dismissed on alternative grounds. Each of Plaintiffs' counts fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

A. Plaintiffs Cannot State a Claim Pursuant to the Right to Financial Privacy Act

Count I of Plaintiffs' Second Amended Complaint alleges a claim under the Right to Financial Privacy Act ("RFPA"). Plaintiffs cannot state a claim under the RFPA because it does not apply to grand jury investigations.

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[3] To the extent a criminal indictment would constitute a cognizable injury, "the prospective injury provides its own remedy: plaintiff[s] . . will have due process opportunities to challenge the basis of their arrest." *Nat'l Council of La Raza*, 468 F. Supp.2d at 439.

The RFPA provides no basis for the claim that Plaintiffs assert against Defendant Mukasey. *See* 12 U.S.C. § 3401 *et seq*. The RFPA allows a government authority to obtain from a financial institution the financial records (or any financial information contained in the records) of a customer, either with the customer's consent or by administrative or judicial subpoenas, search warrants, or formal written requests. *Id*. §§ 3402, 3404-08. In passing the RFPA, Congress "intended to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity." H.R. Rep. No. 95-1383, 95th Cong. at 33 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9305. Congress sought "to strike a balance" between the customer's rights to privacy and the needs of law enforcement agencies. *Id*.; *see also United States v. Frazin*, 780 F.2d 1461, 1465 (9th Cir. 1986) (discussing the purpose and legislative history of the RFPA).

The RFPA does not apply to subpoenas or court orders issued in conjunction with grand jury proceedings.[4] *See* 12 U.S.C. § 3413(i). As one court has stated, "[u]nder 3413(i), . . . disclosure pursuant to issuance of a subpoena or court order respecting a grand jury proceeding is exempted from all provisions of the Act except Section 3415, the reimbursement section, and Section 3420 which controls the nature of the search." *In re Grand Jury Proceedings*, 636 F.2d 81, 84 (5th Cir. 1981). *See also Taylor v. United States Air Force*, 176 F.3d 489, 1999 WL 270405 at *2 (10th Cir. 1999) (Table) ("generally, the RFPA does not apply 'to any subpoena or

[4] Moreover, provisions in other statutes make it a crime for financial institutions to disclose grand jury subpoenas to customers in certain circumstances. *See, e.g*, 18 U.S.C. § 1510(b)(2); *United States v. Fieger*, 2007 WL 4181570 at *2 (E.D. Mich. Nov. 27, 2007) (same).

court order issued in connection with proceedings before a grand jury'") (quoting 12 U.S.C. § 3413(i)).

Here, Plaintiffs have asserted that they have "documentary proof" that the government had obtained Plaintiffs' financial records. Sec. Am. Compl. ¶ 16. This "documentary proof" comes from the criminal *Fieger* case, in which the government, during discovery, produced the information gathered during the grand jury investigative stage of that criminal matter. *See* Oct. 4, 2007 letter from M. Kendall Day and Lynn Helland to Steven Fishman and David Nevin (attached as Ex. C to Pl.'s Motion to Compel Compliance with Third Party Subpoena) (Doc. #67). Therefore the "documentary evidence" upon which Plaintiff relies *supports* the conclusion that there is no RFPA claim, as it demonstrates that the material was gathered during a criminal investigation. In fact, the court handling the criminal *Fieger* matter has also rejected claims that the RFPA applies to this campaign finance investigation. When one of the *Fieger* defendants raised an RFPA claim during the grand jury investigation leading to his criminal indictment, the court rejected the claim, finding that it was based on a "misunderstanding[] of the law." *See In re Federal Grand Jury Investigation*, Misc. No. 05X71994, at 35 (E.D. Mich) (attached as Ex. 1 to Attorney General's Reply Mem. in Support of his Mot. to Dismiss) (Doc. #66). The court in the grand jury investigation further reiterated that the RFPA does not apply to subpoenas or court orders issued in conjunction with grand jury proceedings. *Id.* at 50.

B. Plaintiffs Cannot State a Claim for Retaliation for Constitutionally Protected Activity

Plaintiffs allege that they are affiliated with a law firm that is being investigated for campaign finance violations and that the alleged retaliatory investigation constitutes a violation of their constitutional right to freely engage in the political process and their First Amendment

free speech rights. Second Am. Compl. ¶ 7-10, 26-27. For the reasons that follow, Plaintiffs cannot state a claim for retaliation for protected First Amendment activity.[5]

Plaintiffs cite no legal basis to assert a retaliation claim where the alleged retaliatory act is an investigation for violating campaign finance laws. Indeed, the Supreme Court recently cast doubt on whether any action would lie for a retaliatory *investigation*, as opposed to a retaliatory *prosecution*. *See Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort. . . . Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us."). Defendant is not aware of any case where a plaintiff has successfully stated a claim for a retaliatory investigation in the context of alleged violations of the campaign finance laws. Plaintiffs ask the Court to recognize an entirely new cause of action, but they provide the Court no justification for doing so.

Permitting a claim of retaliatory investigation to proceed in these circumstances makes no logical sense. At an irreducible minimum, a tort claim for retaliation is premised on the assumption that the plaintiff has engaged in constitutionally protected activity. For Plaintiffs to complain that they are being investigated in retaliation for First Amendment-protected activity begs a crucial question—whether all of their political contributions were lawful under federal law, and thus protected by the First Amendment, or unlawful and thus unprotected by the First

[5] Plaintiffs also have failed to allege a waiver of sovereign immunity that is applicable to this claim. Because waivers of sovereign immunity must be "strictly construed . . . in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192 (1996), the plaintiff bears the burden to show that a waiver of sovereign immunity exists. *Clark v. United States*, 326 F.3d 911, 912 (7th Cir. 2003).

Amendment. That question can be resolved only at the conclusion of the criminal process and not during an alleged pending investigation. To permit Plaintiffs' retaliatory investigation claim to proceed puts the cart before the horse. If such a claim could be stated in these circumstances, any target of a criminal investigation regarding campaign contributions could turn the prosecutor into the prosecuted, thus turning the entire campaign finance enforcement structure on its head. Deferring court consideration, however, would permit courts to establish whether contributions were lawful, protected by the First Amendment, and thus a potential predicate for a constitutional tort claim. The Court's inability to resolve this conundrum at this time, of course, underscores that this claim is not ripe for review.

Assuming, *arguendo*, that an action for retaliatory investigation does exist in these circumstances, Plaintiffs still would not be able to state a claim because they have failed to satisfy the prima facie requirements for constitutional torts. The Supreme Court recently reiterated a plaintiff's obligation to plead all the elements of a constitutional tort in order to avoid dismissal. *Hartman*, 547 U.S. at 252. Most clearly, Plaintiffs have failed to allege the absence of probable cause.[6] In *Hartman*, the plaintiff brought *Bivens* claims against postal inspectors alleged to have engineered a retaliatory prosecution against the plaintiff. The Court held that establishing a lack of probable cause for the prosecution is an essential element of this cause of action and that plaintiff must not only prove this element but plead it in his complaint:

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[6] In addition to alleging lack of probable cause, Plaintiffs also must allege the following prima facie elements of a constitutional tort for retaliation: (1) participation in constitutionally protected activity; (2) defendant's action chills participation in that activity; and (3) defendant's adverse action was motivated by plaintiff's protected activity. *See generally Ctr. for Bio-Ethical Reform, Inc., et al. v. City of Springboro*, 477 F.3d 807, 821 (6th Cir. 2007) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 479 U.S. 274 (1977)). Plaintiffs have not satisfied all of these requirements.

> [Plaintiff] says that the issue of probable cause or its absence is simply an evidentiary matter going to entitlement in fact. But the [defendants] are making more than a claim about the evidence in this case: they are arguing that we should hold that a showing of no probable cause is an element of the kind of claim [plaintiff] is making against them. In agreeing with the [defendants], we are addressing a requirement of causation, which [plaintiff] must plead and prove in order to win . . .

Id. at 257 n.5; *see also id.* at 265-66 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven"); *see also id*. at 266 (Ginsburg, J., dissenting) (noting majority holding imposes on plaintiff the burden to "plead and prove lack of probable cause" for a retaliatory prosecution claim). Here, Plaintiffs have failed to plead facts to establish a lack of probable cause. Therefore, even if this Court were inclined to be the first to recognize a cause of action in these circumstances, the claim currently before the Court cannot stand.[7]

C. Plaintiffs Cannot State a Claim for Selective and Vindictive Prosecution

The only new claim raised by Plaintiffs is one for selective and vindictive prosecution. Plaintiffs allege that the government has been "vindictively targeting Jack and Renee Beam with frivolous and demonstrably false claims of campaign finance violations." Second Am. Compl ¶ 31. In order to state a claim for selective prosecution, Plaintiffs must demonstrate: "(1) they were singled out for prosecution while other violators similarly situated were not prosecuted; and

[7] Indeed, Plaintiffs have not even established the threshold question of whether they are the subject of any investigation and thus an "injured" party with standing to challenge the investigation. Moreover, the absence of facts relevant to an inquiry into probable cause serves further to highlight the prematurity of this action and the lack of ripeness required to present a justiciable "case or controversy."

(2) the decision to prosecute was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights." *United States v. Cyprian*, 23 F.3d 1189, 1195 (7th Cir. 1994). In order to state a claim for vindictive prosecution, Plaintiffs must show that the prosecution is "undertaken in retaliation for the exercise of a legally protected statutory or constitutional right." *Id.* at 1196.

Plaintiffs are unable to state a claim for selective or vindictive prosecution because one very important element is missing from their claim; they have *not* been prosecuted. Plaintiffs allege no prosecution whatsoever against them for violation of campaign finance laws. Therefore, they cannot meet the requisite element of being "singled out *for prosecution*" in order to state a claim of selective or vindictive prosecution. Because this basic element of a selective or vindictive prosecution is lacking, Plaintiffs' claim must be dismissed.

To the extent Plaintiffs' claim of selective and vindictive prosecution rests on the indictment and subsequent criminal case of Geoffrey Fieger and Vernon Johnson, Plaintiffs do not have standing to bring such a claim. In any event, Messrs. Fieger and Johnson raised this claim in their criminal case, and the court rejected it. *See United States v. Fieger, et al.*, No. 07-CR-20414, March 20, 2008 Order (E.D. Mich.) (Doc. #225).

CONCLUSION

For the foregoing reasons, the Attorney General's motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant Attorney General's Memorandum in Support of his Motion to Dismiss the Second Amended Complaint was served on May 27, 2007 in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing ("ECF") pursuant to the district court's system as to ECF filers.

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