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 MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE

Defendant Federal Election Commission ("FEC" or "Commission") respectfully moves this Court for an order in advance of trial prohibiting plaintiffs Jack and Renee Beam from introducing certain categories of evidence that are irrelevant, privileged, or otherwise protected from disclosure. The only issue remaining in this case is a narrow one: whether the FEC obtained plaintiffs' private financial records from the Department of Justice ("DOJ") in violation of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 *et seq*. *See* Mem. Op. and Order, dated Feb. 4, 2010, at 1 (Doc. #148); Final Pretrial Order ¶ 2(b) (Doc. #175). However, given the history of this case and plaintiffs' stated intentions in the final pretrial order, it is likely that they will seek to introduce evidence that relates only to their already-dismissed allegations that the FEC impermissibly deferred its investigation of conduit contribution violations of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-455, so that DOJ could pursue an allegedly overreaching, politically-motivated criminal prosecution of plaintiffs' associates Geoffrey Fieger and Vernon Johnson. Plaintiffs are also likely to attempt to introduce protected

information related to the conduct of that investigation, in an effort to convert this limited trial into a wide-ranging attack on DOJ's past enforcement of federal campaign finance law.

To avoid this improper diversion, and to keep the trial focused on plaintiffs' RFPA claim, the Commission respectfully requests an order excluding the following:

1. Evidence relevant only to claims this Court has already dismissed;
2. Evidence relevant only to the Fieger-Johnson criminal investigation, indictment, or trial;
3. Evidence breaching the secrecy of the Fieger-Johnson grand jury investigation;
4. Examination of DOJ trial attorney M. Kendall Day on irrelevant or protected topics;
5. Evidence of claimed actual damages beyond any pecuniary harm caused by the alleged RFPA violation; and
6. Documents listed on the FEC's privilege log.

ARGUMENT

I. Evidence Relevant Only to Claims the Court Has Already Dismissed Should Be Excluded from Trial

Of the seven claims plaintiffs have asserted against the FEC and DOJ in the course of this litigation, only plaintiffs' RFPA claim against the FEC remains. The six dismissed claims all centered on allegations that the FEC and DOJ engaged in a politically motivated conspiracy to investigate plaintiffs for violations of FECA's ban on contributions in the name of another, *see* 2 U.S.C. § 441f, allegedly in retaliation for plaintiffs' support of the 2004 Edwards for President Committee. *See generally* Mem. Op. and Order, dated Mar. 7, 2008 (Doc. #90); Mem. Op. and Order, dated Oct. 15, 2008 (Doc. #108). For example, plaintiffs' dismissed claims included allegations that

- DOJ and the FEC "conspired to retaliate against plaintiffs Jack and Renee Beam for exercising their First Amendment rights to freely engage in political speech," and

"made frivolous allegations of campaign finance abuse as a pretext for their politically motivated investigation," Am. Compl. ¶¶ 32, 34 (Doc. #47);

- the FEC violated FECA in facilitating DOJ's "politically motivated investigation," Am. Compl. ¶¶ 42-45 (Doc. #47); *see also* Compl. ¶¶ 18-32 (Doc. #1);

- the FEC failed to engage in a required investigation after finding that there was reason to believe that plaintiffs violated 2 U.S.C. § 441f "in order to aid the [DOJ's] politically motivated investigation," Am. Compl. ¶¶ 47-49 (Doc. #47); and

- former FEC Chairman Michael Toner and the FEC, "for reasons of personal and political animosity, acted with discriminatory purpose and intent by selectively and vindictively targeting [plaintiffs] with frivolous and demonstrably false claims" that they had violated 2 U.S.C. § 441f, Second Am. Compl. ¶¶ 31-32 (Doc. #91).

Despite the fact that these claims have been dismissed since 2008, plaintiffs signaled their intent in the final pretrial order to introduce evidence at trial relevant only to these claims. *See* Final Pretrial Order ¶ (2)(c) (Doc. #175). This evidence should not be admitted.[1] *See, e.g.*, *Littleton v. Pilot Travel Centers, LLC*, 568 F.3d 641, 648 (8th Cir. 2009) (affirming district court's motion in limine ruling excluding evidence relevant only to dismissed claims). For instance, plaintiffs wish to introduce two October 2006 letters they sent to then-FEC Chairman Toner in response to the six-member Commission's finding that there was "reason to believe" plaintiffs had violated 2 U.S.C. § 441f. *See* Final Pretrial Order at ¶ (2)(c)(4) (Doc. #175). Mr. Beam's letter denies any FECA violation, but the letter is largely an *ad hominem* attack on Mr. Toner and others. For example, it accuses Mr. Toner of being "[n]ominated by a former nose-candy clown"; being "a point man for Big Tobacco against children"; "disenfranchising African-Americans"; gerrymandering Congressional districts; being a "neo-brown shirt[]"; cheating

[1] "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence'" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Whether a fact is "of consequence" is dictated by whether it is relevant to a determination of liability under substantive law. *United States v. Morris*, 957 F.2d 1391, 1400 (7th Cir. 1992).

"Gore out of Florida"; and "trying to undermine the civil justice system." *See* Letter from Jack Beam to Michael E. Toner, Chairman, FEC (Oct. 6, 2006) at 1-2 (Exh. A); *see also* Letter from Renee Beam to Michael E. Toner, Chairman, FEC (Oct. 6, 2006) at 1 (Exh. B). These assertions plainly have no relevance to whether the FEC obtained the Beams' private financial information from DOJ in violation of the RFPA. The letters do not discuss the RFPA, the Beams' private financial records, or the alleged transfer of such records between DOJ and the FEC. The Court should not permit them to be admitted.

The Court should also exclude any testimony at trial regarding the dismissed claims. Because plaintiffs attempted to obtain deposition testimony and documents relating only to their dismissed claims during discovery — when only their RFPA claim remained — it is reasonably likely that they will continue to question witnesses on these irrelevant topics at trial. For example, plaintiffs' counsel questioned two FEC staff members during their depositions on whether section 441f bars reimbursement of campaign contributions in light of the fact that the word "reimbursement" does not appear in the statute. *See* Mem. in Supp. of Def.'s Mot. Summ. J. at Exh. 3 (Sealander Dep. 12:15-13:8) and Exh. 5 (Wassom Bayes Dep. 16:3-17:5) (Doc. #142-4).

Additionally, plaintiffs issued a subpoena *duces tecum* to Mr. Toner seeking a wide range of information relevant only to the dismissed claims, such as material related to Fieger, Fieger, Kenney & Johnson, P.C. ("Fieger law firm") and its associates, as well as alleged communications between Mr. Toner and White House officials. *See* Subpoena Duces Tecum Issued to Michael E. Toner, dated Nov. 17, 2008 (Doc. #121-3). Plaintiffs attempted to enforce the subpoena in the District Court for the District of Columbia, but that court refused to enforce the subpoena in the absence of an indication from this Court that the information sought was

relevant. *See* Order, *In Re Subpoena Duces Tecum Issued to Michael E. Toner*, Misc Action No. 08-804 (RBW) (Doc. #121-6). This Court sustained the FEC's objection to plaintiffs' subpoena, calling it "intrusive." *See* Minute Order dated Feb. 11, 2009 (Doc. #126); Transcript of Mot. Hearing on Feb. 11, 2009 at 14:1-5 (Doc. #127).

Plaintiffs also issued a subpoena *duces tecum* to DOJ for documents that were completely unrelated to their RFPA claim, such as documents regarding DOJ's policies and procedures for enforcement of FECA; search warrants relating to the Fieger law firm; and DOJ communications with White House officials relating to federal campaign contributions or FECA. *See* Subpoena Duces Tecum Issued to DOJ, dated Nov. 5, 2008 (Doc. #110-2); Letter from David Margolis, Assoc. Deputy Att'y Gen., DOJ, to Michael R. Dezsi (Dec. 23, 2008) ("*Touhy* letter") at 1-3 (Exh. C).

The Court should not permit plaintiffs' overreaching to continue into trial. Accordingly, the FEC respectfully requests an order excluding the Beams' October 6, 2006, letters and any other evidence, including testimony, relating only to plaintiffs' dismissed claims.

II. Evidence Relevant Only to the Fieger-Johnson Criminal Proceedings Should Be Excluded from Trial

The Court should also order that plaintiffs may not introduce evidence that is relevant only to the Fieger-Johnson criminal proceedings, and therefore not relevant to their RFPA claim. For example, the final pretrial order states that plaintiffs will attempt to introduce the grand jury indictment and acquittal of Fieger and Johnson into evidence. *See* Final Pretrial Order ¶¶ (2)(c)(7) & (8) (Doc. #175). But those materials are not relevant to whether the FEC obtained plaintiffs' private financial information in violation of the RFPA. The Fieger-Johnson indictment does not mention the RFPA or state that anyone's private financial records were

given to the FEC, and it does not name the Beams. *See generally* Indictment, *United States v. Fieger*, No. 2:07cr20414 (E.D. Mich.) filed Aug. 22, 2007 (Doc. #61-1). The fact that two members of the Fieger law firm, with which Mr. Beam was associated, were charged with and acquitted of FECA violations does not make it more or less probable that the FEC obtained plaintiffs' private financial records in violation of the RFPA.

This Court has previously recognized that records relating to the criminal proceedings against Mr. Beam's associates at the Fieger law firm have no relevance to plaintiffs' RFPA claim. In its November 15, 2008 ruling partially granting the FEC's motion to dismiss, the Court declined the Beams' request to consider a grand jury subpoena seeking records of the Fieger law firm from the firm's bank. *See* Mem. Op. and Order, dated Oct. 15, 2008, at 6 n.3 (Doc. #108). The Court stated that it was "not persuaded that this subpoena has any relevance to Plaintiffs' claims for relief in their Second Amended Complaint, as it does not concern any RFPA violation relating to the Beams' own financial records." *Id.*

The indictment and later acquittal that resulted from that same grand jury investigation do not concern any alleged RFPA violation, and the Court should therefore exclude them, along with any other similarly irrelevant materials or testimony.

III. Evidence That Would Breach the Secrecy of the Fieger-Johnson Grand Jury Investigation Should Be Excluded from Trial

The Court's order should also exclude any evidence or testimony that would breach the secrecy of the Fieger-Johnson grand jury investigation, since there is plainly no basis for the disclosure of such material in this case.

Grand jury proceedings must be kept secret. *See* Fed. R. Crim. P. 6(e). The "judicial system has recognized that the proper functioning of grand jury proceedings depends on their

absolute secrecy." *Matter of EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996) (internal quotation marks omitted). Without grand jury secrecy, witnesses may hesitate to testify voluntarily, suspects about to be indicted may attempt to flee or improperly influence grand jurors, and the reputation and privacy of those ultimately not charged may be harmed. *Id.* Accordingly, even after a grand jury has concluded its investigation, a party seeking grand jury materials must show that there is a "compelling necessity" for their disclosure. *Id.*

Plaintiffs have repeatedly claimed or implied that the FBI and other government agents engaged in wrongdoing while investigating alleged 2 U.S.C. § 441f violations by associates of the Fieger law firm. *See* Compl. ¶¶ 15-16 (claiming that during the investigation "witnesses were coerced to reveal constitutionally protected activities such as the identity of the presidential candidate for whom they voted in the 2004 election") (Doc. #1); Am. Compl. ¶ 35 (alleging that the grand jury investigation engaged in "strong arm tactics [by] federal agents [that] reek[] of totalitarianism") (Doc. #47); Second Am. Compl. ¶ 23 (same) (Doc. #91). During discovery, plaintiffs attempted to collect evidence about the Fieger-Johnson grand jury investigation, without regard for its secrecy, and despite the fact that only the RFPA claim remained at the time. *See, e.g.*, Subpoena Duces Tecum Issued to DOJ, dated Nov. 5, 2008 (Doc. #110-2).

Because disclosing that evidence would breach the secrecy of the grand jury investigation and the evidence is not even relevant to plaintiffs' RFPA claim against the FEC, plaintiffs cannot show the "compelling necessity" required in order to abrogate grand jury secrecy. *See Matter of EyeCare*, 100 F.3d at 518 ("compelling necessity" is a showing of "more than relevance"). This Court should therefore exclude evidence, including testimony, that would breach the secrecy of the Fieger-Johnson grand jury investigation.

IV. Plaintiffs Should Not Be Permitted to Examine DOJ Trial Attorney M. Kendall Day on Irrelevant or Protected Topics

Subject to DOJ's approval, *see United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the FEC plans to call M. Kendall Day to testify at trial. Mr. Day is a trial attorney in DOJ's Public Integrity Section who helped prosecute the Fieger-Johnson criminal matter and was in charge of communicating with the FEC regarding that case. If he is able to testify, the Commission anticipates that Mr. Day will confirm — consistent with his declaration — that the Beams' private financial records were never transferred to the FEC. *See* Mem. in Supp. of Def.'s Mot. Summ. J. at Exh. 1 (Decl. of M. Kendall Day, dated Dec. 3, 2008) (Doc. #142-4). For the reasons described above, *supra* pp. 2-7, if Mr. Day is able to testify this Court should order that plaintiffs' may not elicit any testimony from him regarding irrelevant and protected topics, such as testimony relating to plaintiffs' dismissed claims and DOJ's conduct of the Fieger-Johnson criminal investigation and proceedings. Such an order would be particularly appropriate in light of Mr. Day's role as a prosecutor in the Fieger-Johnson case, because plaintiffs' counsel here is an attorney at the Fieger firm and he served as a defense attorney in the criminal matter.

If Mr. Day were to testify, it is reasonably likely that plaintiffs would attempt to question him on these irrelevant and protected topics. As noted above, during discovery plaintiffs subpoenaed voluminous material from DOJ that is plainly irrelevant to the RFPA claim. *See* Subpoena Duces Tecum Issued to DOJ, dated Nov. 5, 2008 (Doc. 110-2). The DOJ treated plaintiffs' subpoena as a *Touhy* request, and denied it largely on relevance and grand jury secrecy grounds. *See Touhy* letter at 3-4 (Exh. C). DOJ explained to plaintiffs that their "document requests far exceed[ed] the scope of relevant inquiry into the issues involved in this litigation," which consist of "whether the [DOJ] shared with the FEC the Plaintiffs' financial information and, if so, how." *Id.* On this one relevant issue, DOJ provided plaintiffs with a declaration by

Mr. Day explaining that neither he nor others at DOJ transferred the Beams' financial records to the FEC. *Id.* at 4-5; *see also* Day Decl. at 1 (Doc. #142-4). Plaintiffs did not challenge DOJ's *Touhy* decision under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, as they could have, *see Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 314-15 (7th Cir. 1994). This Court should similarly restrict the scope of topics about which Mr. Day can be questioned on relevancy and grand jury secrecy grounds.

V. The Court Should Limit the Scope of Evidence Regarding Alleged Actual Damages

Under the RFPA, a plaintiff can seek "actual damages" resulting from a defendant's violation of the statute. 12 U.S.C. § 3417(a)(2). Although plaintiffs have not made any specific damages claims to date, the final pretrial order indicates that plaintiffs plan to testify at trial. *See* Final Pretrial Order at ¶ (2)(d) (Doc. #175). Because neither plaintiff was involved in any alleged transfer of their personal financial records between DOJ and the FEC, it appears that plaintiffs' counsel may question them about, among other things, damages they may have suffered from the FEC's alleged RFPA violation. The Court should issue an order excluding any evidence, including testimony, that plaintiffs suffered actual damages resulting from DOJ's or the FEC's campaign finance investigations (rather than the alleged RFPA violation) or resulting from any alleged non-pecuniary harm.

A. Evidence That Plaintiffs Suffered Actual Damages Resulting from the Government's Campaign Finance Investigations Should Be Excluded

Under the RFPA, a plaintiff is only entitled to actual damages that are sustained "as a result of the disclosure." 12 U.S.C. § 3417(a)(2). For example, those damages might include harm resulting from "identity theft or other tangible adverse financial or tax problems caused by the disclosure[]." *Flowers v. First Hawaiian Bank*, 295 F. Supp. 2d 1130, 1140 (D. Haw. 2003).

However, plaintiffs should not be permitted to put forth evidence, including testimony, suggesting that they suffered actual damages as a result of the Fieger-Johnson criminal investigation or as a result of the FEC's civil investigation. Even assuming there was a disclosure that violated the RFPA, neither investigation could have been caused by any such disclosure, because both investigations started well before any disclosure could have taken place. According to plaintiffs' apparent claims, if any illegal transfer of their records took place, it must have occurred after April 24, 2007 — the date the Fieger-Johnson grand jury subpoenaed Merrill Lynch for the Beams' bank records. *See* Grand Jury Subpoena Issued to Merrill Lynch, dated Apr. 24, 2007 (Doc. #100-2); *see also* Second Am. Compl. ¶¶ 15-16, 18 (claiming that DOJ "secretly obtained Plaintiffs' private banking records" from "Merrill Lynch," and "transmitted such illegally gathered documents to the [FEC].") (Doc. #91). DOJ's investigation started as early as May 2005. *See* Day Decl. at 1 (Doc. #142-4). The FEC started examining the Fieger law firm's activities on or about February 1, 2006, when the firm's counsel wrote a letter to the Commission to "demand that the FEC . . . determine whether there is reason to believe" that members of the Fieger law firm violated campaign finance laws, and if so, to conduct an investigation. *See* Letter from Thomas W. Cranmer, Miller Cranfield Paddock & Stone, P.L.C., to Michael E. Toner, Chairman, FEC (Feb. 1, 2006) (Doc. #10-1). On September 26, 2006, the FEC informed plaintiffs that the agency had determined that there was reason to believe they violated section 441f, marking the start of the FEC's formal investigation. *See* Letter from Michael E. Toner to Jack Beam, dated Sept. 26, 2006, at 1 (Doc. #10-2); 2 U.S.C. § 437g(a)(2). Thus, neither the DOJ nor the FEC investigation — nor any damages plaintiffs may allege they suffered as a result — happened "as a result" of an alleged RFPA disclosure that could not have occurred prior to April 2007. *Cf. Flowers*, 295 F. Supp. 2d at 1140 (holding that RFPA plaintiff

could not recover for stress from being subject to a prosecution that started prior to the disclosure of his bank records and which would have been initiated regardless of the disclosure).

Furthermore, plaintiffs should be limited to presenting evidence demonstrating any actual damages suffered as a result of *the Commission's* allegedly obtaining their records, and not as a result of Merrill Lynch's initially disclosing those records to DOJ. As this Court has held, DOJ did not violate the RFPA by allegedly obtaining plaintiffs' records from Merrill Lynch by grand jury subpoena. *See* Mem. Op. and Order, dated Oct. 15, 2008, at 13 (Doc. #108). If the FEC violated the RFPA, it would only be because such records allegedly changed hands between DOJ and the FEC. *Id.* at 13-14. Plaintiffs' actual damages, if any, must flow from that alleged transfer.

B. Evidence Concerning Alleged Non-Pecuniary Harm Should Be Excluded Because the RFPA Is a Waiver of Sovereign Immunity That Must Be Strictly Construed

The Court should construe "actual damages" recoverable under the RFPA to include only out-of-pocket damages, and exclude any evidence, including testimony, regarding alleged non-pecuniary injuries such as emotional distress, reputational harm, and embarrassment.[2] The RFPA does not define "actual damages," and its legislative history fails to shed light on whether the phrase was intended to include non-pecuniary damages. *See Neece v. IRS*, No. 88-C-1320-E, 1993 WL 305963, at *6 (N.D. Okla. May 21, 1993), *aff'd in part, rev'd in part*, 41 F.3d 1396 (10th Cir. 1993).[3] However, where a federal statute contains a waiver of sovereign immunity —

[2] This is particularly true to the extent such evidence relates to alleged harm stemming not from the actions of the FEC, but the actions of plaintiffs or others, such as efforts to publicize this or other litigation. *See, e.g.*, Scott Horton, *Feiger's Fight for Freedom*, AM. TRIAL LAWYER, Fall 2008, at 59-63 (Doc. #116-4).

[3] Generally, "actual damages" has "no plain meaning or consistent legal interpretation." *Hudson v. Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997). Although at common law

as the RFPA does — courts must strictly construe that waiver in favor of the government, and must not enlarge the waiver of immunity beyond what the language requires.[4] *See Ardestani v. INS*, 502 U.S. 129, 137 (1991) (citing *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986)). Though no case could be found on point with regard to the RFPA, courts have applied this rule of statutory construction to restrict "actual damages" to out-of-pocket losses under the Privacy Act, 5 U.S.C. § 552a(g)(4)—a similar privacy-protective statute that also waives sovereign immunity.[5] *See Hudson*, 130 F.3d at 1207 n.11 ("'[A]ctual damages' has no plain meaning or consistent legal interpretation, thus when it is being applied against the government it must be narrowly interpreted — here that requires finding that actual damages only mean out-of-pocket losses, not emotional distress"); *DiMura v. FBI*, 823 F. Supp. 45, 48 (D. Mass. 1993) (construing "actual damages" "strictly in favor of the sovereign" and adopting view that it "does not include emotional damages").[6]

"emotional" injury is often considered a form of "actual damages," this does not settle the separate question of whether the use of "actual damages" *in a statute* encompasses non-pecuniary injury. *See Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 878, 881 (7th Cir. 2001) (Posner, J.) (concluding that the authorization of "actual damages" under 11 U.S.C. § 362 is restricted to "financial loss" and not emotional distress).

[4] This Court has previously construed the RFPA's limited waiver of sovereign immunity in favor of the FEC. On May 27, 2010, the Court granted the FEC's motion to strike plaintiffs' jury demand (Doc. #160) on the ground that the RFPA does not explicitly provide for a jury trial. The Court recognized that "'accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.'" Minute Order dated May 25, 2010 (Doc. #181) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 162 n.9 (1981)).

[5] Similar to the RFPA, the Privacy Act, 5 U.S.C. § 552a, delineates the duties and responsibilities of federal agencies that collect, retain, and distribute individuals' personal information, and it authorizes private civil actions against those agencies for violations of its provisions. *See Ely v. Dep't of Justice*, 610 F. Supp. 942, 945 (N.D. Ill. 1985).

[6] *See also Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 872-73 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1755 (2010) ("'[A]ctual damages' as used in the Privacy Act permits recovery only for proven pecuniary losses and not for generalized mental injuries, loss of

This Court should strictly construe the RFPA's sovereign immunity waiver in the same manner. This result would protect the U.S. Treasury from dubious claims of emotional distress, which the Seventh Circuit has recognized "are so easy to manufacture." *See Aiello*, 239 F.3d at 878, 880-811 (limiting "actual damages" in 11 U.S.C. § 362 to pecuniary harm, where "potential for abuse . . . [was] considerable"). The risks of abuse resulting from entertaining non-pecuniary damage claims is exacerbated where, as here, the plaintiff likely has no legitimate claim to any actual pecuniary losses. *See id.*

Accordingly, this Court should exclude any evidence, including testimony, regarding claimed non-pecuniary damages resulting from the FEC's alleged violation of the RFPA.

VI. Documents Listed on the FEC's Privilege Log Should Be Excluded

In the final pretrial order, plaintiffs state that they may seek to introduce 69 documents listed on the FEC's privilege log. *See* Final Pretrial Order ¶ 2(c)(5) (Doc. #175); FEC privilege log, dated Jan. 28, 2009 (Doc. #130-2). This Court has already reviewed 51 of these documents *in camera* and ruled that they are protected from disclosure by the attorney work product and law enforcement investigatory privileges.[7] *See* Minute Order, dated July 7, 2009 (Doc. #141). Furthermore, the Court found that these documents contain "no evidence of any shared financial data." *Id.* Accordingly, the Court should order that these privileged, and ultimately irrelevant, documents are excluded from trial.

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reputation, embarrassment or other non-quantifiable injuries."); *Pope v. Bond*, 641 F. Supp. 489, 501 (D.D.C. 1986) ("Although the term 'actual damages' is not defined in the Act, this court has held that Congress, concerned about the drain on the treasury created by a rash of Privacy Act suits, indicated its intention to limit 'actual damages' to 'out-of-pocket' expenses").

[7] These 51 documents are marked with Bates numbers 45-51, 52-57, 58-59, 60-63, 64-65, 162-163, 164-169, 177, 180-181, 193, 194, 196-97, 206-209, 221-224, 239-244, and 311. *See* Final Pretrial Order ¶ 2(c)(5) (Doc. #175).

The attorney work product and law enforcement investigatory privileges also protect the remaining 18 documents from the FEC's privilege log that plaintiffs intend to introduce.[8] Under the attorney work product doctrine, a party may not discover materials "prepared in anticipation of litigation or for trial" unless it can demonstrate a "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3). The law enforcement investigatory privilege generally protects "information pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would otherwise . . . interfere[ ] with an investigation." *In re The City of New York*, ___ F. 3d ___, 2010 WL 2294134, at *14 (2d Cir. Jun. 9, 2010) (Cabranes, J.) (internal quotation marks omitted and alterations in original). The privilege applies regardless of whether the investigation is ongoing or completed. *Id.* While this protection is not absolute, "there ought to be a pretty strong presumption against lifting the privilege." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) (Posner, C. J.).

As described in the FEC's privilege log, the e-mails marked with Bates numbers 594-611 are communications between staff of the FEC and DOJ concerning their investigations into potential federal campaign finance violations. Indeed, some of the emails discuss potential witnesses and evidence. *See* FEC privilege log, dated Jan. 28, 2009, at 27 (Bates Nos. 594-97, 607-11) (Doc. #130-2). These communications all occurred in September or October of 2007 — well before the Fieger-Johnson criminal trial ended in June 2008 and the Commission concluded its investigation in November 2009. As such, these emails fall squarely within the attorney work

[8] These 18 documents are marked with Bates numbers 594-611. *See* Final Pretrial Order ¶ 2(c)(5) (Doc. #175).

product and law enforcement investigatory privileges. Thus, like the other similar e-mails on the FEC's privilege log that plaintiffs have unsuccessfully sought to obtain, these materials should be excluded from trial in this matter.

CONCLUSION

For the foregoing reasons, the FEC respectfully requests that the Court issue an order excluding the previously discussed categories of inadmissible evidence from trial. The FEC will electronically submit a proposed order for the Court's consideration.

Respectfully submitted,

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