No. 11-3386

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JACK and RENEE BEAM,

Plaintiffs-Appellants,

vs.

CAROLINE C. HUNTER, FEDERAL ELECTION COMMISSION CHAIR,

Defendant(s)-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 07-cv-1227

Honorable Rebecca R. Pallmeyer

BRIEF FOR APPELLANTS

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel provides the following information:

1. The full name of every party that the attorney represents in the case:

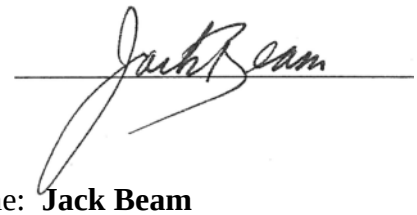
Jack Beam and Renee Beam.

2. Names of all law firms whose partners or associates have appeared for the party in this case (including proceedings in the district court, or before any administrative agency), or are expected to appear in this Court.

Jack Beam
Beam & Raymond
954 W. Washington Blvd., Suite 215
Chicago, Illinois 60607

Michael R. Dezsi
Geoffrey N. Fieger
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.
19390 W. Ten Mile Road
Southfield, Michigan 48075

3. The party represented is not a corporation.

Attorney's Signature:  Date: August 15, 2012

Attorney's Printed name: **Jack Beam**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes.**

Address: **954 W. Washington Blvd., Suite 215, Chicago, Illinois 60607**

Phone Number: **(312) 733-0930** Fax Number: **(312) 733-0921**

E-Mail Address: **jbeam@beamandraymond.com**

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to FRAP 34(a) and Local Rule 34(f), Plaintiff-Appellant requests oral argument. The appeal is sufficiently complex to warrant oral argument which would afford the Court the opportunity to pose any questions it may have concerning the facts or the specifics of the parties' respective positions.

Plaintiffs' counsel sincerely believes that participation in oral argument will be beneficial, and that the decisional process will be significantly aided by this Court's grant of oral argument.

As Sixth Circuit Senior Judge Gilbert S. Merritt has stated:

> At its core, the adversary process is oral argument. The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss and reconsider a case as can nothing else, including able briefs and judicial opinions on analogous points. It focuses thought and reflection more than discussion and debate with law clerks in chambers even when the law clerks are better lawyers than the lawyers in the case.
>
> * * *
>
> The oral tradition runs deep in Anglo-American jurisprudence for good reason. It is a safeguard against inattentiveness and unreflection. Oral argument, as Karl Llewellyn observed, is one of the 'major steadying factors' which produce 'reckonability' in '[o]ur institution of law-government.'
>
> > "In oral argument lies counsel's one hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey. In oral argument lies the opportunity to catch attention and rouse interest among men [and women] who must be got to read – or to reread – this brief not as a routine duty nor under the undiscriminating press or other business, but with the pointed concentration this cause merits.

> [citing K. Llewellyn, The Common Law Tradition: Deciding Appeals, 18-19 (1960)]."

Merritt, Judges on Judging: The Decision Making Process in Federal Courts of Appeals, 51 Ohio St. L.J. 1385, 1386-1387 (1991).

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

The jurisdiction of the U.S. District Court for the Northern District of Illinois (hereafter "District Court") arose under Title 28 of United States Code (U.S.C.), Section 1331 and Title 12 U.S.C. Section 3401 *et seq*.

Jurisdiction of the Circuit Court

The jurisdiction of the U.S. Court of Appeals for the Seventh Circuit arises under Title 28 of U.S.C., Section 1291, pertaining to, *inter alia,* final decisions of the district courts.

In the present appeal, the Plaintiff-Appellant appeals from the Order of September 22, 2011 granting Defendant's Motion for Bill of Costs.

The Notice of Appeal was filed on October 21, 2011. The due date of the Appellant's Brief was established by this Court to be December 19, 2011 pursuant to Circuit Rule 33. It was subsequently extended due to mediation until June 11, 2012.

This case is a direct appeal from the decision of U.S. District Court Judge Rebecca R. Pallmeyer.

STATEMENT OF ISSUES

1. Whether the District Court Abused Its Discretion in Awarding Costs to the Defendant where the Defendant Engaged in Misconduct or Litigated in Bad Faith.
2. Whether This Was Public Interest Litigation Rooted in the First Amendment and Therefore the District Court Erred in Finding that Being Recklessly and Flagrantly Threatened with Felony Prosecutions Was a Mere "Inconvenience."
3. Whether the District Court was Mistaken in Awarding Costs to the Defendant when the Plaintiffs Brought Their Action in Good Faith and the Issues Presented were Close and Complex.
4. Whether the District Court Erred in Awarding Costs to the Defendant when the Defendant was Not the Prevailing Party.
5. Whether the District Court Erred in Awarding the Total Amount Requested by the Defendants.

STATEMENT OF CASE

This is an appeal from the District Court's order granting costs to the Defendant pursuant to Rule 54(d)(1). In September of 2006, Jack Beam and Renee Beam (hereinafter "Plaintiffs") received "Reason to Believe" ("RTB") letters from the Federal Election Commission ("Defendant" or "FEC"), threatening Plaintiffs with felony prosecution for allegedly making illegal contributions to John Edwards' 2004 Presidential campaign. Plaintiffs promptly sent letters to the FEC vigorously denying all allegations. Months passed, and Plaintiffs never received any response that either acknowledged the false nature of the FEC's allegations or otherwise admitted that the FEC would not be pursuing the matter.

In March of 2007 Plaintiffs brought suit against Defendant, the FEC, and the Department of Justice ("DOJ") alleging among other things that the FEC had obtained financial records in violation of the Right to Financial Privacy Act of 1978 ("RFPA"), 12 U.S.C. § 3401 *et seq*. All allegations against the DOJ were dismissed soon thereafter.

After a two-day bench trial, the Court entered a judgment in favor of Defendant opting to believe an FEC witness, who had recanted his unfavorable discovery deposition testimony twelve months after providing this dispositive testimony and six months prior to trial. On October 29, 2010, Defendant filed a motion for bill of costs. The District Court granted Defendant's motion and awarded the total requested amount of $8,300.64 to the Defendant.

STATEMENT OF FACTS

A. Renee Beam & Jack Beam: Federal Campaign Contributors & Activists

For decades the Beams had been politically active. Following his tenure with the DOJ and the U.S. Attorneys' Office for the District of Delaware, where Jack Beam ("Beam") served as an Assistant U.S. Attorney and Director of an FBI Strike Force, Beam ran for the Michigan State Senate with the endorsement of former President Gerald R. Ford. In 2002, Beam was elected to and served on the Glen Lake Michigan School Board. In the early 1980's Renee Beam performed campaign advance work for former Illinois Attorney General Tyrone Fahner and worked on women's issues with, among others, the late Geraldine Ferraro. In the late 1980's, the Beams were high-profile supporters and fundraisers for Federico Peña, the former Mayor of Denver and the former U.S. Secretary of Transportation. All of this information is a matter of public record and was available to the FEC.

In the RTB letter signed by then FEC Chairman Michael Toner, the FEC falsely claimed that The Beams "had never contributed to a Federal political committee prior to his contributions to the Edwards campaign." (Documents: 193-2, 193-3). Before the FEC threatened Beams with felonies, the Beams had made campaign contributions to the following U.S. Senate campaigns: Harvey Gantt of North Carolina, Mark Udall of Colorado, Barack Obama of Illinois, Debbie Stabenow of Michigan, Carl Levin of Michigan, Tom Strickland of Colorado, Tim Wirth of Colorado, Ned Lamont of Connecticut and Joe Sestak of Pennsylvania. A contribution was also made by the Beams to Michael Dukakis' Presidential campaign. As conceded by the FEC at trial, the Beams lengthy history of donating to federal campaigns had always been available to the FEC (Trial Testimony of Roger Hearron, Direct Examination).

Consequently, as to Plaintiffs, the genesis of this case lies in the fact that the Beams took great umbrage at being threatened with spurious felony prosecutions in violation of their First Amendment rights. But for the unfounded RTB letters threatening the Beams with felony prosecutions, and the failure of the FEC to ever acknowledge that their allegations were utterly devoid of merit, the Beams would not have had any need to defend themselves.

The allegations in the RTB letters were patently false. Even a scintilla of due diligence by the FEC to search its own records and/or the internet would have revealed the Beam's long history of federal campaign contributions and political activism. Thus, it is apparent that the Beams were caught up in the reckless and expensive FEC/DOJ dragnet strategy to prosecute a prominent trial attorney, Geoffrey Fieger—perhaps for the purpose of being "flipped." Both Toner's FEC[1] as well as the Gonzales DOJ were on what has been characterized as a "witchhunt" to convict attorney Geoffrey Fieger. Mr. Fieger is the same trial attorney that President Bush had disparagingly referred to in a televised interview as "that Kevorkian lawyer," after Fieger aided his Arizona neighbor Senator John McCain in his upset victory over the President in the 2000 Michigan Republican Primary.

The FEC never responded to the letter of Renee Beam or the letter of Jack Beam, both of which vehemently denied the reckless and false allegations contained in the FEC's RTB letters.

B. The Beam Suit

As a result of the FEC's RTB letters threatening felony prosecution and the FEC's failure to respond to Plaintiffs' letter, the Plaintiffs filed suit against the Attorney General, the Chairman of the FEC and unknown FBI agents alleging violations of the Right to Financial Privacy Act

[1] Perhaps inspired by the flood of money earmarked for "Super-PACs", the former FEC Chairman Toner advocated for the former Senator John Edwards in the media (e.g. in interviews with Chuck Todd on MSNBC) and was listed as an expert by Mr. Edward's defense team in Mr. Edward's recent FEC criminal trial. (MSNBC's *The Daily Rundown* with Chuck Todd, Apr 26, 2012)

["RFPA"], FECA, and retaliatory conduct for engaging in constitutionally-protected speech. Thereafter, Plaintiffs filed an amended complaint, reasserting their RFPA and retaliation claims, and adding a claim under the Fifth Amendment for selective and vindictive prosecution. The court dismissed all of Plaintiffs' claims except for the RFPA claim which alleged that Defendant FEC obtained their bank records from the DOJ without a written certification, in violation of the RFPA.[2]

C. The Fieger Investigation

In 2005, the DOJ commenced a criminal investigation of the Michigan law firm, Fieger, Fieger, Kenney & Johnson ("Fieger Firm"). The probe in question examined alleged and ultimately unsubstantiated violations of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441f.[3] The DOJ claimed that the Fieger Firm violated FECA by reimbursing employees in return for their contributions to John Edwards' 2004 presidential campaign. The federal prosecutors sometimes refer to these matters as "conduit contribution cases," in which a third party or entity advances or reimburses campaign contributions of a donor in a way that the donor is not the true source of the funding.

In 2006, the FEC began a contemporaneous civil investigation of the Fieger Firm for suspected violations of FECA. In the course of their investigation, the FEC cross-referenced several names that were listed on the Fieger Firm's website with information gleaned from the

[2] "Financial records originally obtained pursuant to this chapter 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." RFPA, 12 U.S.C. § 3412.

[3] In August 2007, the DOJ's investigation of the Fieger firm led to the indictment of two partners of the firm: Geoffrey Fieger and Vernon Johnson. In June of 2008, a jury acquitted Fieger and Johnson of all 10 counts that they were indicted on.

FEC database of contributors to Edwards' campaign. The FEC found several names, including the Plaintiff Jack Beam, who was concomitantly listed on both sources. When these references to Mr. Beam were queried against the information in the FEC's database, the results showed that he and his wife, Plaintiff Renee Beam, had each contributed $2,000 to the Edwards campaign in 2003, for which the Beams were never reimbursed by Fieger nor anyone else.

D. The Basis of the Underlying Case

By virtue of the fact that there were parallel investigations being coordinated by the DOJ and FEC into Plaintiffs' alleged campaign contribution violations, their staff members undisputedly shared information concerning the targets of these investigations. Plaintiffs' primary claims against the FEC pertained to violations of RFPA; specifically, whether the FEC accessed their banking records in the course of the above described investigation without following proper legal procedures. Thus, the thrust of Plaintiffs' case against the FEC focused on factual issues; specifically, whether a transfer of Plaintiffs' financial records had transpired.

Plaintiffs offered three main points in support of their claim that such a transfer did occur: (1) the FEC, as a matter of course, obtains and reviews bank records to substantiate a violation of FECA;[4] (2) FEC staff attorneys admittedly obtained more than one CD of trial materials prior to and/or from the Fieger trial from the DOJ;[5] and (3) Phillip Olaya, an FEC

[4] This contention is factually based on the testimony of FEC Assistant General Counsel for Litigation Colleen Sealander: "In my experience at the FEC, if the Commission wants to prove that somebody has violated Section 441f, … it frequently uses bank records to prove that fact or not." (Document 142-4, Deposition of Colleen Sealander, March 10, 2009, pg. 13); as well as the testimony of FEC Assistant General Counsel for Enforcement Mark D. Shonkwiler: "[i]f there was an allegation that someone was reimbursed, and they said no, I was never reimbursed, we might seek financial records to see if there were deposits made into a bank account in some proximity to the contribution." (Document 142-4, Deposition of Mark D. Shonkwiler, March 11, 2009, pg. 19-22)

[5] The Department of Justice indicted Geoffrey N. Fieger with violations of 2 U.S.C 441(b) and 2 U.S.C 441(f), as well as several other parallel charges stemming from these alleged violations. Mr. Fieger was eventually acquitted of any and all wrongdoing.

lawyer, testified under oath in his deposition that he had seen both Jack and Renee Beam's financial records in the DOJ documents. Defendant argued they had never received the Plaintiffs' bank records and moved for summary judgment on these claims. The Court denied the FEC's motion based on Olaya's deposition testimony **(**Document: 147**)**. Defendant moved for summary judgment on these claims a second time, closer to trial, which the court denied (Document: 181).

E. The Beam Trial Testimony

Michael Kendall Day's Testimony

The trial testimony primarily focused on the cooperation between Defendant FEC and the DOJ. The court heard testimony from Michael Kendall Day ("Day"), an attorney at the DOJ, and Audra Wassom Bayes ("Bayes"), an FEC staff attorney. Day and Bayes served as primary contacts for each other at their respective agencies and met many times over the progression of their investigations. Day testified that after learning of the FEC civil investigation in late 2006 or early 2007, the DOJ sent several of its non-grand jury investigative reports, or FBI 302 reports, on the Fieger firm to the FEC (Jack Beam was "Of Counsel" to the Fieger firm). Furthermore, Day attested that the DOJ had served Merrill Lynch with a grand jury subpoena in April 2007 to obtain Plaintiffs' bank records for its criminal investigation.[6] When reviewing these records, the DOJ did not find any shred of evidence indicating that the Plaintiffs' participated in the alleged reimbursement scheme and Plaintiffs were never charged with any criminal or civil wrongdoing. Day testified that he met with Bayes and provided her with a CD

[6] The DOJ continued its criminal investigation of the Fieger firm through the spring of 2007, but the FEC deferred pursuing its civil investigation during this time. While the FEC does have the power to conduct administrative discovery, it declined to issue administrative subpoenas for the Plaintiffs' bank records while the civil investigation was on hold.

of the DOJ's trial exhibits, including charts which allegedly documented the flow of money from the Fieger firm to its members for use as campaign donations.

Audra Wassom Bayes' Testimony

Successive to the Fieger acquittal, Ms. Bayes initiated contact with the DOJ to obtain copies of the trial transcripts and exhibits so that the FEC could continue its civil investigation.[7] In her deposition, Bayes stated that she recalled receiving more than one CD from the DOJ, but she further qualified her statement by asserting that she might have been confused and conflated the number of original disks with the number of copies that she made for use in her office. She identified as many as four or five CDs of pertinent information that were relayed to her office from the DOJ.

Thomas Anderson's Testimony

Mr. Day also testified that he met with a potential expert witness, Thomas Anderson, prior to the Fieger trial. Mr. Anderson was the acting Assistant General Counsel of the FEC at the time. Day explained that it was customary to show a witness exhibits that would be used at trial, but he also claimed that even though Plaintiffs' financial records were subpoenaed, the DOJ did not use any of the records as exhibits during the Fieger criminal trial. Moreover, Anderson testified that he did not see Plaintiffs' bank records, nor did he take any documents with him at the conclusion of his meeting with Day. Anderson further testified that after their second meeting in late March or early April 2008, he received a packet of trial materials from Day, which contained one CD with financial contribution information on at least hundreds, if not thousands, of contributors to the Edward's campaign. Anderson reported that he did not share this information with anyone at the FEC, although he himself was an official with the FEC and acting

[7] Day had previously testified and substantiated that he had provided the discs containing records used in the Fieger trial to Bayes in this meeting.

in his official capacity. Mr. Anderson further testified that any discs that his agency had received had been [fortuitously] lost or destroyed prior to the Beams' discovery investigation.

Roger Hearron's Testimony

On March 10, 2009, Roger Hearron, a FEC Investigator, had been involved in research regarding financial records for the FEC's investigation of the Beams that were being used in the DOJ investigation against Mr. Fieger. Mr. Hearron testified regarding the RTB letter sent to the Beams, as well as his subsequent contact with several CDs of financial materials that were used in both the DOJ and FEC investigations. He stated that he received the first CD "sometime after the RTB letters were sent out." He also indicated that a second, separate CD of materials were forwarded to him after the criminal trial of Geoffrey N. Fieger had concluded. Mr. Hearron further testified that he had received the first and second CD of information electronically, either via a hard disc or email. His indication that there were two CDs of information relayed to the FEC conflicted with the testimony of both Bayes and Anderson, who each averred a different number of discs. Moreover, Mr. Hearron testified that he had, in the past, been involved in the transfer of banking and financial records between different federal agencies, such as the Department of Justice. However, Mr. Hearron could not recall if he had or had not seen the Beams' financial information listed in the CDs in question.

Phillip Olaya's Testimony

Philip Olaya, a staff attorney at the FEC, assumed primary responsibility for the civil investigation after Bayes was promoted, and he received all of the files that Bayes kept on the case. In his deposition, Olaya testified that among the files he received was a CD containing financial records used as exhibits in the Fieger trial. When questioned further about the exact names associated with these financial records, Olaya responded clearly and unequivocally that he

had seen both Jack and Renee Beam's financial records. However, nearly a year after his initial testimony and with the trial on the matter in question quickly approaching, Mr. Olaya submitted a declaration recanting his deposition testimony that he had seen Beams' records.

At trial, Mr. Olaya cited several excuses why he was recanting his prior sworn deposition testimony. Mr. Olaya stated that the reason he had admitted to seeing the Plaintiffs' bank records from DOJ in his deposition was because he had answered in the affirmative to the two previous questions, without fully considering the questions of Plaintiffs' counsel. Mr. Olaya further stated that he was not being specific enough and he should have asked for clarification regarding where he saw those particular records. (Trial Testimony of Mr. Olaya, Cross-Examination, pg. 311-324) Although Mr. Olaya is a licensed attorney for a governmental agency, he testified at trial that he was flustered by the deposition, and not used to the litigation environment or what his responsibilities were in the context of a deposition (*Id.*). At trial, the District Court believed Mr. Olaya's explanation for recanting his admission, despite the fact that the District Court had previously disregarded Olaya's exact same declaration in its Order denying Defendant's Motion for Summary Judgment (Document: 148).

F. The Beam Trial and Conclusion of the District Court Case

The District Court conducted a two-day bench trial and heard testimony from various DOJ and FEC officials, as well as Plaintiffs themselves. The Plaintiffs were disparagingly referred to throughout the investigation and trial as "conduits" although they had never been reimbursed by the Fieger firm nor anyone else for their contributions to Edwards. The Court heard testimony from various FEC officials, including the pivotal revamped testimony of Mr. Olaya. The Court elected to believe Mr. Olaya's recanted version at trial. Consequently, the Court found in favor of Defendant. Subsequent to the trial, the FEC submitted its bill of costs,

which was objected to by the Plaintiffs. The District Court granted the Defendant's motion for bills of costs which is now being presented as an issue on appeal.

Hopefully, this appeal will not be viewed as an "inconvenience" to the Court of Appeals. Eight thousand dollars is not an inconsequential sum for any parents with children at university. Of course, that sum pales by comparison to the sums expended in response to the FEC's threats of felony prosecutions during the years that this litigation dragged on because of the FEC's reckless failure to exercise due diligence before threatening the Beams, and thereafter as a result of Olaya's sworn deposition testimony; testimony which became the *sine qua non* of Plaintiffs' case once the District Court dismissed all the other claims and denied Defendant's Motion for Summary Judgment based on Olaya's deposition testimony.

SUMMARY OF THE ARGUMENT

The District Court erred in granting the Defendant-Appellees' Motion for bill of costs. First, the District Court abused its discretion holding that the Defendant did not engage in misconduct or litigate in bad faith. Second, this was public interest litigation rooted in the First Amendment and therefore the District Court erred in finding that being recklessly and falsely threatened with felony prosecutions was a mere "inconvenience." Third, the District Court should not award costs to the Defendant when the Plaintiffs brought their action in good faith and the issues presented were close and complex. Fourth, even if the Court determines that the Defendant litigated in good faith, the District Court erred by stating that the Defendant was the prevailing party. Finally, the District Court erred in granting Defendant's bills of costs in its entirety given the delay and excessive cost over-runs engendered by the FEC.

ARGUMENT

Statement of the Standard of Review

The proper interpretation of Rule 54(d)(1) presents a question of law that is determined *de novo* on appeal. *Gavoni v. Dobbs House, Inc.*,164 F.3d 1071, 1075 (7th Cir. 1999) (holding that where a party's entitlement to costs rests on a legal interpretation of a rule of civil procedure, review is *de novo*); *See also, Rivera v. City of Chicago*, 469 F.3d 631 (7th Cir. 2006).

I. The District Court Abused its Discretion in Awarding Defendant's Costs Where the Defendant Engaged in Misconduct and Litigated in Bad Faith

Rule 54(d) of the Federal Rules of Civil Procedure, 28 U.S.C.A. contains a presumption that the losing party will pay costs, but grants the court discretion to direct otherwise. The Seventh Circuit has adhered to this interpretation and has reversed exercises of discretion which go beyond it. *United States v. E. J. Biggs Const. Co.*, 116 F.2d 768, 775 (7th Cir. 1940); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 11 (7th Cir. 1949); *Jones v. Schellenberger*, 225 F.2d 784, 794 (7th Cir. 1955) ("reprehensible" conduct by the prevailing party triggered the "fullest extent" of discretion against him). Several factors have been identified to scrutinize when determining whether costs should be awarded to the prevailing party, including some fault, misconduct, default, or action worthy of a penalty on the part of the prevailing side. *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242 (7th Cir. 1985); *Congregation of the Passion v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988). Examples of such defections include the calling of unnecessary witnesses, raising unnecessary issues, encumbering the record, or causing delay in raising an objection fatal to the plaintiff's

case. *Congregation of the Passion*, 854 F.2d at 222 (7th Cir. 1988); *Williams v. Northern Indiana Public Service Co.*,131 F.R.D. 676, 677 (N.D. Ind. 1990) (defendant's lack of diligence causing increased costs and waste of judicial resources was declared conduct worthy of penalty); *Also see, Remington Products, Inc. v. North American Philips, Corp.*,763 F. Supp. 683, 688 (D. Conn. 1991) (costs denied because prevailing party refused to provide discovery and did not comply with the rules governing discovery proceedings constituting bad faith).

The Defendant's reckless indifference and lack of due diligence prior to threatening the Plaintiffs was the catalyst that triggered Plaintiffs to file suit. Such conduct unworthy of reward. *Williams v. Northern Indiana Public Service Co.*, 131 F.R.D. 676, 677 (N.D. Ind. 1990) (holding that the defendant's lack of diligence in failing to raise challenge to diversity jurisdiction until motion to set aside judgment and waste of judicial resources made an award of costs to defendant inappropriate). The record is undisputed that the FEC had absolutely no factual basis whatsoever to send the Plaintiffs RTB letters.

Roger Hearron, the investigator for the Defendant, grudgingly conceded that the information within the factual and legal analysis was a "mistake and was worded incorrectly." (Trial Testimony of Mr. Hearron, Direct Examination, 70). Among other things the factual and legal analysis attached to the RTB letters from the Defendant to the Plaintiffs states that neither Plaintiff has contributed to a federal political committee prior to their contributions to the Edwards committee (Documents: 193-2, 193-3). Anyone, even an FEC employee "simply putting in his 20," performing a modicum of due diligence would find that both Plaintiffs have a long history of contributions to federal political candidates. (Documents: 185-2, 185-3). Defendant nevertheless threatened Plaintiffs, without any basis in fact, with federal offenses with constructive knowledge that the allegations were false. It was these fabricated threats of

prosecution that led Plaintiffs to file suit against Defendant. Had the FEC done their homework; had the FEC checked information that was literally at their fingertips, they would have had "**R**eason **T**o **B**elieve" that the Beams had not committed felonies. As discussed *infra*, the conduct of the Defendant was not simply "inconvenient" and "unfair" to the Plaintiffs, it is the type of conduct for which our Circuit Courts deny the so-called prevailing party their costs---as conduct declared worthy of a penalty.[8]

In addition to the misconduct of the FEC in threatening the Beams, Defendant's dilatory tactics throughout discovery and their failure to raise fatal objections to Plaintiffs' case prolonged the litigation and ultimately led to increased costs.

Most significantly, Defendant's Staff Attorney handling this matter, Phillip Olaya, gave sworn testimony during a discovery deposition that he had seen the Plaintiffs' financial records, a statement which was relied upon by the Plaintiffs and the Court. Specifically, during Mr. Olaya's deposition, he was asked if he recalled seeing Jack Beam and Renee Beam's names on the financial records generated by financial institutions that were part of Mr. Olaya's file at the FEC. He answered, yes. (Document: 147, Deposition of Phillip Olaya, pg. 28).

Olaya's testimony was the *sine qua non* of the remaining claim against the FEC. This testimony caused the District Court to deny Defendant's motion for summary judgment and prompted a trial on the merits as the remaining issue in Plaintiffs' suit was whether the Plaintiffs' bank records had been transferred to the Defendant by the DOJ in violation of the RFPA. (Document: 148).

[8] The Honorable Rebecca Pallmeyer's stated that "Although Plaintiffs may very well have been *inconvenienced* by this process, and found it unfair, it does not support a finding of misconduct in the instant case." (Document: 218)

Although Mr. Olaya is a licensed FEC attorney, knows that depositions are given under oath, and presumably understood that the Beams' entire case hinged on whether there was a transfer of records from the DOJ to the FEC, Olaya testified in his deposition that he saw the Beams names in the disc from the DOJ investigation. However, a year after his deposition, Mr. Olaya submitted a declaration recanting his deposition testimony. (Document: 161-4) Mr. Olaya recanted his testimony, citing ignorance and inattentiveness as the reasoning for his prior testimony. (Document: 161:3, Trial Testimony of Mr. Olaya, Direct Examination, 304-306, Trial Testimony of Mr. Olaya, Cross Examination, 310-344) Specifically, Mr. Olaya declared that "he was just answering 'yes' to the names, perhaps not paying attention or had lost [his] concentration and just responded 'yes' to seeing that information." (Trial Testimony of Mr. Olaya, Cross Examination, 336).

As a licensed attorney, officer of the Court and witness sworn to "tell the whole truth," Mr. Olaya was required to pay attention and provide accurate testimony during his deposition. Mr. Olaya's statements affirming that he had in fact examined the Plaintiffs' financial records, and his declaration and testimony, a year later, recanting those statements, when combined with the fact that he was employed by the FEC, and the fact that such conduct substantially extended the litigation, amounts to conduct worthy of penalty and should be construed as such for the purposes of denying Defendant's Bill of Costs. At the very least, if Mr. Olaya had told the "truth" the first time, the litigation would have been concluded sooner *vis a vis* summary judgment and without the necessity of a trial.[9]

In addition to Olaya's, euphemistically speaking, perplexing revision, the FEC engaged in a pattern of conduct designed to obstruct the discovery process and inevitably increase costs.

[9] Of course, only the District Court Judge knows why she discounted/disregarded Mr. Olaya's declaration (Document 161-4,) recanting his deposition testimony, only to believe his trial testimony months later, but that was solely her prerogative as the fact finder in a non-jury trial.

After the District Court denied Defendant's motion to dismiss and/or for summary judgment based on the sworn deposition testimony of Mr. Olaya (Document: 107), the Plaintiffs served Defendant discovery requests for interrogatories, documents and depositions. (Document: 43-2). Defendant objected to each of Plaintiffs' deposition notices, refused to produce any documents under a vague claim of privilege and objected to nearly all of Plaintiffs' interrogatories. (Documents: 43-4, 43-5). Due to the Defendant's noncompliance with the rules governing discovery, Plaintiffs' filed their first motion to compel discovery. (Document: 73). At the hearing on Plaintiffs' motion to compel, the Court ordered Defendant to comply with Plaintiffs' discovery requests and to provide a privilege log for any documents being withheld under a claim of privilege. (Document: 117). During a subsequent hearing, the Court ordered the Defendant to make witnesses available for the depositions requested by Plaintiffs. (Document: 141). When Defendant finally complied with the Court's order and produced the requested witnesses for deposition, Defendant continuously objected on the grounds of "law enforcement privilege" to the very questions tailored toward garnering facts that would have been dispositive to the case, intending to obstruct the discovery process.

This might all be considered fair game in a state court case, but discovery standards are presumably higher in federal court. The FEC's handling of their witness attorney Anderson clearly was bad faith even by state court discovery standards. Thomas J. Anderson, an FEC attorney, testified in his deposition that he had seen bank records of employees of the Fieger firm produced to him from the DOJ. (Document: 145-3, p. 21). When asked if he happened to recall the individual's name on the bank records, he answered "I have a fairly good recollection of the individual's name." (Document :145-3 p.21). Anderson was thereafter asked if he could state whose name that was and Defendant objected to "law enforcement privilege." Based upon Mr.

Anderson's testimony, Plaintiffs had good reason to believe Mr. Anderson had illegally seen the Plaintiffs bank records (the only pendent issue at trial). At trial, however, the Defendant allowed the very same question to be answered without objecting to privilege. When Plaintiff's counsel asked Mr. Anderson whose name he saw on the bank records, he testified: "I can tell you with certainty the first four letters of that name … B-i-a-l." (Trial Testimony of Mr. Anderson, Direct Examination, 132-33).

This active obstruction of the discovery process and more importantly attorney Olaya's "one-eighty" prolonged the litigation resulting in increased costs to the parties and the Court. Providing evidence that materially absolved the Defendant prior to trial was the Defendant's responsibility to both the Plaintiffs and the Court, and by failing to do so, the Defendant has engaged in gross misconduct rendering the award of costs unjustified.

II. This Was Public Interest Litigation Rooted in the First Amendment and Therefore the District Court Erred in Finding that Being Recklessly and Falsely Threatened with Felony Prosecutions is a Mere "Inconvenience."

In her Memorandum Opinion and Order awarding costs against the Beams and in favor of the FEC, the District Court judge writes:

> "Although Plaintiffs may well have been **inconvenienced** by this process, and found it **unfair**, it does not support a finding of misconduct in the instant case. Indeed, Plaintiffs offer no legal support for such and argument." (Document 218)

What is it about U.S. citizens, who in the exercise of their First Amendment Rights are willfully and recklessly threatened with felonies by a federal agency, that is not inconvenient and not unfair? *See Citizens United v. Federal Election Com'n*, 130 S.Ct. 876 (2010) (where the Supreme Court overturned *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)[10]

[10] The *Austin* Court held that the government has an interest in preventing distortion of the electoral system through limiting the political speech of certain speakers and therefore sustained a Michigan statute

and portions of *McConnell v. FEC*, 540 U.S. 93 (2003)[11] and struck down the portions of the Bipartisan Campaign Reform Act of 2002[12] ("BCRA") that prohibited expenditures on electioneering communications by corporations, leaving corporations and unions free to speak and spend independently of candidates during elections without facing a felony conviction with serious sanctions.)

Using "inconvenience" to describe what the FEC did to the Beams speaks volumes about this Federal judge. At the very least, the judge's chilling word choice is quite inapposite to two esteemed English authors, whose usage of the word "inconvenience" is considered exemplary by the editors of the Oxford English Dictionary ("OED"). Mr. Murray's venerated lexicon cites Evelyn Waugh, to wit: "An umbrella under his left arm further *inconvenienced* him." Additionally, E.M. Forster's use of the word "inconvenience" is as quoted: "I really came to… thank you for so kindly giving us your rooms last night. I hope that you have not been put to any great *inconvenience*." Even as our great language has "gone Jersey Shore," the OED editors would probably not accept: "It was such an inconvenience for the Beams to come home and find their apartment mailbox stuffed with junk mail and letters threatening felony prosecution."

The FEC's conduct in recklessly fomenting the litigation should be considered when determining if costs should be assessed against the Plaintiffs. The issues presented in this case

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that subjected corporations, but not unions, to restrictions on the kinds of general expenditures that they could make on election campaigns. 494 U.S. 652 (1990).

[11] The *McConnell* Court upheld Section 441b of the BCRA which prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. § 441b. Since the Court considered the availability of speech through a corporation's associated political action committee an acceptable alternative to direct independent campaign expenditures, the BCRA provision banning direct expenditures by corporations and unions was considered only partially speech-restrictive. *McConnell*, 540 U.S. at 204.

[12] Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

involve constitutionally protected freedoms and when litigation stems from perceived violations of such fundamental First Amendment rights, the Court must take into account the potential "chilling effect" that taxing costs upon the Plaintiffs may have. The Court has denied costs to the Government when a plaintiff's suit was not frivolous, unreasonable or without foundation and plaintiff's claim pursued was without confessed commercial self-interest. *Sun Ship, Inc. v. Lehman*, 655 F.2d 1311, 1315 (D.C. Cir. 1981) *quoting, Baez v. United States Dep't of Justice*, No. 79-1881 (D.C. Cir. 1981). In these situations, "courts have broad discretion to reject claims for costs made by prevailing defendants under the federal rules in order to avoid discouraging the prosecution of public interest litigation." *Id.* at 1316.

Plaintiffs' suit was not motivated by any commercial self-interest. Claims arising under the RFPA have statutory damages in the amount of $100 per violation. (12 U.S.C § 3417(a)(1).) Moreover, this litigation involved the Plaintiffs' right to privacy and Plaintiffs' right not to be unreasonably threatened by the FEC for exercising their First Amendment Right to make campaign contributions. Litigating these constitutional issues serve a societal purpose and thus the court must take a guarded approach to any conduct that may serve to discourage meritorious litigation on these issues. *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 466 (3d Cir. 2000); *Muslin v. Frelinghuysen Livestock Managers*, 777 F.2d 1230, 1236 (7th Cir. 1985).

III. The District Court Erred in Granting Defendant's Bill of Costs Because the Plaintiffs' Brought their Action in Good Faith and the Issues Presented were Close and Complex

In *Chicago Sugar Co. v. American Sugar Refining Co.*, the Seventh Circuit indicated that a district court may consider certain equitable factors in arriving at a cost award, including the "closeness or complexity" of the issues at hand. 176 F.2d 1, 11 (7th Cir.1949). Costs have been denied on the ground that the losing party prosecuted the action in good faith, the issues

presented were difficult, novel, or complex, and the winning party could absorb the costs. *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 731, 733 (6th Cir.1986) *(*stating that in addition to cases of defective conduct by the prevailing party, "close and difficult" cases also justify cost denials).

When determining the closeness of the issues at hand, it is important to scrutinize whether the decisions of the court clearly indicate a prevailing party. In denying Defendant's motion for summary judgment, but ruling in favor of Defendant at trial, the court clearly indicated that Plaintiffs' claims were, *prima facie*, meritorious. In denying the Defendant's motion for summary judgment, the court stated that:

> Based on Olaya's testimony and the undisputed fact that Plaintiffs' financial records were not part of the [Fieger] trial exhibits, a jury could find that the FEC received the Beam's financial records (Document 148).

Only after Olaya recanted his deposition testimony at the two-day bench trial on the merits did the Court rule in favor of the Defendant. The issues in this case were clearly close and complex and Defendant should be denied its bill of costs.

IV. The District Court Erred in Determining the Defendant was the Prevailing Party

Rule 54(d)(1) provides in pertinent part, "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d)(1). Thus, the determination of who qualifies as a prevailing party is essential in deciding whether costs are available.

In cases analyzing what is necessary to show that a party prevailed, the Supreme Court has eschewed technical considerations for what is essentially a result-oriented approach. The Supreme Court has instructed that a party prevails "if they succeed on any significant issue in

litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *quoting, Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). The Supreme Court has emphasized that the alteration or termination of conduct is a determinative factor of whether a plaintiff has prevailed. For example, in *Hewitt v. Helms*, the Court stated:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. 482 U.S. 755, 761 (1987).
>
> …
>
> If the defendant … alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. 482 U.S at 761.

In this case, the Defendant issued RTB letters to the Plaintiffs which contained patently false accusations and threatened the Plaintiffs with civil and concomitant criminal prosecution. (Documents: 193-2, 193-3) Moreover, not only was the accusation false but the FEC actually admitted that it had "reason to believe" ["RTB"] that "a Jack Beam" had previously contributed to federal candidates. (Trial Testimony of Roger Hearron, Direct Examination, 46-49, 68-81)

Plaintiffs responded to these unsubstantiated threats by filing their complaint requesting, among other things, the right to be free from selective and vindictive prosecution and alleging that the Defendants invaded their right to privacy pursuant to RFPA (Document: 1). Although the selective and vindictive prosecution count was dismissed, the Plaintiffs still prevailed as the Defendant discontinued all investigation regarding the Plaintiffs. (Document: 193-4, Document: 193-5).

The Seventh Circuit has recognized the catalyst theory in awarding costs. The catalyst theory applies when a plaintiff receives the desired result because the lawsuit brought about a voluntary change in governmental conduct. *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994). In order to be considered the prevailing party under the catalyst rule, one must satisfy two requirements: (1) his lawsuit must be causally linked to the achievement of the relief obtained; and (2) he must not have acted wholly gratuitously (claim was not frivolous, unreasonable or groundless). *Johnson v. LaFayette Fire Fighers Assoc.*, 51 F.3d 726, 730 (7th Cir. 1995); *Zinn*, 35 F.3d at 274.

Here, Plaintiffs satisfy the two-prong catalyst test. First, the Plaintiffs lawsuit is causally linked to Defendant dropping its civil and/or criminal prosecution of Plaintiffs. As outlined above, the Plaintiffs filed their lawsuit in direct response to the RTB letters. Second, Plaintiffs' did not act wholly gratuitously as they filed their lawsuit based upon their receipt of the RTB letter. On the contrary, it was the Defendant's actions that were frivolous, unreasonable and groundless. The Defendant's own investigator, Roger Hearron, testified that the RTB letters as well as the factual and legal analysis document contained mistaken, inconsistent and false information. (Trial Transcript, Hearron Redirect Examination, 85-87) The Defendant's knew the information was false and still chose to threaten the Plaintiffs. As a result of this accusatory action, Plaintiff's filed their lawsuit and eventually Defendant's investigations of Plaintiffs were terminated. Therefore, Plaintiffs satisfy the catalyst test as the prevailing party.

V. The District Court Erred by Awarding the Total Amount Requested by the Defendants

It is further deemed proper for district courts to withhold or reduce costs when the prevailing party has increased its costs unnecessarily. If the allegedly prevailing party prolongs litigation but fails to clearly prevail in a case, that party may not be entitled to costs, or if they are

so entitled, such costs award may be reduced. *Richmond v. Southwire Co*., 980 F.2d 518, 520-21 (8th Cir. 1992).

There are many reasons why, as addressed above, that the Defendant should not be entitled to costs or at the very least, any award of costs should be reduced. If Philip Olaya had never testified on March 11, 2009 that he had seen the Plaintiffs financial records, the bill of costs would have been *de minimis*, as the case would have ended shortly thereafter. However, attorney Olaya did state he had seen the Plaintiffs financial records from DOJ in his deposition on March 11, 2009; therefore, the Defendants motion for summary judgment was denied and the case proceeded to trial over a year later on August 25, 2010. At the very least, the Defendant's request for costs after Olaya's deposition should be denied. In this instance, the case should be remanded to the District Court for a finding of what additional costs were incurred due to Mr. Olaya's false deposition testimony.

CONCLUSION

Of course, it was profoundly frustrating to have Judge Pallmayer believe the recanted testimony of attorney Olaya based upon excuses that would have caused most lay jurors to roll their eyes out of their heads. However, on appeal issues involving questions of fact are usually resolved in favor of the fact finder.

The issues raised on this appeal are not questions of fact. The issues here involve fundamental rights of citizens to protect themselves from reckless and abusive conduct by their government. As such, the District Court's decision to grant Defendant FEC's Bill of Costs should be reversed.

s/ Jack Beam
Jack Beam
Atty. No. 6285383

Attorney for Plaintiff-Appellant

BEAM AND RAYMOND
954 W. Washington Blvd.
Ste. 215
Chicago, IL 60607
Ph. (312) 733-0930
Fx. (312) 733-0921

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) are attached hereto and materials required by Circuit Rule 30(b) are included in the separate appendix.

s/ Jack Beam
Jack Beam
Atty. No. 6285383

Attorney for Plaintiff-Appellant

BEAM AND RAYMOND
954 W. Washington Blvd.
Ste. 215
Chicago, IL 60607
Ph. (312) 733-0930
Fx. (312) 733-0921

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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s/ Jack Beam
Jack Beam
Atty. No. 6285383

Attorney for Plaintiff-Appellant

BEAM AND RAYMOND
954 W. Washington Blvd.
Ste. 215
Chicago, IL 60607
Ph. (312) 733-0930
Fx. (312) 733-0921

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not or may not be CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Phillip Christopher Hughey
Acting General Counsel

David Kolker
Associate General Counsel

Harry J. Summers
Assistant General Counsel

Benjamin A. Streeter III
Attorney

Holly J. Baker
Attorney

Attorneys for the Defendant,

Federal Election Commission and its Chairman
999. E Street, NW
Washington, D.C., 20463
(202) 694-1650

s/ Jack Beam
Jack Beam
Atty. No. 6285383

Attorney for Plaintiff-Appellant

BEAM AND RAYMOND
954 W. Washington Blvd.
Ste. 215
Chicago, IL 60607
Ph. (312) 733-0930
Fx. (312) 733-0921