**No. 11-3386**

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

**JACK BEAM and RENEE BEAM, Plaintiffs-Appellants,**
**v.**
**CAROLINE C. HUNTER, FEDERAL ELECTION COMMISSION CHAIR,**
**Defendant-Appellee.**

**On Appeal from the United States District Court**
**for the Northern District of Illinois**
**Case No. 07-cv-1227**
**The Honorable Rebecca R. Pallmeyer**

# BRIEF OF APPELLEE FEDERAL ELECTION COMMISSION AND ITS CHAIR

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## STATEMENT OPPOSING ORAL ARGUMENT

Under the standards of Fed. R. App. P. 34(a), oral argument is unnecessary because this is a meritless appeal of a routine award of $8,300.64 in post-trial costs reviewed for abuse of discretion. Appellants' arguments on appeal are frivolous or precluded because they were not raised before the district court. *See* Fed. R. App. P. 34(a)(2)(A). In any event, "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." Fed. R. App. P. 34(a)(2)(C). Indeed, oral argument in this appeal would be a waste of judicial and governmental resources.

## JURISDICTIONAL STATEMENT

Appellee Federal Election Commission ("Commission" or "FEC") states that the jurisdictional statement in appellants' brief is complete and correct. The Commission notes that the due date for its brief was initially established by this Court as January 18, 2012, but was extended to July 30, 2012, because of court-sponsored mediation.

## COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court abused its discretion in awarding reasonable costs to the Federal Election Commission as the prevailing party under Federal Rule of Civil Procedure 54(d).

## COUNTERSTATEMENT OF THE CASE

This appeal presents a challenge to a routine award of $8,300 in costs to the Federal Election Commission after the district court, following a trial, rejected the claims of Jack Beam and Renee Beam that the Commission had violated the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401-22, in the course of conducting a civil investigation. Although the Beams had previously been identified by the Commission as possible participants in a scheme to violate the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-57, the Commission never found "probable cause" to believe that they had violated the Act or pursued any sort of enforcement action against them. *See* 2 U.S.C. §§ 437g(a)(4)-(6). The issues litigated in this case did not involve any assessment of the Beams' liability under FECA.

The FECA issues first arose in 2005, when the Department of Justice ("DOJ") began to investigate whether the Michigan law firm Fieger, Fieger, Kenney, Johnson & Giroux, P.C. ("Fieger law firm"), where Jack Beam is "of counsel," reimbursed firm employees and their family members for their campaign contributions to John Edwards' 2004 presidential campaign

in violation of the ban on contributions in the name of another, 2 U.S.C. § 441f. In September 2006 — after the Fieger law firm itself had asked the Commission to investigate this matter — the Commission determined that there was "reason to believe" that the Fieger law firm, Geoffrey Fieger, and more than 50 suspected conduits associated with the firm, including the Beams, had violated section 441f, triggering a civil investigation. *See* 2 U.S.C. §§ 437g(a)(1)-(2).

In March 2007, the Beams filed suit against DOJ and the FEC in the action that underlies this appeal. The Beams claimed, *inter alia*, that DOJ's criminal investigation and prosecution were unlawful because they had begun without first receiving a referral from the FEC pursuant to 2 U.S.C. § 437g(a)(5)(C). (*See generally* Application for Writ of Mandamus and Complaint ("Compl.") (Dist. Ct. Document No.) ("Doc. #") 1.) In June 2007, after the district court rejected that claim and dismissed their complaint, the Beams amended their complaint and included an RFPA claim, among others. (First Amended Complaint and Application for Writ of Mandamus and Jury Demand ("Am. Compl.") ¶¶ 14-29 (Doc. #47).) In their Second Amended Complaint, filed in March 2008 after their First Amended Complaint had also been dismissed (*see* Memorandum Opinion and Order ("Mem. Op.") (Doc. #90)), the Beams alleged more specifically that DOJ and the FEC had violated the RFPA when DOJ purportedly transferred their private banking records to the FEC. (Second Amended Complaint and Jury Demand ("2nd Am. Compl.") ¶¶ 15-16, 18 (Doc. #91).) The district court later dismissed all claims against DOJ, and all claims against the FEC except the RFPA claim. (Doc. #108.) In the meantime, the Commission entered into a conciliation agreement with the Fieger law firm and closed the investigation as to all of the alleged conduits.

The district court held a two-day bench trial in August 2010 on the Beams' RFPA claim. After trial, the district court ruled in favor of the Commission, and the Beams did not appeal the

decision on the merits. *Beam v. Gonzales*, No. 07-1227, 2010 WL 3894225 (N.D. Ill. Sept. 30, 2010). As the prevailing party, the FEC requested costs in the amount of $8,300.64. The Beams challenged the costs award, but the district court rejected their claims and approved the award on September 22, 2011. (Appellants' Circuit Rule 30(a) Appendix (or Short Appendix) ("Short App.") 1, 9.) That award of costs is the only decision on appeal in this case.

## COUNTERSTATEMENT OF THE FACTS

### I. THE INVESTIGATIONS OF THE FIEGER LAW FIRM AND THE COMMISSION'S ADMINISTRATIVE REASON-TO-BELIEVE FINDING

Appellant Jack Beam is a Chicago attorney who is "of counsel" to the Fieger law firm. (2nd Am. Compl. ¶¶ 1, 7 (Doc. #91).) Appellant Renee Beam is married to Jack Beam. (*Id.*) The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-57. The Commission is composed of six members, no more than three of whom may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1).

In 2005, the Department of Justice began to investigate whether the Fieger law firm reimbursed its employees and their family members for their campaign contributions to John Edwards' 2004 presidential campaign, in violation of FECA's ban on contributions in the name of another, 2 U.S.C. § 441f. (FEC's Supplemental Appendix ("FEC App.") 7, 20, 21. In February 2006, the Fieger law firm itself requested that the FEC begin a civil investigation of the alleged FECA violations. (*Id.* at 20.) In August 2006, the FEC's Office of General Counsel recommended that the Commission find "reason to believe" that the Fieger law firm, Geoffrey Fieger, and more than 50 suspected conduits associated with the firm — including the Beams — had violated section 441f. (*Id.* at 2-3, 20, 22.) In September 2006, the Commission found that

"reason to believe" existed and informed the Beams of that determination.[1] (Appellants' Appendix ("Beam App.") 1-2, 6-7.) The Commission's reason-to-believe finding as to the Beams was based in part on the Beams' affiliation with the Fieger law firm and the fact that they had made substantial contributions to the Edwards campaign at roughly the same time as many Fieger law firm conduits had also contributed to the Edwards campaign. (*See id.* at 3-5, 8-10.) In response, the Beams denied that they had been reimbursed for their contributions. (*Id.* at 11-17.) The Commission's September 2006 reason-to-believe findings triggered a civil investigation, called Matter Under Review ("MUR") 5818, of the Fieger law firm's alleged conduit contribution scheme. *See* FEC MUR 5818, *Fieger, Fieger, Kenney and Johnson, P.C.* (documents available at http://eqs.nictusa.com/eqs/searcheqs); FEC App. 22.

Meanwhile, in August 2007, as a result of DOJ's investigation, a grand jury indicted Fieger and his law firm partner, Vernon Johnson, for violating section 441f. (FEC App. 15.) The indictment alleged that Fieger and Johnson reimbursed various conduits, but the Beams were not among them. (*Id.* at 14, 16.) Fieger and Johnson's trial started in April 2008 and concluded in June 2008, when a jury acquitted both defendants. (*Id.* at 7-8, 17-18, 24.) At trial, Fieger conceded that he and his firm had reimbursed many of the firm's employees and their relatives for their campaign contributions to the Edwards campaign. (*Id.* at 4-5.) In October 2009, the Commission entered into a conciliation agreement with the Fieger law firm that included the payment of a $131,000 civil penalty and resolved the agency's civil investigation of the section

[1] A "reason to believe" finding is a preliminary determination that an investigation is warranted. *See* 2 U.S.C. § 437g(a)(2). It does not prejudge an issue. An "FEC[ ] investigation does not determine any rights of the person under review and merely leads to a possible FEC decision to seek *de novo* judicial review to enforce the provisions of the Act." *Stockman v. FEC*, 138 F.3d 144,155 (5th Cir. 1998). *See also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 240-41 (1980) ("By its terms, the [Federal Trade] Commission's averment of 'reason to believe' that [the respondent] was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted.").

441f violations. (*See* FEC Closing Letter and Conciliation Agreement in MUR 5818 ("Conciliation Agreement") (available at http://eqs.nictusa.com/eqsdocsMUR /29044253415.pdf). The Commission decided to take no further action against any of the alleged conduits, including the Beams, and the administrative matter was closed. *See id.*

## II. THE HISTORY OF THIS LITIGATION

On March 2, 2007, about six months after receiving the FEC reason-to-believe letters, the Beams filed their first complaint (Doc. #1) against the Commission and DOJ alleging that the Beams were targets of the ongoing grand jury investigation centered on the Fieger law firm. The crux of the Beams' initial allegations was that DOJ's investigation was unlawful in the absence of an FEC referral pursuant to 2 U.S.C. § 437g(a)(5)(C), and that the FEC had illegally conspired with DOJ to delay its civil investigation in order to allow DOJ to pursue its own allegedly unlawful criminal investigation.

In June 2007, the district court granted DOJ's and the Commission's motions to dismiss (Doc. #46). A few days later, the Beams filed an Amended Complaint (Doc. #47) alleging that DOJ and the FEC had violated the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 *et seq.*, by "secretly accessing plaintiffs' financial records and/or suppressing the existence of its [sic] acts" (Am. Compl. ¶ 26 (Doc. # 47).) and failing to inform the Beams of the alleged access (*id.* ¶ 12). The Beams further alleged that DOJ and the Commission had "conspired to retaliate" (*id.* ¶¶ 32, 40) against them for exercising their First Amendment rights, and the Beams renewed their claim that DOJ and the FEC had failed to comply with the purported referral requirement. On March 7, 2008, the district court dismissed the Amended Complaint, ruling that DOJ was not required to wait for a referral from the FEC before it could begin a criminal investigation or prosecution. *Beam v. Gonzales*, 548 F. Supp. 2d 596, 610 (N.D. Ill. 2008). With respect to the

Beams' other claims, the district court held that it lacked subject matter jurisdiction because the Beams lacked standing and their claims were not ripe. *Id*. at 604-606.

On March 24, 2008, the Beams filed a Second Amended Complaint (Doc. #91). In this new complaint, the Beams included a claim of selective prosecution in violation of the Fifth Amendment based on the FEC's administrative investigation, even though the Fieger law firm itself had requested the FEC investigation. *Id.* ¶¶ 29-36; Conciliation Agreement at 1. The Beams' Second Amended Complaint also alleged more specifically that DOJ and the FEC had violated the RFPA when DOJ "secretly obtained plaintiffs' private banking records" from Merrill Lynch and "transmitted such illegally gathered documents to the [FEC]." (2nd Am. Compl. ¶¶ 15-16, 18 (Doc. #91).)

In October 2008, the district court dismissed the non-RFPA claims, as well as the RFPA claim against DOJ, explaining that DOJ had obtained the Beams' records by grand jury subpoena, a method that is exempted from the reporting requirements of the RFPA. (Mem. Op. at 12-13 (Doc. #108).) Nevertheless, the court allowed the Beams' RFPA claim to proceed against the FEC, finding that if the FEC had obtained the records from DOJ without following the procedures outlined in section 3412, it could be liable under 12 U.S.C. § 3417 for "obtaining financial records or information" in violation of the RFPA, "even if [DOJ] obtained the documents legally." (*Id.* at 14.)

The Commission moved for summary judgment, and in February 2010 the district court denied that motion, finding that a genuine issue of fact existed as to whether the FEC had obtained the Beams' financial information from DOJ in violation of the RFPA. (Mem. Op. at 4-5 (Doc. #148).) In so ruling, the district court identified an ambiguity in the deposition testimony of FEC attorney Phillip Olaya as to whether he had seen the Beams' financial

information on a CD of public trial exhibits from the Fieger criminal trial that DOJ had sent to the Commission after the trial's end. The Commission later filed a second motion for summary judgment, presenting a declaration from Mr. Olaya explaining that he had made a mistake in stating that he had seen the Beams' financial records on the CD, which in any event contained no private financial information subject to the RFPA. In May 2010, the district court denied the FEC's second motion for summary judgment. (Minute Order (Doc. #181).)

Accordingly, the case proceeded to a two-day bench trial in August 2010 on the sole issue of whether the Commission had impermissibly obtained the Beams' financial records from DOJ in violation of the RFPA. Primary witnesses included M. Kendall Day, a DOJ prosecutor in the Fieger criminal trial, and Audra Wassom Bayes (via video-taped deposition), a former FEC attorney, who had acted as the main liaisons between the two government entities. They testified that none of the Beams' financial records or information was exchanged or on the CD of public trial documents that DOJ had provided to the FEC after the criminal trial ended in June 2008. (FEC App. 8-13, 24-27.) In addition, FEC attorney Philip Olaya again explained his mistake at deposition and confirmed that the CD he had seen in fact contained no financial records of the Beams. (Beam App. 56-57.)

On September 30, 2010, the district court granted judgment in the Commission's favor, ruling that the FEC had not violated the RFPA. *See* 2010 WL 3894225. The Commission timely filed its bill of costs, requesting court reporter and deposition transcript fees, pre-trial transcript and witness fees, trial witness travel expenses, and certain other expenses. (Bill of Costs (Doc. #213).) After considering the Beams' objections (Plaintiffs' Objections to Defendant's Bill of Costs ("Objections") (Doc. # 215)) and the FEC's Reply (Doc. #216), the

district court on September 22, 2011, awarded the Commission the $8,300.64 in costs it had sought. (Short App. 1, 9.)

## SUMMARY OF ARGUMENT

The district court properly exercised its discretion in awarding the Commission $8,300.64 in costs following a two-day trial, in accord with the strong presumption in favor of such an award to the prevailing party under Federal Rule of Civil Procedure 54(d). The Beams' claims on appeal amount to a baseless effort to relitigate the merits of the case — and to inject issues outside this case — even though they elected not to appeal their losses on the Right to Financial Privacy Act claim that went to trial or on any of their other claims that had previously been dismissed. The district court correctly rejected the Beams' objections to the costs award when it held that the Commission did not engage in litigation misconduct, that the agency's pre-litigation conduct is irrelevant to an award of costs, and that the Beams' good faith belief in their case is likewise irrelevant. The Beams now argue for the first time that they were in fact the prevailing party below and make several additional new arguments, but these claims were waived when they were not raised below, and in any event, they are baseless. This Court should uphold the district court's award of the full amount of costs awarded to the Commission.

## ARGUMENT

### I. STANDARD OF REVIEW

This Circuit reviews a district court's award of costs for abuse of discretion. *See, e.g.*, *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 864 (7th Cir. 2005) ("A district court's award of costs will not be overturned in the absence of a clear abuse of discretion.") (citing *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 945 (7th Cir. 1997)). That standard applies because "Federal Rule of Civil Procedure 54(d) provides that costs should be allowed as a matter

of course to the prevailing party." *Little v. Mitsubishi Motors N. Am., Inc.*, 514 F.3d 699, 701 (7th Cir. 2008). Although a district court has the discretion not to award costs, this Circuit has held that the discretion itself is "narrowly confined" because of the strong presumption in favor of a costs award created by Rule 54(d). *See, e.g.*, *Rivera v. City of Chicago*, 469 F.3d 631, 634 (7th Cir. 2006); *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000); *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997). "[W]here Rule 54(d) applies . . . the losing party must overcome that presumption." *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490 (7th Cir. 1982) (citations omitted); *Mother & Father v. Cassidy*, 338 F.3d 704, 708 (7th Cir. 2003) (describing the "strong presumption" created by Rule 54(d)).

Thus, "the losing party bears the burden of an affirmative showing that taxed costs are not appropriate." *Beamon*, 411 F.3d at 864 (citation omitted). Where the identity of the prevailing party is clear, this Circuit recognizes "only two situations in which the denial of costs might be warranted: the first involves misconduct of the party seeking costs, and the second involves a pragmatic exercise of discretion to deny or reduce a costs order if the losing party is indigent." *Mother & Father*, 338 F.3d at 708; *see also, e.g.*, *Rivera*, 469 F.3d at 634.[2] The term "misconduct" applies only in "exceptional circumstances." *Overbeek v. Heimbecker*, 101 F.3d 1225, 1228 (7th Cir. 1996).

The Beams make conflicting statements about the proper standard of review and suggest that the district court's award of costs rests on a question of law for which there is *de novo* review. (*See* Brief of Appellants' ("Br.") 16.) But no such legal issues are properly under review here because the district court's decision rests on a straightforward analysis of the

[2] The Beams state that "[e]ight thousand dollars is not an inconsequential sum for any parents with children at university" (Brief of Appellants ("Br.") 14), but they have never claimed to be indigent.

reasonableness of costs such as travel and deposition expenses. (*See* Short App. 4-8.) The correct standard of review is abuse of discretion. *See Beamon*, 411 F.3d at 864.

## II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE FEC IS THE PREVAILING PARTY AND IS ENTITLED TO ITS REASONABLE COSTS

The district court's award of costs to the Commission accords with the strong presumption for such an award to the prevailing party and was fully justified. The Beams now make a flurry of complaints about this routine award of costs, some of which they did not raise below, but their claims amount to a frivolous attempt to re-litigate the merits decision that the Beams chose not to appeal. The Court should reject these improper grounds to appeal a costs award. *See Exch. Nat'l Bank of Chi. v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1985) (an appeal of an award of costs or fees does not raise the judgment on the merits for appellate review).

### A. The Commission Is the Prevailing Party in This Case, and the Beams' New Claim to the Contrary Has Been Waived and, in Any Event, Is Frivolous

The Commission prevailed completely on every claim the Beams have made in this case since 2007, including the RFPA claim that went to trial in August 2010 and for which the awarded costs were necessarily incurred. Indeed, the Beams themselves *admitted* that the Commission had prevailed when they raised other objections to the bill of costs in the district court: "While Plaintiffs recognize that the Court ruled against them on the merits, Plaintiffs should not be penalized, again, with having to incur Defendant's taxable costs." (Objections 2-3 (Doc. #215).) The Beams now assert that *they* should be considered the prevailing parties (*see* Br. 24-26), but they are precluded from raising this issue for the first time on appeal: "It is a well-established rule that arguments not raised to the district court are waived on appeal." *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (citing *Brown v. Auto. Components*

*Holdings, LLC*, 622 F.3d 685, 691 (7th Cir. 2010); *Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1238 (7th Cir. 1997)).

Even if not waived, the Beams' argument that they prevailed below is frivolous. Although the Beams do not dispute that they lost all of their claims, they argue (Br. 26) that they satisfy the "catalyst test" applied by this Circuit because their suit supposedly caused a voluntary change in government conduct. Under this test, a party may be considered to prevail if his lawsuit is causally linked to the achievement of the relief he desired and he did not act "'wholly gratuitously.'" *Johnson v. LaFayette Fire Fighters Ass'n*, 51 F.3d 726, 730 (7th Cir. 1995) (quoting *Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994)). However, a litigant is not a prevailing party if the change was on account of "a reason unrelated to the proceeding." *Brown v. Griggsville Com. Unit. School Dist. No. 4*, 12 F.3d 681, 685 (7th Cir. 1993).

Mistaking coincidence for causality, the Beams speculate without a shred of proof that the Commission ended its investigation because their lawsuit caused the agency to change course. But there is no evidence that this lawsuit had anything to do with the Commission's decision not to pursue *any* of the more than 50 suspected conduits, including the Beams, after the Fieger law firm had agreed to pay a civil penalty for the section 441f violations. Rather, the timing of the Commission's resolution of MUR 5818 was related to the conclusion of the criminal trial and the conciliation agreement reached with the Fieger law firm. *See supra* pp. 5-6.

More fundamentally, neither the Beams' initial claims in this case nor the RFPA claim that ultimately went to trial had anything to do with the FEC's administrative reason-to-believe findings. The Beams' original Complaint (Doc. #1), filed about six months after the reason-to-believe findings, was not directed at the FEC's civil investigation at all, but instead focused

*solely* on stopping the Department of Justice's criminal investigation by means of the specious "referral" claim. *See supra* pp. 6-7. Indeed, the Beams did not even raise their RFPA claim until after the district court had dismissed their Complaint in June 2007. (Am. Compl. ¶¶ 12, 26 (Doc. #47).) And the relief available for the RFPA claim was the statutory penalty of $100, not the end of the FEC's administrative investigation. *See* 12 U.S.C. § 3417; Am. Compl. (Doc. #47); 2nd Am. Compl. (Doc. #91). The RFPA simply has nothing to do with whether FECA was violated, and the Beams' meritless claim under the RFPA concerned their speculation that DOJ had provided their financial records to the Commission, not that the Commission itself had directly sought their records from a banking institution during its own investigation.

The Commission ultimately concluded its investigation after reaching a conciliation agreement in which the Fieger law firm paid a significant civil penalty for the FECA violations. The Commission also decided, exercising its prosecutorial discretion, to take no further action against *any* of the suspected conduits, a common law enforcement practice once proceedings against the primary actors in any unlawful enterprise have been resolved. Thus, there is no evidence that the Commission did anything in response to this lawsuit except to defend itself and ultimately prevail.

**B. The Beams Do Not Contest the Reasonableness of the Costs Incurred**

The district court rejected each of the objections the Beams raised to the specific categories of costs in the Commission's bill of costs. (Short App. 4-8.) Specifically, the court below found that the expenses incurred for travel, lodging, depositions, and transcripts were reasonable. (*Id.*) In their brief before this Court, the Beams have not challenged any of these specific findings, so any renewed objection to them has been waived. *See, e.g.*, *Logan v. Wilkins*, 644 F.3d 577, 583 (7th Cir. 2011).

### C. Appellants' Claim of "Misconduct" Lacks Merit

The Beams also repeat their argument (Br. 16-21), rejected by the district court below, that the Commission engaged in "misconduct," but this Circuit denies costs for misconduct only in "exceptional circumstances" not present here. *Overbeek*, 101 F.3d at 1228. Indeed, this Circuit has rarely found circumstances so exceptional as to justify denying a prevailing party's costs. "[O]nly misconduct by the prevailing party worthy of a penalty (for example, calling unnecessary witnesses, raising unnecessary issues, or otherwise unnecessarily prolonging the proceedings) . . . will suffice to justify denying costs." *Congregation of the Passion, Holy Cross Province v. Touche, Ross, & Co.*, 854 F.2d 219, 222 (7th Cir. 1988); *see also, e.g.*, *Weeks*, 126 F.3d at 945 (same). For example, in *Overbeek* this Court concluded that the district court did not abuse its discretion in denying costs when the prevailing party's counsel caused a decade of protracted and needless litigation. In that case, counsel refused multiple settlement offers of an insurance policy limit, unnecessarily pursued a trial, appealed the jury's decision not to award punitive damages (even though the defendants were judgment-proof), vanished for long periods, and made frivolous arguments. 101 F.3d at 1228. But unlike the prevailing party in *Overbeek*, the FEC defended itself reasonably, as the district court correctly concluded. (*See* Short App. 3.)

#### 1. The Commission's Reason-to-Believe Finding Does Not Constitute Litigation Misconduct

As explained *supra* p. 5 n.1, a reason-to-believe finding is only a preliminary determination that a civil investigation is warranted, *see* 2 U.S.C. § 437g(a)(2), and an "FEC[ ] investigation does not determine any rights of the person under review." *Stockman*, 138 F.3d at 155. The Beams argue (*see, e.g.*, Br. 17-18) that the FEC's reason-to-believe findings amount

to misconduct, but *pre-litigation* actions cannot constitute *litigation* misconduct.[3] Thus, the reason-to-believe findings are irrelevant to the costs award, and the district court correctly concluded that the Beams' claims about those findings do "not support a finding of misconduct . . . Indeed, Plaintiffs offer no legal support for such an argument." (Short App. 3.)

Even if a party's pre-litigation conduct were relevant to a costs award, the Commission's conduct here provides no basis to deny costs. The Beams repeatedly mischaracterize the Commission's reason-to-believe findings and civil investigation as "threats of felony prosecution." (*See* Br. 7, 14, 17-18, 21, 25.) But as already explained, a reason-to-believe finding is nothing more than a threshold determination that further inquiry into a possible violation is warranted. And the Commission has no authority to bring or threaten criminal prosecution. *See* 2 U.S.C. § 437d. The Beams also make much (*see, e.g.*, Br. 6-7, 17) of the incorrect statements in the FEC analyses accompanying the reason-to-believe letters that the Beams had not made prior federal contributions. But the Beams wrongly assume that past contributions would somehow preclude them from acting as conduits in the factual situation involved in MUR 5818. A history of past campaign contributions does not prevent anyone from participating in a scheme to make additional contributions in the name of another.

The Beams also claim (Br. 21-23) that the Commission should be denied its costs because the reason-to-believe findings had a "chilling effect" on their First Amendment rights and so their lawsuit was purportedly "public interest litigation." First, although the Beams' Amended Complaint included constitutional claims, those claims were dismissed in 2008, and

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[3] Moreover, the Commission's reason-to-believe findings against the Beams are not even properly viewed as pre-litigation conduct related *to this lawsuit*, because those findings did not lead to any Commission enforcement proceeding and were never legally reviewable or relevant as part of any of the claims the Beams raised in their original or amended complaints in this action.

the Beams did not argue below that the FEC should be denied costs on the theory that this is "public interest litigation," so they are precluded from raising the argument on appeal. *See Puffer*, 675 F.3d at 718. Second, even if the claim had been preserved, the Beams offer no support for the notion that unsuccessful constitutional claims are exempt from the normal presumption of Rule 54(d)(1) that the prevailing party is entitled to an award of costs. Third, the Beams' claims that their First Amendment rights were chilled and that their RFPA cause of action is public interest litigation are simply unsupported, conclusory assertions. The Beams have never alleged any facts demonstrating that the Commission's reason-to-believe finding has affected the exercise of their First Amendment rights or that their meritless RFPA claim would serve the public interest.

In sum, the district court was correct in finding that although the subject of a reason-to-believe finding may be "inconvenienced" (Short App. 3), that finding here occurred prior to litigation and did not constitute misconduct warranting a denial of the Commission's costs. *See generally, e.g.*, *Stockman*, 138 F.3d at 154-55; *Standard Oil*, 449 U.S. at 244 (noting that the "expense and annoyance of litigation is part of the social burden of living under government" (internal quotation marks and citation omitted)).

**2. The Commission's Objections to the Beams' Discovery Requests Were Not Misconduct**

During the litigation, the Commission objected to some of the Beams' discovery requests and explained its position in writing. (*See* Defendant FEC's Opposition to Plaintiffs' Motion to Compel Responses to Interrogatories, for Production of Documents, and for Depositions ("FEC Opp.") at 4-5 (Doc. #119).) The Beams repeat their claim (Br. 19-21) that the Commission's opposition to this discovery should preclude the recovery of costs, but the Commission acted

reasonably in opposing the Beams' overbroad and burdensome discovery requests, and the district court rightly rejected the Beams' claims of misconduct. (Short App. 3-4.)

Prior to trial, the Commission furnished sworn declarations from knowledgeable government employees who stated that the agency had not received any personal financial information about the Beams from DOJ. In response, the Beams improperly sought to depose litigation counsel representing the Commission in this very case. Moreover, the Beams did not limit their document requests to items relevant to the alleged RFPA violation — the only remaining claim at that time — but instead requested documents including confidential information about ongoing law enforcement proceedings. (*See* FEC Opp. at 5-8, 11-14 (Doc. #119).) The district court ordered modified discovery — permitting some parts of the Beams' requested discovery and denying others — but did not find that the Commission's objections were frivolous or sanctionable. (*See* Transcript of Jan. 7, 2009, hearing (Doc. #120); Transcript of Feb. 11, 2009, hearing, *e.g.*, at 5, 7-12, 14 (Doc. #127).)

Thus, the district court was well within its discretion in finding, in its Order awarding costs, that "[d]iscovery disputes are, by definition, contentious" and that "[t]he disputes in this case were, from the court's perspective, neither remarkably nor obviously motivated by anything more unsavory than a reasonably aggressive litigation posture." (Short App. 4.) And it is well-settled that a court may not "penalize[ ] [a party] for maintaining an aggressive litigation posture." *Lipsig v. Nat'l Student Mktg. Corp.*, 663 F.2d 178, 180-81 & n.17 (D.C. Cir. 1980) (citing *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975)). The district court's conclusion regarding discovery was a factual one based on more than three years of litigation that included more than 200 docket entries, and the Beams present no legitimate basis to question this quintessential exercise of district court discretion.

### 3. Witness Olaya's Testimony Does Not Evidence Commission Misconduct

The Beams also argue (Br. 13, 19, 24, 28) that misconduct occurred in connection with the testimony of FEC staff attorney and witness Phillip Olaya, but the district court properly rejected the Beams' claim that the Commission had "unclean hands." (Short App. 3.) Before trial, Mr. Olaya executed a declaration explaining that he had mistakenly answered in the affirmative a question at his deposition about whether he had seen materials related to the Beams on a CD of public trial materials. (Beam App. 56-57, 63.) At trial, Mr. Olaya further explained that, in answering that question, he "perhaps was not paying attention or had lost . . . [his] concentration and just responded 'Yes' to seeing that information." (*Id.* at 61; *see also id*. at 64.) Mr. Olaya also stated that he is "not a litigator. I had never been part of a deposition. . . . So there were some nerves . . . ." (*Id.* at 64.) Finally, he testified that he was not "pressured" to change his deposition testimony and that he himself had discovered his error. (*Id*. at 63.) In sum, an inexperienced and nervous deponent made a mistake in answering a question and corrected it before the bench trial began. The district court assessed Mr. Olaya's credibility in ruling for the FEC at trial. (Mem. Op. at 9 (Doc. #211).)

The Beams also suggest (Br. 21) for the first time that the Commission should be denied costs because the Olaya deposition testimony "prolonged" the case, but the Beams are precluded from raising that claim on appeal because they failed to raise it below.[4] *See Puffer*, 675 F.3d at 718. In any event, there is no basis to penalize a litigant simply because its witness erroneously says something that creates a factual issue requiring a trial. The Commission took every reasonable step to end this case as quickly and efficiently as possible, including filing a second

[4] In the alternative, the Beams argue (Br. 27) that the Commission should be denied an award for costs incurred after the Olaya deposition. The Beams also failed to raise this argument below, and it lacks merit for the same reasons as their main argument.

summary judgment motion in which Mr. Olaya clarified his deposition testimony. (Beam App. 31.) Moreover, given the scope of the Beams' allegations, every FEC witness at trial was necessary, and the Beams do not suggest otherwise; indeed, the Beams' counsel questioned every FEC witness at trial. Of course, as noted *supra* p. 8, the primary witnesses at trial were Mr. Day from DOJ and Ms. Wassom Bayes from the FEC, the attorneys who were the main contact points for the two agencies. They confirmed that Mr. Olaya could not have seen any of the Beams' private financial information on the CD that DOJ provided to the FEC because the CD simply did not contain any such information. Regardless, the district court was within its discretion in judging for itself the credibility of Mr. Olaya and the other witnesses and evidence before it. The Commission engaged in no misconduct regarding Mr. Olaya's testimony.

### D. The Beams' Subjective Belief in Their Case Is Irrelevant to an Award of Costs

Finally, appellants argue that they believe their case against the Commission was so strong that the district court should have denied the Commission its costs (Br. 23-24), but in this Circuit, "[m]ore than just a showing of good faith is necessary to immunize the losing party from paying costs." *Muslin v. Frelinghuysen Livestock Managers, Inc.*, 777 F.2d 1230, 1236 (7th Cir. 1985). "[I]t is insufficient that the losing plaintiff had a reasonable basis for her case." *Delta Air Lines*, 692 F.2d at 491. As the district court noted, this Court has "specifically addressed the question of whether the good faith and credibility of the nonprevailing party's case can justify the denial of costs. The answer is no: 'If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d) would have little substance remaining.'" (Short App. 4 (quoting *Popeil Bros., Inc. v. Schick Elec., Inc.*, 516 F.2d 772, 776 (7th Cir. 1975)).) Rule 54(d) is a generally applicable modification of the former practice that each side bears its own costs. *See, e.g., Anderson v. Griffin*, 397 F.3d 515, 522 (7th

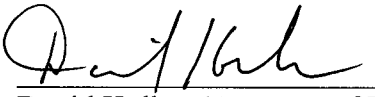
Cir. 2005). In contrast, denying the prevailing party its costs does function as a "penalty." *Congregation of the Passion*, 854 F.2d at 222. The Beams have failed to show that the Commission should be so penalized or that the district court abused its discretion in finding that none of the Commission's conduct warranted a denial of costs. (*See* Short App. 4.)[5]

## CONCLUSION

Because the Commission was the prevailing party and engaged in no litigation misconduct disqualifying it from an award of costs, this Court should uphold the district court's award of reasonable costs to the Commission.

Respectfully submitted,

Anthony Herman
General Counsel



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[5] The Commission notes that this meritless appeal likely justifies the assessment of double costs against appellants under Fed. R. App. P. 38, which provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." The Beams' appellate arguments virtually ignore the district court's specific findings about the reasonableness of the costs incurred and focus instead either on relitigating the merits or on issues unrelated to the claims under the RFPA that were at issue in the trial.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,076 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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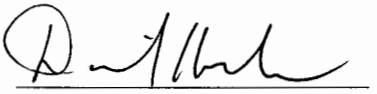

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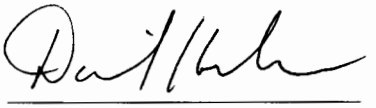

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