No. 22-15378

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN J. WALSH, Secretary of Labor,
United States Department of Labor

Plaintiff-Appellee,

v.

BRIAN J. BOWERS, an individual; Dexter C. KUBOTA, an individual; BOWERS + KUBOTA CONSULTING, INC., a Hawai'i corporation

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Hawai'i
No. 1:18-cv-155-SOM-WRP
Hon. Susan O. Mollway

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Appellant Bowers + Kubota Consulting, Inc. has no parent corporation. Moreover, no publicly held corporation owns any stock of Bowers + Kubota Consulting, Inc.

Dated: July 20, 2022

Respectfully submitted,

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INTRODUCTION

After having conducted a more than three year investigation of the Bowers + Kubota Consulting, Inc. Employee Stock Ownership Plan and Trust ("the ESOP") and its independent fiduciary and sole trustee, Nicholas L. Saakvitne ("Saakvitne"), on April 27, 2018, Plaintiff/Appellee, Secretary of the U.S. Department of Labor (the "Secretary" or the "Government"), sued numerous defendants, including Appellants, for various alleged violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, *et seq*. The Secretary's claims arose out of the creation of an employee stock ownership plan and trust ("an ESOP") by Defendant/Appellant Bowers + Kubota Consulting, Inc. ("B+KC") and the December 14, 2012, sale of all of the shares of B+KC common stock by the trusts of Defendants/Appellants Brian J. Bowers ("Bowers"), and Dexter C. Kubota ("Kubota") to the ESOP for $40,000,000 (the "December 2012 ESOP Transaction").

The Secretary sued Bowers and Kubota, the selling shareholders, as parties-in-interest under ERISA for participating in an ERISA prohibited transaction (selling the B+KC stock to the ESOP for more than "adequate consideration" or fair market value), for breaching their ERISA fiduciary duties, for ERISA co-fiduciary liability, for knowingly participating in an ERISA fiduciary breach, and

sought to invalidate any indemnification agreements between Bowers, Kubota, and B+KC. [7-ER-1799-1822.]

The Secretary also sued the independent fiduciary and sole trustee of the ESOP who approved the December 2012 ESOP Transaction on behalf of the ESOP, Saakvitne, and Saakvitne's law firm (Nicholas L. Saakvitne, A Law Corporation) for breaching Saakvitne's ERISA fiduciary duties and participating in an ERISA prohibited transaction. [*Id.*] The Secretary sued B+KC and the ESOP as a nominal defendants. [*Id.*] The Secretary asserted at trial damages of $13,050,000, plus prejudgment interest, and 20% penalties under ERISA Section 502(l), 29 U.S.C. § 1132(l).[1]

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[1] As of June 15, 2016, the Secretary's Los Angeles Regional Office of EBSA ("LARO") originally calculated damages at a range of $20M to $25M. [8-ER-1270.] LARO investigators (Wen and Paredes) and their supervisors (Hanzich and Palacios) then prepared in 2017 a draft voluntary compliance letter in which the Appellants believe, based upon other discovery responses, that the Secretary was going to demand at least $20,000,000 in alleged damages. The Secretary did not send a voluntary compliance letter to the Appellants, and instead referred its investigation matter to litigation. On April 10, 2018, weeks prior to the Government's filing of this lawsuit, the Secretary demanded damages of "as much as $18,000,000", plus ERISA Section 502(l) 20% penalty under 29 U.S.C. § 1132(l) and 29 CFR § 2570.81. In Supplemental Initial Disclosures herein, the Secretary claimed that the ESOP overpaid by $16,280,000, not including the ERISA Section 502(l) 20% penalty under 29 U.S.C. § 1132(l) and 29 CFR § 2570.81. [3-ER-617-619, Defense Ex. 264 (Secretary's Second Supplemental Initial Disclosures).]

Defendant Saakvitne died approximately six months after the Secretary filed the Complaint. [ECF 35.] The Secretary immediately substituted his surviving spouse, Sharon L. Heritage ("Heritage"), as Saakvitne's successor-in-interest. [ECF 68.] Shortly before trial, Heritage and the Saakvitne Law Firm settled the Secretary's claims against them for the $1,800,000 balance of Saakvitne's $3,000,000 fiduciary liability insurance policy (the remainder of which Saakvitne's counsel wasted away without adding any real value in the defense of the litigation). [6-ER-1601-1615.]

After the five-day trial involving the remaining defendants (Appellants), the District Court ruled in Appellants' favor [1-ER-68-145] and entered a Judgment against the Secretary [1-ER-146].

Appellants sought taxable costs through the filing of a Bill of Costs [3-ER-583-604] and sought an award of attorneys' fees and nontaxable costs through a separate motion for same [3-ER-439-474]. The Honorable Judge Susan Oki Mollway referred these issues to the Magistrate Judge, who bifurcated the briefing on Appellants' attorneys' fees and nontaxable costs motion into two phases, first an "eligibility" briefing to determine whether Appellants were eligible under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, to recover attorneys' fees and costs, and second, if so, the amount of such attorneys' fees and costs to be awarded. The Magistrate Judge first awarded $72,962.95 in taxable costs to

Appellants. [1-ER-50-67.] The Magistrate Judge then denied any attorneys' fees and nontaxable costs [1-ER-35-49].

Upon the parties' respective appeals of the Magistrate Judge's orders to the District Court judge who presided over the trial, Judge Mollway reduced the amount of taxable costs to $41,810.46 and denied any award of attorneys' fees and nontaxable costs in a single ruling of February 7, 2022, styled, "Order Adopting in Part and Modifying in Part Findings and Recommendation to Grant in Part Defendants' Bill of Costs (ECF 682); Order Adopting Finding and Recommendation to Deny Defendants' Motion for Attorneys' Fees and Nontaxable Costs (ECF 684)" (the "February 7, 2022, Order"). [1-ER-2-34.]

Appellants appeal the February 7, 2022, Order. [7-ER-1823-1827.] As established in the ruling on the merits of the trial [1-ER-68-145], the Secretary wholly failed to present any credible evidence of alleged ERISA violations at trial. [1-ER-132]. For example, as the District Court found, the Secretary came to court without a "credible challenge to the actual sales price", the crux of the Secretary's claims, succinctly summarizing the Secretary's actions: "when the Government filed this lawsuit, it took on the burden of proving that its suspicions were reflected in fact. What has happened in the trial of this case is that the Government failed to carry that burden, not for want of effort but for what appears to be a want of evidence." [*Id*.] The District Court similarly acknowledged the Secretary's

complete failure of proof with respect to his claims of Bowers' and Kubota's alleged knowing participation in the alleged fiduciary breaches of Saakvitne. [4-ER-958:9-959:3.]

The absence of any credible evidence of the alleged ERISA violations at trial merits the conclusion that there was no substantial justification for the Secretary's complaint. The District Court was clearly erroneous in confusing the justification of the Secretary's investigation of the ESOP with the Secretary's abject failure to provide evidence in support of its claims at trial. The District Court concluded that the Secretary's investigation of the ESOP was justified and failed to distinguish between the rationale for that investigation and the need to ensure that post-investigation claims in litigation were reasonable and substantially justified. The fact that the investigation was justified has no bearing under the law on the justification of the Secretary filing a Complaint after the investigation concluded.

This was a case that should not have been filed in the first place or brought to trial. The Secretary's investigation revealed this in advance of filing the Complaint.

Simply put, if attorneys' fees and costs cannot be awarded under the circumstances of this case against the Plaintiff agency of the United States government, then prevailing defendants such as Appellants will be severely

prejudiced, in this matter and any other Appellant in future similar matters. Requiring the United States to present credible evidence at trial in support of its claims (even if such credible evidence does not result in the claims being successful) is not burdensome and ensures that the EAJA's substantial justification standard is meaningful. Moreover, the District Court judge's ruling with respect to reducing the award of taxable deposition costs to Appellants was based upon a clear factual mistake regarding the dates of the underlying depositions and an abuse of discretion.

JURISDICTIONAL STATEMENT

The February 7, 2022, Order is a final order and disposed of all parties' claims with respect to taxable costs and attorneys' fees and nontaxable costs. On March 11, 2022, Appellants timely noticed their appeal of the District Court's February 7, 2022, Order. [7-ER-1823-1827.]

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(a)(2) and (a)(5). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

The relevant statutory authority, the EAJA, 28 U.S.C. § 2412, appears in this brief and in the Addendum to this brief. All other relevant statutory authorities are cited in this brief.

ISSUES PRESENTED

1. Whether the District Court erred under the EAJA in denying an award of attorneys' fees and nontaxable costs to Appellants.
2. Whether the District Court erred under the EAJA in reducing its award of taxable costs to Appellants attributable to deposition costs.

STATEMENT OF THE CASE

The underlying case involved the transition of a highly successful corporation to an ESOP and the Secretary's exceptionally aggressive and mistake-ridden prosecution of that transition under ERISA after a lengthy investigation.

The Secretary conducted an investigation of the ESOP and its independent fiduciary and sole trustee, Saakvitne, for more than three years (from at least December 2014 to April 2018) that included, without limitation, the review by investigators at the Secretary's LARO a substantial number of documents, interviews and e-mails, questioning of witnesses, administrative depositions, and various valuations by the Secretary's valuation experts in the Secretary's National Office in Washington, D.C. coordinated with LARO. [*See*, *e.g.*, 3-ER-666-667.]

The Secretary's investigations of possible violations of ERISA involved documents obtained from third-parties and interviews and administrative depositions, if necessary, of such third-parties. After the Secretary filed the complaint, the only non-expert witnesses that the Secretary used to prosecute his

claims were third-parties (with the exception of an internal investigator testifying inaccurately to damages). [*See generally* 5-ER-622 – 6-ER-1600 (Trial Transcripts).] The Secretary's employees had no personal knowledge of the underlying facts and were not witnesses to such facts.

An appropriate weighing of the evidence and third-party witnesses discovered in the Secretary's investigation of Saakvitne and the ESOP, however, clearly revealed that there was no reasonable factual basis for asserting the ERISA violations in the underlying litigation. The District Court rejected each and every category of "evidence" that the Secretary tried to introduce at trial in support of his claims as failing to support a legal conclusion of an ERISA violation. For example, as the District Court found that the Secretary came to court without a "credible challenge to the actual sales price" – the crux of the Secretary's claims – succinctly summarizing the Secretary's actions: "when the Government filed this lawsuit, it took on the burden of proving that its suspicions were reflected in fact. What has happened in the trial of this case is that the Government failed to carry that burden, not for want of effort but for what appears to be a want of evidence." [1-ER-132.] Similarly, with respect to the Secretary's claim for Bowers' and Kubota's alleged knowing participation in the fiduciary breaches of Saakvitne, the District Court noted at trial the Secretary's complete failure of proof, as follows:

> "I'm still questioning the need for Mr. Saakvitne's documents. If you are going -- okay. So you're not going under concealment, or you

> may or may not, but assume for the moment you're going under knowing participation. So you do have to establish that Mr. Bowers and Mr. Kubota knew about something that Mr. Saakvitne did.
>
> So what is the evidence that they knew and why isn't that enough to show -- I mean knowing that Mr. Saakvitne did something, if you elicited testimony about that, it would have to include some testimony that Mr. Saakvitne did the thing.
>
> You know, did you know that Mr. Saakvitne, you know, punched somebody? Yes, I knew. Then -- then you don't need Mr. Saakvitne's admission that he punched somebody because Mr. Bowers and Mr. Kubota by saying, Yes, I knew he punched somebody, would be providing the punching element by Mr. Saakvitne, plus their knowledge of what Mr. Saakvitne did.
>
> So if you're going under knowing participation, I do not understand why you need Mr. Saakvitne's documents and could not just have established Mr. Saakvitne's actions through examination of Mr. Bowers and Mr. Kubota about what they knew."

[4-ER-958:9-959:3.]

Whatever suspicions led to the Secretary's investigation of the ESOP and Saakvitne, such suspicions failed to result in reasonable evidence of an ERISA violation. In other words, the Secretary presented no evidence at trial of any substantial justification for asserting that Appellants violated ERISA. The complete want of evidence reveals the unreasonable and unjustified nature of the Government's filing and prosecution of this case. The District Court's finding of a lack of frivolity in the Government's investigation of the ESOP has no bearing on whether the Government's complaint and prosecution of same were justified. The District Court accepted the reasonableness of the Government's investigation and

conflated that action with the Secretary's poor and unreasonable decision to file and prosecute the complaint in this action.

Instead, throughout this litigation the Secretary's employee investigators and his counsel blindly labeled the facts of the December 2012 ESOP Transaction as showing events (commonly known as "red flags") of which Bowers and Kubota knew or should have known that were improper, and used this red flag approach to accuse Appellants of violations of ERISA. [*See*, *e.g.*, 7-ER-1855 (Complaint), ¶ 8 ("despite a list of red flags …"), 1864, 1867, 1869, at ¶¶ 33, 40, 45 ("knew or should have known"); *see also* 7-ER-1819-1820, 1841-1848 (denying Appellants' motions to dismiss with respect to failure to monitor, co-fiduciary, and knowing participation in an ERISA fiduciary breach.][2] [*But see* uncontradicted witness trial

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[2] The District Court also found on the motion to dismiss that the Complaint alleged sufficient facts to support the Secretary's claims that Bowers and Kubota had actual knowledge of Saakvitne's alleged breaches of ERISA. [7-ER-1844.] At trial, of course, the Secretary presented no such facts. Moreover, the Secretary's attempt at summary judgment was very limited, seeking only an order that Bowers and Kubota acted as fiduciaries, and only prevailed in a very limited fashion. [7-ER-1688-1700.] The District Court determined them to be ERISA fiduciaries from the December 3, 2012, date of the adoption of the ESOP and appointment of Saakvitne as ESOP trustee, and no earlier (the Secretary sought such status to relate back to January 1, 2012). Indeed, Bowers and Kubota prevailed in dismissing the Secretary's indemnification claims with respect to any provisions in the ESOP Stock Purchase Agreement. [7-ER-1723-1724.]
Such very limited partial success herein, such as defeating Appellants' statute of limitations affirmative defense or motion to dismiss, does not establish substantial

testimony of lack of any red flags at 6-ER-1576:4-23 (Bowers Testimony); 6-ER-1642:3-1643:18 (Kubota Testimony); 6-ER-1333:5-25 (Hansen Testimony); 5-ER-1083:21-1092:16 (Kniesel Testimony).]

At the end of the day, however, the District Court ruled in Appellants' favor because of the Secretary's abject failure of proof. More significantly, the District Court did not find any reasonable factual assertion by the Secretary that was worthy of weighing and balancing in the application of the ERISA standards. [*See*, *e.g.*, 1-ER-132; 4-ER-958:9-959:3.] The Secretary's litigation position was not justified in law or in fact. Appellants respectfully submit that they should not have to suffer the costs of their defense in a Government claim in which the Government did not merely lose but failed to convince the District Court of the

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justification. *Malama Makua v. Hagel*, No. 1:09-cv-00369-SOM-RLP, 2013 U.S. Dist. LEXIS 206575, *10 (D. Haw. Apr. 22, 2013). Under the EAJA, a plaintiff's "degree of success factors into the amount of fees awarded but does not constitute substantial justification". *Dalles Irrigation Dist. v. United States*, 91 Fed Cl. 689, 699 (2010); *see also Air Transp. Ass'n of Canada v. F.A.A.*, 156 F.3d 1329, 1232 (D.C. Cir. 1998) (government required to prove substantial justification on fifth issue, even though it prevailed on other four); *Natural Res. Def. Council v. Locke*, 771 F. Supp. 2d 1203, 1209 (N.D. Cal. 2011) (defendants' litigation position not substantially justified because they "won on some issues"). Had the Secretary objectively reviewed all of the evidence, he would not have filed and prosecuted the Complaint and such affirmative defenses and motions would not have been necessary.

existence of any facts that supported in any reasonable manner a violation of ERISA.

A. Factual Background

B+KC was at the time of the December 2012 ESOP Transaction and remains an award winning, highly successful corporation that provides architectural and engineering design, project management, and construction management services throughout Hawai'i and the Pacific Rim. [1-ER-72.] Bowers, B+KC's president and a member of its board of directors, and Kubota, B+KC's vice president and a member of its board of directors, were the owners of B+KC through their respective trusts. [1-ER-73.]

Alleged red flag 1: the URS nonbinding indication of interest. The Secretary's complaint related heavily on an unjustified and unreasonable "red flag" allegation relating to a corporate nonbinding indication of interest. Bowers and Kubota entertained the idea of selling their interests in B+KC. [1-ER-77.] As relevant here, in late 2011, they discussed a possible sale with URS Corporation ("URS"). [1-ER-77-83.] Paul Vallone was responsible for managing URS's mergers and acquisitions, and after B+KC provided URS in the fall of 2012 with a limited number of documents, including sales numbers, award list, resumes, and 2010 tax returns, Vallone helped URS evaluate a possible purchase of B+KC. [1-ER-78.] Vallone sent to B+KC a preliminary nonbinding indication of interest.

That nonbinding indication of interest expressly stated that URS was interested in purchasing B+KC for $15,000,000 plus or minus "cash and debt on the Company's balance sheet". [*Id*.; 3-ER-605-607.] It specifically stated that the nonbinding indication of interest did not constitute an offer and proposed a 90-day exclusivity period in which to conduct initial due diligence. [*Id*.]

In the complaint and throughout this litigation and at trial, however, the Secretary repeatedly falsely characterized the URS nonbinding indication of interest as a valid arm's-length offer to purchase B+KC for $15,000,000, as somehow setting forth a false or "red flag" of the prior corporate value of B+KC and a signal of "adequate consideration" – a term of art under ERISA[3] – as to the

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[3] As applicable here, "the term 'adequate consideration' … means … (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary". ERISA Section 3(18)(B), 29 U.S.C. § 1002(18)(B). *See also* IRS Revenue Ruling 59-60, § 2.02 (fair market value is "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."), https://www.pvfllc.com/files/IRS_Revenue_Ruling_59-60.pdf (last visited July 12, 2022).

Legislation is pending in Congress to require the Secretary to issue "formal guidance for acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan (as defined in ERISA Section 407(d)(6), 29 U.S.C. 1107(d)(6))."

fair market value of B+KC in a sale by a willing buyer and a willing seller. The only evidence presented at trial proved otherwise. Vallone testified in deposition that URS conducted "very little" due diligence and that URS "did not begin to do detailed due diligence on the company" [1-ER-79.] Moreover, as plainly set forth on the face of the URS nonbinding indication of interest, the $15,000,000 offer included "cash and debt" on B+KC's balance sheet, which balance sheet the Secretary had as a result of its investigation and which Bowers and the ESOP's independent appraiser, Gregory E. Kniesel, ASA, of Libra Valuation Advisors, Inc. ("Kniesel"), testified was in the amount of "more than $7 million in cash and more than $7 million in working capital" [*Id*.] As such, as the District Court found, had the Secretary bothered to add these amounts "to the $15 million cited in URS's nonbinding indication of interest, the amount would have risen to about $29 million to $30 million". [*Id*.] The Secretary simply ignored the actual cash and debt on B+KC's balance sheet that the URS nonbinding indication of interest expressly acknowledged should be considered and falsely argued otherwise. [*Id*.]

The ESOP Association has been seeking this guidance from the Secretary for more than four decades. [https://esopassociation.org/articles/senate-committee-passes-landmark-bipartisan-retirement-security-legislation.] While these legislative efforts do not address the lack of justification of the Secretary's action in this case alone, they document concerns with the Secretary's enforcement methodology through litigation rather than administrative guidance.

Moreover, Bowers and Kubota did not reach an agreement with URS. The District Court thus appropriately found the URS nonbinding indication of interest to have no relevance to the actual value of B+KC as of the 2012 ESOP Transaction:

> "An individual who makes an offer of $15,000 for a used luxury car with a Blue Book value of $40,000 does not, by virtue of making a 'lowball' offer that is never accepted, tend to establish that the car is worth only $15,000. Here, there is no evidence that the URS indication of interest was the price that a willing buyer was willing to pay and that a willing seller was willing to accept. *See* IRS Revenue Ruling 59-60, § 2.02."

[1-ER-80.]

Indeed, the Secretary knew or should have known that the allegations regarding the URS indication of interest were not substantially justified. The Secretary's total failure of proof on this purported "red flag" resulted in Appellants having to spend considerable sums of money defending a substantially unjustified claim.

Alleged red flag 2: Gary Kuba and GMK Consulting, LLC. The Secretary's complaint relied heavily on an unjustified and unreasonable "red flag" allegation relating to the lack of quality and thoroughness of the Gary Kuba and GMK Consulting, LLC May 2012 valuation of B+KC and the limited involvement of Gary Kuba and GMK Consulting, LLC in the December 2012 ESOP Transaction While in discussions with URS, and in response to the URS nonbinding indication

of interest, Bowers and Kubota wanted to determine and sought their own indication of what B+KC was worth. On January 25, 2012, they hired Gary Kuba of GMK Consulting, LLC ("GMK") to provide them with a negotiating appraisal of B+KC's worth. [1-ER-80-81]. Kuba was a CPA accredited as a business valuator by the American Institute of Certified Public Accountants. [*Id*.] As set forth in the Kuba's and GMK's engagement agreement with B+KC, B+KC engaged Kuba and GMK to prepare a limited valuation report for internal use only. [*Id*.]

The Secretary, through Kuba and its expert valuation witness, Steven J. Sherman, aggressively tried to convince the District Court that Kuba had concerns over the financial projections provided to him. The Secretary argued that, after reviewing considerable documents including financial information showing projected increased profits of $9,284,000 for 2012, Kuba expressed concerns over a significant jump from the Company's listed profit for 2011 of $6,452,000. [1-ER-81.] Kuba testified that after having discussed such information with Bowers, however, he refined his estimate of value downward from an initial range of $31 million to $54 million to a tighter range of between $40 million and $46 million, ultimately providing a valuation of approximately $39.7 million (very close to Mr. Kniesel's final transaction valuation), and relied upon that increased 2012 profits figure because "the scope of my assignment was an internal-use analysis for

negotiation purposes". [1-ER-81.] Mr. Bowers testified that B+KC retained Kuba to determine the value of B+KC because it had no previous information regarding such value. [6-ER-1502:8-18.]

As the Secretary knew or should have known from his investigation, Kuba's appraisal was limited in scope. Nonetheless, the Secretary repeatedly argued below that Kuba's appraisal was a "red flag", that Bowers was surprised by the valuation amount as being "high", that the financial information and assumptions underlying it were inflated consistent with the Secretary's incorrect arguments relating to the appraisal used in the December 2012 ESOP Transaction conducted by Saakvitne and Kniesel, and that B+KC was somehow in breach of its agreement with Kuba (i.e., improperly sent Kuba's limited appraisal to URS). [ECF 600, Kuba Trial Declaration, at ¶ 50.]

Whether sending Kuba's limited appraisal to URS was improper or not was wholly irrelevant to the Secretary's claims. Moreover, as Bowers repeatedly explained, his "surprise" at Kuba's appraisal related only to the context of what the Secretary characterized as URS's $15 million indication of interest and was not a "red flag". [1-ER-81-82.] The Secretary knew this or should have known this from his three-year investigation.

Shortly after Bowers' delivery of the Kuba limited appraisal in May of 2012 to URS, the discussions with URS ended. [1-ER-82.]

Alleged red flag 3: B+KC's corporate ESOP attorney "quarterbacked" the December 2012 ESOP Transaction at a Preconceived Price. The Secretary's complaint relied heavily on an unjustified and unreasonable "red flag" allegation relating to the involvement of the B+KC attorney in the December 2012 ESOP Transaction. In the late summer of 2012, Bowers and Kubota contemplated selling their B+KC equity interests to an ESOP trust. [1-ER-83.] They had previously learned about ESOPs, and Kuba recommended that they speak with Hawai'i ESOP attorney Gregory M. Hansen, Esq. of Case Lombardi & Pettit, A Professional Corporation ("Hansen"). [*Id*.] Hansen had substantial experience with ESOPs and, in 2012, more than 50% of Hansen's legal practice involved ESOPs. [*Id*.]

The Secretary, however, asserted without justification that Hansen's involvement in the ESOP suggested violations of ERISA were carried out through the involvement of Hansen, arguing in its opening statement that:

> "After defendants failed to sell their company to any private buyer, defendants decided on $40 million as the – as the transaction price and decided to create the ESOP to sell to the captive ESOP. Defendants met and hired Greg Hansen as the attorney to quarterback the ESOP transaction in August of 2012. By September of 2012, defendants began setting up their desired ESOP transaction, including hiring the appraiser to determine the fair market value of the company for the ESOP."

[5-ER-1407.] Even after trial, in his proposed findings of fact and conclusions of law, the Secretary furthered his unfounded arguments:

> "Specifically, Defendants set up the entire transaction before appointing Saakvitne at the last minute, leaving him insufficient time to do anything but rubber stamp the prebaked transaction set out for him by Defendants. Defendants then watched as the pieces of their plan fell into place, doing nothing despite their knowledge the $40 million price was in excess of fair market value."

[3-ER-633, Section II.C.iii., ¶ 38.]

In late August 2012, Bowers and Kubota met with Hansen to discuss a potential ESOP. Hansen inquired, among other things, about a minimum sales price and recalled that they replied that they hoped to get about $40 million if the sale was for 100% of their equity interests in B+KC. Hansen specifically explained to them, however, that the sales price could not exceed fair market value as determined in good faith by an independent professional, advice that the District Court found they followed. [1-ER-83.] Messrs. Bowers Kubota testified that they did not recall any statements to Mr. Hansen that they were targeting a specific selling price. [4-ER-1566:15-17, 1603:7-10.]

On September 2, 2012, B+KC signed a formal engagement agreement with Hansen and relied upon Hansen, as is typical in the formation of ESOPs, to coordinate and hire a team of professionals, draft plan documents, and provide advice relating to the structure of a possible sale of B+KC to an ESOP. [1-ER-84.]

The Secretary's assertions that Hansen "quarterbacked" an ESOP transaction at a pre-determined price in violation of ERISA was an unfounded direct attack on Bowers, Kubota, and Hansen, an experienced ESOP attorney. Hansen testified at

trial that, at every step in the process of the formation of the ESOP, he appropriately counseled B+KC with respect to its ERISA obligations and that the sales price had not been pre-determined. [6-ER-1367:4-12.] This was not a case of an ESOP attorney allegedly improperly interjecting himself or herself into an ESOP formation or somehow conspiring. Quite the opposite.

Alleged red flag 4: Kuba and GMK fail to participate in the formation of an ESOP. The Secretary's complaint relied heavily on an unjustified and unreasonable "red flag" allegation relating to the failure of Kuba and GMK to participate in the formation of the ESOP. In July 2012, Kuba initially was willing to prepare a formal valuation of B+KC in connection with the formation of an ESOP. [1-ER-84-85.] In October 2012, Kuba changed his mind because he felt "uncomfortable with the structure of the transaction". [1-ER-85.] The Secretary asserted, without any evidence, however, that Kuba's discomfort was somehow an indication that the proposed ESOP transaction was improper or inappropriate. [*See*, *e.g.*, 6-ER-1458:11-1459:3.] Kuba's discomfort, however, was due to the proposed transaction involving preferred stock, a structure that Kuba was unfamiliar with. [1-ER-85.] The Secretary knew or should have known this in his investigation as a result of the documents and e-mails that he received during the investigation.

Following Kuba's declination to proceed as an independent appraiser and financial advisor, Hansen recommended Kniesel instead of Kuba and also later recommended Saakvitne as an independent fiduciary and trustee of the ESOP. [1-ER-85.]

On October 20, 2012, Kniesel sent a proposed engagement letter to B+KC. In the engagement letter, Kniesel agreed to provide a preliminary analysis and fair market value of the Company's stock no later than November 21, 2012, with a final summary letter no later than December 31, 2012. [1-ER-85-86.] Bowers sent Kniesel copies of the Company's accrual basis financial statements for 2011 and 2012, as well as Kuba's final valuation report. Then, two days after the date of LVA's proposed engagement letter, Bowers and Kubota met Kniesel in a due diligence discussion in Chicago. [1-ER-86.]

On November 21, 2012, Kniesel sent a "preliminary fair market value of the common stock" of the Company. [*Id*.] Kniesel preliminarily determined that the "ESOP Controlling Interest Value" fell between $37,090,000 and $41,620,000. The next day, Bowers sent Thomas Nishihara, CPA (B+KC's outside CPA) Kniesel's preliminary valuation as an attachment to an email, stating, "Range is tighter and falls within Gary's previous range which is good." [*Id*.]

On November 21, 2012, Bowers and Kubota met with Hansen to discuss, among other things, the appointment of an independent trustee for the proposed

ESOP. [1-ER-86-87.] Hansen mentioned several names, but highly recommended Saakvitne as the ESOP trustee. Hansen worked with Saakvitne on multiple ESOP transactions and considered Saakvitne to be a qualified and competent trustee. [*Id*.] Bowers and Kubota reviewed Saakvitne's resume, interviewed Saakvitne, considered Hansen's advice, and B+KC then agreed to hire Saakvitne. [1-ER-87.]

Hansen confirmed to Saakvitne that he had recommended him and told Saakvitne that he was leaving town on December 19, 2012 and that the sale would have to close by the date. Hansen also told Saakvitne that "[t]his is looking like a $12 million preferred stock transaction", and that [t]here is a slight possibility they will change their mind a do a 100% transaction for 40 million". [*Id*.]

On or about November 26, 2012, B+KC and Saakvitne entered into a fiduciary agreement under which B+KC appointed Saakvitne as the proposed ESOP's trustee and engaged him to evaluate any proposed sale of shares of B+KC to an ESOP trust, negotiate the terms of such a sale on behalf of the ESOP, and continue to serve as the ESOP's trustee after that. [1-ER-88-89.]

On December 3, 2012, B+KC formally adopted the ESOP and appointed Saakvitne as the ESOP's independent fiduciary and sole trustee. [1-ER-89.] On December 11, 2012, B+KC formally adopted the Bowers + Kubota Consulting, Inc. Employee Stock Ownership Plan (Effective as of January 1, 2012). [*Id*.]

On December 10, 2012, Bowers and Kubota offered to sell to the ESOP 100% of the B+KC common stock for $41 million, proposing that the sale would be financed at 10% interest per annum for more than 20 years. [1-ER-89-90.] Saakvitne sent a counteroffer to pay $39 million with a 25-year loan at 6% interest. [*Id*.] Bowers countered at $40 million, with a 25-year loan and 8% interest. Saakvitne agreed to the $40 million price, but countered with a request for a loan at 7%, which Bowers and Kubota accepted. [*Id*.]

Bowers and Kubota knew that the sale could only close at $40 million if an independent appraiser and financial advisor determined that that purchase price did not exceed the fair market value of the company stock to be purchased by the ESOP trust. [1-ER-90.] Saakvitne's negotiation saved the ESOP millions of dollars by lowering the interest rate from 10% to seven percent per annum and by lowering the purchase price by $1,000,000.[4] [*Id*.]

While, as the District Court noted, the Secretary raised concerns about how the parties ended up agreeing on the very amount that Bowers and Kubota wanted, suggesting that Saakvitne failed to really study the valuation and simply acquiesced in the sellers' price, this concern was solely predicated upon a finding that B+KC was not worth at least that amount. Indeed, as discussed below,

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[4] Bowers estimated such interest savings as $1M per year. [6-ER-1578:3-15.]

Saakvitne had a proper valuation from Kniesel indicating that B+KC was worth at least $40 million and Saakvitne had a good faith basis for agreeing to purchase B+KC for $40 million. Kuba also had previously concluded in May of 2012 that B+KC was worth approximately $39.7 million.

Alleged red flag 5: Saakvitne was "rushed" in the performance of his trustee duties and failed to conduct appropriate due diligence. The Secretary's complaint relied heavily on an unjustified and unreasonable "red flag" allegation relating to the failure of Saakvitne to address his ERISA fiduciary duties with adequate time and due diligence. In order to discredit Kniesel's appraisal and the $40 million purchase price, the Secretary inappropriately argued without any justification that Saakvitne should not have hired Kniesel and that Saakvitne was rushed in the performance of his duties and failed to appropriately conduct due diligence.

Saakvitne, however, was solely responsible for retaining a qualified independent appraiser to value B+KC. He had unfettered discretion to hire anyone. [1-ER-91.] The worst that could be said about Saakvitne's hiring of Kniesel, however, was that Kniesel's familiarity with B+KC allowed Saakvitne to try to conduct an independent appraisal to meet Hansen's holiday schedule, knowing that Hansen's schedule was not a rigid deadline, that Saakvitne was required to meet all of his legal obligations with respect to the December 2012

ESOP Transaction, and that the closing date could and would be put off if he could not do so. [1-ER-91-92.]

On December 11, 2012, Kniesel sent Saakvitne a preliminary valuation of B+KC. Saakvitne had this preliminary valuation when he agreed to the terms of the sale. [1-ER-92.] Saakvitne also spoke with Kniesel that day, and Saakvitne knew that the agreement on purchase price was only preliminary because the closing documents were not executed until three days later and the parties all knew of the requirement that an independent appraiser had to determine that the sale price did not exceed fair market value. [1-ER-92-93.]

On December 14, 2012, Kniesel sent Saakvitne a summary of his valuation, concluding that the fair market value of B+KC was $40,150,000, more than the preliminarily agreed-upon price of $40,000,000. Saakvitne knew that the proposed purchase price did not exceed fair market value, and Kniesel also informed him that the terms of the loans to the ESOP from Bowers and Kubota were "at least as favorable to the ESOP, from a financial standpoint, as would be the terms of a comparable loan resulting from an arms-length negotiation between independent parties". Kniesel's actual evaluation of B+KC as of December 14, 2012, was attached to his summary. [1-ER-93-94.]

The Secretary, however, refused to acknowledge that Saakvitne had properly performed his due diligence. The Secretary's prudence expert, Mark Johnson,

testified that Saakvitne rushed the transaction, doing only minimal work and improperly relying upon Kniesel, who Johnson believed not to qualify as an independent appraiser because of this prior work. [1-ER-93-94.] He testified that Saakvitne billed 28 hours working on the transaction. [*Id*.]

The District Court noted that Appellants' prudence expert, Gregory K. Brown, a defense expert with 45 years of legal practice involving ERISA, testified that Saakvitne's due diligence was sufficient and consistent with ERISA fiduciaries. [1-ER-94.] Brown testified that the December 2012 ESOP Transaction was "relatively straightforward" and that "a more complicated transaction would have required more due diligence". [1-ER-94-95.]

While evaluating the burden of proof, however, the District Court highlighted a complete failure of proof by the Secretary: "Johnson did not detail what kind of review another trustee might have done" and "[i]nstead, he simply concluded, '[r]ather than taking the time to properly supervise and evaluate the process, [Saakvitne] seemed proud of bringing the transaction to conclusion based [on] a tight and entirely artificial time frame". [1-ER-95.]

Moreover, Johnson's critique of Saakvitne's 28 hour billing failed to quantify whether 28 hours was more or less than would be necessary based upon comparably complex transactions. [*Id*.] In other words, Johnson wholly failed to testify as to what Saakvitne should have done and how much time it should have

taken him to do his work properly under ERISA. This is not just failing to meet a burden of proof, it is a complete failure of proof of which the Secretary knew or should have known:

> "The Government pointed to a number of circumstances that the Government viewed as suspicious. The Government raised concerns that Saakvitne had spent very little time working on the matter before agreeing on a price and on the terms of the sale of the Company shares to the ESOP. But Saakvitne actually negotiated significant benefits for the ESOP, and the amount of time Saakvitne billed for is by no means proof of carelessness or negligence on his part."

[1-ER-110.]

Alleged red flag 6: Kniesel's appraisal for the December 2012 ESOP Transaction and Sherman's testimony and purported expert appraisal. The District Court held that Kniesel's appraisal for the December 2012 ESOP Transaction was appropriate and permissible. In so doing, it found the Secretary's actions during his investigation to be non-frivolous, acknowledging that the Secretary was not acting on a whim in questioning Kniesel's continued involvement in the appraisal process. [1-ER-95.] That said, the Secretary had no evidence on which to base his complaint, which is evidence of bad faith.

The Secretary inappropriately attacked Kniesel's appraisal on several grounds. The Secretary asserted that Kniesel's appraisal was flawed because it used a 2012 projected EBITDA of $9.24 million in its discounted cash flow analysis. [1-ER-97.] Kniesel did not. [*Id*. ("... [t]he analysis for the DCF Method

is based on . . . projected income statements after an adjustment has been made . . . to include income taxes at a 40 percent rate" and because B+KC management projected moderately lower, but increasing profitability through 2017, assigned the discounted cash flow method equal weight to the other two methods combined.]

The Secretary's valuation expert, Sherman, criticized Kniesel's analysis as relying, in part, on an allegedly inflated projected EBITDA of $9,235,000, testifying that the amount exceeded B+KC's historical EBITDA. [1-ER-98.] Sherman testified instead that a more appropriate "corrected" EBITDA would have been $4,849,000, yielding a much lower valuation amount. This was completely hypothetical on Sherman's part. [1-ER-99 (District Court finding Sherman "corrected" EBITDA was incorrect and "unreliable").] Sherman also criticized Kniesel's report for having relied upon projections that he did not think were supportable. [1-ER-98-99.] Appellants' valuation expert, Ian Rusk ("Rusk") highlighted that B+KC had actually achieved earnings similar to its historical earnings because the company's earnings were projecting upward in 2012 and the company had a substantial backlog of contracts. As such, the projections were not inaccurate. [1-ER-99.]

The District Court appropriately found that Sherman's critiques were unfounded and unreliable. He should have taken into account the relevant circumstances that Rusk identified and should have known that his "corrected"

EBITDA figure of $4,849,000 was blatantly incorrect because the actual EBITDA as of December 31, 2012, was $7,047,000. Such actual EBITDA as of December 31, 2012, "should have caused Sherman to reexamine the historical results that he claimed required him to 'correct' the EBITDA to only $4,849,000" and the "Company's earnings in 2010 and 2011, placed against the upward trend the company experienced in 2012 and the Company's backlog of contracts, justified a higher EBITDA, further demonstrating the unreliability of Sherman's 'corrected' EBITDA". [1-ER-124-125.]

Similarly, as the District Court appropriately noted, the Secretary's and Sherman's contention that Bowers inflated revenue growth projections for 2014 through 2017 were false. Bowers projected a five percent growth rate, which understated B+KC's actual growth rate of between 10 and 14 percent for that time period. [1-ER-125-126.] This, too, is a complete failure of proof of which the Secretary knew or should have known from its investigation.

Indeed, Sherman's testimony and purported appraisal of B+KC's fair market value as of December 14, 2012, for $26.9 million presented additional concerns for the District Court of which the Secretary knew or should have known from its investigation. Specifically, Sherman made substantial errors that significantly and unreasonably undervalued B+KC, rendering his opinion unreliable and undermining his usefulness as an expert witness:

> "In aid of showing that Saakvitne's reliance on LVA was problematic, the Government presented the opinions of its expert, Sherman, who valued the Company at $26,900,000 as of December 14, 2012. Unfortunately for the Government, however, Sherman's opinion contained notable errors that may have amounted to an undervaluation of $13,515,000 ($10,521,000 relating to subconsultant fees + $2,994,000 relating to a 'limited control' discount). If $13,515,000 is added to his value of $26,900,000, the total is $40,415,000, which is very close to the actual sale price."

[1-ER-110.]

Moreover, Sherman violated the Uniform Standards of Professional Appraisal Practice ("USPAP") in apprising B+KC by not interviewing B+KC's management or having the Secretary's counsel conduct an administrative deposition of such management during the Secretary's investigation or, at the latest, a deposition in the underlying litigation, and thereby violating USPAP's scope of work and competency rules requiring research and analysis to be sufficient to produce credible results and to be conducted in a manner that is not careless or negligent. [1-ER-102-105.] It is noteworthy that at his February 16, 2021, deposition and at trial, Sherman testified that the Government advised him that interviewing B+KC management was not possible. [4-ER-875:2-13.] This reasonably infers that the Government intentionally prevented such an interview from occurring. Such a failure, for example, resulted in Sherman improperly treating $10.521 million in subconsultant fees (which were pass-through items with no earnings impact) as expenses in his analysis, an error that he could have avoided

had he or his counsel appropriately interviewed or deposed B+KC's management. [1-ER-104.] Sherman inappropriately treated such subconsultant fees as company expenses, which he deducted in calculating B+KC's fair market value, instead of treating them as pass-through fees with no earnings impact. [1-ER-104-105.] Moreover, no one knows where Sherman obtained his $10.521 million figure when his declaration and Kniesel's appraisal refer to $2.923 million in subconsultant fees, a clear error that the Secretary could not use to substantially justify the filing and prosecution of the Complaint. [*Id*.]

Sherman also deducted a "limited control" discount of $2,994,000 from his valuation conclusion, reasoning that such limited control was evidenced by B+KC paying bonuses to Bowers and Kubota without Saakvitne's approval. [1-ER-105-106.] As the District Court found, Sherman's reliance upon matters occurring after the sale to apply a limited control discount contravened the appraisal standards limiting the facts that he was to consider in his appraisal and resulted in an improper decrease in his calculation of B+KC's fair market value by $2,994,000. [1-ER-106.] Moreover, there was no evidence introduced at trial that Saakvitne actually had an absolute right to approve or disapprove the compensation paid to Bowers and Kubota. [*Id*.]

Again, correcting Sherman's errors, of which the Secretary and his counsel knew or should have known, Sherman's own appraisal would have been

$40,415,000, or slightly greater than Kniesel's appraisal. Sherman did not "credibly undermine" Kniesel's appraisal.

Alleged red flag 7: the negotiations. In the Complaint, the Secretary falsely alleged that in negotiating the December 2012 ESOP Transaction with Bowers, Saakvitne allegedly bid against himself. [7-ER-1862-1863, ¶ 27.] Johnson parroted this falsity no fewer than five times in his initial report, even emphasizing in bold face type this alleged lack of prudence by Saakvitne, and suggesting this to be of critical importance to his views. When faced with the facts establishing that their conclusion was incorrect, both in the Brown Expert Report and during Johnson's deposition, neither the Secretary nor Johnson ever acknowledged the error or amended the Complaint or Johnson's expert opinions. [5-ER-1188:11-1189:11.] The Secretary and Johnson both maintained this fiction before and throughout trial, forcing Appellants to prepare to address this issue at trial, right up to the point that the Secretary submitted Johnson's trial Declaration, which ignored the issue and hoping it would simply go away. Even when Appellants cross-examined Johnson at trial, he still refused to admit that his opinion in this respect was wrong, only being "open to the possibility of the chronology proposed by the defense, is correct, but I cannot figure it out". [*Id.*] Johnson did acknowledge that the opinion so predominantly set forth in his expert report was not included in his trial declaration. [*Id.*]

The facts were clear and unequivocal that Saakvitne did not bid against himself. Yet, neither the Secretary nor Johnson ever corrected the record or admitted they were wrong, forcing Appellants to defend this assertion from the date of the Complaint right up to the moment Johnson appeared to testify and then simply dropped the allegation with no explanation at that time.

SUMMARY OF THE ARGUMENT

Appellants, as prevailing parties, are entitled to attorneys' fees and nontaxable costs under the EAJA against the Secretary for his actions in this case. The District Court erred in determining, contrary to its ruling on the merits of trial, that the Secretary had "substantial justification" for filing the Complaint and proceeding to trial, despite the Secretary's complete failure to establish at the trial evidence of wrongdoing by Appellants.

By rendering a wholly inconsistent determination in this respect on Appellant's motion for attorneys' fees and nontaxable costs, the District Court has made it impossible for any prevailing defendants in ERISA cases brought by the Secretary to recover attorneys' fees and nontaxable costs despite having to expend substantial sums to defend against substantially unjustified claims. Moreover, the Secretary acted in bad faith. This Court should overturn the District Court's ruling and remand this case for purposes of determining the appropriate amount of attorneys' fees and nontaxable costs to be awarded to Appellants under the EAJA.

Moreover, in failing to award all of the deposition costs that Appellants appropriately incurred in the underlying litigation for the reasons explained by the District Court, namely, the District Court clearly committed a factual error and abused its discretion. That factual error and abuse of discretion should be overturned.

STANDARD OF REVIEW

This Court reviews a denial of attorneys' fees and costs under the EAJA for an abuse of discretion. *Carbonell v. I.N.S*, 429 F.3d 894, 897 (9th Cir. 2005) (citing *Akopyan v. Barnhart,* 296 F.3d 852, 856 (9th Cir. 2002)). A district court abuses its discretion if its ruling on a fee motion is based on an inaccurate view of the law or a clearly erroneous finding of fact. *Id*. (citing *Barrios v. Cal. Interscholastic Fed'n,* 277 F.3d 1128, 1133 (9th Cir. 2002)). Any elements of legal analysis and statutory interpretation underlying the district court's attorneys' fees decision are reviewed *de novo. Id.* Factual findings underlying the district court's decision are reviewed for clear error. *Id.*

Moreover, a district court's discretion to refuse attorneys' fees and costs is not unlimited and it must specify reasons for denying attorneys' fees and costs. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 591–92 (9th Cir. 2000)(*en banc*).

ARGUMENT

I. The Equal Access to Justice Act

Appellants' Bill of Costs and Motion for Attorneys' Fees and Nontaxable Costs are governed by the EAJA, 28 U.S.C. § 2412.

Congress adopted the EAJA as a limited waiver of the Government's sovereign immunity "to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority". *Ardestani v. I.N.S.*, 502 U.S. 129, 138, 112 S. Ct. 515 (1991); *Western Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 989 (9th Cir. 2010). *See also Comm'r v. Jean*, 496 U.S. 154, 163 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."). Congress specifically intended the EAJA to deter unreasonable agency conduct. *Jean*, 496 U.S. at 163 n.11 (quoting the statement of purpose for the EAJA, Pub. L. No. 96-481, §§ 201-08, 94 Stat. 2321, 2325-30 (1980)). The policy behind the EAJA "is to encourage litigants to vindicate their rights where any level of the adjudicating agency has made some error in law or fact and has thereby forced the litigant to seek relief from a federal court." *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007). "[W]e have consistently held that regardless of the government's conduct in the federal court proceedings, unreasonable agency action

at any level entitles the litigant to EAJA fees." *Id*. This Court has thus equated unreasonable agency action with a lack of substantial justification.

With respect to Appellants' Bill of Costs, under EAJA Section 2412(a), 28 U.S.C. § 2412(a), the District Court "may" award costs. Appellants' burden remains the same as an analysis under Fed. R. Civ. P. 54(a), however, namely that the costs have to be allowable by statute (such as 28 U.S.C. §§ 1821, 1920, and 1924), reasonable and necessary. No one disputes that. To that end, the EAJA provides, in pertinent part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C. § 2412(a)(1).

Attorneys' fees and nontaxable costs may be recovered as set forth in 28 U.S.C. § 2412(d)(1)(A), which provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort, including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of

> the United States was substantially justified or that special circumstances make an award unjust.

"Party" under 28 U.S.C. § 2412(d) is a term of art defined in 28 U.S.C. § 2412(d)(2)(B) to mean "(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed …".

Thus, Appellants may be entitled to an award of attorneys' fees and expenses under 28 U.S.C. § 2412(d) provided (i) that they qualify as a "party" under the financial standards of 28 U.S.C. § 2412(d)(2)(B) and (ii) unless the court finds that the position of the U.S. government was "substantially justified" or that special circumstances make an award unjust. Under the EAJA, "net worth" is "calculated by subtracting total liabilities from total assets". *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 590 (9th Cir. 1986).

An award of attorneys' fees and nontaxable costs under EAJA Section 2412(d), 28 U.S.C. § 2412(d), however, is at a reduced rate: "… The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for

expert witnesses paid by the United States and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee". EAJA Section 2412(d)(2)(A), 28 U.S.C. § 2412(d)(2)(A).

A. Sovereign Immunity, Prevailing Party, and Net Worth Requirements

As applicable to this appeal, the District Court appropriately determined that an award of taxable costs and attorneys' fees and nontaxable costs against the Secretary was appropriate under the EAJA in the context of (i) the EAJA being a limited waiver of the Secretary's sovereign immunity [1-ER-14-15], (ii) that Appellants were "prevailing parties" under the EAJA [1-ER-6-10], and (iii) Appellants satisfied the net worth requirements of EAJA Section 2412(d), 28 U.S.C. § 2412(d) [*Id.*]. These issues are not the subject matter of this appeal.

Appellants challenge the District Court's determination that the Secretary was substantially justified in its positions in the underlying litigation and/or acted in bad faith.

II. The District Court Erred in Failing to Award Attorneys' Fees and Nontaxable Costs to Appellants

Appellants respectfully submit that the District Court erred in failing to award attorneys' fees and nontaxable costs to Appellants and abused its discretion in doing so.

A. The Secretary Was Not Substantially Justified in Bringing This Action

The Secretary's position herein was not "substantially justified". "Substantially justified means justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A substantially justified position must have a reasonable basis in both law and fact. *Id*. Put another way, "substantially justified" means there is a dispute over which reasonable minds could differ. *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005); *United States v. Marolf*, 277 F.3d 1156, 1161 (9th Cir. 2002); *United States v. Rubin*, 97 F.3d 373, 376 (9th Cir. 1996). In making this determination, the court looks to both the government's position during the litigation and to "the action or failure to act by the agency upon which the civil action is based". *Id*. (quoting 28 U.S.C. § 2412(d)(1)(B)). The court "must focus on two questions: first, whether the government was substantially justified in taking its original action; and second, whether the government was substantially justified in defending the validity of the

action in court." *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001) (quoting *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). It is the Secretary's burden to show that his position was substantially justified. *Id*. at 1258.

Here, the Secretary had no credible evidence to support any of the Secretary's claims in court and this lack of credible evidence documents the unreasonableness of the Secretary's alleged facts and filing of the complaint. There was a complete failure of proof of the complaint filed by the Secretary. The District Court did not weigh the evidence asserted by the Secretary in reaching its judgment, it found that the Secretary failed to present evidence indicative of any ERISA violation. The District Court found substantial justification for the filing of this case by confusing the powers of the Government to conduct its investigation (such conduct is not at issue in this appeal) with its decision to file the action following its three-year investigation, proceed to trial, and compel Appellants to incur considerable attorneys' fees and nontaxable costs to successfully defend themselves because the Government had absolutely no proof of wrongdoing by Appellants. The District Court stated: "As discussed in detail in this court's Post-Trial Findings of Fact and Conclusions of Law, ECF No. 657, which the court does not rehash here, the Government had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP." This legitimate suspicion to investigate referenced by the District Court had no bearing on the fact

that the investigation yielded no credible basis to assert ERISA claims in litigation. The District Court erroneously concluded: "While the Government ultimately failed to meet its burden of proving any of its claims by a preponderance of the evidence, it was nevertheless substantially justified in bringing those claims." By confusing the Government's justifiable conduct in carrying out an investigation of the ESOP with the unreasonableness of the factual and legal claims after the investigation in litigation, the District Court abused its discretion by referencing the reasonable nature of the pre-litigation investigation in its substantial justification analysis. Appellants do not seek attorneys' fees and nontaxable costs related to that investigation. The reasonableness of that investigation is simply not relevant to the issue of the Government's lack of substantial justification and bad faith for filing and prosecuting the complaint.

Indeed, this case never should have been brought, prosecuted, or gone to trial. The Secretary failed to objectively review the evidence revealed in his three-year investigation and instead, in overly-aggressive fashion (as is very typical of the Secretary), relied upon "red flags" that did reflect any justifiable or reasoned factual or legal basis for alleging a violation of ERISA. The District Court was clear in concluding that the Secretary's theories relating to the December 5, 2011, URS nonbinding indication of interest were not justified. The District Court was clear in concluding that the Secretary's theories relating to the alleged failure of

then-ESOP Trustee Saakvitne to devote adequate time to reviewing and implementing the valuation process) were not justified. The District Court was clear in concluding that the Secretary improperly relied on the flawed opinion of his valuation expert, Sherman, whose opinion the District Court appropriately rejected because his "calculation rested on errors".

The District Court concluded that "Sherman significantly and unreasonably undervalued the Company. Not only does this render Sherman's ultimate valuation unreliable, it also undermines the usefulness of his critique of LVA's valuation." [1-ER-102.] Given that Sherman's assertions were unreasonable and unreliable, the District Court abused its discretion in finding that the complaint based on these unreasonable and unreliable facts was substantially justified. To that end, this Court identified the series of clear deficiencies with Sherman's opinions identified above, including.:

1. Violations of the mandatory provisions of USPAP in appraising B+KC, introducing substantial errors into Sherman's analysis.

2. Failing to interview B+KC management, and/or coordinating with counsel for the Secretary to ask the necessary questions during the Secretary's investigation or depositions.

3. Improperly treating pass-through subconsultant fees as expenses, an error that easily could have been avoided, which Sherman then deducted in

calculating the Company's value and using a $10.521 million figure that was nowhere to be found.

5. Relying on matters occurring after the December 2012 ESOP Transaction to apply a "limited control" discount that contravened the USPAP appraisal standards limiting the facts to be considered, and thereby decreasing the value of the Company by $2,994,000.

6. Undervaluing B+KC by at least $13,515,000 ($10,521,000 in subconsultant fees + $2,994,000 in limited control discount), which, if added to Sherman's value of $26,900,000, would be $40,415,000, more than Kniesel's appraisal.

These errors by Mr. Sherman were not revealed for the first time at trial. These errors were pointed out during expert discovery by the Appellants' experts, Pia and Rusk. The Secretary knew or should have known of these objective facts during his three-year investigation. He simply ignored them.

In addition, there were no less than four valuations of the fair market value of B+KC that independent of one another established that the ESOP did not pay more than adequate consideration for the B+KC shares of company stock:

1. In November and December of 2012, Kniesel determined B+KC's total fair market value to be $40,150,000, for a per share value of $40.15 for each of the one million shares of company stock.

2. Pia, a CPA with more than thirty years of experience, opined in December of 2022 that the fair market value of B+KC on December 14, 2012, was $43.20 million, or $43.20 per share, and accordingly, opined that Kniesel's conclusions of the fair market value range "were within a reasonable range".

3. Rusk, a professional business appraiser, testified that the fair market value of a nonmarketable controlling interest in B+KC as of December 14, 2012, was $43,050,000 or $43.05 per share, reasoning that the fair market value of the Company on a controlling interest basis was $44,600,000, but that there was a potential for dilution of the Company's stock and deducting 3.5%, or $1,550,000, leading to a value of $43,050,000.

4. The Secretary and Sherman were also aware of the expert opinion of Renee McMahon, a valuation expert retained by Heritage and the Saakvitne Law Firm. [*See* ECF 465-3; ECF 467-6.] While this opinion was not in the record or considered by this Court, it was undeniably known to Sherman and the Secretary. [*Id*.] In her Expert Report dated November 19, 2020, McMahon concluded first that Sherman "provides a flawed analysis of certain inputs to the forward-looking projections for B+K at the time of the Transaction, particularly with regard to bonus compensation and subconsultant expenses. I have also concluded that Mr. Sherman inappropriately applied a 'limited control' discount to his valuation, artificially understating the value of B+K. Correcting for these flaws causes Mr.

Sherman's concluded value to increase to approximately $40.90 million, or $40.90 per share." Furthermore, McMahon's independent analysis of the fair market value of B+KC indicated a fair market value of $40.015 million. As such, it was her opinion that the $40 million value paid by the ESOP on December 14, 2012, was reasonable.

In short, both Sherman and the Secretary were well aware long before the trial of the significant flaws in Sherman's analysis and nevertheless advanced a case entirely upon the woefully flawed opinions of Mr. Sherman.

Indeed, the District Court found that Pia's and Rusk's expert analysis "would be important only if the Government had mounted a credible challenge to the actual sales price". [1-ER-108.] The Secretary failed to objectively analyze Sherman's opinions, both on their own, and in light of specific opinions of qualified experts who clearly and plainly exposed Sherman's errors and the consequence thereof to his conclusions.

Similarly, the other "red flags" raised by the Secretary, such as the Secretary's unreasonable mischaracterization of the URS nonbinding indication of interest, Kuba's limited appraisal report and declination to act as appraiser for the ESOP, Hansen allegedly "quarterbacking" the December 2012 ESOP Transaction at a predetermined price, Saakvitne allegedly rushing the transaction process, allegedly not having sufficient time to adequately perform his ERISA fiduciary

obligations, and allegedly negotiating against himself, as detailed above, are all indications that the Secretary did not have substantial justification to file and prosecute the underlying complaint. He knew or should have known during his investigation that Appellants' actions were appropriate and permissible under ERISA.

As the court in *Donovan v. Cunningham* provided: "[t]he award of fees and expenses is appropriate not only because the DOL is able to satisfy the award or because the suit was largely unjustified, but also because this award might, to some degree, cause the DOL to take a more objective approach before instituting suits which have such significant adverse impact upon the lives of a relatively small but successful business and on the lives of hardworking individuals whose industry has resulted in gain for themselves and their employees." 541 F. Supp. 276, 289 (S.D. Tex. 1982).

These very same reasons support a claim for attorneys' fees and nontaxable costs to Appellants. As the District Court found, the Secretary came to court without a "credible challenge to the actual sales price", the crux of the Secretary's claims, succinctly summarizing the Secretary's actions: "when the Government filed this lawsuit, it took on the burden of proving that its suspicions were reflected in fact. What has happened in the trial of this case is that the Government failed to carry that burden, not for want of effort but for what appears to be a want of

evidence." [1-ER-132.] The want of evidence reveals the unreasonable and unjustified nature of the Government's filing and prosecution of this case. The lack of frivolity in the Government's investigation of the BK+C ESOP as found by the District Court has no bearing on whether the Government's complaint and prosecution of same are justified. The District Court accepted the reasonableness of the Government's investigation and conflated that action with the Secretary's poor and unreasonable decision to file and prosecute the complaint in this action.

B. The Government Acted in Bad Faith

Under EAJA Section 2412(b), 29 U.S.C. § 2412(b), "[t]he common law allows a court to assess attorney's fees against a losing party that has acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008). A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument. *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997). "A frivolous case is one that is groundless … with little prospect of success or when a position is 'so obviously wrong as to be frivolous'". *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1183 (9th Cir. 2003).

For all of the same reasons discussed above, the Government acted in bad faith, and Appellants should be awarded their attorneys' fees and nontaxable costs.

III. The District Court Erred in Reducing Its Award of Taxable Costs to Appellants Attributable to the Deposition Costs of the Secretary's Employees

Appellants respectfully submit that the District Court erred in failing to award as part of the taxable costs awarded to Appellants the amount of $28,932.77 in Appellants' deposition transcript costs for the Appellants' depositions of certain EBSA personnel. [1-ER-16-23.]

The District Court's denial of taxable costs is reviewed for an abuse of discretion. *See PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 884 F.3d 812, 829 (9th Cir. 2018); *Carbonell*, 429 F.3d at 897 (EAJA); *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1020 (9th Cir. 2003); *Association of Mexican-American Educators*, 231 F.3d at 591–92 (*en banc*)(noting court must "specify reasons" for denying costs). It also is reviewed for clear error. *Carbonell*, 429 F.3d at 897.

More particularly, the District Court declined to award taxable deposition costs associated with Appellants' statute of limitations defense to the extent that those deposition costs were incurred after the District Court's March 12, 2021, Order denying Appellants' Motion for Summary Judgment on limitations grounds. [*See* 1-ER-16-23.]

Appellants' statute of limitations defense asserted that the Secretary's claims under ERISA were time-barred under ERISA Section 413(2), 29 U.S.C. §

1113(2)[5]. Appellants asserted that that the Secretary had actual knowledge of its ERISA claims against the defendants below either as a result of B+KC's October 15, 2013, required filing of an IRS Form 5500 for the ESOP's 2012 Plan year had given the Government actual knowledge of the facts underlying the sale of B+KC stock to the ESOP Trust or because the Secretary had been investigating Saakvitne's conduct with respect to at least 15 other ESOPs. [1-ER-138-143.] Appellants also asserted that the Secretary had been "willfully blind" to Saakvitne's conduct with respect to the ESOP arising out of the Secretary's investigations of Saakvitne with respect to at least three other ESOPs that predated the October 15, 2013, filing of the B+KC's ESOP 2012 Form 5500 and 12 other investigations that post-dated such filing. [1-ER-143-144.]

Because the Secretary had been conducting an investigation of Saakvitne and the ESOP for more than three years (from at least December 2014 to the filing of the complaint), and because such actual knowledge or willful blindness would be solely in the "possession" of the Secretary and his investigators, Appellants

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[5] "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of— … (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." The United States Supreme Court has interpreted ERISA Section 413(2)'s actual knowledge standard holding that it requires actual, not constructive knowledge. *Intel Corp. Inv. Policy Committee v. Sulyma*, 140 S. Ct. 768, 777-78 (2020).

deposed the Secretary's present and former personnel involved in the Secretary's investigation of Saakvitne and the ESOP and other personnel involved in the Secretary's other investigations of Saakvitne. Those depositions all occurred before the District Court's March 12, 2021, determination of the parties' motions for summary judgment.

In its February 7, 2022, Order, the District Court, after discussing its denial of Appellants' statute of limitations arguments on summary judgment because of a factual dispute [7-ER-1702-1707], set forth its reasons for denying to award the costs of Appellants' depositions of the Secretary's personnel:

> "The Remaining Defendants fail to show that, given this court's summary judgment ruling, depositions of Government officials were necessary to allow the Remaining Defendants to explore whether the Government could be said to have had actual knowledge. *None of the Government officials deposed after this court's order testified differently with respect to actual knowledge.* While this court understands that the Remaining Defendants may have been uncertain what the deponents would say, the depositions appear to have been a fishing expedition with respect to establishing actual knowledge.

[1-ER-17 (emphasis supplied).][6]

The District Court then detailed in a chart in its Order fifteen separate deposition invoices for depositions of EBSA personnel that allegedly occurred

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[6] Appellants submit that the District Court unduly limited the scope of discovery with respect to Appellants' Statute of Limitations Affirmative Defense and prevented any development of their arguments. [*See*, *e.g.*, 7-ER-1727-1752.]

after the District Court's March 12, 2021, ruling on summary judgment, setting forth the deponent, the invoice date and the amount of the invoice. [1-ER-21-22.]

As set forth in the District Court's chart, however, each of the depositions set forth therein occurred before the District Court's March 12, 2021, Order denying Appellants' Motion for Summary Judgment on limitations grounds as indicated by the invoice date of each such invoice occurring prior to March 12. 2021. [*Id*.] Moreover, as set forth in Appellants' Memorandum in Support of Bill of Costs, each of the dates of the depositions is set forth [3-ER-485-541], and such dates also are set forth in the parties' deposition designations for purposes of trial[7]. Each of them occurred before March 12, 2021. [3-ER-485-541.]

28 U.S.C. § 1920(2) provides for the taxation of transcripts "… necessarily obtained for use in the case". The District Court's Local Rule 54.1(f) appears to clarify a portion of 28 U.S.C. § 1920(2) by noting that deposition transcripts need not be used so long as it could have been reasonably expected that the deposition would be used for trial purposes: "(2) The cost of a stenographic and/or video original and one copy of any deposition transcript necessarily obtained for use in the case is allowable. A deposition need not be introduced in evidence or used at

[7] Appellants' deposition designations for trial are not included in the Excerpts of Record herein. They may be found at ECF 505-506, 643.

trial, so long as, at the time it was taken, it could reasonably be expected that the deposition would be used for trial preparation, rather than mere discovery. The expenses of counsel for attending depositions are not allowable."

Appellants respectfully submit that, consistent with the District Court's Local Rule 54.1(f), they are entitled to an award of taxable costs for the fifteen invoices that the District Court mistakenly disallowed. At the time each deposition was taken, and before the District Court's order on summary judgment, Appellants reasonably expected that each deposition would be used for purposes of trial.

The proper legal standard is derived from Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2676 at 424-27 (1998), which provides that when a deposition is not actually used at trial or as evidence on some successful preliminary motion, whether its cost may be taxed generally is determined by deciding if the deposition reasonably seemed necessary at the time it was taken. *Id*., at 424-427. Transcripts need not be absolutely indispensable. It is enough if they are "reasonably necessary at the time it was taken, without regard to later developments that may eventually render the deposition unneeded at the time of trial". *Art Attacks Ink, LLC v. MGA Entm't, Inc*., 2008 U.S. Dist. LEXIS 21476, *5 (C.D. Cal. Mar. 19, 2008) (citing *Frederick v. City of Portland*, 162 F.R.D. 139, 143 (D. Or. 1995)). In *Art Attacks*, the court found that, "[b]ecause Plaintiff does not document any opposing position and because Defendants certify that the

depositions were reasonably necessary at the time they were preparing for trial, the Court sustains the expense". *Id*. (citing *Evanow v. M/V Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998)).

Moreover, as a threshold matter, there is no rule requiring courts to apportion a defendant's request for taxable costs. *Kalai v. Dep't of Human Servs.' Haw. Pub. Hous. Auth.*, 2009 U.S. Dist. LEXIS 64130, *22 (D. Haw. Jul. 23, 2009), report and recommendation adopted without objection, 2009 U.S. Dist. LEXIS 71185 (D. Haw. Aug. 13, 2009):

> This Court has found that Defendant was not the prevailing party as to Plaintiff's claim for injunctive relief and as to her state law claim. The Court, however, finds that it is not necessary to apportion Defendant's request for taxable costs among these claims because there is no rule requiring courts to apportion taxable costs based on the relative success of the parties. *See Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1348 (Fed. Cir. 2006). "In fact, apportioning costs according to the relative success of parties is appropriate only under limited circumstances, such as when the costs incurred are greatly disproportionate to the relief obtained." *Id*. (citing 10 James Wm. Moore et al., Moore's Federal Practice § 54.101[1][b] (3d ed. 2006)). The Court therefore RECOMMENDS that the district judge DENY this objection."

See also Sakugawa v. Mortg. Elec. Registration Sys., Inc., 2011 U.S. Dist. LEXIS 46990, *10-11 (D. Haw. May 2, 2011), report and recommendation adopted without objection, 2011 WL 2039539 (D. Haw. May 23, 2011).

The deposition transcripts at issue were all, at the time taken, reasonably expected to be used for trial preparation and at trial. At least seven of the

depositions of current and former DOL/EBSA employees were submitted as part of Appellants' motion for summary judgment. Each of the depositions of current and former DOL/EBSA employees were used at trial, including Robert Prunty, Miguel Paredes, Ty Fukumoto, Crisanta Johnson, Mauricio Palacios, Harold LeBrocq, Paul Zielinski, Dorian Hanzich, Jerome Raguero, and Michael Wen. [*See* 8-ER-1946-1949, at ECF 505-506, ECF 522-525, ECF 531-534, ECF 536-537.] Michael Wen and Dorian Hanzich were both directly involved in the investigation of this case and the Appellants questioned them extensively regarding issues related to this investigation, and the related valuation, as well as issues related to the DOL's improper reliance on the URS nonbinding indication of interest. [ECF 643-4, Consolidated Wen Deposition Designations; ECF 643-1, Consolidated Hanzich Deposition Designations.] Jerome Raguero was the Fed. R. Civ. P. Rule 30(b)(6) witness for the Secretary who testified regarding a broad range of topics. [ECF 643-7, Consolidated Raguero Deposition Designations.] Dorian Hanzich was the Secretary's purported financial analyst/valuation expert although the Secretary never called him as a witness at trial and his damage calculations proved to be clearly erroneous. [ECF 643-1, Hanzich Deposition Designations.] The scope of such depositions went beyond Appellants' ERISA statute of limitations defense. Furthermore, even the portions of the depositions that focused on the issue of the affirmative defenses were reasonably necessary at the time taken. The Secretary

was not forthcoming regarding his policies for targeting, triggering, flagging, and reviewing of ESOP transactions with respect to the ESOP 2012 Form 5500, nor was the Secretary forthcoming regarding how the E-Fast System in which such Form 5500s were filed read those forms, or what the Secretary and his agents did to discover potential violations of ERISA by Saakvitne. The Magistrate Judge ordered certain depositions be taken again because of the Defendant's right to pursue discovery relating to the Secretary's policies for targeting, triggering, flagging and reviewing of ESOP transactions with respect to the ESOP 2012 Form 5500, nor was the Secretary forthcoming regarding how the E-Fast System in which such Form 5500s were filed read those forms, or what the Secretary and his agents did to discover potential violations of ERISA by Saakvitne [7-ER-1743-1752, ECF 307 (allowing Defendants to reconvene depositions of two EBSA employees (Paredes and Prunty) for limited questioning within permissible scope of prior Saakvitne investigations and 2012-2018 review of Forms 5500); 7-ER-1727-1742, ECF 313 (allowing Defendants to reconvene depositions of two other EBSA employees (C. Johnson and Palacios) for limited questioning regarding prior Saakvitne investigations and 2012-2018 review of Forms 5500).]

All of the depositions in question occurred before the District Court's March 12, 2021, Summary Judgment Order. [Compare 3-ER-485-541 with 7-ER-1669-1726.] The District Court's reduction of such deposition costs because the court

erroneously believed such depositions to have occurred after the March 12, 2021, Summary Judgment Order was a clear error and an abuse of discretion. As such, Appellants are entitled to recover the costs related thereto.

CONCLUSION

WHEREFORE, for the foregoing reasons, the District Court's order denying Appellants' eligibility for attorneys' fees and costs should be reversed and this case should be remanded to the District Court for a determination of the amount of attorneys' fees and nontaxable costs to be awarded to Appellants. Moreover, the District Court's order deducting $28,932.77 in deposition costs should be reversed and such costs should be awarded to Appellants.

Date: July 20, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number 22-15378

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature */s/ David R. Johanson* **Date:** July 20, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 22-15378

I am the attorney or self-represented party.

This brief contains 12,995 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ David R. Johanson* **Date:** July 20, 2022

ADDENDUM

28 USCS § 2412, Part 1 of 2

Current through Public Law 117-159, approved June 25, 2022.

United States Code Service > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001) > Part VI. Particular Proceedings (Chs. 151 — 190) > CHAPTER 161. United States as Party Generally (§§ 2401 — 2460)

§ 2412. Costs and fees

(a)

(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title [*28 USCS § 1920*], but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title [*28 USCS § 1914(a)*]. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)

(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title [*28 USCS §§ 2414*] and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title [*28 USCS §§ 2414* and *2517*], except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)

(1)

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in *section 501(c)(3) of the Internal Revenue Code of 1954* [1986] (*26 U.S.C. 501(c)(3)*) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (*12 U.S.C. 1141j(a)*), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41 [*41 USCS §§ 7101* et seq.];

(F) "court" includes the United States Claims Court [United States Court of Federal Claims] and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of *section 504 of title 5,* or an adversary adjudication subject to chapter 71 of title 41 [*41 USCS §§ 7101* et seq.], the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)

(A) Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act [enacted March 12, 2019], and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B) Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)

(i) Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

(ii) The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report—

(i) any amounts paid under section 1304 of title 31 [*31 USCS § 1304*] for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act [enacted March 12, 2019], the following information:

(A) The case name and number, hyperlinked to the case, if available.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made as such party is identified in the order or other court document making the award.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which *section 7430 of the Internal Revenue Code of 1954* [1986] [*26 USCS § 7430*] applies (determined without regard to subsections (b) and (f) of such section [*26 USCS § 7430(b)*, (f)]). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title [*28 USCS § 1920*] (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title [*28 USCS § 1961(a)*[, and shall run from the date of the award through the day before the date of the mandate of affirmance.

History

HISTORY:

June 25, 1948, ch 646, *62 Stat. 973*; July 18, 1966, *P. L. 89-507*, § 1, *80 Stat. 308*; Oct. 21, 1980, *P. L. 96-481*, Title II, § 204(a), (c), *94 Stat. 2327*, 2329; Sept. 3, 1982, *P. L. 97-248*, Title II, Subtitle G, § 292(c), *96 Stat. 574*; Aug. 5, 1985, *P. L. 99-80*, §§ 2, 6, *99 Stat. 184*, 186; Oct. 29, 1992, *P. L. 102-572*, Title III, § 301(a), Title V, §§ 502(b), 506(a), *106 Stat. 4511*, 4512, 4513; Dec. 21, 1995, *P. L. 104-66*, Title I, Subtitle I, § 1091(b), *109 Stat. 722*; March 29, 1996, *P. L. 104-121*, Title II, Subtitle C, § 232, *110 Stat. 863*; Nov. 11, 1998, *P. L. 105-368*, Title V, Subtitle B, § 512(b)(1)(B), *112 Stat. 3342*; Jan. 4, 2011, *P. L. 111-350*, § 5(g)(9), *124 Stat. 3848*; Mar. 12, 2019, *P.L. 116-9*, Title IV, Subtitle C, § 4201(a)(2), (3), *133 Stat. 763*, 764.

Annotations

Notes