IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	No. 1:96CV01285
v.	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

INTRODUCTION

On October 9, 2003, Plaintiffs filed a Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act ("Request"). Although Plaintiffs claim to have "prevailed on the merits in virtually every aspect of this case," Request at 1, they rely on the results of three proceedings to support their claim to "prevailing party" status: the Phase 1 trial in 1999, the Contempt II trial in 2002, and the Phase 1.5 trial in 2003. See Request at 11-17. Relying on their purported successes in these proceedings and the alleged corresponding lack of substantial justification for the Defendants' positions, Plaintiffs seek attorney fees and other expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). To avoid the statutory cap on fee recoveries imposed by § 2412(d), Plaintiffs allege bad faith during this litigation and seek unrestricted fees under 28 U.S.C. § 2412(b). Request at 25-27. Plaintiffs also seek an undefined "enhancement" of fees as an "exceptional" achievement award. Request at 28-29.

The Request is fatally defective on its face. It does not identify the amount of fees and expenses sought, as required by EAJA. The Request does not show, or even allege, that the Plaintiffs are eligible to recover fees, as required by EAJA. The Request is also premature. In addition to these threshold defects, Plaintiffs do not make the necessary showing to recover under § 2412(d), do not establish the requisite bad faith for recovery under § 2412(b), and do not qualify for a special achievement award. The Request should be rejected.

BACKGROUND

The Court is surely familiar with the procedural history of this case, but a brief recap may be helpful to put Plaintiffs' fee request in perspective. The Complaint was filed on June 10, 1996, seeking declaratory and injunctive relief, and an accounting of funds held in trust. The Complaint included a request for EAJA fees. Complaint at 27.

On February 4, 1997, the Court certified five named plaintiffs[1] as class representatives for all present and former IIM account beneficiaries. On May 5, 1998, the Court bifurcated the case into a "prospective" or "fixing the system" phase addressing Plaintiffs' claims for declaratory and injunctive relief ("Phase 1") and an "accounting" phase to assess "defendants' rendition of an accounting" ("Phase 2"). On November 5, 1998, the Court denied, in part, Defendants' motion to dismiss and motion for summary judgment as premature, but dismissed any claim for mandamus, Cobell v. Babbitt, 30 F. Supp. 2d 24, 37 (D.D.C. 1998), and ordered phrases indicating that damages were being sought stricken from the Complaint. Id. at 40 n.18.

After a six-week Phase 1 trial, on December 21, 1999, the Court issued a declaratory judgment holding that the American Indian Trust Fund Management Reform Act of 1994, Pub.

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[1] Elouise Cobell, Earl Old Person, Mildred Cleghorn, Thomas Maulson, and James LaRose.

L. No. 103-412, 108 Stat. 4239 ("1994 Act"), requires Interior to provide an accurate accounting of all money in the IIM trust accounts held for the benefit of plaintiffs. Cobell v. Babbitt , 91 F. Supp. 2d 1 (D.D.C. 1999), aff'd sub nom, Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). Because the agency had not yet provided such an accounting, the Court remanded the matter to allow Interior the opportunity to come into compliance. The Court also retained jurisdiction for five years, and required Interior to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 56.

On interlocutory appeal, the D.C. Circuit largely affirmed. Cobell, 240 F.3d 1081. The D.C. Circuit recognized the duty to perform an accounting, and also affirmed the Court's decision to retain jurisdiction over the case for five years and to require periodic progress reports, id. at 1109, noting that this relief was "relatively modest," id., and "well within the district court's equitable powers." Id. at 1086.

The Court subsequently issued an order for Secretary Norton and Assistant Secretary McCaleb to show cause why they should not be held in contempt for five "specifications." After a twenty-nine day "Contempt II" trial, the Court issued an order and memorandum opinion on September 17, 2002, holding the Secretary and Assistant Secretary in contempt. Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). The Court also ordered that Interior file plans "for conducting a historical accounting" and for "bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries," permitted Plaintiffs to file such plans, and set a Phase 1.5 trial regarding these plans. Id. at 162.

On July 18, 2003, the D.C. Circuit vacated the Court's contempt Order. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). The D.C. Circuit declined to assert jurisdiction over the Court's

orders regarding the filing of plans and the setting of the Phase 1.5 trial because the Court's September 17, 2002 opinions "signified very little to be done by the DOI." Id. at 1138.

On January 6, 2003, Interior, and Plaintiffs, filed the plans ordered by the Court, and then conducted a forty-four day Phase 1.5 trial on those plans. On September 25, 2003, the Court issued a "structural injunction." Cobell v. Norton, Civ. No. 96-1285, 2003 WL 22211405 (D.D.C. Sept. 25, 2003). The Court did not adopt Plaintiffs' plans which, among other things, had asserted that an accounting was "impossible."

ARGUMENT

I. PLAINTIFF'S FEE REQUEST DOES NOT COMPLY WITH EAJA'S THRESHOLD REQUIREMENTS

A. Plaintiffs Have Submitted a Defective Fee Request That Does Not Identify the Fees and Expenses Requested.

Before a court can award attorney fees and expenses under EAJA § 2412(d), the claimant must satisfy several threshold requirements. An EAJA petition must show "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." 28 U.S.C. § 2412(d)(1)(B); see also Fed. R. Civ. P. 54(d)(2) (petition for attorney fees "must state the amount or provide a fair estimate of the amount sought"). The language of EAJA is unequivocal that this requirement is mandatory. The failure to file a timely EAJA petition which complies with EAJA pleading requirements deprives a court of authority to award fees.

To satisfy this pleading requirement, an attorney must submit "contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a

breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and other expenditures related to the case." Community Heating & Plumbing Co. v. Garrett, 2 F.3d 1143, 1146 (Fed. Cir. 1993) (internal quotation marks and citation omitted). Sufficiently detailed information about the hours logged and the work done "is essential not only to permit the District Court to make an accurate and equitable award but to place government counsel in a position to make an informed determination as to the merits of the application." National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir.1982). Thus, "[c]asual after-the-fact estimates of time expended on a case are insufficient to support an award of attorney fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney." Id.

Plaintiffs have not complied with this requirement. Their Request does not include the amount sought under EAJA and does not provide any information about the fees or expenses incurred.[2] Plaintiffs merely allege that they have expended "great cost" and that the uncompensated attorney time tops "50,000 hours."[3] Request at 4. These vague and unsupported

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[2] In the proposed order attached to the Request, Plaintiffs set forth, without citation, their own novel alternative to the mandatory EAJA requirement: they suggest that they be allowed to file "a statement of fees" within sixty days after the Court grants their Request. Proposed Order at 1.

[3] The Request also vaguely claims that "more than $10 million" has been spent on experts. Request at 4. Without any itemization or support for these expenses, Defendants are unable at this time to respond to their reasonableness. However, Plaintiffs surely are aware that they cannot recover for expert fees incurred at a rate greater than that which the United States would pay its experts. See § 2412(d)(2)(A) (expert witness fees must be reasonable and based on "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").

allegations do not satisfy EAJA's requirement, do not "permit the District Court to make an accurate and equitable award," and do not "place government counsel in a position to make an informed determination as to the merits of the application." National Ass'n of Concerned Veterans, 675 F.2d at 1327. The absence of any reference to the amount sought and the failure to include an itemized statement of fees and expenses deprives this Court of jurisdiction to rule on Plaintiffs' EAJA Request.

B. The Request Is Defective for Failure to Allege Eligibility to Collect Fees

EAJA also requires a party seeking attorney fees and expenses under § 2412(d) to submit an application that "shows that the party is . . . eligible to receive an award under [the] subsection." 28 U.S.C. § 2412(d)(1)(B). The eligibility requirement refers to the EAJA's definition of "party," which, the statute says, means "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed." Id. at § 2412(d)(2)(B)(i).

EAJA requires an applicant to *show* that he or she is eligible to receive an award of fees, not merely *allege* eligibility. See 28 U.S.C. § 2412(d)(1)(B) (the party seeking fees under EAJA must submit an application "which shows that the party is a prevailing party and is eligible to receive an award," but he need only "allege that the position of the United States was not substantially justified"). The requirement, however, is not an onerous one. An affidavit as to net worth from the party or the party's attorney – essentially someone in a position to know the party's net worth at the commencement of the litigation – ordinarily should be sufficient to meet the applicant's burden, "absent some at least minimally factually supported argument by the government that the applicant is not eligible." Fields v. United States, 29 Fed. Cl. 376, 382 (1993). This eligibility requirement is also jurisdictional and its absence bars an award. But see

Bazalo v. West, 150 F.3d 1380, 1383 (Fed. Cir. 1998) (holding that fee applicant whose EAJA application stated that he was a "prevailing party," satisfied jurisdictional eligibility requirement and, thus, could supplement his filing after 30-day filing period in order to set forth more explicit statement about his net worth).

Plaintiffs do not even attempt to satisfy the EAJA eligibility requirement in their Request. They do not allege, much less show, that the five named Plaintiffs were eligible for EAJA at the time the suit was filed.[4] Defendants do not have information that would suggest the Plaintiffs are ineligible, but the burden to satisfy this requirement is on Plaintiffs. The absence of any eligibility information also renders the Request defective and deprives the Court of authority to award fees.

C. The Request Is Premature

The plain language of § 2412(d)(1)(B) makes clear that, to receive an award of attorney fees under § 2412(d), a claimant must submit an application for fees within 30 days of final judgment. EAJA defines "final judgment" as "a judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). This means that an EAJA petition must be filed within 90 days of a

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[4] The fee arrangement the named Plaintiffs have with their attorneys is unknown to Defendants and thus it is not clear who is responsible for paying counsel fees or whether all the named Plaintiffs need submit eligibility information. The Request indicates that the attorneys have not been paid since 1999. Request at 5. In 1999, Plaintiffs' attorneys advised the Court that they have waived all "but a portion" of their hourly fees and that they plan to apply for fees under the "common fund" doctrine. See, e.g., Plaintiffs' Memorandum of Supplemental Information at 4 (filed March 22, 1999). Because this Court does not have jurisdiction to award damages, the creation of a "common fund" in this litigation seems impossible, absent settlement. Where the parties have agreed that only one of them will be responsible for paying the attorney in the event they should be unsuccessful in the litigation, the party responsible for paying the fees is the "real party in interest" with respect to fees and, thus, the only party whose financial eligibility is relevant. Unification Church v. INS, 762 F.2d 1077, 1082 (D.C. Cir. 1985).

district court judgment (60 days until the time for appeal has lapsed plus 30 days in which to file the application); and within 120 days from any court of appeals' judgment (90 days until the time for a petition for certiorari has lapsed plus 30 days in which to file the application).

Because none of the orders or judgments in this litigation is "final," Plaintiffs' entire Request is premature under EAJA. Plaintiffs recognize this defect in their Request and cite several cases where "interim" EAJA awards have been granted. See Request at 9 n.7. Ordinarily, whether a party has "prevailed" in litigation cannot be determined until the end of the lawsuit, for only then is it known whether the party has "obtain[ed] an enforceable judgment against the [government] . . . or comparable relief through a consent decree or settlement." Farrar v. Hobby, 506 U.S. 103, 111 (1992) (citations omitted). Nevertheless, courts have recognized the propriety of an award of interim attorney fees where a party establishes an entitlement to final relief on the merits of a claim before the termination of the litigation as a whole. See, e.g., Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (confirming the possibility of an interlocutory award of attorney fees, but only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (citation omitted) (Where plaintiffs have "succeed[ed] on [a] significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing [the] suit," they may be considered "prevailing parties."); see also H.R. Conf. Rep. No. 96-1434, at 22 (1980), reprinted in 1980 U.S.C.C.A.N. 5003, 5011 (citations omitted) ("An award may . . . be appropriate where the party has prevailed on an interim order which was central to the case, or where an interlocutory appeal is 'sufficiently significant and discrete to be treated as a separate unit.'").

As a rule, however, interim fees should not be awarded when the final judgment in the case may undo the very victory for which the party seeks attorney fees. See Grubbs v. Butz, 548 F.2d 973, 976 (D.C. Cir. 1976) (if courts prematurely grant interim attorney fees, "the ultimately successful party might end up having subsidized a large segment of the losing party's suit"); Harmon v. United States, 101 F.3d 574, 587 (8th Cir. 1996) ("[T]he better course is for the district court to refrain from passing on the question of attorney fees until the litigation is final . . . [so as to] avoid deciding an issue that may become moot if the government prevails on appeal.").

Plaintiffs' Request is premature.[5] Under EAJA, the Request will not be timely until after final judgment has been entered, and thus should be rejected by the Court.

II. PLAINTIFFS ARE NOT ENTITLED TO RECOVERY UNDER SECTION 2412(d)

A. Plaintiffs' Request Does Not Satisfy the EAJA Standards for Recovery

Even if Plaintiffs' Request were not otherwise defective, Plaintiffs still have not established a right to recovery under EAJA section 2412(d). To recover under that section, after a party has satisfied the threshold pleading requirements, it must demonstrate that it was a "prevailing party." Section 2412(d)(1)(A). If this is established, the United States then has the burden of showing that its position was "substantially justified." Id.

Moreover, as the Supreme Court has held, "[t]he EAJA renders the United States liable for attorney fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United

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[5] The Request is especially premature with respect to fees incurred for the Phase 1.5 trial, in that the time for appeal has not yet run.

States." Ardestani v. INS, 502 U.S. 129, 137 (1991); see also St. Louis Fuel & Supply Co. v. FERC, 890 F.2d 446 (D.C. Cir. 1989).

1. "prevailing party"

Under the Supreme Court's "generous formulation" of the term, "'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing suit.'" Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). "[L]iability on the merits and responsibility for fees go hand in hand." Kentucky v. Graham, 473 U.S. 159, 165 (1985). As the Court has emphasized, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989). Where a party has not prevailed against the United States, either because of legal immunity or on the merits, EAJA does not authorize a fee award. See Kentucky v. Graham, 473 U.S. at 165.

Even where the government has been prevailed against, a prevailing party is not entitled to fees for unsuccessful claims that are separate and distinct from those claims on which the party prevailed. Hensley v. Eckerhart, 461 U.S. at 440 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.").

For a plaintiff to qualify as a prevailing party, that plaintiff "must obtain an enforceable judgment against the [government] . . . or comparable relief through a consent decree or

settlement." Farrar v. Hobby, 506 U.S. 103, 111 (1992) (citation omitted).[6] Furthermore, "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or the settlement." Id. Otherwise, the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curiam).

For these reasons, a party who litigates to judgment and loses on all his claims cannot be a prevailing party, even if the party obtained a favorable interlocutory ruling on some evidentiary question or point of law. See Hewitt v. Helms, 482 U.S. 755, 760 (1987); Thomas v. National Science Foundation, 330 F.3d 486, 493 (D.C. Cir. 2003); Sims v. Apfel, 238 F.3d 597, 601 (5th Cir. 2001) (per curiam); Huey v. Sullivan, 971 F.2d 1362, 1367 (8th Cir.1992); Escobar v. Bowen, 857 F.2d 644, 646 (9th Cir.1988). Under this formulation, "a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." Garland, 489 U.S. at 792.

As discussed below, if this Court were to overlook the pleading and timing deficiencies of the Request, Plaintiffs probably are prevailing parties for the Phase 1 trial. Even under the Supreme Court's "generous formulation," however, they are not prevailing parties in either Contempt II or the Phase 1.5 trial.

2. "substantial justification"

EAJA does not provide for attorney fees, even to prevailing parties, if "the court finds that the position of the United States was substantially justified or that special circumstances

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[6] The Supreme Court has since made clear that only settlements approved by a court qualify to make a party a "prevailing party." Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 121 S. Ct. 1835, 1840 & n.7 (2001).

make an award unjust." 28 U.S.C. § 2412(d)(1)(A). EAJA does not define the term "substantially justified." In Pierce v. Underwood, 487 U.S. 552, 565 (1988), however, the Supreme Court explained that "substantially justified" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Id. at 565. The government bears the burden of showing that its position was substantially justified. Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993).

In Commissioner, INS v. Jean, 496 U.S. 154 (1990), the Supreme Court held that "[w]hile the parties' postures on individual matters may be more or less justified, EAJA – like other fee-shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line-items." Id. at 161-62. Both the underlying agency conduct as well as the agency's litigation position must be considered. 28 U.S.C. § 2412(d)(2)(D). See also Aguilar-Ayala v. Ruiz, 973 F.2d 411, 416 (5th Cir. 1992). But, as Jean emphasizes, only a single substantial justification inquiry is made, looking at the case as a whole. See United States v. Rubin, 97 F.3d 373, 375 (9th Cir. 1996) (recognizing Jean's statement that EAJA favors treating case as an inclusive whole for substantial justification inquiry); Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir.) ("when determining whether the government's position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation").

The question whether the government's position was substantially justified is analytically distinct from whether its merits position was right or wrong. That the government lost at trial or

on appeal cannot raise the presumption that its position was not substantially justified. See H.R. Rep. No. 96-1418, at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4989-90; see also Cooper v. United States R.R. Retirement Bd., 24 F.3d 1414, 1416 (D.C. Cir.1994) (the inquiry into the reasonableness of the Government's position under EAJA "may not be collapsed into our antecedent evaluation of the merits, for EAJA sets forth a 'distinct legal standard'") (quoting FEC v. Rose, 806 F.2d 1081, 1089 (D.C. Cir.1986)). Thus, "because 'unreasonable' may have different meanings in different contexts, even the presence of that term or one of its synonyms in the merits decision does not necessarily suggest that the Government will have a difficult time establishing that its position was substantially justified." F.J. Vollmer Co. v. Magaw, 102 F.3d 591, 595 (D.C. Cir. 1996); see also United States v. $19,047.00 in U.S. Currency, 95 F.3d 248, 251-52 (2d Cir.1996) (explaining why search found unreasonable under Fourth Amendment may be reasonable for EAJA purposes); Lousiana, ex rel. Guste v. Lee, 853 F.2d 1219, 1222 (5th Cir. 1988)(quoting Griffon v. HHS, 832 F.2d 51, 52 (5th Cir. 1987)) ("a finding of unreasonable governmental action is not 'conclusive on the substantial justification issue, else in this class of case the substantial justification issue would always simply merge with the decision on the merits'"); Andrew v. Bowen, 837 F.2d 875, 878 (9th Cir. 1988) (in the EAJA context, "arbitrary and capricious conduct is not per se unreasonable").

It is also not unreasonable for the government to assert a position just because the argument was rejected by another court. Hanover Potato Prods., Inc. v. Shalala, 989 F.2d at 131. "Such a rule would tend to give undue authority to the first appellate court to decide an issue and chill advocacy." Id.

As discussed below, the position of the Defendants was "substantially justified," for purposes of EAJA, both as to the underlying agency positions, and the litigation positions taken during Phase 1, Contempt II, and Phase 1.5.

B. Plaintiffs Are Not Entitled to Fees for Phase 1

1. Defendants' positions in Phase 1 were substantially justified

Even if this Court were to classify Phase 1 as an "interim" final judgment,[7] Plaintiffs cannot collect attorney fees for Phase 1 because the government's position in Phase 1 was substantially justified. The trial and appellate decisions in Phase 1 both show that the government's position was substantially justified during this phase of the litigation.

Although the government did not prevail at trial, the greatest indicator that its position was nonetheless substantially justified is that the Court certified its order for interlocutory appeal. Cobell, 91 F. Supp. 2d at 57, 59 (citing 28 U.S.C. § 1292 (b) (2000)). Relying on the standards set out in 28 U.S.C. § 1292 (b), this Court found "that this order involves controlling questions of law as to which there is substantial ground for difference of opinion . . . ." Cobell, 91 F. Supp. 2d at 57. Under the Supreme Court's "reasonableness" standard, see Pierce, 487 U.S. at 565-566, it is difficult to imagine how the government's position was not "justified to a degree that could satisfy a reasonable person," id. at 565, when the Court certified its Order for appeal because of the "substantial ground for difference of opinion" regarding "controlling questions of law" contained in that Order.

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[7] Plaintiffs generally prevailed at both the trial and appellate levels during Phase 1. See generally Cobell, 91 F. Supp. 2d 1; Cobell, 240 F.3d 1081.

The Court's Phase 1 opinion also contains other indicia of the reasonableness of the government's position. For example, both agency Defendants agreed to many factual stipulations prior to trial. Cobell, 91 F. Supp. 2d at 33-34 (e.g., "Interior has made significant concessions . . . ."). Even when the Court criticized Interior's positions, it did not do so in language that would lead a reasonable person to believe that Interior's positions were not substantially justified. For example, the Court stated, "Defendants' position that the court should simply allow them to carry out their duties under the same supervision that has brought them to this point cannot prevail." Id. at 53. Such language is quite different from cases where courts have found the government's position not to be substantially justified. See, e.g., Halverson v. Slater, 206 F.3d 1205, 1212 (D.C. Cir. 2000) (citing "[Defendant's] failure to offer any convincing reasons for believing that its interpretation of [a regulation] was substantially justified."); F.J. Vollmer, 102 F.3d at 593 ("[A]gency's position was not substantially justified because it was wholly unsupported by the text, legislative history, and underlying policy of the governing statute."); Cooper, 24 F.3d at 1417 (Government "*wholly lacked* a reasonable factual basis for its conclusion" and "*nothing* in the record" supported its position.); Wilkett, 844 F.2d at 872 (describing government's position "not only as 'misdirected,' but as positively 'unreasonable'" and holding that "no adequate explanation was possible."). While this Court did use some strong language in ruling against Interior,[8] such language does not rise to the level of "no adequate explanation possible" language seen elsewhere in this Circuit.

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[8] Cobell, 91 F. Supp. 2d at 41 (The "court can see no basis for inferring any such limitation [on Interior's interpretation of "all funds."]); id. at 45 (Interior's "misunderstanding" of the Special Trustee's timetable renders it "irrelevant and useless" and is thus "disingenuous."); id. at 48 ("[C]ertain basic mechanical functions" are not "complex."); id. at 54 ("[D]efendants have the type of historical record of recalcitrance that troubles the court.").

Likewise, the D.C. Circuit's Phase 1 opinion also contains indicia of the reasonableness of the government's position. For example, the court acknowledged Interior's concessions on legal as well as factual matters at the trial level. Cobell, 240 F.3d at 1090. The court also agreed with the government's trial argument that "an on-going program or policy is not, in itself, a 'final agency action' under the APA." Id. at 1095 (citation omitted).[9] The court also referred to the government's arguments regarding excessive interference in the executive's ministerial functions as "sound legal principles," id. at 1109, and acknowledged that "[t]he level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case . . . ." Id.[10] In concluding, the court noted that "supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction" and that "the district court may have mischaracterized some of the government's specific obligations . . . ." Id. at 1110.

In short, the circuit court "generally" affirmed the Court's judgment and order while "order[ing] the district court to modify the characterization of some of its findings . . . ." Id. at 1086. Even more than with this Court's opinion, the circuit court's opinion thus leads to the conclusion that the government's position at Phase 1 was "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." Pierce, 487 U.S. at 565. Therefore, Plaintiffs cannot collect attorney fees for Phase 1 because the government's position in Phase 1 was substantially justified.

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[9] The court found, however, that the trial court nonetheless had jurisdiction under an "unreasonable delay" theory. Cobell, 240 F.3d at 1095-1096.

[10] The court "excuse[d] court oversight that might be excessive in an ordinary case" because of the "magnitude of government malfeasance and potential prejudice to the plaintiffs' class." Id. at 1109.

C. Plaintiffs Are Not Entitled to Fees for Contempt II

1. Plaintiffs did not prevail in Contempt II

Although Plaintiffs initially were successful in the Contempt II trial,[11] this "victory" was overturned by the D.C. Circuit. See Cobell, 334 F.3d 1128. Plaintiffs lost on appeal. It is difficult to comprehend how a party who loses an appeal can consider itself a "prevailing party."[12]

Plaintiffs struggle to find elements of the Contempt II Order which were not overturned on appeal. See Request at 13-14. These "victories" include: (1) the ordering of the Phase 1.5 trial, (2) the order to file the plans which would be the subject of the Phase 1.5 trial; (3) the opportunity for Plaintiffs to file plans of their own; (4) the right to conduct discovery; and (5) the right to file an issue preclusion motion.[13] Id.

Neither having plans ordered for the Phase 1.5 trial, nor the restoration of discovery rights, was a "material alteration of the legal relationship of the parties." Garland, 489 U.S. at

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[11] Even this initial "success" would not qualify Plaintiffs for recovery. EAJA authorizes the award of fees and expenses only for "civil action[s]," § 2412(d)(1)(A). To the extent that D.C. Circuit found that Contempt II was a "criminal contempt" proceeding, 334 F.3d at 1145-1147, Plaintiffs are ineligible under EAJA to recover fees for this proceeding.

[12] Plaintiffs are obviously not entitled to any fees or expenses for prosecuting their unsuccessful appeal of Contempt II. See Atkins v. Apfel, 154 F.3d 986, 988, 989-90 (9th Cir. 1998) (district court abused its discretion in awarding attorney fees for unsuccessful appeal); Jean v. Nelson, 863 F.2d 759, 770 (11th Cir. 1988), aff'd on other grounds, 496 U.S. 154 (1990).

[13] Plaintiffs also point to "declaratory relief" related to maintaining information necessary to perform an accounting. Request at 13. The Contempt II decision did not provide any declaratory judgment regarding this issue. Indeed, such a "finding" was merely a restatement of what the Court, and the Court of Appeals, had previously determined. See Cobell, 91 F. Supp. 2d at 58; 240 F.3d at 1105.

792-93.[14] At most these "victories" were merely procedural successes that do not transform a party into a "prevailing party" for purposes of EAJA.[15] See National Science Foundation, 330 F.3d at 493 ("[I]t is clear that appellees are not 'prevailing parties' under EAJA, for neither the preliminary injunction nor the partial summary judgment changed the legal relationship between appellees and NSF in a way that afforded appellees the relief that they sought."); Sims, 238 F.3d at 601 (5th Cir. 2001) (per curiam) (although Supreme Court reversed the appeals court's determination that it lacked jurisdiction over plaintiff's disability claims, claimant's "success before the Supreme Court [did] not render her a prevailing party because the Supreme Court did not order any relief relating to the merits of [her] claims, and [claimant] received nothing from [the defendant]"); Huey v. Sullivan, 971 F.2d at 1367 ("[e]stablishing jurisdiction is a procedural victory that does not justify fee shifting"); Escobar, 857 F.2d at 646 ("even a significant procedural victory which implicates substantive rights is not sufficient to make a party a prevailing party under EAJA").

Plaintiffs simply did not prevail in Contempt II. They are not entitled to EAJA fees.[16]

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[14] Moreover, as the Court itself noted, much of the "relief" granted was not dependent upon any of the findings in its Contempt II decision, but rather was fashioned because of its views about the status of trust reform. 226 F. Supp. 2d at 135.

[15] Furthermore, if Plaintiffs wish to link their "success" in Contempt II with Phase 1.5 issues, then the claim to success is premature since relief in Phase 1.5 is not complete until the United States' right to appeal has expired.

[16] The D.C. Circuit vacated that portion of the Court's Contempt II order which awarded fees and expenses to Plaintiffs for matters related to that proceeding. See 334 F.3d at 1150. The Request is an improper end-run around that mandate.

2. Defendants' positions in Contempt II were substantially justified

Even if the procedural relief ordered by the Court after Contempt II, which the D.C. Circuit described as requiring "very little to be done by DOI," 334 F.3d at 1138, could qualify Plaintiffs as a "prevailing party," they are still not entitled to recover fees under EAJA because the position of the Defendants in Contempt II was "substantially justified." In overturning the contempt finding, the Court of Appeals discussed in detail the various specifications that formed the basis of Contempt II and concluded that the Defendants had not committed contempt. See 334 F.3d at 1147-1150. The position of the Defendants with respect to the contempt specifications was thus "justified to a degree that could satisfy a reasonable person." Pierce, 487 U.S. at 565.

D. Plaintiffs Are Not Entitled to Fees for the Phase 1.5 Trial

1. Plaintiffs did not prevail in the Phase 1.5 trial

In the Phase 1.5 trial Plaintiffs submitted two plans of their own and a substantial amount of testimony in the forty-four day trial was devoted to those two plans. In the end, the Court did not adopt either of Plaintiffs' plans. See Cobell v. Norton, 2003 WL 22211405 (D.D.C. September 25, 2003). Indeed, Plaintiffs' "accounting" plan was premised on the impossibility of performing an accounting. The Court rejected Plaintiffs' notion of impossibility.

Even if the entry of a structural injunction could be described as a victory for Plaintiffs, a prevailing party is not entitled to fees for unsuccessful claims that are separate and distinct form those claims on which the party prevailed. Hensley, 461 U.S. at 440 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable

fee."). Plaintiffs would not be permitted under EAJA to recover any of the attorney fees and expenses incurred by Plaintiffs' unsuccessful effort to advance their own plans.

2. Defendants' positions in the Phase 1.5 trial were substantially justified

Interior Defendants were ordered to submit plans that were to be the subject of the Phase 1.5 trial. Interior Defendants submitted the plans as ordered and defended those plans at trial. The Interior Defendants complied with the Court's directions. The position of Defendants with respect to the matters at issue in Phase 1.5 was thus "justified to a degree that could satisfy a reasonable person." Pierce, 487 U.S. at 565.

E. Plaintiffs Are Not Entitled to Fees for Any Other Proceedings

Because Plaintiffs failed to submit the required fee statement, it is unclear whether Plaintiffs will claim fees for other activities in this litigation unrelated to the three proceedings which are discussed in their Request. Plaintiffs request an award for fees and expenses incurred "from June 10, 1996 through September 25, 2003." Request at 6. Throughout the seven-year course of this case, Plaintiffs have litigated numerous matters unrelated to the merits. For example, it is unknown how much in fees and expenses Plaintiffs have incurred in prosecuting their baseless contempt claims against the many non-party individuals. These fees cannot be recovered under EAJA. Plaintiffs have not prevailed in any of these proceedings and, as discussed above, Plaintiffs are only entitled to recover fees in a "civil action," not a criminal proceeding. Moreover, to the extent that the contempt claims were brought against defendants in their individual, as opposed to their official capacity, no EAJA fees may be recovered. See 28 U.S.C. §2412(d)(1)(A) (civil actions "brought by or against the United States"); § 2412(b) (civil suits "brought by or against the United States or any agency or any official of the United States

acting in his or her official capacity"). As the Supreme Court has explained, "[a] victory in a personal-capacity [suit] is a victory against the individual defendant, rather than against the entity that employs him." Kentucky v. Graham, 473 U.S. 159, 167-68 (1985). As a consequence, neither § 2412(b) nor § 2412(d) authorizes an award of attorney fees against the United States in personal capacity suits. See Kreines v. United States, 33 F.3d 1105, 1109 (9th Cir. 1994).

III. PLAINTIFFS ARE NOT ENTITLED TO RECOVERY UNDER SECTION 2412(b)

The United States is liable for fees and expenses under § 2412(b) "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." Id. There are only two bases at common law for an award of attorney fees against another party: (1) an opponent's bad faith; or (2) the litigant's establishment of a "common fund" or "common benefit." Although Plaintiffs mention a "common fund" in the context of their promise to "credit the dollar amount of any fees paid pursuant to this fee application against the ultimate award of fees paid pursuant to the common fund doctrine," Request at 30 n.14, they do not make an EAJA claim for attorney fees in a common fund.

Instead, they allege that they are entitled to recover under § 2412(b) because of the "bad faith" of Defendants. Request at 25-27. The "bad faith" theory allows an award where a party has willfully disobeyed a court order, or has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991); Aleyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975); Kerin v. United States Postal Serv., 218 F.3d 185, 190 (2d Cir. 2000).

A finding of bad faith requires a determination that the government both (1) pursued claims that were "entirely without color," and (2) was motivated by an "improper purpose," such as harassment or delay, in making the claims. Wells v. Bowen, 855 F.2d 37, 46 (2d Cir. 1988) (citation omitted). The test for bad faith is "'conjunctive and neither meritlessness alone nor improper purpose alone will suffice.'" Id.; see also Kerin, 218 F.3d at 190.[17]

The substantive standard for a finding of bad faith is "stringent" and "attorneys' fees will be awarded only when extraordinary circumstances or dominating reasons of fairness so demand." Association of American Physicians & Surgeons, Inc. v. Clinton, 187 F.3d 655, 660 (D.C. Cir. 1999). A finding of bad faith must be supported by "'clear and convincing evidence,'" which "'generally requires the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain.'" Id. (quoting United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994)).

It has become Plaintiffs' common practice, repeated in the Request, to make general accusations of wrongdoing, without citation, and then to treat as established that Defendants are guilty. Plaintiffs accuse Defendants in general terms of the worst possible behavior. See Request at 26-27. Defendants dispute this unsupported, and insupportable, broadside. In any event, such vague and unsubstantiated claims cannot satisfy the clear and convincing evidence of bad faith needed to support an EAJA petition under § 2412(b). When specific instances of bad faith are required, however, Plaintiffs only marshal four: (1) the Court of Appeals' rejection of

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[17] A claim is "meritless" if it is "entirely without color." See id. n.2. "A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established." Id. (citations omitted) (emphasis added).

Defendants' legal argument on appeal, Request at 1 n.1; (2) the Court's rejection of Interior's interpretation of the 1994 Act after Phase 1.5, Request at 2 n.1; (3) Contempt I, Request at 26; and (4) Contempt II, Request at 26.

Plaintiffs allege that the "Court of Appeals again pointed out defendants' bad faith interpretation of their legal obligations." Request at 1 n.1. The Court of Appeals, however, nowhere claimed that Defendants' interpretation was "bad faith." In the very portion of the opinion quoted by Plaintiffs, the court simply said the government was "incorrect" and that the obligations "should be beyond dispute." Asserting statutory interpretations that have not been the subject of previous adjudication, but which are later deemed "incorrect," cannot possibly support a finding of bad faith by Defendants.

Plaintiffs' citation to the Contempt I ruling as authority for imposition of fees now is also puzzling. The Court already granted Plaintiffs a fee award for that proceeding. It cannot be the basis for a further fee award now under EAJA. The Contempt II proceeding is also not sufficient evidence of bad faith to support an EAJA, § 2412(b) award. As already discussed above, the Court of Appeals vacated the Court's finding of contempt arising out of that proceeding. See Cobell, 334 F.3d 1128.

In short, Plaintiffs have not provided sufficient specific evidence of bad faith in their fee petition to support an EAJA award on those grounds. Their request for a § 2412(b) award should be denied.

IV. PLAINTIFFS ARE NOT ENTITLED TO ANY SPECIAL "ENHANCEMENTS"

Citing the "groundbreaking nature of this litigation" and the "successful efforts" of Plaintiffs' counsel, Plaintiffs claim that any fees awarded should be enhanced, by some

undefined amount. Request at 28-9. Although the Supreme Court has left open the possibility of enhancement of a fee award in an exceptional case where the calculation of reasonable rates by a reasonable number of hours expended results in an unreasonably low award, the Supreme Court has not actually identified such a case. See Hensley, 461 U.S. at 435 (enhancement not awarded); Blum v. Stenson, 465 U.S. 886, 897 (1984) (enhancement rejected). As one court concluded, "a review of the case law suggests that this exception is more likely to be described than employed, and that, relatedly, proving entitlement under this factor is no easy matter." Applegate v. United States, 52 Fed. Cl. 751, 771 (Fed. Cl. 2002). As the Supreme Court in Blum cautioned, "[b]ecause acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." 465 U.S. at 900.[18]

The few courts that would even consider such an enhancement usually require the fee applicant to demonstrate that "it is customary in the area for attorneys to charge an additional fee above their hourly rates for an exceptional result." Walker v. U.S. Dept. of Housing and Urban Development, 99 F.3d 761, 772 (5th Cir. 1996); see also Shipes v. Trinity Indus., 987 F.2d 311, 322 (5th Cir. 1993). As noted by the Court of Federal Claims in Applegate, "in the absence of evidence that a private individual would have extracontractually rewarded his counsel with payment in excess of that attorney's hourly rate, this court is disinclined to impose a similar obligation on the United States." 52 Fed. Cl. at 773. The Fourth Circuit in Hyatt v. Apfel, 195 F.3d 188, 192 (4th Cir. 1999), approved an enhancement where "the financial benefits conferred

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[18] In addition, as discussed above, since EAJA represents a waiver of sovereign immunity, the statute, including determinations about such extraordinary exceptional achievement awards, should be construed narrowly in favor of the United States. See Ardestani, 502 U.S. at 137.

on the Plaintiff class as a result of this case are unprecedented." Id. The court relied, however, upon "affidavits presented with Plaintiffs' fee motion." Id.

Plaintiffs here have not supplied any fee information so it is impossible to determine whether a fee calculated by the ordinary means – a reasonable rate multiplied by a reasonable number of hours expended – would produce a result that is unreasonably low – or perhaps one that is unreasonably high. In addition, as Plaintiffs have noted, this case is not over and they are merely seeking an interim fee award. Determinations about exceptional results should only be made after there is indeed a result.

CONCLUSION

For these reasons, Plaintiffs' Fee Request should be denied.

Dated: October 23, 2003

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the Court on Plaintiffs' Request For an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act. Upon consideration of the Request, the responses thereto, and the record in this case, it is hereby

ORDERED that the Request for an Award is DENIED.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 23, 2003 I served the foregoing *Defendants' Opposition to Plaintiffs' Request for an Award of Attorney's Fees and Expenses Pursuant to the Equal Access to Justice Act* by facsimile in accordance with their written request of October 31, 2001 upon:

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