IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' EQUAL ACCESS TO JUSTICE ACT PETITION FOR INTERIM FEES THROUGH THE PHASE 1.0 PROCEEDING

INTRODUCTION

On October 9, 2003, Plaintiffs requested an award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, for attorney fees incurred in connection with the Phase 1 trial in 1999, the Contempt II trial in 2002, and the Phase 1.5 trial in 2003. On May 27, 2004, the Court denied the fee request, but advised Plaintiffs that they could submit an interim EAJA application for appropriate fees incurred "through the Phase 1.0 proceeding." Cobell v. Norton, 319 F. Supp. 2d 36, 44 (D.D.C. 2004). Plaintiffs were instructed to exclude from this application all fees previously awarded for Contempt I. Id. at 42. The Court also determined that Plaintiffs were not entitled at this time to any EAJA fees incurred in connection with Contempt II or the Phase 1.5 trial. Id. at 42-43.

On August 17, 2004, Plaintiffs filed their EAJA Petition for Interim Fees Through the Phase 1.0 Proceeding ("Interim Petition"). In the Interim Petition, Plaintiffs claim that because they prevailed during the Phase 1 trial and the position of Defendants was not substantially justified, Plaintiffs are entitled to an interim award of attorney fees and expenses under EAJA, 28

U.S.C. § 2412(d). Interim Petition at 2. To avoid the statutory cap on fee recoveries imposed by § 2412(d), Plaintiffs allege bad faith by Defendants, both before and after their suit was filed, and thus seek unrestricted fees under 28 U.S.C. § 2412(b). Interim Petition at 2-4. Plaintiffs seek an award of $14,528,467.21.

The Interim Petition is not ripe for consideration by the Court until Plaintiffs demonstrate compliance with Federal Rule of Civil Procedure 23(h), which requires that class members be given notice of the Petition and an opportunity to object. The Interim Petition itself is also procedurally defective in that it does not show, or even allege, that Plaintiffs are eligible to recover fees, as required by EAJA. It is also defective to the extent that many of the time records supposedly supporting the Petition are admittedly not contemporaneous records.

In addition to these threshold defects, Plaintiffs have not satisfied the requirements for recovery under § 2412(d), and have not established the requisite bad faith for recovery under § 2412(b). The entire Interim Petition should be denied.

If the Court disagrees, and determines that an interim EAJA award for fees incurred through the Phase 1 trial is appropriate, the amount requested by Plaintiffs is grotesquely excessive. They have ignored the Court's May 27, 2004 Order and submitted time beyond the Phase 1 trial. They have submitted time spent on settlement and mediation that is not compensable and, in the case of the 1999 mediation, was expressly foreclosed by order of this Court. Their time records also reveal that an unreasonable amount of time was expended on many matters, including the time spent in preparing the Interim Petition. Any interim EAJA award for Phase 1 should not exceed $4,313,047.22.

BACKGROUND

The Court is obviously familiar with the procedural history of this case, but a brief summary may be helpful to put the Interim Petition 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. 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

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

breaches found. Id. at 56. The Court declared breaches of trust obligations with respect to a variety of other matters, including staffing and computer support. Id. at 48-49. The Court dismissed Plaintiffs' common law claims. Id. at 28-31.

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 of Appeals explained, however, that the only actionable breach of duty was the failure to produce an accounting. It thus required the Court to amend its opinion to the extent that it had held that operations that may have an effect on an accounting constituted breaches of an enforceable duty. Id. at 1106.

On November 30, 2000, Plaintiffs moved to reopen the Phase 1 trial, claiming spoliation of evidence, presentation of false testimony at the Phase 1 trial, and general misleading and deceitful actions. On October 19, 2001, Plaintiffs moved to amend their motion to reopen the Phase 1 trial and consolidated it with a motion to appoint a receiver and a motion to show cause why Defendants should not be held in contempt. On November 28, 2001, the Court ordered Interior Defendants to show cause why they should not be held in contempt on four specifications: (1) Failing to comply with the Court's Order of December 21, 1999 to initiate a Historical Accounting Project; (2) Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001; (3) Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999; and (4)

Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Clean-up. A fifth specification – committing a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data – was added in a supplemental order to show cause issued on December 6, 2001.

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 based on the five specifications.[2] Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). The Court ordered Defendants to pay the Plaintiffs' reasonable expenses, including attorney fees, incurred "as a result of the defendants' contumacious conduct." Id. at 153. 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 their own 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 Court of Appeals also overturned the award of fees. Id. at 1150. 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 the Court then conducted a forty-four day Phase 1.5 trial on those plans. On September 25, 2003, the

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[2/] On the same date the Court entered an order denying the Motion to Reopen Trial 1 as "moot" given the contempt order. See Order of September 17, 2002.

Court issued a "structural injunction." Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). The Court did not adopt Plaintiffs' plans which, among other things, had asserted that an accounting was "impossible."

On October 29, 2003, Defendants filed a notice of appeal of the Phase 1.5 structural injunction. The Court of Appeals stayed the structural injunction on January 28, 2004, pending appeal. Argument on the appeal is scheduled for September 15, 2004.

ARGUMENT

I. THE INTERIM PETITION IS NOT RIPE FOR CONSIDERATION

Before the Court may consider the Interim Petition, Plaintiffs must demonstrate that they have complied with Federal Rule of Civil Procedure 23(h). For motions by class counsel for an award of attorney fees, notice of the motion must be "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Class members must be given an opportunity to object to the fee petition. Fed. R. Civ. P. 23(h)(2). The Court may hold a hearing and must find the facts and state its conclusions of law. Fed. R. Civ. P. 23(h)(3).

The Advisory Committee notes concerning new Rule 23(h) indicate that the provision was added to give the court (and, presumably, absent class members) more opportunity to supervise class counsel's representation of the class:

> Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Fed. R. Civ. P. 23(h) Advisory Committee Note.

Although Rule 23(h) does not itself create any right to recover fees, by its terms the provision applies if class counsel seeks such a recovery. Neither the rule nor the accompanying Advisory Committee Note draws any distinctions based upon how class counsel will actually be paid. Thus, the new rule seems to apply regardless of whether the attorney fees will be paid from the class members' common proceeds, from money paid directly by a defendant, or from taxpayer funds available under EAJA.

These provisions of Rule 23(h) became effective on December 1, 2003. Plaintiffs might argue that a rule change enacted after the commencement of the litigation should not be applied to their fee petition. The new rule was enacted, however, before the Interim Petition was filed. Also, the Supreme Court has held that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994). This principle holds true because "rules of procedure regulate secondary rather than primary conduct." Id.

Our research has not found much reported discussion of new Rule 23(h). Two cases have so far mentioned Rule 23(h), and both appear to have applied it to existing class actions. See In re Excess Value Ins. Coverage Litig., 2004 WL 1724980 (S.D.N.Y July 30, 2004) (citing Rule 23(h) in decision approving proposed settlement of multidistrict case involving multiple certified classes); Coleman v. General Motors Acceptance Corp., 220 F.R.D. 64 (M.D. Tenn. 2004) (referring to Rule 23(h) while considering motion to expand existing state-wide class action, instituted in 1998, to cover a nationwide class).

Until Plaintiffs demonstrate that they have complied with the requirements of Rule 23(h),[3] and the class members have been given notice of the Interim Petition and an opportunity to be heard, the Interim Petition is not ripe for review by the Court.

II. THE INTERIM PETITION SUFFERS FROM FATAL TECHNICAL DEFECTS

A. Plaintiffs Have Not Submitted the Required Detailed Contemporaneous Time Records To Support All the Requested Fees and Expenses

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).

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." Cmty. 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." Nat'l Ass'n of Concerned

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[3/] It is not clear what will constitute adequate "notice" of the Interim Petition that must be provided to the class members under Rule 23(h). Merely posting the Interim Petition on Plaintiffs' website (www.indiantrust.com) would be insufficient because many class members – who Plaintiffs' counsel refer to as the "poorest of the poor" – may not have internet access, but it is notable that the Interim Petition is conspicuously absent from their website, on which Plaintiffs' counsel have posted almost all of their court filings.

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.; see also Cobell, 319 F. Supp. 2d at 43 (EAJA application must include "[d]etailed contemporaneous time records showing itemized statements of tasks performed").

Although they have known since their Complaint was filed that they would be seeking EAJA fees, Plaintiffs' attorneys – and experts – have not all complied with this requirement. In the Interim Petition, Mr. Gingold seeks $4,817,641.70. He concedes in his Affidavit of August 16, 2004, that the time records that he submitted to support his request were not contemporaneous records. Mr. Gingold input the information from the "hard copy diaries" where he maintains his contemporaneous records into a "software application." Affidavit of Dennis M. Gingold at ¶ 2 (August 16, 2004). Mr. Gingold did not transfer the information verbatim. Instead, he "added clarity where contemporaneous entries had been made in abbreviated, coded, short-hand, or summary form . . . ." Id. Mr. Gingold has submitted 454.2 hours for conducting the following task while preparing the Interim Petition: "Review, segregate, prepare relevant time re Trial 1 EAJA fee application." See Gingold Affidavit, "EAJA Petition Time." It is unknown how much of the time that Mr. Gingold has submitted for reviewing, segregating, and preparing his time records for the Interim Petition was spent on adding "clarity" to his

contemporaneous entries, but his modified time records are not contemporaneous and therefore do not satisfy the requirements of EAJA.[4]

Mr. Harper also admits that he has edited his time records. Affidavit of Keith M. Harper at ¶ 4 (August 16, 2004). As with Mr. Gingold, he concedes that he "clarified" the time entries. Id. Ms. Babby also admits that "because of the need for increased clarity . . . I have slightly modified some of the descriptions to clarify the task completed." Affidavit of Lorna Babby at ¶ 3; see also Affidavit of John Echohawk at ¶ 3; Affidavit of Geoffrey Rempel at ¶ 4; Affidavit of Stacy Gingold Bear at ¶ 2. All of these recently modified records are also defective under EAJA's contemporaneity requirement.

Other time records submitted by Plaintiffs were contemporaneous, but are defective because they lack sufficient detail. For example, Mr. Holt supplied contemporaneous – but occasionally indecipherable – records: "I have not modified [the original entries] in any way . . . and they accordingly contain abbreviations and occasional typographical errors." Holt Affidavit at ¶ 4. According to the affidavit accompanying the time records submitted by Plaintiffs' expert, PriceWaterhouseCoopers ("PWC"), for June 1996 until March 1998 "sufficient details were not maintained to allow a description of the specific tasks performed by person by day." Pollner Affidavit at ¶ 30. The amount claimed by PWC for this period is $1,723,377. These records are defective because they lack the required detail.

[4/] If the Court plans to rely on the altered records of Mr. Gingold and the other Plaintiffs' attorneys who concede that they modified their records, Defendants request the right to obtain discovery from those attorneys in order to ascertain the extent to which "clarity" was added. At a minimum, Defendants are entitled to review the contemporaneous records to compare them with the newly revised records.

Plaintiffs are not entitled to recover fees for time that is not supported by detailed contemporaneous records.

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 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. See 28 U.S.C. § 2412(d); but see Bazalo v. West, 150 F.3d 1380, 1383 (Fed. Cir. 1998) (EAJA applicant permitted to supplement his filing after 30-day filing period in order to set forth a more explicit statement about his net worth).

Plaintiffs do not even attempt to satisfy the EAJA eligibility requirement in the Interim Petition. They do not allege, much less show, that the five named Plaintiffs were eligible for EAJA at the time the suit was filed.[5] 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 eligibility information renders the Interim Petition defective.

C. The Interim Petition 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 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).

[5/] 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. Mr. Gingold and Mr. Holt initially had an arrangement that they would be paid $345 per hour, but this arrangement apparently ended on June 5, 1998. See Holt Affidavit at ¶ 22; Gingold Affidavit at ¶ 13. It is not clear who was responsible to pay this fee. Since June 1998, Mr. Gingold and Mr. Holt have had a contingent fee arrangement with Plaintiffs. See Holt Affidavit at ¶ 22; see also Plaintiffs' Memorandum of Supplemental Information at 4 (filed March 22, 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). Because this Court does not have jurisdiction to award damages, the creation of a "common fund" in this litigation seems impossible, absent settlement involving a monetary payment. 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).

Because none of the orders or judgments in this litigation is "final," Plaintiffs' Interim Petition is premature under EAJA. Defendants recognize that the Court has permitted Plaintiffs to file an interim EAJA application, Cobell, 319 F. Supp. 2d at 41-42, but Defendants respectfully submit that this was error. Many of the issues for which Plaintiffs are now claiming a fee award have not been finally resolved. For example, the parties are still disputing in the appeal of the structural injunction entered by the Court after the Phase 1.5 trial whether this case is solely about the accounting required under the 1994 Act or whether it is a broad "institutional reform" case covering virtually any trust reform matter.

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). 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.").

It is particularly inappropriate to award interim fees in this case because some of the time submitted by Plaintiffs in the Interim Petition is intertwined with Phase 1.5 and even Phase 2 matters. Many of Plaintiffs' attorneys concede the difficulty in differentiating between time spent

on various phases of the case, but have submitted the time nonetheless. See Gingold Affidavit at ¶ 4; Harper Affidavit at ¶ 8; Babby Affidavit at ¶ 5; Echohawk Affidavit at ¶ 5; Holt Affidavit at ¶ 9 ("some time was of necessity spent in the early part of the case on matters that would later be identified with Phases 1.5 and 2").

Plaintiffs' Interim Petition is premature. Under EAJA, the petition will not be timely until after final judgment has been entered, and thus should be rejected by the Court.

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

Even if Plaintiffs' Interim Petition were not otherwise defective, Plaintiffs still have not established a right to recovery under EAJA § 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's 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 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).

A. Plaintiffs Were "Prevailing Parties" in the Phase 1 Proceeding, but Not as to All Claims

Under the Supreme Court's "generous formulation" of the term, "'plaintiffs may be considered "prevailing parties" for attorney 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)). 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, 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."[6] Farrar, 506 U.S. at 111 (citation omitted). 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. Nat'l

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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. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res., 532 U.S. 598, 604 & n.7 (2001).

Science Found., 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." Texas State Teacher's Ass'n v. Garland, 489 U.S. 782, 792 (1989).

Under the EAJA standards, Plaintiffs are probably prevailing parties for the Phase 1 trial. They have not, however, prevailed on all their claims. Their common law claims were dismissed. Cobell v. Babbitt, 91 F. Supp. 2d at 28-31. The Court's December 21, 1999 opinion holding that the 1994 Act requires Interior to provide an accurate accounting of all money in the IIM trust accounts held for the benefit of Plaintiffs was largely affirmed on appeal, Cobell, 240 F.3d 1081, but the Court of Appeals explained that the only actionable breach of duty was the failure to produce an accounting. The Court's declared breaches of trust obligations with respect to a variety of other matters, including staffing and computer support, 91 F. Supp. 2d at 48-49, were not affirmed on appeal. Indeed, the D.C. Circuit required the Court to amend its order to the extent that it had held that operations that may have an effect on an accounting constituted breaches of an enforceable duty. Cobell, 240 F.3d at 1106.

Based upon the opinions and structural injunction issued by the Court after the Phase 1.5 trial, it appears that the Court disagrees with Defendants about the proper scope of this case. The Court obviously views this as an "institutional reform" case involving trust matters well beyond the provision of an accounting. Defendants do not expect to persuade the Court that its view is wrong in this Opposition. Rather, Defendants only want the record to be clear that, while Plaintiffs have included extensive discussion in their Interim Petition about alleged

mismanagement of the IIM trust and alleged breaches of trust duties, the issue of whether these topics are properly the subject of this case is being vigorously disputed in the current appeal and has not been finally resolved for purposes of an EAJA evaluation.

B. Defendants' Positions Were Substantially Justified

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 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, the 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. Ret. 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").

Plaintiffs' assessment of the government's position focuses almost exclusively on the trust management failures and claimed breaches of fiduciary duties over the years. Interim Petition at 10-12. As discussed above, the issue of whether these matters are properly a part of this case has not yet been finally resolved. For purposes of this interim EAJA application, the only relevant consideration is whether the government's positions on the duty to render an accounting were substantially justified.

On this accounting issue, Plaintiffs have mischaracterized the government's position. They claim that "the government took the position during the entire Phase 1.0 proceeding that the United States does not owe a duty to account to individual Indian trust beneficiaries." Interim Petition at 11. The government has disputed the source of the accounting duty, its scope, and its enforceability. Defendants raised defenses, including sovereign immunity, and asserted that the Court's jurisdiction was limited by the APA. Defendants did not claim, however, that no accounting duty was owed to the IIM beneficiaries.

Although the government did not prevail at the Phase 1 trial, the greatest indicator that its position was nonetheless substantially justified is that the Court certified its December 21, 1999 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 565-66, 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.

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 v. I.C.C., 844 F.2d 867, 872 (D.C. Cir. 1988) (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,[7] such language does not rise to the level of "no adequate explanation possible" language seen elsewhere in this Circuit.

Likewise, the D.C. Circuit's Phase 1 opinion 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."[8] Id. at 1095 (citation omitted). 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 . . . ."[9] Id. 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

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[7] 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.").

[8] The court found, however, that the trial court nonetheless had jurisdiction under an "unreasonable delay" theory. Cobell, 240 F.3d at 1095-96.

[9] 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.

1086. Even more than 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.

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

In addition to providing for fees at a capped rate pursuant to 28 U.S.C. § 2412(d)(1)(A), EAJA also contains a lesser waiver of sovereign immunity in § 2412(b), which makes the United States "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." 28 U.S.C. § 2412(b). The common law "American rule" – a party is normally responsible for its own attorney fees – contains a bad faith exception that permits fee-shifting to deter conduct related to abuse of process "where an action has been commenced or conducted 'in bad faith, vexatiously, wantonly or for oppressive reasons.'" Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980). 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 Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Kerin v. United States Postal Serv., 218 F.3d 185, 190 (2d Cir. 2000).

In this case, were the Court to find that Defendants' position in defending the litigation was not substantially justified, Plaintiffs' attorney fees should be limited to the EAJA capped rates because they have failed to establish any bad faith that would entitle them to enhanced rates.

Plaintiffs have not presented any evidence that clearly and convincingly establishes that Defendants acted "in bad faith, vexatiously, wantonly or for oppressive reasons." Chambers, 501 U.S. at 45-46. Instead, they make unfounded accusations that fail to meet the stringent burden of proof required for recovery of fees on that basis.

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." Ass'n of Am. 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)). And if the court concludes that a party has litigated in bad faith, the court must provide detailed factual findings to explain its reasoning. Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 21 (2d Cir. 1996); see also Kerin, 218 F.3d at 191 ("fee awards under the bad faith exception must be supported by 'clear evidence,' and . . . the factual findings of the court below must exhibit a 'high degree of specificity'") (emphasis in original) (citation omitted). The reason for such a stringent standard is that the underlying rationale of fee shifting upon a showing of bad faith is punishment of the wrongdoer rather than compensation of the victim. Nepera Chem., Inc. v. Sea-Land Serv., Inc., 794 F.2d 688, 702 (D.C. Cir. 1986).

"Bad faith can support an award of attorneys' fees in circumstances where the bad faith (1) occurred in connection with the litigation, or (2) was an aspect of the conduct giving rise to the litigation." Am. Hosp. Ass'n v. Sullivan, 938 F.2d 216, 219 (D.C. Cir. 1991). Bad faith in

conduct giving rise to the lawsuit "may be found where 'a party confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights.'" Id. at 220 (quoting Fitzgerald v. Hampton, 545 F. Supp. 53, 57 (D.D.C. 1982). However, pre-litigation conduct alone may not be the sole basis for a fee award resulting from a finding of bad faith. Kerin, 218 F.3d at 195 ("[w]hile bad faith fees may not be awarded solely on the basis of prelitigation business conduct, district courts may properly consider such conduct in making a determination that there was bad faith sufficient to justify a fee award"); Lamb Eng'r & Constr. Co. v. Nebraska Pub. Power Dist., 103 F.3d 1422, 1435 (8th Cir. 1997) (court evaluating a fee award for bad faith conduct "may consider conduct both during and prior to the litigation, but it may not base an award solely on the conduct that led to the substantive claim"); Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 767 (10th Cir. 1997); Perales v. Casillas, 950 F.2d 1066, 1071 (5th Cir. 1992); Ass'n of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541, 548-50 (9th Cir. 1992); Shimman v. Int'l Union of Operating Eng'rs, Local 18, 744 F.2d 1226, 1233 (6th Cir. 1984).

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). The test for bad faith is "conjunctive and neither meritlessness alone nor improper purpose alone will suffice."[10] Id. An improper purpose cannot be solely based on a party's colorless or

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[10/] A claim is "meritless" if it is "entirely without color." Kerin, 218 F.3d at 190 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

frivolous position because to do so erroneously transforms the two-part test into a one-part test. Sierra Club v. United States Army Corps of Eng'rs, 776 F.2d 383, 391 (2d Cir. 1985) (reversing finding of bad faith where district court concluded improper purpose from its determination that defendant's position was colorless). Thus, a pattern of "bureaucratic bungling" and improper legal assessments does not amount to bad faith, in the absence of additional evidence of vexatious, wanton, or oppressive motives on the part of the government. See United States v. Waksberg, 942 F. Supp. 40, 43 (D.D.C. 1996) (government action to enforce settlement agreement, although not substantially justified, was the result of "bureaucratic bungling" and an improper legal assessment of the agreement, rather than bad faith).

Moreover, to the extent any bad faith is found to have occurred, "[o]nly those [bad faith] fees attributable to the offensive conduct can be awarded." Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 650 (2d Cir. 1989). Therefore, the district court should apportion the bad faith fee award to cover only that segment of the litigation where the government acted in bad faith. See Kerin, 218 F.3d at 192 ("[t]he amount of bad faith fees awarded is a function of the attorneys' fees attributable to the offensive conduct in question"); Sierra Club, 776 F.2d at 389 ("[W]e require that the award be limited to those expenses necessary to counter the losing party's bad faith.").

Plaintiffs allege bad faith by Defendants both before the suit was filed and during the litigation itself. They fail to make the requisite showing of bad faith necessary for an award of fees calculated above the EAJA-capped rates. Nowhere in their Interim Petition do they point to

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whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established." Id. (emphasis in original) (citations omitted).

clear and convincing evidence that any of the conduct they describe, to the extent it occurred, was the result of bad faith.[11] In addition, they improperly seek to recover fees at enhanced rates for the entire time period covered by their Petition, regardless of whether such time was spent in countering alleged bad faith.

A. Defendants Did Not Engage in Pre-litigation Bad Faith

As with the "substantial justification" assessment, Plaintiffs' pre-litigation claims of bad faith focus almost exclusively on their claims of trust mismanagement and supposed breaches of various trust duties. Interim Petition at 15-20. It can only be an understatement to concede that management of the IIM trust over its first hundred years will not be featured in any textbook as the model for efficient trust management. Indeed, most of the "evidence" for mismanagement relied upon by Plaintiffs comes from reports prepared by the government itself throughout the years. The IIM trust beneficiaries deserved better trust services than they received. But a lawsuit, especially one against the United States, is more than a question of simply asking for what one deserves. Not all injustices can be remedied in all courts; not all claims for better

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[11/] Many of the misconduct allegations included in the Interim Petition overlap with the claims made by Plaintiffs in their contempt claims against the many non-party individuals. It is unknown how much of the fees and expenses in this Petition were actually incurred in prosecuting those baseless contempt claims, but those fees cannot be recovered under EAJA. Plaintiffs have not prevailed in any of these proceedings and, under EAJA, 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).

treatment are enforceable. Plaintiffs must fit their pleas into legally cognizable, judicially enforceable claims.

When suing the United States, part of this calculus depends upon where the suit is launched. Suits filed in United States district courts by law deprive the court of jurisdiction over certain claims. For example, Plaintiffs' attorneys could have filed a suit in the Court of Federal Claims for damages for mismanagement of the IIM trust, or for breach of trust duties. Instead, they elected to file the current suit. The Court of Appeals has explained that the only actionable duty in this case is the duty to provide an accounting.

Defendants may have had other trust duties apart from providing an accounting, but failure to fulfill those duties is not part of this case and thus cannot support a claim of pre-litigation bad faith. This case is not about whether Interior or Treasury had appropriate trust architecture systems over the years, or appropriate IT security, or appropriate computer systems, or the appropriate record-keeping systems, or the countless other areas of trust management where Plaintiffs claim the government failed in its trust responsibilities.

To be sure, Plaintiffs have also alleged that the failure to conduct an accounting by June 1996, when they filed suit, was also evidence of bad faith. Interim Petition at 15. Although the Court of Appeals has recognized that a duty to account existed before the 1994 Act was passed, it never suggested that such a preexisting duty was independently enforceable. Morever, there is no evidence that before 1994 the government had an obligation to provide an accounting unless asked by a beneficiary. Plaintiffs have produced no evidence that an IIM beneficiary requested an accounting and the request was denied in bad faith.

After 1994, an enforceable duty to provide such an accounting to all IIM beneficiaries existed, even in the absence of a request. The Court of Appeals has found that the failure to provide the accounting required by the 1994 Act constituted unreasonable delay for purposes of jurisdiction under the APA, but unreasonable delay is not the equivalent of bad faith. Given the massive effort in time and money involved in providing the accounting required by the 1994 Act – money that can only be spent if appropriated by Congress – it is difficult to comprehend how it could be bad faith, within the meaning of EAJA, that such an accounting was not accomplished before June 1996 when this lawsuit was initiated.

B. Defendants Did Not Conduct the Litigation in Bad Faith

Even if the Court believes that the failure to provide the accounting required by the 1994 Act prior to commencement of this suit was a result of bad faith by the government, pre-litigation conduct alone cannot support a finding of bad faith for purposes of § 2412(b). See Kerin, 218 F.3d at 195 ("[w]hile bad faith fees may not be awarded solely on the basis of prelitigation business conduct, district courts may properly consider such conduct in making a determination that there was bad faith sufficient to justify a fee award"); Lamb Eng'r, 103 F.3d at 1435 (court evaluating a fee award for bad faith conduct "may consider conduct both during and prior to the litigation, but it may not base an award solely on the conduct that led to the substantive claim"); Towerridge, 111 F.3d at 767; Perales, 950 F.2d at 1071; Horizon Air Indus., 976 F.2d 541 at 548-50; Shimman, 744 F.2d at 1233. Plaintiffs thus also allege that the United States has conducted the litigation in bad faith. Interim Petition at 20.

1. The "foundational" positions of Defendants do not constitute bad faith

Plaintiffs begin by claiming that the "foundational positions" taken by the United States during the litigation can support a finding of bad faith under EAJA. Interim Petition at 21. Plaintiffs cite no case law in support of this novel position. Indeed, they recognize that EAJA law only permits the recovery of the fees and expenses incurred as a result of specific instances of bad faith conduct. See Interim Petition at 21.

Moreover, they do not identify which "foundational" positions of the government they believe qualify as bad faith under this novel standard. The United States has certain defenses, such as sovereign immunity, unavailable to an ordinary defendant or trustee. Similarly, jurisdiction over certain claims against the United States cannot be asserted in all courts. If Plaintiffs are contending that it was "foundational" bad faith for the United States to assert certain defenses and raise questions about the enforceability of certain of their claims, they have cited no case law to support their contention. As discussed above in the evaluation of whether the positions of the United States were substantially justified, the best evidence that the "foundational" positions asserted by Defendants during the Phase 1 proceedings were not bad faith is the Court's decision to certify its decision in Phase 1 for interlocutory appeal.[12]

Defendants' positions regarding the jurisdiction of the Court, the sovereign immunity of the United States, the source and scope of the accounting duty, and the ability of Plaintiffs to obtain judicial relief were not bad faith positions. Indeed, Defendants succeeded on some of

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[12/] Although not relevant to their EAJA claims, in the Interim Petition Plaintiffs allege that IIM trust beneficiaries, "including tens of thousands of children, the elderly, and the infirm" have been "deprived of their property, their funds, their assets and thus are unable to obtain adequate shelter, food, clothing, health care, and education" as a result of the "bad faith defense mounted by defendants and their counsel." Interim Petition at 25. This horrible accusation, which has become commonplace by Plaintiffs, is not supported by a shred of evidence from this litigation, or otherwise, and is vehemently denied by the United States.

their positions during the Phase 1 proceeding: Plaintiffs' common law claims were dismissed and the Court of Appeals agreed that the only actionable claim was for an accounting. Some of the positions asserted by the United States were determined to be wrong in the Court's Phase 1 decision and in the Court of Appeals affirming opinion. Other positions have not yet been decided. None was adopted or asserted in bad faith.

Plaintiffs' Interim Petition is replete with general, unsupported allegations of "malfeasance" and "misconduct" during the litigation. Shorn of these types of generalized allegations of bad faith that cannot qualify Plaintiffs for an award under § 2412(b), Plaintiffs have identified several instances of specific activity which they believe constitute bad faith misconduct during the litigation. These allegations fit into three categories: 1) activity which has already been the subject of a contempt trial; 2) activity which occurred during settlement or mediation talks; 3) activity which occurred as part of the Phase 1 proceedings. The alleged activity in the first two categories cannot form the basis of a bad faith fee award as a matter of law. The alleged activity in the third category does not constitute bad faith as a matter of fact and law.

2. The Contempt II allegations do not constitute bad faith

The vast majority of the conduct identified as bad faith in the Interim Petition involves precisely the same allegations that were the subject of the Contempt II trial. Indeed, much of the discussion in the Interim Petition on these topics was lifted verbatim from Plaintiffs' Motion To Reopen Trial One in This Action (filed November 30, 2000). The same so-called chronological "factual" appendix attached to that motion has been attached to the Interim Petition. As the Court will recall, the Motion To Reopen Trial One was amended by Plaintiffs on October 19,

2001, and consolidated with a Motion to Show Cause.[13] This consolidated amended motion, which contained precisely the same allegations as in the original Motion, with a few additional charges added, resulted in the Contempt II trial.

The Court is thus familiar with all of the allegations in the Interim Petition related to the testimony at the Phase 1 trial and the subsequent reporting to the Court in the Quarterly Reports regarding: TAAMS systems "architecture," Interim Petition at 35-36, 46-47, 61-65, the TAAMS "implementation schedule," id. at 36, 56-59, 60-61, the "Independent Verification and Validation" of TAAMS, id. at 36, 46, 65-67, the "interface" between TAAMS and TFAS, id. at 37, 46-47, 61-65 the "functionality" of TAAMS, id., the "TAAMS works" testimony, id. at 43-45, 52-56, TAAMS as a "COTS" system, id. at 45-46; BIA "Data Cleanup," id. at 47-48, 69-70, the "Probate Backlog," id. at 49, the "user acceptance" of TAAMS, id. at 49–50, the definition of "deployment" of TAAMS, id. at 50, 59-60.

Plaintiffs' tedious and repetitive discourse on these claims in the Interim Petition (the redundant discussions on these topics consumes almost forty of the eighty pages of text in their Interim Petition) does not obscure the fact that these allegations were the genesis for the specifications at the Contempt II trial.[14] The Court heard testimony and received exhibits on all of these claims. The Court's September 17, 2002 opinion discusses each of these allegations in

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[13] This amended Motion to Reopen included heavy reliance upon the reports of the Court Monitor, who has since been disqualified.

[14] Mr. Brown even concedes that much of the time related to Contempt II and Trial 1.5 "can be viewed as part of the effort to prove or confirm defendants' misrepresentations to this Court in Trial 1 and the Quarterly Reports." Declaration of Mark Brown at ¶ 6.

considerable detail. See 226 F. Supp. 2d at 46-100, 122-127. The Court agreed with Plaintiffs in its Contempt II opinion that the conduct on these topics alleged by Plaintiffs was contumacious.

These allegations cannot support a claim of bad faith in the Interim Petition, however, because the Court's opinion and finding of misconduct on these matters were overturned on appeal. See Cobell v. Norton, 334 F. 3d at 1150. Indeed, the Interim Petition now marks the third time that Plaintiffs have tried to collect fees for the very same conduct. The fees incurred "as a result of the defendants' contumacious conduct" were awarded to Plaintiffs in the September 17, 2002 Contempt II opinion. That award was overturned on appeal when the D.C. Circuit vacated the Court's opinion. Plaintiffs then filed a Request for Award of Attorney's Fees and Related Expenses Based Upon Findings Establishing Defendants' Litigation Misconduct (filed November 26, 2003). In denying that motion on May 27, 2004, the Court explained that "[t]he Court's finding of misconduct was tied directly to those five counts which the Circuit overturned and for which the Circuit explicitly denied Plaintiffs the right to collect fees." 319 F. Supp. 2d at 40.

Perhaps Plaintiffs should be singled out for their persistence and creativity in their efforts to recover the fees related to these allegations. As this Court and the Court of Appeals have already ruled, however, they cannot be awarded these fees.

Moreover, although not articulated as such in the Interim Petition, it is possible that Plaintiffs have included these allegations in their Interim Petition because they believe that even if the fees related to these issues cannot be recovered, the alleged misconduct constitutes sufficient bad faith to permit an uncapped § 2412(b) EAJA award of other, unrelated fees. If this is Plaintiffs' position, they are mistaken. To the extent any bad faith is found to have occurred,

"only those [bad faith] fees attributable to the offensive conduct can be awarded." Ostano Commerzanstalt, 880 F.2d at 650; see also Kerin, 218 F.3d at 192 ("[t]he amount of bad faith fees awarded is a function of the attorneys' fees attributable to the offensive conduct in question"); Sierra Club, 776 F.2d at 389 ("[W]e require that the award be limited to those expenses necessary to counter the losing party's bad faith.").

3. The settlement and mediation allegations do not constitute bad faith

The Interim Petition also seeks recovery of fees and expenses incurred in various settlement and mediation efforts. Although the body of the Interim Petition contains no discussion of the content or nature of the settlement and mediation talks, several of the supporting affidavits include allegations that Defendants conducted these talks in bad faith.[15]

Many of Plaintiffs' attorneys claim that the mediation efforts in 1999 and the 2001 settlement talks were conducted in bad faith. See Gingold Affidavit at ¶ 14; Harper Affidavit at 6-7 n.1; Babby Affidavit at 5 n.1; Echohawk Affidavit at 5 n.1.[16] One of their non-attorney assistants, Geoffrey Rempel, also asserts bad faith by Defendants during the 2001 settlement negotiations, which he labels as "bogus." Rempel Affidavit at ¶ 16 (August 16, 2004). He further claims that the government "coerced plaintiffs into settlement discussions to improperly procure plaintiffs' experts' workproduct [sic]," upon which the government allegedly "promptly

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[15] Plaintiffs seek market rates for their settlement and mediation time, another indicator that they believe these talks were conducted in bad faith.

[16] The Court's October 14, 1999 Order required that the substance – and information related to the substance – of the mediation efforts remain confidential. October 14, 1999 Order at 2-4; see also December 21, 1999 Order at 1 ("the requirements of confidentiality . . . shall remain in full force and effect"). Mr. Gingold, Mr. Harper, Ms. Babby, and Mr. Echohawk have violated that Order.

ceased those negotiations." Id.[17] Aside from the failure of the term "bogus" to constitute evidence, Mr. Rempel cites no support for these reckless assertions, nor is any to be found in his time records that he indicates relate to settlement negotiations, id. at 26-28, Schedule E (September 6, 2000 to December 11, 2000).

As discussed below in Section V, the fees and expenses of unsuccessful settlement and mediation talks are not compensable in an EAJA application. However, the allegations of bad faith during these talks cannot go unchallenged. Defendants unequivocally deny that any of the settlement and mediation efforts in this litigation were conducted in bad faith by Defendants. Should the Court consider it necessary for Defendants to counteract Plaintiffs' vague and unsubstantiated claims – and is willing to modify its October 14, 1999 Order requiring confidentiality – Defendants are prepared to submit affidavits from individuals who were actively involved in the relevant settlement and mediation efforts to disprove Plaintiffs' claims.

In the meantime, Plaintiffs' vague claims do not satisfy the "stringent" standards for showing bad faith. The allegations regarding the settlement and mediation talks cannot support a finding of bad faith.

4. Destruction of documents at the Treasury Hyattsville facility does not constitute bad faith

Plaintiffs claim that the destruction of 162 boxes of documents maintained at Treasury's Financial Management Service ("FMS") facility in Hyattsville, Maryland, from November 1998 until January 1999, also constitutes bad faith by Defendants. Interim Petition at 26-29. They rely

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[17] Plaintiffs' "workproduct" apparently refers to their revenue model – rejected by the Court as a substitute for an historical accounting in its Phase 1.5 opinion – which was not provided to Defendants until late 2001, well after the February 28, 2001 cut-off date chosen by Plaintiffs for this petition.

heavily upon the findings in the December 3, 1999 Report and Recommendation of the former Special Master. The Special Master, in turn, relied upon the results of the thorough and detailed investigation of the matter that was conducted by the government and transmitted to the Special Master on June 3, 1999. Contrary to the claims from the Interim Petition, the report from the Special Master showed that the destruction of documents potentially relevant to the IIM trust at the Hyattsville facility was not done intentionally. As soon as it was discovered that potentially relevant documents were being destroyed, the FMS employees immediately stopped the destruction and ordered a review of the remaining 245 boxes of documents housed at the facility to determine potential relevance to the IIM trust.

The Special Master did not conclude that the documents were destroyed as a result of any bad faith by Defendants or their employees. The Special Master questioned why it took three months for the Court (and for counsel from the Department of Justice representing Treasury) to learn of the destruction from Treasury, but he concluded that the delay was largely a result of institutional communication problems. Report & Recommendation at 99-107. He recommended that procedures be implemented to minimize the risk of inadvertent destruction. Report & Recommendation at 121. The Department of Justice and Treasury concurred with the Special Master's recommendation and instituted changes. See, e.g., Report of the United States on Corrective Measures (January 18, 2000); Corrected Supplemental Report (January 21, 2000); Second Supplemental Report (February 25, 2000).

There is also no evidence of actual – or even potential – prejudice suffered by Plaintiffs, at least with respect to any matters at issue in the Phase 1 proceeding – which is obviously the subject of this interim EAJA application. In denying Plaintiffs' motion to reopen the Phase 1 trial

record to include the Special Master's December 3, 1999 Report, the Court concluded that even if relevant, it was cumulative of other evidence and thus denied the motion. Order of December 21, 1999 at 1-2. The records destroyed at the FMS Hyattsville facility were historical documents related to disbursements made by various federal agencies from the beginning of the twentieth century until approximately 1958. Report and Recommendation at 1-2. To the extent that any of the destroyed documents were related to the IIM trust, the only possible relevance they would have in this litigation would be to Phase 2 issues in demonstrating that disbursements indicated in an accounting were actually made.

Plaintiffs have not met their "stringent" burden of proof. They have not demonstrated any bad faith by any employee or Defendant in this matter. They may not recover enhanced fees.

5. Document retention problems identified in the Special Master Site Visit Reports do not constitute bad faith

Plaintiffs also allege that the document retention issues identified in four Site Visit Reports from former Special Master Balaran constitute litigation misconduct.[18] Interim Petition at 29-31. Plaintiffs are unable to identify any evidence of bad faith by Defendants. The Special Master identified mistakes and poor conditions at several Interior facilities where IIM records were housed, but these problems were the result of inadequate resources, mistakes, or simple "bureaucratic bungling," see Waksberg, 942 F. Supp. at 43, rather than any bad faith by Defendants.

Moreover, these document retention issues are related to general trust management activities, not issues that were properly part of the Phase 1 proceeding. Indeed, the propriety of

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[18/] The Special Master's Fourth Site Visit Report was issued in November 29, 2000, well outside the scope of this interim EAJA application.

these kinds of monitoring activities was questioned by the Court of Appeals when it disqualified Special Master-Monitor Kieffer. See Cobell v. Norton, 334 F. 3d 1128, 1142-1144 (D.C. Cir. 2003). Record-keeping failures by Defendants do not constitute litigation misconduct.[19] They cannot support an enhancement of fees under EAJA.

6. Sanctions imposed for January 21, 2000 Motion for Protective Order filed by Defendants do not constitute bad faith

Relying on a Report and Recommendation of the Special Master, Plaintiffs claim that Defendants acted in bad faith in filing a Motion for Protective Order on January 21, 2000. Interim Petition at 32-33. The Special Master concluded that three of the four arguments advanced by Defendants in support of the motion were not "substantially justified" and thus, pursuant to Federal Rule of Civil Procedure 37, he recommended that Defendants should pay 75% of the fees incurred by Plaintiffs in responding to the motion. Over the objections of Defendants, the Court adopted the recommendation of the Special Master and imposed sanctions on Defendants. See Order of November 12, 2002.

Defendants continue to maintain that the Special Master and the Court were mistaken in this matter and that the arguments presented by Defendants in their Motion were substantially justified. But for purposes of the Interim Petition, the appropriateness of the Court's Order is beside the point. Plaintiffs have already been awarded all reasonable fees incurred in responding to this matter and they cannot get an award of additional fees in the Interim Petition.[20]

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[19] It is also inappropriate, at least at this time, to rely upon the reports of Special Master Balaran. Although he has resigned, the Court of Appeals has not yet decided whether it will rule upon Defendants' bias claims against him.

[20] In addition, Defendant's Motion was not filed until after the Phase 1 proceeding was over. This matter is thus outside the scope of this interim EAJA application.

7. Overwriting of Email backup tapes at Interior does not constitute bad faith

As part of their "evidence" of "bad faith," Plaintiffs rehash the same specious arguments they have made over and over again regarding the issue of overwriting of backup tapes of Solicitor's Office emails. Interim Petition at 39-44. This issue was the subject of a motion for civil and criminal contempt, filed March 20, 2002, against seven current and former government employees in their official and personal capacities. Both the government and the individuals responded to that motion, pointing out that no evidence existed of any intent to destroy relevant documents, and that although backup tapes had been overwritten in the ordinary course, all Solicitor's Office employees had been instructed repeatedly to retain hard copies of their emails. Although the Court gave Plaintiffs numerous additional opportunities to specify what actions by which individuals supposedly violated a Court order or constituted "fraud on the court," they failed to do so. Their attempt to resurrect this issue in support of their "bad faith" argument underscores the weakness of their claim.

There is no need to burden this Court with additional exhaustive argument detailing the many flaws in Plaintiffs' contentions on this issue, since the existing stack of papers addressing it is already voluminous. Accordingly, we incorporate by reference the arguments made in the *Memorandum of Points and Authorities in Support of the Government's Motion to Dismiss Plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes and "Bills of Particulars" Filed by Plaintiffs in Support of Such Motion* (filed January 6, 2003) (the "*Government's Memorandum*"), and the *Reply Memorandum* in support of same (filed March 5, 2003). The same failures that doomed Plaintiffs' demand for contempt

sanctions based upon the overwriting of backup tapes also undermine their attempt to use this issue as evidence of "bad faith" for purposes of obtaining an enhanced fee under EAJA.

As noted above, for Plaintiffs to qualify for an enhanced rate under EAJA, they must show that the government willfully disobeyed a court order, or acted in bad faith, vexatiously, wantonly or for oppressive reasons. Chambers, 501 U.S. at 45-46. As with the "fraud on the court" claims that Plaintiffs have leveled against the government previously, Plaintiffs' "bad faith" claim is subject to a "stringent" standard of proof and must be established by clear and convincing evidence. Ass'n of Am. Physicians and Surgeons, 187 F.3d at 660. Accordingly, loose charges unsupported by actual evidence are as insufficient to sustain a claim of "bad faith" as they are to support a demand for sanctions based on "fraud on the court." The *Government's Memorandum* details the serious deficiencies in Plaintiffs' allegations that any government official had acted intentionally to thwart any clear directive of the Court or otherwise to destroy relevant evidence in connection with the backup tape issue. We summarize those deficiencies here.

As the *Government's Memorandum* points out, Plaintiffs have both misstated and overblown the backup tape issue. The overwriting of the backup tapes did not fulfill any of the elements necessary to show civil or criminal contempt or fraud on the court. The issue concerned Interior's failure to preserve backup tapes of Solicitors' Office email for certain periods of time. The Solicitors' Office had a paper recordkeeping system, in accordance with rules promulgated by the National Archives and Records Administration ("NARA") and upheld in Public Citizen v. Carlin, 184 F.3d 900 (D.C. Cir. 1999). Backup tapes were created solely to allow the Office to recover from a catastrophic failure of the computer system. The backup tapes

were not archival, and, in the normal course of operations, Solicitor's Office backup tapes were periodically overwritten.[21] When Plaintiffs received the Third Document Request, the Solicitor's Office was preserving certain backup tapes only because an Independent Counsel had specifically requested backup tapes. See July 27, 2001 Opinion at 4. Those backup tapes that the Independent Counsel had specifically requested continued to be preserved. After the Independent Counsel notified Interior that she no longer needed backup tapes, the Solicitor's Office resumed its normal practice of overwriting newly generated backup tapes. Plaintiffs, despite multiple opportunities to do so, have never shown that the resumption of overwriting violated any specific court order, or that it was done with the intent to deceive anyone or with the intent to defraud the Court. Overwriting of the tapes was the normal and accepted practice within the Department of the Interior.[22]

[21/] As noted in the *Government's Memorandum* at 21, Item 14 to General Records Schedule 20, "Disposition of Electronic Records," 60 Fed. Reg. 44643 (August 28, 1995), promulgated by NARA, authorizes (that is, requires) deletion of email records from the email system after they have been copied into a paper or other recordkeeping system. 60 Fed. Reg. at 44649. The provisions of General Records Schedule 20 that permitted the Department of the Interior and other agencies to maintain email records in paper form and authorized the agencies to delete electronic copies were upheld in Public Citizen v. Carlin, *supra*. In that decision, the Court of Appeals specifically upheld the Archivist's "ultimate determination that a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system." Id. at 910. Accordingly, Plaintiffs' repeated attempts to cast the overwriting of backup tapes as a "destruction of federal records" is entirely fallacious.

[22/] Plaintiffs have repeatedly referred to the overwriting of backup tapes as "spoliation" of evidence. While the Special Master did make such a finding in his July 27, 2001 opinion, the Master did not include sanctions for the overwriting itself in his recommendation to the Court. Such sanctions would not be appropriate on this record because of Plaintiffs' failure to demonstrate that the backup tape overwriting constituted a conscious effort by the government to destroy potentially relevant evidence. See Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1481 (D.C. Cir. 1995) ("A sanction for failure to preserve evidence is appropriate only when a party has consciously disregarded its obligation to do so."). Moreover, as already noted here and in the *Government's Memorandum*, the overwriting of backup tapes conformed to NARA rules and did

While the Special Master concluded that Interior should have continued to preserve Solicitor's Office email backup tapes for purposes of discovery in this action, other judicial officers addressing nearly the same issue in the same time frame reached differing conclusions about a party's obligation to search backup tapes for materials responsive to document production requests. See McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D.D.C. 2001) (Mag. J. Facciola) ("[T]here is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search, and the handful of cases are idiosyncratic and provide little guidance."); Byers v. Illinois State Police, No. 99-8105, 2002 WL 1264004 at *10 (N.D. Ill. June 3, 2002) (magistrate judge decision) (holding that plaintiffs were entitled to production of emails on backup tapes only if they paid a portion of the cost of production). This split in authority demonstrates that the limited overwriting of some backup tapes is not conduct of the magnitude necessary to constitute "bad faith" under the EAJA.

Finally, as noted in the *Government's Memorandum*, Plaintiffs have not even attempted to show that the allegedly wrongful overwriting prejudiced them in presenting their case or caused them to expend additional resources. In their numerous filings on the backup tape issue, including the current motion for fees, Plaintiffs have not even identified the issue or issues to which documents responsive to the Third Document Request were relevant or how the absence of the emails on the overwritten tapes prejudiced their ability to present their case on any issue.

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not violate any specific court order or requirement of the Federal Rules of Civil Procedure. For the same reasons Plaintiffs have failed to establish a basis for a "spoliation" sanction, they have also failed to show that the overwriting constituted "bad faith" for purposes of an enhanced attorney fee award.

Plaintiffs' overheated rhetoric should not obscure the limited scope of the Third Document Request. Item one of the Third Document Request requested production of "[a]ll documents prepared or signed" by three attorneys in the Solicitor's Office, all of whom worked in the Washington, D.C. headquarters of the Solicitor's Office, "which express legal advice, conclusions, opinions, assessments, instructions or directions to the Secretary or any and all other Department of Interior personnel not employed in the Office of the Solicitor, . . . pertaining to the administration of the Individual Indian Money (IIM) trust." The Third Document Request also asked for "All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Interior Personnel" regarding the transfer of trust assets to tribes (Item 2), the 1990 delegation of IIM trust fund disbursement authority to Interior area office and agency personnel (Item 3), proposed legislation referred to as the Tribal Trust Fund Settlement Act of 1998 (Item 4), or "interest overdrafts" described by the then-Special Trustee in a deposition (Item 5). Id. The Third Document Request incorporated by reference definitions set forth in Plaintiffs' First Set of Interrogatories, and those definitions defined "documents" as including emails and information contained on "tapes."

The Third Document Request did not specifically request production of "backup tapes." The Third Document Request did not request production of all Solicitor's Office emails. The Third Document Request did not even request production of all Solicitor's Office documents or emails pertaining to the administration of the IIM trust. Interpreted broadly, item one of the Third Document Request asked for documents prepared or signed by three identified employees which pertained to administration of the IIM trust, while items two through five were limited to

documents prepared or signed by other Solicitor's Office attorneys which addressed one or more of four specific topics. Moreover, throughout the course of motion practice on the Third Document Request, Defendants and the Named Individuals promptly notified the Court, the Special Master and Plaintiffs of developments concerning the Solicitor's Office backup tapes. All of these circumstances plainly belie Plaintiffs' accusation that the government acted in "bad faith, vexatiously, wantonly or for oppressive reasons." Accordingly, this issue cannot serve as a basis for enhancing Plaintiffs' claim for attorney fees.

8. Representations about adequacy of trust systems do not constitute bad faith

Throughout the Interim Petition, Plaintiffs accuse Defendants of misrepresenting the adequacy of trust management and trust management systems. See, e.g., Interim Petition at 22, 33-38, 51. Most of these allegations involve the same accusations that were the subject of Contempt II, as discussed above. One new allegation in the Interim Petition involves statements made in a pretrial submission to the Court. Plaintiffs accuse Defendants of telling the Court that "present" management of the IIM trust (as of 1998) was adequate when, according to Plaintiffs, they knew that it was inadequate. Interim Petition at 22-23.

The Court had ordered Defendants to submit a "statement of the specific respects, if any, in which they concede that the present management of the trust here involved is inadequate." Order at 2, ¶ 1 (May 5, 1998), quoted in Interim Petition at 22. Defendants responded that "the present management of the trust, taking into account the changes that are in progress, is adequate" ("1998 Statement"). Cobell v. Babbitt, 30 F. Supp. 2d 24, 47 (D.D.C. 1998). The Court rejected Plaintiffs' motion to strike Defendants' statement as "not responsive." Id. Specifically, the Court recognized that "defendants clearly concede that some improvements need

to be made" and "that their present management of the trust is adequate because of ongoing reform." Id.

Unwilling to acknowledge the law of the case on this issue, Plaintiffs then attempt a bait and switch by comparing Interior's position on the adequacy of management with Defendants' stipulated concessions about Interior's inability at the time of the Phase 1 trial to carry out specific administrative functions. Interim Petition at 22-23. Plaintiffs mischaracterize the 1998 Statement as Defendants' "pre-trial position that trust management systems were 'adequate.'"[23] Id. at 23 (emphasis added). "Management of the trust, taking into account the changes that are in progress" is not synonymous with the current status of "trust management systems."

In short, far from being a position taken in bad faith, Defendants' litigation position on management of the trust was reasonable. Moreover, as discussed above, the Phase 1 trial was not – or at least according to the Court of Appeals *should not* have been – about management of the trust. This issue cannot sustain enhanced fees under EAJA for bad faith.

9. Representations about the level of accounting records at Treasury do not constitute bad faith

Plaintiffs claim that Treasury "falsely" represented that it did not keep detail-level accounting information but later admitted that it did keep such information. Interim Petition at 67-68. Plaintiffs' offhand accusation on this matter does not provide the Court – or Defendants – *any* information about the so-called false representations, who they claim made them and when,

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[23] Plaintiffs admit that, even under their misleading representations of the 1998 Statement and the Trial 1 stipulations, the government could show that its position had changed in the year from the filing of the 1998 Statement and the stipulations. Interim Petition at 23-24.

and what relevance this has to the Phase 1 trial, much less the detailed factual support that they must provide to establish clear and convincing evidence of bad faith.

They incorrectly attribute to a Justice attorney and a Treasury witness a supposed assertion that Treasury maintains only summary-level documents. Interim Petition at 67 (interpolating the word "only" into a statement by government counsel). Neither the attorney nor the witness asserted any such thing. The government correctly explained that "Treasury only has summary level accounting *responsibilities* for these accounts." Trial 1 Tr. 5003 (emphasis added). Commissioner Gregg also attested to this fact. See, e.g., Phase 1 Tr. 3299, 3309-3310. In addition, the Commissioner made abundantly clear that Treasury maintains information about individual checks that it can retrieve with appropriate predicate information. See, e.g., Phase 1 Tr. 3311. This testimony belies any suggestion that Treasury sought to persuade the Court that it does not maintain any information at the individual level.

10. Manner in which IIM funds are kept at Treasury does not constitute bad faith

Plaintiffs also claim that Treasury finally admitted in June 2000 that all the IIM funds were kept in one account. Interim Petition at 69. Plaintiffs do not identify which claim or issue this is related to in this litigation. They do not describe how the manner in which funds are kept by the United States could possibly constitute litigation misconduct.

11. So-called retaliation against Mona Infield does not constitute bad faith

Plaintiffs claim that retaliation against Mona Infield also constituted bad faith. Interim Petition at 73 n.46. Defendants dispute this allegation, but Plaintiffs already have received fees related to this matter in a settlement. They cannot recover additional fees in this EAJA petition.

In short, Plaintiffs have not identified evidence of compensable bad faith conduct by Defendants either before the litigation began or during the case. They are thus not entitled to an enhanced award of fees under § 2412(b).

V. THE SCOPE OF REQUESTED FEES IS OVERBROAD

A. Plaintiffs Cannot Recover Fees Incurred after the Phase 1 Proceeding

The Court's May 27, 2004 Order advised Plaintiffs that they could file an EAJA application "for work done through the Phase 1.0 proceeding." 319 F. Supp. 2d at 44. Plaintiffs have ignored the Court's Order. They have redefined the phrase "through the Phase 1.0 proceeding" to include vast amounts of work done after the Court's Phase 1 opinion was issued on December 21, 1999. They include time spent during this period "monitoring defendants' trust reform efforts." Interim Petition at 5. As support for their position they cite "institutional reform" cases and other cases in which decrees were entered and required time monitoring the decree. Interim Petition at 4-7. Plaintiffs neglect to discuss that none of those cases involved an interim fee petition where the Court had already circumscribed the time period for which fees could be awarded.

As discussed at length above, whether this is an "institutional reform" case has not been finally resolved. The only enforceable duty at issue in this case is the duty to conduct an accounting. Time spent monitoring "trust reform" is not compensable.[24] At the very least it should not be awarded at this time. This is an interim fee petition. If Plaintiffs prevail in the

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[24] It should also be noted that the Court appointed Mr. Kieffer to the job of monitoring trust reform. Before he was disqualified, he generated $1,264,527.12 in fees and expenses, paid for by the taxpayer. The Special Master also engaged in monitoring activities, and before he resigned, he generated $3,813,041.14 in fees and expenses, paid for by the taxpayer. The taxpayer has already paid "monitoring" fees and should not be required to pay additional fees to Plaintiffs.

Phase 1.5 appeal or at a later phase of this case, they can resubmit the fees incurred after the Phase 1 proceeding in a final EAJA petition.

Plaintiffs have also included time spent in 2000 and 2001 trying to prove the bad faith litigation allegations that they have made in the Interim Petition. Plaintiffs make the tortured circular argument that even though the time was incurred after the Phase 1 proceedings, it is relevant to this interim Phase 1 fee petition because they included the time in the Phase 1 fee petition, and without it they would not be able to show bad faith. Interim Petition at 7-8.

The Interim Petition includes a claim for 7,403.66 hours incurred after the Phase 1 proceeding ended on December 21, 1999.[25] For the convenience of the Court, attached as Exhibit 1 is a table identifying the amount of time submitted by each individual that falls outside the scope of this interim fee petition.[26] This time should be deducted from any interim EAJA award.

Plaintiffs also seek reimbursement for PWC's fees incurred after conclusion of the Phase 1 trial in July 1999. PWC's billings between August 1999 and January 2000 indicate that, following the trial, PWC spent time assisting in post-trial pleadings. See Pollner Affidavit, Exhibit AG. However, the following table illustrates that the vast majority of time submitted for

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[25] Plaintiffs also include time spent on the appeal of the Phase 1 opinion and time spent preparing the Interim Petition. Defendants agree that reasonable time spent on these activities is properly part of this Interim Petition. As discussed below, Plaintiffs have included excessive time spent on these matters.

[26] Attached as Exhibit 2A is a marked-up copy of Plaintiffs' Interim Petition time records. We have added a "PT" notation beside the post-Phase 1 trial entries. This bulky exhibit is being filed separately in paper form and is available for review from the Clerk's office.

the period after the Phase 1 trial was unrelated to Phase 1 and should be excluded from any interim award:

PWC Billings August 1999-January 2000			
Month	Total Monthly Bill From PWC	Fees Related To Trial I or Related Post Trial Work	Fees Unrelated To Trial I And Outside Scope Of 5/27/04 Order
Aug. 1999	$87,315.00	$52,800.00[27]	$34,515.00
Sept. 1999	$33,975.00	$900.00[28]	$33,075.00
Oct. 1999	$62,888.00	$0.00	$62,888.00
Nov. 1999	$17,168.00	$0.00	$17,168.00
Dec. 1999	$7,088.00	$1,463.00[29]	$5,625.00
Jan. 2000	$3,825.00	$450.00[30]	$3,375.00
Total	**$212,259.00**	**$55,613.00**	**$156,646.00**

B. Time Spent on Contempt II Matters Must Be Deducted

As discussed above, none of the time related to the Contempt II allegations is compensable. This time is a subset of the improper post-Phase 1 billings discussed above, but even if the Court permits Plaintiffs to include time spent after Phase 1, the Contempt II time should be deducted.

[27/] See Pollner Affidavit, Exhibit AG, August 1999 (Pollner, Schweitzer, Rempel, Tomlinson, and Weber billings related to post-trial pleadings).

[28/] See Pollner Affidavit, Exhibit AG, September 1999 (Schweitzer billings related to post-trial pleadings).

[29/] See Pollner Affidavit, Exhibit AG, December 1999 (Schweitzer billings related to review of Trial I Opinion).

[30/] See Pollner Affidavit, Exhibit AG, January 2000 (Pollner 10/10/2000 billing related to review of Trial I Opinion).

For the convenience of the Court, we have attached, as Exhibit 2B, a copy of the bills previously submitted by Plaintiffs for these Contempt II fees.[31] We have also attached, as Exhibit 3, a table identifying this time previously billed by Plaintiffs for Contempt II matters that has reappeared in the current petition.[32]

C. Time Must Be Deducted from Mr. Gingold's Claim To Avoid Double Billing

The time records that Mr. Gingold submitted in connection with previous fee petitions and sanctions awards in this case were so inadequate that it is now impossible to determine whether time previously compensated has been deducted from the modified time records that he has submitted in the Interim Petition. Because we are unable to determine whether he eliminated previous awards when he added "clarity" to the current records, all time previously compensated must be deducted from his current fee petition. For the convenience of the Court we have prepared a table, attached as Exhibit 4, which, for each day that he has been awarded fees in this litigation, indicates the amount of time previously compensated and subtracts it from the amount that he is seeking now.[33] Attached as Exhibit 5 is a table identifying the number of hours that should be deducted each year for Mr. Gingold. Defendants submit that this approach is the only fair way to ensure that Mr. Gingold does not receive a double award.

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[31] This bulky exhibit is being filed separately and is available for review in the Clerk's office.

[32] Plaintiffs have also submitted in the Interim Petition time incurred on Contempt II matters that was not previously billed by Plaintiffs. This time is also a subset of the post-Phase 1 category but should also be deducted from any interim award even if the Court permits post-Phase 1 time.

[33] For those days for which this calculation produces a negative number, Defendants have used zero as the appropriate hours.

D. Plaintiffs Cannot Recover Fees and Expenses Related to Settlement and Mediation Efforts

Plaintiffs seek to recover fees and expenses for "time spent in trying to resolve this case through settlement and mediation." Interim Petition at 8 n.11. Based on the time records submitted by Plaintiffs, it appears that they are requesting compensation for four different efforts.

First, in 1996 and 1997, they claim to have spent time investigating whether a legislative "settlement" could be reached and whether money could be paid from the Judgment Fund for this effort. Second, in 1996 through 1999, the parties jointly engaged in a statistical sampling project. Each party hired accounting experts – the government hired Arthur Anderson and Plaintiffs hired PWC – to assist them in identifying an appropriate sample of IIM accounts, the detailed examination of which could enable the parties to ascertain an agreed-upon error rate. With this agreed error rate, it was believed that the parties could then engage in informed settlement talks and perhaps work out an appropriate settlement amount. This unsuccessful statistical sampling project consumed much time in 1997 and 1998, both by attorneys and the accounting professionals assisting them. Third, in 1999, the parties engaged in mediation talks. These talks were authorized by the Court's Order of October 14, 1999. Fourth, in 2001, the parties again engaged in settlement talks.

Plaintiffs' Interim Petition seeks recovery for 3,269.07 hours spent on these various settlement and mediation efforts, yet they fail to present any argument as to why these unsuccessful efforts should be compensated under EAJA. They cite two cases, Ellis v. Univ. of Kansas Med. Ctr., 163 F. 3d 1186, 1202-03 (10th Cir. 1998), and E.M. v. Milville Bd. of Educ., 849 F. Supp. 312, 317 (D.N.J. 1994), as authority for the Court to award time spent on settlement

and mediation. Interim Petition at 8 n.11. Both cases, however, involved settlement and mediation efforts which were successful and terminated the proceedings. The discussion in those cases was thus about whether the plaintiffs had "prevailed" under those circumstances and whether the settlements constituted a sufficient change in the relationship of the parties to qualify for an EAJA award.

In stark contrast, the settlement and mediation efforts here were unsuccessful. They did not terminate the litigation and no change in the legal relationship between the parties resulted. See Buckhannon, 532 U.S. at 604 & n.7 (only settlements changing the legal relationship of the parties which are approved by a court qualify to make a party a "prevailing party"). These efforts were thus discrete, severable claims upon which Plaintiffs did not prevail.[34] See 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.").

The settlement time submitted by Plaintiffs is thus not compensable under EAJA. It would be particularly inappropriate to award the accounting fees submitted by PWC incurred in the statistical sampling project. Defendants have already paid a large amount of money to Arthur Anderson for this project. It would be unjust to ask the American taxpayer to pay additional accounting fees for the very same work.

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[34] It is expected that Plaintiffs will claim that the time spent on the statistical sampling project was not part of a settlement effort, but was rather an approach designed to identify a possible surrogate for an accounting. Even if true, the EAJA analysis is unchanged. This was time spent on a discrete, severable claim which was not part of Phase 1 and on which Plaintiffs did not prevail.

Moreover, with respect to the 1999 mediation efforts, the October 14, 1999 Order provides that "[e]ach party shall be independently responsible for its own expenses associated with the mediation process, attorney fees, or any of their own expert expenses it deems necessary for the process." Order at 1. Plaintiffs have ignored this Order and included time for the 1999 mediation efforts in their fee request. This time cannot be compensated.

Defendants have attached as Exhibit 6 a table identifying the amount of time each individual spent on settlement and mediation efforts. Attached as Exhibit 7 is a table identifying the time spent on the statistical sampling project.[35]

VI. UNREASONABLE FEES AND EXPENSES MUST BE DEDUCTED

The EAJA authorizes a court to award only "reasonable attorney fees." 28 U.S.C. §2412(d)(2)(A). The party requesting the fees has the burden of establishing the reasonableness of its fee request. Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 970 (D.C. Cir. 2004). In determining what constitutes a reasonable attorney fee, a court's first step is to calculate a "lodestar" by multiplying the reasonable number of hours it finds the prevailing party expended on the litigation by a reasonable hourly rate. Hensley, 461 U.S. at 433.[36] Plaintiffs have failed to meet their burden of establishing the reasonableness of the number of hours they claim and the hourly rates upon which they seek reimbursement. "Lawyers claiming fees from the government must exercise 'billing judgment.'" Action on Smoking and Health v. C.A.B., 724 F.2d 211, 220

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[35] Attached as Exhibit 2A is a marked-up copy of Plaintiffs' Interim Petition time records. We have added a "M/S" notation beside the settlement and mediation entries and a "PWC/SS" notation beside the statistical sampling entries.

[36] Although Hensley did not involve the EAJA, the Supreme Court in INS v. Jean, 496 U.S. 154, 161 (1990), made clear that the Hensley analysis applies to EAJA cases. See also Atkins v. Apfel, 154 F.3d 986, 988 (9th Cir. 1998).

(D.C. Cir. 1984) (quoting Hensley, 461 U.S. at 434 (citations omitted)). Plaintiffs have failed to do so. Instead, they have submitted a fee request totaling $14,528,467.21, accompanied by inadequately documented and excessive time entries, as well as time and expenses that are simply not compensable under the EAJA.

A. Number of Hours

1. Inadequate Documentation

The party seeking fees under the EAJA bears the burden of submitting evidence supporting the number of hours worked. Hensley, 461 U.S. at 433. Section 2412(d)(1)(B) specifically requires the party seeking an award of attorney fees and expenses to submit "an itemized statement . . . stating the actual time expended" in the litigation. The party seeking a fee award "has the burden of establishing the reasonableness of its fee request and '[s]upporting documentation must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended . . . .' " Role Models, 353 F.3d at 970 (internal citations omitted). The D.C. Circuit has held that attorneys who submit time records that lack sufficient detail to adequately describe the work for which their client is being billed fail to meet their burden. Id. at 971. A court should not award attorney fees where the claimant has not adequately documented the hours spent. See Hensley, 461 U.S. at 433 ("[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly").

A time entry is inadequately documented if: (1) it lumps multiple tasks together in a single entry, (2) it contains generic descriptions with no subject matter specified, e.g., "research," or (3) the entries contain initials or subjects that cannot be identified as relating to the litigation.

Role Models, 353 F.3d at 971. Such entries are inadequate for reimbursement because they prevent a court from evaluating the reasonableness of time spent on a particular task and whether the proper amount of time has been deducted for non-compensable tasks. Id.

The attorney and expert fee schedules attached to the Interim Petition are riddled with entries that contain inadequate documentation and woefully fail to meet the standard of providing the Court a high degree of certainty that the hours submitted were actually reasonably expended.

a. Dennis Gingold

Mr. Gingold's fee schedule contains dozens of time entries between April 24, 1996, and November 24, 1996, in which all of the tasks for each day are lumped together in one time entry. See Gingold Schedule at 1-21. Some of his entries span as many as 12 hours and contain several tasks, but with no breakdown to explain how much time he spent on each task. See, e.g., id. at 3 (10.8 hours on 6/5/96 in one entry); id. at 8 (12.0 hours on 7/25/96 in one entry). Under the circumstances, it is impossible for Defendants or the Court to determine whether the hours included were reasonably expended for each task. Thus, the time included in such entries should be deducted from any fee award to Mr. Gingold. Hensley, 461 U.S. at 433.

b. Robert Peregoy

Mr. Peregoy's submission also contains several entries that do not segregate tasks. For example, on June 5, 1996, he includes 11.9 hours of work on seven different tasks in one entry, and on June 7, 1996, he includes 13.2 hours of work on five tasks in one entry, only segregating 1.5 hours and leaving the reader to guess how the other 11.7 hours are divided. Peregoy Schedule at 2-3. It is impossible for Defendants or the Court to determine whether a reasonable

amount of time is expended on each task. Any fee award to Mr. Peregoy should be reduced accordingly.

Mr. Peregoy also fails to adequately document entries by not specifying the subject matter of meetings or conference calls in several instances, and it is not otherwise apparent from their context which matters they concern. Indeed, for one conference call, he does not bother to include any subject matter at all:

Robert Peregoy Inadequately Documented Entries		
DATE	Activity	Hours Billed
5/31/96	MEET WITH N-D, JMCC, DG, DP, RD, KH, EC LD	2
6/1/96	MEET WITH IIM TEAM	7
6/14/96	MEET WITH D HARRISION, C AHWINONA, M ZUNI	1
6/27/96	GENERAL CALLS TO DG; RD; DP	0.5
7/2/96	TELEPHONE CALL TO DENNIS G RE MEETING	0.6
7/2/96	PREPARATION OF MEETING WITH KSIH, PRESS, GLIDDEN	0.8
7/2/96	MEET WITH KISH, PRESS AND GLIDDEN	1.4
7/2/96	TELEPHONE CALL TO LMC AND JEE RE MEETING WITH KISH, ET AL	0.9
7/2/96	MEET WITH RD, KH RE MEETING	1.5
7/2/96	GENERAL FOLLOW-UP NOTES AFTER MEETING	0.8
7/12/96	TELEPHONE CALL FROM TELECON WITH TEAM	1.5
7/15/96	MEET WITH IIM TEAM	0.8
7/18/96	MEET WITH IIM TEAM	3
12/20/96	TELEPHONE CALL FROM [no description]	0.5
Total		**22.30**

These inadequately documented time entries should be excluded from any fee award to Mr. Peregoy.

c. Richard Dauphinais

Mr. Dauphinais's time records contain inadequate descriptions throughout. Examples include "Meet with DG, DP, RP, KH" for 2.5 hours on May 15, 1996, and 2.5 hours of additional time spent on that day for "Preparation of MTG" without specifying what either of the meetings concerned or even if they concerned this case. See Dauphinais Schedule at 2. In addition, for numerous entries, Mr. Dauphinais uses indecipherable shorthand and initials that make it impossible for Defendants and the Court to discern the particular task for which he is billing. See, e.g., id. at 7. Time entries with inadequate or indecipherable descriptions should be deducted from any award to Mr. Dauphinais.

d. Thaddeus Holt

Mr. Holt seeks reimbursement for the following entries in which he fails to document the subject matter of research, telephone calls, and a meeting:

Thaddeus Holt Inadequately Documented Entries		
DATE	Activity	Hours Billed
5/1/96	Basic Research	3
5/2/96	Basic Research	3
5/3/96	Basic Research	3
7/15/96	Confce call and followups	2.5
7/19/96	Research	4
7/23/96	Confce call and followup	3
10/17/97	Prepare for XXX meeting; lunch meeting with Gingold, Cobell to discuss same, future strategy; telcon Harper re status, projects for status conference	4.5

7/18/98	Research at WBAM	4
Total		**27.00**

Mr. Holt's failure to adequately describe these tasks makes it impossible to determine whether the time Mr. Holt spent on these tasks was reasonable. Thus, 27 hours should be deducted from any fee award to Mr. Holt.

e. Elliot Levitas and Attorneys and Staff Under his Supervision

Mr. Levitas's affidavit submits a schedule seeking reimbursement for numerous individuals he alleges were under his supervision. Although he identifies several of the individuals in his affidavit, his fee submission contains the following initials of other unidentified individuals: "MSY," "WWB," "TC," "BLS," "DGB," "ASC," "JWX," "TKB," "JCB," "AD," "DFC, "JTC," "RCV," "JFM," and "RSF." Levitas Affidavit. Because these individuals are not identified, Defendants have no way to determine whether the 186.7 hours submitted for these individuals was reasonable. Time for these individuals should be excluded from any fee award to Mr. Levitas and his firm.

f. PriceWaterhouseCoopers

If the Court were to determine that Plaintiffs are eligible for reimbursement for any of the time spent by Plaintiffs' expert, PWC, the Court should disallow reimbursement for those portions of PWC's time submissions with inadequate documentation. In her affidavit, PWC partner Jessica Pollner admits that PWC can provide no adequate documentation for its alleged work through March 1998. She adds this disclaimer in her affidavit: "[S]ufficient details were not maintained to allow a description of the specific tasks performed by person by day. Subsequent to March, 1998, our invoices detailed the tasks completed by each PwC staff member

by day, as well as the total hours for each task." Pollner Affidavit, ¶ 30. Plaintiffs never address this defect, but simply attach PWC's bill and request full reimbursement for the period of time for which adequate documentation is lacking – totaling a staggering $1,723,377 – notwithstanding that their expert concedes that documentation is inadequate. This submission is particularly egregious because Plaintiffs have known since the beginning of this litigation that they intended to seek EAJA fees, Complaint at 27, and therefore had the responsibility to instruct their expert to maintain detailed time records if they expected to be reimbursed. Because no detailed records were kept and no adequate documentation is presented, it is impossible for Defendants or the Court to ever know whether the time for which Plaintiffs seek reimbursement was reasonable. Accordingly, PWC's undocumented time should be excluded and the amount billed for that time period for PWC, $1,723,377 should be deducted from any fee award.[37]

2. Excessive Time Claimed

A court also should exclude from a fee calculation "hours that were not 'reasonably expended.'" Hensley, 461 at 434 (quoting S. Rep. No. 94-1011, at 6 (1976)). Counsel for the prevailing party must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Id. In addition to excessiveness by one attorney, duplication of effort is another basis on which hours have been found to be excessive. Role Models, 353 F.3d at 972. As the D.C. Circuit has explained, "[h]ours are not reasonably expended if an attorney duplicates work done earlier by another attorney, if an attorney takes extra time due to inexperience, or if an attorney performs tasks that are normally performed by paralegals, clerical personnel or other non-attorneys." Action on Smoking and Health, 724 F.2d at 221. The standard of

[37] The amount of time submitted by PWC is also excessive. See Section VI.A(2), infra.

reasonableness under EAJA in some instances prohibits recovery for fees that law firms routinely bill clients. "In awarding fees under the EAJA, however, [the courts] have a special responsibility to ensure that taxpayers are required to reimburse prevailing parties for only those fees and expenses actually needed to achieve the favorable result."[38] Role Models, 353 F.3d at 975.

Plaintiffs' fee submission as a whole is excessive on its face. Plaintiffs request nearly $15,000,000 in fees and expenses, including $4,817,641.70 for lead counsel Dennis Gingold. Perhaps the most egregious example of Mr. Gingold's excessive billing are his entries for time spent editing his own time entries – after the fact. For the period between June 4, 2004, and August 14, 2004, he submits, along with other time, a series of 63 virtually identical time entries containing the description "review, segregate, prepare relevant time re Trial 1 EAJA petition fee application." See Gingold Schedule at 260-264. In his affidavit, Mr. Gingold euphemistically refers to this pursuit as "add[ing] clarity" to his time entries. Yet, in total, Mr. Gingold seeks reimbursement for 454.2 hours for simply fixing his time entries to get a fee award. At the market rate Mr. Gingold is attempting to claim, this amounts to $249,810 sought in reimbursement for adding "clarity" to time entries. That does not include 15.7 hours Mr. Gingold claims for meeting and conferring with colleagues about "the same." In total, Mr. Gingold incurred 604.7 hours on preparing his fee petition.

To put the utter excessiveness of Mr. Gingold's time editing activities into proper perspective, Mr. Gingold's bill indicates that he spent more time fixing his time entries to obtain

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[38] Thus, the willingness of a private client to pay a bill does not necessarily mean the fee can be assessed against the government. Role Models, 353 F.3d at 975.

a fee award than he spent on the case from inception up through researching, drafting and filing the complaint (202.3 hours), or during the trial dates of the Phase 1 proceeding (428 hours), or preparing proposed findings of fact and conclusions of law for Phase 1 and Plaintiffs' Reply (269.2 hours). By any measure, this type of billing is so grossly excessive that the Court should deduct such time – 469.9 hours – from any award to Mr. Gingold, rather than unjustifiably rewarding his behavior at taxpayer expense.

In addition to Mr. Gingold's time editing activities, the total time Plaintiffs' attorneys spent on preparing their entire EAJA petition – 1,410.46 hours – is excessive. The following table lists the amount of time each individual attorney or law clerk billed for preparation of the fee petition:

Plaintiffs' EAJA Time	
ATTORNEY	TIME
Gingold	604.70
Harper	206.80
Guest	75.60 (Not Detailed)
Kelly - Law Clerk	41.00 (Not Detailed)
Babby	None Listed
Echohawk	None Listed
Holt	17.50
Levitas	160.30
Brown	140.16
Rempel	164.40
Pollner-PWC	None Listed
Total Hours:	**1410.46**

Plaintiffs may attempt to justify this enormous expenditure of time by claiming that they were required to review time spent after the Phase 1 trial to identify time spent on so-called "monitoring" of the Phase 1 trial order. To the contrary, expending time in that manner was completely unnecessary because the Court's May 27, 2004 Order plainly ordered Plaintiffs to only submit a petition "for work done through the Phase 1.0 proceeding." Cobell, 319 F. Supp 2d at 44.

If Plaintiffs had simply abided by the Court's order and only reviewed time through the Phase 1 trial, including the time spent on the appeal, there would have been no reason to waste additional time wading through entries in 2000 and 2001. While it is impossible to determine exactly how much additional time Plaintiffs spent searching through these entries, it is apparent that their decision to extend the date range substantially increased the time spent to prepare the petition. Accordingly (after deducting the excessive time Mr. Gingold spent editing his entries), the Court should apply a 50 percent reduction to the remaining hours each attorney and law clerk has submitted for time preparing their EAJA petition.

Not to be outdone, Plaintiffs' experts at PWC submitted bills for $4,528,684, at times billing as much as $265,769 per month on the case. Pollner Affidavit, Exhibit AC. In PWC, Plaintiffs had a veritable think tank of 44 consultants who were nearly constantly billing on this case (although they only started keeping detailed records in March 1998). While it is up to Plaintiffs to determine PWC's value to them, when viewed objectively in terms of hours reasonably expended, much of their work was overkill, particularly since there were several attorneys and support staff already working on the litigation full time.

PWC billed an excessive number of hours for trial time during the Phase 1 trial. In addition to Plaintiffs' lawyers and legal staff, there were as many as three PWC consultants at $200 per hour in court at any given time, inflating Plaintiffs' hourly expenses by $600 per hour. See Pollner Affidavit, Exhibit AG, July and August 1999. This was an unnecessary duplication of effort that contributed to PWC's excessive bill. PWC consultants describe their time as "trial preparation and attendance" or "trial attendance and preparation" or simply "trial attendance." Id. However, they were not testifying experts and Plaintiffs fail to provide any justification for having as many as three consultants from the same firm sitting in court. Accordingly, Plaintiffs should be reimbursed – at most – for one consultant's time for each day of the Phase 1 trial.

PWC billed 539 hours resulting in $100,975 in expenses for "Assistance with Post Trial Briefs." Pollner Affidavit, Exhibit AD. Plaintiffs already had five attorneys, and legal assistants, spending 522 hours on post trial briefing. Plaintiffs fail to meet their burden to show that it was reasonable to have a consulting firm spend even more time on that same task. It should be excluded as excessive.

PWC billed 252 hours to review DOI's High Level Implementation Plan [HLIP] resulting in a bill of $50,400. Pollner Affidavit, Exhibit AD. The HLIP was 93 pages, which means that it cost $541.93 per page just to have PWC "review" the document, in addition to amounts charged by Plaintiffs' attorneys for the same task.

In a recent decision analyzing the reasonableness of a fee application, the court found it appropriate to compare the total number of hours worked to the specific document produced. Mitchell v. National R.R. Passenger Corp., 217 F.R.D. 53, 58-60 (D.D.C. 2003) (Facciola, MJ); see also Environmental Defense Fund v. Reilly, 1 F.3d 1254, 1258 (D.C. Cir. 1993) (evaluating

fee application under Resource Conservation and Recovery Act by multiplying prevailing hourly rate by number of attorney hours reasonably expended).

We have randomly selected several pleadings for which time was submitted in the Interim Petition and calculated the amount of time claimed for these documents. This analysis reveals that Plaintiffs' attorneys have submitted excessive billings. For example, Plaintiffs submitted 24.8 hours (from four different attorneys) for a two-page Request for Trial Date (filed October 28, 1997) – over twelve hours per page. For the nine-page Reply to Defendants' Opposition to the Request for Trial Date (filed November 13, 1997), Plaintiffs submitted 122.33 hours – over thirteen hours per page. Attached as Exhibit 8 is a table identifying the more egregious examples of this type of excessive billing in the Interim Petition.

In addressing excessive fee requests, the D.C. Circuit has applied a fixed reduction when a large number of entries suffer from one or more deficiencies. See Action on Smoking and Health, 724 F.2d at 220 ("Where a [fee] request has been inadequately documented, or is excessive, we will not attempt to identify and eliminate particular hours. Rather, following the Supreme Court's suggestion in *Hensley v. Eckerhart*, we will 'simply reduce the award' by particular percentages to account for deficiencies in the application."). Based on overall excessiveness, Plaintiffs' fee request should be reduced by at least 20 percent, after hours outside the scope of the Court's May 27, 2004 Order, inadequately documented hours, and otherwise non-compensable hours are excluded.

3. Time Otherwise Not Compensable Under the EAJA

Certain activities and expenses for which attorneys might ordinarily bill clients are nevertheless non-compensable under the EAJA. These include: (1) time spent filing and serving

documents, Role Models, 353 F.3d at 973; (2) time spent conversing with the press, id. ; (3) overhead expenses, including time spent by attorneys drafting a retainer agreement, time spent applying for admission to a court, secretarial or clerical duties, id. at 973-74; and (4) taxi fares, messenger services, travel expenses, telephone bills, and postage expenses, Massachusetts Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066, 1069 (D.C. Cir. 1985).

Plaintiffs seek reimbursement for the following non-compensable activities and expenses:

a. Dennis Gingold

Mr. Gingold seeks reimbursement for time spent "filing" the Complaint and "serving" individuals, listed in addition to drafting the complaint in an unsegregated 9.5 hour time entry on June 10, 1996. Gingold Schedule at 3. He also seeks reimbursement for "serving" Paul Homan with a subpoena as well as drafting it in an unsegregated 3.8 hour time entry dated May 28, 1997. Because these time entries are not segregated, it is impossible to determine how much time he actually spent on drafting these documents as opposed to "filing" and "serving" them. Accordingly, 13.3 hours should be deducted from any award to Mr. Gingold.

b. Keith Harper

Mr. Harper seeks reimbursement in the following time entries for time apparently spent consulting with the media and preparing for other public relations activities, traveling to and attending conferences, and performing administrative tasks relating to funding Plaintiffs' litigation efforts:

Keith Harper Other Non-Compensable Activities		
DATE	Activity	Hours Billed
	Media and Public Relations Activities	
9/3/96	(RC) NATIVE AM. NEWS: UPDATE ON CASE	0.7
9/9/96	NATIVE NEWS CALL	0.2
10/18/96	TELEPHONE CALL TO JIM MCCARTHY RE: NBC & LA TIMES	0.3
10/29/96	CONFERENCE CALL WITH DG RE: WHETHER TO ATTEND ALBEQUERQUE, MEDIA STRATEGY, SPECIAL TRUSTEE AND FY98 APPROPRIATIONS	0.3
12/10/96	TELEPHONE CALL FROM NATIVE NEWS REPORTER; UPDATE	0.2
1/3/97	TELEPHONE CALL FROM MCCARTHY; RE: MEDIA DEVELOPMENTS, PARTICULARLY KEEPING INDIAN COUNTRY INFORMATION AS PER DENVER ITMA MEETING	0.3
1/23/97	TELEPHONE CALL FROM MCCARTHY; RE: MEDIA INDIAN COUNTRY RELEASE AND SCHEDULING	0.2
1/23/97	TELEPHONE CALL FROM MCCARTHY; GET VERSIONS OF PRESS RELEASE & MOVE FORWARD ON INDIAN MEDIA SCHEDULE	0.2
1/23/97	TELEPHONE CALL FROM MCCARTHY; PRESS RELEASE AND CONFERENCE	0.5
1/24/97	CONFERENCE CALL WITH BP & MCCARTHY; INDIAN PRESS	0.1
1/24/97	TELEPHONE CALL TO FINAL COMMENTS ON MEDIA RELEASE & SUGGEST PRE-CALL FOR HOSTS AND MCCARTHY APPROVE FINAL PRESS RELEASE	0.2
1/24/97	TELEPHONE CALL TO N*D; RE: INDIAN MEDIA TELECONFERENCE	0.1
1/24/97	TELEPHONE CALL FROM JM; RE: LAST EDIT ON PRESS RELEASE	0.1
1/24/97	TELEPHONE CALL TO RETURN CALL FROM REPORTER @ FORT HALL & LEAVE MESSAGE TO CONTACT MCCARTHY	0.1
1/27/97	TELEPHONE CALL TO DG; RE: REPLY BRIEF & MEDIACC	0.3
1/28/97	CONFERENCE CALL WITH INDIAN COUNTRY MEDIA; Q & A SESSION	1.0

1/28/97	CONFERENCE CALL WITH EC & JEE; RE: PRE-CONFERENCE CALL FOR UPDATE FOR THE INDIAN COUNTRY MEDIA CALL	0.4
2/6/97	TELEPHONE CALL FROM TWO INDIAN COUNTRY PAPERS & TIMES	0.4
2/6/97	TELEPHONE CALL FROM DG; UPDATING HIM ON MEDIA DEVELOPMENTS	0.3
2/7/97	CONFERENCE WITH INDIAN COUNTRY PAPERS INCL. ADVOCATE	0.3
3/19/97	TELEPHONE CALL FROM REPORTER FROM PUBLIC RADIO (MN)	0.2
10/14/97	GENERAL RESEARCH ATTEND ITMA CONFERENCE; COLLECT INFO; TAKE NOTES; ADDRESS QUESTIONS RE: IIM CASE; ATTEND CONFERENCE DINNER; REQUEST FOR INFORMATION	8.40
3/2/99	TELEPHONE CALL FROM AM LAWYER PHOTOGRAPHER	0.3
7/18/99	TRAVEL TO WEST COAST (ON WAY TO VANCOUVER) FOR NCAI MEETING	6
7/19/99	DRAFT COMMENTS FOR NCAI PRESENTATION	3.5
7/21/99	MEET WITH INDIVIDUALLY W/ TRIBAL LEADERS TO DISCUSS VARIOUS ISSUES RE: IIM CASE; ADDRESS RAISED POLITICAL CONCERNS	1.5
7/22/99	PREPARATION OF COMMENTS FOR PRESENTATION TO GENERAL ASSEMBLY	3.5
7/22/99	APPEAR AT PRESENTATION OF COMMENTS TO GENERAL ASSEMBLY	1
7/26/99	TRAVEL FROM WEST COAST TO DC (POST NCAI)	8
9/2/99	GENERAL TRAVEL FOR ITMA IN WARM SPRINGS	0.2
9/7/99	TELEPHONE CALL TO MARY ZUNI RE: ITMA CONFERENCE	0.3
9/7/99	DRAFT STATEMENT FOR ITMA CONFERENCE	1.2
9/13/99	TRAVEL TO WARM SPRINGS FOR ITMA MEETING	7
9/13/99	DRAFT AND FINALIZE NOTES FOR COMMENTS ON COBELL CASE FOR ITMA	1.2
9/14/99	GENERAL ATTEND REMAINDER OF ITMA SESSION INCL. DISCUSSIONS BY TOMMY THOMPSON, MCHUGH, HARRISON, ZUNI, ORR, ETC.	6
9/15/99	TRAVEL FROM WARM SPRINGS FROM ITMA MEETING	7

2/23/00*[39]	APPEAR AT NCAI POLICIES AND PROCEDURES MEETING; DISCUSS SAME WITH DG AND LB	4
2/24/00*	APPEAR AT NCAI TO DISCUSS COBELL ISSUES WITH TRIBAL	1.4
4/4/00*	GENERAL PREPARATION OF COMMENTS FOR FBA AND RESEARCH	2.1
	Administrative and Funding Activities	
8/14/97	TELEPHONE CALL FROM DG; RE: LEGEND ISSUE AND LANNAN FOUND. FUNDING AND USE FOR PRICE	1.1
12/1/97	TELEPHONE CALL FROM DG; RE: UPDATE ON BANK OF AMERICA FUNDING POSSIBILITY	0.35
1/8/98	DRAFT LETTER. (1ST) OF ENGAGEMENT LETTERS.	0.9
2/4/98	TELEPHONE CALL FROM REBECCA ADAMSON RE: POTENTIAL FUNDING FR ALLOTTEE FACT-FINDING	0.5
Total		**71.75**

The foregoing time is not compensable under EAJA and thus, 71.75 hours should be deducted from any award to Mr. Harper.

c. Robert Peregoy

Mr. Peregoy seeks reimbursement for the following time spent on public relations matters as well as administrative time on client engagement letters:

Robert Peregoy Other Non-Compensable Activities Under the EAJA		
DATE	Activity	Hours Billed
5/29/96	MEET WITH IIM TRUST TEAM MEETING AND INTERVIEWS WITH COMMUNICATIONS FIRMS	4
6/3/96	MEET WITH MEDIA CONSULTANTS AND IIM TEAM	3

[39] The time that should be excluded for other reasons, such as post-Phase 1 work, is marked with an asterisk.

6/7/96	MEET IIM ATTORNEYS; TT AND MT WITH PR PEOPLE; DRAFT 2 PAGE PR PAPER; DRAFT, SEND AND COLLECT CLIENT ENGAGEMENT LETTERS FOR CLEGHORN, LAROSE AND MAULSON TALK WITH REPORTERS FROM AZ REB, USA TOD AND INDIAN COUNTRY TODAY; REVIEW AND EDIT COMPLAINT 1.5 HOURS;	13.2
7/25/96	PREPARATION OF PORTLAND TRIP-REVISE FACT SHEET, Q&A DRAFT PRESS RELEASE; TT BOULDER; TT JEE; TT DG (4); TT DP (1); HEARING PREP; GN MT RD; MT KH RE DOCS;	8
12/18/96	TELEPHONE CALL TO DENNIS GINGOLD RE DISCOVERY ORDER; HISTRAN FILES; BILLING MATTERS	0.3
2/26/97	DRAFT REVISE LETTER TO ANHORAGE TIMES AND DRAFT LETTER TO CONG YOUNG RE EDITORIAL; CALL HILL RE SAME	1.3
4/8/97	TELEPHONE CALL TO TWO CALLS TO DENNIS GINGOLD RE GRANT AND ATTORNEYS TIME	0.4
4/29/97	REVIEW GINGOLD, HOLT, PW CONTRACTS AND BILLS AND DRAFT MEMO TO BOULDER AND FAX	0.5
8/15/97	GENERAL PREPARE SPEECH	1
8/16/97	PREPARATION OF SPEECH	2
8/17/97	FINALIZE SPEECH TO INDIAN COUNTRY RE IIM STATUS	1
Total		**34.70**

Since public relations and administrative time is not compensable under the EAJA, 34.7 hours should be deducted from any award to Mr. Peregoy.

d. Lorna Babby

Ms. Babby seeks reimbursement for the following time preparing for, traveling to, attending, and speaking at a symposium:

Lorna Babby Other Non-Compensable Activities Under the EAJA		
DATE	Activity	Hours Billed
9/14/99	PREPARATION FOR INDIAN LAND CONSOLIDATION SYMPOSIUM PRESENTATION ON COBELL LITIGATION (DISCUSS W/ KEITH)	2.3

9/20/99	PREPARATION OF COMMENTS FOR COBELL PRESENTATION AT INDIAN LAND CONSOLIDATION SYMPOSIUM	1.5
9/20/99	TRAVEL TO PALM SPRINGS (PHOENIX LAYOVER)	7.8
9/23/99	TRAVEL FROM PALM SPRINGS TO PHOENIX	1.5
9/23/99	GENERAL INDIAN LAND CONSOLIDATION SYMPOSIUM; COBELL PRESENTATION	7.6
Total		**20.70**

Since time spent on public relations matters is not compensable under the EAJA, 20.7 hours should be deducted from any award to Ms. Babby.

e. Thaddeus Holt

Mr. Holt seeks reimbursement for the following time spent on administrative matters that appear to relate to Plaintiffs' efforts at securing funding and budgeting for the litigation:

Thaddeus Holt Other Non-Compensable Activities under the EAJA		
DATE	Activity	Hours Billed
11/27/96	Further telcons and discussions revising orders; attended status confce re same; followup with govt lawyers; review report to funders (0.5 hrs court time)	2.5
11/29/96	Revising report to funders	1
12/23/96	Work on budgeting, funding questions; telcons Gingold re same	1
12/26/96	Review draft budget etc	1
12/27/96	Draft budget; draft proposal re 1997	1
4/22/97	Telcon Gingold re new billing practices	0.5
5/7/97	Telcons Gingold re contracts	0.2
5/7/97	Review Gingold 1st draft contract	0.3
5/8/97	Telcons Gingold re contracts	0.2
5/9/97	Review Gingold 2d draft contract	0.5

5/10/97	Telcon Gingold re NARF contracts	0.1
5/11/97	Review Gingold 3d draft contract	0.1
10/10/97	Telcons, voicemails Gingold re XXX Fdn, handling of demand for sample	0.5
Total		**8.90**

These all appear to be overhead items that are not compensable under EAJA. Accordingly, 8.9 hours should be deducted in calculating the portion of any fee award pertaining to Mr. Holt.

Mr. Holt also seeks reimbursement for $3,626.59 in expenses: $1,808.25 in taxi fares; $1,220.90 in telephone expenses; and $597.44 in miscellaneous expenses for Lexis, Express mail, telephone bills, transcript fees, United Parcel Service, and postage expenses. Exhibits 2-4, Holt Affidavit. Of these expenses, only the $356.68 claimed in Lexis expenses are compensable under the EAJA. Therefore, $3,269.91 in expenses should be deducted from any award to Mr. Holt. The Court should also deduct the 3.0 hours Mr. Holt spent preparing his expenses schedule because D.C. Circuit case law has determined that these expenses are not compensable under the EAJA. Massachusetts Fair Share, 776 F.2d at 1069.

f. Elliott Levitas

Mr Levitas seeks reimbursement for the following time entries pertaining to client engagement letters, which are not compensable under the EAJA:

Elliott Levitas & Attorneys & Staff Under His Supervision Other Activities Not Compensable Under the EAJA		
DATE	Activity	Hours Billed
3/22/99	EHL - draft and revise engagement letters to plaintiffs, modifications to same and lawyer fees reduction	0.5
4/7/99	EHL - revisions to engagement letters to plaintiffs	0.7
Total		**1.20**

Accordingly, 1.2 hours should be deducted from any award to Mr. Levitas.

g. Geoffrey Rempel

Mr. Rempel seeks reimbursement for the following time spent on public relations matters, contracting and consulting with public relations firms, internet web site firms, and also secretarial and administrative tasks, which are not compensable under the EAJA:

Geoffrey Rempel Other Activities Not Compensable Under the EAJA		
DATE	Activity	Hours Billed
	Non-Compensable Time Spent on Public Relations Matters	
5/24/00*	Meeting w/ DG and Phil Smith PR firm re: public relations and class outreach.	1.5
6/5/00*	Discussion and meeting w/ Policy Impact,[40] potential PR firm for Plaintiffs. DG, EC.	1.5
6/5/00*	CC w/ EC, DG (part) re: afternoon meeting with Policy Impact.	1.3
6/12/00*	Review Policy Impact proposal for clients.	0.3
6/16/00*	Meeting w/ Policy Impact, DG re: Public Relations approach and outreach.	1.0
6/22/00*	Meeting w/ Hayley Barber, Policy Impact, DG re: T II update and PR for IIM class.	1.2
6/23/00*	Meeting w/ Policy Impact, DG, EC re: T II and PR requirements for class.	1.3
6/25/00*	Review Policy Impact letter to EC re: T II and public relations for class.	0.2
6/26/00*	Discussion w/ Phil Smith re: Policy Impact contract.	0.1
6/27/00*	Draft e-mail to EC re: Policy Impact and contract revisions.	0.2
6/27/00*	Discussion w/ Policy Impact re: contract changes.	0.4
6/28/00*	CC w/ EC re: T II update and Policy Impact.	0.2
6/29/00*	Draft letter to Joe Ignat re: authorization of website for outreach.	1.3
7/6/00*	Review Internet material for IIM website.	0.3
7/6/00*	Discussion with Phil Smith, Policy Impact, re: events update.	0.1

[40/] Mr. Rempel indicates in his affidavit that Policy Impact is a public relations firm. Rempel Affidavit at ¶ 16, p. 6.

7/6/00*	Review contract for internet services co. Viawest. Forward onto Viawest.	1.5
7/9/00*	E-mail response to Phil Sith, Policy Impact.	0.1
7/10/00*	E-mail w/ Phil Smith re: update.	0.1
7/10/00*	Discussion w/ Phil Smith. Update on case status.	0.2
7/11/00	Discussion w/ Phil Smith re: udpate on events and T II progress.	0.3
7/11/00*	Discussion w/ Joe Ignat re: internet website, progress of identification of experts and related T II issues.	0.5
7/12/00*	Discussion w/ DG and Policy Impact re: approach to communication with constituents, reporters and class. (EC by phone).	1.2
7/13/00*	Review Policy Impact case overview and edit.	0.3
7/17/00*	Discussion w/ Phil Smith re: IIM chronology for communication purposes.	0.2
7/17/00*	Review Phil Smith chronology for completeness and accuracy.	0.2
7/21/00*	CC w/ Joe Ignat re: meeting w/ Policy Impact re: internet web hosting service.	0.1
7/25/00*	Meeting w/ Policy Impact, EC, Joe Ignat (by CC for part) re: status of public relations effort, Babbitt and status of litigation.	2.0
7/25/00*	Discussion w/ Phil Smith re: website, approach and related issues.	0.4
8/2/00*	Review web hosting contract for PR firm.	1.1
8/3/00*	CC w/ web hosting firm, Phil Smith and MKB re: contract and disputed provisions.	0.5
8/3/00*	Review web hosting contract and update with draft changes.	2.0
8/4/00*	Review web hosting contract and update with MKB and my changes.	0.8
8/9/00*	CC w/ Policy Impact, GSL, MKB re: contract w/ web hosting firm. (2 calls).	0.4
8/10/00*	CC w/ Blackburn re: PR firm.	0.3
8/21/00*	CC w/ Adam Lombardo re: invoicing and web site.	0.1
8/28/00*	Review web site material and suggest changes.	0.4
8/29/00*	CC w/ EC re: update & approach to NPR interview. (2 calls)	0.7
9/2/00*	CC w/ Phil Smith re: submittal of affidavit of Diane Rehm radio program w/ Gover.	0.2
9/5/00*	Left msg w/ Real Legal re: posting on transcripts on web site.	0.1
9/5/00*	CC w/ Eva Gottleib at Real Legal re: posting transcripts on web site.	0.1

9/6/00*	Transfer domain name to GSL re: Indian trust web site, including CC w/ Adam Lombardo (website contractor).	1.5
9/7/00*	Left msg. For real legal.com re: web site.	0.1
9/13/00*	CC w/ reallegal.com re: web hosting.	0.4
9/14/00*	CC w/ GSL Solutions re: Indian trust web site.	0.3
9/15/00 *	Meeting w/ GSL personnel re: indian trust web site.	0.6
9/15/00*	CC w/ AP reporting re: class size definition.	0.2
9/18/00*	Meeting w/ Policy Impact re: communication w/ class and related settlement updates.	0.2
11/7/00 *	CC w/ GSL re: web site.	0.2
11/29/00*	CC w/ EC, Phil Smith re: presentation (2 calls).	0.6
12/13/00*	Review Policy Impact contract draft and edit.	1.3
12/15/00*	Review Policy Impact contract and edit.	0.5
12/18/00*	CC w/ DG, EC re: recent motions and events, including Policy Impact.	0.3
12/18/00*	Edit Policy Impact contract.	0.5
12/18/00*	Meet w/ Policy Impact regarding contract edits and goals, includes CC w/ principal.	0.4
12/19/00*	Discuss w/ Policy Impact re: agreement.	0.2
12/19/00 *	CC w/ EC, DG re: Policy Impact.	0.2
12/19/00*	Review Policy Impact contract.	0.3
1/19/01*	Discuss w/ EC, Policy Impact, DG re: status.	1.7
1/26/01*	Discuss w/ DG, MB, Policy Impact re: drafting of public comments.	1.6
1/26/01*	Meet w/ DG, Policy Impact, MKB re: status of case and recent events.	0.4
2/6/01*	CC w/ Policy Impact, GSL re: website.	0.2
2/12/01*	Discuss case options w/ Policy Impact, DG, MB.	0.5
2/12/01*	Discuss w/ DG, Policy Impact re: status.	1.3
	Non-compensable Time Serving Documents and on Secretarial Duties	
7/12/00*	Transcribe unknown caller's voice mail for possible investigation into probate (mis) reporting.	0.3
9/8/00*	Serve email brief at federal courthouse.	0.6
12/16/00*	Fax to DOJ motion for extension.	0.2

1/05/01*	Go to Courthouse to retrieve Bakaly Grand Jury investigation material for e-mail contempt	1.3
Total		**40.60**

Accordingly, 40.6 hours should be deducted from any award to Mr. Rempel.

B. Hourly Rates

1. The EAJA-Capped Rates Are Appropriate For Any Fees Awarded

If the Court finds that Defendants' position was not substantially justified and it elects to award interim fees to Plaintiffs, then it should use the EAJA-capped rates in calculating any fee award to Plaintiffs.[41] As set forth above, Plaintiffs have failed to meet the stringent standard to establish bad faith conduct by Defendants that could entitle them to hourly rates beyond the statutory cap.

2. The Laffey Matrix Should Apply For Fees Attributable To Conduct Deemed Bad Faith.

If the Court were to disagree with Defendants and find bad faith conduct, the Court should use the Laffey Matrix to determine "market rates." In determining a reasonable hourly rate, the petitioner's proposed rates should be compared to rates "'charged for similar work by attorneys of like skill in the area.' " Sierra Club v. Army Corps of Engineers, 776 F.2d 383, 392 (2d Cir. 1985) (remanded to the district court where there was no indication that these rates were compared with rates charged by attorneys in similar skill area) (quoting Cohen v. West Haven Board of Police Comm'rs, 638 F.2d 496, 505-06 (2d Cir. 1980)). As this Court has previously observed, the updated version of the Laffey Matrix "reflects prevailing market rates in the greater

[41] Defendants agree with Plaintiffs that the table included in the Interim Petition, id. at 12, reflects the appropriate capped EAJA rates, as adjusted for cost of living increases.

Washington area." Cobell v. Norton, 231 F. Supp. 2d 295, 302 (D.D.C. 2002). Moreover, Plaintiffs have previously submitted the Laffey Matrix as evidence of reasonable hourly rates for calculating prior fee awards in this case. Id.

Plaintiffs fail to provide any competent evidence that the Laffey Matrix no longer represents a reasonable hourly rate. In the Interim Petition, they request that the Court depart from the Laffey Matrix and increase their fees based on substantially higher rates found in a PWC "Survey" attached to their submission. See Levitas Affidavit, Exhibit D-1.[42] Indeed, it dramatically enriches their fee award – increasing Mr. Gingold's submission alone by over $1.4 million, see Gingold Affidavit at 15 – yet Plaintiffs do not bother to lay a foundation for use of the survey, either by affidavit or other means, or otherwise attempt to explain why it should serve as competent evidence of "market rates." Instead, they just casually attach it to their submission with a passing mention in a footnote explaining that they "utilized" the PWC survey instead of an expert for evidence of "market rates." See EAJA Petition at 2 n.2.

In using the PWC survey, Plaintiffs provide no explanation as to whether all relevant parts of the PWC survey are attached,[43] what the methodology is behind the survey, whether it is typically used or has ever been used in litigation as evidence of reasonable market rates or whether it is applicable to attorneys practicing in this type of class action litigation in this locality. There is also no way to tell from the survey itself whether Mr. Gingold, for instance,

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[42] Plaintiffs mistakenly inform the Court that the PWC "survey" is attached to the Gingold Affidavit. See Interim Petition at 2 n.2. In addition, their request – unaccompanied by a motion for a protective order – that the PWC "survey" be kept confidential, id., should not be granted.

[43] Without explanation, it provides less detailed information for the years 1996 and 1997 than for the years 1998 through 2001. See Levitas Affidavit, Exhibit D-1.

should be billed at the very top billing rate category for all attorneys in Washington, DC, as he opines in his affidavit. Gingold Affidavit at 14. Tellingly, Mr. Gingold and Mr. Holt both state in their affidavits that, prior to June 5, 1998, the actual hourly rate they charged their clients in this case was $345 per hour, including expenses. Gingold Affidavit at ¶ 29; Holt Affidavit at ¶ 22. Yet, they now both inexplicably seek to rely on this survey for higher "market rates" than they actually charged their clients. Gingold Affidavit at ¶ 30; Holt Affidavit at ¶ 23. In short, Plaintiffs have submitted the PWC survey without meeting their burden to establish that the rates contained therein are "'charged for similar work by attorneys of like skill in the area.'" Sierra Club, 776 F.2d at 392. Therefore, it must be rejected.

3. Hourly Rates For Consultants Performing Paralegal Work Must Not Exceed The Reasonable Hourly Rate For Paralegals

Improper billing rates from Plaintiffs' consultants also contribute to the excessiveness of the Interim Petition. Plaintiffs' professional consultants bill at a $200 to $225 hourly rate for tasks ordinarily performed by a paralegal at a lower rate. Examples include, but are not limited to, PWC Associate Consultant Chris Weber spending 149 hours in February 1999 bates numbering documents. See Pollner Affidavit, Exhibit AG, February 1999. At his $200 consultant rate, this amassed a $29,800 bill. Similarly, during February 1999, another PWC Associate Consultant, Henry Ines, spent 117 hours to inventory, stamp, and label documents at an hourly rate of $200 per hour, amassing a $23,400 bill. Id. Prior to that, in August 1998, Mr. Weber billed at his $200 rate for preparing binders. Id. Exhibit AG, August 1998. Two hundred dollars per hour is not a reasonable hourly rate for stamping documents and preparing binders.

PWC associate consultants also performed paralegal functions during the Phase 1 trial, yet billed at their higher consultant rates. Leslie Tomlinson spent 266 hours performing "Trial

Support" work that included organizing exhibits, pulling documents, and maintaining a database of documents, but billed at $200 per hour, amassing a bill of $53,200 for those tasks in June 1999. See Pollner Affidavit, Exhibit AG, June 1999. Also during the trial, Mr. Weber billed $200 per hour on multiple occasions for a task described as "Courthouse run/photocopy documents for court" and another PWC consultant, Rachel Graban charged $200 per hour to "Download and print trial transcripts." Id., Exhibit AG, June 1999. These are but a few examples of PWC consultants performing what are essentially paralegal functions. While Plaintiffs may wish to use $200 per hour consultants to organize exhibits and photocopy and print documents, the government cannot be required to reimburse Plaintiffs at those unreasonably high hourly rates. Accordingly, for all time spent performing these type of tasks, PWC consultants' hourly rates should be reduced to the EAJA-capped rate for paralegal work.

Plaintiffs' consultant, Geoffrey Rempel, is also requesting reimbursement at $225 per hour for time after he left the employ of PWC and worked directly for Plaintiffs' legal team. As Mr. Rempel points out, the Court previously ruled that he was entitled to an hourly rate of $225 per hour for his professional services. See Rempel Affidavit at 7. While that hourly rate may be reasonable for time Mr. Rempel spent performing accounting work, it is not a reasonable hourly rate for a legal assistant. The work he bills for in this submission is the type of work ordinarily performed by a paralegal. He assists with drafting legal pleadings, reviews documents, conducts research and other litigation tasks that do not require the expertise of an accountant. Id., Schedule A. Mr. Rempel's bills include tasks like searching for a document on the internet, conferring with attorneys regarding bates stamping documents, printing documents, and distributing documents via fax or e-mail. Id., Schedule A at 3. His tasks range from drafting

documents, id., Schedule A at 7, to acting as a courier to pick up documents at the courthouse (which are not compensable under the EAJA), id., Schedule F at 33. Mr. Rempel does not claim to have a law degree and, by any reasonable measure, this is not accounting work. Regardless of what title Plaintiffs assign to Mr. Rempel, the tasks described in his time entries indicate that the work actually performed is akin to the work of a paralegal. Accordingly, Mr. Rempel's work as a legal assistant for Plaintiffs' counsel should only be reimbursed at EAJA-capped rates for paralegals.

VII. APPROPRIATE INTERIM EAJA TIME

As discussed above, Plaintiffs are not entitled to any EAJA award. If the Court nevertheless elects to grant an interim award, Defendants have prepared a table, attached as Exhibit 9, which identifies the improperly billed hours in the Interim Petition (as described in Sections V & VI above). Exhibit 10 is a table that indicates the maximum amount under EAJA that can be awarded to each individual after the improperly billed hours are deducted. As discussed above, this figure should be reduced by 20% due to the excessive billing in the Interim Petition. After these calculations are done, Plaintiffs can be awarded no more than $4,313,047.22.

CONCLUSION

For these reasons, Plaintiffs' Interim Petition should be denied and no EAJA fees or expenses should be awarded.

Dated: September 7, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 7, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Equal Access to Justice Act Petition for Interim Fees Through the Phase 1.0 Proceeding* was served by Electronic Case Filing, and;

on the following who is not registered for Electronic Case Filing, by pre paid First Class U.S. Mail to:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

a copy of the Bulky exhibits was served upon:

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Elliot Levitas, Esq
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Washington, D.C. 20005

Keith Harper, Esq.
Richard A. Guest, Esq.
Native American Rights Fund
1712 N Street, NW
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/s/ Kevin P. Kingston
Kevin P. Kingston

Post Trial 1					
Billing Entity	1999	2000	2001	2002	Total
ASC	0.2	1.5	0.8	0	2.5
BABBY	9.2	796	59.2	0	864.4
BLS	0	6.8	0	0	6.8
BROWN	0	143.386	237.638	20.331	401.355
CHRIS WEBER	1	0	0	0	1
CRB (CHARLOTTE BUTTRAM)	0	1.4	0	0	1.4
DMZ (DAVID ZACKS)	0.5	29.2	2.5	0	32.2
ECHOHAWK	0	1.8	0	0	1.8
EHL (LEVITAS)	10.6	628.2	62.5	0	701.3
GINGOLD	7	1813.6	376.2	0	2196.8
HARPER	19.4	1050.45	73.2	0	1143.05
HOLT	1.1	35.7	72.6	0	109.4
JESSICA POLLNER	4	3	0	0	7
JMW (J. MICHAEL WIGGINS)	0	249.1	116.6	0	365.7
JTC	0	2.1	0	0	2.1
LAURA SCHWEITZER	13	6	0	0	19
MJA (MILES ALEXANDER)	0	0.6	0.5	0	1.1
MSY	0	0	6.8	0	6.8
NARF CLERKS	0	221.45	132.5	0	353.95
PEREGOY	21.6	0	0	0	21.6
RCD (RODERICK DENNEHY)	0	53.2	0	0	53.2
REMPEL	0	587.975	276.625	0	864.6
RIC PACE	4	0	0	0	4
RLR (RONALD L. RAIDER)	0	3.2	0	0	3.2
RPM (ROBERT MARCOVITCH)	0	40	2.2	0	42.2
RSF	0	0.8	0	0	0.8
SAC (STEVE CLAY)	0	0.6	0	0	0.6
SANDEEP SOORYA	0	7	0	0	7
SP (SARAH PEREZ)	0	141.9	38.7	0	180.6
TC	0	5.1	0	0	5.1
WP (WILMER PARKER)	2	0.3	0	0	2.3
WWB	0	0.8	0	0	0.8
					7403.655

EXHIBIT 1
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

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.	)	

NOTICE REGARDING EXHIBIT ATTACHMENT

Exhibit 2, an attachment to Defendants' Opposition To Plaintiffs' Equal Access To Justice Act Petition For Interim Fees Through The Phase 1.0 Proceeding, is in paper form only and is being maintained in the case file in the Clerk's Office. This document – which is comprised of two parts, Exhibits 2A and 2B – will be available for public viewing and copying between the hours of 9:00 a.m. to 4:00 p.m., Monday through Friday.

Dated: September 7, 2004

Respectfully submitted,

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Contempt 2				
Billing Entity	**2000**	**2001**	**2002**	**Total**
BROWN	46.215	117.617	3.749	167.581
EHL (LEVITAS)	40	0	0	40
GINGOLD	651	0	0	651
HARPER	407.4	7	0	414.4
NARF CLERKS		28	0	28
REMPEL	150.4	1.6	0	152
RPM (ROBERT MARCOVITCH)	4.6	0	0	4.6
SP (SARAH PEREZ)	4.6	0	0	4.6
			Grand Total	1462.181

EXHIBIT 3
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

DOUBLE BILLING/CONFUSING BILLS (Table I)

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
December 2, 1996	11	4.0	7.0
December 3, 1996	8	6.0	2.0
December 4, 1996	5	4.0	1.0
December 6, 1996	5	3.4	1.7
December 9, 1996	3	2.0	1.0
December 10, 1996	4.5	1.0	3.5
December 11, 1996	5	2.5	2.5
December 12, 1996	8	3.0	5.0
December 16, 1996	6.5	2.1	4.4
December 17, 1996	7	1.0	6.0
December 18, 1996	7	1.5	5.5
December 19, 1996	2.5	2.5	0.0
December 21, 1996	6.5	0.3	6.2
December 24, 1996	5	0.1	4.9
December 27, 1996	2	0.9	1.2
December 31, 1996	1	0.2	0.8
January 4, 1997	3	2.0	1.0
January 7, 1997	1.5	0.4	1.1
January 9, 1997	2	0.6	1.4
January 10, 1997	6.5	1.6	4.9
January 13, 1997	7	3.2	3.8
January 14, 1997	7	0.2	6.9
January 15, 1997	3	0.2	2.8
January 16, 1997	4.5	1.7	2.8
January 17, 1997	3.8	0.7	3.1
January 20, 1997	3.1	0.5	2.6
January 29, 1997	1	1.0	0.0
January 30, 1997	1.5	0.4	1.1
February 4, 1997	7	1.0	6.0
February 7, 1997	6	0.8	5.3
February 8, 1997	2.7	0.7	2.0
February 19, 1997	4.5	0.8	3.8
February 21, 1997	6.5	3.8	2.8
February 24, 1997	1.9	0.3	1.6
February 25, 1997	4.5	0.6	4.0
February 27, 1997	6	1.5	4.5
February 28, 1997	4	0.7	3.3
March 4, 1997	3	0.7	2.3
March 6, 1997	4	0.7	3.4
March 7, 1997	5.5	0.4	5.1
March 10, 1997	7	1.5	5.5
March 11, 1997	8.5	1.0	7.5
March 17, 1997	8	4.0	4.0
March 18, 1997	8	0.6	7.4
March 19, 1997	8	0.8	7.2

EXHIBIT 4
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
March 21, 1997	5	1.9	3.1
March 24, 1997	7.8	3.0	4.8
March 25, 1997	6.5	0.3	6.2
March 26, 1997	5.4	0.5	4.9
March 28, 1997	3.1	0.8	2.3
March 31, 1997	5	0.5	4.6
April 3, 1997	5	1.1	3.9
April 14, 1997	8	0.3	7.7
April 16, 1997	7.7	0.2	7.5
April 24, 1997	3.6	0.2	3.4
April 25, 1997	4.9	1.2	3.8
April 28, 1997	3	0.1	2.9
April 29, 1997	5.4	1.0	4.4
May 9, 1997	5.7	0.3	5.4
May 13, 1997	5.3	1.8	3.5
May 15, 1997	3.2	0.7	2.5
May 19, 1997	4.7	0.7	4.0
May 21, 1997	7.4	0.3	7.1
May 30, 1997	7.9	0.9	7.0
June 2, 1997	7	0.6	6.4
June 3, 1997	3.2	1.2	2.0
June 4, 1997	6.2	0.7	5.5
June 5, 1997	6.3	0.6	5.7
June 6, 1997	6.3	1.7	4.6
June 9, 1997	6.3	0.3	6.0
June 10, 1997	6.1	1.9	4.2
June 11, 1997	11.5	1.0	10.5
June 12, 1997	5.9	0.6	5.3
June 13, 1997	5.8	1.0	4.8
June 16, 1997	6.1	1.7	4.4
June 17, 1997	3.2	0.7	2.5
June 18, 1997	3.9	1.4	2.5
June 19, 1997	4.8	1.7	3.1
June 20, 1997	7.6	0.4	7.3
June 23, 1997	4.7	4.7	0.0
June 25, 1997	4.8	2.2	2.6
June 30, 1997	0.8	0.2	0.6
July 3, 1997	3.7	0.1	3.6
July 6, 1997	6	5.4	0.6
July 7, 1997	7.9	0.2	7.7
July 18, 1997	13.2	3.1	10.2
July 24, 1997	6.7	1.7	5.0
July 25, 1997	3.5	0.5	3.0
July 28, 1997	3	1.7	1.3
July 29, 1997	4.7	0.3	4.4
July 30, 1997	4.9	0.3	4.6
August 1, 1997	6.9	0.1	6.9
August 3, 1997	2	2.0	0.0

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
August 8, 1997	6.1	0.4	5.7
August 9, 1997	0.9	0.9	0.0
August 10, 1997	0.2	0.2	0.0
August 11, 1997	1.1	0.1	1.0
August 14, 1997	2.1	1.9	0.2
August 15, 1997	1.1	0.2	0.9
August 24, 1997	2.5	1.3	1.3
September 3, 1997	3.2	1.2	2.0
September 5, 1997	1.3	0.3	1.0
September 8, 1997	4.1	0.6	3.5
September 11, 1997	7.3	0.7	6.6
September 12, 1997	2.2	2.1	0.1
September 15, 1997	6.5	0.6	5.9
September 17, 1997	9.2	0.2	9.1
September 18, 1997	8.8	2.6	6.2
September 23, 1997	6.5	0.4	6.1
September 30, 1997	3.6	0.4	3.3
October 4, 1997	1	0.3	0.7
October 8, 1997	12.9	5.8	7.1
October 9, 1997	6	2.6	3.4
October 14, 1997	8.4	0.6	7.8
October 15, 1997	3.6	1.9	1.7
October 22, 1997	2.4	0.1	2.3
October 23, 1997	5.9	0.4	5.5
October 29, 1997	6.8	0.7	6.2
October 30, 1997	1.5	0.2	1.3
October 31, 1997	3.8	0.8	3.0
November 3, 1997	4.6	0.8	3.8
November 4, 1997	5.6	1.1	4.5
November 5, 1997	2.7	0.2	2.6
November 14, 1997	8	1.2	6.8
November 17, 1997	1.9	2.0	-0.1
November 20, 1997	1.8	1.5	0.3
November 21, 1997	2.5	2.5	0.0
November 24, 1997	4	4.8	-0.8
November 25, 1997	6.4	0.9	5.5
November 26, 1997	5.4	2.3	3.2
December 1, 1997	4.9	3.0	1.9
December 2, 1997	7	4.9	2.1
December 3, 1997	4.2	1.3	2.9
December 4, 1997	5.8	1.5	4.3
December 5, 1997	7.8	7.3	0.5
December 6, 1997	1.6	0.9	0.7
December 7, 1997	2.1	1.2	0.9
December 8, 1997	5.9	1.1	4.8
December 10, 1997	3.5	0.4	3.2
December 11, 1997	6.4	6.4	0.0
December 12, 1997	9.2	0.7	8.5

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
December 14, 1997	2.3	0.9	1.4
December 15, 1997	5.3	0.8	4.5
December 17, 1997	5.1	0.4	4.7
December 18, 1997	4.2	0.8	3.4
December 19, 1997	3.9	0.5	3.4
December 20, 1997	5.9	1.1	4.8
December 21, 1997	4.9	0.1	4.8
December 22, 1997	4.9	5.4	-0.5
January 5, 1998	7.3	0.6	6.7
January 7, 1998	5.8	0.3	5.5
January 14, 1998	4.4	1.3	3.1
January 15, 1998	7.6	1.1	6.6
January 17, 1998	0.5	0.5	0.0
January 22, 1998	3.5	1.1	2.4
January 23, 1998	6.9	3.3	3.7
January 24, 1998	2.7	0.2	2.6
January 29, 1998	6.4	2.2	4.2
January 30, 1998	4.8	1.2	3.6
February 2, 1998	5.3	4.2	1.1
February 3, 1998	5.1	0.2	4.9
February 4, 1998	4.6	0.1	4.5
February 6, 1998	7.8	0.1	7.7
February 9, 1998	6.5	0.9	5.6
February 11, 1998	3.6	1.3	2.3
February 12, 1998	4.3	2.1	2.2
February 13, 1998	3.7	2.9	0.8
February 16, 1998	1	0.9	0.1
February 17, 1998	2.6	0.6	2.0
February 18, 1998	3.5	1.6	1.9
February 19, 1998	5.1	1.4	3.7
February 20, 1998	4.5	4.8	-0.3
February 23, 1998	3.8	0.8	3.0
February 24, 1998	8.4	1.6	6.8
February 25, 1998	6.6	4.5	2.1
February 26, 1998	4	0.6	3.5
March 2, 1998	1	0.3	0.7
March 6, 1998	4.3	0.1	4.2
March 25, 1998	6.1	0.7	5.4
April 1, 1998	5.7	1.5	4.2
April 6, 1998	5.8	0.9	4.9
April 8, 1998	2.8	3.0	-0.2
April 9, 1998	7.6	0.6	7.0
April 10, 1998	9.7	2.6	7.1
April 13, 1998	3.7	1.4	2.3
April 14, 1998	3.8	2.7	1.1
April 16, 1998	4.7	4.1	0.6
April 17, 1998	6.9	3.7	3.2
April 20, 1998	4	1.1	2.9

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
April 21, 1998	5	3.0	2.0
April 22, 1998	8.5	4.9	3.6
April 23, 1998	7.7	5.8	1.9
April 24, 1998	5.2	3.8	1.4
April 27, 1998	2.4	1.2	1.2
April 28, 1998	3.1	2.6	0.5
April 29, 1998	2	0.6	1.4
May 1, 1998	0.5	0.5	0.0
May 2, 1998	0.2	0.2	0.0
May 4, 1998	3	3.1	-0.1
May 5, 1998	3.2	3.1	0.1
May 6, 1998	6.7	3.7	3.0
May 7, 1998	11.8	3.5	8.4
May 8, 1998	9.1	4.8	4.3
May 9, 1998	12	6.0	6.0
May 10, 1998	3.5	3.5	0.0
May 11, 1998	6.2	2.5	3.7
May 12, 1998	7.7	8.1	-0.4
May 13, 1998	8.1	4.4	3.7
May 14, 1998	3.1	1.3	1.8
May 15, 1998	4.9	1.9	3.0
May 18, 1998	7.1	1.1	6.0
May 20, 1998	4.9	0.6	4.3
May 21, 1998	7.2	0.5	6.7
May 22, 1998	6.7	2.9	3.8
May 26, 1998	5.8	1.1	4.7
May 27, 1998	5.8	1.1	4.7
May 28, 1998	9.9	0.4	9.5
May 29, 1998	5.3	3.7	1.7
May 30, 1998	3.8	3.9	-0.1
June 1, 1998	5.3	2.5	2.8
June 2, 1998	2.7	2.8	-0.1
June 3, 1998	6	1.9	4.1
June 4, 1998	4.2	3.3	0.9
June 5, 1998	7.3	2.4	4.9
June 6, 1998	5.9	5.9	0.0
June 7, 1998	3.6	3.7	-0.1
June 8, 1998	4.8	4.6	0.2
June 9, 1998	6.5	2.4	4.1
June 10, 1998	8.2	5.6	2.6
June 11, 1998	10.3	2.0	8.3
June 12, 1998	7.4	3.6	3.8
June 13, 1998	7	2.3	4.7
June 14, 1998	10	3.3	6.7
June 15, 1998	8.8	3.6	5.2
June 16, 1998	9	4.7	4.3
June 17, 1998	9	0.1	8.9
June 18, 1998	10.1	2.8	7.3

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
June 19, 1998	7.2	2.3	4.9
June 22, 1998	2.5	1.0	1.5
June 23, 1998	3.9	1.9	2.0
June 24, 1998	4.1	2.2	1.9
June 25, 1998	1.5	0.9	0.6
June 26, 1998	0.8	0.8	0.0
June 29, 1998	4.7	4.3	0.4
June 30, 1998	1.4	1.6	-0.2
July 2, 1998	5.2	0.2	5.1
July 3, 1998	1.9	0.8	1.1
July 6, 1998	3.8	2.3	1.5
July 8, 1998	4.1	0.7	3.4
July 9, 1998	3.7	0.5	3.2
July 10, 1998	3.3	0.2	3.1
July 14, 1998	7	0.1	6.9
July 15, 1998	8.4	0.5	7.9
July 16, 1998	9.5	3.3	6.2
July 17, 1998	10	4.3	5.7
July 19, 1998	4.1	0.1	4.0
July 20, 1998	5.4	0.1	5.3
July 21, 1998	8.5	0.7	7.8
July 22, 1998	8.9	0.4	8.6
July 23, 1998	7.1	1.1	6.0
August 4, 1998	8.8	2.2	6.6
August 7, 1998	9.8	0.3	9.5
August 10, 1998	7.6	4.8	2.8
August 21, 1998	9.7	5.0	4.7
September 2, 1998	6	5.9	0.1
September 3, 1998	5.9	6.1	-0.2
September 4, 1998	5.8	1.0	4.8
September 8, 1998	2.2	2.4	-0.2
September 9, 1998	0.4	0.2	0.2
September 10, 1998	1.6	0.2	1.4
September 11, 1998	5	0.9	4.1
September 14, 1998	6.2	4.0	2.2
September 15, 1998	5.5	3.6	1.9
September 17, 1998	3.5	2.6	0.9
September 18, 1998	0.7	0.7	0.0
September 21, 1998	5.8	3.3	2.5
September 22, 1998	4.5	1.4	3.1
September 26, 1998	5.8	5.4	0.4
September 28, 1998	8.8	2.5	6.3
September 29, 1998	7.1	1.0	6.1
September 30, 1998	7.9	7.0	0.9
October 1, 1998	10.5	1.4	9.1
October 2, 1998	9.1	1.5	7.6
October 3, 1998	0.1	0.1	0.0
October 4, 1998	3.7	2.0	1.7

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
October 5, 1998	4.8	0.9	3.9
October 6, 1998	4.4	1.1	3.3
October 7, 1998	0.7	1.6	-0.9
October 8, 1998	6.3	1.1	5.2
October 17, 1998	9.3	1.0	8.3
October 18, 1998	4.6	2.3	2.3
October 19, 1998	13.9	6.5	7.4
October 20, 1998	3.7	2.1	1.6
October 21, 1998	7.8	2.3	5.5
October 22, 1998	9.8	5.1	4.7
October 23, 1998	7.9	1.6	6.3
October 26, 1998	13.5	3.7	9.8
October 27, 1998	14.3	5.2	9.1
October 28, 1998	14.3	6.6	7.7
October 29, 1998	4.2	2.7	1.5
October 30, 1998	7.6	4.0	3.6
November 2, 1998	10.1	6.8	3.3
November 3, 1998	9.8	5.8	4.0
November 4, 1998	11.2	9.3	1.9
November 5, 1998	11.4	6.6	4.8
November 6, 1998	4.7	6.4	-1.7
November 7, 1998	2.6	0.9	1.7
November 8, 1998	0.4	0.1	0.3
November 9, 1998	8.3	5.6	2.7
November 10, 1998	8	8.3	-0.3
November 11, 1998	7.3	5.7	1.6
November 12, 1998	7.9	3.4	4.5
November 13, 1998	3.9	0.1	3.8
November 14, 1998	3.8	3.7	0.1
November 15, 1998	0.8	0.8	0.0
November 16, 1998	8.6	4.9	3.7
November 17, 1998	9.1	5.8	3.3
November 18, 1998	9.8	8.8	1.0
November 19, 1998	7.8	9.1	-1.3
November 20, 1998	10.5	10.6	-0.1
November 21, 1998	1.9	1.0	0.9
November 23, 1998	14.4	11.0	3.4
November 24, 1998	10	9.9	0.1
November 25, 1998	2.4	7.6	-5.2
November 27, 1998	3.8	4.0	-0.2
November 30, 1998	6.6	7.2	-0.6
December 1, 1998	4.8	3.3	1.5
December 2, 1998	3.5	5.5	-2.0
December 3, 1998	2.5	8.1	-5.6
December 4, 1998	4.9	5.1	-0.2
December 5, 1998	0	6.1	-6.1
December 6, 1998	0	7.0	-7.0
December 7, 1998	6.5	4.8	1.7

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
December 8, 1998	0.9	7.8	-6.9
December 9, 1998	0.1	11.0	-10.9
December 11, 1998	16.9	4.9	12.0
December 12, 1998	3.2	2.4	0.8
December 13, 1998	8.5	4.6	3.9
December 14, 1998	16.3	7.1	9.2
December 15, 1998	5.3	2.6	2.7
December 16, 1998	4.7	5.3	-0.6
December 17, 1998	3.8	1.6	2.2
December 18, 1998	2.8	2.9	-0.1
December 19, 1998	0	6.0	-6.0
December 21, 1998	2.9	1.6	1.3
December 22, 1998	1.4	1.4	0.0
December 23, 1998	0	1.5	-1.5
December 28, 1998	0	0.9	-0.9
December 29, 1998	0	3.0	-3.0
December 30, 1998	0	0.6	-0.6
December 31, 1998	0	3.8	-3.8
January 1, 1999	0.1	0.2	-0.1
January 2, 1999	1	0.6	0.4
January 4, 1999	3	4.8	-1.8
January 5, 1999	2.8	2.6	0.2
January 6, 1999	2.8	8.9	-6.1
January 7, 1999	1.6	8.8	-7.2
January 8, 1999	6.4	6.8	-0.4
January 9, 1999	1.4	10.9	-9.5
January 10, 1999	0.7	13.9	-13.2
January 11, 1999	0	9.8	-9.8
January 27, 1999	3.4	3.6	-0.2
January 28, 1999	6.3	3.8	2.5
January 29, 1999	6	2.9	3.1
January 30, 1999	0.6	0.7	-0.1
February 1, 1999	4.1	3.8	0.3
February 2, 1999	3.4	2.3	1.1
February 3, 1999	10.1	1.8	8.3
February 4, 1999	2.2	0.3	1.9
February 5, 1999	9.1	0.9	8.2
February 8, 1999	4.9	2.1	2.8
February 9, 1999	7.7	1.6	6.1
February 10, 1999	6.8	2.5	4.3
February 11, 1999	7.9	3.5	4.4
February 12, 1999	10.1	4.1	6.0
February 13, 1999	6.3	1.6	4.7
February 15, 1999	8.4	4.3	4.1
February 16, 1999	6.7	1.6	5.1
February 17, 1999	6	0.2	5.8
February 18, 1999	7.8	2.7	5.1
February 19, 1999	6.8	2.5	4.3

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
February 20, 1999	7.1	3.5	3.6
February 21, 1999	0.3	0.1	0.2
February 22, 1999	1.2	4.6	-3.4
February 23, 1999	6	3.5	2.5
February 24, 1999	7.6	7.0	0.6
February 25, 1999	2.8	2.9	-0.1
February 26, 1999	10.4	4.1	6.3
February 28, 1999	4.6	2.2	2.4
March 2, 1999	11.8	3.0	8.8
March 3, 1999	15.3	1.0	14.3
March 4, 1999	10.9	2.0	8.9
March 8, 1999	5.8	7.1	-1.3
March 16, 1999	7.2	1.0	6.2
March 17, 1999	6.2	3.8	2.4
March 18, 1999	11.1	2.8	8.3
March 19, 1999	10.5	2.8	7.7
March 20, 1999	3.8	6.9	-3.1
March 22, 1999	5	4.5	0.5
March 23, 1999	6.3	6.8	-0.5
March 24, 1999	14.9	2.3	12.6
March 25, 1999	11.8	3.2	8.6
March 26, 1999	11.8	4.2	7.6
March 27, 1999	3.2	7.8	-4.6
March 28, 1999	0.2	6.7	-6.5
March 29, 1999	8	9.5	-1.5
March 30, 1999	8.3	3.4	4.9
March 31, 1999	4.7	10.6	-5.9
May 25, 1999	19.1	0.4	18.7
May 26, 1999	19.3	1.0	18.3
June 1, 1999	11.7	0.1	11.6
June 24, 1999	10.5	0.2	10.3
June 26, 1999	8.3	2.4	5.9
June 30, 1999	14.3	2.0	12.3
August 12, 1999	3.7	1.5	2.2
August 18, 1999	1	0.3	0.7
October 5, 1999	9.9	0.5	9.4
November 3, 1999	9.2	0.2	9.0
December 14, 1999	6.8	0.3	6.5
December 22, 1999	6.1	0.4	5.7
December 23, 1999	4.7	1.5	3.2
December 28, 1999	2.9	1.9	1.0
January 3, 2000	14.6	1.2	13.4
January 11, 2000	9	1.0	8.0
January 19, 2000	3.4	0.3	3.1
January 27, 2000	6.9	1.5	5.4
February 1, 2000	4.4	0.2	4.2
February 4, 2000	6.5	4.0	2.5
February 7, 2000	8.4	4.5	3.9

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
February 8, 2000	2.4	0.4	2.0
February 15, 2000	12.1	0.4	11.7
February 22, 2000	10.4	2.4	8.0
February 25, 2000	17.1	2.6	14.5
February 28, 2000	8	2.5	5.5
February 29, 2000	1.9	4.1	-2.2
March 1, 2000	1.3	5.8	-4.5
March 2, 2000	6.5	0.8	5.8
March 6, 2000	12.2	1.7	10.5
March 12, 2000	10.8	9.6	1.2
March 13, 2000	18.3	15.4	2.9
March 14, 2000	7.4	3.7	3.7
March 15, 2000	10.2	9.3	0.9
March 16, 2000	9.3	5.3	4.0
March 17, 2000	6.6	1.1	5.5
March 18, 2000	1.1	0.9	0.2
April 5, 2000	7.9	2.0	5.9
April 8, 2000	0.2	7.0	-6.8
April 9, 2000	0	5.0	-5.0
April 10, 2000	4.7	0.1	4.6
April 11, 2000	3.4	4.8	-1.4
April 13, 2000	9.9	1.3	8.6
April 14, 2000	6.4	1.8	4.6
April 15, 2000	0.1	0.1	0.0
April 16, 2000	0	2.6	-2.6
April 17, 2000	3.2	1.6	1.6
April 18, 2000	3.5	1.4	2.1
April 19, 2000	2.9	2.0	0.9
April 20, 2000	2.5	0.2	2.3
April 21, 2000	9.1	0.6	8.5
April 24, 2000	5	0.7	4.3
April 26, 2000	1.8	2.0	-0.2
April 27, 2000	10	0.2	9.8
April 28, 2000	13.1	0.1	13.0
April 29, 2000	9.1	0.2	8.9
May 5, 2000	2.9	1.0	1.9
May 6, 2000	3.2	4.2	-1.0
May 8, 2000	7.6	2.7	4.9
May 9, 2000	1.9	1.2	0.7
May 10, 2000	8.4	1.0	7.4
May 11, 2000	10.2	1.1	9.1
May 12, 2000	14	2.5	11.5
May 13, 2000	8.4	1.0	7.4
May 15, 2000	11.6	0.6	11.0
May 16, 2000	11.9	0.7	11.2
May 17, 2000	7	1.9	5.1
May 18, 2000	2	1.8	0.2
May 20, 2000	4.8	0.1	4.7

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
May 22, 2000	8.9	0.2	8.7
May 24, 2000	7.5	1.0	6.5
May 25, 2000	2.5	2.1	0.4
May 26, 2000	3.3	1.8	1.5
May 30, 2000	6.2	2.6	3.6
May 31, 2000	3.9	1.4	2.6
June 2, 2000	0.6	3.8	-3.2
June 5, 2000	4.7	0.1	4.6
June 6, 2000	4	0.8	3.2
June 7, 2000	1.6	0.7	0.9
June 8, 2000	3	2.4	0.6
June 9, 2000	1.7	1.7	0.0
June 12, 2000	3.1	5.4	-2.3
June 13, 2000	1.5	5.2	-3.7
June 14, 2000	4	3.1	0.9
June 15, 2000	10.1	3.4	6.7
June 16, 2000	4.8	2.4	2.4
June 19, 2000	3	0.8	2.2
June 20, 2000	9.6	0.7	8.9
June 21, 2000	5.7	1.4	4.3
June 22, 2000	4.6	1.5	3.1
June 23, 2000	9	1.2	7.8
June 24, 2000	4.2	0.2	4.0
June 26, 2000	5.3	0.8	4.5
June 27, 2000	5.3	1.4	3.9
June 28, 2000	1.2	1.5	-0.3
June 29, 2000	0.1	3.9	-3.8
June 30, 2000	3.7	2.1	1.6
July 1, 2000	7.4	1.4	6.0
July 2, 2000	3.9	0.8	3.1
July 3, 2000	4.2	2.7	1.5
July 5, 2000	11.8	0.9	10.9
July 6, 2000	21	3.7	17.3
July 7, 2000	9.4	0.5	9.0
July 9, 2000	2	1.8	0.2
July 10, 2000	6.4	4.2	2.2
July 13, 2000	7.6	0.8	6.8
July 14, 2000	0.1	1.9	-1.8
July 18, 2000	8.6	2.6	6.0
July 19, 2000	4.6	4.2	0.4
July 20, 2000	2.6	4.7	-2.1
July 21, 2000	3.8	4.1	-0.3
July 22, 2000	5.6	1.3	4.3
July 24, 2000	6.7	3.8	2.9
July 25, 2000	3.1	2.1	1.0
July 26, 2000	9	4.3	4.7
July 27, 2000	7.3	0.8	6.5
July 28, 2000	8.7	0.2	8.5

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
July 29, 2000	0	1.0	-1.0
July 31, 2000	3.7	4.5	-0.8
August 1, 2000	6	4.6	1.4
August 2, 2000	1.4	3.6	-2.2
August 3, 2000	8	2.5	5.5
August 4, 2000	6.7	3.4	3.3
August 5, 2000	1.9	5.6	-3.7
August 6, 2000	0.4	5.1	-4.7
August 8, 2000	2.7	8.3	-5.6
August 9, 2000	2.4	7.0	-4.6
August 10, 2000	2.1	8.3	-6.2
August 11, 2000	2.4	5.9	-3.5
August 12, 2000	0.1	5.7	-5.6
August 13, 2000	0	6.4	-6.4
August 14, 2000	0.8	7.9	-7.1
August 15, 2000	4.4	7.7	-3.3
August 16, 2000	14	1.1	13.0
August 17, 2000	8.9	0.9	8.0
August 18, 2000	5.4	2.4	3.0
August 19, 2000	0.1	0.6	-0.5
August 21, 2000	3.2	6.0	-2.8
August 22, 2000	0.5	1.1	-0.6
August 23, 2000	5.7	5.6	0.1
August 24, 2000	4	3.1	0.9
August 25, 2000	3.8	2.9	1.0
August 28, 2000	3.7	2.0	1.7
August 30, 2000	4.5	6.1	-1.6
August 31, 2000	2.9	2.5	0.4
September 4, 2000	3.2	0.2	3.1
September 5, 2000	6.3	0.5	5.8
September 6, 2000	9.9	4.1	5.8
September 7, 2000	7.2	3.7	3.5
September 8, 2000	3.6	3.6	0.0
September 9, 2000	5.2	0.1	5.1
September 11, 2000	12.2	1.0	11.2
September 12, 2000	7.1	4.2	2.9
September 13, 2000	4.8	0.2	4.6
September 14, 2000	11.3	0.2	11.1
September 15, 2000	11.2	0.3	10.9
September 19, 2000	19.6	0.1	19.5
September 20, 2000	10.9	0.2	10.8
September 25, 2000	2.4	0.5	2.0
September 26, 2000	9.6	1.0	8.6
September 27, 2000	0.4	6.8	-6.4
September 28, 2000	2.7	0.4	2.3
September 29, 2000	9.6	0.2	9.4
October 1, 2000	0.1	11.5	-11.4
October 2, 2000	0.2	10.0	-9.8

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
October 3, 2000	0.1	7.0	-6.9
October 4, 2000	2.7	7.7	-5.0
October 5, 2000	1.9	1.1	0.8
October 6, 2000	10.2	0.8	9.4
October 7, 2000	1	0.8	0.2
October 10, 2000	7.6	1.3	6.3
October 11, 2000	5	0.5	4.5
October 12, 2000	14.3	0.2	14.1
October 14, 2000	6.2	0.7	5.5
October 16, 2000	11.1	1.0	10.1
October 23, 2000	9.4	0.1	9.3
October 26, 2000	10.9	5.2	5.7
October 27, 2000	7.4	2.7	4.7
October 30, 2000	3.9	0.3	3.6
October 31, 2000	4	1.6	2.5
November 1, 2000	1.9	0.7	1.2
November 2, 2000	2	0.1	1.9
November 7, 2000	9.4	0.2	9.2
November 8, 2000	10.1	3.0	7.1
November 9, 2000	8	0.1	7.9
November 10, 2000	8.4	0.2	8.2
November 11, 2000	6.7	0.2	6.5
November 13, 2000	10.8	0.4	10.4
November 14, 2000	6.9	0.2	6.7
November 15, 2000	11.3	8.0	3.3
November 16, 2000	6.6	4.2	2.4
November 17, 2000	11.2	0.9	10.3
November 18, 2000	8	0.9	7.1
November 19, 2000	6	0.1	5.9
November 20, 2000	12.6	0.8	11.8
November 21, 2000	10.2	0.2	10.0
November 22, 2000	12.2	2.7	9.5
November 24, 2000	13.7	1.2	12.5
November 25, 2000	6.8	1.1	5.7
November 27, 2000	9.2	0.3	8.9
November 29, 2000	17.2	0.3	16.9
December 1, 2000	0.1	0.2	-0.1
December 4, 2000	11.4	1.4	10.1
December 5, 2000	6.8	0.7	6.1
December 6, 2000	8.8	0.4	8.4
December 7, 2000	10.8	0.3	10.5
December 8, 2000	7.8	0.5	7.3
December 9, 2000	6.2	1.0	5.2
December 10, 2000	5.3	0.9	4.4
December 11, 2000	9.8	0.3	9.5
December 12, 2000	10.5	0.6	9.9
December 13, 2000	10.1	0.1	10.0
December 15, 2000	10.7	0.1	10.6

DATE	CURRENT BILL	PREVIOUS AWARD	CORRECTED
December 17, 2000	6.9	0.1	6.8
December 18, 2000	8.3	0.1	8.2
December 19, 2000	0.2	0.8	-0.6
December 20, 2000	7.9	2.3	5.6
December 21, 2000	15.8	0.2	15.6
December 22, 2000	0.1	1.5	-1.4
January 2, 2001	9.8	0.1	9.7
January 4, 2001	10.2	0.5	9.8
January 9, 2001	11.6	0.3	11.3
January 10, 2001	9.6	6.8	2.9
January 11, 2001	9.2	0.1	9.1
January 12, 2001	0.2	0.1	0.1
January 13, 2001	9.1	1.4	7.7
January 14, 2001	8.3	6.3	2.0
January 15, 2001	7.7	9.5	-1.8
January 16, 2001	10.3	10.1	0.2
January 17, 2001	10.4	0.4	10.0
January 18, 2001	10.1	0.2	9.9
January 24, 2001	11.4	0.8	10.6
January 25, 2001	9.3	3.7	5.6
January 26, 2001	8.9	0.2	8.7
January 30, 2001	9.4	0.5	9.0
January 31, 2001	0.8	4.6	-3.8
February 1, 2001	10.5	2.2	8.3
February 2, 2001	9	1.2	7.8
February 3, 2001	8.5	1.0	7.5
February 4, 2001	6.2	0.6	5.6
February 5, 2001	9.2	1.4	7.8
February 6, 2001	1	6.9	-5.9
February 7, 2001	3.1	6.1	-3.0
February 8, 2001	1.2	6.8	-5.6
February 9, 2001	2	6.4	-4.4
February 10, 2001	0.9	4.1	-3.2
February 11, 2001	0.14	2.7	-2.5
February 12, 2001	0.18	10.7	-10.5
February 13, 2001	8.3	6.5	1.8
February 14, 2001	10.3	3.7	6.6
February 15, 2001	8.9	4.0	4.9
February 16, 2001	9.9	1.6	8.3
February 17, 2001	5.8	0.5	5.3
February 21, 2001	9.8	2.2	7.6
February 22, 2001	1.1	1.1	0.0

DOUBLE BILLING/CONFUSING BILLS

(previously awarded hours, excluding time deducted for other objections)

Year	Hours deducted (previously awarded)
1996	**31.5**
1997	**89.6**
1998	**356.7**
1999	**90.3**
2000	**6.2**
	Grand total : **574.3**

Settlement							
Billing Entity	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**Total**
ASC	0	0	0	12.9	0.6	0.8	14.3
BABBY	0	0	0	13.4	1.5	0	14.9
BROWN	0	0	0	0	9.992	0.5	10.492
CHRIS FORHECZ	0	0	9	0	0	0	9
DAUPHINAIS	17.8	0	0	0	0	0	17.8
DMZ (DAVID ZACKS)	0	0	0	10.8	12.9	0	23.7
EHL (LEVITAS)	0	0	0	329.5	72.1	0.4	402
GEOFFREY REMPEL (PWC)	0	0	87	0	0	0	87
GINGOLD	161.2	33.1	24	283.7	310.6	6.5	819.1
GREG BARDNELL	0	0	8	0	0	0	8
HARPER	4.7	16.65	2.5	185.3	98.4	3.5	311.05
HOLT	11.5	6.2	0.3	115	0.4	0	133.4
JCB	0	0	0	0.6	0	0	0.6
JESSICA POLLNER	0	0	14	0	0	0	14
JMW (J. MICHAEL WIGGINS)	0	0	0	68.3	5.7	0	74
JTC	0	0	0	0.9	0.5	0	1.4
JVH (VANCE HUGHES)	0	0	0	0.5	0	0	0.5
KAWAHARA	13.8	0.5	0	0	0	0	14.3
KHS (KIM STOGNER)	0	0	0	0.8	0	0	0.8
LAURA GOODING	0	0	9	0	0	0	9
MJA (MILES ALEXANDER)	0	0	0	0.6	0.3	0	0.9
NARF CLERKS	0	0	0	3	24.5	16	43.5
PEREGOY	12.15	2.7	7.863	0	0	0	22.713
RCD (RODERICK DENNEHY)	0	0	0	4.5	3	0	7.5
RCV	0	0	0	0.6	0	0	0.6
REMPEL	0	0	0	0	98.6	0	98.6
RLR (RONALD L. RAIDER)	0	0	0	0.5	0	0	0.5
RSF	0	0	0	1	0.5	0	1.5
SP (SARAH PEREZ)	0	0	0	15	2.3	0.9	18.2
TKB	0	0	0	1	0	0	1
WWB	0	0	0	0	0.8	0	0.8
						GRAND TOTAL	2161.155

EXHIBIT 6
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

STATISTICAL SAMPLING

Billing Entity	1996	1997	1998	1999	2000	2001	Total
ANDREA MCGLYNN	0	0	5	0	0	0	5
CHRIS FORHECZ	0	0	17	0	0	0	17
ECHOHAWK	0	4.95	2.3	0	0	0	7.25
GEOFFREY REMPEL (PWC)	0	0	66	2	0	0	68
GINGOLD	168	328.3	139.2	14.1	13.2	0	662.8
GREG BARDNELL	0	0	37	0	0	0	37
HARPER	15.6	40.118	14.35	0	0	0	70.068
HOLT	35.5	53.8	38.2	0	0	0.6	128.1
JESSICA POLLNER	0	0	41	0	0	0	41
JOE CHERIATHUNDAM	0	0	10	0	0	0	10
KAWAHARA	0	2.7	0	0	0	0	2.7
LARRY THIBODEAU	0	0	1	0	0	0	1
LAURA GOODING	0	0	58	0	0	0	58
						GRAND TOTAL	1107.918

EXHIBIT 7
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

EXCESSIVE TIME														
ATTORNEY TIME														
PLEADING	PGs	Babby	Brown	Echohawk	Dauphinais	Gingold	Harper	Holt	Kawahara	Levitas	Peregoy	PWC	NARF Clerks	TOTAL
Certify Class Action, Filed 6-6-96	43				33.55	75.80	76.00	63.50	18.50		18.40			285.75
	Hrs./ Page				0.78	1.76	1.76	1.47	0.43		0.42			6.64
Plaintiffs' Motion for Interim Relief Filed 4-16-97	44			1.80		444.30	16.00	87.80	20.10		11.90			581.90
	Hrs./ Page			0.04		10.09	2.75	1.99	0.45		0.27			13.22
Plaintiffs' Opposition to Defendants' Motion for Protective Order and to Quash Subpoena Directed to Paul Homan File 6-13-97	14					24.30	17.15	20.30	3.30					65.05
	Hrs/ Page					1.73	1.22	1.45	0.23					4.64
Reply Memorandum in Support of Plaintiffs' Motion for Interim Relief Filed 7-21-97	25					120.00	96.90	36.80	9.80					263.70
	Hrs./ Page					4.80	3.87	1.47	.392					10.54
Plaintiffs' Request for Trial Date to Begin on Aug 03 1998 Filed 10-28-97	2					16.50	4.10	4.20						24.80
	Hrs./ Page					8.25	2.05	2.10						12.40
Plaintiffs' Reply to Defendants' Opposition to Setting a Trial Date Filed 11-13-97	9					59.60	40.83	3.40					18.50	122.33
	Hrs./ Page					6.62	4.53	0.37					2.05	13.59

EXHIBIT 8
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

EXCESSIVE TIME														
ATTORNEY TIME														
PLEADING	PGs	Babby	Brown	Echohawk	Dauphinais	Gingold	Harper	Holt	Kawahara	Levitas	Peregoy	PWC	NARF Clerks	TOTAL
Plaintiffs' Memorandum in Opposition to Defendants' Motions for Protective Order and Expedited Hearing Regarding Depositions of Joe Christie and Donna Erwin, Filed, Apr. 2,1998	11	13.90				15.80	8.90	9.30			20.05			67.95
	Hrs./ Page	1.26				1.43	0.80	0.84			1.82			6.17
Plaintiffs' Memorandum in Support of Their Proposed First Case Management Order, Apr. 22, 1998	16	5.30				21.80		24.80						51.90
	Hrs./ Page	0.33				1.36		1.55						3.24
Plaintiffs' Response to Defendants' Memorandum in Support of Defendants Motion for Protective Order Regarding Third Formal Request for Production (RFP3), 14 pgs, DKT 123, Jul . 31, 1998	14	24.70				64.46	6.90	32.00			8.00			136.06
	Hrs./ Page	1.76				4.60	0.49	2.28			0.57			9.71
Plaintiffs' Proposed Findings of Fact and Conclusions of Law, 75 pgs. Aug 4, 1999	75	131.70				195.10	105.10	37.30		48.80		539.00	4.00	1061.00
	Hrs./ Page	1.75				2.60	1.40	0.49		0.65		7.18	0.05	14.14

EXCESSIVE TIME														
ATTORNEY TIME														
PLEADING	PGs	Babby	Brown	Echohawk	Dauphinais	Gingold	Harper	Holt	Kawahara	Levitas	Peregoy	PWC	NARF Clerks	TOTAL
Plaintiffs' Opposition to Defendants' Motion for Leave to File Reply to Plaintiffs' Answers to "Corrected" Petition for Petition for Permission to Appeal, Jan 24, 2000	9	18.40		2.80		16.90	7.30	1.90		13.40				60.70
	Hrs./ Page	2.04		0.31		1.87	0.81	0.21		1.48				9.74
Appellees Response Brief, Jun 23, 2000	66	211.60	60.87	1.70		15.20	212.00	205.10		146.00				852.47
	Hrs./ Page	3.20	0.92	0.02		0.23	3.21	3.10		2.21				12.91

	Year	Data								
	1996		1997		1998		1999		2000	
Billing Entity	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed
JFM							12.50			
AD							23.50	23.50		
ADRIAN CLARKE					58.00					
AEA (ALEXIS APPLEGATE)										
ANDREA CLARK-CIGANEK							43.00			
ANDREA MCGLYNN					15.00	5.00				
ASC							34.10	34.10	2.50	2.50
BABBY					973.71		1,423.64	43.30	1,130.10	797.50
BEAR							94.40			
BLS									20.90	20.90
BRENDA SUN					286.00					
BRIAN MCKAY							31.00			
BROWN	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	292.05	196.31
CANDICE WU							285.00			
CHRIS BORDENER					34.00					
CHRIS FORHECZ					223.00	26.00	493.00			
CHRIS WEBER					725.00		1,027.00	1.00		
CHRISTINE HSIEH							106.00			
CRB (CHARLOTTE BUTTRAM)									1.40	1.40
DANELLE LARSEN					4.00					
DANTE PARHAM					9.00		102.00			
DAUPHINAIS	363.75	17.80								
DFC							0.60	0.60		
DGB									0.80	0.80
DMZ (DAVID ZACKS)							17.10	11.30	47.10	42.10
DONALD MCGAUHEY							15.00			
DOUGLAS BARBIN					58.00					
ECHOHAWK	29.40		6.35	4.95	11.15	2.30	68.40		6.20	1.80
EHL (LEVITAS)							1,092.80	341.30	1,131.00	740.30
ELENI BUNCH					115.00					
ERIC SEIFERT					67.00					
ERICA STRATEN					7.00					
GEOFFREY REMPEL (PWC)					1,169.00	153.00	1,347.00	2.00		
GINGOLD	1,315.60	51.10	1,478.90	286.20	1,732.10	507.10	2,321.80	490.80	2,252.40	127.30
GREG BARDNELL					197.00	45.00	56.00			
HARPER	400.10	34.30	631.54	71.62	825.46	18.25	1,663.25	251.40	1,858.05	1,563.75
HENRY INES					456.00		257.00			
HOLT	237.35	71.50	408.26	66.90	431.03	42.50	855.20	116.10	321.10	36.10
JASON FLEMMONS					46.00					
JCB							3.10	3.10		
JEFF PARMET							2.00			
JESSICA POLLNER					189.00	55.00	150.00	4.00	3.00	3.00
JMW (J. MICHAEL WIGGINS)							101.50	68.30	287.40	254.80
JOE CHERIATHUNDAM					493.00	10.00	108.00			
JOHN LANKENAU							24.00			
JRS (JORDANA STERNBERG)							5.20			
JTC							1.30	1.30	2.60	2.60
JVH (VANCE HUGHES)							3.00	0.50		
JWX							33.30	33.30		
KAWAHARA	94.80	13.80	118.74	3.20						
KHS (KIM STOGNER)							6.30	0.80		

EXHIBIT 9
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

	2001		2002		2003		2004		Total Hours Billed	Total Hours Disputed
Billing Entity	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed		
JFM									12.50	
AD									23.50	23.50
ADRIAN CLARKE									58.00	
AEA (ALEXIS APPLEGATE)							15.80	7.00	15.80	7.00
ANDREA CLARK-CIGANEK									43.00	
ANDREA MCGLYNN									15.00	5.00
ASC	1.60	1.60					0.20	0.20	38.40	38.40
BABBY	60.20	59.20							3,587.65	900.00
BEAR									94.40	
BLS									20.90	20.90
BRENDA SUN									286.00	
BRIAN MCKAY									31.00	
BROWN	378.92	357.26	24.08	24.08	139.28	69.64	140.16	70.08	974.48	717.36
CANDICE WU									285.00	
CHRIS BORDENER									34.00	
CHRIS FORHECZ									716.00	26.00
CHRIS WEBER									1,752.00	1.00
CHRISTINE HSIEH									106.00	
CRB (CHARLOTTE BUTTRAM)							81.20	40.60	82.60	42.00
DANELLE LARSEN									4.00	
DANTE PARHAM									111.00	
DAUPHINAIS									363.75	17.80
DFC									0.60	0.60
DGB									0.80	0.80
DMZ (DAVID ZACKS)	*2.50*	*2.50*					*0.80*	*0.40*	*67.50*	*56.30*
DONALD MCGAUHEY									15.00	
DOUGLAS BARBIN									58.00	
ECHOHAWK									121.50	9.05
EHL (LEVITAS)	68.30	62.90					19.30	9.65	2,311.40	1,154.15
ELENI BUNCH									115.00	
ERIC SEIFERT									67.00	
ERICA STRATEN									7.00	
GEOFFREY REMPEL (PWC)									2,516.00	155.00
GINGOLD	431.80	29.90					569.20	284.60	10,101.80	1,777.00
GREG BARDNELL									253.00	45.00
HARPER	89.90	83.70					206.80	103.40	5,675.10	2,126.42
HENRY INES									713.00	
HOLT	76.55	73.20					17.50	8.75	2,346.99	415.05
JASON FLEMMONS									46.00	
JCB									3.10	3.10
JEFF PARMET									2.00	
JESSICA POLLNER									342.00	62.00
JMW (J. MICHAEL WIGGINS)	123.90	116.60							512.80	439.70
JOE CHERIATHUNDAM									601.00	10.00
JOHN LANKENAU									24.00	
JRS (JORDANA STERNBERG)									5.20	
JTC									3.90	3.90
JVH (VANCE HUGHES)									3.00	0.50
JWX									33.30	33.30
KAWAHARA									213.54	17.00
KHS (KIM STOGNER)									6.30	0.80

	Year Data									
	1996		1997		1998		1999		2000	
Billing Entity	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed
LARRY THIBODEAU					1.00	1.00				
LAURA GOODING					324.00	67.00				
LAURA SCHWEITZER					206.00		527.00	13.00	8.00	6.00
LESLIE TOMLINSON							905.20			
MARICE DORSEY					17.00					
MCKAY MOTSHABI					78.00					
MICHAEL CHANG					2.00		395.00			
MIKE SAVAGE					25.00					
MJA (MILES ALEXANDER)							1.10	0.60	0.90	0.90
MSY										
NARF CLERKS			293.25		148.25		357.00	3.00	245.95	245.95
PATRICK KELKAR					13.00					
PAUL GUNSON					21.00					
PEREGOY	267.35	62.95	317.75	8.90	729.63	7.86	26.30	21.60		
RACHEL GRABAN							481.00			
RCD (RODERICK DENNEHY)							133.40	4.50	59.50	56.20
RCV							4.40	0.60		
REMPEL									912.58	870.58
RENEE GRAVES					25.00		42.00			
RIC PACE							164.00	4.00		
RLR (RONALD L. RAIDER)							0.50	0.50	3.20	3.20
RON MONTICONE					73.00					
RPM (ROBERT MARCOVITCH)									81.50	44.60
RSF							1.00	1.00	1.30	1.30
SAC (STEVE CLAY)									*0.60*	*0.60*
SANDEEP SOORYA					391.00		1,386.00		7.00	7.00
SHANNON JONES							44.00			
SHARON FITZSIMMONS							224.00			
SP (SARAH PEREZ)							151.30	15.00	171.80	148.80
STEPHANIE ZHUANG							174.00			
TC									33.70	33.70
TKB							1.40	1.40		
TRACEY FOLEY					7.00		11.00			
WP (WILMER PARKER)							2.00	2.00	1.70	0.30
WWB									1.60	1.60
Grand Total	2,708.35	251.45	3,254.79	441.77	10,185.34	940.01	16,838.59	1,493.90	8,885.92	5,211.88

	2001		2002		2003		2004		Total Hours Billed	Total Hours Disputed
Billing Entity	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed	Hours Billed	Hours Disputed		
LARRY THIBODEAU									1.00	1.00
LAURA GOODING									324.00	67.00
LAURA SCHWEITZER									741.00	19.00
LESLIE TOMLINSON									905.20	
MARICE DORSEY									17.00	
MCKAY MOTSHABI									78.00	
MICHAEL CHANG									397.00	
MIKE SAVAGE									25.00	
MJA (MILES ALEXANDER)	0.50	0.50							2.50	2.00
MSY	6.80	6.80							6.80	6.80
NARF CLERKS	176.50	176.50							1,220.95	425.45
PATRICK KELKAR									13.00	
PAUL GUNSON									21.00	
PEREGOY									1,341.03	101.31
RACHEL GRABAN									481.00	
RCD (RODERICK DENNEHY)									192.90	60.70
RCV									4.40	0.60
REMPEL	282.53	285.23					164.40	82.20	1,359.50	1,238.00
RENEE GRAVES									67.00	
RIC PACE									164.00	4.00
RLR (RONALD L. RAIDER)							43.40	21.70	47.10	25.40
RON MONTICONE									73.00	
RPM (ROBERT MARCOVITCH)	2.20	2.20							83.70	46.80
RSF									2.30	2.30
SAC (STEVE CLAY)									0.60	0.60
SANDEEP SOORYA									1,784.00	7.00
SHANNON JONES									44.00	
SHARON FITZSIMMONS									224.00	
SP (SARAH PEREZ)	40.70	39.60							363.80	203.40
STEPHANIE ZHUANG									174.00	
TC									33.70	33.70
TKB									1.40	1.40
TRACEY FOLEY									18.00	
WP (WILMER PARKER)									3.70	2.30
WWB									1.60	1.60
Grand Total	1,742.89	1,297.68	24.08	24.08	139.28	69.64	1,258.76	628.58	45,037.99	10,359.00

	Year	Data										
	1996			1997			1998			1999		
Billing Entity	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount
JFM										0		0
AD										0		0
ADRIAN CLARKE							58	200	11600			
AEA (ALEXIS APPLEGATE)												
ANDREA CLARK-CIGANEK										43	200	8600
ANDREA MCGLYNN							10	200	2000			
ASC										0		0
BABBY							973.712	127.62	124265.1254	1380.335	130.25	179788.6338
BEAR										94.4	90	8496
BLS												
BRENDA SUN							286	200	57200			
BRIAN MCKAY										31	200	6200
BROWN	0		0	0		0	0		0	0		0
CANDICE WU										285	200	57000
CHRIS BORDENER							34	200	6800			
CHRIS FORHECZ							197	200	39400	493	200	98600
CHRIS WEBER							725	200	145000	1026	200	205200
CHRISTINE HSIEH										106	200	21200
CRB (CHARLOTTE BUTTRAM)												
DANELLE LARSEN							4	200	800			
DANTE PARHAM							9	200	1800	102	200	20400
DAUPHINAIS	345.95	125	43243.75									
DFC										0		0
DGB												
DMZ (DAVID ZACKS)										5.8	130.25	755.45
DONALD MCGAUHEY										15	200	3000
DOUGLAS BARBIN							58	200	11600			
ECHOHAWK	29.4	125	3675	1.4	126	176.4	8.85	127.62	1129.437	68.4	130.25	8909.1
EHL (LEVITAS)										751.5	130.25	97882.875
ELENI BUNCH							115	200	23000			
ERIC SEIFERT							67	200	13400			
ERICA STRATEN							7	200	1400			
GEOFFREY REMPEL (PWC)							1016	200	203200	1345	200	269000
GINGOLD	1264.5	125	158062.5	1192.7	126	150280.2	1225	127.62	156334.5	1831	130.25	238487.75
GREG BARDNELL							152	200	30400	56	200	11200
HARPER	365.8	125	45725	559.9225	126	70550.235	807.2135	127.62	103016.5869	1411.85	130.25	183893.4625
HENRY INES							456	200	91200	257	200	51400
HOLT	165.85	125	20731.25	341.361	126	43011.486	388.529	127.62	49584.07098	739.1	130.25	96267.775
JASON FLEMMONS							46	200	9200			

EXHIBIT 10
Defs' Opposition to Pltfs
EAJA Fees for Phase 1

	2000			2001			2002			2003		
Billing Entity	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount
JFM												
AD												
ADRIAN CLARKE												
AEA (ALEXIS APPLEGATE)												
ANDREA CLARK-CIGANEK												
ANDREA MCGLYNN												
ASC	0		0	0		0						
BABBY	332.6	134.5	44734.7	1	138	138						
BEAR												
BLS	0		0									
BRENDA SUN												
BRIAN MCKAY												
BROWN	95.737	134.5	12876.6265	21.662	138	2989.356	0	141.25	0	69.635	145.25	10114.48375
CANDICE WU												
CHRIS BORDENER												
CHRIS FORHECZ												
CHRIS WEBER												
CHRISTINE HSIEH												
CRB (CHARLOTTE BUTTRAM)	0		0									
DANELLE LARSEN												
DANTE PARHAM												
DAUPHINAIS												
DFC												
DGB	0		0									
DMZ (DAVID ZACKS)	5	134.5	672.5	0	138	0						
DONALD MCGAUHEY												
DOUGLAS BARBIN												
ECHOHAWK	4.4	134.5	591.8									
EHL (LEVITAS)	390.7	134.5	52549.15	5.4	138	745.2						
ELENI BUNCH												
ERIC SEIFERT												
ERICA STRATEN												
GEOFFREY REMPEL (PWC)												
GINGOLD	2125.1	134.5	285825.95	401.9	138	55462.2						
GREG BARDNELL												
HARPER	294.3	134.5	39583.35	6.2	138	855.6						
HENRY INES												
HOLT	285	134.5	38332.5	3.35	138	462.3						
JASON FLEMMONS												

	2004			Total Hours	Total Amount
Billing Entity	Hours	EAJA_Rate	Amount		
JFM				0	0
AD				0	0
ADRIAN CLARKE				58	11600
AEA (ALEXIS APPLEGATE)	8.8	105	924	8.8	924
ANDREA CLARK-CIGANEK				43	8600
ANDREA MCGLYNN				10	2000
ASC	0		0	0	0
BABBY				2687.647	348926.4592
BEAR				94.4	8496
BLS				0	0
BRENDA SUN				286	57200
BRIAN MCKAY				31	6200
BROWN	70.078	148.62	10414.99236	257.112	36395.45861
CANDICE WU				285	57000
CHRIS BORDENER				34	6800
CHRIS FORHECZ				690	138000
CHRIS WEBER				1751	350200
CHRISTINE HSIEH				106	21200
CRB (CHARLOTTE BUTTRAM)	40.6	105	4263	40.6	4263
DANELLE LARSEN				4	800
DANTE PARHAM				111	22200
DAUPHINAIS				345.95	43243.75
DFC				0	0
DGB				0	0
DMZ (DAVID ZACKS)	0.4	148.62	59.448	11.2	1487.398
DONALD MCGAUHEY				15	3000
DOUGLAS BARBIN				58	11600
ECHOHAWK				112.45	14481.737
EHL (LEVITAS)	9.65	148.62	1434.183	1157.25	152611.408
ELENI BUNCH				115	23000
ERIC SEIFERT				67	13400
ERICA STRATEN				7	1400
GEOFFREY REMPEL (PWC)				2361	472200
GINGOLD	284.6	148.62	42297.252	8324.8	1086750.352
GREG BARDNELL				208	41600
HARPER	103.4	148.62	15367.308	3548.686	458991.5424
HENRY INES				713	142600
HOLT	8.75	148.62	1300.425	1931.94	249689.807
JASON FLEMMONS				46	9200

	Year	Data										
	1996			1997			1998			1999		
Billing Entity	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount
JCB										0		0
JEFF PARMET										2	200	400
JESSICA POLLNER							134	200	26800	146	200	29200
JMW (J. MICHAEL WIGGINS)										33.2	130.25	4324.3
JOE CHERIATHUNDAM							483	200	96600	108	200	21600
JOHN LANKENAU										24	200	4800
JRS (JORDANA STERNBERG)										5.2	130.25	677.3
JTC										0		0
JVH (VANCE HUGHES)										2.5	130.25	325.625
JWX										0		0
KAWAHARA	81	125	10125	115.54	126	14558.04						
KHS (KIM STOGNER)										5.5	130.25	716.375
LARRY THIBODEAU							0		0			
LAURA GOODING							257	200	51400			
LAURA SCHWEITZER							206	200	41200	514	200	102800
LESLIE TOMLINSON										905.2	200	181040
MARICE DORSEY							17	200	3400			
MCKAY MOTSHABI							78	200	15600			
MICHAEL CHANG							2	200	400	395	200	79000
MIKE SAVAGE							25	200	5000			
MJA (MILES ALEXANDER)										0.5	130.25	65.125
MSY												
NARF CLERKS				293.25	85	24926.25	148.25	85	12601.25	354	90	31860
PATRICK KELKAR							13	200	2600			
PAUL GUNSON							21	200	4200			
PEREGOY	204.4	125	25550	308.85	126	38915.1	721.7695	127.62	92112.22359	4.7	130.25	612.175
RACHEL GRABAN										481	200	96200
RCD (RODERICK DENNEHY)										128.9	130.25	16789.225
RCV										0		0
REMPEL												
RENEE GRAVES							25	200	5000	42	200	8400
RIC PACE										160	200	32000
RLR (RONALD L. RAIDER)										0		0
RON MONTICONE							73	200	14600			
RPM (ROBERT MARCOVITCH)												
RSF										0		0
SAC (STEVE CLAY)												
SANDEEP SOORYA							391	200	78200	1386	200	277200
SHANNON JONES										44	200	8800
SHARON FITZSIMMONS										224	200	44800
SP (SARAH PEREZ)										136.3	90	12267
STEPHANIE ZHUANG										174	200	34800
TC												
TKB										0		0
TRACEY FOLEY							7	200	1400	11	200	2200
WP (WILMER PARKER)										0	130.25	0
WWB												
Grand Total	2456.9	875	307112.5	2813.0235	841	342417.711	9245.324	6850.72	1533443.194	15328.385	7423.75	2557158.171

	2000			2001			2002			2003		
Billing Entity	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount	Hours	EAJA_Rate	Amount
JCB												
JEFF PARMET												
JESSICA POLLNER	0	200	0									
JMW (J. MICHAEL WIGGINS)	32.6	134.5	4384.7	7.3	138	1007.4						
JOE CHERIATHUNDAM												
JOHN LANKENAU												
JRS (JORDANA STERNBERG)												
JTC	0		0									
JVH (VANCE HUGHES)												
JWX												
KAWAHARA												
KHS (KIM STOGNER)												
LARRY THIBODEAU												
LAURA GOODING												
LAURA SCHWEITZER	2	200	400									
LESLIE TOMLINSON												
MARICE DORSEY												
MCKAY MOTSHABI												
MICHAEL CHANG												
MIKE SAVAGE												
MJA (MILES ALEXANDER)	0		0	0		0						
MSY				0		0						
NARF CLERKS	0		0	0		0						
PATRICK KELKAR												
PAUL GUNSON												
PEREGOY												
RACHEL GRABAN												
RCD (RODERICK DENNEHY)	3.3	134.5	443.85									
RCV												
REMPEL	42	90	3780	0		0						
RENEE GRAVES												
RIC PACE												
RLR (RONALD L. RAIDER)	0		0									
RON MONTICONE												
RPM (ROBERT MARCOVITCH)	36.9	134.25	4953.825	0		0						
RSF	0		0									
SAC (STEVE CLAY)	0		0									
SANDEEP SOORYA	0		0									
SHANNON JONES												
SHARON FITZSIMMONS												
SP (SARAH PEREZ)	23	90	2070	1.1	90	99						
STEPHANIE ZHUANG												
TC	0		0									
TKB												
TRACEY FOLEY												
WP (WILMER PARKER)	1.4	134.5	188.3									
WWB	0		0									
Grand Total	3674.037	2193.75	491387.2515	447.912	1194	61759.056	0	141.25	0	69.635	145.25	10114.48375

	2004			Total Hours	Total Amount
Billing Entity	Hours	EAJA_Rate	Amount		
JCB				0	0
JEFF PARMET				2	400
JESSICA POLLNER				280	56000
JMW (J. MICHAEL WIGGINS)				73.1	9716.4
JOE CHERIATHUNDAM				591	118200
JOHN LANKENAU				24	4800
JRS (JORDANA STERNBERG)				5.2	677.3
JTC				0	0
JVH (VANCE HUGHES)				2.5	325.625
JWX				0	0
KAWAHARA				196.54	24683.04
KHS (KIM STOGNER)				5.5	716.375
LARRY THIBODEAU				0	0
LAURA GOODING				257	51400
LAURA SCHWEITZER				722	144400
LESLIE TOMLINSON				905.2	181040
MARICE DORSEY				17	3400
MCKAY MOTSHABI				78	15600
MICHAEL CHANG				397	79400
MIKE SAVAGE				25	5000
MJA (MILES ALEXANDER)				0.5	65.125
MSY				0	0
NARF CLERKS				795.5	69387.5
PATRICK KELKAR				13	2600
PAUL GUNSON				21	4200
PEREGOY				1239.7195	157189.4986
RACHEL GRABAN				481	96200
RCD (RODERICK DENNEHY)				132.2	17233.075
RCV				0	0
REMPEL	82.2	105	8631	124.2	12411
RENEE GRAVES				67	13400
RIC PACE				160	32000
RLR (RONALD L. RAIDER)	21.7	148.62	3225.054	21.7	3225.054
RON MONTICONE				73	14600
RPM (ROBERT MARCOVITCH)				36.9	4953.825
RSF				0	0
SAC (STEVE CLAY)				0	0
SANDEEP SOORYA				1777	355400
SHANNON JONES				44	8800
SHARON FITZSIMMONS				224	44800
SP (SARAH PEREZ)				160.4	14436
STEPHANIE ZHUANG				174	34800
TC				0	0
TKB				0	0
TRACEY FOLEY				18	3600
WP (WILMER PARKER)				1.4	188.3
WWB				0	0
Grand Total	630.178	1355.34	87916.66236	34665.3945	5391309.03

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' Equal Access to Justice Act Petition for Interim Fees Through the Phase 1.0 Proceeding*. Dkt.2627. Upon consideration of the Interim Petition, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs must provide notice of their Interim Petition and Defendants' Opposition to the petition to all class members; it is further

ORDERED that Plaintiffs' Interim Petition is denied and no EAJA fees or expenses are awarded.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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