UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

SHOW, INC.; CONTENDER FARMS, L.L.P; and MIKE MCGARTLAND,	§	
Plaintiffs,	§	Case No. 4:12-cv-00429-Y
v.	§	
UNITED STATES DEPARTMENT OF AGRICULTURE,	§	
Defendant.	§	

PLAINTIFFS' BRIEF SUPPORTING APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

Respectfully submitted by:

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ATTORNEYS FOR PLAINTIFFS

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Preliminary Statement

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, authorizes the award of attorneys' fees and expenses in a successful lawsuit against a federal agency. It "'ensure[s] that certain individuals, partnerships, corporations . . . or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.'" *Scarborough v. Principi*, 541 U.S. 401, 407 (2004) (citation omitted).

Two provisions of the EAJA further this interest in government accountability here. Section 2412(b) *permits* fee awards at market-level hourly rates where, for example, an agency "obstinately" acts contrary to statutory language. Section 2412(d), however, *requires* a rate-capped fee award where an agency fails to prove that its rulemaking and litigation positions were "substantially justified." *See Baker v. Bowen*, 839 F.2d 1075, 1080 (5th Cir. 1988).

Both provisions compel an award to Plaintiffs. *First*, the Fifth Circuit emphatically rejected the United States Department of Agriculture's ("USDA" and "Agency") positions in this case using the same, plain-language arguments that Plaintiffs and others have raised for years. The Horse Protection Act ("HPA") on its face "plainly prohibits" the USDA from promulgating the regulation at issue in this case, and the Agency was unreasonably obstinate in arguing otherwise. The court thus may award Plaintiffs attorneys' fees calculated at a $250 per hour blended rate, plus expenses. *Second*, the administrative record and the Fifth Circuit's opinion virtually preclude the Government from establishing that it was "substantially justified" in its conduct. The USDA failed to rebut Plaintiffs arguments at the rulemaking stage, and the Fifth Circuit repeatedly observed that the Agency's litigation positions contravened fundamental administrative law principles. At minimum, then, Plaintiffs are entitled to a fee award based on statutory, cost-of-living adjusted hourly rates, plus expenses.

I. PRIOR PROCEEDINGS

A. Proceedings at the agency level.

Horse Industry Organizations ("HIOs"), like Plaintiff SHOW, Inc., promote the anti-soring purposes of the Horse Protection Act ("HPA" and the "Act") by licensing Designated Qualified Persons ("DQPs") to inspect horses entered at certain competitive events. Those found to have violated an HIO rule receive a penalty determined by reference to the inspecting HIO's rulebook and penalty matrix. As a result, the rules and penalties enforced by HIOs at Tennessee Walking Horse shows vary depending on the identity of the HIO hired to facilitate the inspection of horses for each event.

In early 2010, however, the USDA developed a protocol that, if adopted by an HIO, would have required the HIO to impose suspension penalties against entrants whose horses failed a DQP inspection, essentially placing the violation of a private entity's rulebook on par with a violation of the HPA itself. Px. 83, pp. 1199-1204.[1] SHOW and various other HIOs refused to adopt the protocol. Px. 76, pp. 1162-65; Px. 81, p. 1192.

The Agency responded by proposing to make the protocol a regulation imbued with the force of law.[2] The regulation's enforcement provision was simple: HIOs that refused to abide by proposed regulation would be stripped of the Agency certification necessary to license horse inspectors, effectively putting non-adopting HIOs out of business. Px. 90, p. 1254; Px. 4, pp. 92-96. The USDA specifically intended to give HIOs primary responsibility for enforcing the HPA;

[1] Plaintiffs' evidence is included in seven separate appendices. Plaintiffs' Exhibits A and 1 through 130 were filed prior to the appeal, while Plaintiffs' Exhibits 131 through 155 are filed with the application and this brief. References to the exhibits are by "Px.__, p.__," the page numbers being consecutive and at the bottom of the page. References to the district court's files are by "Doc.__, p.__." "AR" references the Administrative Record, at Doc. 35, pp. 1–5810.

[2] This brief refers to the regulation using both "Rule" and "Regulation." Both terms have been used in various stages of this litigation.

the proposed regulation "amend[ed] the horse protection regulations to require [HIOs] . . . to assess and enforce minimum penalties for violations of the [HPA]." Px. 4, p. 92; Px 7, pp. 162, 168. Rather than looking to the statute for guidance, the new rule created penalties that the USDA "determined to be appropriate and necessary to eliminate soring." Px. 7, p. 169.

SHOW and McGartland objected to the proposed rulemaking. They pointed out—correctly, it turns out—that nothing in the HPA authorized the USDA to create an enforcement scheme mandating that HIOs adopt and enforce Agency-created penalties. What's more, SHOW and McGartland argued, doing so would *directly contravene* the HPA. The Act's plain language empowers only the USDA to adjudicate whether a person has violated the HPA, and then only through the procedures and penalties statutorily authorized by Congress. Px. 97, pp. 1335–80; Px. 98, pp. 1381–1406; Px. 131, pp. 1951–52, ¶¶ 4–7. As the Fifth Circuit has now admonished, the HPA's text could not have been clearer about the scope of the Agency's authority: "*No penalty* shall be assessed [against a person who violates the HPA] *unless* such person is given notice and opportunity for a hearing *before the Secretary*" and with the "amount of [any] civil penalty . . . assessed *by the Secretary by written order*." *See* 15 U.S.C. § 1825(b)(1) (emphasis added).

The Agency never addressed these plain-language arguments, which were reiterated throughout the rulemaking process. In June 2012, the USDA nonetheless adopted the Rule. Px. 7, pp.162-94. Confronted with a regulation unauthorized and contrary to the HPA and that mandated the unlawful enforcement of federal law, Plaintiffs sued to enjoin enforcement of the Rule. Px. 131, pp. 1952–53, ¶¶ 7–9.

B. Proceedings in federal court.

Consistent with their positions before the Agency, and relevant here, Plaintiffs argued to this court that Congress had spoken directly to the issue of HPA enforcement and that the Act did not authorize the Rule. *See, e.g.*, Doc. 100, p.18 (acknowledging that "[p]laintiffs contend that

'Congress, in HPA § 1825, has spoken directly to the precise questions concerning how those engaging in prohibited conduct should be punished, who should decide whether punishment is warranted, and what the penalty should be'" (citation omitted)).

The USDA, however, took a different approach in federal court. During the rulemaking process, the USDA conceded that the Rule was meant to punish horse show participants like McGartland and Contender Farms, the types of persons who could actually serve-out HPA-related punishments. In litigation, however, the Government took the position that HIOs were the Rule's true objects and that McGartland and Contender Farms lacked standing. The court, persuaded by this framing as to on the merits, concluded that "[t]he precise question at issue" in this case was "whether the HPA authorizes the Department to impose [the Rule's] requirements on HIOs as a condition of certification." *Id*. at 15. This court granted summary judgment for the USDA under this view, and McGartland and Contender Farms appealed.

C. Fifth Circuit Decision.

The Fifth Circuit emphatically sided with the Plaintiffs.[3] It agreed with the Plaintiffs' overarching characterization of the challenged Regulation as one "requiring that private entities, [HIOs], impose mandatory suspensions on those participants found to engage in a practice known as soring." *See* Px. 150, pp. 2222–23 (slip op.); *see also Contender Farms, L.L.P. v. USDA*, 779 F.3d 258 (5th Cir. 2015). The court began by rejecting the USDA's position that Plaintiffs lacked standing, holding that it was "*clear* that Contender Farms and McGartland are the objects of the Regulation," as evidenced by the USDA's position at the agency level that "the suspensions target[ed] *participants*." *Id*. at 2228 (emphasis added).

[3] On appeal, the parties took the same positions as they did in this court. *See* Pxs. 151–52, pp. 2247–346.

The opinion's merits holdings refuted each of the Agency's positions as patently untenable. Instead of a mere certification requirement, the court held that "the Regulation is an indisputably significant effort by the USDA to become involved in HIO *enforcement* procedures." *Id*. at 2238. Rather than an issue left to agency discretion, the court concluded that the "well-established principles of *Chevron*" and the HPA's plain text compelled the conclusion that the HPA did not authorize the Regulation. *See id.* at 2234.

Indeed, the court held that the HPA "plainly prohibit[ed]" the Regulation and its approach to HPA enforcement. *See id.* at 2239. As to the position that HPA § 1823(c) authorized the Agency to impose the new enforcement scheme on HIOs, the Court held that "by looking to the plain language of §1823(c)," it is clear that "nothing in § 1823(c) contemplates USDA involvement in the *enforcement* procedures of HIOs." *Id.* at 2241. "Section 1823(c) plainly allows the USDA only to impose those requirements that relate to the certification and inspection process for individual inspectors." *Id.* "[C]ontrary to the statute," then, "the Regulation establishes a parallel enforcement scheme" unsupported by the "plain language" of the statutory text. *See id* at 2241–42.

The Fifth Circuit just as thoroughly dismissed the Government's position that the Regulation was authorized by the general rulemaking provision in HPA § 1828. In fact, building off of a question posed to the Agency at oral argument, the opinion portrayed this position as tantamount to allowing the USDA to amend the HPA. *See id.* The Court concluded that the "USDA's reading of its rulemaking authority under §1828 of the HPA stretches beyond the statute's plain language" because the "Regulation addresses an area that is plainly outside the USDA's statutory authority." *Id.* at 2343. As with § 1823, nothing in § 1828 "impl[ies] that the USDA may [] establish a mandatory *enforcement* system administered by [] HIOs." *Id.*

The Court echoed the arguments the Plaintiffs raised in the rulemaking proceedings in holding that HPA § 1825 also fails to authorize the Regulation's approach:

> Indeed, Congress expressly conferred civil and criminal enforcement to the USDA elsewhere in the HPA. Such violators of the HPA could be disqualified from participating in horse shows "by order of the Secretary, after notice and an opportunity for a hearing before the Secretary." 15 U.S.C. §1825(c). By its plain language, the HPA confers upon the USDA the ability to disqualify competitors from participating in the Tennessee walking horse industry following notice and a hearing *before the USDA*. This provision addresses the issue of enforcement, and it provides that only the USDA has enforcement power, not HIOs. In light of §1825, the USDA possesses only the authority: (1) to provide qualifications for inspectors; and (2) to, itself, assess penalties for HPA violations.

Id. at 2241 n.6. The court further held that (1) "the enforcement provisions in § 1825 apply *only* to the USDA and do not contemplate delegation to third parties," *id*. at 2242; and (2) the Regulation's separate liability and enforcement scheme "extends the authority of the USDA beyond that statutorily defined mission." In doing so, the Regulation ran afoul of Fifth Circuit precedent holding that, "[a]lthough federal agencies often possess broad authorities to regulate behavior, an agency may not 'create from whole cloth new liability provisions.'" *Id.* at 2240 (quoting *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 753 (5th Cir. 2011)).

D. The Law of the Case Doctrine

After examining each part of the HPA relied upon by the USDA, the Fifth Circuit "conclude[d] that none of the[] provisions authorizes the Regulation but, conversely, that these provisions *plainly prohibit* the Regulation." *Id*. at 2239 (emphasis added). Under the law-of-the-case doctrine, this ruling and the holdings described above, among others, control consideration of the instant fee application. The law-of-the-case doctrine "prevents a district court on remand from revisiting an issue of law or fact decided on appeal" and "'binds [any] subsequent proceedings in the district court and on later appeal'" as to any issue previously resolved, "regardless of whether the issue was decided explicitly or by necessary implication."

See Crowe v. Smith, 261 F.3d 558, 562 (5th Cir. 2001) (citations omitted).

II. PLAINTIFFS ARE ENTITLED TO A MANDATORY FEE AWARD.

The EAJA makes the award of attorneys' fees and expenses mandatory "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[4] 28 U.S.C. § 2412(d)(1)(A). To satisfy this standard, the Government's position must have been objectively reasonable "both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The EAJA places this heavy burden on the Government, which must show "substantial justification" by a preponderance of the evidence for "the positions it took both during the litigation and agency proceedings that preceded that litigation." *See Castaneda-Casillo v. Holder*, 723 F.3d 48, 73 (1st Cir. 2013) (citations omitted); *Washington v. Heckler*, 756 F.2d 959, 961 (3rd Cir. 1985) (noting Government's "heavy" burden).

During the rulemaking process and in court, an agency cannot ignore clear or settled law. The Government is charged with knowledge of relevant legal authorities, and its positions cannot be substantially justified if it ignored them. *Baird v. C.I.R.*, 416 F.3d 442, 452 (5th Cir. 2005). Notably, this rule applies where "a regulation obviously altered the scope of the relevant statute." *Nalle v. C.I.R.*, 55 F.3d 189, 193 (5th Cir. 1995). In such a case, the Government should have known that the regulation was invalid and generally cannot be "substantially justified in defending it." *Id.*; *cf. Estate of Perry v. C.I.R.*, 931 F.2d 1044, 1046 (5th Cir. 1991) (When Congress adopts a law and the language is clear and unequivocal as to the scope of the agency's authority, that settles the issue.).

[4] Each Plaintiff is EAJA eligible. Contender Farms LLP is a partnership "the net worth of which did not exceed $7,000,000 at the time the civil action was filed," *see* 28 U.S.C. § 2412(d)(2); Px. 131, p. 1950, ¶ 2, and Mike McGartland is a partner in Contender Farms. *Id.* SHOW, Inc. satisfies the same criteria and also is a 501(c)(3) not-for profit under the Internal Revenue Code. *See id.* at 1950–51, ¶ 3; Px. 133, pp. 1962–72.

Here, the Fifth Circuit's decision effectively establishes that the scope of the USDA's authority in the HPA "was not even open to serious question," *Bouterie v. C.I.R.*, 36 F.3d 1361, 1370 (5th Cir. 1994), precluding the Agency from defending the Regulation's sweeping provisions as substantially justified under the EAJA. In striking down the Regulation, the Fifth Circuit reminded the USDA that, "'where Congress has established a clear line, the agency cannot go beyond it,'" a basic tenet of administrative law. *See* Px. 150, p. 2235 (citation omitted). The court also analogized the Regulation's creation of a liability and enforcement scheme different from the one Congress included in the HPA as an attempt to amend the Act, also a black-letter precept. *See Manhattan Gen. Equip. Co. v. United States*, 297 U.S. 129, 134 (1957) (An agency does not have the power to make laws, but only "the power to carry into effect the will of Congress as expressed in the statute."); *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (An agency cannot add to the statute something that is not there.). One simply cannot read the strong language in the Fifth Circuit's opinion and conclude that the court considered the Government's interpretations of the simple and short statutory provisions at issue "substantially justified." Accordingly, a fee award is mandatory here.

Where the Government has taken a position rejected by a court, the

> Fifth Circuit has held that the government's position was substantially justified: (1) where the government relied on a regulation that was later invalidated; (2) where the government relied on a case precedent later set aside; or (3) where new evidence, not available at the administrative level, became available at trial.

Burgess v. Astrue, No. C–10–371, 2011 WL 3667705, at *3 (S.D. Tex. Aug. 4, 2011). Having lost in the Fifth Circuit, the USDA cannot carry its burden to show substantial justification unless one of these exceptions applies. *See Baker*, 839 F.2d at 1081.

Not one does. The Agency lost based on the plain language of the HPA and the clear teachings of decades-old administrative case law. It was not required to apply its expertise to

disputable factual matters or grapple with complex legal issues over which reasonable minds might differ.[5] The Agency therefore has no basis to claim that it has unearthed new evidence or that it relied on now-discredited case law. *See generally Emplanar, Inc. v. Marsh*, 11 F.3d 1284, 1297 (5th Cir. 1994); *Hallman v. INS*, 879 F.2d 1244, 1246-47 (5th Cir. 1989) (per curiam). Nor can the Government argue that this dispute arose out of its enforcement of a now-invalid regulation. *See Spawn v. W. Bank-Westheimer*, 989 F.2d 830, 840 (5th Cir. 1993). The Plaintiffs challenged the USDA's authority to adopt the Regulation—relying on legal authorities of which the Government had imputed knowledge *ab initio*—not its application in a specific instance.

Given the considerations above and the law-of-the-case doctrine, the USDA must establish the following to prove that it was substantially justified in forcing the Plaintiffs to bring this litigation:

- that the plaintiffs were not the "objects of the regulation," where the Fifth Circuit
    - held that a "commonsense approach" made "clear" that the Regulation specifically and explicitly targeted horse show participants like Contender Farms and McGartland, and

[5] This is not a case where the Government advanced "novel but credible . . . interpretations of the law" as part of "vigorous enforcement efforts." *Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985). Not only has the USDA has never claimed otherwise, it advanced arguments in litigation that depended on a run-of-the-mill application of *Chevron* principles. And, at the agency level, the USDA failed to introduce anything into the administrative record, such as memoranda, that contained an arguably "novel" legal analysis, let alone an evaluation of the straightforward legal arguments raised by Plaintiffs and ultimately applied by the Fifth Circuit. *See* AR at Doc. 35, pp. 1-5810.

This dearth of legal analysis may be traceable to privilege concerns. *See* Px. 148, pp. 2211-12; AR at Doc. 35-2, pp. 2-3. However, the case the Government cited for withholding privileged documents, *Nat'l. Courier Ass'n. v. Bd. of Governors of the Fed. Reserve Sys.*, 516 F.2d 1229, 1241–42 (D.C. Cir. 1975), acknowledges that privilege does not apply to "memoranda adopted by the agency as the basis of its decision." *Id.* at 1242. The absence of legal analysis in the administrative record therefore suggests that the USDA either (1) failed to subject the positions it adopted in the rulemaking process to legal analysis, or (2) conducted a legal analysis that it ultimately did not rely upon.

- rejected the USDA's position to the contrary as "unpersuasive," *see* Px. 150, pp. 2228–30;

- that it was reasonable to construe the HPA to give the Agency authority to adopt any regulation that furthered the purposes of the Act, even though the Fifth Circuit concluded that this interpretation

  - went well beyond the "clear line[s]" established by Congress in the HPA, *id* at 2235,

  - "indisputably" interjected the USDA in HIO enforcement, *id*. at 2238,

  - "extend[ed] the authority of the USDA beyond [its] statutorily defined mission," *id* at 2240, into "an area that is *plainly outside* the USDA's statutory authority," *id.* at 2243 (emphasis added),

  - ignored that the HPA does not "imply [that] the USDA may . . . establish a mandatory private *enforcement* system administered by . . . HIOs," *id*;

- that the Regulation was authorized by § 1823(c), even though the Fifth Circuit said

  - "nothing in § 1823(c) contemplates USDA involvement in the enforcement procedures of HIOs," *id*. at 2241,

  - "[s]ection 1823(c) plainly allows the USDA only to impose those requirements that relate to . . . inspectors," *id*., and

  - "[t]he plain language of § 1823(c) simply does not support" the Regulation, *id*. at 2242;

- that HPA § 1828's general rulemaking provision authorized an alternative enforcement scheme administered by private entities in addition to that entrusted to the USDA in § 1825, even though the Fifth Circuit explained that

  - "[n]othing in [the] legislative history supports the wholesale creation of an enforcement regime carried out by HIOs," *id*. at 2242, fn. 7,

  - "the enforcement provisions of § 1825 apply only to the USDA and do not contemplate delegation to third parties," *id*.,

  - "a broad grant of general rulemaking authority" like that in § 1828 "does not allow an agency to make amendments to statutory provisions[,] . . . . an area plainly outside the USDA's statutory authority," *id.* at 2243;

- the USDA's position with respect to § 1828 "stretches beyond the statute's plain language" and untenably argues that the HPA must have "expressly *disallow[ed]*" the Regulation's approach, *id.*

From the beginning, the USDA was repeatedly told that its adoption of the Rule was not only unauthorized but prohibited by the HPA. *See Nalle*, 55 F.3d at 192–93. The Fifth Circuit now has held as much, and the Government cannot meet its burden to prove that its positions in adopting and defending the Regulation were substantially justified. Accordingly, the Plaintiffs are entitled to mandatory payment of attorneys' fees under 28 U.S.C. § 2412(d).

III. THE USDA'S "UNREASONABLY AND OBDURATELY OBSTINATE" POSITIONS JUSTIFY RECOVERY AT MARKET RATES.

The EAJA's "bad faith and common benefit/common fund" provision, 28 U.S.C. § 2412(b), "permits a court to award attorney's fees and costs against the government to the same extent that it may award fees in cases involving other parties (i.e., the market rate)." *See Baker*, 839 F.2d at 1080. As with the mandatory fee-award provision, the market-rate provision focuses on the Government's conduct. At all stages, including at the agency level, the Government must act reasonably. *SEC v. Fox*, 855 F.2d 247, 251–52 (5th Cir. 1988). Unreasonable conduct at any point permits recovery, even if the Government's positions were otherwise substantially justified. That "the government's litigating position was substantially justified does not necessarily offset prelitigation conduct that was without a reasonable basis." *See Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994); *see also Smith v. Bowen*, 867 F.2d 731, 734 (2d Cir. 1989) ("[I]f the underlying Government position is not substantially justified, a court must award fees for counsel's representation . . . in all subsequent litigation of the matter—even if the Government's litigation position is itself reasonable when considered alone."); *cf. United States v. 515 Grandy, LLC*, 736 F.3d 309, 317 (4th Cir. 2013) ("adopt[ing] the view that an unreasonable prelitigation position will generally lead to an award of attorney's fees under the EAJA").

The Government's position also must be consistent. An unreasonable underlying agency action cannot be cured by subsequent—but different—litigation positions, even if persuasive. To credit such arguments would allow agencies to defend regulations on grounds not considered by the agency during the rulemaking process. *See Hackett v. Barnhart*, 475 F.3d 1166, 1174–75 (10th Cir. 2007).

A. Recovery for Unreasonably Obdurate Conduct.

The factors relevant to determining whether a prevailing party is eligible for market-rate recovery predates § 2412(b). Over four decades ago, the Fifth Circuit identified "three principle rationales for allowing attorneys' fees" even in the absence of statutory authorization: "(1) 'unreasonably and obdurately obstinate' behavior, (2) private attorney general theory, and (3) the common fund situation." *See Fairley v. Patterson*, 493 F.2d 598, 605 n.10 (5th Cir. 1974) (collecting authorities). The "unreasonably and obdurately obstinate" principle applies "[w]hen a suit alleging violation of clearly established law in a particular area is filed, and the defendants, in the face of evident violation of this law, persist in forcing the plaintiffs to" litigate the issue. *Id.*; *accord Alabama Disabilities Advocacy Program v. Safetynet Youthcare, Inc.*, No. 13-0519-CG-B, 2015 WL 566946, at *5 (S.D. Ala. Feb. 10, 2015). The "private attorney general" theory also allows "fee shifting" where the litigation "vindicat[es] a policy that Congress considered of highest priority." *Wilderness Society v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974). And, "[u]nder the 'common benefit' exception [to the American rule], a court may award fees to a party where the party's actions have conferred a substantial benefit upon a class of persons." *See Knights of the Ku Klux Klan Realm of La. v. E. Baton Rouge Parish Sch. Bd.*, 679 F.2d 64, 67 (5th Cir. 1982).

Congress amended the EAJA to add a market-rate provision after the Supreme Court abrogated the line of cases authorizing such fee awards under common law and equitable principles. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In doing

so, Congress specifically found "that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing vindication of their rights in civil actions and in administrative proceedings." *See* Pub. L. 96-481, 94 Stat. 2321 (Oct. 21, 1980). The EAJA amendment purposefully "diminish[ed] this deterrent [to] seeking [judicial] review" and "insure[d] the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees." The Supreme Court and the Fifth Circuit subsequently affirmed that pre-*Alyeska* approaches to fee awards remain viable under § 2412(b). *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991) (reiterating that a court's authority to award fees "derives" in part from its "historic equity jurisdiction," and that awards are appropriately given "to a party whose litigation efforts directly benefit others"); *Knights*, 679 F.2d at 67.

The Plaintiffs' request satisfies these common-law approaches to market-rate fee recovery. The USDA "clearly" exceeded its statutory authority by promulgating a "plainly prohibited" Regulation and then, despite objections on those very grounds, persisted in defending its clearly unlawful position. The Regulation adversely affected thousands of participants in the Tennessee Walking Horse industry. As a result of Plaintiffs' efforts, the HPA will now be enforced as Congress intended. Plaintiffs undertook this expensive effort with no view to being financially rewarded by a possible monetary recovery; they sought only declaratory and injunctive relief. Having vindicated the rule of law, Plaintiffs should be reimbursed the full cost of their effort, and EAJA § 2412(b) grants this court the authority to make them whole.

B. The Government's Position Was "Unreasonably and Obdurately Obstinate."

The record evidence at the agency level establishes that the USDA knew, or should have known, (1) that the HPA did not authorize it to adopt the Regulation and (2) that adopting the

Regulation would contravene the Act. Indeed, given the Fifth Circuit's holdings, the Agency is charged with such knowledge. *See, e.g., Baird*, 416 F.3d at 452; *Nalle*, 55 F.3d at 193.

The USDA nonetheless embarked on an effort to compel HIOs to enforce uniform mandatory suspension penalties in early 2010, when it promulgated the 2010 "Points of Emphasis" protocol requiring HIOs to enforce mandatory suspension penalties through their rulebooks. Px. 83, pp. 1199–1204. In an email of March 9, 2010, several HIOs raised a host of concerns about this proposal. Px. 79, p. 1177. Only eight days later, however, the USDA said that any HIO licensing DQPs must adopt the penalty protocol or be decertified. *See id.* at 1178. During an August 10, 2010, teleconference, the USDA again demanded that HIOs include the protocol in their rulebooks, and followed that with a written directive on August 12, 2010. Px. 90, p. 1254. That same day, the Humane Society of the United States, Friends of Sound Horses, Inc., and American Horse Protection Association—*amici* supporting the USDA in both the trial court and Fifth Circuit in this case—filed a Petition for Rule Making with the USDA, seeking to make the protocol mandatory by regulation. *See id*. at 1178, Px. 88, pp. 1231–1246.

SHOW formally objected to the Petition for Rule Making. Px. 97, pp. 1335–80. Citing *Chevron*, it unambiguously argued that "the adoption of the proposed penalty scheme would not give effect to Congress' express intention, and therefore could not be upheld." *Id*. at 1367. Presaging the Fifth Circuit's opinion issued over four years later, SHOW also asserted that the proposed rule was "in direct contravention to the express authority granted to the Secretary under the HPA" because, among other things, "[t]he HPA is clear that primary responsibility for enforcement of the Act rests with the USDA." *See id*. at 1338, 1342–43, 1363.

SHOW did not confine its concerns to the formal rulemaking process. In September 2010, the USDA's Office of Inspector General ("OIG") issued an audit report about the USDA's HPA

enforcement activities. Px. 6, pp. 109-160. SHOW responded to the OIG report, observing that the Act allowed penalties for HPA violations to be assessed only by the Secretary, so that "the USDA can not do through rulemaking what it can not do under the Law." Px. 79, pp. 1179.

Still, the USDA continued to insist that the HIOs incorporate the mandatory suspension penalty protocol into their rulebooks. By a letter dated November 30, 2010, SHOW informed the USDA that it would not adopt the protocol because, as the Fifth Circuit would later hold,

> [n]o where in the Act, Regulations or under any case law does the Secretary have the right or ability to delegate enforcement of the HPA penalties to an HIO or its DQPs. As a matter of law, Courts have held the opposite. The USDA has the sole authority and responsibility to enforce the HPA.

Px. 76, pp. 1163–64. The Administrative Record contains no document from the USDA responding to or addressing SHOW's contentions. Instead, on January 18, 2011, the USDA gave notice to SHOW that it had 30 days to adopt and enforce the protocol or be decertified. Px. 90, p. 1256–57.

SHOW pressed its case in the notice-and-comment portion of the rulemaking. On May 27, 2011, the USDA issued its "Proposed Rules" with a call for comments. Px. 4, pp. 92–96. In justifying the proposed rule, the USDA discussed the HPA, its present regulations, and the development of the DQP/HIO system, noting that the Act permits the agency to enforce penalties, but that it had found this too burdensome and costly. *Id.* at 93. The USDA failed to explain how any HPA provision authorized it to create an enforcement system separate from the one in § 1825, let alone one administered by private entities who appear nowhere in the Act.

Rather, the USDA relied on the OIG report, which it mischaracterized as recommending development of a protocol "to more consistently negotiate penalties with individuals who are found to be in violation of the Act." *Id.* Although that recommendation appeared in OIG report, it was made in the context of the report's primary recommendation: that the USDA "[a]bolish the current

DQP system and establish by regulation an inspection process based on independent accredited veterinarians, and obtain authority, if needed, to charge show managers the cost." Px. 6, p. 116. In other words, the OIG envisioned making independent USDA accredited veterinarians—agents of the USDA—part of the enforcement process, not DQPs or HIOs.

The call for comments drew 28,249 responses, of which 27,349 were substantially identical form letters solicited by and submitted through the Humane Society. Px. 7, p. 166. Most of the remaining 900 comments opposed the Rule, with at least 56 comments contending specifically that the USDA would exceed its authority under the HPA by adopting the Rule. *See* Pxs. 100–103, pp. 1433–1521 (observing, variously, that the HPA can only "be amended by Congress"; that the proposed "changes go beyond the scope of the agency" and were "unlawful"; that "Congress has already set the penalties in the HPA"; that "the HPA already has set penalties for violations"; that "Congress has expressly spoken"; that the Rule was "a bald faced attempt by the USDA to circumvent the law"; that "the USDA does NOT have the unilateral authority to alter the HPA"; and that the Rule was "an ultra vires agency action"). *Id.*

Consistent with its position in federal court, SHOW's comment, Px. 98, pp. 1381–1406, asserted that the USDA was "fully aware that its proposed rulemaking is in direct contravention of the [HPA] as written, constitutional requirements as well as fundamental principles of fairness." *Id*. at 1382. The USDA's coercive attempts to compel HIOs to adopt the mandatory penalties, SHOW further argued, "were made with the full knowledge that [it] had no such authority to require HIOs to do so." *Id*. at 1383. SHOW again noted that, although HPA § 1823(c) authorizes DQPs to inspect horses, "the clear language of the HPA states: **'<u>No penalty</u> shall be assessed <u>unless</u> such person is given notice and opportunity for a hearing <u>before the Secretary</u>'"** and that "under the HPA, **<u>ONLY</u>** the USDA has authority to issue **<u>ANY</u>** penalty for violation of the

Act." *Id*. at 1387 (emphasis in original). SHOW also contended that HPA § 1825 "[a]llows ONLY the Secretary to Assess Penalties," *id*. at 1389, and that § 1823(c)'s "express language . . . provides that inspectors may only 'detect', 'diagnose' and 'inspect.'" *Id*. at 1391.

The "commenters" and SHOW were clearly right, but the USDA bulled ahead. On June 7, 2012, the USDA adopted the new Regulation. It paid lip-service to some of the concerns discussed above in a section titled "Requiring HIOs to Assess and Enforce Minimum Penalties in the Context of the Act." Px. 7, pp. 168–71. The USDA's core position—later held by the Fifth Circuit as contrary to fundamental principles of administrative law—was that it has authority to "impose whatever requirements on the HIOs that [it] determines to be necessary to enforce the Act and the regulations." *Id*. at 168. To justify this virtually unlimited scope of its rulemaking authority, the USDA then set forth its version of the history of the HIO/DQP program since 1970, attempting to justify its action as a mere extension of what was already being done. Px. 7, pp. 166–71. Nowhere did the USDA address the unambiguous language of HPA § 1825.

The result of this obstinate refusal to confront the clear language of the HPA, as repeatedly pointed out by comments opposing the rule, was predictable. The Regulation did not survive a legal challenge when tested against the language Congress adopted.

The Government acted "unreasonably and obdurately obstinate" in adopting and defending the "plainly prohibited" Regulation, and the litigation resulted in a common benefit vindicating a public right. Where an agency is "confronted with a clear statutory or judicially-imposed duty" to initially determine if a statute permits adopting a regulation, but the agency "is so recalcitrant in performing that duty that an injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal rights," an award of fees under § 2412(b) is appropriate. *See, e.g.*, *Fitzgerald v. Hampton*, 545 F. Supp. 53, 57 (D.D.C. 1982). That is precisely what occurred here,

and the Government should now be made liable to those who paid the cost of putting the HPA back on a lawful track. Plaintiffs respectfully request that this court order a fee award under the EAJA's market-rate provision. *See* 28 U.S.C. § 2412(b).

IV. THE AWARD OF THE ATTORNEYS' FEES AND EXPENSES.

The cost of litigating the USDA's "plainly prohibited" conduct has been significant. Fees and expenses paid in this lawsuit total $431,169.39.[6] Px. 131, p. 1959, ¶ 19.

The first step in a fee award analysis is to determine the lodestar hours for which compensation will be allowed. The three attorneys who have represented the Plaintiffs have filed their declarations supporting a fee award. Px. 140, pp. 2062–129; Pxs. 144–146, pp. 2154–96; Px. 147, pp. 2197–210. Those declarations reflect that the attorneys have taken into account the factors in *Johnson v. Georgia Highway Patrol,* 488 F.2d 714, 717 (5th Cir. 1974).

The first *Johnson* factor is the time and labor required. In establishing the total hours to be compensated, the attorneys included itemized statements reflecting the actual time expended during the litigation. The attorneys have exercised billing judgment, and noted where they have taken voluntary reductions in hours. *See, e.g.*, *Hamblen v. Colvin,* 14 F. Supp. 3d 801, 804 (N.D. Tex. 2014). In addition to attorney time spent preparing the case, litigating in the district court, and appealing to the court of appeals, Plaintiffs are entitled to recover fees for time spent in preparing and prosecuting this fee application, or "fees for fees." *Comm'r, I.N.S. v. Jean,* 496 U.S. 154, 160 (1990); *Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992).

[6] Payment has been a burden not just on SHOW and McGartland, but has been spread among those within the industry who support the proper administration of the HPA. *See* Px. 131, p. 1959, ¶ 20. Funds were raised by several organizations, including FAST, Inc., Tennessee Walking Show Horse Organization, Performance Show Horse Association LLC, SHOW Horse Support Fund, Inc., Tennessee Walking Horse National Celebration, Inc., and individuals contributing through those organizations. *Id.* Prevailing in a case conferring a common benefit on a significant class of interested persons is a factor to be taken into account in awarding fees.

The following tables set forth the total hours spent by the three attorneys, the hours billed, for which reimbursement is sought, and the hours not billed.

CAGLE'S HOURS[7]

YEAR	TOTAL HRS.	BILLED HRS.	NON-BILLED HRS.	% NOT BILLED
2011	46	46	0	0%
2012	435	428	7	25%
2013	104	88	16	16%
2014	147	22	126	85%
2015	31	28	4	11%
TOTALS	763	610	153	20%

BROILES'S HOURS

YEAR	TOTAL HRS.	BILLED HRS.	NON-BILLED HRS.	% NOT BILLED
2011	190	190	0	0%
2012	598	581	15	3%
2013	308-328	265	43-63	14%
2014	173	76	97	56%
2015	200	122	78	39%
TOTALS	1,469-1,489	1,234	233-253	16%

CHAPA'S HOURS

YEAR	TOTAL HRS.	BILLED HRS.	NON-BILLED HRS.	% NOT BILLED
2014	147	112	35	24%
TOTALS	2,379-2,399	1,957	421-44	18%

Under the mandatory recover provision at EAJA § 2412(d), the rate of compensation is capped at $125 per hour, though cost-of-living-adjustments ("COLAs") are uniformly made for such fee awards in the Fifth Circuit and the Northern District of Texas. *See Hamblen,* 14 F. Supp. 3d at 805 (citing *Baker,* 839 F.2d at 1084). The cost-of-living increase must be determined on a yearly basis. Using the CPI Price Index for Cost of Living, All Urban Consumers, Dallas/Fort Worth, the COLA adjustment from 1996 yields an hourly rate for 2011 of $174 per hour; for 2012

[7] *See* Px. 140, p. 2075 for this summary, which is based on Ms. Cagle's hours found in Px. 144, Mr. Broiles' hours found in Px. 140, and Mr. Chapa's hours found in Px. 147.

a rate of $178 per hour; for 2013 a rate of $181 per hour; for 2014 a rate of $182 per hour; and for 2015 a rate of $180 per hour. Px. 140, p. 2074; Px. 143, p. 2148–53.

An award under EAJA § 2412(b) is based on the prevailing market rate for attorneys. For attorneys with similar experience to Ms. Cagle, Mr. Broiles, and Mr. Chapa in the Dallas/Fort Worth area—after taking into account the size of their firms, the Texas Lawyer survey of hourly rates for 2012, the State Bar of Texas 2013 Hourly Fact Sheet, and customary rates in the DFW area—$250 per hour represents a reasonable blended market rate for all three attorneys' time.[8] Px. 140, pp. 2072–74; Px. 141; Px. 142, pp. 2136–47.

This blended rate will result in an award under § 2412(b) that is consistent with the attorneys' agreements with their clients that specified billing rates between $200 to $400 per hour through trial, between $100 and $355 per hour for the appeal, and between $150-$300 for this fee application. Additionally, the attorneys agreed to cap fees, and, as a result, they either lowered their hourly rate or did not charge for hours included in their time statements. Px. 140, pp. 2069–70; Px. 144, p. 2157; Px. 147, p. 2198, ¶ 8.

The table below sets forth, by year, a calculation of the compensable hours for which reimbursement is sought, multiplied by the three potentially applicable rates: (1) the $125 per hour rate from § 2412(d); (2) that rate with COLAs from 1996; and (3) a blended market rate of $250 per hour for an award based on § 2412(b).[9]

[8] In 2010, this court approved a blended rate of $250 per hour in a case involving Ms. Cagle and Mr. Broiles, and a market rate of $250 for Ms. Cagle and $400 for Mr. Broiles. *See Smith v. Tarrant Cnty. Coll. Dist.*, No. 4:09-cv-658-Y, 2010 WL 4063226 (N.D. Tex. Oct. 13, 2010).

[9] Px. 140, p. 2076, summarizes from Pxs. 140, 144, 147.

YEAR	TOTAL HRS.	X $125 RATE	X COLA RATE		X $250 MARKET RATE
2011	236	$29,500	[$174]	$41,064	$59,500
2012	1,009	$126,125	[$178]	$179,602	$252,250
2013	353	$44,125	[$181]	$63,893	$88,250
2014	210	$26,250	[$182]	$38,220	$52,500
2015	150	$17,750	[$180]	$27,000	$37,000
TOTAL	1,957	$244,750		$349,779	$489,500

The EAJA also authorizes recovery of reasonable and necessary expenses. Ms. Cagle billed and was paid for $6,422.39 in expenses, of which $5,442.25 has been billed as taxable costs. *See* Doc. 111-1, pp. 1-8. Plaintiffs also seek recovery of $980.04 in expenses. Mr. Broiles and K&L Gates expended several hundred dollars on cite-checkers, proof-readers, copies, binding services, and travel expenses that are not included in this application.

Any recovery will be awarded to the clients, who have agreed that the attorneys will be paid unpaid fees for the fee application with the balance of any award distributed, as directed, to those entities that have contributed to the payment of fees and expenses. *See* Px. 131, p. 1960, ¶ 22.

CONCLUSION

Plaintiffs request that the court order a fee award under the EAJA. Because the Government's adoption of the Rule was unreasonably obstinate, Plaintiffs are entitled to an award of market-rate fees under EAJA § 2412(b) of $489,500, plus expenses of $980.14. At minimum, the Government's positions at the agency and litigation levels were not substantially justified under EAJA § 2412(d), entitling Plaintiffs to a mandatory, cost-adjusted fee award in the total amount of $349,749, plus expenses of $980.14. Applicants request that the court order the government to pay them the higher award found be the court.

CERTIFICATE OF SERVICE

I served this document on the Defendant, by ECF according to the Local Rules and Federal Rules of Civil Procedure, on May 21, 2015.

/s/Karin Cagle
Karin Cagle