

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

SHOW, INC.; CONTENDER FARMS,
L.L.P; and MIKE MCGARTLAND,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF AGRICULTURE,

Defendant.

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Case No. 4:12-cv-00429-Y

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

1. The Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412, authorizes district courts to award reasonable attorneys' fees and expenses to a prevailing party in a lawsuit against a government agency. As a condition of recovery, the party seeking fees and expenses must file an application with the court within 30 days of the final judgment. EAJA §2412(d)(2)(G). The "application [must show] that the party is a prevailing party, is eligible to receive an award under this subsection and the amount sought, including an itemized statement from an attorney ...stating the actual time expended and the rate at which fees and other expenses were computed," EAJA §2414(d)(1)(B). The application seeking fees under §2412(d) shall also allege that the "position of the United States was not substantially justified."

2. Fed. R. Civ. Proc. 54(d)(2) requires that the request for attorneys' fees be made by a motion. The "Contents of the Motion" shall set forth the statutory authority for an award, enumerate the grounds entitling the movant to the award and provide a statement showing the amount sought or a fair estimate. Local Rule 7.1(d) requires a motion be accompanied by a brief

setting forth the parties' contentions of law and fact. Applicants' brief supporting this application is incorporated herein and sets forth the facts and legal authorities justifying an award.

3. In compliance with Local Rule 7.1(i), the evidentiary materials supporting the application are included in the six volumes of appendices containing Plaintiffs' Exhibits A and 1 through 130, which were filed in this court during the district court proceedings. Docs. 24-33, 41-43, 76, and 98. Appendix Volume Seven, containing Plaintiffs' Exhibits 131 through 155, are filed with this application. Applicants refer to these exhibits by "Px. __, p.____." The page numbers are the handwritten consecutive numbers at the bottom of the pages of the exhibits. References to documents filed as a part of the Clerk's record in this court are referenced as "Doc.____, p.____," with a page reference to the Clerk's page number at the top of the page. Where possible, exhibits have been highlighted as required by this Court's rule.

4. The three plaintiffs who filed this lawsuit are eligible to receive a fee award under the criteria in EAJA §2412(d)(2). Contender Farms, L.L.P. is a partnership "the net worth of which did not exceed \$7,000,000 at the time the civil action was filed." Px. 131. p. 1950, ¶2. Mike McGartland is a partner in Contender Farms. *Id.* SHOW is a corporation meeting this same requirement, and additionally, it is a 501(c)(3) not-for profit under the IRC. *Id.* at 1950-51, ¶ 3.

5. Applicants are prevailing parties, having received all relief requested in this lawsuit. Doc. 110, p. 1. The Fifth Circuit Court of Appeals held that the USDA had no authority to adopt the Rule about which the plaintiffs complained and directed this court to enter a judgment accordingly. That judgment is final. *Id.*; Px. 150, pp. 2200-2246.

6. Under §2412(d)(1)(A), the award of attorneys' fees is mandatory "unless the court finds that the position of the United States was substantially justified or that special circumstances make

an award unjust.” The positions of the government at the agency and litigation levels were not substantially justified.

7. Underlying this lawsuit was one dominant legal issue – by what authority could the USDA create a liability and enforcement scheme different from the one Congress established in the HPA. This legal question can be answered by reading a short and unambiguous statute. In its decision, the Fifth Circuit held that HPA §1823 and §1828 not only do not authorize the USDA to adopt the Regulation, but went further, holding that the clear language of the HPA prohibited the agency from adopting a private-party enforcement scheme different from the enforcement provisions Congress adopted in HPA§1825. *Id.* at 2222-2244.

8. Two restrictions apply to the standard of review in this court in determining whether the government has met its burden of proving that its positions at the agency and litigation levels were substantially justified as required under §2412(d). First, the government is restricted to the record made at the agency level and record during litigation. Second, this court must review that evidence bound by the law of the case doctrine. Based on the evidence in the record and applying the law of the case, the government cannot meet its burden of proving its positions were substantially justified.

9. Section 2412(b) provides that “a court may award reasonable fees and expenses of attorneys...to a prevailing party in a civil action brought by or against ... any agency.... [and] the United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law.” Recovery of market rate fees should be awarded when the government unreasonably and obdurately required the plaintiffs to bear the cost of vindicating not only their rights and the rights of a large class of citizens, but also to protect the public interest in having the Executive adopt rules within the confines of statutory authority.

11. The plaintiffs' three attorneys' declarations supporting a fee award are submitted with this filing. Pxs. 140-147, pp. 2062-2210. 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 factor is the time and labor required. In establishing the total hours to be compensated, the attorneys have presented itemized statements reflecting the hours they expended during the litigation. Px. 140, pp. 2076-2128, Px. 145, pp. 2160-93, Px. 147, pp. 2200-10. The attorneys have exercised billing judgment, and noted where they have taken voluntary reductions in hours. *See, Hamblen v. Colvin*, 14 F.Supp. 3d 801, 804 (N.D. Tex. 2014).

12. Applicants are entitled to recover fees for time spent in preparing and prosecuting the application for fees, or "fees for fees." Where the court awards fees under §2412, that award is not defeated by a government showing that its opposition to the fee application was substantially justified. *Commissioner, I.N.S. v. Jean*, 496 U.S. 154,160 (1990), *Perales v. Casillas*, 950 F.2d 1066, 1073 (5th Cir. 1992). Ms. Cagle and Mr. Broiles have spent approximately 240 hours through April 30, 2015, preparing this application, the supporting brief, declarations, exhibits and the supporting Appendix. Px. 140, pp. 2120-28, Px. 144, p. 2158, Px. 145, pp. 2190-93. Ms. Cagle and Mr. Broiles have substantially reduced the hours for which reimbursements is sought to 150 hours. Px. 140, p. 2075.

13. The table below sets forth the total hours the attorneys have spent on the case, the billed hours for which applicants seek reimbursement and the hours not billed for which reimbursement is not sought.

CAGLE'S HOURS¹

<u>YEAR</u>	<u>TOTAL HRS.</u>	<u>BILLED HRS.</u>	<u>NON-BILLED HRS.</u>	<u>% NOT BILLED</u>
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

<u>YEAR</u>	<u>TOTAL HRS.</u>	<u>BILLED HRS.</u>	<u>NON-BILLED HRS.</u>	<u>% NOT BILLED</u>
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

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

14. The attorneys' agreements with the applicants specified billing rates of \$200 to \$400 per hour through trial and between \$100 and \$350 per hour for the appeal. Px. 140, pp. 2069-70, ¶ 12; Px. 144, p. 2159, ¶8. Px. 147, pp. 2198-99, ¶s. 7-14. However, the attorneys agreed to cap fees, and, as a result, they either lowered the hourly rate or did not charge for hours included in their bills. Id. Total fees billed and paid through district court litigation, the court of appeals proceedings preparing and filing the fee application have been \$424,747, while billed and paid expenses have been \$6,422.39, a total of \$431,169.39. Px. 140, p. 2072, ¶14.

¹ Ms. Cagle's hours can be found in Px. 144. Mr. Broiles' hours can be found in his declaration, Px. 140, while Mr. Chapa's hours can be found at Px. 147. See Px. 140, 2075.

15. Under §2412(d), the rate of compensation is capped at \$125 per hour, though in the discretion of the court that rate can be and should be increased by the cost of living index for inflation since 1996. Cost of living adjustments are uniformly made in fee awards in Fifth Circuit courts. 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 adjustment from 1996 yields the following rounded-off hourly rates: for 2011, \$174 per hour; for 2012, \$178 per hour; for 2013, \$181 per hour; for 2014, \$182 per hour; and for 2015, \$180 per hour. Px. 140, p. 2074, Px. 143, pp. 2148-53. *See Hamblen v. Colvin*, 14 F. Supp. 3d 801, 805 (N.D. Tex. 2014)

16. Based on the market rate for attorneys of similar experience in the Dallas/Fort Worth area, taking into account the size of their firms, using the Texas Lawyer survey of hourly rates for 2012 and the State Bar of Texas 2013 Hourly Fact Sheet and based on knowledge of customary rates in the D/FW area, a very low reasonable blended market rate for all three attorneys' time would be \$250 per hour. Px. 140, pp. 2072-73, Px. 141, pp. 2136-38, Px. 142, pp. 2139-47.

17. The table below sets forth, by year, a calculation of the compensable hours multiplied by three different rates: (1) the \$125 per hour from §2412(d), (2) \$125 per hour adjusted for cost of living increases; and (3) a blended market rate of \$250 per hour under §2412(b). Px. 140, p. 2074-75.

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

18. EAJA §2412 also allows recovery of reasonable and necessary expenses. Applicants paid approximately \$6,422.39 in reasonable and necessary expenses that were incurred by their attorneys. Px. 146, p. 2196. Of this amount, \$5,442.25 has been submitted in the amended Bill of Costs, leaving a balance of expenses sought here of \$980.14. Px. 144, p. 2159.

19. Any recovery of fees and expenses will be paid to the clients, who will apportion the recovery to pay any outstanding attorneys' fees and expenses associated with the application for fees with the balance returned in appropriate amounts as directed by those who contributed to the payment of fees. Px. 131, p. 1960, ¶ 22.

CONCLUSION

Applicants request that under §2412(d), the court find that the government's positions at the agency and litigation levels have not been substantially justified, making the applicants eligible for attorneys' fees adjusted to reflect cost of living increases from 1996 to 2011 and into 2015, in the total amount of \$349,749 plus expenses of \$980.14. Applicants additionally request the court find the government's actions in adopting the rule were unreasonably obdurate, entitling applicants to an award fees at market rates under EAJA §2412(b) of \$489,500 plus expenses of \$980.14. Finally, Applicants request that the court order the government to pay them the higher award found be the court.

Respectively Submitted

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CERTIFICATE OF CONFERENCE

The undersigned began conferring with the government's attorney on May 4, 2015, with a written proposal setting forth the legal and factual bases for the application for fees and expenses. Plaintiffs sent drafts of the application, the supporting brief and the three supporting attorney declarations to the USDA's counsel. Counsel stated that he and others are reviewing the materials but at this time the government is not in a position to agree to an award of fees and expenses under 28 USC §2412. USDA's counsel has suggested that discussions of the respective positions can continue after the filing of this application.

/s/David Broiles
David Broiles

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