Nos. 15-12407, 15-15376

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DAISY ABDUR-RAHMAN AND RYAN PETTY,
Petitioners/Cross-Respondents
v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent,

DEKALB COUNTY, GEORGIA,
Respondent and Cross-Petitioner.

On Appeal from the U.S. Department of Labor Administrative Review Board,
Hons. E. Cooper Brown, Luis A. Corchado, Paul M. Igasaki

BRIEF FOR RESPONDENT UNITED STATES DEPARTMENT OF LABOR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, counsel for Respondent U.S. Department of Labor certifies that the following persons and entities have or may have an interest in the outcome of this appeal:

Abdur-Rahman, Daisy (Complainant/Intervenor)

Acosta, R. Alexander (Secretary of Labor)

Berndt, Joseph (Attorney, U.S. DOL)

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Brantley, O.V. (County Attorney, DeKalb County)

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Petty, Ryan (Complainant/Intervenor)

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Date: October 16, 2017

Respectfully submitted,

/s Jesse Z. Grauman
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Senior Attorney

STATEMENT REGARDING ORAL ARGUMENT

Although the Department of Labor will gladly participate in any oral argument scheduled by this Court, the Department does not believe that oral argument is necessary because the issues may be resolved based on the briefs submitted by the parties.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the employee protection ("whistleblower") provisions of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. 1367, authorizing the Secretary of Labor ("Secretary") to investigate complaints, conduct hearings, and order abatement of violations under the Act and its regulations. The Secretary had subject matter jurisdiction based on complaints filed by Daisy Abdur-Rahman and Ryan Petty ("Complainants") against their former employer, DeKalb County ("County"), on April 11, 2005 with the Occupational Safety and Health Administration ("OSHA").

Following Complainants' success on the merits, on March 30, 2015, the Department of Labor's Administrative Review Board ("ARB") affirmed an administrative law judge's ("ALJ") award of $396,724.25 in attorneys' fees and $27,843.15 in costs. On November 10, 2015, the ARB issued a second order awarding Complainants' attorneys an additional $53,743.50 in fees and $183.15 in costs. The ARB has authority to issue final agency decisions in FWPCA whistleblower cases. *See* Dep't of Labor, Office of the Sec'y, Sec'y's Order 2-2012 (Oct. 19, 2012), Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, § 5(c)(22), 77 Fed. Reg. 69378 (Nov. 16, 2012).

Complainants and the County timely petitioned for review of both of the ARB's orders. Because the FWPCA violations occurred in Georgia and

Complainants' attorneys transact business there, this Court has jurisdiction to review the Secretary's decisions under 33 U.S.C. 1367(b) through reference to 33 U.S.C. 1369(b)(1).

In its July 16, 2015 response supporting the County's motion to dismiss in this Court, the Department of Labor ("DOL") had previously argued that this Court lacked jurisdiction over the petitions to review the ARB's March 30, 2015 order because it was not a final order subject to judicial review under 5 U.S.C. 704 and 29 C.F.R. 24.112(a) given that Complainants' second fee petition was then pending before the ARB. In the alternative, DOL did not object to the County's request to hold the petitions in abeyance pending the ARB's resolution of the second fee petition. In light of the ARB's second fee award on November 10, 2015, which all parties agree was a final order and which Complainants and the County timely petitioned the Court to review,[1] the jurisdictional issue regarding the March 30, 2015 order is now moot. Accordingly, this Court now has jurisdiction over both petitions for review.

[1] For an explanation of why Complainants' cross-petition for review of the November order was timely, DOL refers the Court to its February 1, 2016 response to the Court's jurisdictional question of January 19, 2016.

STATEMENT OF THE ISSUES

1) Whether the ALJ and ARB abused their discretion when determining reasonable hourly rates for attorneys' fees in a whistleblower case, including by taking judicial notice of two well-known surveys of hourly rates and by declining to grant Complainants' counsel a fee enhancement for delay.

2) Whether the ALJ and ARB abused their discretion in excluding certain hours from the lodestar calculation because they were excessive or unreasonable.

STATEMENT OF THE CASE

Under the employee protection ("whistleblower") provisions of the Federal Water Pollution Control Act ("FWPCA"), a prevailing complainant is entitled to costs and expenses, including attorneys' fees, "reasonably incurred by the [complainant] for, or in connection with, the institution and prosecution of such proceedings[.]" 33 U.S.C. 1367(c). This case concerns two awards of fees and costs in favor of Daisy Abdur-Rahman and Ryan Petty ("Complainants") against DeKalb County, Georgia ("County") for administrative litigation before the United States Department of Labor ("DOL").

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

A. Proceedings Before the Department of Labor

On April 11, 2005, Complainants, who worked for the County's Division of Water and Sewer, brought an FWPCA complaint to DOL, alleging that the County terminated their employment after they raised concerns to their superiors about potential violations of environmental law. CL-III, No. 131.[2] Although an

[2] This brief uses the convention "CL-__, No. __," where the Roman numeral following "CL" refers to the certified list, and the Arabic numeral following "No." refers to the item in the appropriate certified list.

This brief cites documents from three certified lists. CL-I, filed in case no. 15-12407 on July 6, 2015, pertains to the first fee proceeding that culminated in the ARB's March 30, 2015 order. CL-II, filed in case no. 15-15376 on March 22, 2016, pertains to the second fee proceeding that culminated in the ARB's November 10, 2015 order. CL-III, filed in case no. 14-15435 on May 28, 2015,

administrative law judge ("ALJ") initially ruled in the County's favor, on May 18, 2010, the Administrative Review Board ("ARB"), DOL's appellate body with authority to issue final agency decisions in FWPCA matters, reversed the ALJ and found in Complainants' favor. CL-III, No. 147. On remand, the ALJ issued an order on damages, which the ARB affirmed. CL-III, No. 182.

Following the ARB's reversal, Complainants moved before the ALJ for $518,106.50 in attorneys' fees and $41,326.88 in costs pursuant to 33 U.S.C. 1367(c) and 29 C.F.R. 24.109(d). CL-I, No. 7, at 2. On July 15, 2013, the ALJ granted the petition in substantial part, awarding $396,724.25 in fees, and $27,843.15 in costs. CL-I, No. 1, at 18-19. On March 30, 2015, the ARB affirmed the ALJ's order, and awarded postjudgment interest. CL-I, No. 9 ("First Fee Award"), at 10.

Complainants subsequently moved the ARB for $53,743.50 in fees and $183.15 in costs in connection with the ARB proceedings. CL-II, No. 3, at 2. On November 10, 2015, the ARB granted this petition in full, but declined Complainants' additional request to apply their attorneys' then-current hourly rate,

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concerns the merits proceeding that formed the basis for the two fee petitions. Although CL-III was not filed in either of these two consolidated cases, it was filed in related case no. 14-15435, and the record in that case provides context for the fee proceedings. Accordingly, the parties have agreed to include excerpts from that record in the forthcoming joint appendix.

$450, to the hours covered by the First Fee Award. CL-II, No. 1 ("Second Fee Award"), at 3, 5.

B. Proceedings in this Court

On December 5, 2014, the County petitioned this Court for review of the ARB's merits decisions. *See DeKalb Cty. v. U.S. Dep't of Labor*, No. 14-15435. In May and June 2015, Complainants and the County petitioned for review of the First Fee Award. *See* Complainants' Pet., No. 15-12407, May 29, 2015; County's Cross-Pet., No. 15-12407, June 30, 2015. On July 7, 2015, the County moved to dismiss the petitions for review of the First Fee Award on the grounds that the ARB's March 30, 2015 order was not a final order since the second fee petition was still pending before the ARB. In the alternative, the County moved to stay the petitions, or hold them in abeyance, pending the ARB's decision on the second fee petition. Subsequently, this Court, reserving decision on the motion to dismiss, stayed the petitions for review of the First Fee Award and held them in abeyance until the ARB resolved the second fee petition and until this Court resolved the merits case. *See* Order, No. 15-12407, Sept. 1, 2015.[3]

After the ARB issued the Second Fee Award in November 2015, both parties petitioned for review of that order as well. *See* County's Pet., No.

[3] As explained above, the jurisdictional issue raised in the County's motion to dismiss is now moot in light of the Second Fee Award. *See supra* p. 2.

15-15376, Dec. 3, 2015; Complainants' Cross-Pet., No. 15-15376, Dec. 23, 2015. The Court consolidated those cases with the petitions for review of the First Fee Award and stayed proceedings pending its resolution of the merits appeal. *See* Order, Dec. 31, 2015. The Court also ruled that it appeared to have jurisdiction over Complainants' petition to review the Second Fee Award, though it reserved final decision on the matter. *See* Order, No. 15-15376, Feb. 12, 2016.

On February 8, 2016, this Court denied the County's petition for review of the ARB's merits decision. *See DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015 (11th Cir. 2016). Following the issuance of the mandate in that case, the Court ordered briefing on the fee petitions.

II. STATEMENT OF THE FACTS

A. First Fee Award

Complainants' first fee petition sought $518,106.50 in fees and $41,326.88 in costs. CL-I, No. 7, at 2. The vast majority of this petition covered work done before the ALJ. CL-II, No. 1, at 3. Each attorney sought an hourly rate of $350 for hours prior to 2010, and $400 for hours in 2010 and 2011. CL-I, No. 7, at 11-13.

In support of these rates, Complainants submitted two declarations by their attorneys, Robert N. Marx and Jean Simonoff Marx (collectively "Counsel"), declarations of seven attorneys in support of fee requests in cases in the Northern

District of Georgia, and four court decisions from that district. *See* CL-I, No. 20, Tabs 3-4, 8-18. In support of their hours and costs, Complainants submitted billing and expense records. *See id.* Tabs 5-7. They also sought an enhancement of the fee based on excessive delay in obtaining compensation, given that the case had been pending for six years at the time. *See* CL-I, No. 7, at 32-35. Complainants argued that Counsel should receive the lesser of (1) their current rates, or (2) their historic rates multiplied by the percentage increase in the Consumer Price Index-All Urban Consumers, U.S. city average since March 2005. *See id.* at 34-35.

The County argued that the $350-$400 rates were unreasonable, excessive, and unsupported by the evidence. *See* CL-I, No. 6, at 25-31. It proposed an hourly rate of $290, citing a November 3, 2006 sanctions order in which the ALJ previously awarded Mr. Marx and Ms. Marx $295 and $285 per hour, respectively. *See id.* at 29; CL-III, No. 84, at 4-5. The County opposed a delay-based fee enhancement. *See* CL-I, No. 6, at 30-31. Additionally, the County argued that numerous hours should be excluded due to double-billing, non-billable office conferencing, block-billed or vague entries, driving time, and entries that were unreasonably excessive for the tasks listed. *See id.* at 5-25. The County proposed reducing Counsel's hours by 499.4 hours, or alternatively, by 40%. *See id.* at 24-25. As a result, the County proposed a fee award of no more than $207,350. *Id.* at

31.[4]

The ALJ sustained some of the County's objections but rejected others. He determined to continue using the $295 and $285 rates through 2006, as he did in the sanctions order. CL-I, No. 1, at 4-5. As in the 2006 order, because the ALJ did not find Complainants' evidence on hourly rates conclusive, he took judicial notice of the *2005 Survey of Law Firm Economics*, published by Altman & Weil Publications. CL-I, No. 1, at 4. He arrived at the $295 and $285 figures by averaging the *2005 Survey's* hourly rates for the upper quartiles of (1) attorneys in Georgia with Counsel's respective experience levels, (2) similarly-experienced attorneys in firms of under nine lawyers, and (3) similarly-experienced attorneys who practice employment litigation. *Id.* at 4-5.[5] The $295 rate for Mr. Marx retained a clerical error from the ALJ's 2006 order, as the above calculation should have yielded $302 for an attorney of Mr. Marx's experience. *Id.*[6] Observing that Complainants had not challenged the $295 rate from the 2006 order until their new fee petition in 2011, the ALJ declined to disturb this prior finding and used the

[4] The County took also issue with $15,648.82 of the $41,326.88 in requested costs. CL-I, No. 6, at 33. The ALJ sustained most of these objections, awarding $27,843.15 in costs, CL-I, No. 1, at 19, and the ARB affirmed this ruling, CL-I, No. 9, at 10. Costs are not at issue in this appeal.

[5] The ALJ found the upper quartile to be appropriate given Counsel's skill and performance and the complexity of the case. CL-I, No. 1, at 4.

[6] The ALJ had erroneously reported one of the three relevant hourly rates for Mr. Marx. CL-I, No. 1, at 4-5.

$295 rate for Mr. Marx for 2005 and 2006. *Id.* at 5.

For the remaining time period, the ALJ compared Complainants' requested rates—$350 from 2007 through 2009 and $400 for 2010 and thereafter—to those in Altman & Weil's *2007 Survey of Law Firm Economics*, and found the requested rates to be reasonable "even at a superficial glance." *Id.* In actually awarding the fees, however, the ALJ awarded Complainants the $350 rate through 2010, and the $400 rate only from 2011 forward. *Id.* at 6, 14-17.

The ALJ rejected Complainants' request to enhance Counsel's fee in recognition of the delay in litigation. *Id.* at 5-6. Citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010), the ALJ noted that fee enhancements are appropriate only in "extraordinary circumstances," and found that the delay in this case, while "understandably frustrat[ing]," did not justify an enhancement. *Id.* The ALJ further explained that Complainants had not met their burden to justify an enhancement, that Complainants had not prevailed until the ARB's reversal in 2010, that the delays generally were not attributable to the County, and that the County is a government entity whose judgments are paid by taxpayers. *Id.*

The ALJ reduced and excluded time he considered excessive. He reduced, by 50%, Counsel's hourly rates for legal research and other work by Ms. Marx on Complainants' briefs, and for time spent preparing digests of transcripts, concluding that these tasks were more appropriately billed at a paralegal rate. *Id.*

at 10-11, 13-16. He also concluded that it was unnecessary for both attorneys to attend each deposition, and therefore compensated only the deposing attorney for that time and for the associated travel time. *Id.* at 9-10. The ALJ also excluded hours for certain intra-office conferences, including conferences while traveling, and accordingly compensated travel time at half of the relevant attorney's rate rather than at the full rate. *Id.* at 10, 12, 13, 14, 16. He excluded hours spent revising and finalizing certain briefs, *id.* at 14, 16, and reduced by 20% the compensable time associated with the attorneys' fee briefs, finding the billed hours excessive and citing "block billing," *id.* at 16-17. The ALJ excluded some additional hours not relevant to this appeal and rejected the County's remaining requests for exclusions and reductions. *See generally id.* at 6-17.

The ALJ accordingly awarded $396,724.25 in fees. *Id.* at 18. On appeal, the ARB affirmed, finding that the ALJ considered all of the relevant evidence, including the *Surveys*, and that the ALJ's hourly rate determinations were not arbitrary, capricious, or an abuse of discretion, and were in accordance with law. CL-I, No. 9, at 7, 8. The ARB also affirmed the ALJ's reductions and disallowances of compensable hours, and rejected the County's request for additional reductions, finding that the ALJ comprehensively detailed a rational

basis for each reduction or lack thereof. *Id.* at 8.[7] The ARB affirmed the ALJ's rejection of Complainants' request to enhance their hourly rates based on delay, citing *Perdue* and this Court's decision in *Gray ex rel. Alexander v. Bostic*, 613 F.3d 1035, 1045 (11th Cir. 2010). *Id.* at 9. The ARB also awarded Complainants postjudgment interest from the date of its order. *Id.* at 10.

B. Second Fee Award

In their second fee petition, for services from January 1, 2012 to December 12, 2014, Complainants sought $53,743.50 in fees at $450 per hour, plus $183.15 in costs. CL-II, No. 3, at 2. Complainants also requested that the ARB apply the $450 rate to all of the work Counsel had performed on the case since 2005. *Id.* at 11. In support of the requested fees, Complainants submitted Counsel's billing records, Counsel's own affidavits, affidavits of four other attorneys, and a 2014 district court order. *Id.* Tabs A-K.

The County argued for a rate of no more than $350 per hour, and for a reduction of 49.5 hours. CL-II, No. 2, at 21. The ARB, citing Complainants' evidence and noting that in the First Fee Award it had affirmed a rate of $400 for Counsel's work in 2011, concluded that $450 per hour for work from 2012 to 2014 was reasonable. CL-II, No. 1, at 3-4. It denied the County's requests for

[7] The County has not challenged the ALJ or ARB's lack of additional reductions in this appeal.

reductions in Counsel's hours. *Id.* at 4. Accordingly, the ARB awarded the requested $53,743.50 in fees and $183.15 in costs, plus postjudgment interest. *Id.* at 5. It rejected Complainants' requests to apply the $450 rate to all work performed in the case since 2005. *Id.* at 3, 4 n.6.

III. STANDARDS OF REVIEW

A. Standard for Review of the Secretary's Decisions

This Court reviews the Secretary's final decisions under the FWPCA and other whistleblower statutes under the Administrative Procedure Act ("APA"), 5 U.S.C. 706. *See DeKalb Cty.*, 812 F.3d at 1020. Under APA review, a court must sustain the ARB's decisions unless they are "unsupported by substantial evidence" or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the findings were made "without observance of procedure required by law." 5 U.S.C. 706(2)(A), (D), (E); *see DeKalb Cty.*, 812 F.3d at 1020; *Stone & Webster Constr., Inc. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1132 (11th Cir. 2012); *Fields v. U.S. Dep't of Labor*, 173 F.3d 811, 813 (11th Cir. 1999).

Awards of attorneys' fees by the ARB and ALJs, like fee awards by district courts, are reviewed for abuse of discretion. *See Roadway Express, Inc. v. Admin. Review Bd.*, 116 F. App'x 674, 676 (6th Cir. 2004) (unpublished) (applying abuse-of-discretion standard to ALJ fee award upheld by ARB); *see also E. Associated Coal Corp. v. Dir., Office of Workers' Comp. Programs*, 724 F.3d 561, 568-69 (4th

Cir. 2013) (applying abuse-of-discretion standard to fee award by the Benefits Review Board ("BRB"), the DOL appellate body for workers' compensation cases);[8] *cf. Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008) (abuse-of-discretion award applies to attorneys' fee awards by district courts). Under this standard, reversal or modification is warranted only if the tribunal below "fails to apply the proper legal standard or to follow proper procedures in making the determination, . . . bases an award upon findings of fact that are clearly erroneous[,]" or "commits a clear error of judgment." *Gray*, 613 F.3d at 1039 (quoting *Am. Civil Liberties Union v. Barnes,* 168 F.3d 423, 427 (11th Cir. 1999)). This standard "usually implies a range of choices, instead of only one right choice, and often [this Court] will affirm even though [it] would have decided the other way if it had been [this Court's] choice." *Id.* (citations omitted). In the attorneys' fee context, this means that the opinion below "must articulate the decisions it made, give principled reasons for those decisions, and show its calculation." *Norman v. Housing Auth.*, 836 F.2d 1292, 1304 (11th Cir. 1988)).[9]

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[8] BRB decisions, like those of the ARB, are subject to APA review. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010).

[9] To the extent that this Court declines to apply the abuse-of-discretion standard, under the APA, factual findings are reviewed under the "substantial evidence" standard and conclusions of law are reviewed de novo. *See DeKalb Cty.*, 812 F.3d at 1020. In attorneys' fee proceedings, the reasonableness of an hourly rate and the number of hours expended—the principal matters at issue in these appeals—are

B. Standard for Awarding Attorneys' Fees

An attorneys' fees award is calculated by determining the "lodestar" amount "by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Am. Civil Liberties Union*, 168 F.3d at 427 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). This amount may be adjusted based on the results obtained. *See id.* The fee applicant bears the burden of documenting the claimed hours and rates by providing "specific and detailed evidence." *See id.* (quoting *Norman*, 836 F.2d at 1304). Fee applicants must exercise "billing judgment" by "exclud[ing] from their fee applications 'excessive, redundant, or otherwise unnecessary [hours],' which are hours 'that would be unreasonable to bill to a client and therefore to one's adversary irrespective of the skill, reputation or experience of counsel.'" *Id.* at 428 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) and *Norman*, 836 F.2d at 1301) (emphasis omitted). If an applicant fails to do so, that role falls to the courts. *See id.*

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findings of fact. *See Dependable Component Supply, Inc. v. Carrefour Informatique Tremblant, Inc.*, 572 F. App'x 796, 802-03 (11th Cir. 2014) (unpublished) (reviewing district court's findings as to these issues for clear error). Thus, they would be subject to substantial-evidence review, under which a court may reverse an agency's findings "only when the record compels a reversal; the mere fact that the record may support a contrary conclusion is not enough." *DeKalb Cty.*, 812 F.3d at 1020 (quoting *Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1304 (11th Cir. 2015)).

SUMMARY OF THE ARGUMENT

Both Complainants and the County ask this Court to go beyond the narrow bounds of the applicable standard of review. In asking this Court to revisit the hourly rates and—in Complainants' case—reductions of compensable time, neither party has established that the ALJ or ARB abused their discretion.

As to the hourly rates, the ALJ's use of the Altman & Weil *Surveys of Law Firm Economics* is not a basis for reversal. First, both parties forfeited the ability to object to the *Surveys* when they failed to timely object to the ALJ's taking of judicial notice. Moreover, two courts of appeals have approved of the *Surveys* in fee proceedings, and the ALJ explained why he consulted them, carefully setting forth why the evidence submitted by the parties was inconclusive. Complainants' challenge to the 2005-2006 rates derived from the *2005 Survey* also fails due to the law-of-the-case doctrine, because Complainants failed to object to those rates when the ALJ originally used them in a 2006 order. And neither Complainants nor the County can demonstrate substantial prejudice from the *2007 Survey*, because the ALJ consulted that *Survey* only to confirm that Counsel's requested rates were reasonable, not to set the rates themselves. Finally, even assuming that the use of the *Surveys* in the First Fee Award was somehow problematic, the County has not demonstrated that it materially affected the Second Fee Award.

The ALJ and ARB also did not abuse their discretion in declining to award

Counsel their current rates in recognition of a delay in compensation. The ALJ and ARB reasonably interpreted Supreme Court and Eleventh Circuit precedent to require "extraordinary circumstances" for such an enhancement, and did not abuse their discretion in concluding that Complainants had not demonstrated such circumstances. The ALJ's sole error was that he inadvertently applied a $350 rate, rather than $400, to Counsel's hours in 2010. DOL recognizes this error and accordingly asks that this Court award Complainants an additional $1,882.50.

Complainants' challenges to the exclusions and reductions of hours in the First Fee Award fail as well. While Complainants may not agree with the ALJ's decisions, he meticulously documented each one, citing applicable authority, and none of them was legally or procedurally deficient or based on clearly erroneous factfinding or a clear error of judgment.

ARGUMENT

I. THE ALJ AND ARB'S DETERMINATIONS OF REASONABLE HOURLY RATES WERE WITHIN THE AGENCY'S DISCRETION.

A. The ALJ Reasonably Relied on the Evidence Submitted by the Parties, Together with the Two *Surveys*, in Determining Hourly Rates.

Both Complainants and the County challenge the ALJ's methods used to determine hourly rates—when it suits them to do so. Complainants primarily challenge the ALJ's decision to take judicial notice of the *2005 Survey of Law Firm Economics*, on which the ALJ relied in awarding lower rates than

Complainants requested for 2005 and 2006, but do not object to the ALJ's finding—supported by the *2007 Survey*—that Complainants' requested rates for 2007 and thereafter were reasonable. Conversely, while the County challenges the use of the *Surveys* generally, it argues for affirmance of the ALJ's rates for 2005 and 2006 that were explicitly derived from the *2005 Survey*. As explained below, neither party's challenge has merit.

1. Both Complainants and the County Have Forfeited The Argument that Judicial Notice Was Improper By Failing to Raise It Before the ALJ.

The parties' arguments regarding the *Surveys* must be rejected for the threshold reason that they failed to timely object to the ALJ's use of judicial notice. This Court has squarely held that where a district court takes judicial notice of a fact without prior notice to the parties, and the parties fail to make a timely request *in the district court* to be heard on the matter, as permitted by Federal Rule of Evidence 201(e), "the fact that the court took judicial notice of a fact or the tenor of the notice taken is not grounds for later appeal." *Norman*, 836 F.2d at 1304. The applicable regulations provide parties in DOL's ALJ proceedings with the same right to be heard on a judicially noticed fact after the notice has been taken. *See* 29 C.F.R. 18.201(e). Here, following the ALJ's July 15, 2013 decision in which he took judicial notice of the *Surveys*, neither Complainants nor the County requested to be heard before the ALJ on the propriety of that judicial notice.

Accordingly, they cannot raise that argument now in this Court. *Cf. Vidiksis v. E.P.A.*, 612 F.3d 1150, 1158 (11th Cir. 2010) (a reviewing court generally will not consider arguments not raised before an administrative agency).

Even, however, if Complainants' and the County's arguments were properly before this Court, they would fail, as explained below.

2. It Was Within the ALJ's Discretion to Use the *Surveys*.

The ALJ consulted the *Surveys* because the evidence submitted by the parties, while informative, was not conclusive. First, Complainants did not provide evidence that Counsel had ever been compensated, or awarded fees by a court, at their requested hourly rate. CL-I, No. 1, at 3-4. The ALJ correctly explained that in the only case Complainants cited that involved Counsel's own rates, the court did not award Counsel $350 per hour, but rather enforced a contingency agreement which it compared to a $350 per hour arrangement that it parenthetically characterized as reasonable. *See Redmond v. City of E. Point*, No. 1:00-cv-2492-WEJ (N.D. Ga. Mar. 21, 2005), CL-I, No. 20, Tab 18, at 12. The remainder of the cases Complainants cited were distinguishable. Two apparently involved uncontested rates. *See Yule v. Jones*, 766 F. Supp. 2d 1333, 1347 (N.D. Ga. 2010) (explicitly noting that rates were unchallenged); *Harris v. Carriage House Imps., Inc.*, No. 1:03-cv-00106-GET, 2008 WL 513337, at *5-6 (N.D. Ga. Feb. 22, 2008) (no indication that rates were contested). In another, attorneys were paid at

varying rates, some of which were below Counsel's requested rates, *see Goodridge v. Astrue*, No. 1:07-cv-01919-RLV, 2011 WL 13173911, at *3 (N.D. Ga. Aug. 11, 2011). And none of Complainants' declarations, except Counsel's own, attested to Counsel's expertise or the reasonableness of the fees they sought in connection with this specific matter. *See generally* CL-I, No. 20, Tabs 3-4, 8-14.

The district court decisions and evidence that the County offered was similarly unpersuasive. *See* CL-I, No. 6, at 28-29 (citing cases). In *Disabled Patriots v. HT W. End, LLC*, No. 1:04-cv-3216-JEC, 2007 WL 789014, at *3 (N.D. Ga. Mar. 14, 2007), the court awarded rates of $250 and $200 because the case was "not particularly novel or complex" and "did not require substantial or difficult legal work," a characteristic that this case, with voluminous discovery, numerous depositions, and considerable briefing, did not share. Similarly, in *Feliciano v. Wehunt*, No. 1:09-cv-03130-JOF, 2010 WL 1565493, at *1, *3 (N.D. Ga. Apr. 19, 2010), attorneys were awarded $250 per hour for a case in which the plaintiffs won a default judgment, not a complex, multi-year, vigorously contested case such as this one. Finally, the County cited *Davenport v. City of Columbus*, No. 4:06-cv-150 (CDL), 2009 WL 235253, at *7 (N.D. Ga. Jan. 30, 2009), in which defendants seeking to minimize their fee liability provided declarations by Georgia employment lawyers who charged $125 to $225 per hour for plaintiff's work. But the court in *Davenport* largely disregarded those rates, finding that it was not clear

that they involved cases or clients similar to the case at bar. *Id.* The same is true here.

Faced with attorneys who worked significant hours for prevailing parties in contentious litigation, but without convincing evidence as to their reasonable hourly rates, the ALJ acted within his discretion in consulting the well-known Altman & Weil *Surveys*. *Cf. Norman*, 836 F.2d at 1303 (stating that "fee counsel bears the burden . . . of supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate," and "where the time or fees claimed seem expanded or there is a lack of documentation or testimonial support the court may make the award on its own experience"). Two courts of appeals have approved of the use of the *Surveys* in fee proceedings, and a third has suggested that their use is permissible where—as here—the parties do not provide reliable information about the relevant market. *See E. Associated Coal Corp.*, 724 F.3d at 575 n.12 (concluding that an ALJ and the BRB did not abuse their discretion by considering the 2006 *Survey* "along with the other evidence submitted by claimant's counsel"); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 56 (2d Cir. 2000) (concluding that a special master's use of the 1997 *Survey* as well as "his own experience as a practitioner" was not clearly erroneous); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 226, 231 (2d Cir. 1987) (affirming, in relevant part, decision that relied in part on *Surveys* from 1980 through 1984). *Cf.*

Shirrod v. Dir., Office of Workers' Comp. Programs, 809 F.3d 1082, 1088-89 (9th Cir. 2015) (rejecting ALJ and BRB's use of the *Survey* because it was not tailored to Portland, but noting that its use could be permissible if reliable data on fees in the relevant community did not exist). The ALJ's reliance on the *Surveys* in this case, together with the evidence submitted by Complainants, fits comfortably within this precedent.

Moreover, an ALJ may take notice of facts under broader circumstances than those permitted by the Federal Rules of Evidence. *See Air Prod. & Chems., Inc. v. Fed. Energy Regulatory Comm'n*, 650 F.2d 687, 697 (5th Cir. 1981) ("Section 556(e) of the APA recognizes that agency decisions often will rest on official notice of material facts not appearing in the record evidence."); 5 U.S.C. 556(e) (permitting agency decisions that "rest[] on official notice of a material fact not appearing in the evidence in the record"). And even assuming that the *Survey* would not have met the requirements for judicial or official notice at a merits hearing, the ALJ did not abuse his discretion by taking notice of it in an attorneys' fee proceeding. *See Robinson v. Tanner*, 798 F.2d 1378, 1384 (11th Cir. 1986) (stating that "the rules governing attorney's fee cases are *sui generis* in many respects"); *Norman*, 836 F.2d at 1303 (noting that a court may rely on its own experience in attorneys' fee matters).

The parties also contend that the geographic scope of the *Survey* data was too broad, with the County erroneously suggesting that the ALJ relied on data from the entire South Atlantic region. County's Br. 33. Rather, when examining the rates for attorneys with similar experience to Counsel's, the ALJ used data for the State of Georgia. CL-I, No. 1, at 4-5; CL-I, No. 13, Tab 7 at 95.[10] Given that this Court has approved of a statewide geographic scope for attorneys' fee rates, *see Martin v. Univ. of S. Ala.*, 911 F.2d 607, 609-10 (11th Cir. 1990) (approving of rate set by special master who characterized the relevant market as Alabama), it was not an abuse of discretion for the ALJ rely on data for a broader area than Atlanta. *See Bear Rock Franchise Sys., Inc. v. Hedlund*, No. 5:08-cv-63-F, 2008 WL 2551328, at *2-3 (E.D.N.C. June 25, 2008) (considering relevant *Survey* rates for Illinois to be reasonable rates for attorneys in Chicago).

Both Complainants and the County take issue with the ALJ's averaging of different rates from the *Surveys*, with Complainants arguing that the ALJ should not have averaged employment litigators' rates with generalists' rates, and the County contending that the rates in the *Surveys* did not incorporate a sufficient number of factors. *See* Complainants' Br. 76, County's Br. 33-34. But they cite

[10] The other two rates the ALJ examined—rates for similarly-experienced attorneys practicing employment law and in firms of two to eight lawyers—appear to be nationwide rates. CL-I, No. 1, at 4-5; CL-I, No. 13, Tab 7 at 106, 119.

no authority for the proposition that consideration of imperfect data on rates constitutes an abuse of discretion, especially where, as here, the court consults the data because the parties have not submitted adequate information. Nor do they acknowledge the advantages of aggregating a variety of rates.[11]

The parties also argue that the *Surveys* were outdated. But in establishing rates for 2005 and 2006, the ALJ used the *2005 Survey*. *See* CL-I, No. 1, at 4-5. This was outdated by at most one year for the 2006 rates only, and its use was not an abuse of discretion. For 2007 forward, as discussed in more detail below, the ALJ consulted the *2007 Survey* simply to confirm the reasonableness of Counsel's requested rates. *See id.* at 5; *infra* Arg. § I.A.4. Thus, to the extent that the ALJ should have used a more recent *Survey* than 2007, neither party was prejudiced.

3. The Rates for 2005 and 2006 Are Further Justified by the Law-of-the-Case Doctrine.

Complainants' challenge to the 2005-2006 rates fails for the additional reason that those rates were already the "law of the case" based on the ALJ's 2006 sanctions order. Under this well-established doctrine,

> a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.

[11] For example, the *Surveys* demonstrated that lawyers at small firms earned less per hour than other similarly situated attorneys. CL-I, No. 1, at 4-5. The ALJ thus appropriately factored law firm size into his calculations.

United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997) (quoting *Williamsburg Wax Museum v. Historic Figures*, 810 F.2d 243, 250 (D.C. Cir. 1987)).

Here, the $285 and $295 rates for 2005 and 2006 that the ALJ awarded in his July 2013 order were identical to those he awarded in his November 3, 2006 order on sanctions, which similarly relied on the *2005 Survey*. *See* CL-III, No. 84, at 4-5. That 2006 order predated Complainants' September 24, 2007 merits appeal to the ARB, which should have encompassed any prior interlocutory rulings that Complainants were contesting. It is undisputed that Complainants did not challenge these rates in their 2007 appeal. *See* CL-III, Nos. 149, 156. When Complainants failed to challenge these rates at the proper time, they became the law of the case. Complainants therefore cannot challenge those rates now. *See Vidiksis*, 612 F.3d at 1158-59 ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made *at the time appropriate under its practice*.") (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (emphasis added).

The law-of-the-case doctrine also supports the ALJ's decision not to revisit a minor clerical error in his 2006 sanctions order. As the ALJ recognized in his 2013 order, the third of the three rates from the *2005 Survey* that he used to derive Mr. Marx's 2005-2006 rate was $325, not $304 as he had erroneously reported in

the 2006 order. CL-I, No. 1, at 4-5; CL-III, No. 84, at 5. As a result, the ALJ calculated the average of the three rates as $295; when the correct figure is used, the result is $302. In his 2013 order, the ALJ continued using the $295 rate for Mr. Marx for 2005 and 2006 because he continued to find it reasonable and because the $295 rate remained unchallenged from 2006 until 2011, when Complainants filed their motion for attorneys' fees. CL-I, No. 1, at 5. Without saying so explicitly, the ALJ effectively applied the law-of-the-case doctrine, and thus acted within his discretion when he declined to alter the $295 rate.

Complainants maintain that they did not challenge the rates from the 2006 sanctions order earlier because of the ARB's "strong precedent against permitting interlocutory review." Complainants' Br. 77 (quoting *U.S. Dep't of Labor v. Bank of Am.*, ARB No. 10-048, 2010 WL 1776983, at *1 (ARB Apr. 29, 2010)). This argument misses the point. Had Complainants challenged the ALJ's 2006 sanctions order as part of their 2007 ARB appeal, such a challenge would not have been an interlocutory appeal but part and parcel of their merits appeal. The ARB's disfavor of interlocutory review does not justify Complainants' failure to challenge the $285 and $295 rates at the proper time in 2007.

4. Neither Complainants Nor the County Suffered Substantial Prejudice from the Use of the *2007 Survey*.

While both Complainants and the County object to the ALJ's use of the *2007 Survey* for post-2006 rates, neither acknowledges that the ALJ used this

Survey for a fundamentally different purpose than the *2005 Survey*. Specifically, the ALJ did not actually derive Counsel's rates using data from the *2007 Survey*, as he did for 2005 and 2006 with the *2005 Survey*. Rather, he simply consulted the *2007 Survey* to confirm that the rates Complainants requested from 2007 onward were reasonable. CL-I, No. 1, at 5.

For the reasons explained above, it was not an abuse of discretion for the ALJ to consult the *2007 Survey*. *See supra* Arg. § I.A.2. But even if it was, "the mere fact that an agency has looked beyond the record without opportunity to a party for rebuttal does not invalidate its action unless substantial prejudice is shown to result." *Air Prod. & Chems., Inc.*, 650 F.2d at 697. Complainants certainly cannot demonstrate substantial prejudice from the use of the *2007 Survey*, since the ALJ awarded them the very rates they requested.[12] And the County cannot demonstrate substantial prejudice where the ALJ consulted a survey but did not rely on it in any demonstrable way.

5. The ARB's Award of Complainants' Requested Rates in the Second Fee Petition Was Not an Abuse of Discretion.

Beyond their request for a fee enhancement, *see infra* Arg. § I.B, Complainants do not take issue with the ARB's Second Fee Award. The County

[12] Although Complainants appear to suggest that the ALJ' s award of a $350 rate in 2010, rather than $400, resulted from his use of the *Survey*, Complainants' Br. 75, there is no indication that this is the case. Rather, the ALJ's award of $350 for 2010 appears to have been an inadvertent error. *See infra* Arg. § I.C.

challenges this award in passing, arguing that the hourly rate in the Second Fee Award was an abuse of discretion because the ARB relied on the rates from the First Fee Award, which in turn relied on the *Surveys*. County's Br. 30 n.12, 37-38. The basis for this "fruit of the poisonous tree" argument appears to be the ARB's statement, "We note that we previously upheld an hourly rate of $400 for both Robert N. Marx and Jean Simonoff Marx for work performed in 2011 in this case." CL-II, No. 1, at 3.

The County fails to mention that in addition to this "note," the ARB explicitly cited and relied on all of the declarations and time records submitted by Complainants with their second fee petition. *Id.* Thus, even assuming *arguendo* that the rates in the First Fee Award were abuses of discretion (which they were not), a mere reference to the First Fee Award does not constitute prejudicial reliance sufficient to warrant reversal.

B. The Decision Not to Enhance Counsel's Fees Based on a Delay in Payment Was Not an Abuse of Discretion.

The ALJ did not abuse his discretion by declining to enhance Counsel's fees based on a delay in payment, and the ARB did not abuse its discretion in affirming the ALJ's decision. The decisions below reasonably applied the Supreme Court's decision in *Perdue* and this Court's application of *Perdue* in *Gray*.

In *Perdue*, the Supreme Court stated that there is a "strong presumption" that the "lodestar figure"—the number of hours reasonably worked multiplied by a

reasonable hourly fee—is reasonable, but that that enhancements may be appropriate in "rare circumstances." 559 U.S. at 554. In particular, an enhancement may be appropriate in "extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees . . . particularly where the delay is unjustifiably caused by the defense." *Id.* at 556.

Before *Perdue*, this Court had "held that 'where there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates.'" *Gray*, 613 F.3d at 1044 (quoting *Norman*, 836 F.2d at 1302). But in *Gray*, it clarified that "[o]ur existing circuit law on this subject must be read in light of, and modified to fit, the holdings in *Perdue* about enhancements for the delay in payment of expenses and fees." *Id.*

Applying these principles, the ALJ concluded that the then-eight-year length of the case did not constitute "extraordinary circumstances," particularly given that the litigation delays generally were not attributable to the County and that the County is a government entity.[13] CL-I, No. 1, at 5-6. The ARB affirmed, relying

[13] The ALJ also noted that Complainants were not successful in the litigation until the ARB reversed the ALJ's initial merits decision. CL-I, No. 1, at 6. DOL agrees with Complainants that they are the prevailing party for the entire litigation, regardless of the initial adverse decision. *See* Complainants' Br. 46-47. Any error on this point, however, was harmless given that, as discussed herein, the ALJ's

on *Perdue* and *Gray*. CL-I, No. 9, at 9. Complainants appear to raise two primary arguments challenging the ALJ and ARB's rulings.

First, Complainants contend that the payment of current rates to account for delay is simply part of the lodestar calculation, not an "enhancement" reserved for extraordinary circumstances. Complainants' Br. 42-43.[14] *Perdue* did not explicitly state whether disfavored "enhancements" include the payment of current rates (or inflation-indexed historic rates), or whether updated rates are part of the lodestar and an "enhancement" is an additional amount beyond that. Similarly, although *Gray* at one point characterizes the payment of updated rates as an "enhancement," 613 F.3d at 1046, it also criticizes the district court for "us[ing] both current rates *and* an enhancement to compensate for the delayed payment," *id.* at 1044 (emphasis added), suggesting that updated rates may not constitute an enhancement. And courts in this circuit applying *Perdue* and *Gray* have reached different conclusions as to whether the payment of current rates to account for delay requires "extraordinary circumstances." *Compare*, *e.g.*, *In re Delta/Airtran Baggage Fee Antitrust Litig.*, No. 1:09-md-2089-TCB, 2015 WL 4635729, at *18-

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ruling that Complainants had not demonstrated extraordinary circumstances was not an abuse of discretion.

[14] One court of appeals, in an unreported case, has adopted this view. *See Reaching Hearts Int'l v. Prince George's Cty.*, 478 F. App'x 54, 60 (4th Cir. 2012) (unpublished).

19 (N.D. Ga. Aug. 3, 2015) (stating that an award of current rates to account for delay is not an "enhancement" but "standard in this circuit") *with Hartage v. Astrue*, No. 4:09-CV-48-CDL, 2011 WL 1123401, at *2 (M.D. Ga. Mar. 24, 2011) (concluding that historic rates were appropriate in a case with no extraordinary circumstances). Given this uncertainty, the ARB did not abuse its discretion by affirming the ALJ's ruling that an award of current rates requires extraordinary circumstances.

Second, Complainants argue that even assuming that compensation for delay requires extraordinary circumstances, those circumstances existed here. But the ALJ and ARB did not abuse their discretion in declining to find extraordinary circumstances. The ALJ considered the County's status as a public entity—a consideration the Court explicitly raised in *Perdue*. *See Perdue*, 559 U.S. at 559 (noting that when defendants are public entities, "the fees are paid in effect by state and local taxpayers, and . . . money that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services"). *Cf. Foley v. City of Lowell*, 948 F.2d 10, 19 (1st Cir. 1991) ("At least where public funds are involved or the public interest is otherwise implicated, the court has a duty to consider the application [for attorneys' fees] critically to ensure overall fairness . . .

.").[15] Additionally, the ALJ correctly noted that the single factor identified by the Court in *Perdue* as "extraordinary"—a delay caused by "unjustifiable conduct by the defense"—was not present here. CL-I, No. 1, at 6. Rather, as Complainants acknowledge, the most significant delays were occasioned by gaps between the completion of briefing and decisions by the ALJ and ARB. *See* Complainants' Br. 27-32. Although these delays were unfortunate, neither the ALJ nor the ARB abused their discretion in declining to hold the County financially responsible for them.

Complainants also argue that failure to compensate them for the delay in receiving payment will deter attorneys from accepting FWPCA whistleblower cases. Complainants' Br. 47-49. They fault the ALJ and ARB for not adopting the rationales in the declaration of Michael Caldwell, which argues that compensation at current rates is necessary to incentivize attorneys to take cases like Complainants' case. *Id.* at 49-50.

While delays in obtaining fees might deter some lawyers from accepting civil rights cases, the Court recognized in *Perdue* that attorneys who do take such

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[15] Complainants mischaracterize this Court's holding in *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977), as "establish[ing] that fee awards and costs are not subject to reduction because they are collectible out of public treasuries." Complainants' Br. 51. *Miller* rejected an argument that a fee award could not run against a public entity *at all*. It did not hold that public entity status is irrelevant when determining the *amount* of a fee award. *Miller*, 563 F.2d at 754-56.

cases already "understand[] that payment of fees will generally not come until the end of the case, if at all." *Perdue*, 559 U.S. at 556. The more limited question here is whether such attorneys would be deterred from accepting cases like Complainants' by the payment of Counsel's historic rates rather than their current ones. Given that the ALJ awarded Counsel rates in excess of those awarded to many other plaintiffs' attorneys, *see* CL-I, No. 6, at 28-29; County's Br. 34-36 (citing cases in the Northern District of Georgia in which plaintiffs' attorneys were awarded rates between $175 and $350), it was not an abuse of discretion to conclude that Complainants had not demonstrated that plaintiffs' attorneys would be deterred by rates of $285 to $400. As for the Caldwell declaration, it was not part of the record in the first fee petition. *See* CL-I, No. 20, Appendix, Table of Contents. It was only submitted to the ARB with Complainants' *second* fee petition, in which the ARB *granted* Complainants' request to compensate them at their then-current rate of $450 per hour. *See* CL-II, No. 3, Tab F. It was not error for the ALJ and ARB, in the first fee petition, to ignore a declaration that was not before them.

Complainants also argue that the award of historic rates was inconsistent with ARB precedent. Complainants' Br. 44-46. As the ALJ pointed out, however, the ARB cases Complainants cited below predated *Perdue*, limiting their precedential value. Although Complainants now cite one post-*Perdue* ARB case

awarding current rates, *see Smith v. Lake City Enters.*, ARB Nos. 12-112, 12-113, 2013 WL 5773496, at *4 (ARB Sept. 12, 2013), there is no indication that the ARB in *Smith* considered *Perdue.* Also, not surprisingly, given that *Smith* originated in the Sixth Circuit, *see Smith v. Perez*, 659 F. App'x 296 (6th Cir. 2016) (unpublished), the ARB did not consider this Court's decision in *Gray*, as it did here.

Finally, Complainants argue that this Court should award fees for this entire matter at Counsel's current rate of $500 per hour. Complainants' Br. 77-78. As set forth in detail above, the ALJ and ARB did not abuse their discretion in declining to award Counsel current rates. But even if this Court were to disagree, any error below was limited to the time preceding each of the ARB's two orders because the ARB awarded postjudgment interest, which accounts for the time subsequent to the ARB's decisions. CL-I, No. 9, at 10; CL-II, No. 1, at 5.

C. DOL Concedes that the ALJ's Use of a Rate of $350, Rather than $400, for 2010 Was Error.

Complainants point out that the ALJ awarded Counsel only $350 per hour for 2010 despite deeming reasonable their requested rate of $400 for that year. Complainants' Br. 73. DOL submits that the ALJ's decision on this point was an inadvertent error.

The ALJ noted that Complainants requested $350 per hour for services performed until January 1, 2010 and $400 per hour thereafter. CL-I, No. 1, at 2.

The ALJ later concluded, after examining the *2007 Survey*, that "Counsel's request for $350.00 from 2007 to January 2010 [was] reasonable and request for $400.00 thereafter [was] reasonable[.]" *Id.* at 5. However, for 2010, the ALJ only actually awarded Complainants $350 per hour, not $400. *Id.* at 6, 14-15.

Based on the ALJ's explicit finding that Complainants' requested rates from 2007 forward were reasonable, DOL believes that the ALJ made an inadvertent error and intended to award the requested $400 rate for 2010. While the County argues that the ALJ held only that the *request* for $400 in 2010 was reasonable, but found $350 more appropriate after examining the evidence, *see* County's Br. 28, this conclusion is difficult to square with the ALJ's opinion. The opinion provides no explanation for awarding $350 per hour in 2010, rather than the requested "reasonable" $400 rate that the ALJ awarded for 2011 and afterwards.[16] This supports an inference that the award of $350 for 2010 was inadvertent rather than intentional.

Accordingly, DOL agrees that the 36.5 hours of work by Mr. Marx in 2010 that the ALJ found compensable should be paid at $400 per hour, and the 2.3 hours of work by Ms. Marx that the ALJ found compensable at a 50% paralegal rate

[16] For example, the only analysis between the ALJ's finding that the $400 rate for 2010 was reasonable and his decision to award Counsel only $350 for 2010 pertained to Complainants' requested fee enhancement, not to the baseline rate for 2010. CL-I, No. 1, at 5-6.

should be paid at $200 per hour. This yields $15,060 for work performed in 2010, a difference of $1,882.50 from the $13,177.50 awarded for that time period. CL-I, No. 1, at 15. DOL concedes that Counsel should receive this additional $1,882.50.

II. THE ALJ'S REDUCTIONS OF CERTAIN HOURS IN THE FIRST FEE AWARD, AND THE ARB'S AFFIRMANCE OF THOSE REDUCTIONS, WERE NOT ABUSES OF DISCRETION.

A. The ARB's Summary Affirmance of the Reductions Is Not Grounds for Reversal.

Complainants contend that the ARB's affirmance of the ALJ's reductions in the First Fee Award must be reversed because the ARB provided no meaningful basis for review. Complainants' Br. 53-54. This argument relies on a readily distinguishable case in which the Sixth Circuit reversed and remanded a 60% reduction of attorneys' requested fees because the district court failed to justify that specific amount. *See H.D.V.-Greektown, LLC v. City of Detroit*, 660 F. App'x 375, 385 (6th Cir. 2016) (unpublished) ("The district court . . . did nothing to explain why 60% was the appropriate amount to account for those factors."). In contrast, here, the ARB—an appellate tribunal—affirmed, under an abuse-of-discretion standard, the ALJ's meticulously-justified reductions on the grounds that

> The ALJ provided a thorough discussion of all the relevant evidence and, in an exhaustive analysis of the law as applied to the facts of this case, provided a rational basis for each time allowed or disallowed and the reasons therefor, including any adjustment in rate for the work described. The ALJ supported each allocation and/or reduction with supporting determinations and rulings and rendered a comprehensive analysis of the amount of time Counsel adequately justified for

> compensation. Further, the ALJ acted within his discretion in determining the persuasive value of the evidence Counsel offered in the furtherance of the Complainants' case.

CL-I, No. 9, at 8.

That the ARB did not detail each and every reduction is not an abuse of discretion. This Court regularly summarily affirms district court decisions, incorporating their reasoning by reference. *See, e.g., Stein v. Ala. Sec'y of State*, 774 F.3d 689, 691 (11th Cir. 2014) (affirming, after two-paragraph discussion, "for these reasons and for the reasons stated in the district court's well-reasoned memorandum opinion"); *Williams v. Wal-Mart Stores, Inc.*, 342 F. App'x 478, 480 (11th Cir. 2009) (unpublished) (affirming "[f]or the reasons stated in the district court's thorough and well-reasoned opinion").

DOL recognizes that given the ARB's summary affirmance, it is necessary for this Court to review the ALJ's rationales for the reductions. But these "exclusions for excessive or unnecessary work" are subject to the deferential abuse-of-discretion review. *Norman*, 836 F.2d at 1301. And the ARB's summary affirmance of them is not cause for reversal.

B. Each of the Reductions Was Within the ALJ's Discretion.

1. 50 Percent Reduction for Certain Tasks

Complainants contest the ALJ's decision to compensate two categories of work at 50% of Counsel's otherwise-applicable rates: time Ms. Marx spent

working on several briefs, and time that both attorneys spent preparing digests of deposition and hearing transcripts.

i. Legal Research and "Entwining"

In concluding that certain work on briefs could have been performed by a paralegal and was therefore compensable at a 50% rate, the ALJ relied on Counsel's own characterization of Ms. Marx's contributions as "[doing] the requisite legal research" and "entwin[ing] the applicable legal research and analysis into the draft prepared by Mr. Marx and finaliz[ing] the document." CL-I, No. 1, at 13 (citing CL-I, No. 2, at 29). This was not an abuse of discretion. *See Zech v. Comm'r of Soc. Sec.*, No. 16-11292, 680 F. App'x 858, 860 (11th Cir. 2017) (unpublished) (applying abuse-of-discretion standard to decision to compensate attorney at paralegal rate).

The issue is not whether "legal research is compensable attorney activity," which it certainly is. Complainants' Br. 55. Indeed, in order for paralegal work to be compensated through fee-shifting at all, it must be "work traditionally done by an attorney." *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988) (quoting *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982)) (emphasis omitted).

Rather, the question is whether this type of work should be billed at an experienced attorney's highest rate. To that end, this Court, as well as others, has characterized legal research as work that can be performed by a paralegal. *See St.*

Fleur v. City of Fort Lauderdale, 149 F. App'x 849, 853 (11th Cir. 2005) (unpublished) (declining to find abuse of discretion in district court's reduction of plaintiff's hours based in part on "senior counsel's billing for legal research that could have been assigned to an associate or paralegal"); *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 180 (3d Cir. 2001) (rejecting application of an attorney's highest rate to tasks including legal research, as "[m]any of these tasks are effectively performed by administrative assistants, paralegals, or secretaries"); *Latiolais v. Griffith*, No. 09-cv-00018, 2015 WL 4253976, at *7 (W.D. La. July 13, 2015) (awarding paralegal rates for work "confined to legal research"); *see also People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1315 (7th Cir. 1996) (describing testimony by former Vice President of Illinois Paralegal Association that "complex paralegal work" includes legal research).

Even assuming that Ms. Marx's research, "entwining," and "finalizing" could not have been performed by a paralegal, the ALJ reasonably concluded, based on Counsel's own representations, that this supporting work did not require the services of an attorney with over two decades of experience and therefore should be compensated at a lower rate. *See Loughner*, 260 F.3d at 180 ("[T]o claim the same high reimbursement rate for the wide range of tasks performed is unreasonable" when such tasks included such diverse work as "telephone calls with a client, legal research, a letter concerning a discovery request, the drafting of

a brief, and trial time in court."). The ALJ's conclusion was not an abuse of discretion, regardless of whether one characterizes the nature of the work in question as that of a paralegal or junior attorney. *See Maner v. Linkan LLC*, 602 F. App'x 489, 493 (11th Cir. 2015) (unpublished) (affirming rates for junior associates that were 32% and 35%, respectively, of the lead counsel's rate); *St. Fleur*, 149 F. App'x at 853 (affirming rates for junior associates that were 54% of the rates of the senior attorneys); *see also* U.S. Att'y's Office for the Dist. of Columbia, *USAO Attorney's Fees Matrix—2015-2017*, https://www.justice.gov/usao-dc/file/889176/download (listing rates for attorneys with fewer than two years' experience as 50-54% of the rates for attorneys with twenty-one to thirty years' experience).

Finally, Complainants' allegation of "an undertone of arbitrary sexism" on the part of the ALJ is without merit. Complainants' Br. 56. The ALJ based the different rates assigned to certain work by Mr. Marx and Ms. Marx on their *own representations* that the two attorneys performed fundamentally different tasks on the briefs. CL-I, No. 1, at 13 (citing CL-I, No. 2, at 29).[17]

[17] In a footnote, Complainants reference declarations Counsel filed *in this Court* for the proposition that "Mr. and Ms. Marx collaborate on writing the briefs with each person contributing different sections that is then entwined in a single product." Complainants' Br. 54 n.12. In contrast, during the proceedings below, Counsel stated that "Mr. Marx did the lion's share of the work" and "prepared" the briefs, while Ms. Marx conducted legal research which she "entwined" into the

ii. Deposition and Hearing Digests

Complainants also argue that it was reversible error for the ALJ to reduce, by 50%, their hourly rates for preparing digests of the deposition and hearing transcripts. Complainants' Br. 67. The ALJ's conclusion that preparing a digest is the work of a paralegal or junior attorney is supported by precedent. *See Walker v. Gruver*, Nos. 1:11-cv-1223, 1:11-cv-1224, 2013 WL 5947623, at *12 (M.D. Pa. Nov. 5, 2013) (reducing digest preparation fees for attorney with fifteen years of experience by 50% because the task should have been delegated "to a less experienced attorney or paralegal"); *Grievson v. Rochester Psychiatric Ctr.*, 746 F. Supp. 2d 454, 467 n.7 (W.D.N.Y. 2010) (characterizing digesting transcripts as "a task more commonly delegated to legal assistants"); *In re 29 Brooklyn Ave., LLC*, 548 B.R. 642, 653 (Bankr. E.D.N.Y. 2016) ("'Digesting of transcript' and 'digesting of hearing' are services more properly allocated to a paralegal or junior associate . . . .").

Moreover, even if indexing is deemed attorney work, the very authority on which Complainants rely, *Evans v. Miami Valley Hospital*, ARB Nos. 08-038, 08-043, 2009 WL 2844816 (ARB Aug. 31, 2009), actually supports the ALJ's decision. In *Evans*, the ARB awarded an attorney with three years of experience

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final version. CL-I, No. 2, at 28-29. This Court should reject Complainants' invitation to consider matters outside the record.

her requested rate of $175 per hour for tasks including indexing a hearing transcript in 2007. *Id.* at *6. That $175 rate is identical to the rate the ALJ awarded Counsel for preparing digests in 2007. *See* CL-I, No. 1, at 11. *Evans* thus reinforces the ALJ's conclusion that $175 was an entirely reasonable rate at which to compensate such a task, and that charging the requested $350 rate would have been unreasonable. *See also Buffinton v. PEC Mgmt. II, LLP*, No. 1:11-cv-229 Erie, 2014 WL 670854, at *7 (W.D. Pa. Feb. 20, 2014) (awarding attorney $180 per hour for indexing transcripts).

2. Elimination of Duplicative Time For Deposition Attendance

A reduction of fees is warranted if multiple attorneys "are unreasonably doing the same work." *Johnson v. Univ. Coll.*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis omitted); *see also Norman*, 836 F.2d at 1301 ("'[E]xcessive, redundant or otherwise unnecessary' hours should be excluded from the amount claimed.") (quoting *Hensley*, 461 U.S. at 434). The ALJ therefore acted within his discretion, and consistent with this Court's precedent, in eliminating the hours billed when an attorney attended a deposition he or she did not take. *See* CL-I, No. 1, at 9; *Duckworth v. Whisenant*, 97 F.3d 1393, 1398 (11th Cir. 1996) (subtracting half of each attorney's hours spent for "mere attendance of depositions"); *SE Prop. Holdings, LLC v. Stradley*, No. 11-0219-WS-N, 2012 WL 2130806, at *3 (S.D. Ala. June 11, 2012) (reducing fees where two senior partners attended

depositions); *accord Evans v. Port Auth.*, 273 F.3d 346, 362 (3d Cir. 2001) (concluding that hours billed were excessive where, *inter alia*, both attorneys on a case billed identical hours at their full rate for attending depositions).

While it is not *per se* unreasonable for multiple attorneys to attend depositions, *see Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575, 1580 (11th Cir. 1990) (affirming district court's refusal to reduce hours for multiple attorneys who attended depositions), the ALJ did not abuse his discretion by concluding that it was unwarranted here. Awarding fees to multiple lawyers for the same time is proper if it "reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Johnson*, 706 F.2d at 1208. The "distinct contribution" that Complainants identify is that attending one deposition helped the non-deposing attorney prepare for the next deposition. But as the ALJ concluded, this goal could have been accomplished had the deposing attorney briefed the non-deposing attorney. CL-I, No. 1, at 9.[18]

[18] While Complainants argue that this suggestion is inconsistent with the ALJ's denial of compensation for conferencing time, *see* Complainants' Br. 66, the conference time denied by the ALJ generally consisted of entries where both attorneys discussed a matter together, leaving it unclear whether each conference was reasonably necessary. *See, e.g.*, CL-I, No. 20, Tab 6, at 19 (Nov. 20, 2006 "Conference re Depositions"), 38 (Apr. 12, 2011 "Conference re strategy re settlement"). Conversely, the ALJ might well have granted compensation for a conference in which one attorney actively briefed the other on a deposition, which would have been more plainly necessary.

Although it is true, as Complainants argue, that both attorneys were actively engaged in the litigation as a whole, only one attorney could take or defend each deposition, and the ALJ did not abuse his discretion in compensating only one attorney for that task. *See Oravec v. Sunny Isles Luxury Ventures, L.C.*, No. 04-22780-CIV, 2009 WL 6337121, at *21 (S.D. Fla. Jan. 12, 2009) ("When two attorneys . . . prepare for and attend the same deposition or mediation, the only time properly awardable is for the attorney who actively took or defended the deposition on behalf of the client or actively participated in the mediation."). In contrast, where the presence of each attorney was reasonable and necessary—such as at client interviews, a conference call with the ALJ, or a mediation session—the ALJ compensated both attorneys. *See* CL-I, No. 1, at 6-7, 15-16.

3. Attorney Conference and Travel Time

The ALJ excluded two general categories of conference time. The first consisted of time Counsel asserted they spent conferencing in a car traveling to and from depositions, the hearing, and the trial. For this category, the ALJ entirely excluded travel time to and from depositions for the non-deposing attorney. CL-I, No. 1, at 10. For travel time that he found to be compensable, the ALJ reduced the number of hours by 50%, effectively awarding travel time at half of each attorney's regular hourly rate. *Id.* at 10, 11-12.

Given that only one attorney's presence was necessary at each deposition, *see supra* Arg. § II.B.2, it reasonably followed that only one attorney was entitled to compensation for travel to and from each deposition. Additionally, the ALJ acted within his discretion when he reduced by half the hours of compensable travel time. *See Gaylor v. Greenbriar of Dahlonega Shopping Ctr., Inc.*, No. 2:12-cv-00082-RWS, 2014 WL 2195719, at *5 n.5 (N.D. Ga. May 27, 2014) (compensating travel time at half of an attorney's normal hourly rate). Even assuming that Counsel discussed the case while traveling, given that Counsel traveled by car—where one attorney presumably was driving—it was reasonable for the ALJ to conclude that their travel time was not as productive as time spent in an office and should not be compensated as such.

The second category of conferencing time the ALJ reduced was office conferencing time. CL-I, No. 1, at 10, 12, 13, 14, 16. While conferencing time is not noncompensable as a matter of law, *see Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008) (rejecting "a blanket rule according to which internal communication time never would be reimbursed" under the Equal Access to Justice Act), in determining the reasonableness of hours sought in a fee petition, a court must ask whether an attorney would bill a paying client for the same time. *See Norman*, 836 F.2d at 1301 ("[A] lawyer may not be compensated for hours

spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights.").

Many private clients pay reduced fees or no fees for internal attorney meetings because they are often not very productive and disproportionately expensive relative to their benefit. *See* Brad Malamud, *How Times Have Changed: A Systematic Approach to Billing*, 62 Def. Couns. J. 583, 585-86 (1995) (noting that "many clients refuse to pay more than one biller's conference time, while others refuse to pay for any conferencing whatsoever"); Am. Int'l Group, Gen. Lit. Mgm't Guidelines 10 (Apr. 2013), http://www.aig.com/content/dam/aig/america-canada/us/documents/brochure/2013-litigation-management-guidelines-as-of-083113-brochure.pdf (stating that leading insurance company will typically pay for only two hours of intra-office conference time per billing cycle). Accordingly, many courts carefully scrutinize fee requests for attorney conference time, particularly where, as here, all participating attorneys charge their full hourly rates. *See Davila v. Menendez*, No. 10-21281-CIV-KING/BANDSTRA, 2012 WL 12893544, at *2 (S.D. Fla. Feb. 14, 2012) (declining to compensate "time unnecessarily spent for inter-office conferences"); *Beishir v. Chase Home Fin. LLC*, No. 8:07-CV-65-T-27MAP, 2008 WL 533881, at *1 (M.D. Fla. Feb. 27, 2008) (deeming "numerous inter-office conferences" to be "not reasonable or necessary"); *compare Williams v. R.W. Cannon, Inc.*, 657 F. Supp. 2d 1302, 1312

(S.D. Fla. 2009) (awarding compensation for intra-office conferencing where plaintiff sought reimbursement for only one attorney at a time, rather than for all attorneys who attended conferences). *But see Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas Cty.,* 278 F. Supp. 2d 1301, 1316 (M.D. Fla. 2003) (stating that time spent in attorney conferences is generally compensable for each participant).

In light of this authority, the ALJ's exclusion of office conferencing time was not an abuse of discretion. Complainants' reliance on *City of Riverside v. Rivera*, 477 U.S. 561, 573 n.6 (1986), for the proposition that "productive conferences between two attorneys both actively litigating a case are fully compensable," Complainants' Br. 61, is misplaced. In *Rivera*, the Court concluded that a district court did not abuse its discretion in awarding attorneys' fees, including determining whether the hours expended—which included intra-office conferences—were reasonable. *See* 477 U.S. at 573 n.6. It did not conclude that it would be an abuse of discretion for a court to decline to award fees for conferencing time. Rather, it stated that "the District Court was in the best position to determine whether the time expended by respondents' counsel was reasonable." *Id.* Here, as in *Rivera*, the ALJ was familiar with the attorneys, the case, and the level of effort that this case required, and was in the best position to determine

whether the time expended on conferences was reasonable. This Court should not disturb his findings.

4. Review and Revision of Briefs

The ALJ also did not abuse his discretion in excluding a total of eleven hours for review and revision of the petition for review, motion for reconsideration, and post-remand brief. *See* CL-I, No. 1, at 14, 16. First, the ARB's precedent supported this decision. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, 2011 WL 327976, at *2 (ARB Jan. 5, 2011) (excluding "time attributed to office conferences, supervision, and training, and review and revision, since such time is not normally billable to private clients"). As the ARB explained in a prior case, when a senior attorney's full hourly rate is used, reflecting that attorney's skill and expertise, the need for billing judgment becomes more pronounced. *See Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, 2004 WL 1955436, at *10 (ARB Aug. 31, 2004) ("[B]ecause we have accepted a senior associate's hourly rate, downward adjustments must be made for time that shows review and revision of her work, supervision and training, duplication of effort, and legal research on topics in her area of presumed expertise."). Courts and commentators also support the reduction of fees for duplicative review and revision of an experienced attorney's work. *See Neuros Co. v. KTurbo Inc.*, No. 08-CV-5939, 2010 WL 547599, at *3 (N.D. Ill. Feb. 9, 2010) (denying fees for

partner to review work that had already been reviewed by a sixth-year associate); *Burleson v. Astrue*, No. C07-2019-RSL, 2009 WL 364115, at *3 (W.D. Wash. Feb. 9, 2009) (deducting time for reviewing a brief because "[i]t appears duplicative for one highly experienced attorney to charge additional fees simply for reading the work of another highly experienced attorney"); *In re Poseidon Pools of Am.*, 180 B.R. 718, 741 (Bankr. E.D.N.Y. 1995) (denying compensation for revisions by noting that "a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Gerald F. Phillips, *Reviewing A Law Firm's Billing Practices*, 13 No. 1 Prof. Law. 2, 12 (2001) (opining that if constant review and revision were necessary, a firm should not have billed fully for both the original work and the time spent making revisions).

Here, Mr. Marx and Ms. Marx are both extremely experienced attorneys in their field, were therefore awarded significant hourly rates, and sought their full hourly rates for drafting their briefs. Under these circumstances, it was not an abuse of discretion for the ALJ and ARB to conclude that the time they spent reviewing and revising those same briefs was not compensable.

5. Reduction of Fees for Preparing Fee Petition

Complainants also take issue with the ALJ's decision to reduce time spent preparing the fee petition itself by 20%, arguing that it was not supported by

evidence. Complainants' Br. 67-69. They argue that even if a reduction was warranted, the ARB's case law supported a smaller reduction, such as 5%.

The ALJ did not abuse his discretion. If fee records are voluminous, a reviewing court may apply an across-the-board reduction rather than parse each individual record, provided that the court "concisely but clearly" articulates its reasoning. *See Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994). Here, the ALJ articulated four specific reasons justifying the 20% reduction: (1) Complainants' information pertaining to the market rate in Atlanta was unpersuasive; (2) cases cited in the fee petition at times did not stand for the proposition stated; (3) the relevant facts and issues were scattered throughout the brief and reply, and (4) Counsel's use of block billing in this section was "rampant." CL-I, No. 1, at 16-17.

The record supports the ALJ's conclusions. First, as explained above, Complainants' evidence regarding hourly rates was unpersuasive. *See supra* Arg. § I.A.2. Second, the ALJ was correct that Counsel sometimes overstated the value of the cases they cited. *See*, *e.g.*, CL-I, No. 7, at 25 (overstating the holding in *Redmond*, *see supra* p. 19); *id.* at 30-31 (mischaracterizing the holding in *Miller*, *see supra* p. 32 n.15); CL-I, No. 2, at 6 (mischaracterizing the holding in *Rivera*, *see supra* p. 47). Third, as the ALJ stated, the facts in Complainants' brief were somewhat scattered rather than set out in a clearly-defined section. *See, e.g.*, CL-I,

No. 7, at 25-30 (introducing facts regarding hourly rates that were not mentioned in factual background section). Finally, the ALJ was also correct that Counsel used "block billing"—grouping multiple tasks in a single time entry—excessively during the relevant time period from November 18, 2011 to December 29, 2011. *See* CL-I, No. 20, Tab 6, at 45 ("Research re various elements re attorneys fees; enhancement of fees; delay; Judge Shoob's decision in Kenney; 11th Cir affirmance of Shoob; recent supreme court decision") (Nov. 18, 2011), 47 ("Work on attorneys fees petition, read record in Yule, attys fee petition, supporting docs and decisions, begin reviewing attys fees docs in Goodrich") (Dec. 25, 2011), 48 ("Continue work on attys fee petition, finish declarations, draft brief" (Dec. 28, 2011)). The ALJ's 20% reduction was therefore not an abuse of discretion. *Accord Dial HD, Inc. v. ClearOne Commc'ns*, 536 F. App'x 927, 931 (11th Cir. 2013) (district court did not abuse its discretion when it applied a 25% reduction based on block billing).

Additionally, although the ALJ did not explicitly cite this rationale, a 20% reduction was reasonable given Complainants' degree of success on the fee petition. *See Norman*, 836 F.2d at 1302 (court may reduce fee award in proportion to prevailing party's successful claims). Complainants sought $41,326.88 in costs, plus $477,346.50 in fees, excluding fees for the fee petition itself. *See* CL-I, No. 7,

at 2, 12-13.[19] They were awarded $27,843.15 in costs and $364,116.25 in fees for the same work. *See* CL-I, No. 1, at 18-19. This represents a success rate of about 75%, confirming the reasonableness of a 20% reduction for work on the fee petition.

Complainants' contention that the reduction was arbitrary because the ARB, in a different case, reduced an attorney's hours by only 5% for block billing, *see Evans*, 2009 WL 2844816, at *5, is misplaced. Nowhere in *Evans* did the ARB suggest that 5% is the maximum permissible reduction for block billing. In fact, the ARB in *Evans* reduced a different attorney's hours by 15% due to block billing and vague time entries. *Id.* at *6. Additionally, here, block billing was only one of four reasons the ALJ cited for reducing Counsel's fees sought for preparing the fee petition. Given that the ALJ "concisely but clearly" articulated his rationale, a 20% reduction was entirely within his discretion. *Loranger*, 10 F.3d at 783.

C. Different Standards of Review, Not Arbitrariness, Account for the Distinctions Between the ARB's Two Orders.

Complainants argue that differences between the ARB's Second Fee Award on March 30, 2015 and its First Fee Award on November 10, 2015 render the ARB's affirmance of the ALJ's reductions in the First Fee Award arbitrary and capricious. *See* Complainants' Br. 58. Specifically, Complainants suggest that

[19] The $477,346.50 figure reflects the $518,106.50 total amount requested minus the $40,760 requested for work on the fee petition.

given that the ARB fully compensated Counsel for certain tasks in the Second Fee Award, the First Fee Award should have reversed the ALJ's reductions or exclusions of time for the same or similar tasks. *See id.* at 57-58 (concerning ALJ's application of a 50% reduction for tasks it concluded should be compensated at paralegal rates); 60 (concerning ALJ's exclusion of time reviewing and revising briefs); 64 (concerning ALJ's exclusion of attorney conference time).

Complainants' argument ignores the different postures of the ARB's two orders. In the First Fee Award, the ARB served as an appellate tribunal reviewing the ALJ's ruling under the abuse-of-discretion standard. *See* CL-I, No. 9, at 3 n.1 (explaining that "the ARB has embraced the abuse-of-discretion standard applied by federal appellate courts in the review of a district court's attorney fee award") (quoting *Smith*, 2013 WL 5773496, at *1). As discussed above, this standard "usually implies a range of choices, instead of only one right choice, and often [the reviewing court] will affirm even though [it] would have decided the other way if it had been [its] choice." *Gray*, 613 F.3d at 1039 (citations omitted). Conversely, in the Second Fee Award, the ARB evaluated Complainants' fee request in the first instance. *See* CL-II, No. 1, at 2. Complainants' argument essentially suggests that in the First Fee Award, the ARB should have applied de novo review, substituting its judgment for the ALJ's. To do so would have been error, and this Court should

reject Complainants' argument.[20]

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for review, except that it should grant Complainants' request to compensate Counsel at $400 per hour for work during 2010, and accordingly award an additional $1,882.50.[21]

Dated: October 16, 2017

Respectfully submitted,

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[20] Additionally, Complainants submitted evidence with their second fee petition that they did not submit with the first. Specifically, the second petition included two declarations from attorneys other than Robert and Jean Marx who reviewed the proceedings in this case, were familiar with the Marxes' work and experience, and opined on the reasonableness of their rates and hours. *See* CL-II, No. 3, Tab F ¶¶ 5-11; Tab H ¶¶ 9-12.

[21] DOL agrees with the parties that given the long history of this case, if this Court reverses any aspects of the ARB's decision, it should re-calculate the fee rather than remand, unless additional factfinding is warranted.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,597 words, excluding portions exempted by Fed. R. App. P. 32(f) or 11th Cir. R. 32-4.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes.

Dated: October 16, 2017

s/ Jesse Z. Grauman
JESSE Z. GRAUMAN

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, a true and correct copy of the foregoing Brief for Respondent United States Department of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will send notification of such filing to:

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