

No. 14-40585

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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GATE GUARD SERVICES, L.P.; BERT STEINDORF,

Plaintiffs - Appellees Cross-Appellants,

v.

THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR,

Defendant - Appellant Cross-Appellee.

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On Appeal from the United States District Court  
for the Southern District of Texas

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**RESPONSE AND REPLY BRIEF FOR THE SECRETARY OF LABOR**

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**RESPONSE AND REPLY BRIEF FOR THE SECRETARY OF LABOR**

Defendant-Appellant/Cross-Appellee, Thomas E. Perez, Secretary, Department of Labor ("Secretary"), submits this response and reply brief. This Court should affirm the district court's decision denying the request by Plaintiffs-Appellees/Cross-Appellants, Gate Guard Services, L.P. ("GGs") and Bert Steindorf ("Steindorf") (collectively "Plaintiffs"), for attorneys' fees under the bad faith provision of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412(b) – the subject of Plaintiffs' cross-appeal. And for the reasons set forth in the Secretary's opening brief, this Court should reverse the district court's award of attorneys' fees to GGS under EAJA's



substantially justified provision, 28 U.S.C. 2412(d) – the subject of the Secretary’s appeal.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1346(a)(2) (jurisdiction over suits against the United States). The district court fully and finally disposed of Plaintiffs’ requests for EAJA attorneys’ fees in orders dated July 24, 2013 and April 9, 2014. Plaintiffs’ June 11, 2014 cross-appeal following the Secretary’s June 5, 2014 appeal was timely under Federal Rule of Appellate Procedure 4(a)(3). This Court has jurisdiction over both the appeal and the cross-appeal pursuant to 28 U.S.C. 1291. See Plaintiffs’ Brief, 1-3; Secretary’s Brief, 1-2.

STATEMENT OF THE ISSUE

The issue on cross-appeal is whether the district court abused its discretion by concluding that Plaintiffs failed to satisfy their burden of showing an entitlement to an award of attorneys’ fees from the Secretary under EAJA’s bad faith provision, 28 U.S.C. 2412(b).

## STATEMENT OF THE CASE<sup>1</sup>

### Factual and Procedural Background

1. The Department of Labor's Wage and Hour Division ("Wage and Hour") investigated GGS' compliance with the Fair Labor Standards Act ("FLSA"), including whether GGS' gate guards were misclassified as independent contractors and were actually employees under the FLSA. See ROA.9040. The investigation was prompted by complaints from GGS workers, including a gate guard, which resulted in the investigation of the gate guards' status. See ROA.9609; ROA.9612. GGS asserts that its two former service technicians who filed complaints with Wage and Hour or assisted with the investigation were friends of the Wage and Hour investigator. See Plaintiffs' Brief, 15-16.<sup>2</sup> One of the service technicians (Daniel McDaniel) testified that he did not file a complaint (see ROA.9527), and the other (Jerry Studlar) testified that he was "not really a friend" or acquaintance of the Wage and Hour investigator (ROA.9517).

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<sup>1</sup> The Secretary limits the Statement of the Case in this brief to matters relevant to the cross-appeal. Nonetheless, this Statement of the Case repeats portions of the Statement of the Case in the Secretary's opening brief so that this brief contains a full discussion of the matters necessary to resolve the cross-appeal.

<sup>2</sup> According to GGS, one of its former service technicians may be a KKK sympathizer, and the other may be a child molester. See Plaintiffs' Brief, 16. Neither of these two former GGS service technicians' characters was relevant to Wage and Hour's investigation.

The Wage and Hour investigator scheduled an initial conference with GGS at its offices in Corpus Christi, Texas. After scheduling the conference but prior to the conference itself, the investigator was in Corpus Christi working on another investigation (the investigator was not based in Corpus Christi). The investigator briefly stopped by GGS' offices to introduce himself and confirm the initial conference that he had scheduled. See ROA.9605-9606; ROA.9592.

Following the initial conference, the investigator interviewed over 30 GGS workers, including 17 gate guards. See ROA.9603-9604; ROA.9592-9593. The investigator took handwritten notes from the interviews and then transcribed his notes to Wage and Hour interview forms in the case narrative file. See ROA.9269-9270; ROA.9593; ROA.9610-9611. After transcribing the notes and contrary to Wage and Hour procedures, the investigator destroyed the notes. See id.; see also ROA.9549.

A day after the initial conference, Wage and Hour began to input payroll data received from GGS. See ROA.9179. The data was inputted so that Wage and Hour could perform a payroll analysis, not to calculate back wages due; it was unknown at that time whether back wages would be due. See ROA.9179-9181; ROA.9592. The investigator explained that investigators work multiple cases at a time, so available time is used to input data. See ROA.9181; ROA.9592. Also, the investigator emailed a

colleague and described the initial conference as a "good example of being quiet and letting them do all the talking and consequently digging their own grave." ROA.9228. The investigator apologized for the comment at his deposition and agreed that it was inappropriate and unprofessional. See ROA.9271.

As part of the investigation, Wage and Hour mailed questionnaires to GGS workers. GGS asserts that Billy Reid received a questionnaire and answered "yes" to the question whether he was able to negotiate his pay from GGS, and that the Secretary ignored that evidence. See Plaintiffs' Brief, 22-23. Mr. Reid stated in a declaration filed by GGS, however, that he received two such questionnaires, threw one away, and did not respond to the other. See ROA.7638-7639; ROA.9597.

Several months later, the Wage and Hour investigator met with GGS for a final conference to discuss his findings following the interviews and analysis. See ROA.9195. The investigator informed GGS that he found certain of GGS' employees to be exempt from the FLSA's overtime requirements (as GGS had classified them), but that the service technicians were not exempt because they did not perform the duties required for an employee to be exempt even if they were paid on salary. See

id.<sup>3</sup> The investigator further informed GGS that he found the gate guards to be employees as opposed to independent contractors, and he explained why. See id. He provided back wage calculations to GGS in the amount of over six million dollars. See id. The investigator should not have provided back wage calculations to GGS because he had not obtained from GGS an agreement to comply with the FLSA. See ROA.9545.

2. On November 19, 2010, Wage and Hour held a second-level conference with GGS, at which Wage and Hour supervisors and GGS' attorneys discussed the investigation's findings. See ROA.54-56. Later that same day, GGS filed a declaratory judgment lawsuit against the Secretary seeking a declaration that the gate guards were properly classified as independent contractors under the FLSA. See ROA.22-44; ROA.9040. Although headquartered in Corpus Christi, GGS filed its lawsuit in the Victoria Division of the United States District Court for the Southern District of Texas. See ROA.22-23.

In the meantime, Wage and Hour was interviewing additional GGS workers and reviewing its back wage calculations. See ROA.9542-9544. Wage and Hour reduced its calculation of back wages due to about two million dollars. See ROA.9594-9595; ROA.9543-9544. After these additional interviews and

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<sup>3</sup> Any claims by the Secretary on behalf of GGS' service technicians were later dismissed by agreement of the parties. See ROA.9040-9041.

deliberations, the Secretary filed a lawsuit against GGS and Steindorf in February 2011, alleging violations of the FLSA's minimum wage, overtime, and record-keeping requirements. See ROA.187-200; ROA.9040-9041. GGS had not yet served its declaratory judgment lawsuit on the Secretary, and the Secretary filed his lawsuit in the Corpus Christi Division of the United States District Court for the Southern District of Texas. See id. GGS is headquartered in Corpus Christi, and Corpus Christi was more convenient for the majority of the Secretary's witnesses. See ROA.23; ROA.9594. GGS served its lawsuit on the Secretary later in February 2011. See ROA.68-77.

GGs sought to transfer the Secretary's lawsuit from the Corpus Christi Division to the Victoria Division, and the Secretary opposed the transfer. See ROA.510-511. Noting that the first-to-file rule is a discretionary doctrine, the Corpus Christi Division rejected GGS' argument that transfer was required. See ROA.514-515. The Corpus Christi Division, however, considered the circumstances and ultimately ruled that the Secretary's lawsuit should be transferred to the Victoria Division. See ROA.517-519. At no point did the Corpus Christi Division suggest that the Secretary's opposition to the motion to transfer was without merit. See ROA.510-519.

3. During the litigation, there were several discovery disputes. GGS filed a few motions to compel; however, the

disputes were resolved by the parties, and GGS withdrew the motions. See ROA.9596-9597. In particular, GGS' counsel halted the deposition of the Wage and Hour investigator because counsel believed that the Secretary's counsel was making too many and improper objections. At that time, the parties did not yet have an agreement to reserve objections for trial, and some of the questions by GGS' counsel specifically sought to elicit privileged information from the Wage and Hour investigator. See ROA.9595. The parties reached an agreement to resolve this dispute (and to govern later depositions), whereby the investigator appeared for a new deposition for up to seven additional hours of questioning. See ROA.9614-9617. In addition, GGS moved to compel the Secretary to produce certain documents that the Secretary maintained were privileged. See ROA.1599-1632. After a year had passed, GGS withdrew that motion. See ROA.3257-3258; ROA.9597.

4. Both the Secretary and Plaintiffs moved for summary judgment on the issue whether the gate guards were employees under the FLSA. In addition to other evidence, the Secretary submitted declarations from 28 GGS gate guards in support of his summary judgment motion. See ROA.3584-3590; ROA.3596-3687; ROA.3796-3854. The district court noted that, in determining whether a worker is an employee or independent contractor under the FLSA, it must focus "on 'whether, as a matter of economic

reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.'" ROA.9043 (quoting Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008)). The district court identified five economic realities factors used by this Court to guide that determination. See ROA.9043-9044 (identifying degree of control, relative investments, opportunity for profit or loss, skill and initiative, and permanency of relationship). Of those factors, the district court found three to weigh in favor of independent contractor status, one to be neutral, and one to weigh in favor of employee status. See ROA.9044-9056.

The district court stated that its "determination of employee status is very fact dependant, and here, 'as with most employee-status cases, there are facts pointing in both directions.'" ROA.9060 (quoting Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 305 (5th Cir. 1998)).

Weighing the various factors, the district court concluded that the gate guards were independent contractors, and it granted summary judgment to Plaintiffs on February 13, 2013. See ROA.9060-9061.

District Court's Denial of Attorneys' Fees under EAJA's  
Bad Faith Provision

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On February 27, 2013, Plaintiffs filed a motion to recover attorneys' fees pursuant to EAJA solely on the basis that the



Secretary acted in bad faith. See ROA.9063. In the motion, Plaintiffs expressly recognized that EAJA provides "two distinct methods for a district court to award attorneys' fees." ROA.9071 (citing 28 U.S.C. 2412). They identified EAJA's bad faith provision as "the method applicable to this case." Id. (citing 28 U.S.C. 2412(b)).

The district court denied Plaintiffs' motion to recover fees in a July 24, 2013 Memorandum Opinion and Order. See ROA.9776-9789. It noted that "GGS moves for attorneys fees solely under § 2412(b)" – EAJA's bad faith provision. ROA.9783. The district court further noted that, to recover fees under that provision, Plaintiffs had to show that the Secretary's position was meritless and was advanced or maintained for an improper purpose. See ROA.9782-9783.

After reviewing "the numerous cases cited by both Parties," the district court was "unable to find that the DOL's conduct in this litigation is analogous to conduct found to constitute bad faith in other contexts." ROA.9787 (citing cases). The district court noted that, although it had concluded that the gate guards of another employer "were independent contractors

under nearly identical circumstances," its "opinion is not controlling law in the Fifth Circuit." Id.<sup>4</sup> It concluded:

Finally, although the Court does not agree with the DOL's position that the gate attendants are employees, the DOL's arguments were not entirely frivolous. As the Court recognized in its Memorandum Opinion & Order on the Parties' cross motions for summary judgment, "as with most employee-status cases, there are facts pointing in both directions." Here, . . . the Court is not "convinced that the government brought claims that were either wholly unsupported or that were easily dispatched by cursory review of the evidence." Thus, even assuming that the DOL brought this action for an improper purpose, the Court is unable to make a finding of bad faith.

ROA.9788 (internal citations omitted). Accordingly, the district court ruled that Plaintiffs did not satisfy their "burden of showing bad faith on the part of the DOL in order to justify an award of attorneys' fees under 28 U.S.C. § 2412(b)," and it denied the motion. ROA.9788-9789. Months later, the district court awarded fees to GGS under EAJA's substantially justified provision. See ROA.10192.10211.

Plaintiffs cross-appealed the denial of fees under EAJA's bad faith provision after the Secretary appealed the award of fees to GGS under the substantially justified provision. See ROA.10264-10266.

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<sup>4</sup> The case involving the status of another employer's gate guards was Mack v. Talasek, No. V-09-53, 2012 WL 1067398 (S.D. Tex. Mar. 28, 2012).

SUMMARY OF ARGUMENT IN RESPONSE TO CROSS-APPEAL

This Court should affirm the district court's denial of attorneys' fees under EAJA's bad faith provision. The standard for finding bad faith is stringent, and the district court's conclusion is reviewed under an abuse of discretion standard. The district court correctly required Plaintiffs to show *both* an improper purpose and a lack of merit by the Secretary to recover fees pursuant to the bad faith provision. Plaintiffs failed to show either.

As the Secretary demonstrated in his opening brief, his position that the gate guards were employees not only had merit but was reasonable (even if it did not prevail). The Secretary presented substantial evidence on each of the economic realities factors used by this Court to determine whether workers are employees or independent contractors under the FLSA. The district court recognized that there were facts pointing in both directions and concluded that three economic realities factors weighed in favor of independent contractor status, one weighed in favor of employee status, and one factor was neutral. And in several instances, the district court credited evidence presented by Plaintiffs as opposed to contrary evidence presented by the Secretary. While the Secretary did not prevail, the entirety of the evidence, fairly read, falls far short of showing that the Secretary's position was without

merit. Thus, the district court did not abuse its discretion in determining that the Secretary's position was not frivolous, and this determination alone disposes of Plaintiffs' claim for fees under EAJA's bad faith provision.

Additionally, the Secretary did not advance his position for an improper purpose. The record shows that Wage and Hour did not initiate its investigation for an improper purpose but, rather, to determine GGS' compliance with the FLSA, including the proper classification of the gate guards as employees or independent contractors. Although Wage and Hour made mistakes during the course of the investigation, its conduct of the investigation did not rise to the level of bad faith. For example, the investigator's destruction of his handwritten interview notes did not occur until after the notes had been transcribed. And after the investigator provided GGS back wages calculations in an amount of over six million dollars, Wage and Hour stressed that its goal was securing FLSA compliance and not to focus on back wages, and it later reduced its calculation of back wages due to about two million dollars. Finally, other conduct that GGS asserts is indicative of an improper purpose was actually innocuous, such as the investigator's visit to GGS' offices in Corpus Christi prior to the initial conference for the purpose of introducing himself and confirming the upcoming conference.

Likewise, the Secretary's conduct of the litigation does not support a bad faith finding. The Secretary had reasonable grounds for filing his lawsuit in Corpus Christi and opposing Plaintiffs' motion to transfer: GGS is headquartered in Corpus Christi, and Corpus Christi was more convenient for a majority of the Secretary's witness. It was also reasonable for the Secretary to continue his lawsuit following the district court's decision in the Mack v. Talasek case given that the decision, as the district court itself recognized, was not controlling law in the Fifth Circuit. And the Secretary worked with Plaintiffs to resolve discovery disputes. For these reasons, the district court did not abuse its discretion by determining that the Secretary's conduct of the investigation and lawsuit were not analogous to the egregious conduct relied upon to support a bad faith finding in other cases.

#### STANDARD OF REVIEW

This Court "review[s] a district court's decision to grant or deny a party's request for attorney's fees pursuant to the EAJA for an abuse of discretion." Murkeldove v. Astrue, 635 F.3d 784, 789 (5th Cir. 2011) (citing Pierce v. Underwood, 487 U.S. 552, 570 (1988)). This Court "conduct[s] 'a highly deferential review of district courts' tentative findings of fact,'" but "closely scrutinize[s] 'the district courts' rulings on questions of law.'" Id. (quoting Houston Agric. Credit Corp.

v. United States, 736 F.2d 233, 235 (5th Cir. 1984)). Thus, this Court should review under an abuse of discretion standard the district court's conclusion that Plaintiffs failed to satisfy their burden of showing bad faith by the Secretary to justify an award of fees under EAJA's bad faith provision. Moreover, because it is a partial waiver of sovereign immunity, EAJA must be strictly construed in the government's favor. See Murkeldove, 635 F.3d at 790; Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578, 580 (5th Cir. 1996).

#### ARGUMENT IN RESPONSE TO CROSS-APPEAL

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF ATTORNEYS' FEES UNDER EAJA'S BAD FAITH PROVISION

I. The District Court Applied the Correct Legal Standard When Denying Attorneys' Fees under EAJA's Bad Faith Provision.

EAJA's bad faith provision provides that "[t]he United States shall be liable for [attorneys' fees] to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. 2412(b).<sup>5</sup> "The standards for a finding of bad faith are stringent." United States ex rel.

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<sup>5</sup> EAJA's bad faith provision incorporates the "American rule" for attorneys' fees, meaning that each party usually pays its own fees and permitting "a fee award only when the losing party acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Perales v. Casillas, 950 F.2d 1066, 1071 (5th Cir. 1992) (quoting F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 129 (1974)) (emphasis omitted).

Howell Crane Serv. v. United States Fid. & Guar. Co., 861 F.2d 110, 113 (5th Cir. 1988); see Griffin Indus., Inc. v. United States Evtl. Prot. Agency, 640 F.3d 682, 685 (6th Cir. 2011) (“Because an award of attorney fees under the EAJA for bad faith is extraordinary and punitive, a ‘stringent standard’ must be met to justify the award.”) (quoting Bergman v. United States, 844 F.2d 353, 357 (6th Cir. 1988)); Fed. Trade Comm’n v. Kuykendall, 466 F.3d 1149, 1152 (10th Cir. 2006) (EAJA’s bad faith exception to general rule that fees are not recoverable is “exceedingly narrow”).

This Court has recognized that EAJA itself does not define the scope of conduct that constitutes bad faith under 28 U.S.C. 2412(b), but that “the EAJA House Report states that ‘the bad faith exception allows an award where the losing party has . . . acted in bad faith, vexatiously, wantonly or for oppressive reasons.’” Baker v. Bowen, 839 F.2d 1075, 1081 (5th Cir. 1988) (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9, reprinted in 1980 U.S. Code Cong. & Admin. News 4953, 4987) (ellipsis in original). In addition, this Court has held that if the government’s position is not frivolous, then the standard for bad faith is not met. In United States v. Medica Rents Co. Ltd., Nos. 03-11297, 06-10393, 07-10414, 2008 WL 3876307, at \*4 (5th Cir. Aug. 19, 2008), this Court rejected the argument that “the government brought claims that were either wholly

unsupported or that were easily dispatched by cursory review of the evidence.” Because the government “did have a nonfrivolous argument,” the district court abused its discretion in awarding fees under EAJA’s bad faith provision. Id.

Accordingly, a prevailing party must show both improper purpose and a lack of merit (i.e., a frivolous position) by the government to recover fees under EAJA’s bad faith provision. Other courts of appeals apply a similar standard. In Fed. Trade Comm’n v. Freecom Commc’ns, Inc., the Tenth Circuit employed the following two-prong test to determine whether a fee award under the bad faith provision was proper: the government’s claim was entirely without support, and was asserted wantonly, for purposes of harassment or delay, or for other improper reasons. See 401 F.3d 1192, 1201 (10th Cir. 2005). Thus, “[t]he test is conjunctive; that is, both a complete lack of color and improper purpose must be present to support a fee award under § 2412(b).” Id. The court concluded that the district court abused its discretion by awarding fees because the government’s position was not frivolous, and therefore did not need to address whether the government’s action was brought for an improper purpose. See id. at 1207-08; see also Kerin v. United States Postal Serv., 218 F.3d 185, 190 (2d Cir. 2000) (“In order to award bad faith fees, the district court must find that the losing party’s claim was (1) meritless; and (2) brought for improper purposes



such as harassment or delay.") (internal footnote omitted); Griffin Indus., 640 F.3d at 685 ("In order to justify such a bad faith award of attorney fees, the district court must find (1) that the position advanced or maintained by a party was meritless, (2) that the meritlessness was known to the party, and (3) that the position was advanced or maintained for an improper purpose, such as harassment.").<sup>6</sup>

In light of the foregoing decisions from this Court and other courts of appeals, the district court adopted the correct legal standard when denying fees under EAJA's bad faith provision, and thus did not commit legal error by doing so (as Plaintiffs argue, see Plaintiffs' Brief, 50). See ROA.9782-9783.<sup>7</sup> Moreover and contrary to Plaintiffs' assertion, the legal standard advocated by the Secretary and adopted by the district court was not "itself indicative of the DOL's bad faith litigation tactics." Plaintiffs' Brief, 48. Again, that legal standard is supported by the decisions of this Court and other courts of appeals (discussed above). In sum, the district court

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<sup>6</sup> But see Maritime Mgmt., Inc. v. United States, 242 F.3d 1326, 1333 (11th Cir. 2001) ("In determining the propriety of a bad faith fee award, 'the inquiry will focus primarily on the conduct and motive of a party, rather than on the validity of the case.'" ) (quoting Rothenberg v. Sec. Mgmt. Co., 736 F.2d 1470, 1472 (11th Cir. 1984)).

<sup>7</sup> After arguing that the district court applied the incorrect legal standard, Plaintiffs state: "But admittedly, it is not entirely clear the degree to which this improper legal standard actually influenced the district court's ultimate holding regarding bad faith." Plaintiffs' Brief, 50.

did not err by requiring Plaintiffs to show both a lack of merit and an improper purpose by the Secretary to recover fees under EAJA's bad faith provision.

II. The Secretary's Position Was Neither Meritless Nor Advanced for an Improper Purpose.

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Plaintiffs failed to show that the Secretary's position was meritless or advanced for an improper purpose, and the district court did not abuse its discretion by accordingly denying fees under EAJA's bad faith provision.

A. The Secretary's Position Had Merit.

Applying the correct legal standard, the district court determined that the Secretary's position had merit even though it did not prevail. See ROA.9788 ("[A]lthough the Court does not agree with the DOL's position that the gate attendants are employees, the DOL's arguments were not entirely frivolous."); id. ("As the Court recognized in its Memorandum Opinion & Order on the Parties' cross motions for summary judgment, 'as with most employee-status cases, there are facts pointing in both directions.'" ) (citing ROA.9060); id. ("[T]he Court is not 'convinced that the government brought claims that were either wholly unsupported or that were easily dispatched by cursory review of the evidence.'" ) (quoting Medica Rents, 2008 WL 3876307, at \*4).

For all of the reasons set forth in his opening brief discussing why his position was substantially justified (see Secretary's Brief, 34-51), the Secretary's position had merit. Even though the position failed to persuade the district court, it was neither frivolous nor unreasonable. Indeed, the Secretary presented substantial evidence on each of the five economic realities factors used by this Court to determine whether workers are employees or independent contractors under the FLSA. See id. at 45-50. The Secretary presented additional evidence that the gate guards' work was integral to GGS' business, further indicating that, as a matter of economic reality, the gate guards were employees. See id. at 50-51.<sup>8</sup> In light of the evidence presented, the district court recognized that there were facts pointing in both directions (see ROA.9060; ROA.9788), and found that three of the economic realities factors weighed in favor of independent contractor status, one was neutral, and one weighed in favor of employee status (see ROA.9044-9056). The evidence presented and the ruling on the merits foreclose the argument that the position was frivolous and lacked any support.

Nonetheless, Plaintiffs point to several instances where the district court credited evidence presented by Plaintiffs as

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<sup>8</sup> The five economic realities factors used by this Court are a "non-exhaustive" list of the relevant factors that may be considered. Hopkins, 545 F.3d at 346.

opposed to contrary evidence presented by the Secretary as warranting a finding of bad faith. See Plaintiffs' Brief, 51-54. This argument, however, falls well short of the stringent standard required to show bad faith. See Howell Crane Serv., 861 F.2d at 113. Moreover, the argument ignores the substantial evidence that the Secretary presented in support of his position that the gate guards were employees. See Secretary's Brief, 45-51. The district court's crediting of Plaintiffs' evidence over the Secretary's evidence on several issues simply means that Plaintiffs prevailed on those issues; it is insufficient to show that the Secretary's position as a whole was meritless or even unreasonable.

For these reasons, the district court did not abuse its discretion in determining that the Secretary's position had merit. This determination alone disposes of Plaintiffs' claim for fees under EAJA's bad faith provision.

B. The Secretary Did Not Act with an Improper Purpose.

Plaintiffs failed to show that the Secretary advanced its position with an improper purpose. First, Wage and Hour initiated its investigation of GGS' compliance with the FLSA because of complaints from GGS workers, including a gate guard. See ROA.9609; ROA.9612. Plaintiffs attack the characters of two former GGS service technicians and assert that they were the cause of the investigation. See Plaintiffs' Brief, 15-16.

However, one testified that he did not file a complaint with Wage and Hour, and the other testified that he was not really a friend or acquaintance of the investigator. See ROA.9517; ROA.9527. In any event, a GGS gate guard did complain to Wage and Hour. See ROA.9609; ROA.9612. And importantly, Wage and Hour can and does initiate investigations (directed investigations) regardless of whether workers have filed complaints. See Wage and Hour Fact Sheet 77A ("The Wage and Hour Division investigates FLSA violations through its complaint-based and directed investigation programs.").<sup>9</sup> Thus, although a GGS gate guard complained here, no complaint was required for Wage and Hour to have initiated an FLSA investigation. In sum, Wage and Hour did not initiate the investigation of GGS for an improper purpose.

Second, although Wage and Hour made mistakes during the investigation, those mistakes did not rise to the level of an improper purpose necessary to satisfy the stringent standard for showing bad faith. For example, the investigator's destruction of his handwritten interview notes was contrary to Wage and Hour procedures, but occurred after the investigator transcribed the notes to Wage and Hour interview forms in the case narrative file. See ROA.9269-9270; ROA.9549; ROA.9593; ROA.9610-9611.

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<sup>9</sup> Fact Sheet 77A is available on Wage and Hour's website (see <http://www.dol.gov/whd/regs/compliance/whdfs77a.htm>).

There is no indication that the destruction of the notes affected the investigation. Likewise, the investigator's offhand comment to a colleague that GGS' representatives were "digging their own grave" at the initial conference was, as admitted by the investigator, unprofessional (ROA.9228; ROA.9271), but falls far short of showing that the actual investigation (as opposed to a comment made to a colleague about the investigation) was tainted with an improper purpose. Finally, once the investigator determined that there were FLSA violations, he should not have given GGS any back wage calculations until he obtained from GGS an agreement to comply with the FLSA. However, at the second-level conference with GGS, Wage and Hour stressed that its goal was securing FLSA compliance, did not focus on the amount of back wages due, and indicated that no decision had been made regarding whether to file an enforcement action. See ROA.423; ROA.9594-9595. Moreover, Wage and Hour later reduced its initial calculation of six million dollars in back wages due to about two million dollars. See ROA.9594-9595; ROA.9543-9544.

Other aspects of the investigation which GGS asserts were indicative of bad faith were innocuous. For example, while in Corpus Christi working on another investigation, the investigator did visit GGS' offices prior to the initial conference. He did so to locate GGS' offices, introduce

himself, and confirm that the initial conference would proceed as scheduled. See ROA.9605-9606. Moreover, Wage and Hour began inputting payroll data received from GGS at the initial conference the following day in anticipation of doing a payroll analysis of the workers – not because it was already calculating back wages. See ROA.9179-9181. It was not known at the time whether there would be any back wages due. See id.<sup>10</sup>

Furthermore, Wage and Hour's investigation was comprehensive. In addition to interviewing GGS and reviewing the documents that it produced, the investigator interviewed over 30 GGS workers, including 17 gate guards. See ROA.9603-9604; ROA.9592-9593. Wage and Hour later conducted additional interviews. See ROA.9542-9543. The Secretary submitted declarations from 28 GGS gate guards in support of his summary judgment motion (in addition to other evidence). See ROA.3584-3590; ROA.3596-3687; ROA.3796-3854. Even though GGS submitted more declarations with its summary judgment motion, that does not detract from the quantum of evidence (or from the quality of such evidence) submitted by the Secretary. Thus, even considering the investigator's mistakes, the way in which Wage and Hour conducted the investigation does not meet the stringent standard for showing bad faith.

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<sup>10</sup> Wage and Hour agreed with GGS that one group of employees was correctly classified by GGS as exempt from the FLSA's requirements. See ROA.9195.

Third, there is nothing about the Secretary's litigation conduct that suggests an improper purpose. The Secretary waited several months after GGS sued before filing his lawsuit; GGS had not yet served the Secretary with its lawsuit. See ROA.187-200, 9040-9041. The Secretary filed his lawsuit in Corpus Christi, where GGS is headquartered and which was a more convenient location for the majority of the Secretary's witnesses. See ROA.23; ROA.187-200; ROA.9040-9041; ROA.9594. Especially given that Corpus Christi is GGS' home, there was nothing improper about the Secretary's filing suit there or opposing transfer of his lawsuit from there. Moreover, the fact that GGS filed first did not preclude the Secretary from making reasonable arguments opposing GGS' motion to transfer. As the Corpus Christi district court noted, the first-to-file rule is a discretionary doctrine under this Court's precedent. See ROA.514 ("[T]he Court disagrees with [GGS'] assertion that dismissal or transfer is *required* given this substantial overlap between the cases.") (emphasis in original). The court considered the particular circumstances of the case and, exercising its discretion, determined that transfer was appropriate. See ROA.514-519. The court never suggested, however, that the Secretary's opposition to GGS' motion to transfer was improper. See ROA.510-519.

Likewise, the discovery disputes between the parties do not indicate that the Secretary acted with an improper purpose. The



several motions to compel filed by GGS were withdrawn, in part because the parties were able to resolve any disputes. See ROA.9596-9597. After the Wage and Hour investigator's deposition was halted by GGS' counsel because she believed that the Secretary's counsel was making too many and improper objections,<sup>11</sup> the parties reached an agreement governing future depositions, and GGS deposed the investigator for up to seven additional hours. See ROA.9614-9617. In addition, GGS withdrew a motion to compel the Secretary to produce certain documents that the Secretary maintained were privileged after the motion sat for a year on the district court's docket. See ROA.1599-1632; ROA.3257-3258; ROA.9597. Moreover, there is no basis for the assertion (see Plaintiffs' Brief, 22-23) that the Secretary ignored evidence from a gate guard who indicated in response to a questionnaire from Wage and Hour that he was able to negotiate his pay with GGS. The gate guard, Mr. Reid, stated in a declaration filed by GGS that he never returned the questionnaire to Wage and Hour. See ROA.7638-7639; ROA.9597. In sum, the Secretary's litigation was not advanced for or conducted with an improper purpose.

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<sup>11</sup> The parties did not yet have an agreement to reserve objections for trial, and GGS' counsel asked some questions of the investigator that sought to elicit privileged information, thereby necessitating objections. See ROA.9595.

As the district court correctly recognized, government conduct must be egregious to constitute bad faith. To demonstrate what this consists of, the district court cited cases where the government failed to follow a court order for seven months, continued a baseless action against a party in an effort to coerce the party to waive its right to fees under EAJA, and repeatedly refused to follow statutory mandates. See ROA.9787. In another case cited by the district court, the government "abused the judicial process and 'demonstrated an unprecedented level of defiance'" of the federal rules and court orders by "refusing to comply with a court order to produce documents, making numerous illegitimate representations, failing to correct known misrepresentations, and neglecting to inform the court about self-inflicted obstacles to comply with its discovery obligations." Id. (quoting Cobell v. Norton, 407 F. Supp.2d 140, 168-69 (D.D.C. 2005)). And in yet another case cited by the district court, engaging in dilatory tactics during discovery and hearings, consistently failing to meet deadlines, misusing the discovery privilege, and misleading the court by misquoting or omitting material evidence constituted bad faith. Id. (citing Lipsig v. Nat'l Student Mktg. Corp., 663 F.2d 178, 181 (D.C. Cir. 1980) (*per curiam*)).

The district court correctly concluded that the Secretary's conduct was not analogous to conduct that constituted bad faith

in these other cases. See ROA.9787. The Secretary's admission of and amends for those mistakes that Wage and Hour did make, his willingness to resolve disputes that arose, and his compliance with all court orders rebut any suggestion that he acted with an improper purpose. Moreover, the district court correctly recognized that its ruling in another case involving gate guards, that the workers were independent contractors (Mack v. Talasek), did not suggest that the Secretary's continued pursuit of his litigation was in bad faith. See id. As the district court recognized, its opinion in the other case was "not controlling law in the Fifth Circuit." Id. Although the repeated failure "to follow 'controlling circuit precedent'" can warrant a finding of bad faith, that is not what happened here. Id. (quoting Hyatt v. Shalala, 6 F.3d 250, 255-56 (4th Cir. 1993)).

Thus, not only did the Secretary's position have merit, but it also was not advanced for an improper purpose. The district court therefore did not abuse its discretion by denying fees under EAJA's bad faith provision.

REPLY IN SUPPORT OF APPEAL

THIS COURT SHOULD REVERSE THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES TO GGS UNDER EAJA'S SUBSTANTIALLY JUSTIFIED PROVISION

The Secretary's opening brief demonstrated that the district court's award of attorneys' fees to GGS pursuant to EAJA's substantially justified provision should be reversed. First, the district court erred by applying the relation-back doctrine to deem timely GGS' motion for fees under the substantially justified provision. Within the statutory 30-day period for filing such motions, see 28 U.S.C. 2412(d)(1)(B), Plaintiffs filed only a motion seeking fees under EAJA's bad faith provision, see ROA.9063-9096. That motion demonstrated that they expressly chose not to seek fees under EAJA's substantially justified provision. See ROA.9071 (EAJA's bad faith provision is "the method applicable to this case"). When GGS filed a motion for fees under the substantially justified provision months later, the statutory deadline had passed. Relating the late motion back to the denied motion for fees under EAJA's bad faith provision was error because there was no request (or indication at all) in the prior motion that GGS was seeking fees under EAJA's substantially justified provision. The relation-back doctrine applies to supplemental filings to a timely but deficient motion, not to a new motion based on

completely different grounds that was filed past the statutory deadline for such motions.

Second, even if GGS' motion for fees under EAJA's substantially justified provision were deemed timely, the district court abused its discretion by ruling that the Secretary's position was not substantially justified. The district court correctly focused on the evidence presented regarding the gate guards' status as employees or independent contractors as opposed to GGS' assertions of misconduct by Wage and Hour and the Secretary. However, the district court abused its discretion by selecting ten "facts" to the exclusion of all other evidence and ruling (see ROA.10206-10207) that these ten facts mandated the conclusion that a reasonable person could not believe that the Secretary's position was correct. The facts selected by the district court were the subject of conflicting evidence in the record, were not probative, or were not indicative of the economic realities of the gate guards' work. The district court discounted substantial record evidence showing that the Secretary's position that the gate guards were employees under the FLSA was substantially justified.

As discussed below, Plaintiffs have offered no argument in their brief that refutes the conclusion that the Secretary's position was substantially justified.

- I. The District Court Erred by Applying the Relation-Back Doctrine to Salvage GGS' Late Motion.
- A. The Secretary Correctly Stated the Applicable Standard of Review on Appeal.

Contrary to GGS' assertion (see Plaintiffs' Brief, 31-32), the Secretary correctly stated the standard of review applicable to this Court's review of the district court's decision awarding fees to GGS under the substantially justified provision (see Secretary's Brief, 22-23). The standard of review is abuse of discretion, meaning that this Court "conduct[s] 'a highly deferential review of district courts' tentative findings of fact,'" but "closely scrutinize[s] 'the district courts' rulings on questions of law.'" Murkeldove, 635 F.3d at 789 (quoting Houston Agric. Credit, 736 F.2d at 235). The district court's interpretation of 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline and its determination that GGS' request for fees pursuant to EAJA's substantially justified provision was timely under that statutory deadline are conclusions of law and are thus reviewed de novo. See id. at 790; see also Sherrod v. Breitbart, 720 F.3d 932, 938 (D.C. Cir. 2013) ("Statutory time limits are different. Whether a statute of limitations may be tolled requires the court to engage in statutory interpretation. This

is not a matter of the court's discretion. The intent of the legislature is controlling." ).<sup>12</sup>

Moreover, the principle that EAJA, because it is a partial waiver of sovereign immunity, must be strictly construed in the government's favor remains applicable. See Secretary's Brief, 12. GGS asserts that the principle cannot apply after Scarborough v. Principi, 541 U.S. 401 (2004). See Plaintiffs' Brief, 32 n.11. However, this Court has reiterated the principle of strict construction of EAJA in favor of the government in cases decided since Scarborough. See Murkeldove, 635 F.3d at 790; Sanders v. Barnhart, No. 04-10600, 2005 WL 2285403, at \*1 (5th Cir. Sept. 19, 2005).

B. GGS' Request for Attorneys' Fees under EAJA's Substantially Justified Provision Was Untimely and Therefore the Relation-Back Doctrine Does Not Apply.

The Secretary demonstrated in his opening brief that GGS' motion for fees pursuant to EAJA's substantially justified provision was untimely under 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline, and that the district court erred by ruling that the motion was nonetheless timely because it related back to the prior motion seeking fees under the bad faith provision. See Secretary's Brief, 24-32. Specifically, the statutory 30-day

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<sup>12</sup> The parties agree that, if GGS' request for fees under EAJA's substantially justified provision was timely, this Court applies an abuse of discretion standard to review the determination that the Secretary's position was not substantially justified. See Secretary's Brief, 23; Plaintiffs' Brief, 32.

period for seeking fees under the substantially justified provision had expired months before GGS' second motion actually sought fees under that provision. There was simply no request for fees under the substantially justified provision in the prior motion to which GGS' second motion could relate back. Applying the relation-back doctrine to deem GGS' second motion to be timely effectively read the statutory 30-day deadline out of EAJA.

GGs seeks to excuse its failure to meet the statutory deadline by arguing that it pled in its complaint an entitlement to attorneys' fees under EAJA's substantially justified provision, that the district court was merely exercising discretion to extend the statutory deadline, that it submitted "an EAJA request of some kind" before the 30-day deadline expired, and that its request for fees under EAJA's bad faith provision implicated a higher standard than (and thus apparently subsumed) a request for fees under the substantially justified provision. None of these arguments is persuasive.

1. The fact that GGS pled in its complaint and amended complaint an entitlement to attorney fees' under EAJA's substantially justified provision does not absolve GGS' failure to actually submit to the district court an application for such fees within the time period required by 28 U.S.C. 2412(d)(1)(B). An allegation in a complaint does not excuse GGS from complying



with EAJA's statutory deadline. Indeed, a party seeking to recover fees under EAJA's substantially justified provision "shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows . . . ." 28 U.S.C. 2412(d)(1)(B). That requirement is plainly not satisfied by what GGS pled in its complaint.

Moreover, any notice that the Secretary may have had from the complaint that GGS intended to pursue fees under EAJA's substantially justified provision ended when GGS filed only a motion for fees under the bad faith provision by the statutory deadline. In that motion, GGS disclaimed any intent to seek fees under the substantially justified provision by identifying the bad faith provision as "the method applicable to this case." ROA.9071 (citing 28 U.S.C. 2412(b)). Thus, any notice provided by pleading in the complaint an entitlement to fees under the substantially justified provision was negated.

2. The 30-day deadline set forth by 28 U.S.C. 2412(d)(1)(B) is a statutory deadline, not (as GGS asserts, Plaintiffs' Brief, 32) a "garden-variety procedural deadline" that may be modified at the court's discretion. Courts do not have discretion to rewrite deadlines that Congress has committed to statute. See Sherrod, 720 F.3d at 938 ("Whether a statute of limitations may be tolled requires the court to engage in statutory interpretation. This is not a matter of the court's

discretion. The intent of the legislature is controlling." ).  
Hetzel v. Bethlehem Steel Corp., which involved a district court's acceptance of a motion filed one day after the deadline set forth in the court's scheduling order as timely, is inapposite because it did not involve a statutory deadline. See 50 F.3d 360, 367 (5th Cir. 1995).

Likewise, GGS' reference (see Plaintiffs' Brief, 35) to district courts' discretion under Federal Rule of Civil Procedure 6(b) to modify deadlines is unavailing. Rule 6(b) allows district courts to modify deadlines established in the federal rules and by court order – not statutory deadlines. See Sherrod, 720 F.3d at 938 (Rule 6(b) cannot be used to extend statutory time limits). "Every court to have considered this question has held that Rule 6(b) may be used only to extend time limits imposed by the court itself or by other Federal Rules, but not by statute." Argentine Republic v. Nat'l Grid PLC, 637 F.3d 365, 368 (D.C. Cir. 2011) (collecting cases).

Thus, the district court had no discretion to modify, extend, or ignore 28 U.S.C. 2412(d)(1)(B)'s deadline for requesting fees under EAJA's substantially justified provision.

3. GGS' argument (see Plaintiffs' Brief, 35) that relation-back was proper because it submitted "an EAJA request of some kind" before the expiration of the 30-day deadline

fails. EAJA requires that a party seeking to recover fees under the substantially justified provision

shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. 2412(d)(1)(B). GGS' first motion for fees did none of what 28 U.S.C. 2412(d)(1)(B) requires. Instead, the motion identified the "two distinct methods for a district court to award attorneys' fees under the EAJA," ROA.9071 (citing 28 U.S.C. 2412), and declared that the bad faith provision was "the method applicable to this case," id. (citing 28 U.S.C. 2412(b)). GGS notes that its first motion itemized the fees requested (see Plaintiffs' Brief, 40), suggesting that it may have fulfilled that requirement of 28 U.S.C. 2412(d)(1)(B). However, that itemization of fees requested was prepared using the rates applicable when seeking fees under EAJA's bad faith provision (see ROA.9279-9286), not the restricted rates available when seeking fees under the substantially justified provision.<sup>13</sup>

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<sup>13</sup> EAJA's substantially justified provision restricts the hourly rate when calculating recoverable attorneys' fees. See 28 U.S.C. 2412(d)(2)(A).

An "EAJA request of some kind" does not satisfy 28 U.S.C. 2412(d)(1)(B). Instead, the party must submit within 30 days a request for fees pursuant to EAJA's substantially justified provision showing that it was a prevailing party and is eligible for fees under that provision, as well as the amount of fees sought, and alleging that the government's position was not substantially justified. See 28 U.S.C. 2412(d)(1)(B). To the extent that the timely submission for fees is deficient, the party may cure that deficiency by filing a supplemental submission out of time that relates back to the initial submission. See Scarborough, 541 U.S. at 417-420. The relation-back doctrine, however, does not cure the failure to file in the first place a timely (even if deficient) request for fees under EAJA's substantially justified provision. Otherwise, 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline would be meaningless.

Consistent with these principles, the cases applying the relation-back doctrine and relied upon by GGS involve *timely but deficient* requests for fees under EAJA's substantially justified provision. In Scarborough, the prevailing party timely filed a request "for attorney's fees and costs pursuant to § 2412(d)" but failed to allege that the government's position was not substantially justified. 541 U.S. at 408-09. "In all other respects," the request "met the § 2412(d)(1)(B) application-content requirements." Id. at 409. Because the requirement

that a party expressly allege that the government's position was not substantially justified is "nothing more than an allegation or pleading requirement" (id. at 414) and "does not serve an essential notice-giving function" (id. at 416), the later amendment curing the deficiency related back to the *timely* request for fees and was itself timely (see id. at 418-423).

In Singleton v. Apfel, the request for fees under EAJA's substantially justified provision was timely but failed to show that the party met the net worth eligibility requirements. See 231 F.3d 853, 857 (11th Cir. 2000) ("While the Commissioner concedes that Singleton's EAJA application was timely, he insists that it otherwise failed to meet the jurisdictional requirements of § 2412(d)(1)(B)."). The court described the issue before it as follows:

This court has held that a failure to file a timely EAJA application precludes a district court from considering the merits of the application. But, we have never addressed the question of whether a timely application that fails to meet the statutory pleading requirements also leaves a district court without subject matter jurisdiction.

Id. (internal citation and quotation marks omitted). The court concluded that, as a general matter, "courts may permit supplementation of timely EAJA fee applications." Id. at 858. The court recognized, however, that there had to be a *timely* request for fees under EAJA's substantially justified provision for a subsequent untimely filing curing a deficiency in the

request to be permitted. Likewise, in Dunn v. United States, the court made clear that a request for fees under EAJA's substantially justified provision may be supplemented after 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline expires to cure defects "[s]o long as a fee petition is filed within the thirty-day period which puts the court, and eventually the government, on notice that the petitioner seeks fees under [EAJA]." 775 F.2d 99, 104 (3d Cir. 1985).

The rulings in these cases stand in stark contrast to the district court's ruling here. GGS did not seek attorneys' fees under EAJA's substantially justified provision within 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline and later seek to supplement its timely filing. Instead, its filing within that deadline sought fees only under the bad faith provision, which was "the method applicable to this case" according to GGS. ROA.9071 (citing 28 U.S.C. 2412(b)). The district court denied that request and invited GGS to file a request for fees on an entirely distinct basis. See ROA.9789 (denying Plaintiffs' motion "without prejudice to refileing pursuant to 28 U.S.C. § 2412(d)"). The first motion (the timely motion) simply gave no indication that GGS was requesting fees under EAJA's substantial justification provision as 28 U.S.C. 2412(d)(1)(B) requires. Simply put, GGS' untimely motion for fees under EAJA's substantially justified

provision cannot relate back to that denied motion that sought fees on an entirely different basis.

4. GGS further argues that, because bad faith is a higher standard than substantially justified, its request for fees under EAJA's bad faith provision subsumed a request for fees under the substantially justified provision. This argument is incorrect.

EAJA provides two separate and distinct methods for recovering fees: 28 U.S.C. 2412(b) (bad faith provision) and 28 U.S.C. 2412(d) (substantially justified provision). See 28 U.S.C. 2412; see also Tri-State Hosp. Supply Corp. v. United States, 341 F.3d 571, 580 (D.C. Cir. 2003) ("EAJA expressly waives the government's sovereign immunity for the recovery of attorney's fees 'in two distinct manners.'") (quoting Am. Hosp. Ass'n v. Sullivan, 938 F.2d 216, 219 (D.C. Cir. 1991)). EAJA's two provisions are "statutorily distinct" and "the elements required to sustain a fee award under each [provision] are different as well." Klein v. United States Postal Serv., 218 F.3d 185, 191 (2d Cir. 2000). Thus, only the substantially justified provision requires a prevailing party to file its request for fees within 30 days, meet certain net worth eligibility requirements, and allege that the government's position was not substantially justified. See 28 U.S.C. 2412(d)(1)(B); see also United States v. Knott, 256 F.3d 20, 26

(1st Cir. 2001) ("Section 2412 of the EAJA . . . provides for the award of attorneys' fees in two separate subsections, each containing different procedures and limitations.").

The Secretary agrees that it is less difficult to obtain an award of fees under the substantially justified provision than under the bad faith provision. However, that is beside the point because it does not change the fundamental fact that, as the plain text of 28 U.S.C. 2412 and the above cases demonstrate, a party must make a different showing under each of the provisions. Because of these differences, a request to recover fees under the bad faith provision does not, as GGS argues, automatically include a request for fees under the substantially justified provision.<sup>14</sup> Indeed, arguing that a request for fees under the bad faith provision subsumes a request under the substantially justified provision effectively

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<sup>14</sup> The Third Circuit rejected the argument that a request for fees under the substantially justified provision subsumes a request for fees under the bad faith provision. See Morgan v. Perry, 142 F.3d 670, 683 n.26 (3d Cir. 1998); see also Newmark v. Principi, 283 F.3d 172, 177-78 (3d Cir. 2002) (Morgan "treated assessment of fee awards under the two sections as analytically distinct") (citing Morgan, 142 F.3d at 683 n.26). Surely, the same reasoning applies to an argument attempting to subsume a request for fees under the substantially justified provision within a request for fees under the bad faith provision.



reads out of the substantially justified provision the statutory prerequisites for making such a request.<sup>15</sup>

Moreover, Plaintiffs' request for fees under EAJA's bad faith provision made clear that it did not subsume a request for fees under the substantially justified provision. As discussed above, Plaintiffs' motion for fees under the bad faith provision acknowledged the "two distinct methods" to recover fees under EAJA, ROA.9071 (citing 28 U.S.C. 2412), identified the bad faith provision as "the method applicable to this case," id. (citing 28 U.S.C. 2412(b)), made no attempt to show that they met the net worth or other eligibility requirements for recovering fees under the substantially justified provision, see ROA.9063-9096, and did not allege that the Secretary's position was not substantially justified, see id. There is no basis in the request for attorneys' fees under the bad faith provision to infer that a request for fees under the substantially justified provision was also intended. Indeed, Plaintiffs admittedly pursued the bad faith provision "in an attempt to avail

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<sup>15</sup> The cases cited by GGS (see Plaintiffs' Brief, 41-42) do not support its argument that its request for fees under the bad faith provision subsumed a request for fees under the substantially justified provision. In Perales v. Casillas, this Court noted that "[a] finding that defendants did *not* act in bad faith does not resolve the 'substantial justification' issue, because the standards are different." 950 F.2d at 1072 (emphasis in original). And in Maritime Management, the court noted that EAJA's bad faith and substantially justified provisions are "[s]tatutorily and conceptually distinct" from each other. 242 F.3d at 1332.

[themselves] of the more generous 'market rate' standard for fees" under that provision (see Plaintiffs' Brief, 42) and possibly also because they were reluctant to divulge the net worth information required by the substantially justified provision.

In sum, neither the relation-back doctrine as properly construed nor GGS' arguments in support of that doctrine defeat application of 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline.

C. The Secretary Preserved the Timeliness Argument before the District Court.

GGs asserts that the Secretary inadequately preserved the timeliness argument for appeal because he raised the argument in a footnote before the district court. See Plaintiffs' Brief, 33-34 (citing United States v. McMillan, 600 F.3d 434, 457 n.75 (5th Cir. 2010)). However, this Court has rejected the argument that raising an issue in a footnote is insufficient to preserve the issue for review. See United States v. Redd, 562 F.3d 309, 314 (5th Cir. 2009) (government permissibly raised timeliness argument in footnote where footnote included "several sentences" with statutory citations, references to the applicable statute of limitations, and a case citation). The Secretary's argument in the footnote consisted of multiple sentences, contained citations to the record and the relevant EAJA provisions, and provided a sufficient basis for the district court to conclude

that GGS' request for fees under the substantially justified provision was untimely. See ROA.10134; see also Secretary's Brief, 32-34.

McMillan is thus distinguishable because the argument in that case was raised in a "one-sentence footnote" and was conclusory. 600 F.3d at 457 n.75. And the other case relied on by GGS proves the Secretary's point. See Plaintiffs' Brief, 34. GGS cites XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd., 513 F.3d 146, 153 (5th Cir. 2008), for the proposition that, to preserve an argument for appeal, it must be raised to such a degree that the district may rule on it. The district court here *did* rule on the Secretary's timeliness argument, meaning that the Secretary sufficiently preserved it for appeal under the reasoning of XL Specialty. See ROA.10196 ("[B]ecause [GGS'] initial fee application was filed in a timely manner, its supplemental motion is also timely."); ROA.10197 ("Thus, the Court finds that GGS timely filed its fee application.").

GGS further argues that the Secretary's footnote was insufficient to preserve the timeliness argument because the footnote did not specifically raise the issue of prejudice. See Plaintiffs' Brief, 34-35. Specifically, GGS asserts that, "[a]s a matter of law, the measure whether a prevailing party can submit supplemental material outside the EAJA's 30-day deadline is 'prejudice' to the United States." See id. at 34 (citing

Scarborough, 541 U.S. at 418-19). However, GGS misreads Scarborough. In Scarborough, the Supreme Court ruled that 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline is not jurisdictional, characterized the defect in the *timely* motion for fees under EAJA's substantially justified provision as relatively minor, and applied the relation-back doctrine in regard to the untimely filing meant to cure that defect. See 541 U.S. at 412-422. The Supreme Court addressed prejudice only briefly by noting that "a showing of prejudice should preclude operation of the relation-back doctrine in the first place"; however, as the Supreme Court noted, the government "never argued" prejudice in that case. Id. at 422. In other words, even when the relation-back doctrine would *otherwise* be applicable, a showing of prejudice defeats its application. See id.

Thus, prejudice is not the measure by which the relation-back doctrine should or should not apply to untimely EAJA filings.<sup>16</sup> The Secretary is arguing here that 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline applies, that the statutory deadline could not be modified by the district court, and that the relation-back doctrine does not salvage GGS' untimely filing because there was no timely filing for fees under EAJA's

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<sup>16</sup> If "prejudice" were the measure of whether the relation-back doctrine should apply (as GGS asserts), then the Scarborough opinion would not have had to address the doctrine as it did given that the government "never argued" prejudice. 541 U.S. at 422.

substantially justified provision to which the untimely filing could relate back. The relation-back doctrine was simply not applicable here as a matter of law, regardless of any consideration of prejudice.

The Secretary nevertheless bolsters his argument by explaining the prejudice to him in this case and the prejudice generally to the government if parties are permitted to first seek fees under EAJA's bad faith provision and, if denied, then seek them under the substantially justified provision. See Secretary's Brief, 30-32. Prejudice, however, is not the measure of whether the Secretary's argument should succeed.

For these reasons, the Secretary's substantive footnote arguing that GGS' motion for attorneys' fees under EAJA's substantially justified provision was untimely sufficiently preserved the argument for appeal.

II. The District Court Abused Its Discretion by Ruling that the Secretary's Position Was Not Substantially Justified.

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The Secretary demonstrated in his opening brief that, even if GGS' motion for fees under EAJA's substantially justified provision was timely, his position that the gate guards were employees under the FLSA was reasonable and thus substantially justified. See Secretary's Brief, 34-51. The district court abused its discretion by selectively relying on ten "facts," to the exclusion of all other evidence, to rule that the

Secretary's position was not reasonable. As the Secretary demonstrated:

- some of the ten facts relied on by the district court were the subject of conflicting evidence and should not have been deemed to be sufficiently conclusive to render the Secretary's position unreasonable (see id. at 38-40);
- others were of limited probative value in light of the circumstances of the gate guards' work (see id. at 40-42); and
- still others should not have been considered when determining, as a matter of the gate guards' economic reality, whether they were employees under the FLSA (see id. at 42-45).

As the district court noted twice during the course of the litigation, there were "facts pointing in both directions" as to the gate guards' status. ROA.9060; ROA.9788. Indeed, the Secretary presented facts on each of the five economic realities factors applied by the district court to support his position that the gate guards were employees. See Secretary's Brief, 45-51. For all of these reasons, the Secretary's position was substantially justified, and the district court abused its discretion by ruling that no reasonable person could conclude that the gate guards were employees.

- A. The Secretary Is Not Seeking to Relitigate the Gate Guards' Status, But Is Instead Showing that His Position as to Their Status Was Substantially Justified so as to Defeat the EAJA Claim.

GGs accuses the Secretary of rearguing the gate guards' status and challenging the district court's weighing of the

evidence. See Plaintiffs' Brief, 43-45. That is not the case. As both the Secretary and GGS recognize, the determination of whether the government's position is substantially justified is whether it is reasonable. See Secretary's Brief, 34-35; Plaintiffs' Brief, 43. The reasonableness of the Secretary's position necessarily depends on the evidence that underlies that position and that was presented to the district court.

Moreover, the district court identified ten "facts" regarding the gate guards and concluded that, "[u]nder this set of facts," it was "not satisfied that a reasonable person could think that the DOL's position that GGS's gate attendants are employees was correct." ROA.10206; see ROA.10206-10207 ("Once discovery revealed the [ten] facts cited . . . , the DOL should have abandoned this litigation."). In light of the basis on which the district court ruled that the Secretary's position was not reasonable, the Secretary must necessarily make arguments regarding the evidence relied on by the district court, as well as the evidence which the district court discounted. The Secretary is thus arguing that the ten facts relied on by the district court, even if sufficient to defeat his claim that the gate guards were employees, did not render that claim unreasonable.

As already explained, a number of the facts relied on by the district court were not indicative of independent contractor

status in this particular case, or more generally are not indicative of independent contractor status because they do not reflect the economic realities of the working relationship. Furthermore, the Secretary is arguing that some of the facts relied on by the district court were subject to conflicting evidence; he is doing so not to revisit the district court's weighing of the evidence, but to show that there was a reasonable evidentiary basis for his position. And, the Secretary is reciting all of the evidence supporting his position that the gate guards were employees not to show that the district court was wrong on the merits, but to show that it discounted relevant evidence that, if considered, shows that his position was reasonable. The district court went from describing this case as one in which there were facts pointing in both directions to concluding that ten facts made the Secretary's position unreasonable. The Secretary must therefore address the evidence to show that its position was reasonable.

B. The District Court Correctly Focused on the Merits of the Gate Guards' Status as Employees or Independent Contractors when Determining Whether the Secretary's Position Was Substantially Justified.

Although the Secretary disagrees with the district court's ultimate conclusion, the district court was correct to focus its substantial justification analysis on the evidence regarding the gate guards' status as employees or independent contractors



under the FLSA, and not on the alleged misconduct by Wage and Hour during its investigation and by the Secretary's attorneys during the litigation. EAJA's substantially justified provision is "analytically distinct" from the bad faith provision (Newmark, 283 F.3d at 177) and focuses on whether the government's position was "'justified in substance or in the main' - that is, justified to a degree that could satisfy a reasonable person" (Pierce, 487 U.S. at 565).

Wage and Hour's position following its investigation was that the gate guards were employees under the FLSA. That is the position that Wage and Hour communicated to GGS, see ROA.27-29, the position that GGS challenged in its lawsuit against the Department, see ROA.22 ("GGS brings this action . . . for entry of an Order providing that GGS is not subject to the [FLSA] with regard to its contractors."), the position from which GGS sought relief through its lawsuit, see ROA.42 (requesting declaration that its gate guards "are properly classified as independent contractors and are not employees under the FLSA"), and the position that the parties litigated and the district court resolved, see ROA.9039-9061 (resolving competing summary judgment motions on issue of whether guards were employees).

In deciding whether fees were due under EAJA's substantially justified provision, the district court repeated GGS' various assertions of misconduct by Wage and Hour and the

Secretary (see ROA.10202-10204); however, it based its decision on the sufficiency of the evidence underlying the Secretary's position that the gate guards were employees under the FLSA (see ROA.10206-10207). The district court correctly focused its substantial justification analysis on whether there was enough evidence supporting that position such that a reasonable person could think it is correct. See Morgan, 142 F.3d at 686 (agency decision challenged by party, not underlying attorney misconduct, was the agency action that must be substantially justified to deny fees to party; "[t]herefore, the district court's exclusive focus on the reasonableness of [the agency] decision was proper"); Bazaldua v. United States Immigration & Naturalization Serv., 776 F.2d 1266 (5th Cir. 1985) (rejecting argument that district court, when determining whether government's position was substantially justified, should have considered government's delay in responding to discovery requests and order compelling government to produce, and should not have considered the merits of the government's defenses to the underlying lawsuit).

In sum, the district court was correct to focus on the evidence when determining whether the Secretary's position was substantially justified. However, the district court abused its discretion by selectively relying on ten facts (many of which

were not conclusive or probative) and discounting the substantial evidence that supported the Secretary's position.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the district court's denial of attorneys' fees under EAJA's bad faith provision and reverse the district court's award of attorneys' fees under EAJA's substantially justified provision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response and Reply Brief for the Secretary of Labor was served this 24<sup>th</sup> day of November, 2014, via this Court's ECF system and by pre-paid overnight delivery on the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28(a)(10), 28.1(e)(3), and 32(a)(7)(C) and Fifth Circuit Rule 28.3(m), I certify that the foregoing Response and Reply Brief for the Secretary of Labor:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2010 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A) because it contains 11,116 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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