

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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**BRIEF FOR THE SECRETARY OF LABOR IN SUPPORT OF HIS APPEAL**

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor requests that this Court hold oral argument. Any award of attorneys' fees against the United States is significant and merits careful review. The Secretary believes that oral argument will ensure that this Court has before it all of the underlying facts and legal arguments from the parties that it needs for its review, and will assist this Court in reaching a decision.

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On Appeal from the United States District Court  
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**BRIEF FOR THE SECRETARY OF LABOR IN SUPPORT OF HIS APPEAL**

Defendant-Appellant/Cross-Appellee, Thomas E. Perez, Secretary, Department of Labor ("Secretary"), submits this brief in support of his appeal of the district court's award of attorneys' fees from the Secretary to Plaintiff-Appellee/Cross-Appellant, Gate Guard Services, L.P. ("GGS").

JURISDICTIONAL STATEMENT

GGS sued the Secretary in the United States District Court for the Southern District of Texas (Victoria division) pursuant to the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 701 et seq., seeking a declaration of its obligations under the Fair Labor Standards

Act ("FLSA" or "Act"). See ROA.22-44. The Secretary sued GGS and two of its executives in the same district court (Corpus Christi division), alleging violations of the FLSA. See ROA.187-200. The actions were consolidated in the district court's Victoria division, which had jurisdiction pursuant to section 17 of the FLSA, as well as 28 U.S.C. 1331 (federal question jurisdiction), 1345 (jurisdiction over suits by the United States), and 1346(a)(2) (jurisdiction over suits against the United States).

This Court has jurisdiction over the Secretary's appeal pursuant to 28 U.S.C. 1291. The district court entered final judgment in Plaintiffs' favor on February 13, 2013, see ROA.9062, and it awarded GGS attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA") on April 9, 2014, see ROA.10192-10211. The April 9, 2014 award fully and finally disposed of the parties' claims with respect to attorneys' fees under EAJA. On June 5, 2014, the Secretary filed a notice of appeal seeking review by this Court of the April 9, 2014 award of attorneys' fees. See ROA.10215-10217. The Secretary's notice of appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).<sup>1</sup>

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<sup>1</sup> On June 11, 2014, Plaintiffs filed a notice of cross-appeal regarding the district court's award of attorneys' fees. See ROA.10264-10266.

## STATEMENT OF THE ISSUES

1. The district court denied Plaintiffs' motion to recover attorneys' fees from the Secretary under EAJA's "bad faith" provision, 28 U.S.C. 2412(b). The issue is whether the district court erred by, sua sponte, characterizing its denial as "without prejudice" and inviting Plaintiffs to refile the motion for attorneys' fees pursuant to EAJA's "substantially justified" provision, 28 U.S.C. 2412(d), thus overriding the 30-day statutory deadline for seeking fees pursuant to that provision.

2. In resolving whether GGS' workers were employees or independent contractors under the FLSA, the district court stated that there were "facts pointing in both directions" and that five pertinent factors did not all weigh in favor of independent contractor status. The issue is, if GGS' refiled attorneys' fee motion is determined to be timely, whether the district court abused its discretion by ruling that the Secretary's position that the workers were employees was not substantially justified and awarding attorneys' fees pursuant to EAJA.

## STATEMENT OF THE CASE

### 1. Factual and Procedural Background

GGs provides gate guards (or gate attendants) for oilfield operators at remote sites in Texas. See ROA.9039. The gate guards log the vehicles that enter and depart the operators'

drilling sites. See id. Gate guards must ensure that their assigned gates are manned either 12 or 24 hours per day, and most gate guards live at their gate sites during an assignment (usually in RVs). See id. GGS treats the gate guards as independent contractors and pays them by the day. See id.

The Department of Labor's Wage and Hour Division ("Wage and Hour") investigated whether the gate guards were misclassified as independent contractors (and were actually employees under the FLSA entitled to its minimum wage and overtime protections). See ROA.9040. The Wage and Hour investigator met with GGS and informed it that it should reclassify the gate guards as employees and pay over six million dollars in back wages. See id. GGS filed a declaratory judgment action against the Secretary seeking a declaration that the gate guards were properly classified as independent contractors under the FLSA. See ROA.22-44, 9040. The Secretary brought an action against GGS, Bert Steindorf ("Steindorf"), and Sidney Smith ("Smith"), alleging violations of the FLSA's minimum wage, overtime, and record-keeping requirements. See ROA.187-200, 9040-9041.<sup>2</sup> On GGS' motion, the Secretary's action was transferred to the

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<sup>2</sup> Smith was later dismissed by agreement of the parties. See ROA.3069-3072, 9041. In addition to bringing suit on behalf of GGS' gate guards, the Secretary sued on behalf of GGS' service technicians, although the claims regarding its service technicians were later dismissed by agreement of the parties. See ROA.3046-3048, 9040-9041.

district court's Victoria division where GGS had first filed; the actions were consolidated, with the Secretary's claims designated as counter-claims. See ROA.1328-1333, 9041. Senior District Court Judge John D. Rainey presided over the consolidated action, as well as presiding over a second case involving gate guards' status under the FLSA brought by private parties against another employer in the industry. In that other case, Judge Rainey adopted a magistrate judge's recommendation granting summary judgment to the employer on the ground that its gate guards were independent contractors under the FLSA. See Mack v. Talasek, No. V-09-53, 2012 WL 1067398 (S.D. Tex. Mar. 28, 2012).

## 2. Summary Judgment

Both the Secretary and Plaintiffs moved for summary judgment on the issue whether the gate guards were employees under the FLSA. 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).

First, the district court determined that GGS lacked control over the gate guards, thus weighing in favor of independent contractor status. See ROA.9044-9049. It rejected the Secretary's evidence and concluded that the gate guards were "free to reject assignments without penalty," received "no training or instruction," worked with "no day-to-day supervision," were "free to engage in personal activities" when not logging vehicles that entered or departed the drilling sites, and were "authorized to hire relief workers to cover the gate." Id.

Second, the district court compared the gate guards' investments to GGS' investment and determined that this factor was "neutral." ROA.9049-9051. The district court determined that the cost of an RV should be included in the gate guards' investments and compared their investments to GGS' investment in relation to the specific job performed by the gate guards (as opposed to GGS' overall investment in relation to its business). See id.

Third, the district court determined that the opportunity for profit or loss factor weighed in favor of independent contractor status. See ROA.9051-9053. The district court concluded that the gate guards could seek to negotiate their

daily rate, could hire relief workers to cover for them, and deducted business-related expenses on their tax returns. See id. It also relied on its conclusions that the gate guards could take advantage of "free time and increase their overall profits by performing other jobs while at the well site" and that they could "increase their overall profits by taking jobs with other general contractors, landowners, or oil companies" when they were not working for GGS. ROA.9051. The district court dismissed the evidence submitted by the Secretary, including declarations from 23 gate guards stating that they did not believe that they had an opportunity to make a profit or suffer a loss, as well as testimony from Steindorf, GGS' owner and operator, that the gate guards "could not make a profit by performing their job more efficiently or exercising managerial skill." ROA.9053.

Fourth, it was clear that the gate guards' "job duties of writing down the license plate numbers of vehicles that come in and out of oilfield gates require no special training or unique skills set." ROA.9054. The district court therefore concluded that the gate guards' job duties did not involve the exercise of skill or initiative and that this factor weighed in favor of employee status. See id.

Fifth, the district court determined that the gate guards worked for GGS "on a project-by-project basis, with each project

ranging from one week to several weeks," took "significant breaks between projects, ranging from one to nine months," and were "not guaranteed continued work beyond each project."

ROA.9054-9056. It thus found "the permanency factor" to weigh in favor of independent contractor status. ROA.9056.

The district court considered several other factors. It considered the Independent Contractor Agreements signed by the gate guards and the agreements' designation of them as independent contractors. See ROA.9057. "Because the gate attendants' independent contractor status [was] proven by other evidence," the district court believed that "their contractual designation as independent contractors" was "relevant" and could be properly considered. Id. Moreover, based on its experience in the Mack case, the district court found "the fact that it is industry custom in this region for oilfield gate attendants to be treated as independent contractors and paid a per diem to live and work at well locations on a temporary, job-by-job basis is . . . relevant and supports a finding the gate attendants are independent contractors." ROA.9057-9058. Additionally, the district court stated that the Army Corps of Engineers ("Corps" or "ACE") "uses the services of gate attendants at federal parks" and treats them as independent contractors. ROA.9058. According to the district court, the similarities between the gate guards and the Corps' gate attendants outweighed any

differences. See ROA.9059. Finally, the district court determined that the FLSA's purpose would not be frustrated by finding that the gate guards were independent contractors. See ROA.9060. Because "their actual work duties take only a few hours per day" and they are otherwise "free to do as they please," the district court determined that the gate guards do not suffer the type of detrimental work conditions which the FLSA seeks to alleviate. Id.

The district court concluded by stating 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 declared that the gate guards were independent contractors, and it granted summary judgment to Plaintiffs on February 13, 2013. See ROA.9060-9061.<sup>3</sup> It entered final judgment for GGS on the same day. See ROA.9062.

### 3. Relevant EAJA Provisions

EAJA permits parties to recover attorneys' fees from the United States in actions brought by or against the United States if they prevail and other criteria are satisfied. See 28 U.S.C. 2412. EAJA provides two separate and distinct routes to recover

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<sup>3</sup> The Secretary did not appeal the summary judgment decision.

fees. First, "[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). This provision incorporates the "American rule" for attorneys' fees, meaning that each party usually pays its own attorneys' 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). A prevailing party may recover attorneys' fees from the United States pursuant to EAJA's bad faith provision regardless of its size or net worth. See 28 U.S.C. 2412(b). Second, attorneys' fees shall be awarded against the United States to a prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). To recover fees pursuant to EAJA's substantially justified provision, a company's net worth must not exceed seven million dollars and it must not have more than 500 employees. See 28 U.S.C. 2412(d)(2)(B).

A party seeking to recover attorneys' fees pursuant to 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 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) (emphasis added). EAJA's bad faith provision for recovering fees contains no such 30-day deadline. See 28 U.S.C. 2412(b); see also Jackson v. United States Postal Serv., 799 F.2d 1018, 1023 (5th Cir. 1986) (section 2412(b), unlike section 2412(d), "contains no time limit within which requests for attorneys' fees must be made").<sup>4</sup> Significantly, EAJA's substantially justified provision restricts the hourly rate when calculating recoverable attorneys' fees, see 28 U.S.C. 2412(d)(2)(A); on the other hand, the bad faith provision contains no such restriction and thus allows for greater recovery. The distinction between the substantially justified provision and the bad faith provision when calculating the amount of fees "'is of considerable consequence.'" ROA.10194-

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<sup>4</sup> Although there is no deadline in EAJA to request attorneys' fees pursuant to its bad faith provision, Federal Rule of Civil Procedure 54 provides generally that motions for attorneys' fees must be filed "no later than 14 days after the entry of judgment" in situations where no "statute" or "court order" provides a deadline. Fed. R. Civ. P. 54(d)(2)(B).

10195 (quoting Hyatt v. Shalala, 6 F.3d 250, 254 (4th Cir. 1993)). Finally, both EAJA provisions, because they are a partial waiver of sovereign immunity, must be strictly construed in the government's favor. See Murkeldove v. Astrue, 635 F.3d 784, 790 (5th Cir. 2011); Texas Food Indus. Ass'n v. United States Dep't of Agric., 81 F.3d 578, 580 (5th Cir. 1996).

#### 4. Award of Attorneys' Fees

##### a. First Motion for Attorneys' Fees

On February 27, 2013 (14 days after final judgment), 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 "[t]here are two distinct methods for a district court to award attorneys' fees under the EAJA." ROA.9071 (citing 28 U.S.C. 2412). They specifically identified EAJA's bad faith provision as "the method applicable to this case." Id. (citing 28 U.S.C. 2412(b)). Plaintiffs did not make any argument that they met the eligibility requirements for recovering fees under EAJA's substantially justified provision (in the case of GGS, that its net worth did not exceed seven million dollars and that it did not have more than 500 employees) or that the Secretary's position was not substantially justified. See ROA.9063-9096.

The district court denied Plaintiffs' motion to recover attorneys' 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. 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 found that the gate guards in Mack "were independent contractors under nearly identical circumstances," its "opinion is not controlling law in the Fifth Circuit." Id. 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.

Although the district court had resolved the issue before it – whether Plaintiffs were entitled to attorneys' fees

pursuant to EAJA's bad faith provision – its order went further. Despite the fact that Plaintiffs had expressly declined to pursue attorneys' fees pursuant to EAJA's substantially justified provision, the district court, sua sponte, stated that "§ 2412(d) provides for mandatory attorneys' fees if the position of the United States was not substantially justified and the prevailing party meets certain financial eligibility requirements." ROA.9788. The district court noted that Plaintiffs did not present any information regarding their net worth. See ROA.9789. According to the district court, "even assuming the DOL's position was not substantially justified, the Court is unable to determine whether Steindorf and GGS are financially able to recover attorneys fees under § 2412(d)." Id. Nevertheless, the district court was "not convinced that the DOL has shown that its actions were substantially justified" (even though the issue was never raised), and it characterized its denial of Plaintiffs' motion as "without prejudice to refiling pursuant to 28 U.S.C. § 2412(d)." Id.

b. Second Motion for Attorneys' Fees

On August 9, 2013, GGS filed a "Supplemental Motion to Recover Attorneys' Fees." See ROA.9790-9809. In this second motion for attorneys' fees (filed about 175 days after the final judgment was entered), GGS alleged that it met the applicable financial eligibility requirements and argued that it was

entitled to fees under EAJA's substantially justified provision.  
See id.

GGs made the following arguments to show that the Secretary's pre-litigation conduct was not substantially justified: the Wage and Hour investigator commenced the investigation to help out friends, made up his mind early in the investigation that GGS was in violation, ignored proper procedures, calculated back wages due after interviewing just a few workers, destroyed interview notes, and demanded that GGS pay six million dollars in back wages without properly vetting the demand (Wage and Hour later reduced the back wages to two million dollars). See ROA.10202-10203. GGS also challenged the Secretary's conduct during the litigation, arguing that the Secretary unreasonably opposed the transfer of his lawsuit to the division of the district court where GGS had already filed and the consolidation of his lawsuit with GGS' lawsuit; "stonewalled" GGS' deposition of the Wage and Hour investigator; and "repeatedly withheld evidence from GGS based on the government informant privilege." ROA.10203-10204.

GGs further argued that the Secretary "was unable to present sufficient evidence on each of the five factors of the independent contractor/employee analysis" and "chose to ignore, hide, or mischaracterize facts contrary to [his] position, or to present only those facts that [he] found helpful." ROA.10204.

GGG asserted that the Secretary should have sought dismissal of his action when he learned that the Corps uses "the services of gate attendants at federal parks under similar circumstances" and classifies them as independent contractors, and in light of the fact that the district court concluded in Mack that "oilfield gate attendants were independent contractors under nearly identical circumstances." ROA.10205.

In response, the Secretary challenged the timeliness of GGS' "Supplemental Motion." In a substantive footnote on page one of his opposition, the Secretary argued that GGS' second motion was untimely under 28 U.S.C. 2412(d)(1)(B):

GGG's first motion for attorneys' fees was promptly filed. (Dkt 137.) By GGS' choice, that first motion sought attorneys' fees solely under EAJA's "bad faith" provision, 28 U.S.C. § 2412(b). The Court found that GGS did not satisfy its burden of showing bad faith and denied its motion. (Dkt. 146.) GGS' second motion seeks attorneys' fees on an entirely different basis – EAJA's "substantially justified" provision, 28 U.S.C. § 2412(d) – and was not filed within the 30-day statutory deadline prescribed by 28 U.S.C. § 2412(d)(1)(B) for filings seeking to recover fees on that basis. (The deadline does not apply to motions seeking to recover attorneys' fees on a "bad faith" basis.) GGS characterizes its second motion for fees as "supplemental" to its first filing; however, there was nothing for GGS to supplement given that its first filing had been previously denied. Although the Court denied GGS' first motion "without prejudice to refiling pursuant to 28 U.S.C. § 2412(d)" (Dkt. 146, p. 14), GGS' second motion fails to satisfy the 30-day statutory deadline prescribed by 28 U.S.C. § 2412(d)(1)(B) and should be denied for that reason.

ROA.10134.

The Secretary further argued that, even if GGS' second motion were deemed timely, it should be denied because the position that the gate guards were employees under the FLSA was substantially justified. See ROA.10134-10135. The Secretary explained that: Wage and Hour's investigation was extensive and 39 exhibits and 28 employee statements were submitted with his summary judgment motion; Mack was not binding precedent, and this Court has recognized that "workers bearing the same title and performing many of the same duties may be employe[e]s in one case yet independent contractors in another"; the district court had noted that these types of cases are fact-dependent and there were facts pointing in both directions; and the Texas Workforce Commission ruled that "very similarly-situated gate guards" were employees. ROA.10139-10144; see also ROA.9584-9646.

c. District Court's Award of Attorneys' Fees

In an April 9, 2014 Memorandum Opinion and Order, the district court ruled that the Secretary's position was not substantially justified and awarded GGS \$565,527.61 in fees and expenses from the Secretary. See ROA.10192-10211. In response to the Secretary's argument that GGS' second motion was untimely, the district court suggested that "an argument raised in a footnote is insufficient and may be disregarded by the Court." ROA.10196. The district court, however, did not exercise that perceived discretion but instead addressed the

merits of the timeliness argument. Applying the relation-back doctrine, the district court determined that “because [GGGS’] initial fee application was filed in a timely manner, its supplemental motion is also timely.” Id. The district court concluded: “Thus, the Court finds that GGS timely filed its fee application.” ROA.10197.<sup>5</sup>

The district court’s explanation as to why the Secretary’s position was not substantially justified was brief. See ROA.10206-10207. It characterized its earlier statement that there were facts pointing in both directions as “somewhat of an overstatement by the Court, as there was only one fact weighing in the DOL’s favor—that the job performed by the gate attendants does not require skill and initiative.” ROA.10206. The district court then identified ten facts regarding the gate guards (including their independent contractor agreements, industry custom, and how “the federal government itself, via the ACE, uses the services of gate attendants at federal parks” and classifies them as independent contractors). Id. It 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.” Id. The district

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<sup>5</sup> The district court further determined that GGS satisfied the financial eligibility requirements to recover attorneys’ fees pursuant to EAJA’s substantially justified provision. See ROA.10197-10201.

court further rejected the Secretary's argument, made in the alternative, that if GGS is entitled to recover fees, it should recover only those fees incurred after the district court's decision in Mack. See id. It stated:

Had the DOL interviewed more than just a handful of GGS's roughly 400 gate attendants before presenting GGS with a \$6,000,000.00 demand and filing its Enforcement Action against GGS, it would have known the gate attendants were not employees. Once discovery revealed the [ten] facts cited . . . , the DOL should have abandoned this litigation. The DOL failed to act in a reasonable manner both before and during the course of this litigation, and it continues to insist that the gate attendants are employees, despite overwhelming contradictory evidence.

ROA.10206-10207. The district court determined that GGS was entitled to \$565,527.61 in attorneys' fees, paralegal fees, and travel expenses. See ROA.10211.

The Secretary filed a timely notice of appeal of the decision to award attorneys' fees. See ROA.10215-10217. Several days later, Plaintiffs filed a notice of cross appeal of the district court's July 24, 2013 decision to deny their motion for fees pursuant to EAJA's bad faith provision. See ROA.10264-10266.

#### SUMMARY OF ARGUMENT

1. It is undisputed that the statutory 30-day period for seeking attorneys' fees pursuant to EAJA's substantially justified provision had expired months before GGS actually sought fees pursuant to that provision. The district court

erred by ruling that GGS' motion for attorneys' fees pursuant to EAJA's substantially justified provision was nonetheless timely because it related back to GGS' first motion seeking fees pursuant to the bad faith provision. Applying the relation-back doctrine to an untimely filing is premised on the existence of a timely filing that already put the opposing party on notice; however, that was not the case here. GGS' only motion within 30 days of judgment sought attorneys' fees solely pursuant to EAJA's bad faith provision, expressly did not pursue fees under EAJA's substantially justified provision, and in no way gave notice that GGS was pursuing (or would pursue) fees pursuant to EAJA's substantially justified provision. GGS' second motion – filed months later – was a new motion that sought fees on an entirely distinct statutory basis and was subject to 28 U.S.C. 2412(d)(1)(B)'s filing deadline. Applying the relation-back doctrine to deem GGS' second motion to be timely was wrong and read the statutory 30-day deadline out of EAJA. Moreover, allowing relation-back in these circumstances prejudiced the Secretary and could encourage parties to take two bites at the apple when seeking attorneys' fees from the government.

And although the district court did not reject the Secretary's timeliness argument because it was in a footnote, the district court was incorrect to suggest that it could reject the argument for that reason. The Secretary's timeliness

argument was substantive and developed, included citations to the relevant portions of the record and EAJA, and put GGS on notice that he was challenging the timeliness of its second motion for attorneys' fees.

2. Even if GGS' second motion for attorneys' fees is deemed to be timely, the Secretary's position that the workers were employees was reasonable and thus substantially justified. The district court abused its discretion by selectively relying on ten "facts," to the exclusion of all other evidence, to determine that the Secretary's position could not have been reasonable. However, a number of these "facts" were the subject of conflicting evidence – whether the gate guards were free to reject assignments without penalty, were authorized to hire relief workers, and had the ability to increase their profits or suffer a loss. Given the evidence presented by the Secretary, these "facts" should not have been deemed to be sufficiently conclusive by the district court to render the Secretary's position unreasonable. Other facts were of limited probative value in light of the circumstances of the gate guards' work. For example, the gate guards' lack of training did not reflect independent contractor status but instead reflected the simple nature of their work. Likewise, to the extent that the gate guards were not subject to day-to-day supervision, such lack of supervision was the product of the remote nature of their work

and did not indicate independent contractor status. Finally, several of the "facts" relied on by the district court (the agreements signed by the gate guards, purported industry custom, and ACE's treatment of gate attendants who bid on federal contracts to perform at national parks) should not have been considered when determining, as a matter of the gate guards' economic reality, whether they were employees under the FLSA.

The district court correctly recognized earlier in the case that there were "facts pointing in both directions" as to the gate guards' status. 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. The district court agreed that one factor favored employee status and another factor was "neutral." And even with respect to those factors that the district court found to favor independent contractor status, the Secretary presented probative evidence in support of employee status. Given the evidence presented, 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 and awarding \$565,527.61 in fees.

#### 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, 635 F.3d at 789 (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)). If a district court's determination turns on its interpretation of EAJA, such statutory interpretations are conclusions of law and are reviewed de novo. See id. at 790.

Thus, this Court should review de novo the district court's determination that GGS' second motion for attorneys' fees (seeking fees on the basis that the Secretary's position was not substantially justified) was timely under 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline, and it should review under an abuse of discretion standard the district court's determination that the Secretary's position was not substantially justified.

#### ARGUMENT

#### I. GGS' MOTION FOR ATTORNEYS' FEES PURSUANT TO EAJA'S SUBSTANTIALLY JUSTIFIED PROVISION WAS UNTIMELY UNDER THE STATUTORY 30-DAY TIME LIMITATION FOR SUCH MOTIONS

Although the district court suggested that the Secretary's timeliness argument could be ignored because it was in a footnote, the district court ultimately rejected the argument on the merits by concluding that GGS' second motion for attorneys'

fees related back to its first motion. See ROA.10196-10197 (citing Scarborough v. Principi, 541 U.S. 401, 418-19 (2004)).

The district court, however, erred by applying the relation back doctrine and determining that the second motion was timely.

A. The Relation-Back Doctrine Does Not Save GGS' Untimely Motion for Attorneys' Fees pursuant to EAJA's Substantially Justified Provision.

1. EAJA requires that a party seeking attorneys' fees pursuant to 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.*" 28 U.S.C 2412(d)(1)(B) (emphases added). EAJA further requires that the submission "include 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," and that the party "allege that the position of the United States was not substantially justified." Id. This statutory direction that a party "shall" file its attorneys' fees motion pursuant to EAJA's substantially justified provision within the 30-day period reflects Congress' intent to impose a mandatory deadline within which such fees must be sought. Similarly, Congress' requirement that such a motion filed within the 30-day period must "show[]" that the party "is eligible to receive an award

under [EAJA's substantially justified provision]," id., indicates that it is insufficient to only seek fees pursuant to EAJA's bad faith provision during that 30-day period. Thus, a party must specifically seek fees "under [EAJA's substantially justified provision]" within the required 30-day period. Id. GGS, however, did not seek fees under EAJA's substantially justified provision within the required 30-day period, making a conscious decision not to seek fees on that basis. See ROA.9071.

2. Unlike GGS, the party in Scarborough timely filed a motion for fees under EAJA's substantially justified provision within the required 30-day period. See 541 U.S. at 405. The party in Scarborough, though, failed to specifically allege in the motion that the government's position was not substantially justified as required by 28 U.S.C. 2412(d)(1)(B). See id. When the government opposed the motion because of this failure, the party filed an amended motion for fees despite the fact that the 30-day period had expired. See id.

The Supreme Court held that EAJA's 30-day period for seeking fees pursuant to the substantially justified provision was not a jurisdictional requirement. See 541 U.S. at 413-14.<sup>6</sup>

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<sup>6</sup> Prior to Scarborough, this Court had determined that the 30-day deadline for seeking attorneys' fees pursuant to EAJA's substantially justified provision was a jurisdictional requirement. See Clifton v. Heckler, 755 F.2d 1138, 1144-45

The Supreme Court further described the requirement that a party expressly allege that the government's position was not substantially justified as "nothing more than an allegation or pleading requirement," id. at 414, and "not serv[ing] an essential notice-giving function" because the government "is aware, from the moment a fee application is filed, that to defeat the application on the merits, it will have to prove its position was 'substantially justified,'" id. at 416-17.

Considering the technical nature of the requirement to specifically allege that the government's position was not substantially justified, and considering that the party had timely filed a motion for attorneys' fees pursuant to EAJA's substantially justified provision, the Supreme Court analogized to Federal Rule of Civil Procedure 15(c) (amended pleading may relate back to date of original pleading) and ruled that the amended motion curing the technical deficiency related back to the timely motion and was itself timely. See id. at 418-423.

The Supreme Court in Scarborough concluded by noting that "a showing of prejudice should preclude operation of the relation-

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(5th Cir. 1985) (30-day deadline, "as an integral condition of the sovereign's consent to be sued, is a jurisdictional prerequisite to an award of fees under the EAJA") (footnotes omitted); Briseno v. Ashcroft, 291 F.3d 377, 379 (5th Cir. 2002) ("Because this thirty-day deadline represents a waiver of sovereign immunity, it is jurisdictional.") (citing Clifton, 755 F.2d at 1144-45).

back doctrine in the first place," but no prejudice was asserted. Id. at 422-23.

3. As is evident from Scarborough, applying the relation-back doctrine is premised on there being something timely to relate back to that has already put the other party on notice. The relation-back doctrine "is founded on the principle that a party who *otherwise has adequately notified his adversary of a claim within the prescribed time period* should not have his claim barred on the merits by virtue of an immaterial pleading defect." Huichan v. Barnhart, No. 05-C-0268-C, 2006 WL 6087660, at \*2 (W.D. Wis. Oct. 10, 2006) (applying Scarborough and citing Maty v. Grasselli Chem. Co., 303 U.S. 197, 200-01 (1938), to rule that motion for attorneys' fees was untimely) (emphasis added).

Indeed, the Supreme Court's ruling in Scarborough was expressly conditioned on the fact that the party sought fees within the 30-day deadline and the "failure to allege the government's lack of substantial justification served no 'essential notice-giving function.'" SAI Indus. Corp. v. United States, 63 Fed. Cl. 1, 4 (Ct. Fed. Cl. 2004) (quoting Scarborough, 541 U.S. at 416), aff'd, 421 F.3d 1344 (Fed. Cir. 2005). The relation-back doctrine has "no application where a plaintiff fails to put his adversary on notice of his claim within the statutorily-prescribed period." Huichan, 2006 WL

6087660, at \*2; see Al-Dahir v. F.B.I., 454 Fed. Appx. 238, 242 (5th Cir. 2011) (“[T]he inquiry regarding whether an amended complaint relates back to the date of the original complaint turns on ‘what the prospective defendant reasonably should have understood about the plaintiff’s intent in filing the original complaint.’”) (quoting Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 554 (2010)); Williams v. Lampe, 399 F.3d 867, 870 (7th Cir. 2005) (“In order to benefit from Fed. R. Civ. P. 15(c)’s ‘relation back’ doctrine, the original complaint must have been timely filed.”) (citing Henderson v. Bolanda, 253 F.3d 928, 931-32 (7th Cir. 2001)).

4. The district court here was wrong to apply Scarborough and the relation-back doctrine. GGS did not seek attorneys’ fees pursuant to the substantially justified provision within 28 U.S.C. 2412(d)(1)(B)’s 30-day deadline. Indeed, GGS was fully aware that it could seek fees pursuant to EAJA’s substantially justified provision, but it rejected that route and chose to pursue fees pursuant only to the bad faith provision. See ROA.9071. Thus, GGS did not fail to comply with 28 U.S.C. 2412(d) on a merely technical point, such as not using certain prescribed language; instead, it failed to seek attorneys’ fees pursuant to EAJA’s substantially justified provision in any manner whatsoever within the 30-day period required by the statute.

In these circumstances, relation back was not appropriate as a matter of law because GGS never filed a timely motion for attorneys' fees pursuant to the substantially justified provision in the first place. As discussed supra, applying the relation-back doctrine may be appropriate when a party files a timely but deficient motion for fees pursuant to 28 U.S.C. 2412(d) and files an amended motion to correct the deficiency after 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline has passed. See Scarborough, 541 U.S. at 418-423; ACE Constructors, Inc. v. United States, 81 Fed. Cl. 161, 164 (Ct. Fed. Cl. 2008) (supplemental documentation filed by party to "flesh out the record respecting its net worth and number of employees" related back to its timely motion for fees pursuant to EAJA's substantially justified provision). But that doctrine is not appropriate when the second motion filed is in no sense an amended motion but, rather, is an entirely distinct motion based on a different statutory provision. Indeed, applying the relation-back doctrine in those circumstances effectively writes the 30-day deadline out of EAJA. Accordingly, GGS' motion seeking attorneys' fees pursuant to EAJA's substantially justified provision cannot relate back to its first motion, which effectively disclaimed recovering fees on that basis.

5. GGS' motion for fees pursuant to the bad faith provision in no way put the Secretary on notice that GGS was

seeking (or would seek) fees on the basis that the Secretary's position was not substantially justified. Cf. SAI Indus., 63 Fed. Cl. at 4-5 (party's untimely motion for attorneys' fees cannot relate back to bill of costs because bill of costs gave the government no notice that party was seeking attorneys' fees). Following the expiration of 28 U.S.C. 2412(d)(1)(B)'s deadline, the Secretary should have been able to safely assume that GGS would recover attorneys' fees only if it showed that the Secretary acted in bad faith. Thus, the Secretary was prejudiced by the district court's sua sponte invitation months later to GGS to seek attorneys' fees pursuant to EAJA's substantially justified provision (notwithstanding the statutory deadline) and its ruling that the second motion related back to the first motion. That prejudice "should preclude" operation of the relation back doctrine. Scarborough, 541 U.S. at 422.

6. Because relation back was improper, GGS' motion for attorneys' fees pursuant to the substantially justified provision – filed about 175 days after 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline had passed – was untimely. See Arulamplam v. Gonzales, 399 F.3d 1087, 1088-1090 (9th Cir. 2005) (motion for attorneys' fees mailed but not filed within 30-day deadline was untimely); Hernandez-Garcia v. Nicholson, 485 F.3d 651, 652 (Fed. Cir. 2007) (affirming denial of motion for attorneys' fees that was filed one day late); Huichan, 2006 WL 6087660, at \*4

(motion for attorneys' fees filed 18 days after 30-day deadline expired was untimely; even if not jurisdictional, 30-day deadline is "an emphatic time restriction with which a plaintiff must comply"); SAI Indus., 63 Fed. Cl. at 4-5 (motion for attorneys' fees filed one day after 30-day deadline expired was "clearly untimely as a matter of law"; Scarborough's "distinction between jurisdictional defects and filing defects . . . in no way vitiates the thirty-day filing prescription contained in 28 U.S.C. § 2412(d)(1)(B)").<sup>7</sup>

7. Finally, the district court's decision overriding the statutory 30-day deadline and effectively encouraging GGS to file for attorneys' fees on a basis which it had previously failed to pursue raises serious policy concerns. If it is allowed to stand, the decision might encourage parties to take two bites at the apple when seeking fees pursuant to EAJA. Parties could first seek fees pursuant to the bad faith provision, which allows for greater recovery and, if denied, seek fees months later pursuant to the substantially justified provision notwithstanding the 30-day statutory deadline. As a

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<sup>7</sup> To the extent that 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline may be equitably tolled, GGS has made no such tolling argument, and there is no basis for equitable tolling considering that GGS chose not to pursue fees pursuant to EAJA's substantially justified provision when it filed its motion pursuant to the bad faith provision.

result, additional time would be spent litigating the availability of fees.

For these reasons, this Court should reverse the district court's decision that GGS' motion for attorneys' fees under EAJA's substantially justified provision was timely.

B. The District Court Was Wrong to Suggest that It Could Disregard the Secretary's Timeliness Argument Because It Was Made in a Footnote.

The district court did not act on its suggestion that it could disregard the Secretary's timeliness argument because the argument was made in a footnote, but instead found GGS' second motion for attorneys' fees to be timely. See ROA.10196-10197. Nonetheless, the district court's suggestion was wrong.

The Secretary's timeliness argument (made in a long and substantive footnote on the first page of his opposition) cited the record and the applicable EAJA provisions, explained why GGS' second motion was untimely under 28 U.S.C. 2412(d)(1)(B)'s 30-day deadline, and provided a sufficient independent basis to deny GGS' motion. See ROA.10134. GGS certainly understood that the Secretary was challenging its motion's timeliness, and it devoted a page and a half of its reply to defending its timeliness. See ROA.10164-10165.

Nonetheless, the district court suggested that a court of appeals rule – whereby an argument insufficiently briefed in an opening brief is forfeited by the appellant – could apply to the

Secretary's argument. See ROA.10196 (citing Bridas S.A.P.I.C. v. Gov't of Turkmenistan, 345 F.3d 347, 356 n.7 (5th Cir. 2003)). However, that appellate principle is supported by a federal rule that does not apply to district court motions. See Fed. R. App. P. 28(a)(8) (appellant's opening brief "must contain: (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Unlike such an appellant, the Secretary was responding to a motion by GGS and making arguments as to why the motion should be denied; GGS' motion had already framed the issue for the district court – whether GGS should be awarded attorneys' fees pursuant to EAJA's substantially justified provision.

Moreover, this Court has rejected the contention that "issues set forth in footnotes are insufficient to raise an issue for review" even at the appellate level. United States v. Redd, 562 F.3d 309, 314 (5th Cir. 2009). In Redd, this Court found that the government permissibly raised a timeliness argument in a footnote in its appellate brief where the footnote included "several sentences" with statutory citations, references to the applicable statute of limitations, and a case citation. Id.; cf. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1093 (5th Cir. 1996) (affirming summary judgment based on argument raised in a footnote in a motion; "[a]lthough it was

raised in a footnote," the argument "clearly places [the plaintiff] on notice that the issue . . . was part of the summary judgment submitted by the defendant"). The Secretary's substantive footnote of several sentences, complete with cites to the record and the relevant EAJA provisions, was sufficient to preserve the issue even if the appellate briefing rule applied.<sup>8</sup>

II. THE SECRETARY'S POSITION THROUGHOUT THIS LITIGATION WAS SUBSTANTIALLY JUSTIFIED, AND THE DISTRICT COURT ABUSED ITS DISCRETION BY CONCLUDING OTHERWISE

A. The Government's Position Is Substantially Justified under EAJA If It Is Reasonable.

The Secretary has the burden of showing that his position was substantially justified under 28 U.S.C. 2412(d). See Scarborough, 541 U.S. at 414-15. "'Substantially justified' means 'justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person.'" Sims v. Apfel, 238 F.3d 597, 602 (5th Cir. 2001) (quoting Pierce, 487 U.S. at 565); see Davidson v. Veneman, 317 F.3d 503, 506 (5th Cir. 2003) ("[T]he Government's position must have a 'reasonable basis both in law and fact.'" ) (quoting Pierce, 487 U.S. at 565); Baker v. Bowen, 839 F.2d 1075, 1080 (5th Cir. 1988) (government must show that "its position in every stage of the

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<sup>8</sup> Thus, the case relied on by GGS, United States v. McMillan, 600 F.3d 434, 457 n.75 (5th Cir. 2010), is distinguishable because the argument in that appeal was raised in a "one-sentence footnote" and was conclusory.

proceedings . . . had a reasonable basis both in law and fact"); Knights of the Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parish Sch. Bd., 679 F.2d 64, 68 (5th Cir. 1982) ("The test of whether or not a government action is substantially justified is essentially one of reasonableness.").

This standard is "not overly stringent," however, and the Secretary's position must be deemed substantially justified if there is a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action. Davidson, 317 F.3d at 506 (citing Pierce, 487 U.S. at 565). The Secretary's position need not be "'justified to a high degree,'" but rather "justified to a degree that could satisfy a reasonable person." Pierce, 487 U.S. at 565. Indeed, the substantial justification standard "was designed to allow the government to advance 'in good faith . . . novel but credible . . . interpretations of the law that often underlie vigorous enforcement efforts.'" Sec. & Exch. Comm'n v. Fox, 855 F.2d 247, 252 (5th Cir. 1988) (quoting Russell v. Nat'l Mediation Bd., 775 F.2d 1284, 1290 (5th Cir. 1985)) (alterations in original); see Davidson, 317 F.3d at 507 ("The substantial justification standard should not be used to prevent the government from making novel arguments.").

The district court was correct to not directly address GGS' primary argument as to why the Secretary's position was not

substantially justified, which focused on perceived misconduct by Wage and Hour during the investigation and by the Secretary's attorneys during the litigation. See ROA.10202-10204. That perceived misconduct had been the basis for the motion seeking attorneys' fees pursuant to EAJA's bad faith provision, which the district court denied. See ROA.9776-9789. Significantly, that perceived misconduct was not the agency action which GGS' lawsuit challenged; instead, GGS challenged and sought relief from Wage and Hour's position that its gate guards were employees under the FLSA. 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."), 42 (requesting declaration that its gate guards "are properly classified as independent contractors and are not employees under the FLSA"). The district court was thus correct to focus on whether the Secretary's position that the gate guards were employees was substantially justified. See Morgan v. Perry, 142 F.3d 670, 686 (3d Cir. 1998) (agency's 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's] decision was proper").

To the extent that the misconduct alleged by GGS were to be considered, the Secretary's position would remain substantially

justified. A substantial justification analysis looks at the case "as an inclusive whole, rather than as atomized line-items." Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 161-62 (1990). As described infra, the Secretary put forth substantial evidence and made arguments based on this Court's and other courts of appeals' precedents to support the position that the gate guards were employees under the FLSA. Thus, looking at the case as a whole and the agency decision that was the dispute between the parties, the Secretary's position was substantially justified.<sup>9</sup>

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<sup>9</sup> In any event, GGS' allegations of misconduct do not accurately reflect what actually happened during the investigation and litigation. For example, Wage and Hour did not commence the investigation because of complaints made by two friends of the investigator; instead, a gate guard complained to Wage and Hour. See ROA.9591-9592. The Wage and Hour investigator, although failing to follow proper procedures, did not destroy crucial evidence because he discarded his interview notes only after they were transcribed to a Wage and Hour interview form. See ROA.9593. The Wage and Hour investigator did not conclude immediately after the initial conference with GGS that six million dollars in back wages were due; instead, he based his conclusions regarding back pay due on more than 30 interviews. See ROA.9592-9593. Moreover, Wage and Hour's investigation focused on securing GGS' future compliance with the FLSA as opposed to demanding payment of back wages, and it later reduced the amount of back wages that it sought to two million dollars. See ROA.9594-9595. Finally, GGS failed to take into account the circumstances in which the Secretary's counsel asserted objections during the deposition of the Wage and Hour investigator. Unlike most depositions, the parties did not yet have an agreement to reserve objections for trial, which made it necessary to assert and preserve for trial each objection. See ROA.9595. Additionally, the questions by GGS' counsel specifically sought to elicit privileged information from the Wage and Hour investigator, necessitating objections. See id.

B. The District Court Abused Its Discretion by Selectively Choosing Certain Facts and Ignoring Other Pertinent Ones to Rule that the Secretary's Position Was Not Reasonable.

The district court abused its discretion by concentrating on ten particular facts to the exclusion of other relevant facts and concluding, based on those facts, that no reasonable person could think that the gate guards were employees. As an initial matter, no one fact or group of facts is dispositive; rather, the economic realities of the working relationship should be utilized to determine employee status under the FLSA. See Reich v. Circle C. Invs., Inc., 998 F.2d 324, 328-29 (5th Cir. 1993) (economic realities factors, on balance, favor determination of employee status); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1054 (5th Cir. 1987) (employee status cannot be determined by reference to any one or two factors; instead, all of the factors must be considered). Moreover, most of the ten so-called "facts" relied on by the district court were the subject of conflicting evidence, were not probative of whether the gate guards were employees or independent contractors, or should not have been considered as a matter of law.

1. The District Court Relied on "Facts" that Were Subject to Conflicting Evidence and that Were Not Probative.

The Secretary presented contrary evidence on many of the ten so-called "facts" relied on by the district court such that

they were not sufficiently reliable to support the conclusion that a reasonable person could not think that the gate guards were employees. Moreover, other of these "facts" were not probative of whether the gate guards were employees or independent contractors given the nature of their work. The district court abused its discretion by nonetheless relying on these "facts."

The district court stated that the gate guards were "free to reject assignments without penalty." ROA.10206. However, the Secretary offered declarations from about 25 gate guards that assignments were given on a take it or leave it basis and that if a gate guard declined an assignment he would likely never be hired again. See ROA.3276. The district court dismissed these declarations as "speculation" and credited contrary declarations submitted by GGS. ROA.9045. Given the declarations submitted by the Secretary, however, the district court should not have considered this "fact" as being so conclusive that it showed that the Secretary's position was unreasonable.

The district court also relied on the "fact" that gate guards were "authorized to hire relief workers." ROA.10206. Yet the district court earlier recognized that the parties "presented conflicting evidence regarding whether GGS requires that gate attendants obtain GGS's approval for their relief

workers and whether relief workers must be licensed." ROA.9047; see ROA.3281, 3291 (Secretary presented evidence that GGS found the relief workers at first, that relief workers had to be approved by GGS and licensed, and that GGS paid relief workers directly). Thus, the evidence was not sufficiently conclusive on this point to show that the Secretary's position was unreasonable.

The "fact" that the gate guards had "the ability to increase their profits or suffer a loss," ROA.10206, was similarly the subject of conflicting evidence. The gate guards were paid a fixed daily rate regardless of their performance, skill, or efficiency. See ROA.3283-3284, 3294-3295. Significantly, GGS' owner testified that the gate guards "could not make a profit by performing their job more efficiently or exercising managerial skill," and the Secretary submitted declarations from 23 gate guards stating that they did not believe that they had an opportunity to make a profit or suffer a loss. ROA.9053. The district court dismissed this testimony, see id., but the evidence was not sufficiently clear to show that the Secretary's position was unreasonable.

The district court also relied on the gate guards' having "receive[d] no training on how to do their jobs." ROA.10206. Yet the district court earlier recognized that the gate guards' "job duties of writing down the license plate numbers of

vehicles that come in and out of oilfield gates require no special training or unique skill set." ROA.9054. Their lack of training was a reflection of the simple nature of their job duties, not of their possession of specialized or marketable skills typical of an independent contractor. Indeed, the district court recognized that their lack of skill or initiative weighed in favor of employee status. See id. Given the simple nature of the gate guards' work, their lack of training did not support independent contractor status and does not show that the Secretary's position was unreasonable.

Likewise, the "fact" that the gate guards worked with "no day-to-day supervision," ROA.10206, was not indicative of independent contractor status in their circumstance. The gate guards worked without such supervision because their job duties were relatively simple and were performed at remote oil field sites. Thus, the lack of day-to-day supervision was not because the gate guards possessed specialized skills or were independent businesspeople; instead, it was a function of the basic and remote nature of the work. See Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1384 (3d Cir. 1985) (the fact that workers were subject to little direct supervision was unsurprising given that such situation is typical of homeworkers and thus largely insignificant in determining their status); Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988) ("An employer

does not need to look over his workers' shoulders every day in order to exercise control."). The lack of day-to-day supervision over the gate guards did not suggest independent contractor status and therefore does not show that the Secretary's position was unreasonable.

2. The District Court Relied on "Facts" that Should Not Have Been Considered in Determining Whether the Gate Guards Were Employees or Independent Contractors as a Matter of Economic Reality.

The district court further abused its discretion because several of the "facts" on which it relied should not have been considered in determining whether the Secretary's position was reasonable. First, the fact that the gate guards signed "independent contractor agreements," ROA.10206, did not indicate, as a matter of economic reality, that the gate guards were independent contractors. For example, in Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 667 (5th Cir. 1983), this Court explained that "[a]n employee is not permitted to waive employee status" and affirmed a ruling that welders were employees despite their having signed contracts stating that they were independent contractors. See also Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (FLSA rights are "nonwaivable" and "cannot be abridged by contract or otherwise waived"); Thibault v. Bellsouth Telecomm., Inc., 612 F.3d 843, 845-46 (5th Cir. 2010) ("The contractual designation

of the worker as an independent contractor is not necessarily controlling."); Usery v. Pilgrim Equip. Co., Inc., 527 F.2d 1308, 1315 (5th Cir. 1976) ("We reject both the declaration in the lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling FLSA employee status. Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative.") (internal footnotes omitted). The district court should not have considered the "independent contractor agreements" that the gate guards were required to sign.

Second, the purported fact that it is "industry custom for gate attendants to work as independent contractors under nearly identical circumstances in this region," ROA.10206, should not have been considered.<sup>10</sup> This Court has stated that the determination of a worker's status "is highly dependent on the particular situation presented." Thibault, 612 F.3d at 848; see

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<sup>10</sup> The district court seems to have arrived at this judgment regarding industry custom based on its own experience in this case and the Mack case. See ROA.9057. Wage and Hour, however, investigated other employers of gate guards in Texas, and at least one of those employers agreed to reclassify its gate guards as employees to resolve the investigation. See ROA.3306. Another of those employers already classified its gate guards as employees (but failed to pay them at a premium rate for overtime hours). See id. It therefore does not appear that there was a uniform industry custom.

Carrell v. Sunland Constr., Inc., 998 F.2d 330, 334 (5th Cir. 1993) ("Our determination of employee status is very fact dependent."). In Thibault, 612 F.3d at 848-49, this Court rejected the conclusion that all workers engaged as cable splicers are independent contractors and noted that they may be employees in some cases – further confirming that the circumstances specific to a worker rather than any general approach or custom control the determination whether the worker is an employee.

Third, for similar reasons, the assertion that "the federal government itself, via the ACE, uses the services of gate attendants" at recreational areas at Corps' projects and classifies them as independent contractors, ROA.10206, should not have been considered. Gate guards and GGS have a fundamentally different relationship than do the gate attendants and the Corps. GGS' gate guards are dependent on GGS for work and rely on it to assign them to oilfield operators who are clients of GGS; GGS is a "middle man" or staffing agency with whom the gate guards have an "at will" working relationship. The Corps' gate attendants, on the other hand, bid on particular work offered by the Corps, enter into direct contractual relationships with the Corps if their bids are successful, must comply with various laws applicable to federal government contractors, and are subject to contractual penalties if they do

not perform or terminate the contract. See ROA.8950-8951. In any event, the focus should have been on the "particular situation presented" by GGS' gate guards, Thibault, 612 F.3d at 848, not on how another employer classifies other workers, and particularly not on how the federal government treats parties who bid on procurement contracts to perform services at recreational areas at Corps' projects, see ROA.8950-8951.

In sum, three of the "facts" that the district court relied on to conclude that no reasonable person could have thought that the gate guards were employees are, under this Court's precedent, inconsistent with analyzing the economic realities of the gate guards' working relationship with GGS and should not have been considered.

3. The Secretary Presented Facts on Each of The Economic Realities Factors to Support His Position that the Gate Guards Were Employees.

Not only do the "facts" relied on by the district court not support the conclusion that there was only one reasonable outcome, but the district court's conclusion also does not square with its earlier descriptions of the case. When resolving the parties' summary judgment motions, the district court said 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 Express Sixty-Minutes, 161 F.3d at 305). Nowhere in

its order granting summary judgment did the district court state or even suggest that the Secretary's position was unreasonable. See ROA.9039-9061. When denying attorneys' fees under the bad faith provision, the district court acknowledged that it "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.'" ROA.9788 (quoting ROA.9060).

The district court subsequently characterized its prior statements as being "somewhat of an overstatement by the Court" and stated that "there was only one fact weighing in the DOL's favor—that the job performed by the gate attendants does not require skill and initiative." ROA.10206. The district court's later characterization, however, does not fairly describe the evidence presented by the Secretary. Although the district court determined that only one of the five economic realities factors ultimately weighed in the Secretary's favor, the Secretary presented facts on each of the factors (degree of control, relative investments, opportunity for profit or loss, skill and initiative, and permanency of relationship) to support the position that the gate guards were employees, and certainly adduced sufficient facts for a reasonable person to conclude that his position was substantially justified.

Degree of Control. The Secretary presented evidence that GGS exercised control over the gate guards, including by requiring them to complete job applications and be licensed by the state of Texas, assigning them oil field sites on a take it or leave it basis, likely not hiring them again if they declined an assignment, requiring them to be at their gates "24/7," prohibiting them from leaving their gates in the event of severe weather, sending them a reminder that it was a "24/7 job," issuing a memo identifying "Gate Guard Duties and Requirements," limiting their ability to hire relief workers, designating how vehicles entering and leaving the sites should be recorded and what other events should be recorded, requiring them to wear orange safety vests with the words "Gate Guard Services," and imposing numerous workplace rules and requirements involving such issues as firearms, alcohol, cigarette butts, trash, and proper attire. See ROA.3274-3282 (citing deposition transcripts, declarations, and other exhibits), 3289-3292. In granting summary judgment, the district court characterized the Secretary's evidence as merely addressing control over cleanliness, safety, and uniforms. See ROA.9048. However, as the evidence described above shows, that is not a fair characterization; the Secretary's evidence indicated a much greater extent of control and provided substantial support for his position that the gate guards were employees.

Relative Investments. The Secretary demonstrated that GGS made large capital investments in its business (including office space, advertising, trucks and flatbed trailers, and service/maintenance warehouses), significant investments in equipment at each gate that it staffed (including portable generators, water tanks, and septic systems), and investments to ensure that its gate guards were licensed. See ROA.3282-3283 (citing deposition transcripts, declarations, and other exhibits), 3292-3293. The district court focused only on GGS' investments in equipment at each gate, compared those investments to the gate guards' investments, and determined that "the relative investments factor is neutral." ROA.9050-9051. The district court relied on Thibault, 612 F.3d at 847, to compare the gate guards' investments to GGS' investments in the specific job that they performed. See ROA.9051. The Secretary argued that the gate guards' investment should be compared to GGS' overall investment in its business. See ROA.3292-3294; see also Hopkins, 545 F.3d at 344 (comparing each worker's individual investment to employer's investment and concluding that employer's "greater overall investment" weighed in favor of employee status). Given this Court's decision in Hopkins, the Secretary was justified in making this argument. Indeed, had the district court followed Hopkins instead of Thibault, a comparison of the relative investments would likely have led to

the conclusion that this factor weighs in favor of employee status for the gate guards. In any event, the district court's conclusion that this factor was neutral indicates that the Secretary's evidence was, at the very least, substantial.

Opportunity for Profit or Loss. As discussed above, the Secretary showed that the gate guards were paid a fixed daily rate on a regular payroll schedule regardless of their performance or efficiency, and submitted testimony from GGS' owner and 23 gate guards that they had no opportunity to make a profit or suffer a loss. See ROA.3281, 3283-3284, 3294-3295. The district court dismissed this evidence, see ROA.9053, but it was sufficient to show that the Secretary's argument on this factor was reasonable – particularly considering that the Secretary's argument was supported by testimony from GGS' owner.<sup>11</sup>

Skill and Initiative. The Secretary showed that the gate guards did not exhibit "the organizational, management, and business skills of an independent contractor." ROA.3295. The district court agreed that their work "require[s] no special training or unique skill set," and concluded that their lack of

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<sup>11</sup> The district court relied on evidence that the gate guards, when not logging vehicles, performed other jobs at the sites (such as selling items on eBay or Etsy or offering massage therapy or teeth whitening) and took other jobs between assignments for GGS. See ROA.9051-9052. However, having more than one job or income stream does not suggest that the gate guards were in business for themselves with respect to GGS.

skill and initiative weighs in favor of employee status.

ROA.9054.

Permanency of Relationship. The Secretary also showed that the relationships between GGS and the gate guards were ongoing (even if the work was periodic), and he submitted evidence that most gate guards worked multiple projects, some worked for years, and some "followed the rig" by working multiple and continuous assignments for the same GGS client at different sites. See ROA.3295.3297, 8947-8948. Moreover, the Secretary argued that the periodic nature of the work was "due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative," and therefore not indicative of independent contractor status. ROA.3297 (citing Mr. W Fireworks, 814 F.2d at 1053-54). The district court was most persuaded by the project-by-project nature of the gate guards' work, see ROA.9054-9056, but the Secretary, at a minimum, made a reasonable argument on this factor.

Finally, the Secretary argued that the district court should consider an additional economic realities factor considered by many other courts – whether the gate guards' work was integral to GGS' business. See ROA.3297-3298; see also Superior Care, 840 F.2d at 1061 (nurses are employees because "[t]heir services are the most integral part of Superior Care's operation"). The district court did not address this argument.

However, this factor is rooted in the Supreme Court's decision in Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (because work was "part of the integrated unit of production," workers were employees), and is particularly indicative of whether a worker is economically dependent on the employer and thus an employee. Had this factor been considered, it would have suggested that the gate guards were employees given that they performed the exact services that GGS is in business to provide.

Considering the totality of the evidence presented by the Secretary and the support for the arguments in caselaw, the position that the gate guards were employees was reasonable and thus substantially justified.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court reverse the district court's award of attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor in Support of His Appeal was served this 5<sup>th</sup> day of September, 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 Brief for the Secretary of Labor in Support of Appeal:

(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 11,305 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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