No. 22-15378

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN J. BOWERS, an individual;
DEXTER C. KUBOTA, an individual;
BOWERS + KUBOTA CONSULTING, INC., a corporation; BOWERS + KUBOTA CONSULTING, INC. EMPLOYEE STOCK OWNERSHIP PLAN, Defendants-Appellants,
v.
MARTIN J. WALSH, Secretary, United States Department of Labor,
Plaintiff-Appellee.

On Appeal from the United States District Court for the District of Hawaii
Case No. 18-cv-00155
The Honorable Judge Susan O. Mollway

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying actions under 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the district court's order with respect to Appellants' motions for bill of costs and for attorneys' fees and non-taxable costs entered on February 7, 2022.

STATEMENT OF THE ISSUES

This appeal arises out of an action brought by the Secretary of Labor ("Secretary") under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against Brian Bowers ("Bowers") and Dexter C. Kubota ("Kubota"), who owned and operated Bowers + Kubota Consulting, Inc. ("B+K" or "the Company"). The Secretary alleged that Bowers and Kubota violated ERISA in connection with their $40 million sale of B+K stock to the Bowers + Kubota Consulting, Inc. Employee Stock Ownership Plan ("the ESOP"). B+K and the ESOP were joined as defendants under Fed. R. Civ. P. 19. The district court of the District of Hawaii found that Bowers and Kubota did not violate ERISA with respect to the sale of B+K to the ESOP.

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, Bowers, Kubota, and B+K, which had paid defendants' litigation costs (collectively, "Appellants"), sought an award of attorneys' fees, non-taxable costs,

and taxable costs. The magistrate judge recommended that the district court (a) award $72,962.95 in taxable costs to B+K, but (b) deny Appellants' request for attorneys' fees and non-taxable costs. On *de novo* review, the district court reduced the award of taxable costs to $41,810.46 after deducting costs attributable to Bowers and Kubota's unsuccessful statute-of-limitations defense. And it declined entirely to award attorneys' fees and non-taxable costs, finding that the Secretary was substantially justified in bringing this action and did not proceed in bad faith. Appellants raise the following issues:

1. Whether the district court abused its discretion in denying an award of attorneys' fees and non-taxable costs under EAJA based on its determination that the Secretary was substantially justified in bringing this action and did not act in bad faith.

2. Whether the district court abused its discretion under EAJA in reducing its award of taxable costs by the amount attributable to the costs Appellants incurred pursuing an unsuccessful statute-of-limitations defense.

STATEMENT OF THE CASE

I. Factual History

A. ESOP Transaction

On December 14, 2012, Bowers and Kubota, the sole owners of B+K through their respective trusts, sold all of their shares to the ESOP for $40,000,000. 1-ER-70.[1] Nicholas L. Saakvitne ("Saakvitne"), the ESOP's independent fiduciary and trustee, executed the purchase on the ESOP's behalf. *Id.*

Prior to their sale to the ESOP, Bowers and Kubota considered selling B+K to members of the management team or to a third party. *Id.* at 77. In 2011, Bowers and Kubota pursued a potential sale to URS Corporation ("URS"), which had provided B+K with a preliminary nonbinding letter indicating its interest in purchasing the Company for $15 million, plus or minus cash and debt on the Company's balance sheet. *Id.* at 77–80. While in discussions with URS, B+K hired Gary Kuba ("Kuba") of GMK Consulting, Inc. ("GMK") to provide B+K with an internal-use valuation of the Company. *Id.* at 80–81. Kuba valued B+K at $38,184,000, relying on B+K's projection of its 2012 profits of $9,284,000, a nearly 44% increase from the year prior. *Id.* at 81. Kuba "expressed concern about the reasonableness of this projection because it represented a 'significant jump' from [B+K's] past performance." *Id.* After Bowers and Kubota presented URS with GMK's $38 million valuation, the deal fell

[1] "ER" refers to Excerpts of the Record, followed by the page number, and preceded by the volume number.

apart, and Bowers and Kubota turned their focus toward selling B+K to an ESOP. *Id.* at 82–83.

B+K retained Greg Hansen "to coordinate a team of professionals, draft plan documents, and provide advice relating to the structure of a possible sale of the Company to an ESOP." *Id.* at 84. At the initial meeting with Hansen, Bowers and Kubota stated they hoped to get a minimum price of $40 million from the ESOP transaction. *Id.* at 83. Hansen advised Bowers and Kubota to commission a formal valuation of the Company from Kuba. *Id.* at 83–84. While Kuba initially told Bowers he was willing to work on a valuation for the ESOP, he later withdrew, stating he had come to feel "uncomfortable with the structure of the transaction." *Id.* at 84–85. Thereafter, B+K retained Libra Valuation Advisors ("LVA"), which issued a preliminary valuation of the company's equity at between $37,090,000 and $41,620,000. *See id.* at 86.

In November 2012, at Hansen's urging, Bowers and Kubota reached out to Saakvitne to act as an independent trustee for the ESOP transaction. *Id.* at 86–88. Hansen told Saakvitne that "[t]his is looking like a $12 million preferred stock transaction" but that "[t]here is a slight possibility [Bowers and Kubota] will change their mind and do a 100% transaction for 40 million." *Id.* at 87. Because he was leaving town on December 19, 2012, Hansen told Saakvitne the transaction would have to close by that date. *Id.* Hansen also sent Saakvitne the preliminary valuation

report that LVA had just issued to B+K. *Id.* at 88. The Company formally retained Saakvitne on November 26, 2012, "to evaluate any proposed sale of the shares of the Company, negotiate terms on behalf of the ESOP, and continue to serve as the ESOP's trustee after that." *Id.* at 88–89.

On December 7, 2012, Saakvitne then proceeded to hire LVA—the very firm that had just valued B+K stock for the Company—to assist him in evaluating the fair market value of B+K stock on behalf of the ESOP. *Id.* at 91–92. Four days later, LVA sent Saakvitne a preliminary valuation that valued the stock at between $37,470,000 to $41,250,000, almost precisely the valuation it had previously provided B+K. *Id.* at 92. On December 14, 2012, LVA provided Saakvitne an updated summary of B+K's stock value, which it now pegged at $40,150,000. *Id.* at 93. LVA's valuation relied on the same $9,284,000 projection for B+K's 2012 profits that had previously concerned Kuba. *Id.* at 133.

Meanwhile, on December 11, 2012, the same day LVA sent Saakvitne its preliminary valuation of B+K, Bowers and Kubota made a formal offer to sell 100% of B+K's stock to the ESOP for $41 million, *id.* at 89, slightly higher than the $40 million "minimum" that had been communicated to Saakvitne prior to his engagement. Saakvitne countered at $39 million. *Id.* at 90. The parties settled on $40 million. *Id.*

On December 14, 2012, the same day Saakvitne received LVA's final

valuation, the ESOP entered into an agreement to purchase all shares in B+K from Bowers and Kubota for $40 million. *Id.* at 90. Between the date of his retention on November 26, 2012, and December 14, 2012, when the $40 million transaction closed, Saakvitne billed 30.1 hours of work. *Id.* at 70, 88, 94.

B. DOL Investigation

In December 2014, a Senior Investigator with the Department of Labor's Employee Benefits Security Administration ("EBSA") ran a search of the Department's Form 5500 database for Hawaii-based leveraged ESOP transactions over a certain value.[2] Included among the search results was the B+K Form 5500 for 2012. *Id.* at 113–14. Thereafter, EBSA opened an investigation and sent a document request to B+K. 4-ER-763–64. After reviewing the GMK and LVA valuation reports and B+K's financial statements, EBSA suspected that the transaction's $40 million price could have been predetermined and that the ESOP may have paid more than fair market value. 1-ER-114–15.

II. Procedural History

A. Complaint and Pre-Trial Motions

After further investigation, on April 27, 2018, the Secretary filed suit against Bowers and Kubota alleging that they violated ERISA by improperly inducing the

[2] A Form 5500 is an annual report that ERISA plans file with the Department detailing basic information about the plan, such as the number of participants and value of plan assets. *See* 29 U.S.C. § 1024(a).

ESOP to pay more than fair market value for the shares of B+K.[3] 7-ER-1851–75. The Secretary asserted that Bowers and Kubota breached their fiduciary duties of proper care, skill, prudence and diligence in violation of 29 U.S.C. § 1104(a)(1)(A), (B), and (D); were liable as co-fiduciaries under 29 U.S.C. § 1105(a)(1)–(3); engaged in prohibited transactions between a plan and party-in-interest in violation of 29 U.S.C. § 1106(a)(1)(A); engaged in prohibited transactions with B+K's ESOP in violation of 29 U.S.C. § 1106(a)(1)(A); and knowingly participated in a transaction prohibited by ERISA under 29 U.S.C. § 1132(a)(5). 1-ER-71–72. In his Complaint, the Secretary alleged that the ESOP paid over fair market value for B+K's shares based on an inaccurate appraisal (which relied on unrealistic projections provided by Bowers and Kubota) and that Bowers and Kubota failed to monitor Saakvitne. 7-ER-1854–55, 1866. The Secretary named B+K and the ESOP as necessary parties under Fed. R. Civ. P. 19.

On January 18, 2019, the district court denied Bowers and Kubota's motion to dismiss the Secretary's Complaint, finding that "the Complaint sufficiently pleads ERISA claims against Bowers and Kubota." *Id.* at 1849–50. On March 12, 2021, the district court denied Bowers and Kubota's motion for summary judgment based on the statute of limitations and the merits of the case. *Id.* at 1702–07. Remaining for

[3] The Complaint also asserted claims against Nicholas L. Saakvitne and Nicholas L. Saakvitne, A Law Corporation. 7-ER-1851. The parties settled these claims on April 29, 2021. 1-ER-71; 8-ER-1946.

trial were the issues of whether Bowers and Kubota violated ERISA with respect to the sale of B+K to the ESOP and defendants' statute of limitations defense. *See* 1-ER-111, 145.

B. Trial and Post-Trial Findings of Fact and Conclusions of Law

The case proceeded to a five-day trial from June 21–25, 2021, during which the Secretary presented evidence in the form of numerous witnesses, including a number of individuals directly involved in the transaction, as well as a prudence expert, a valuation expert, the URS letter, and hundreds of exhibits. 2-ER-220, 384; 5-ER-1232; 6-ER-1449, 1496; 8-ER-1958–61. The district court qualified the Secretary's valuation expert with respect to the fair market value of B+K as of December 14, 2012, as well as with respect to analyzing LVA's valuation as of that date. 1-ER-102. Using three generally accepted methodologies, the Secretary's expert determined that the actual fair market value of B+K as of December 14, 2012, was $26.9 million. *Id.* at 102; 3-ER-606–08. Additionally, the Secretary's prudence expert, who had served as a fiduciary for many ERISA-covered plans, determined that Bowers, Kubota, and Saakvitne did not follow a prudent process in closing the ESOP transaction on December 14, 2012, including by Saakvitne relying on a conflicted appraiser. 3-ER-610–11. In addition to the URS letter, the Secretary's exhibit list included emails regarding the valuations and the projections the valuations relied on (such as one containing Bowers's comment that the initial valuation was "very high");

performance projections that informed the valuation; and communications with Saakvitne regarding the sale (such as an email informing him that Bowers and Kubota were looking to do "a 100% transaction for 40 million" and that the "ESOP transaction has to be closed before December 19, 2012"). *See id.* at 588–89, 597.

Ultimately, the district court found that Bowers and Kubota did not violate ERISA with respect to the sale of B+K to the ESOP. 1-ER-145. As relevant here, the district court found that the Secretary did not meet his burden to establish that Bowers and Kubota breached their fiduciary duties by supplying LVA with inflated projections for 2012 because the Secretary's expert did not account for "relevant circumstances" cited by Appellants' expert, such as the fact that B+K's earnings were "trending upward." *Id.* at 99, 125. The district court also found that the Secretary did not establish that the ESOP paid more than fair market value for the B+K stock. *Id.* at 131. Nevertheless, the district court acknowledged that the Secretary's concerns were "understandable" because "Bowers and Kubota had told Hansen that they wanted $40 million for the Company, and Hansen had told Saakvitne and others about that price point," after which that exact price was the one eventually settled upon. *Id.* at 90–91, 131–32.

As to Saakvitne, while the district court also acknowledged that he billed only 30.1 hours of work prior to approving the transactions and used an appraiser that had previously been engaged by B+K, it ultimately determined that the Secretary did not

meet its burden to prove a fiduciary breach because the Secretary's expert did not detail what kind of review another trustee might have done. *Id.* at 95. But the district court clarified that it "is *not, however, suggesting that the Government was acting on a mere whim* in questioning Saakvitne's reliance on a valuation provided by the very appraiser who had previously provided a preliminary fair market value to the Board of Trustees of the Proposed [ESOP] before Saakvitne became the ESOP trustee." *Id*. at 95–96 (emphasis added).

C. Appellants' Motions for Taxable Costs, Attorneys' Fees, and Non-taxable Costs

On October 1, 2021, Bowers, Kubota, and B+K filed a Bill of Costs seeking $78,341.39 in taxable costs. 3-ER-551–72. On October 15, 2021, they filed a motion for attorneys' fees and non-taxable costs. *See id.* at 408–42; 8-ER-1965. Appellants made these requests pursuant to EAJA, 28 U.S.C. § 2412(a)(1), (b), and (d). The Secretary objected to both motions. *See* 2-ER-316–45; 3-ER-443–63.

On November 18, 2021, the magistrate judge issued his Findings and Recommendation to Grant in Part and Deny in Part Defendants' Bill of Costs ("F&R re Taxable Costs"). 1-ER-50–67. The magistrate judge found that B+K, but not Bowers and Kubota individually, could recover costs, given that the costs were incurred only by B+K pursuant to an indemnification agreement under which Bowers and Kubota had no obligation to repay costs incurred. *Id.* at 52–53. Deducting certain deposition and copying costs, the magistrate judge recommended that the district

court award $72,962.95 in taxable costs to Appellants. *Id.* at 66. The Secretary filed objections to the F&R re Taxable Costs. 2-ER-245–70.

On December 8, 2021, the magistrate judge issued his Findings and Recommendation to Deny Defendants' Motion for Attorneys' Fees and Non-Taxable Costs ("F&R re Attorneys' Fees and Non-taxable Costs"). 1-ER-35–49. While Appellants argued that they were entitled to fees under EAJA sections 2412(b) and (d), the magistrate judge disagreed on both counts. *Id.* at 43, 48. As to EAJA section 2412(b), which gives a court discretion to award fees in actions by or against the Government "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), Appellants argued that they were entitled to an award both under the common law rule permitting fees against a party who acts in bad faith, as well as under ERISA's fee-shifting provision, 29 U.S.C. § 1132(g). *Id.* at 37. The magistrate judge first found that 29 U.S.C. § 1132(g) allows a court to shift fees only in actions brought by "a participant, beneficiary, or fiduciary," 29 U.S.C. § 1132(g)(1), not in actions brought by the Secretary. 1-ER 38. The magistrate judge also found that Appellants failed to show that the Secretary acted in bad faith. *Id.* at 40–43. Regarding EAJA section 2412(d), which requires courts to award fees and expenses to "prevailing parties" that fall below certain net-worth thresholds where the Government's position was not "substantially justified," 28 U.S.C. § 2412(d), the

magistrate judge found that the Secretary met his burden of demonstrating that his position was substantially justified, and thus did not award Appellants fees or non-taxable costs. *Id.* at 43–48. Though the Secretary had also argued that B+K had failed to prove it was an eligible party under EAJA section 2412(d) (by showing that its net-worth was less than $7 million) and that Bowers and Kabota conceded their net worth was greater than the $2 million threshold for individuals, the magistrate judge, having found the Secretary substantially justified, did not need to reach that issue. *See id.* at 43. On December 29, 2021, Appellants objected to the F&R re Attorneys' Fees and Non-taxable Costs. 2-ER-178–211.

On February 7, 2022, the district court issued an Order Adopting in Part and Modifying in Part the F&R re Taxable Costs and Adopting the F&R re Attorneys' Fees and Non-taxable Costs. 1-ER-2–34. The district court first reduced the award of taxable costs by $28,932.77, representing the costs Appellants incurred deposing Department of Labor officials solely to support Bowers and Kubota's unsuccessful timeliness defense predicated on ERISA's three-year statute of limitations from when a plaintiff acquires "actual knowledge," 29 U.S.C. § 1113(2); 1-ER-16. Because these depositions "appear to have been a fishing expedition with respect to actual knowledge," the district court found that Appellants failed to show that the depositions were necessary. *Id.* at 16–23. Additionally, the district court declined to award expenses for the deposition of DOL investigator Michael Wen because of

defense counsel's misconduct at the deposition. *Id.* at 23. Lastly, the district court also declined to award expenses for synchronizing video and stenographic depositions and for fees charged for express pickup of copies, as the district court did not deem these expenses to be necessary. *Id.* at 23–27.

Next, the district court adopted the F&R re Attorneys' Fees and Non-taxable costs, finding that, "based on the evidence submitted at trial," the Secretary was "substantially justified in bringing [his] claims." *Id.* at 31. The district court explained that even though the Secretary failed to meet his burden of proof at trial, he "had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP," and thus declined to award fees and costs under EAJA section 2412(d). *Id.* at 31–32. The district court also declined to award fees and costs under EAJA section 2412(b), rejecting Appellants' argument that the Secretary proceeded in bad faith. *Id.* at 33.[4] On March 14, 2022, Bowers, Kubota, and B+K appealed the district court's Order to this Court.

[4] Similar to the F&R re Taxable costs, the District Court rejected Appellants' argument that they were entitled to fees and non-taxable costs under 29 U.S.C. § 1132(g)(1), because that provision only applies to actions brought by a participant, beneficiary, or fiduciary. *Id.*

SUMMARY OF THE ARGUMENT

After presiding over this case for over four years, including a five-day bench trial, the district court found that while the Secretary may not have met his burden of proof, he was nevertheless substantially justified in bringing this action and did not act in bad faith. That conclusion follows ineluctably from the district court's factual findings detailing the numerous disturbing aspects of the ESOP transaction. As the court put it, "the Government's concerns are understandable" given that it "was looking at a high sale price that had been shared ahead of time with the ESOP trustee." 1-ER-131. Likewise, the Government was not "acting on a mere whim in questioning Saakvitne's [i.e., the ESOP's trustee's] reliance on a valuation provided by the very appraiser who had previously provided a preliminary fair market value to the Board of Trustees of the Proposed [ESOP] before Saakvitne became the ESOP trustee." *Id.* at 95–96. "[T]he Government," in short, "had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP." *Id.* at 30. The problem, in other words, was not the Government's justification for pursuing this action, but rather one that plagues the Government *every* time it does not prevail at trial: in the court's view, the Government's evidence simply was not sufficient to satisfy its burden of proof.

Appellants now contend that the district court abused its discretion in finding that the Secretary was substantially justified because its decision was "contrary to its ruling on the merits of trial." Appellants' Br. at 33. That same rationale also underlies Appellants' argument that the Secretary acted in bad faith, on which they spend a single sentence. *See* Appellants' Br. at 47. Appellants improperly conflate the trial outcome with questions of the Secretary's substantial justification and alleged bad faith, a standard that would justify a fee award in every single case in which the Government fails to meet its burden of proof. EAJA's limited waiver of sovereign immunity does not extend nearly that far. *See Scarborough v. Principi*, 541 U.S. 401, 415 (2004) ("By allocating the burden of pleading 'that the position of the United States was not substantially justified'—and that burden only—to the fee applicant, Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses."). And if it is not enough to prove that the Secretary was not substantially justified, it is certainly not enough to satisfy Appellants' even higher burden of proving that he acted in bad faith.

Appellants will contend that a fee award is appropriate not merely because the Secretary did not prevail at trial, but rather because, in their telling, the Secretary "*had absolutely no proof* of wrongdoing by Appellants," Appellants' Br. at 40 (emphasis added), a charge they rest upon an assortment of "red flags" that the district court did not deem sufficient to meet the Secretary's burden. Appellants claim

the district court, despite presiding over the entire trial, overlooked this "*complete* failure of proof," *id.* at 33 (emphasis added), and instead focused solely on the merits of the Secretary's investigation.

But hyperbolic adjectives cannot change the reality of Appellants' position, especially when they are inaccurate. The district court explicitly found the Secretary substantially justified "based on *the evidence submitted at trial*," 1-ER-31 (emphasis added), which included valuation and prudence experts, and hundreds of exhibits. The evidence void Appellants describe is further belied by the district court's earlier denial of Bowers and Kubota's motion for summary judgment on the merits, where the court found that issues of fact remained as to whether Bowers and Kubota breached their fiduciary duty. And it is belied by the very "red flags" Appellants point to in their brief—many of which Appellants misconstrue, and which only serve to underscore the Secretary's substantial justification. That this evidence did not ultimately convince the district court does not mean the Secretary's position was not substantially justified; again, if that were the standard, fees would be awarded in every case the Government loses. In any event, Appellants' entire approach of pointing to isolated pieces of evidence runs headlong into the Supreme Court's admonition that "the EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line-items," *Comm'r, INS v. Jean*, 496 U.S. 154, 161–62 (1990), as well as this Court's desire to "discourage fee applications from turning into retrials

and re-appeals of the principal case." *Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275, 1278 (9th Cir. 1997). It is also for naught, as Appellants have failed to demonstrate that any one of them falls below the applicable net-worth thresholds to even be eligible for a fee award under EAJA section 2412(d).

Additionally, the district court did not abuse its discretion when it declined to award taxable costs associated with the *nine* depositions of Department of Labor officials that Bowers and Kubota took solely in pursuit of their failed statute of limitations defense. Under EAJA section 2412(a), the district court had wide discretion to award or not award costs, whether in whole or in part. The district court properly exercised that discretion by denying costs associated with these fruitless depositions after determining they were predicated on questionable theories and "unreasonably increased the cost of this litigation." 1-ER-20. While Appellants seize on a mistaken timeline in the district court's decision, that mistake alone does not render the district court's decision to reduce costs an abuse of discretion, especially where it justified its decision for multiple independent reasons.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's decision on whether to award fees under EAJA, including whether the government's position was substantially justified, for

abuse of discretion. *See Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (citing *Pierce v. Underwood*, 487 U.S. 552, 559 (1988)). "Abuse of discretion is a highly deferential standard, under which the appellate court cannot substitute its view of what constitutes substantial justification for that of the district court; rather, the review is limited to assuring that the district court's determination has a basis in reason." *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 618 (9th Cir. 2005) (internal quotation marks and citations omitted). "A district court abuses its discretion if its ruling on a fee motion is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Carbonell v. I.N.S.*, 429 F.3d 894, 897 (9th Cir. 2005). A district court's finding on the question of bad faith is reviewed for clear error. *See Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1166 (9th Cir. 2019) (citing *Cazares v. Barber*, 959 F.2d 753, 754 (9th Cir. 1992)). Reversal for clear error requires "a definite and firm conviction that the district court made a mistake." *Rodriguez v. United States*, 542 F.3d 704, 711 (9th Cir. 2008) (citing *United States v. Asagba*, 77 F.3d 324, 326 (9th Cir. 1996).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION TO DENY APPELLANTS' REQUEST UNDER EAJA FOR ATTORNEYS' FEES AND NON-TAXABLE COSTS

Appellants contend the district court abused its discretion in denying them attorneys' fees and non-taxable costs under two separate provisions of EAJA. The first requires courts to award fees and expenses to prevailing parties where the

Government's position was not "substantially justified." 28 U.S.C. § 2412(d). The second gives courts discretion to award fees in actions by or against the Government "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), with Appellants here invoking the common-law rule awarding fees where one party acts in bad faith. Appellants contend that the district court abused its discretion in denying a fee award under those standards because its decision was "contrary to its ruling on the merits of trial." Appellants' Br. at 33. Appellants' conflation of the trial outcome with questions of substantial justification and bad faith would turn those standards into dead letters, and EAJA into an automatic fee-shifting statute. Stripped of its rhetoric, Appellants' brief is a scattershot and misleading attack at assorted pieces of evidence in this case that fails to overcome the highly deferential abuse-of-discretion standard needed to reverse the district court's denial of attorneys' fees and non-taxable costs.

A. Appellants Fail to Show that the District Court Abused its Discretion in Denying Fees Under 28 U.S.C. § 2412(d)

In proceedings brought by or against the Government, EAJA section 2412(d) requires a court to award fees and expenses to prevailing parties that fall below specific net-worth thresholds, unless the court finds that "the position of the United States was substantially justified." 28 U.S.C. § 2412(d). "[T]he substantial justification test is comprised of two inquiries, one directed toward the government

agency's conduct, and the other toward the government's attorneys' conduct during litigation." *Ibrahim*, 912 F.3d at 1168 (citing *Gutierrez*, 274 F.3d at 1259). "To establish substantial justification, the government need not establish that it was correct or 'justified to a high degree'—indeed, since the movant is established as a prevailing party it could never do so." 5-ER-1167–68 (quoting *Underwood*, 487 U.S. at 565 n.2). "The test is an inclusive one; we consider whether the government's position 'as a whole' has 'a reasonable basis in both law and fact.'" *Id.* at 1168 (citations omitted). As explained below, Appellants fail to demonstrate that the district court abused its discretion in deeming the Secretary's position substantially justified. And in any event, Appellants have failed to demonstrate that they meet the net-worth requirement of EAJA section 2412(d), which provides an independent basis for affirmance.

1. The district court properly predicated its substantial-justification finding on both the Secretary's litigation and pre-litigation conduct

As a threshold matter, Appellants argue that "the district court abused its discretion by referencing the reasonable nature of the Secretary's pre-litigation investigation in its substantial justification analysis," and ignoring "the issue of the Government's lack of substantial justification and bad faith for filing and prosecuting the complaint." Appellants' Br. 41; *see also id.* at 5 ("The fact that the investigation was justified has no bearing under the law on the justification of the Secretary filing a

Complaint after the investigation concluded."). This mischaracterizes the district court's findings.

The district court made clear that the Government was justified in continuing to pursue the action based on the developed factual record, explicitly stating that it "determines based on the *evidence submitted at trial* that the Government was substantially justified in bringing this action." 1-ER-31 (emphasis added). That evidence included the testimony of prudence and valuation experts, and numerous exhibits that called into question the LVA valuation, the projections that valuation relied on, and the process of arriving at a final price of $40 million in the ESOP transaction. *See id.* at 102; 3-ER-588–90, 597, and 611. Moreover, the district court clearly referenced its Post-trial Findings of Fact and Conclusions of Law to support its conclusion that the Secretary was substantially justified. 1-ER-31 ("As discussed in detail in this court's Posttrial Findings of Fact and Conclusions of Law, ECF No. 657, which the court does not rehash here, the Government had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP."). Appellants selectively disregard all of this.

Appellants also overlook the fact that the district court adopted without alteration the magistrate judge's "thorough and well-reasoned" F&R re Attorneys' Fees and Non-taxable costs, which also assessed the Government's litigation position. *Id.* at 31. In finding that the Secretary was substantially justified, the

magistrate judge looked not only at "the underlying agency action giving rise to the civil action" but also "the government's litigation position." *Id.* at 44 (citing *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013)). The magistrate judge found that "[w]ith regard to the underlying agency action . . . the Government's actions and positions were substantially justified" because the "Government's concerns, suspicions, and decision to open an investigation were 'understandable' and 'appear[ed] entirely warranted." *Id.* at 45. And based on a "review of the record, including at trial," the magistrate judge concluded that the Secretary's "position on the whole had a reasonable basis in fact and law." *Id.* at 45.

Accordingly, Appellants' argument that the district court abused its discretion by focusing solely on the reasonableness of the Secretary's investigation is patently wrong.

2. Appellants improperly conflate the trial outcome with the substantial-justification analysis

Next, Appellants mistakenly conflate the district court's conclusion that the Secretary did not meet his burden of proof at trial with a lack of substantial justification to bring this action. As Appellants put it, "[t]he district court erred in determining, contrary to its ruling on the merits of trial, that the Secretary had 'substantial justification' for filing the Complaint and proceeding to trial . . . ." Appellants' Br. at 33. But the fact that the Secretary did not meet his burden of proof at trial "does not raise a presumption that [his] . . . position was not substantially

justified." *Ibrahim*, 912 F.3d at 1168 (citing *Edwards v. McMahon*, 834 F.2d 796, 802 (9th Cir. 1987)). Indeed, equating the failure to meet a party's burden of proof with a lack of substantial justification would mean that a litigant would be entitled to fees each time the Government loses. *See Scarborough*, 541 U.S. at 415 ("By allocating the burden of pleading 'that the position of the United States was not substantially justified'—and that burden only—to the fee applicant, Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses.").

Appellants attempt to skirt the implications of their position by contending that the Secretary did not merely fail to meet his burden, but did so because of a "*complete* failure of proof," Appellants' Br. at 40 (emphasis added), a charge they repeat no less than seven times (not counting similar hyperbole), *see, e.g., id.* ("the Government had *absolutely no proof* of wrongdoing by Appellants") (emphasis added). In the first place, neither the district court nor the magistrate judge—who both presided over the case from its infancy—ever cast the Secretary's case in such absolute terms. To the contrary, in both its fee decision and findings of fact, the district court went out of its way to acknowledge the legitimacy of the Secretary's concerns. *See, e.g.*, 1-ER-30 ("the Government had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP."); 1-ER-95–96 (Government was not "acting on a mere whim in questioning Saakvitne's reliance on

a valuation provided by the very appraiser who had previously provided a preliminary fair market value to the Board of Trustees of the Proposed [ESOP] before Saakvitne became the ESOP trustee."); 1-ER-131. The district court also recognized the strength of the Secretary's evidence when it denied Bowers and Kubota's motion for summary judgment on the merits of all claims against them after finding that issues of fact remained—including "whether the LVA report given to Saakvitne was based on faulty data [and] whether the sale price was too high." 7-ER-1711. And the magistrate judge—whose "thorough" report and recommendation the district court "agreed with and adopted," *id.* at 31—made clear that he "does not interpret the district court's discussion of [the Secretary's] expert's testimony as foreclosing a finding that the Government was justified in proceeding to trial, including in reliance on that opinion and other circumstantial evidence it claimed demonstrated that the sale of the Company for $40 million violated ERISA." 1-ER-46.[5]

Appellants ask this Court to overrule the district court's own evaluation of the Secretary's case based on isolated pieces of evidence—"red flags"—that ultimately

[5] Appellants also incorrectly state that "the only non-expert witnesses that the Secretary used to prosecute his claims were third parties." Appellants' Br. 7–8. The trial transcript shows that the Secretary called a number of individuals directly involved in the prohibited transaction. On the very first day of trial, the Secretary called Mr. Bowers and Mr. Kubota to the stand. 6-ER-1449. On the second day of trial, the Secretary called B+K's outside CPA, as well as Mr. Kuba and Mr. Hansen. 5-ER-1232. Additionally, the Secretary also presented the evidence of the appraiser for the transaction and a former URS representative, who were witnesses or had integral involvement with what led up to the transaction in question. *See, e.g., id.* at 1053.

did not convince the district court. *See* Appellants' Br. at 12–32; 41. For starters, this tactic is directly contrary to the proposition that "the EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line-items," *Comm'r, INS v. Jean*, 496 U.S. 154, 161–62 (1990), and further risks transforming this fee proceeding into a re-litigation of the "principal case." *Meinhold v. U.S. Dep't of Def.*, 123 F.3d 1275, 1278 (9th Cir. 1997). But even engaging Appellants on that granular level, the district court's substantial-justification finding is well supported by the record, including even the "red flags" Appellants trumpet in their brief.

For example, Appellants chastise the Secretary for supporting his contention that the ESOP overpaid for B+K stock based in part on a $15 million indication of interest letter that B+K received from a prospective third-party buyer (URS) before moving forward with an ESOP transaction. Appellants point out that the district court credited the testimony of Saakvitne's appraiser that because B+K had more than $7 million of cash on its books (and supposedly $7 million more in "working capital"), URS's indication of interest amount was really closer to $29 million, not $15 million. Appellants' Br. at 14. But even assuming that is the case, $29 million is still well below the ESOP's $40 million purchase price. While the district court may not have been persuaded by this single piece of evidence, recent prior offers certainly may be relevant (even if not dispositive) considerations for fiduciaries evaluating the fairness of an ESOP transaction. *See Chesemore v. Alliance Holdings, Inc.*, 886 F. Supp. 2d

1007, 1035 (W.D. Wis. 2012) (ESOP fiduciary's "analysis lacked significant pieces of information, including" that he "never requested, nor was he given, information about the other [third-party] proposals, although he was informed early on that Alliance had marketed Trachte for sale to third parties.").

Appellants also highlight the concern expressed by Kuba—who had performed a valuation for B+K just prior to the ESOP transaction—over the reasonableness of the Company's projected profits for 2012 given the stark increase over the prior year, a concern shared by the Secretary's valuation expert. According to Appellants, the Secretary ignored the fact that Kuba's valuation was an "internal use" valuation that was "limited in scope." Appellants' Br. at 16–17. But the fact that Kuba performed a limited "internal use" valuation does not negate his reservations about the reasonableness of B+K's projections. Indeed, the district court pointed to the "limited" nature of Kuba's valuation only in stating that it would accord that valuation "little weight in determining the value of the Company." 1-ER-82. The district court nowhere said that Kuba's concerns over the projections he was provided were unfounded.

Appellants likewise get ahead of their skis in criticizing the relevance of Kuba's refusal to perform a formal valuation for B+K because he felt "uncomfortable with the structure of the transaction." Appellants' Br. at 20. The district court discounted this evidence because it surmised that "Kuba's discomfort *may* have

related" to the fact that a preferred stock transaction was "a structure that Kuba was unfamiliar with." 1-ER-85 (emphasis added). The finding that preferred stock (and not some other aspect of the deal, like the price) may have been the source of Kuba's discomfort was based not on Kuba's testimony, but rather that of Greg Hansen, the advisor hired by B+K to coordinate the ESOP transaction. *See id.* Yet even though the district court itself said only that the presence of preferred stock "may" have been what bothered Kuba, and even though it did so based on another witness's speculation about Kuba's state of mind, Appellants contend that "[t]he Secretary *knew or should have known this in his investigation*." Appellants' Br. at 20. That conclusion simply cannot bear the weight of its foundation.

Remarkably, Appellants ask this Court to award them fees by pointing to two of the most glaring pieces of evidence in the entire case: that Saakvitne (1) knowingly retained as his valuation advisor the very firm (LVA) that had just valued the same stock for the ESOP's counterparties, and (2) spent just over two weeks (and 30 total hours) on due diligence prior to approving a $40 million deal. As to the first item, Appellants contend that the "Secretary inappropriately argued *without any justification* that Saakvitne should not have hired Kniesel [of LVA]." Appellants' Br. at 24 (emphasis added). While the district court surmised that Saakvitne may have chosen LVA because its prior valuation for B+K would allow it to work more efficiently than another valuation firm, numerous courts have found that a trustee's

valuation advisor that previously worked for the ESOP sponsor is not "independent." *See Chesemore*, 886 F. Supp. 2d at 1048 ("Having been hired for years by Alliance and for this transaction to provide a valuation for the Alliance ESOP, [the valuation advisor] was not independent with respect to the Trachte ESOP."); *Montgomery v. Aetna Plywood, Inc.*, 39 F. Supp. 2d 915, 937 (N.D. Ill. 1998) (ERISA "requires that . . . the appraiser on whose report the fiduciary relies . . . be independent of all parties to the transaction other than the plan."). Similarly, while the district court ultimately found that Saakvitne's truncated due diligence may have been motivated by a desire to close the transaction before year end for tax purposes, 1-ER-130, a rushed due diligence is nonetheless a well-established hallmark of imprudence. *See, e.g., Horn v. McQueen*, 215 F. Supp. 2d 867, 885 (W.D. Ky. 2002) (noting that "the valuation process was significantly compressed and driven by [the seller's] deadline for the closing."); *Brundle v. Wilmington Tr. N.A.*, 241 F. Supp. 3d 610, 642 (E.D. Va.), *reconsideration denied*, 258 F. Supp. 3d 647 (E.D. Va. 2017) ("Another instance of [the trustee's] lack of prudence was the short period to which it agreed for approving a price for the [ESOP] Purchase.").

Finally, the reasonableness of the Secretary's position is further evidenced by the fact that it overcame a motion for summary judgment on the merits, as well as two motions to dismiss. *See Free Speech Coal.*, 408 F.3d at 618; *United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010) ("[T]here is a

presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified."); 7-ER-1669–1726, 1816– 50. As the district court concluded in denying summary judgment, "it is not clear from the record that Saakvitne properly and independently determined that the Company stock was worth $40,000,000." *Id.* at 1711. Rather, questions of fact still existed with respect to "whether the LVA report given to Saakvitne was based on faulty data, whether the sale price was way too high, whether Bowers and Kubota knew or should have known that, and whether they failed to take steps to remedy the situation." *Id.* As the magistrate judge summarized, "the district court did not reach a conclusive determination until the parties fully developed the factual record in discovery and after a five-day trial; that the Secretary survived motions to dismiss and summary judgment in the course of these proceedings supports finding his position at each stage of the litigation was substantially justified." 1-ER-47–48 (citations omitted).

In short, Appellants' assertion that the Secretary had "absolutely no proof of wrongdoing by Appellants" has no basis in the district court's decision or in the broader record of this case. Hyperbolic adjectives aside, Appellants' position is that the district court abused its discretion in denying them fees because the Secretary lost at trial. That standard would turn EAJA into an automatic fee-shifting statute, a result

Congress plainly did not intend.[6]

3. Appellants have not established they meet EAJA's net-worth requirement for fee awards under 28 U.S.C. § 2412(d)

An alternative ground for affirmance of the district court's denial of fees under 28 U.S.C. § 2412(d) is that Appellants have not satisfied the "net worth" requirement under EAJA to qualify as an eligible "party" under that subsection. The magistrate judge and the district court did not reach the issue of EAJA "net worth" because they both found that the Secretary was substantially justified in bringing this action. Nonetheless, Appellants' failure to establish that their "net worth" does not exceed the threshold under EAJA is an alternative ground to affirm the district court's denial of fees and costs under 28 U.S.C. § 2412(d).

EAJA section 2412(d)(2)(B) defines "party" as "(i) an individual whose net

[6] Further, this is not a case where the Secretary failed to consider relevant precedent or guidelines, or otherwise committed a legal error, as in other cases where courts have deemed the Government's position not substantially justified. *See Thangaraja v. Gonzales*, 428 F.3d 870, 875 (9th Cir. 2005) (failure to consider most relevant precedents concerning central issues); *Gutierrez*, 274 F.3d at 1261 (where the government "fail[s] to comply with an explicit regulation by resorting to a decision involving a different agency and different facts, particularly in the face of more relevant authority, it appears to be simply prolonging the litigation"); *Flores v. Shalala*, 49 F.3d 562, 569–71 (9th Cir. 1995) (denial of attorneys' fees was based on a finding that was reversed and remanded for an agency's procedural error); *United States v. $12,248 U.S. Currency*, 957 F.2d 1513, 1517 n.5 (9th Cir. 1991) (a due process violation is enough to trigger a finding that the government was not substantially justified under EAJA). Appellants do not point to any relevant precedents or case law that the Secretary did not consider. Nor do the Appellants mention any Department of Labor regulations that the Department disregarded.

worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). The party seeking to recover fees under section 2412(d) of EAJA has the burden of establishing that it meets the net worth limitations set forth in that section. *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991) (citing *Thomas v. Peterson*, 841 F.2d 332, 337 (9th Cir. 1988)). Courts require that the net worth be determined using generally accepted accounting principles ("GAAP"). *See Am. Pac. Concrete Pipe Co., Inc. v. NLRB*, 788 F.2d 586, 591 (9th Cir. 1986); *Broaddus v. U.S. Army Corps of Eng'rs*, 380 F.3d 162, 166–67 (4th Cir. 2004); *Cont'l Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985); *Mantle Ranches v. U.S. Park Serv.*, 993 F. Supp. 1335, 1338 (D. Colo. 1998) (finding the failure to submit information consistent with GAAP is fatal to an EAJA application).

Appellants conceded in their briefing below that "neither Mr. Bowers nor Mr. Kubota qualify as individuals with an EAJA 'net worth' less than the $2,000,000 cap imposed under 28 U.S.C. § 2412(d)(2)(B)." 3-ER-433. But they contended that B+K was a corporation with an EAJA net worth less than the $7,000,000 cap. *Id.* at 434.[7]

[7] It is at the very least ironic that Appellants—who contend that the Secretary was not substantially justified, and even acted in bad faith, in believing that the ESOP's $40

In the Secretary's Opposition as well as Sur-Reply in Opposition to Defendants' Memorandum, the Secretary raised the critical flaw that Appellants failed to establish B+K's net worth using GAAP. *See* 2-ER-168, 321. Appellants claim that the courts "do not require fully audited financial statements nor does EAJA require such statements in its definition of net worth," instead relying on B+K's outside CPA's financial statements that do not adhere to GAAP.[8] *Id.* at 301, 303. Appellants are demonstrably wrong. *Am. Pac. Concrete Pipe Co.*, 788 F.2d at 591 ("It is unreasonable to conclude . . . that Congress could have intended that generally accepted accounting principles would not apply" in determining net worth under EAJA). Appellants also claim that the district court "determined that . . . Appellants satisfied the net worth requirements of EAJA section 2412(d)." Appellants' Br. at 38. This too is incorrect; neither the district court nor the magistrate judge ever made such a finding.

Because Appellants conceded that the net worth of Bowers and Kabota was not within the $2,000,000 cap for individuals, and fail to establish that B+K's net worth is within the required $7,000,000 cap as calculated according to GAAP, an alternative

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million purchase of B+K stock was for more than fair market value—contend in their next breath that B+K's net worth is less than $7 million, such that it qualifies as an EAJA-eligible party.

[8] These financial statements state that the accountant does "not audit or review the financial statements" and does not "verify the accuracy or completeness of the information provided by management" and therefore does not "provide any form of assurance on these financial statements." 2-ER-278, 350–51.

ground exists to affirm the district court's order that Appellants are not entitled to attorneys' fees and non-taxable costs under 28 U.S.C. § 2412(d).

B. Appellants Fail to Show that the District Court Abused its Discretion in Denying Fees under 28 U.S.C. § 2412(b)

EAJA section 2412(b) confers a court with discretion to award fees against the Government "to the same extent that any other party would be liable under the common law . . . ." 28 U.S.C. § 2412(b). Common law provides for a "narrow" bad-faith exception to the general rule against fee shifting, *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990) (citations omitted), allowing a court to award attorneys' fees against a losing party that has acted in bad faith, "vexatiously, wantonly, or for oppressive reasons." *Rodriguez*, 542 F.3d at 709 (citation omitted). Bad faith sanctions are reserved for "rare and exceptional case[s] where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (citing *Operating Eng'rs Pension Tr. v. A–C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988)). The burden of proof is on the prevailing party to show the losing party's bad faith. *See Rodriguez*, 542 F.3d at 711 (citing *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1279 (9th Cir. 1996)).

Continuing their theme of conflating distinct standards, Appellants claim this is one of those "rare and exceptional cases" justifying a bad-faith finding "[f]or all of the same reasons discussed above," referring to their argument that the Secretary's

position was not substantially justified. Appellants' Br. at 47. Not only is Appellants' cavalier accusation of bad faith wrong for the same reasons that doom their substantial-justification argument, the two standards are not one and the same. A bad-faith finding under 28 U.S.C. § 2412(b) "requires far more egregious conduct on the government's part than is required under section 2412(d) and it exposes the government to liability for costs and fees above the limit set by section 2412(d)." *Wells v. Bowen*, 855 F.2d 37, 46 (2nd Cir. 1988); *Barry v. Bowen*, 825 F.2d 1324, 1334 (9th Cir. 1987) ("[T]he bad faith standard must be higher than the substantial justification standard . . . ."). Yet by conflating the bad-faith standard with that of substantial justification, which they in turn conflate with the burden of proof at trial, Appellants are effectively arguing that the Government acts in bad faith whenever it loses a case. As the district court found, because Appellants have not established that the Secretary was not substantially justified, it follows *a fortiori* that they have not met their "higher" burden of proving that the Secretary acted in bad faith. 1-ER-33.

Indeed, Appellants make no effort whatsoever to show that the Secretary, for example, disregarded the judicial process or otherwise engaged in frivolous litigation. *See United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1183 (9th Cir. 2003) ("A frivolous case is one that is groundless . . . often brought to embarrass or annoy the defendant."); *Mendenhall v. Nat'l Transp. Safety Bd.*, 92 F.3d 871, 877 (9th Cir. 1996) (an agency's continuation of an action it knew to be baseless is a

prime example of bad faith); *Brown*, 916 F.2d at 496 (concluding that the "cumulative effect" of the Government's actions that caused delay and necessitated the filing and hearing of additional motions constituted bad faith). And Appellants raise no example of how the Secretary otherwise caused an unduly delay, or engaged in "vexatious, wanton, or oppressive conduct." *Brown*, 916 F.2d at 495.[9] Appellants thus utterly fail to show that this is the type of "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose" for which bad faith sanctions are reserved. *Primus Auto. Fin. Servs., Inc.*, 115 F.3d at 649 (citation omitted).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REDUCING ITS AWARD OF TAXABLE COSTS

Rule 54(d) of the Federal Rules of Civil Procedure provides that costs against the United States "may be imposed only to the extent allowed by law." EAJA, in turn, states that costs "*may* be awarded to the prevailing party in any civil action brought by or against the United States," and that the amount of such costs "shall . . . be limited to reimbursing in whole *or in part* the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. § 2412(a)(1) (emphasis added). Thus, "[i]n awarding costs [under EAJA], the trial court has broad discretion to determine whether and how much to award a prevailing party." *Neal & Co., Inc. v.*

[9] To the extent Appellants mean to point to the contentious nature of discovery in this case, the magistrate judge made clear that "Defendants contributed to complicating discovery proceedings in this matter." 1-ER-41.

U.S., 121 F.3d 683, 686–87 (Fed. Cir. 1997).

The district court declined to award taxable costs with respect to nine depositions of Department of Labor officials taken solely to establish Bowers and Kubota's defense under ERISA's three-year statute of limitations from when a plaintiff acquires "actual knowledge" of a fiduciary breach, 29 U.S.C. 1113(2). 1-ER-20. That defense was predicated on the theories that (a) the Department gained "actual knowledge" of the fiduciary breaches by the mere filing of an annual Form 5500 with the Department, and (b) the Department was "willfully blind" to Saakvitne's alleged breaches here because it had investigated him in other matters unrelated to this one. *Id.* at 16–19. The district court previously denied Bowers and Kubota's summary judgment motion as to the first theory, finding that a Form 5500 does not "establish[] on its own an actual ERISA violation in the form of a sale of stock for more than fair market value." *Id.* at 17. And it denied summary judgment on the second theory because Bowers and Kubota "fail to establish that other investigations were red flags to which the Government was willfully blind." *Id.* at 18.

Thus, in reducing Appellants' taxable-cost award, the district court reasoned that these depositions were "unnecessary and unreasonably increased the cost of this litigation." *Id.* at 20 (explaining that "costs may be limited if they 'were unreasonably incurred or unnecessary to the case'" (*quoting* 10 Moore's Federal Practice - Civil § 54.101)). On the issue of actual knowledge, the district court found that "the

depositions appear to have been a fishing expedition." *Id.* at 17. Regarding willful blindness, the "Defendants submitted no testimony from those depositions that tended to show willful blindness. Nothing established that Government officials were deliberately ignoring red flags that should have caused them to earlier examine the sale of the Company to the ESOP." *Id.* at 20. Accordingly, it was within the district court's discretion to deny unnecessary and unreasonable costs incurred in pursuit of an unsuccessful argument.

To be sure, the district court appeared to be under the mistaken impression that the depositions in question occurred after it denied Bowers and Kubota's motion for summary judgment on their statute of limitations defense. Appellants contend that the district court abused its discretion because of that mistake alone. *See* Appellants' Br. at 54–55 ("The district court's reduction of such deposition costs because the court erroneously believe such depositions to have occurred after the March 12, 2021, Summary Judgment Order was a clear error and an abuse of discretion."). Appellants misunderstand the abuse-of-discretion standard in the context of a decision to deny costs under EAJA. Because a district court under EAJA has "considerable discretion to award costs," it "is under no obligation to award *or explain its decision not to award costs*." *Neal & Co., Inc.*, 121 F.3d at 687 (emphasis added). The question, then, is not whether the district court made a factual mistake in an opinion it was not even required to issue, but rather whether Appellants were so deserving of these costs

that the decision to deny them was an abuse of discretion. Because the district court offered numerous reasons why the nine depositions, independent of their timing, were unnecessary and ultimately fruitless—reasons Appellants do nothing to rebut—its decision denying their associated costs was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's order awarding the modified $41,810.46 in taxable costs to Bowers, Kubota, and B+K, and denying Appellants' request for attorneys' fees and non-taxable costs.

DATED: September 19, 2022

Respectfully submitted,

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COMBINED CERTIFICATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 9,440 words.

I further certify that on September 19, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF pacer NEXT/GEN System.

DATED: September 19, 2022

s/ Christine D. Han
CHRISTINE D. HAN