FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2014

SIGNATURE MINING SERVICES, LLC, Petitioner	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	Docket No. EAJ 2012-0002
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Coalburg No. 1

AMENDED DECISION AND ORDER

Appearances: David Hardy, Esq., & Christopher Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia for Petitioner

Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent

Before: Judge McCarthy

The Decision and Order issued December 5, 2014, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c) (2014), to correct clerical errors and read as set forth below.

I. Statement of the Case

This case is before me upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504 (2014). Signature Mining Services, LLC, filed its Application against the Secretary of Labor's Mine Safety and Health Administration based upon a negotiated settlement that the parties reached in the underlying contest proceeding. Currently pending in this case are Cross Motions for Summary Judgment filed on March 11, 2014, and a Motion to Supplement the Record filed on May 28, 2014. The undersigned finds no genuine issues of material fact that preclude summary disposition of this matter. For the reasons set forth herein, the Secretary's Motion for Summary Judgment is granted, and Signature's Motion for Summary Judgment is denied.

II. Factual and Procedural Background

A. The Underlying Contest Proceeding

On August 25, 2011, adverse roof and rib conditions developed at the Coalburg No. 1 Mine at the 003 MMU-2 East Panel, a retreat mining section. Order No. 8139507; Signature App. at 1-2. Initially, these conditions affected several entries on the right side of the section along and inby the last open crosscut. Order No. 8139507. After MSHA inspectors observed pillars taking weight on the 2 East Panel, MSHA issued imminent danger Order No. 8139507 pursuant to Section 107(a) of the Act. Order No. 8139507; Sec'y Answer at 3. This order covered the #6 and #8 entries along and inby the last open crosscut. Order No. 8139507.

Signature and the Secretary both allege that the conditions began to spread from the mouth of the 2 East Panel to the Mains. Signature App. at 3; Sec'y Answer at 3. In response, Signature began withdrawing miners and equipment from, and dangering off, the affected area. Signature also set Heintzman jacks along the roadway at break 15 along the Mains, outby the area affected by the adverse roof conditions. Richmond Dep. 30:9-31:10; Canterbury Dep. 11:21-12:13; Mackowiak Dep. 60:11-14, 65:2-5, 66:14-15; 75:11-19.

On August 27, 2011, at 1:30 a.m., the Coalburg No. 1 foreman reported that the pillars at the mouth of the 2 East Panel were taking weight. Richmond Dep. 18:21-19:8. Randel Richmond, Signature's president, was informed that the ground failure had migrated into the Mains. Richmond Dep. 19:6-21:8. Before 10 a.m., Richmond spoke with Terry Price, MSHA's field office supervisor, and John Kinder, a representative of the West Virginia Miner's Health, Safety, and Training (WVMHST), to apprise them about the adverse ground conditions. Richmond Dep. 30:20-32:2. Richmond told Price that Signature had stopped production and withdrawn all its miners from the affected areas. Richmond Dep. 30:22-31:3. Richmond also provided Price with assurances that Signature had taken steps to monitor and correct the conditions. Richmond Dep. 31:5-10, 36:14-22.

Approximately fifteen minutes later, Joe Mackowiak, MSHA assistant district manager, called Frank Canterbury, a mine foreman at Signature, to inquire further about the adverse conditions. Mackowiak Dep. 57:8-12. Canterbury informed Mackowiak that the ground failure had migrated into the Mains and that men were underground setting jacks to prevent further migration of the adverse ground conditions. Mackowiak Dep. 73:22-74:20, 97:3-13. Canterbury also told Mackowiak that the ventilation controls of an abandoned mine 75 feet below the Coalburg No. 1 had been crushed and the water sumps had gone dry. Order No. 8126005; Mackowiak Dep. 81:16-82:19. The subsidence led Mackowiak to conclude that the pillar failures and ground conditions created regional instability. Mackowiak Dep. 92:14-94:8.

Pursuant to Section 107(a) of the Act, Mackowiak orally issued imminent danger Order No. 8126005 by phone. Mackowiak Dep. 87:12-14. Mackowiak emphasized that the situation was so dangerous that everyone ought to be withdrawn, without exception. Mackowiak Dep. 99:16-19, 103:2-5. Mackowiak then instructed Price to dispatch inspectors to Coalburg No. 1 and reduce the Order to writing. Mackowiak Dep. 87:21-88:11. Mackowiak also faxed Price instructions to issue the imminent danger order with "[n]o exceptions," which meant that

no one was allowed to be in the mine site. Mackowiak Dep. 102:8-15; Price Dep. 54:10-20, dated November 8, 2011.

When Price and James Jackson, another MSHA inspector, arrived at Coalburg No. 1, they reduced the Order to writing. Price Dep. 56:19-57:4. At that time, 14 miners were underground. Price Dep. 60:22-61:6. Although none of these miners were involved in running coal, Price and Jackson did not conduct any investigation about why these miners were underground. Price Dep. 60:7-15. Price and Jackson did not travel underground to examine the adverse conditions. Price Dep. 64:14-65:5. Price instructed Signature that the entire mine site was closed and no one was permitted underground without MSHA's approval. Price Dep. 62:14-18, 63:4-64:8; *see* Richmond Dep. 36:15-20, 38:16-39:1.

On August 29, 2011, MSHA inspectors, Signature personnel, and consultants from Alpha Engineering traveled underground to observe the adverse conditions and determine whether the ground failure had stopped. Richmond Dep. 40:23-41:13. The inspection party determined that the 2 East Panel and approximately ten crosscuts inby break 15 were the areas primarily affected by the roof and rib conditions. *See* Appl. For Fees and Other Expenses at 3, dated January 6, 2012. Mackowiak heard pillars breaking and continued to express concern that the ground failure posed a regional threat given the conditions of the underlying mine. Mackowiak Dep. 141:22-144:17. As a result, the imminent danger Order remained in effect for the entire mine site. Order No. 8126005; *see* Mackowiak Dep. 140:7-21. Thereafter, Signature filed a Notice of Contest to Order Nos. 8139507 and 8126005. *See* Notice of Contest to Orders Nos. 8139705 & 8126005.

On August 30, 2011, MSHA issued withdrawal Order No. 7257539 pursuant to Section 103(k) of the Act. Order No. 7257539. In this control Order, MSHA alleged that a "coal and floor rock outburst accident" had occurred and all mining activities inby had been disrupted. *Id.* The 103(k) Order covered the entire mine because of hazards presented by crushed ventilation controls and instability of mine pillars. *Id.* MSHA was unsure about the extent of damage and the need to conduct an accident investigation. Sec'y Answer at 4. On August 31, 2011, Signature filed a Notice of Contest to Order No. 7257539.

Six days before the scheduled hearing on the contest proceedings, the parties entered into settlement negotiations. On December 2, 2011, the Secretary of Labor, MSHA, and Signature filed a Joint Motion to Continue based on the terms of a proffered settlement agreement. Jt. Mot. to Continue at 3-4. With respect to the Section 107(a) imminent danger Orders, Signature agreed to withdraw its Notice of Contest to Order No. 8139507 in exchange for MSHA's promise to vacate Order No. 8126005. *See* Jt. Mot. to Continue, at 3. Negotiations on section 103(k) Order No. 7257539 were ongoing at the time the Joint Motion was filed. Thereafter, MSHA agreed to narrow the area of the mine affected by that control Order and to approve Signature's ventilation plan. Jt. Mot. to Continue, Ex. 2. On December 5, 2011, the undersigned granted the parties' Joint Motion to Continue. Order Granting Continuance.

On December 16, 2011, the undersigned granted Signature's motion to partially withdraw its Notice of Contest to Order No. 8139507. My Order noted that the Secretary had agreed to vacate Order No. 8126005 and directed that Order No. 8126005 be addressed in either a

subsequent settlement motion or hearing. On January 4, 2012, I granted the Secretary's motion to dismiss and vacate Order No. 8126005. On January 20, 2012, Signature filed a motion to dismiss its Notice of Contest to Order No. 7257539. By Order dated January 26, 2012, the undersigned granted Signature's motion.

B. The EAJA Proceeding

On January 9, 2012, Signature filed its Application for Fees and Other Expenses under EAJA. On August 30, 2013, the undersigned issued a Decision and Order finding that (1) the judicially-sanctioned negotiations that concluded the underlying contest proceeding were sufficient to grant Signature prevailing party status under the EAJA and (2) Order No. 8126005 was overbroad and the Secretary's decision to enforce it was without merit and could not be substantially justified.[1] The Decision and Order directed that further proceedings address (1) whether Signature's balance sheet met EAJA's financial eligibility requirements, (2) whether Patriot Coal Company controlled the underlying contest proceedings (thereby precluding Signature from recovering fees under the EAJA), and (3) the amount of attorneys' fees, if any, to which Signature was entitled after prevailing on Order No. 8126005.

The parties engaged in additional discovery after issuance of my August 30, 2013, Decision and Order clarifying the issues to be addressed at hearing. In response to a discovery request from the Secretary, Signature's counsel produced a redacted copy of the Contract Mining Agreement, which detailed the nature of the contractual relationship between Signature and Jarrell's Branch. Resp't Ex. 24, Signature's Response to the Secretary's Requests for Production of Documents. The redactions of putative confidential business information included paragraphs 17, 18, and 20, which provided, in relevant part, that Jarrell's Branch would reimburse Signature for certain penalty assessments issued by MSHA that did not arise from intentional misconduct or gross negligence, and for attorneys' fees and costs incurred in contesting penalty assessments before the Commission. Resp't Ex. 24, Signature's Response to the Secretary's Requests for Production of Documents; Resp't Ex. 21.

The Secretary subsequently discovered an un-redacted copy of the contract on the Patriot bankruptcy information website. The contract had been filed with the bankruptcy court on

[1] During a conference call with the parties on November 21, 2013, Signature informed the undersigned that a clarification of my August 30, 2013, Decision and Order was warranted and Signature conceded that its application for fees was limited to Section 103(k) Order No. 7257539 and Section 107(a) Order No. 8126005. The Secretary then filed a Motion for Modification on November 25, 2013. An Amended Decision and Order was issued on December 6, 2013, which stated that Signature was only eligible to be awarded fees and costs related to Section 107(a) Order No. 8126005. While the Secretary may have lacked substantial justification for enforcing 107(a) Order No. 8139507, Signature did not apply for fees related to that order within thirty days of the Commission's final disposition of the underlying proceeding, Docket No. WEVA 2011-2299, and thus is ineligible to be awarded fees incurred in its defense of that Order. 29 C.F.R. § 2704.206 (2013).

July 31, 2013, in support of Signature's claim against Jarrell's Branch.[2] The Secretary had previously been unaware that Jarrell's Branch had fully reimbursed Signature for the fees incurred in the underlying contest proceeding and partially reimbursed Signature for the fees incurred in the EAJA litigation. When the Secretary notified Signature's counsel that he had found an un-redacted copy of the Contract Mining Agreement, counsel admitted that Signature had been reimbursed for attorneys' fees and costs. Secretary's Mot. Summ. J. 10, n.6.

On December 12, 2013, the parties filed a Joint Motion for Decision on Stipulated Record. They stipulated to Signature's net worth and to the amount of attorneys' fees incurred by Signature in its defense of Order Number 8126005 and the litigation of its EAJA application.

On March 11, 2014, after additional discovery, the parties filed Cross Motions for Summary Judgment stipulating to the facts, the record, and the amount of fees Signature incurred in the contest proceeding and its EAJA application. The Cross Motions for Summary Judgment present arguments on the primary issue of whether the terms of the Contract Mining Agreement between Patriot Coal's subsidiary Jarrell's Branch and Signature preclude Signature's recovery of fees under the EAJA.

C. Summary of Stipulated Facts on Cross Motions for Summary Judgment

Signature Mining Services is a West Virginia limited liability corporation formed in 2008. Resp't Ex. 22. Since its formation, Signature has employed less than 500 people and its net worth has never exceeded $7,000,000. *See* Signature's Application under EAJA.

Jarrell's Branch Coal Company is a subsidiary of Patriot Coal Corporation. On August 29, 2011, Patriot Coal was worth more than $7,000,000. Patriot Coal filed for Chapter 11 bankruptcy on July 9, 2012.[3]

Order No. 8126005 was issued on August 27, 2011. Resp't Ex. 4. On August 29, 2011, Signature's counsel filed a Notice of Contest for Order Nos. 8126005. Resp't Ex. 7. The litigation of Order No. 8126005 continued through January 4, 2012, when the undersigned issued an Order to Dismiss Docket No. WEVA 2011-2300. Resp't Ex. 19.

On June 1, 2011, Signature entered into a Contract Mining Agreement with Jarrell's Branch Coal Company governing mining operations at the Coalburg #1 mine. Resp't Ex. 21.

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[2] *See* Amended Proof of Claim No. 1394, at Part 9, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. July 31, 2013), *available at* https://cert.gardencitygroup.com/pcx/readPdf/3839_020101.pdf?secondTime=yes&fileType=rmi&.value=101.

[3] The parties have stipulated to Jarrell's Branch's status as a Patriot Coal subsidiary and to Patriot's net worth as of August 29, 2011. The undersigned takes judicial notice that Patriot Coal's Joint Plan of Reorganization was confirmed by the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division on December 18, 2013 and went into effect that same day. *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. Dec. 18, 2013), *available at* http://patriotcaseinformation.com/pdflib/Dkt_No._5169A.pdf. Additional information on Patriot Coal's bankruptcy proceedings is available at patriotcaseinformation.com.

The Agreement was negotiated over a period of several weeks, and the amount of Signature's compensation pursuant to its terms was directly related to Jarrell's Branch's obligation to reimburse Signature for costs incurred in operating the Coalburg No. 1 Mine, including amounts for legal fees incurred in defending certain citations and orders issued by MSHA.[4] Signature's Mot. Summ. J. 8, Stipulated Fact No. 11. Had Jarrell's Branch not agreed to reimburse Signature for costs incurred in operating the mine, Signature's compensation under the contract's terms would have been higher. Signature's Mot. Summ. J. 8, Stipulated Fact No. 12. The reserves at Coalburg No.1 Mine exceeded the term of the Contract Mining Agreement. Had Jarrell's Branch and Signature negotiated an extension or renewal of the contract upon its expiration, the historical costs incurred in the mine's operation would have been an important consideration in negotiating Signature's future compensation. Signature's Mot. Summ. J. 8, Stipulated Fact No. 13.

Under the Contract Mining Agreement, Signature was responsible for managing the daily operations at the mine, including compliance with the Federal Mine Safety and Health Act and its regulations. Resp't Ex. 21, ¶ 8. The agreement obligated Jarrell's Branch to reimburse Signature for its legal fees incurred as a result of matters pending before the Commission, excluding matters arising under section 104 of the Mine Act. Resp't Ex. 21, ¶ 18. The agreement also obligated Jarrell's Branch to pay Signature for reasonable attorneys' fees after the cancellation, expiration, or termination of the agreement if the citation was issued prior to the effective termination date. *Id.*[5] The maximum hourly rate that Signature can recover in this

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[4] Paragraph 17 of the Contract Mining Agreement states:

> For all assessments, penalties, or fines imposed by federal, state, or local agency for any local, state, or federal law or regulation, except those issued for safety and environmental violations as set for in Articles 18 and 26 of this Agreement, which arise out of the contractors or its Labor Contractor's operation at the Mine, Owner shall reimburse Contractor for the payment of such assessments, penalties, or fines; provided that Owner shall not reimburse Contractor for assessments, penalties or fines arising from Contractor's or its Labor Contractor's intentional misconduct or gross negligence.

Resp't Ex. 21. Paragraph 18, in relevant part, provides that "Owner agrees to pay Contractor for the cost of penalty assessments received by Contractor on citations issued by MSHA . . . for Contractor's or it's Labor Contractor's alleged violation of federal or state mandatory health and safety standards," except for violations arising under sections 104(d), 104(b)(2), and 104(c) of the Mine Act. *See* 30 U.S.C §§ 804(d), 804(b)(2), 820(c) (2013). In addition, "Owner shall pay Contractor for the reasonable attorneys' fees and costs incurred by Contractor in contesting penalty assessments and/or citations. Owner considers reasonable attorneys' fees to be those that are based on an hourly rate not in excess of $275 per hour." *Id.*

[5] Paragraph 18 of the Contract Mining Agreement states that "Owner shall continue to reimburse Contractor for the cost of penalty assessments and reasonable attorneys' fees incurred by

matter is $275, the contractual reimbursement rate from Jarrell's Branch. *Id.*; *see also* Secretary's Mot. Summ. J. 10, n.6.

Signature decided when to initiate, settle, and terminate actions before the Federal Mine Safety and Health Review Commission. No person at Patriot Coal or Jarrell's Branch had authority to make these decisions. Signature's Mot. Summ. J. 7, Stipulated Fact No. 9. The contest proceedings regarding Order 8126005 were initiated and resolved at the sole discretion of Signature. Signature's Mot. Summ. J. 7, Stipulated Fact No. 10.

At the time the EAJA action was filed on January 9, 2012, Signature had not been reimbursed for time spent in December 2011 defending against Order 8126005. By March 9, 2012, Jarrell's Branch had reimbursed Signature for $39,789.59 in fees and expenses incurred in connection with the defense of Order No. 8126005. Signature's Mot. Summ. J. 9, Stipulated Fact No. 18; Secretary's Mot. Summ. J. 3, Stipulated Fact No. 11. Signature incurred $16,734.07 in expenses from expert services provided by Alpha Engineering Services, Inc. in connection with the defense of Order 8126005. Jarrell's Branch reimbursed Signature for all amounts Signature paid to Alpha Engineering. Signature's Mot. Summ. J. 9, Stipulated Fact No. 21; Resp't Ex. 21, ¶ 17; Resp't Ex. 23. Signature has not been and will not be reimbursed for $40,214.78 in legal fees and expenses incurred in the prosecution of the EAJA action. *See* Signature's Mot. Supplement R. Ex. 4.[6]

Contractor after the cancellation, expiration, or termination of this agreement if the citation was issued prior to the effective termination date." Resp't Ex. 21.

[6] The undersigned takes administrative notice of Signature's bankruptcy claims against Patriot. In its Amended Proof of Claim No. 1394, Signature included the following Explanation of Proof of Claim:

> At the time of the bankruptcy filing, Patriot assured Signature Mining that it would continue to pay the fines and defense costs associated with MSHA violations as they arose post-bankruptcy. Signature originally filed two proofs of claim representing expenses that arose prior to the time of the bankruptcy filing. Signature was operating under the assumption that Patriot would reimburse Signature for costs and fees that were continuing to accrue post-bankruptcy. Subsequently, Patriot informed Signature that Patriot does not intend to pay the fines and defense costs as they arise.

Amended Proof of Claim No. 1394, at Part 2, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. July 31, 2013), *available at* https://cert.gardencitygroup.com/pcx/readPdf/3839_0201.pdf?secondTime=yes&fileType=rmi&.value=1. On January 16, 2014, Signature and Patriot entered into a Settlement and Release Agreement that resolved Signature's claims in the amount of $164,687 (Exhibit B) and released Patriot from any further liability. *See* Settlement and Release Agreement, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. January 16, 2014), *available at* https://cert.gardencitygroup.com/pcx/fs/viewreconPdf?fileName=Signature%20Mining.

Signature has been fully reimbursed for legal fees and expenses set forth in the invoices dated September 22, October 18, November 16, and December 15, 2011; and January 18, February 21, and March 21, 2012. Those invoices include all underlying contest proceeding fees and some EAJA fees. Signature was partially reimbursed for the invoice dated April 18, 2012 relating to EAJA fees. Signature has not and will not be reimbursed for the invoices relating to EAJA fees dated May 24, June 22, August 21, October 1 and 22, and November 13, 2012; October 1, November 3, and December 5, 2013; and January 2, February 3, and April 1, 2014. Secretary's Mot. Summ. J. 5, Stipulated Fact No. 21; Signature's Mot. Summ. J. 9, Stipulated Fact No. 19; Signature's Mot. Supplement R. Ex. 4.

The parties stipulated in their cross-motions for summary judgment that Signature could supplement the record to reflect additional fees incurred in the preparation of the motion for summary judgment. On May 28, 2014, Signature's counsel filed a Motion to Supplement the Record with invoices detailing those fees. Should the undersigned find that Signature is entitled to all legal fees and expenses incurred in the defense of Order No. 8126005 and the subsequent EAJA application, the total amount is $80,004.37, as of May 28, 2014. Should the undersigned find that Signature is entitled only to those fees for which it has not been reimbursed, the total is $40,214.78, as of May 28, 2014.

III. Principles of Law

A. Standard of Review for Cross-Motions for Summary Judgment

Under Commission Rule 67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows (1) that there is no genuine issue of material fact; and (2) that the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b) (2014). The burden is on the moving party to establish its right to summary decision. *Wimsatt v. Green Coal Company, Inc.*, 16 FMSHRC 487 (Feb. 1994) (ALJ). In other words, the party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, all reasonable inferences from the underlying facts must be construed in the light most favorable to the non-moving party. *See e.g.*, *Reeves v. Sanderson Plumbing Pods., Inc.*, 530 U.S. 133, 135 (2000). In the case of cross-motions for summary judgment, the Commission has recognized the well-established principle that "the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with a Rule 56 [of the Federal Rules of Civil Procedure] standard." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 10 (Jan. 2007); *see also* Charles Allen Wright et al., 10A Federal Practice & Procedure § 2720 (3d ed. 1998); *Scottsdale Ins. Co. v. Cutz, L.L.C.*, 543 F. Supp. 2d 1310 (S.D. Fla. 2007).[7]

[7] Although the Commission's Procedural Rules do not directly address cross-motions for summary judgment, Rule 1(b) provides that "on any procedural questions not regulated by the [Mine] Act, these Procedural Rules, or the Administrative Procedure Act, the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure." 29 C.F.R. § 2700.1(b) (2014). Motions for summary

Summary judgment, however, is an extraordinary procedure and must be entered with care, especially in the case of cross-motions. There are three reasons why courts must carefully evaluate cross-motions for summary judgment separately and individually.

First, the question of whether genuine issues of material fact still exist is a question of law reserved exclusively to the judge, regardless of the parties' opinions. Wright et al., *supra*, § 2720. The parties' filing of cross-motions for summary judgment do not "conclusively establish[] the universe of facts that [are] . . . material," and the judge must make the determination that no material fact issues remain unresolved. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 10 (Jan. 2007).[8] The Third Circuit has explained that

> [c]ross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by plenary trial and not on summary judgment.

Raines v. Cascade Indus., 402 F.2d 241, 245 (3d Cir. 1968).

Second, a party's claim that there are no genuine issues of material fact for the purposes of summary judgment does not prevent that same party from making the claim that there *are* genuine issues of material fact that preclude judgment from being entered against it. In other words, "the contention of one party that there are no issues of material fact preventing entry of judgment in its favor does not bar that party from asserting that there are issues of fact sufficient to prevent the entry of judgment as a matter of law against it." *Schwabenbauer v. Bd. of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981); *see also Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984); *Nafco Oil & Gas, Inc. v. Appleman*, 380 F.2d 323 (10th Cir. 1967); *Cram v. Sun Ins. Office*, 375 F.2d 670 (4th Cir. 1967).

Finally, "the mere fact that a [party] has failed to meet his burden of proof on his motion for summary judgment does not entitle the [other party] to judgment on its motion." *Rothenberg v. Chemical Bank New York Trust Co.*, 400 F. Supp. 1299, 1302 (S.D.N.Y. 1975). Rule 56 places the burden on the *moving party* to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; when both parties file competing motions for summary judgment, each party must separately and individually satisfy that burden. *See Fair*

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judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, and the jurisprudence regarding standards of review for cross-motions for summary judgments is well-developed. *See e.g.*, Wright et al., *supra*, §§ 2720, 2725 (3d ed. 1998).

[8] Summary judgment may be particularly appropriate, however, where the parties have stipulated to the facts. *See e.g., Trevino v. Yamaha Motor Corp.*, 882 F.2d 182 (5th Cir. 1989); *Estate of Reddert v. United States*, 925 F. Supp. 261 (D.C.N.J 1996).

Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d. 1132, 1136 (9th Cir. 2001).

Summary judgment, therefore, may only be entered when there is no genuine issue of material fact, and when the party in whose favor it is entered is entitled to summary decision as a matter of law. *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (holding that summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law).

B. The Equal Access to Justice Act

1. EAJA Generally and Commission EAJA Rules

The EAJA provides for the award of attorneys' fees and other expenses to a prevailing party against the United States or an agency thereof, unless the position of the government was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1) (2014). The Supreme Court has recognized that eligibility for EAJA fees requires (1) that the claimant be a "prevailing party," (2) that the Government's position was not "substantially justified," (3) that no special circumstances make an award unjust, and (4) that the fee application must be submitted to the court within 30 days and be supported by an itemized statement. *Commissioner, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 158 (1990).

Pursuant to the directive of 5 U.S.C. § 504(c)(1), the Commission has promulgated its own rules and procedures for EAJA applications. In order to be eligible for EAJA fees, a corporate entity such a Signature -- as opposed to an individual or the sole owner of a corporation -- cannot have a net worth in excess of $7 million nor employ more than 500 employees. 29 C.F.R. § 2704.104 (2014). *See, e.g.*, *Bill Simola*, 34 FMSHRC 539, 550–51 (Mar. 2012) (treating LLCs as corporations under the Mine Act). Commission EAJA Implementation Rule 100 defines when eligible parties can recover:

> An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust.

29 C.F.R § 2704.100 (2014); *see also* 5 U.S.C. § 504(a)(4) (2014).

Under Commission rules,

> [a] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the

> Secretary upon which the adversary adjudication is based. The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the underlying proceeding or if special circumstances make the award unjust.

29 C.F.R. § 2704.105 (2014). Contest proceedings, such as the one underlying Signature's application, are expressly included in the types of Commission proceedings in which eligible parties may apply for EAJA fees. *See* 29 C.F.R. §2704.103 (2014).

Although the Commission's EAJA Implementation rules normally cap fees at a rate of $125 an hour,[9] the Commission may exercise its discretion to award fees at a higher rate to account for increases in cost of living or the limited availability of attorneys qualified to handle Commission proceedings. 29 C.F.R. § 2704.107 (2014). Eligible parties may apply for "reasonable expenses," and awards may also include attorneys' fees and expert witness fees regardless of whether "the services were made available without charge or at a reduced rate to the applicant." 29 C.F.R. § 2704.106(a) (2014). The court may also award costs for engineering studies and reports "to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study . . . was necessary for the preparation of the applicant's case in the underlying proceeding." 29 C.F.R. § 2704.106 (2014). The amount of the EAJA award is thus left largely to the discretion of the administrative adjudicator.

When determining the reasonableness of fees to award, the following five factors must be considered:

1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

2) the prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

3) the time actually spent in the representation of the applicant;

4) the time reasonably spent in light of the difficult or complexity of the issues in the underlying proceedings; and

5) such other factors as may bear on the value of the services provided.

29 C.F.R. § 2704.106(c) (2014). The EAJA also vests the adjudicator with the discretion to reduce or deny awards "to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3) (2014); *see also* 28 U.S.C. § 2412(a)(1)(C) (2014).

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[9] *See* 29 C.F.R. § 2704.106(a) (2014); *see also* 28 U.S.C. § 2412(d)(2)(A).

2. EAJA's Purposes and Legislative History

The EAJA was enacted shortly after a period of rapid regulatory growth to address Congress' concerns that small businesses lacked the resources to litigate against the federal government. H.R. Rep. 96-1418, at 9–10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988–89. From a policy perspective, Congress was concerned that the greater resources and expertise of the federal government might coerce small businesses into regulatory compliance simply because they lacked the resources to contest citations, thereby creating precedent on the basis of uncontested orders rather than after the "thoughtful consideration and presentation of opposing views." H.R. Rep. 96-1418, at 10. Therefore, the primary purpose of the EAJA is to eliminate the financial disincentive to challenge unreasonable governmental actions for eligible parties. H.R. Rep. No. 99-120, at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132; *Jean*, 496 U.S. at 163 *citing Sullivan v. Hudson,* 490 U.S. 877, 883 (1989)).

The EAJA's legislative history shows that Congress specifically intended the statute to serve dual functions:

> 1) [to] diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and
>
> 2) [to] insure the applicability of the common law and statutory exceptions to the "American rule" respecting the award of attorneys' fees in actions by or against the United States.[10]

The Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412 (2014)). Thus, the EAJA reduces the resource disparity between the federal government and small business litigants, and creates an incentive for agencies to police their enforcement and litigation activities by imposing the risk of a fee award against them. *See generally United States v. 329.73 Acres of Land in Grenada & Yalobusha Counties*, 704 F.2d 800, 801–03 (5th Cir. 1983) (discussing congressional intent of the EAJA). Accordingly, the "[g]overnment's interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and curbing excessive regulation and the unreasonable exercise of government authority." *Jean*, 496 U.S. at 163 (1990) (citing H.R. Rep. No. 1418, at 12; S. Rep. No. 96-253, at 7 (1979)).

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[10] The American Rule generally provides that each party pays its own attorneys' fees, but allows an award of fees against a party who has acted under common law in bad faith or to preserve a common fund, or when a statute, such as EAJA, provides that fees may be awarded. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (discussing application of the American rule doctrine in federal courts).

IV. Positions of the Parties

Signature and the Secretary have stipulated that Signature, at the time the underlying contest proceeding was initiated, was worth less than $7 million and had less than 500 employees, and is therefore eligible to recover fees and expenses under the EAJA. The undersigned's August 30, 2013 Decision and Order, together with the Amended Decision and Order issued December 6, 2013, found that Signature was a prevailing party for the purposes of the EAJA in the contest proceedings related to Order No. 8126005, and that the Secretary's defense of that order was not substantially justified. If the undersigned finds that Signature has incurred fees within the meaning of the statute, Signature is therefore eligible for a fee award. Further, the parties have stipulated that should the undersigned find that Signature is entitled to all legal fees and expenses incurred in the defense of Order No. 8126005 and its subsequent EAJA application, the total amount is $80,004.37. In the alternative, should the undersigned find that Signature is entitled only to those fees and expenses for which it has not been reimbursed (the fees and expenses related to the EAJA application incurred after the partial reimbursement in April 2012), Signature is entitled to $40,214.78.

Given the purposes of EAJA, the issue of whether Signature is entitled to EAJA fees in this matter turns on whether Signature incurred fees under the EAJA given the terms of the contract mining agreement between Signature and Jarrell's Branch, a subsidiary of Patriot Coal. The contract between Jarrell's Branch and Signature obligated Jarrell's Branch to reimburse Signature for legal fees and costs incurred in defending certain citations and orders before the Commission. Resp't Ex. 21, ¶ 18; *see supra* note 3. Signature argues that its contract mining agreement with Jarrell's Branch does not preclude collection of EAJA fees, despite reimbursement from Jarrell's Branch for all attorneys' fees, costs, and expenses, including those incurred by Alpha Engineering, associated with the underlying contest proceeding, and for part of the fees arising from pursuit of its EAJA application. The Secretary argues that the contract mining agreement precludes Signature from incurring fees for the purposes of EAJA.

Signature advances three legal arguments in support of a summary award of EAJA fees. First, Signature emphasizes that it was responsible for managing the daily operations at the mine and had sole discretion to initiate, settle, or terminate actions before the Commission. Therefore, Signature argues that it is the real party-in-interest instead of a stand-in litigant applying for EAJA fees on behalf of Patriot Coal, an ineligible party. Second, Signature argues that nothing in the EAJA suggests a purpose to prevent contractual reimbursement arrangements like that extant between Signature and Jarrell's Branch. Therefore, Signature argues for a fee award regardless of whether it was responsible for paying the fees or whether the fees already have been paid. Third, Signature argues that failure to award fees would circumvent EAJA's purpose of deterring unreasonable government action.

The Secretary advances three arguments in support of a summary denial of EAJA fees. First, the Secretary argues that the potential litigation costs had no deterrent effect on Signature's decision to defend against Order No. 8126005 because Signature knew in advance that reasonable attorneys' fees and costs incurred before the Commission would be reimbursed by Jarrell's Branch. Moreover, Signature has not actually "incurred" any fees because most of its attorneys' fees and all of its expert costs have already been reimbursed by Jarrell's Branch.

Second, because the contest costs and fees have already been paid, any fee award would constitute a windfall for Signature, contrary to the EAJA's intent. Third, the Secretary argues that any EAJA award would impermissibly impose a fine on MSHA and force taxpayers to finance Signature's EAJA litigation.

V. Analysis and Discussion

A. Circuit Court Disagreement on the Meaning of "Incur" under EAJA

The EAJA statute specifically provides in pertinent part that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). Neither the text of the EAJA nor its legislative history provides a definition of "incur." *Sec. & Exch. Comm'n v. Comserv Corp.*, 908 F.2d 1407, 1413 (8th Cir. 1990). This issue is one of first impression for the Commission.[11] Accordingly, the undersigned has canvassed federal circuit Courts of Appeals decisions for guidance, including the Fourth Circuit, which *may* have appellate jurisdiction over the Commission's final decision because Signature is located in Raleigh County in Beckley, West Virginia.[12]

The federal Circuit Courts of Appeals are divided on the issue, particularly when the EAJA award includes fees that are incurred by the party's liability insurer, or fees that are paid or advanced by a third party (here Jarrell's Branch) with a legal obligation to indemnify or reimburse the prevailing party (here Signature). *See United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010) (dicta finding that award of attorneys' fees under the EAJA can include fees incurred by the prevailing party's liability insurer, because the party had contracted with the insurance company to pay premiums in exchange for the insurance company assumption of defense costs), *accord Ed A. Wilson, Inc. v. Gen. Servs. Admin.*, 126 F.3d 1406 (Fed. Cir. 1997) (contractor Wilson incurred attorney fees and expenses even though Wilson's insurer Bituminous was responsible for paying monthly billings to law firm where

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[11] *Jeroski v. FMSHRC*, 697 F.3d 651 (7th Cir. 2012), comes close, but that case turned on the "prevailing party" issue. *Id.* at 655. The Seventh Circuit affirmed the final order of the Commission judge dismissing the contest proceeding, without prejudice, because the MSHA-targeted janitorial contractor, whose attorney fees were paid by a cement plant, was not a prevailing party under EAJA, but suggested in dicta that contractor had not incurred fees where it would not have been deterred from contesting MSHA action where the cement company financed the litigation and the contractor would receive a windfall from an EAJA award. *Id.* at 655-56.

[12] *See* 30 U.S.C. § 816(a) (2013) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit."). The D.C. Circuit has not addressed the particular issue of whether prevailing parties indemnified by third parties "incur" fees under the EAJA.

Wilson received interest-free loan from Bituminous to pay a denied repair claim against government contracting officer and assigned any potential recovery against government to Bituminous); *Securities & Exch. Comm'n v. Zahareas*, 374 F.3d 624 (8th Cir. 2004) (broker incurred legal fees under EAJA, even though broker's former company had initially agreed to pay fees, where company went bankrupt, leaving broker obligated to pay fees); *see also Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658 (9th Cir. 2009) (taxpayer may incur attorney fees under 26 U.S.C. § 7430(a) even if those fees are paid initially by a third party where there is either a contingent or non-contingent obligation to repay the fees); *Phillips v. Gen. Servs. Ass'n,* 924 F.2d 1577 (Fed. Cir. 1991) (EAJA attorney fees incurred by government employee challenging discipline where contingency fee arrangement required that fee award be paid over to legal representative). *Compare United States v. Paisley*, 957 F.2d 1161 (4th Cir. 1992) (EAJA fees denied where employer paid attorneys' fees on behalf of its former employees pursuant to statutory obligation to indemnify them) *with Securities & Exch. Comm'n v. Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990) (corporate officer not eligible for EAJA award where company's insurance policy reimbursed company for its indemnification of officer and officer had no legal obligation to pay fees); *United States v. 122 Acres of Land*, 856 F.2d 56 (8th Cir. 1988) (because property owner had no obligation under contingent fee agreement to pay his attorney anything, he had not incurred attorneys' fees within meaning of Uniform Relocation Assistance and Real Property Acquisition Policies Act, another fee-shifting statute); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 675 F.3d 1036 (7th Cir. 2012) (commercial truck drivers not entitled to award of attorney fees under EAJA where drivers' association was the only party responsible for payment under fee arrangement and therefore the burden of fees would not have deterred litigation challenging government's action); *Jeroski v. FMSHRC*, 697 F.3d 651 (7th Cir. 2012)) (proprietorship performing janitorial services for cement plant who financed litigation of withdrawal order against MSHA was not prevailing party, and suggesting in dicta that janitorial contractor had not incurred fees where it would not have been deterred from contesting MSHA action where cement company financed the litigation and contractor would receive windfall from EAJA award).[13]

Having carefully reviewed the foregoing circuit precedent in apparent conflict, the undersigned resolves the issue of whether Signature has "incurred" fees under its Contract Mining Agreement with Jarrell's Branch within the meaning of EAJA by focusing on whether the award of fees and costs to Signature would give effect to EAJA's specific purpose and

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[13] The circuits have generally recognized an exception to the requirement that a legal liability for attorneys' fees must be incurred for an EAJA award where the prevailing party is represented by counsel appearing *pro bono* or by a legal services organization. *Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984). For example in *Cornella*, the Eight Circuit relied in part on legislative history suggesting that awards to pro bono organizations were contemplated by Congress. *Id.* (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S.C.C.A.N. 4994). The court held that where a pro bono attorney "forgives" a fee to a client unable to afford legal expenses, that client is eligible for an EAJA award on the basis of that fee arrangement. Other circuits have reached a similar result. *See, e.g., American Ass'n of Retired Persons v. E.E.O.C.*, 873 F.2d 402, 406 (D.C. Cir. 1989); *Watford v. Heckler,* 765 F.2d 1562, 1567 n. 6 (11th Cir. 1985). Similarly, an EAJA award has been found appropriate where the prevailing party is an attorney appearing pro se. *Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989).

Congress' intent to eliminate the financial disincentive to challenge unreasonable government actions. *See Jean*, 496 U.S. at 164 (citing *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989)); *Owner-Operator Indep. Drivers* Ass'n, 675 F.3d at 1040 (citing *Krecioch v. United States*, 316 F.3d 684, 686 (7th Cir. 2003)); *Sullivan v. Hudson*, 490 U.S. 877, 883–84 (1989)); *see also Comserv,* 908 F.2d at 1414–15 ("EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists."); *Paisley*, 957 F.2d at 1164 (recognizing that whether an award serves EAJA's purpose in avoiding deterrence is the "critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense"). The undersigned agrees with that practical approach because it is consistent with the purpose of the statute and its legislative history.

> Congress prefaced the EAJA with this statement of its findings and purposes:
>
> (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.
>
> (c) It is the purpose of this title-
> (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and
> (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

Congressional Findings and Purposes, note following 5 U.S.C. § 504. Furthermore, the Committee Reports of both the House and Senate reflect the concerns of providing access for eligible individuals, partnerships, corporations, and labor or other organizations, for whom cost may be a deterrent to vindicating their rights, and improving government policies by helping to assure that administrative decisions reflect informed deliberation. H.R. Rep. No. 96-1418, at 10 (1980); S. Rep. No. 96-253, at 7 (1979).

In this case, I conclude that the primary purpose of EAJA to eliminate the financial disincentive to challenge unreasonable government action would not be served by awarding fees and expenses to Signature. Denial of Signature's attorney fees and expenses would not remove any financial disincentive for Signature to challenge MSHA's overbroad imminent danger Order because Signature was contractually promised and received full reimbursement for contesting

MSHA's action. In this regard, I find the Fourth Circuit's reasoning and holding in *Paisley*, relied on by the Secretary, to be persuasive here.

> To hold that a prevailing party with an unconditional legal right to indemnification of its attorney fees by a manifestly solvent third party might nevertheless qualify for an EAJA award because indemnification had not yet occurred is unacceptable for several reasons. . . . [S]uch a holding would not in fact serve a principal purpose of the EAJA: to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government. The EAJA provides for fee-shifting precisely to avoid this result. Consequently, in any situation in which the eligibility of a particular prevailing party for an EAJA award is in issue, it is appropriate to inquire whether that party would, as a practical matter, have been deterred from litigating had it been known that a fee-shifting award was not available upon a successful conclusion. If that question is asked here, it is obvious that appellees, all but one of whom were funded by an advance which by contract they need not refund if they prevailed in litigation, would not have been deterred had the EAJA not then existed. This is the critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense.
>
> Accordingly, we hold that, to effectuate the purposes of the EAJA, a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act.

957 F.2d at 1164 (internal citations omitted).[14]

The prevailing parties in *Paisley* were denied fees because they were indemnified per statute by a third party with no obligation of repayment. Signature attempts to blunt *Paisley* by reliance on the Federal Circuit's decision in *Wilson,* where the Federal Circuit found that denying EAJA fees to a prevailing small business that had been indemnified by its liability insurer "would thwart the Act's purpose of deterring unreasonable governmental action." *Wilson,* 126 F.3d at 1410. Signature relies heavily on *Wilson* to support its argument that it incurred fees for EAJA purposes.

The *Wilson* court emphasized that it had previously awarded EAJA fees to prevailing parties who had no obligation to pay any fees to their attorneys, such as those represented pro

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[14] The issue in *Paisley* was whether the prevailing parties, former Boeing employees, had "incurred" fees for the purposes of the EAJA when a Delaware state statute required Boeing to indemnify them if they successfully defended against the underlying government suit. Since Boeing paid the former employees an advance to cover the fees, the prevailing parties argued that the indemnification had actually been a "mere" possibility, because Boeing could have, in theory, demanded repayment from the employees in the event that they lost the suit. The Fourth Circuit, however, rejected that argument as inconsistent with the purpose of EAJA and found the prevailing parties to be ineligible for fees. 957 F.2d at 1164.

bono or by union counsel.[15] The Federal Circuit was unable to discern any material distinction between those cases and Wilson's case since in each instance the litigant paid a third party in advance for the benefit of legal representation as a component of union dues or insurance premiums, and incurred no additional obligation of payment to counsel. *Id.* at 1409–10. The *Wilson* court reasoned that denying the EAJA application "would neither remove the financial disincentives of litigating against the government nor deter the government's unreasonable denial of minor claims filed by its small business contracting partners." *Id.* at 1410. Rather, the court reasoned as follows:

> Denying a small business, which in its keen acumen has obtained insurance to insulate itself from liability for accidents during contract performance, and thus from potential insolvency, an award of fees for the attorney services that it procured as part of its policy would thwart the Act's purpose of deterring unreasonable governmental action. In fact, it would act as an incentive to deny meritorious claims, thereby requiring the small business to litigate. If the small business has insurance, the government could deny the contractor's claim and litigate any appeal of the denial without any pecuniary risk. Even if the contractor were to win the appeal, there would be no award of attorney fees. The government could act unreasonably not only in its initial denial of the small business' claim but also during the litigation of the appeal, confident in the knowledge that it will be exposed to no attorney fee award.

Id. Whereas the Fourth Circuit in *Paisley* focused on the EAJA's primary purpose of eliminating financial disincentives for eligible parties who would defend against unjustified government action, the Federal Circuit in *Wilson* emphasized Congressional intent to deter unreasonable action by encouraging agencies to police their enforcement and litigation activities.

B. This Case is Factually More Analogous To, and Legally More Consonant With, *Paisley* than *Wilson*; Accordingly, Signature Did Not Incur Fees Within the Meaning of the EAJA

1. Pre-Bankruptcy Fees

This case is more factually akin to and legally consonant with *Paisley* than *Wilson* before Patriot filed for bankruptcy. In *Paisley*, the employer indemnified its former employees pursuant to a legal obligation imposed by state statute. Similarly, in this case, Jarrell's Branch reimbursed Signature for legal fees pursuant to contractual obligation. Both Signature and the prevailing parties in *Paisley* had a legally enforceable right to full indemnification or reimbursement of attorney fees from a solvent third party and therefore would not be deterred by liability for attorney fees and expenses from challenging the government's action had the EAJA

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[15] *See Devine v. Nat'l Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986); *Goodrich v. Dept. of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984) (construing 5 U.S.C. § 7701(g)(1)); *see also Nat'l Treasury Employees Union v. Dept. of Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (construing 5 U.S.C. § 552a(g)(3)(B) (1976)).

not then existed. This is the critical concern underlying the EAJA precondition that the fee applicant "incurred" the expense. *Paisley*, 957 F.2d at 1164.

The prevailing parties in *Paisley* were former employees who never incurred or paid insurance premiums. Similarly, Signature never incurred attorney's fees and expenses in the underlying MSHA contest proceeding since Jarrell's Branch reimbursed Signature.

By contrast, the prevailing party in *Wilson* actually paid for its own indemnification in the form of monthly insurance premiums. *Wilson* specifically involved a fixed-price contract between Wilson and the General Services Administration for the remodeling of a federal building. During the remodel, a sprinkler line broke and caused damage to the building's interior. Wilson denied responsibility, but complied with the GSA officer's instruction to repair the damage. The GSA denied Wilson's subsequent claim to cover the additional cost of the repair. Wilson then submitted a claim to its third-party liability insurer, and received an "interest-free loan" that partially covered the cost of the repairs. The loan was "repayable only in the event and to the extent of any net recovery [Wilson] may make from any [party] causing or liable for the loss or damage to the property." *Wilson*, 126 F.3d at 1407. In exchange, Wilson assigned to its insurance carrier any claim against the government, any potential recovery, and the authority to appeal GSA's denial of its claim to the GSA Board of Contract Appeals. Although the appeal was filed in Wilson's name, the insurance carrier had exclusive direction and control of the appeal and covered all the expenses related to the proceeding. *Id.*

The *Wilson* court equated the monthly premiums with prepaying attorneys' fees in advance, and reasoned that Wilson had effectively "incurred" fees under the EAJA. *Id.* at 1411, n.4. In other words, "the insurance premiums are the fee that the insured pays for the insurance company's defense of his case. . . . [T]he cost of defense, to the extent borne by the insurance company, is a cost that the insured has paid for, just as he would have paid a lawyer for his defense had he had no insurance." *Thouvenot,* 596 F.3d at 383 (discussing the reasoning in *Wilson*). In that context, denying Wilson EAJA fees would almost certainly increase insurance premiums, thereby "reintroduc[ing] the cost of litigation as a factor in the small business' decision whether to contest governmental action it deems unreasonable." *Wilson*, 126 F.3d at 1411. As a consequence, "the small business would have to decide whether it is worth the increased premiums, which it will incur regardless of whether it prevails, to challenge the government." *Id.*

Thus, courts have found that an award of attorney fees under the EAJA could properly include fees incurred by the prevailing party's liability insurer because liability insurance is essentially a contingent loan. The insured pays premiums in exchange for the promise that the insurance company will bear the cost of the insured's defense (subject to a deductible) if the insured is sued on a claim that the policy covers, and to minimize the premiums, the insured agrees to repay that cost to the extent it is covered by an award of attorney fees under EAJA. *Thouvenot,* 596 F.2d at 383.

Signature contends that the relationship between Jarrell's Branch and Signature is analogous to that between the insurance carrier and the insured in *Wilson.* Signature argues that its compensation and other benefits under the Contract Mining Agreement were directly related

to Jarrell's Branch's obligation to reimburse Signature for operating costs. Signature's Mot. Summ. J. 13; Stipulated Fact No. 11. Moreover, Signature argues that it assumed the risk that Jarrell's Branch would not be able to reimburse the fees and costs it owed to Signature. Signature further argues that this reduced compensation and the assumed risk for failure to reimburse constitute forms of consideration paid in exchange for Jarrell's Branch's agreement to pay the mine's operating costs. Signature's Mot. Summ. J. 13–14.[16] This consideration, Signature contends, is analogous to the insurance premiums paid in *Wilson* and does not bar Signature from recovering fees under the EAJA. Signature's Mot. Summ. J. 14.

Signature's arguments are not persuasive. Lower compensation and assumption of risk are not explicitly mentioned as forms of consideration in the Contract Mining Agreement. *See* Resp't Ex. 21, at 1; Signature's Mot. Summ. J. 8, Stipulated Facts Nos. 11-12. Likewise, Signature's argument that the historical costs of operating the mine would be an important factor in negotiating Signature's future compensation should there have been an extension or renewal of the Agreement is not certain and is not explicitly mentioned in the Agreement. *See* Signature's Mot. Summ. J. 8, Stipulated Fact No. 13. The Federal Circuit in *Wilson* specifically noted that denying Wilson fees would almost certainly increase Wilson's monthly insurance premiums and thereby reintroduce the cost of litigation as a factor in Wilson's decision to contest the government action. *Wilson,* 126 F.3d at 1411. By contrast, Signature's argument that the costs of defending against Order No. 8126005 would "necessarily result in a reduction of [its] compensation" in the event that Signature renegotiates the contract with Jarrell's Branch is speculative, at best. The undersigned is unconvinced that such speculative reduction in future compensation is akin to the more certain increase in insurance premiums that concerned the Federal Circuit in *Wilson.* Signature's Mot. Summ. J. 17.

On the other hand, the Contract Mining Agreement does explicitly reference safety bonus payments payable to Signature. Signature was entitled to a $2,000 per month safety bonus if Signature and its contractors had zero lost time accidents during a calendar month. In addition, Signature was eligible for an additional monthly $2,000 safety bonus if its MSHA violations per inspection day were between 1.0 and 1.4 each calendar month. If Signature's MSHA violations per inspection day were less than 1.0, the safety bonus increased to $3,000. Resp't Ex. 21, ¶ 20(c). In my view, these bonuses appear to negate Signature's argument that it agreed to lower

[16] The Contract Mining Agreement states that the parties are contracting "for and in consideration of undertakings and agreements set forth, and other good and valuable consideration not fully set forth herein, the sufficiency of which is acknowledged." Resp't Ex. 21, at 1. Under the Agreement, Signature was generally responsible for mining and transporting the coal to the preparation facility, maintaining a comprehensive general liability insurance policy, and obtaining the required state and federal operator identification numbers. Resp't Ex. 21, at ¶ 1, ¶ 16, ¶ 18. In exchange, Jarrell's Branch retained title to the coal mined by Signature, covered all operating costs of the mine (including certain penalty assessments and attorneys' fees and costs incurred in Commission proceedings), and granted Signature the use of the equipment and premises to mine the coal. Resp't Ex. 21, at ¶ 4, ¶ 7, ¶ 18, ¶ 3. Based on these contractual provisions, Signature argues that it "clearly paid consideration in the form of reduced compensation and the risk of bankruptcy in exchange for Jarrell's Branch's agreement to pay the costs of operating the mine." Signature's Mot. Summ. J. 14.

compensation in exchange for Jarrell's Branch's obligation to cover its operating costs. Furthermore, the risk that Jarrell's Branch might fail to fulfill the terms of its contract due to bankruptcy is inherent in any contract, and such an assumption of insolvency risk is not a particular form of consideration under the Contract Mining Agreement with Jarrell's Branch. In short, Signature's arguments regarding contractual exchanges of consideration are speculative, illusory and much less persuasive than the bargained-for insurance exchange in *Wilson*.

More importantly, even were the undersigned persuaded that Signature's lower compensation and assumption of risk were particular forms of consideration, Signature's reliance on *Wilson's* insurance contract analogy for an award of EAJA fees is still misplaced. The relationship between Signature and Jarrell's Branch is not analogous to the relationship between Wilson and its insurance carrier. The *Wilson* court specifically recognized that "the insurance premiums are the fee that the insured pays for the insurance company's defense of his case. . . . [T]he cost of defense, to the extent borne by the insurance company, is a cost that the insured has paid for, just as he would have paid a lawyer for his defense had he had no insurance." *Thouvenot*, 596 F.3d at 383 (discussing the insurance premiums at issue in *Wilson*). The petitioner in *Wilson* received a reimbursement designated as an interest-free loan from its third-party insurance carrier to cover the costs of its initial claim against the government. In consideration of that loan, Wilson assigned its right to pursue an EAJA action and any subsequent award to its insurer. *Wilson,* 126 F.3d at 1407. Signature's Mot. Summ. J. 9, Stipulated Fact No. 13. Unlike *Wilson*, there is no right of subrogation here under which Signature assigned its right to pursue an EAJA action to Jarrell's Branch, thereby allowing Jarrell's Branch to pursue third party MSHA for attorney's fees and costs that Jarrell's Branch has already paid Signature. Also unlike *Wilson*, Signature retained the responsibility for controlling the underlying contest litigation at all times. Otherwise, Jarrell's Branch would be found to be an EAJA-ineligible stand-in litigant. Accordingly, I find *Wilson* inapposite.

Rather, the Fourth Circuit's rationale in *Paisley* is more persuasive on these facts. *Paisley* precludes an award of fees to parties with a legally enforceable right to full indemnification from solvent third parties because such awards do not advance the primary purpose of the EAJA to diminish the deterrent effect of defending against governmental action. *Paisley*, 957 F.2d at 1164. Because Signature no longer has any outstanding attorneys' fees associated with the underlying contest proceeding, any such fees awarded would not further the EAJA's purpose of diminishing the deterrent effect of defending against governmental action. Since Signature was fully reimbursed by Jarrell's Branch for fees incurred in challenging the contest proceeding, Signature was not deterred from defending against MSHA's prosecution of the overbroad imminent danger order. Rather, awarding fees for the contest proceeding for which Signature already has been reimbursed by Jarrell's Branch would constitute a windfall for Signature. *See Jeroski*, 697 F.3d at 656. Accordingly, on the instant record, the undersigned concludes that an award of EAJA fees is contrary to the primary purpose of the EAJA to eliminate the financial disincentive to challenge unreasonable governmental actions for eligible parties. H.R. Rep. No. 99-120, at 4; *Jean*, 496 U.S. at 163 (*citing Sullivan,* 490 U.S. at 883).

The undersigned also concludes that the secondary or dual purpose of the EAJA is not materially advanced by an award of fees here. That purpose is to ensure the applicability of the common law and statutory exceptions to the "American rule," which generally provides that each

party pays its own attorneys' fees, but allows an award of fees against a party who has acted under common law in bad faith or to preserve a common fund, or when a statute, such as EAJA, provides that fees may be awarded. *See supra* text accompanying note 10; *see also* H.R. Rep. 99-120, at 5. Although EAJA provides fees when, as here, the government's position is not substantially justified, I conclude that any EAJA statutory exception to the American rule is subservient to the primary purpose of EAJA, which as explained above, has not been advanced here where Signature has not "incurred" fees under the EAJA statute because it has not been deterred from challenging MSHA given reimbursement from Jarrell's Branch. Accordingly, I find any statutory exception to the American rule inapplicable here. Nor has the common fund exception under common law been advanced here because Signature's contest proceeding did not have the effect of preserving or recovering a common fund for the benefit or equitable trust of others. Finally, the common law bad-faith exception to the American rule is inapposite. Although the federal government (MSHA) may be subject to punitive awards for bad faith, *see e.g., Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991), such bad faith is a narrow basis for recovery and may be "imposed only in exceptional cases and for dominating reasons of justice." *Havrum v. United States*, 204 F.3d 815, 819 (8th Cir. 2000) (citing *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990)). The EAJA's "not substantially justified" standard is less stringent than the bad faith required for punitive damages. Here, the Secretary's insistence on an overbroad imminent danger order during pre-litigation through settlement does not rise to the level of "vexatious, wanton, or oppressive" conduct necessary for a finding of bad faith. *Zahareas*, 374 F.3d at 630 (citing *Brown*, 916 F.2d at 495).

Finally, the undersigned is not persuaded that awarding EAJA fees would deter unreasonable government action. In the circumstances of this case, I find more compelling the Secretary's argument that allowing Signature to recover fees for which it has already been reimbursed by Jarrell's Branch would be an impermissible windfall for Signature for pursuing an overly broad imminent danger order to voluntary settlement prior to any litigation. *Jeroski*, 697 F.3d at 656. The stated Congressional intent behind the EAJA is ameliorative, not punitive. EAJA was enacted to remove the financial disincentives that small businesses face when litigating against the government and to concurrently "impose the risk of a fee award that must be paid by the agency as an incentive to police their enforcement and litigation activities so that only well-founded cases would be litigated." *See 329.73 Acres of Land in Grenada & Yalobusha Counties*, 704 F.2d at 802. Those purposes are not advanced here.

Accordingly, I find that Signature is not eligible to recover EAJA fees related to the underlying contest proceeding and is therefore not entitled to the full $80,004.37 requested in its EAJA application. The Fourth Circuit standard in *Paisley*, which I find most instructive here, does not permit an award of fees to Signature because Signature received full reimbursement for the contest proceeding from Jarrell's Branch and any additional award would not advance the primary purpose of the EAJA to diminish the deterrent effect of defending against MSHA's action. *See Paisley*, 957 F.2d at 1164. When initiating its underlying contest proceeding, Signature knew that Jarrell's Branch had a contractual obligation to reimburse Signature for any costs it might incur, except for intentional misconduct or gross negligence attributable to Signature or its agents. *See* Resp't Ex. 21, ¶ 18. Therefore, since no intentional misconduct or gross negligence has been alleged by MSHA, Signature suffered no deterrent effect from the

costs of litigation, which might have dissuaded Signature from defending against the breadth of imminent danger Order No. 8126005 to voluntary settlement short of actual litigation.

2. Post-Bankruptcy Fees

The Fourth Circuit's holding in *Paisley* referred explicitly to a legally-enforceable right to indemnification from *solvent* third-parties. *Paisley,* 957 F.2d at 1164. It is arguable that *Paisley* does not apply after the third-party indemnifier becomes insolvent. Accordingly, after Patriot's July 2012 bankruptcy filing, the Eighth Circuit's decision in *Securities & Exchange Commission v. Zahareas*, 374 F.3d 624 (8th Cir. 2004), is instructive because it addresses the issue of reimbursement of EAJA fees post-bankruptcy.

Zahareas involved a prevailing party whose employer agreed to pay his attorneys' fees in the underlying litigation. Prior to doing so, however, the corporation filed for bankruptcy. The Eighth Circuit found that since the obligation to pay the attorneys' fees passed to the prevailing party upon the corporation's dissolution, the prevailing party had incurred the attorneys' fees for the purposes of the EAJA. *Zahareas*, 374 F.3d at 631. Signature argues that like the respondent in *Zahareas*, it has incurred fees in spite of Jarrell's Branch's contractual obligation to reimburse it for fees. Signature's Mot. Summ. J. 17.

I disagree. A key factor in *Zahareas* was that the employer's bankruptcy prevented fulfillment of its obligation to pay respondent's attorney fees, and respondent then became responsible for payment. *Zahareas*, 374 F.3d at 631. That is clearly not the case here. Prior to Patriot's bankruptcy, Jarrell's Branch reimbursed Signature for all the fees and expenses incurred in the contest proceeding regarding Order No. 8126005 and part of the fees incurred in the EAJA application. *See supra*, note 6. Thus, Patriot's bankruptcy had no effect on Jarrell's Branch's fulfillment of its contractual obligation to reimburse Signature for fees related to the underlying contest proceeding and the pre-bankruptcy EAJA fees.[17] Regarding the outstanding $40,214.78 related to Signature's EAJA action after Patriot's July 9, 2012 bankruptcy, Signature and Patriot entered into a Settlement and Release Agreement that resolved Signature's allowed claims in the amount of $164,687 (Exhibit B) and released Patriot from any further liability.[18]

Furthermore, the undersigned finds that Signature is not entitled to reimbursement for post-bankruptcy fees concerning pursuit of the EAJA litigation because Signature was not entitled to reimbursement for EAJA fees for the underlying contest proceeding. That is, but for the contest proceeding for which EAJA fees have been denied, additional fees for pursuing the EAJA litigation would not have been incurred. In short, a party cannot obtain EAJA fees for

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[17] Signature filed its EAJA application on January 9, 2012, and Patriot filed for bankruptcy on July 19, 2012. As previously noted, Jarrell's Branch reimbursed Signature for all contest proceeding fees and costs and part of its EAJA litigation costs, prior to Patriot's bankruptcy filing.

[18] See Settlement and Release Agreement, In re Patriot Coal Corp., et al., No. 12-51502-659 (Bankr. E.D. Mo. January 16, 2014), available at https://cert.gardencitygroup.com/pcx/fs/viewreconPdf?fileName=Signature%20Mining.

pursuing an EAJA application when it is not entitled to EAJA fees for the underlying action on the merits.

A. Alternatively, Special Circumstances Warrant Denial of EAJA Fees After Patriot's Bankruptcy

Alternatively, the undersigned finds that even if un-reimbursed fees for pursuing the EAJA litigation were incurred by Signature within the meaning of the statute, special circumstances make an EAJA award unjust. As noted, EAJA provides for the award of attorneys' fees and other expenses to a prevailing party against the United States or an agency thereof, unless the position of the government was substantially justified or *that special circumstances make an award unjust.* 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 29 C.F.R § 2704.100. The undersigned finds in the alternative that special circumstances make an award of any un-reimbursed EAJA fees incurred by Signature after Patriot's bankruptcy unjust.

During the additional discovery conducted after my August 30, 2014 Decision and Order, Signature's counsel produced a redacted copy of the Contract Mining Agreement between Signature and Jarrell's Branch. The redacted portions included Jarrell's Branch's obligation to reimburse Signature for certain fees and costs incurred in Commission proceedings. The Secretary subsequently found an un-redacted copy of the Agreement on the Patriot Coal bankruptcy website, which had been filed on July 31, 2013, in support of Signature's bankruptcy claims against Jarrell's Branch.[19] Prior to finding the un-redacted copy, the Secretary had been unaware of Jarrell's Branch's reimbursement obligation. After the Secretary notified Signature's counsel of his discovery, Signature's counsel admitted that Signature had been partially reimbursed for attorneys' fees and costs. Secretary's Mot. Summ. J. 10, n.6.

Signature argues that counsel proceeded in good faith by redacting confidential business information from the contract. Signature further argues that Paragraph 34 of the Contract Mining Agreement requires prior consent of the parties or a court order to disclose confidential material, and that Signature would have been subject to a breach of contract claim had it produced the un-redacted content without a court order compelling production.[20] Signature also

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[19] *See* Amended Proof of Claim No. 1394, *supra* notes 2 and 6. Filings in bankruptcy proceedings are public records open for examination. *See* 11 U.S.C. § 107(a) (2013). The Contract Mining Agreement became a public record on July 31, 2013 when Signature filed it in support of its bankruptcy claim. *See* Amended Proof of Claim No. 1394, *supra* note 2.

[20] Paragraph 34 states that

> Owner and Contractor agree with each other that both shall treat . . . information relating to the other party or Owner's and Contractor's business operations as confidential and shall not divulge, transmit, or otherwise disclose any such information received without first obtaining prior written consent of the other party unless such information is required by any governmental agency or court of law pursuant to due process of law.

Resp't Ex. 21.

argues that the headings of the redacted paragraphs 17, 18, and 20 were left intact to allow the Secretary to evaluate the nature of the redacted material and file a motion to compel if he so chose. Signature's Resp. to Secretary's Mot. Summ. J. 4.

I find Signature's arguments unconvincing. As noted, the un-redacted Contract Mining Agreement became a public record on July 31, 2013 when Signature filed it in support of its bankruptcy claim. *Cf., Foster-Miller, Inc., v. Babcock & Wilcox Canada*, 210 F.3d 1, 10 (1st Cir. 2000) (jury instructions providing that "[i]nformation ... readily known or knowable to the interest of the public cannot ... be made confidential simply by slapping it with a restrictive label"). In these circumstances, I find Signature's confidentiality arguments disingenuous and waived by public revelation.

Further, even assuming no waiver of Signature's confidentiality claim by public disclosure, the undersigned is not persuaded that the headings of the redacted paragraphs were sufficient to allow the Secretary a fair opportunity to evaluate the nature or potential relevancy of the redacted materials. For example, un-redacted paragraph 16 is titled "Indemnification," redacted paragraph 17 is titled "Fines or Penalties," redacted paragraph 18 is titled "MSHA and WVOMHST Identification Numbers Number: MSHA and WVOMHST Assessments," and redacted paragraph 20 is titled "Compensation." Despite un-redacted paragraph 16's title of "Indemnification," it is redacted paragraph 17 that requires Jarrell's Branch to reimburse Signature for the penalties and assessments at issue, and it is redacted paragraph 18 that requires Jarrell's Branch to reimburse Signature for reasonable attorneys' fees and costs incurred in the contest proceeding. Since no reimbursement obligations regarding MSHA penalties and attorneys' fees were referenced in the paragraph headed "Indemnification," the Secretary's review of un-redacted paragraph 16 and the titles of redacted paragraphs 17 and 18 could reasonably have led the Secretary to believe that no such obligations existed. Redacted paragraph 20, titled "Compensation," contained the terms under which Signature was entitled to bonus payments from Jarrell's Branch for Signature's safe operation of the mine. Resp't Ex. 21, ¶ 20. In these circumstances, I conclude that the Secretary had justifiable grounds for failing to file a motion to compel discovery under Commission Procedural Rule 59.[21]

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[21] Commission Procedural Rule 59 governs discovery disputes:

> Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery *may* file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

29 C.F.R. §2700.59 (2013) (emphasis added).

In short, the redactions of paragraphs 17, 18, and 20 contained contractual obligations between Signature and Jarrell's Branch that were central to the Secretary's case against Signature's application for EAJA fees. Signature should have realized that these contractual obligations were responsive to the Secretary's discovery request and relevant to the remaining issues as defined in my August 30, 2013, Decision and Order, as amended on December 6, 2013. Rather than redacting allegedly confidential but relevant facts for fear of breaching the terms of the Agreement, the more appropriate course for Signature would have been to work with the Secretary toward a mutually agreeable accommodation that would protect the confidentiality of the purportedly sensitive information, after disclosure. *See* Fed. R. Civ. Proc. 26(c)(1)(G); *cf.*, *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (citing *Minnesota Mining & Mfg., Co.*, 261 NLRB 27 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983)). If Signature's counsel and the Secretary had been unable to reach such an accommodation, Signature could have filed a motion for a protective order, a motion for *in camera* review, or a motion to file the allegedly confidential information under seal.[22] Rather, Signature chose to hide the ball.

In these circumstances, the undersigned finds in the alternative that Signature's failure to disclose the nature of its contractual reimbursement agreement with Jarrell's Branch during discovery constitutes special circumstances that make an EAJA award for *unreimbursed* fees and costs after Patriot's bankruptcy unjust. *See* 5 U.S.C. § 504(a)(1).

VI. Conclusion and Order

Having reviewed the record, cross motions, and supporting briefs, the undersigned finds this matter appropriate for summary decision. The undersigned finds as a matter of law that there are no material facts that preclude summary judgment from being entered against Signature. Having evaluated the arguments presented by each party and having applied the relevant law, the undersigned finds that the Secretary has met his burden of proof and is entitled to summary disposition denying any award of EAJA fees.

WHEREFORE,

Pursuant to the stipulations agreed to by Signature and the Secretary in their Cross Motions for Summary Judgment, Signature's Motion to Supplement the Record is **GRANTED**.

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[22] Signature's counsel inadvertently disclosed Signature's balance sheet, which contains confidential business information, as Exhibit 5 attached to Signature's Application for Fees and Costs under the EAJA. The balance sheet thus became part of the public record in this proceeding. Signature's counsel moved to seal Exhibit 5, and the undersigned granted that motion. Signature's counsel is therefore well aware of this tribunal's ability and willingness to protect from public disclosure alleged confidential, albeit relevant documents. *See* Signature's Mot. Seal.

For the reasons set forth above, Signature's Motion for Summary Judgment is **DENIED**. The Secretary's Motion for Summary Judgment is **GRANTED**, and it is **ORDERED** that each party bear their own costs.

Thomas P. McCarthy
Administrative Law Judge

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