

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No. 10-2676 and 10-3599

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MENOMINEE TRIBAL ENTERPRISES,  
MARSHALL PECORE, and  
CONRAD WANIGER,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

THE HONORABLE WILLIAM C. GRIESBACH  
UNITED STATES DISTRICT JUDGE, PRESIDING

Case No. 07-CV-316

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BRIEF OF PLAINTIFF-APPELLEE

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES. ....	ii
JURISDICTIONAL STATEMENT. ....	1
STATEMENT OF THE ISSUES. ....	2
STATEMENT OF THE CASE. ....	3
STATEMENT OF FACTS. ....	6
SUMMARY OF THE ARGUMENT. ....	18
ARGUMENT. ....	19
A.    The district court did not abuse its discretion when it found the position of the government substantially justified. . ....	19
1.    The district court correctly understood that the Plaintiff bears the burden of showing by a preponderance of the evidence that its position was substantially justified. ....	20
2.    After properly allocating the burden of persuasion, the district court thoroughly analyzed the government’s litigation position and did not abuse its discretion when it found the position substantially justified.. ....	23
B.    The district court did not abuse its discretion when it denied Defendants’ request to sanction the Plaintiff pursuant to Rule 37(c)(2). ....	33
CONCLUSION. ....	36
CERTIFICATE OF SERVICE. ....	37

## TABLE OF AUTHORITIES

### Page

### CASES

<i>Collins v. Illinois</i> , 554 F.3d 693 (7th Cir. 2009) .....	34
<i>Conrad v. Barnhart</i> , 434 F.3d 987 (7th Cir. 2006). ....	24
<i>Fednav International, Ltd., v. Continental Insurance Company</i> , 624 F.3d 834 (7th Cir. 2010) .....	19
<i>Insurance Benefit Administrators, Inc. v. Martin</i> , 871 F.2d 1354 (7th Cir. 1989).....	33
<i>Johnson v. Kakvand</i> , 192 F.3d 656 (7th Cir. 1999). ....	34
<i>Pierce v. Underwood</i> , 487 U.S. 552 (1988).....	23, 32
<i>Popeil Bros. v. Schick Electric, Inc.</i> , 516 F.2d 772 (7th Cir. 1975). ....	33
<i>U.S. v. Thouvenot, Wade &amp; Moerschen, Inc.</i> , 596 F.3d 378 (7th Cir. 2010). ....	20-23, 32
<i>United States ex rel. Davis v. Dyna Corp.</i> , 1994 WL 48316 (9th Cir. 1994) .....	31, 32
<i>United States ex rel. Durcholz v. FKW, Inc.</i> , 189 F.3d 542 (7th Cir. 1999).....	31

### STATUTES

Title 28, United States Code, Section 2412(d)(1)(A).....	19
Title 31, United States Code, Section 3729(a)(1). ....	3
Title 31, United States Code, Section 3729(a)(2). ....	3

**OTHER AUTHORITIES**

Federal Rule of Civil Procedure 26 . . . . .	14
Federal Rule of Civil Procedure 37 . . . . .	4, 5, 18, 33-36
Federal Rule of Civil Procedure 37(c)(2) . . . . .	2, 17, 33



## **JURISDICTIONAL STATEMENT**

The Defendants-Appellants Marshall Pecore's and Conrad Waniger's (hereinafter "Defendants," "Pecore," or "Waniger") jurisdictional statement is complete and correct.<sup>1</sup>

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<sup>1</sup>While it does not affect this Court's jurisdiction, the clerk of the district court taxed the Bill of Costs against the Plaintiff on July 16, 2010, and not on July 27, 2010, as stated by the Defendants in their jurisdictional statement.

**STATEMENT OF THE ISSUES**

1. Whether the district court abused its discretion when it found the Plaintiff substantially justified in its litigation position and denied the Defendants' request for attorney's fees pursuant to the Equal Access to Justice Act.
2. Whether the district court abused its discretion when it denied the Defendants' request to sanction the Plaintiff pursuant to Rule 37(c)(2) of the Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

On April 3, 2007, the Plaintiff filed its Complaint alleging False Claims Act (“FCA”) violations against three defendants: Menominee Tribal Enterprises, the principal business arm of the Menominee Indian Tribe of Wisconsin (“MTE”), Marshall Pecore, MTE’s Forest Manager, and Conrad Waniger, MTE’s Fire Management Officer. (R. 1).<sup>2</sup> As to Defendants Pecore and Waniger, the Complaint alleged one count in violation of 31 U.S.C. § 3729(a)(1), which imposes liability on any person who knowingly presents a false or fraudulent claim for payment to the United States. *Id.* Pecore and Waniger were also named in a separate count alleging violations of 31 U.S.C. § 3729(a)(2), which imposes liability on any person who knowingly makes a false or fraudulent record or statement in order to induce the United States to pay money. *Id.*

After all the parties answered the Complaint, they unsuccessfully attempted to mediate their dispute. (R. 41). Thereafter, a protracted period of discovery ensued coupled with the filing of various dispositive motions. On June 25, 2008, MTE filed its Motion for Judgment on the Pleadings, and on July 8, 2008, filed its Motion for Summary Judgment. (R. 133, 157). The Plaintiff filed its Motion for Summary Judgment on July 18, 2008, and Pecore and Waniger filed their Motion for Summary Judgment on July 19, 2008. (R. 165, 179). On January 16, 2009, the district court granted MTE’s Motion for Judgment on the Pleadings, holding that a tribal entity is not a “person” within the meaning of the FCA and

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<sup>2</sup>In this brief, “R” followed by a number refers to an entry on the district court docket sheet.

applying a one-year statute of limitations period to the breach-of-contract claim, effectively dismissing MTE from the case. (R. 257). The district court denied the Motions for Summary Judgment filed by the Plaintiff and by Defendants Pecore and Waniger. *Id.*

The case then proceeded to a jury trial against Pecore and Waniger, commencing on October 19, 2009, and concluding on October 29, 2009, with a jury verdict in favor of the Defendants. (R. 340, 342). Following the trial, on November 16, 2009, Pecore and Waniger filed a motion for a Bill of Costs to be taxed against the government and the government filed its objections to the Bill of Costs on December 2, 2009. (R. 350, 358). On July 16, 2010, the Chief Deputy Clerk issued the taxed costs against the government in favor of the Defendants. (R. 390). On July 22, 2010, the Plaintiff filed its motion to the district court requesting review of the issued Bill of Costs and on August 13, 2010, the Defendants filed their response to the motion seeking review. (R. 392, 396, 397). On October 1, 2010, the district court issued its Decision and Order modifying the costs awarded to Pecore and Waniger. (R. 398).

Pursuant to the district court's scheduling order, on February 1, 2010, Defendants Pecore and Waniger filed their Motion for Taxation of Costs Pursuant to the Equal Access to Justice Act ("EAJA") and for sanctions against the Plaintiff pursuant to Rule 37 of the Federal Rules of Civil Procedure. (R. 370). The Plaintiff filed its brief in opposition to the Defendants' motion on March 3, 2010, and the Defendants filed their reply brief on April 7, 2010. (R. 379, 380, 383). On June 15, 2010, the district court issued its Decision and Order denying the Defendants' Motion for Attorney's Fees under EAJA and for sanctions

pursuant to Rule 37. (R. 374). The Defendants filed their Notice of Appeal on July 14, 2010. (R. 385). The Defendants filed an Amended Notice of Appeal on November 4, 2010, seeking to also appeal the district court's October 1, 2010 Decision and Order modifying the cost award. (R. 400).

By Order dated November 8, 2010, this Court consolidated both appeals for purposes of briefing and disposition. The Defendants now only pursue appellate review of the district court's July 14, 2010 Decision and Order denying their Motion for Attorney's Fees under EAJA and for sanctions pursuant to Rule 37.

## STATEMENT OF FACTS

On April 3, 2007, the Plaintiff filed a civil action against three Defendants: MTE; Marshall Pecore, MTE's Forest Manager; and Conrad Waniger, MTE's former Fire Management Officer. (R. 1). Counts I and II of the Complaint sought to recover damages and civil penalties under the FCA against all three Defendants. *Id.* The Plaintiff alleged in the Complaint, *inter alia*, that the Defendants violated the FCA by knowingly presenting, or causing to be presented, false claims for fire prevention work which MTE did not perform, or which failed to achieve any fire prevention benefit. *Id.*

The facts underlying the allegations in the Complaint and pursued through trial, centered around MTE's presentation, in 2001 and 2002, of a series of invoices to the Bureau of Indian Affairs ("BIA") for payment under the Hazardous Fuels Reduction Program ("HFR"). (R. 1; Tr. 135-149, 161-165).<sup>3</sup> The HFR Program was implemented as a long range effort for the reintroduction of fire in fire dependent ecosystems. (Tr. 125-126, 128-130, 175-177; Exh. 40). The goal of the HFR Program is to reintroduce fire back to its natural role on the landscape, reduce the unnatural fire densities that exist and subsequently reduce the severity of future wildland fires. *Id.* Two project proposals, both drafted and submitted by Pecore and Waniger, pertained to the HFR Program. (Tr. 113-115; 126-129). Under the proposals, MTE represented that it would create fuel breaks in fire prone areas of the forest by removing vegetation through brushing and turning up the mineral soil through disking. (Tr. 114-116, 126-132; Exhs. 10, 11). A fuel break is often created along the side of a road.

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<sup>3</sup>In this brief, "Tr." followed by a number refers to a page in the trial transcript.

(Tr. 116-118, 493-494). It is intended to create clear spaces of sufficient width to provide a defensible area for fire fighters to fight a forest fire. (Tr. 177-178, 494-495, 497-499; Exh. 40). The objective of brushing is to remove the brush alongside the road to improve the probability that the break created by the road would stop or slow a forest fire. (Tr. 346-347). Disking is a process of mixing some soil in with the vegetation that breaks up the continuity of the forest floor. (Tr. 130-132).

In the early spring of 2001, BIA officials, including David Congos ("Congos"), one of the BIA Foresters assigned to the Menominee Indian Reservation (the other forester was Thomas Magnuson), began receiving information from MTE employees that MTE had spent its entire budget for roads maintenance and, as a result, might not have the funds needed to pay the salaries of the roads crews. (Tr. 332-333). Todd Kennedy, the BIA Roads Engineer, testified that MTE had spent all of its roads money several months prior to the end of fiscal year 2001. (Tr. 331-333). In about June 2001, MTE requested additional federal funds and stated that if these funds were not forthcoming, MTE would have to suspend service. (Tr. 334). The BIA awarded MTE additional funds near the close of fiscal year 2001. (Tr. 334).

At trial, the Plaintiff submitted additional evidence that MTE was seeking another source of funding due to the shortfall in the roads maintenance budget. (Tr. 502-507; Exh. 57). In March 2001, Ross McNeel (MTE's Roads Superintendent) and Waniger provided Congos with a written fire road improvement plan. (Tr. 502-503). The plan proposed to use hundreds of thousands of dollars in federal money to create and maintain fire access

roads throughout the forest. (Tr. 502-503; Exh. 57). Congos, however, was concerned that the plan's real purpose was to improve timber access, since many of the proposed roads accessed known timber harvest units. (Tr. 505-506). When Congos communicated these concerns to Waniger, the proposal was dropped. (Tr. 506-507).

Subsequently, in the spring of 2001, MTE began to submit invoices (each numbered and pertaining to specified periods of time and work completed) under the 2000 and 2001 HFR Program. (Tr. 135-184; Exhs. 14, 16-22). The 2001 HFR invoices represented that MTE roads crews employees had performed extensive brushing work to create miles of fuel breaks along identified forest roads. (Tr. 135-184; Exhs. 16-22). With each invoice, MTE submitted a work accomplishment map that was to show the work that was completed for each invoice. (Tr. 160-161, 186-187, 200-201). At about the same time that the invoices were originally submitted, certain MTE staff members communicated to Congos their belief that MTE's alleged fire work (which was being billed to the BIA) was a "make work" project designed to avoid layoffs of road crews personnel. (Tr. 910-912; Exh. 297).

Shortly after MTE began submitting invoices under the HFR program, Congos and Thomas Magnuson inspected some of the work identified on a work accomplishment map associated with HFR Invoice 212, for fuel break work allegedly done in May 2001. (Tr. 511-515; 531-532). Thomas Magnuson testified that there was only sporadic evidence that work had been done. (Tr. 969-972). There were some areas indicated on the map where no work had been done and some areas where there was evidence that a bulldozer had pushed over the brush, but the remains had not been removed. (Tr. 531-532).



Following a report by Congos to his BIA supervisor, Congos conferred directly with Defendant Waniger on the issue, advising him that the work was unacceptable for payment. (Tr. 515-517; Exh. 65). Defendant Waniger agreed and said they would correct the problem. (Tr. 516-517).

During July and August 2001, MTE forestry staff advised Congos that the MTE roads crew (which was assigned to perform fire work) was also working to improve many forest roads for access to timber sale units. (Exh. 297). One MTE employee advised Congos that Defendant Waniger told the employee that MTE was billing some of this timber sale access work to federal fire road projects. *Id.* Other MTE sources conveyed consistent information and when Congos asked Defendant Waniger directly about this, Defendant Waniger responded that he had no choice in the matter and that Congos “knew the political pressure he was under.” *Id.*

In approximately the fall of 2001, MTE’s Chairman imposed a gag order on MTE employees, directing them not to communicate with Congos without proper approval. (Tr. 1259-1290; 1297-1298). In an attempt to resolve his concerns about the HFR work, Congos began to communicate via written memoranda and requests for information to Defendants Waniger, Pecore, and other MTE officials. (Tr. 507-510, 1297-1298; Exhs. 31, 34). In response, Defendant Waniger forwarded a series of reservation maps which he claimed documented the fire work being billed to the federal government. (Tr. 552-553, 557-558; Exhs. 70, 71, 72). To verify what was happening in the field, in early 2002, Congos, again

acting under the direction of his BIA supervisors, inspected some of the work areas highlighted on the maps provided by Defendant Waniger. (Tr. 151-154, 169, 221-222).

Thereafter, in March and April 2002, MTE submitted a series of new invoices under the HFR Program in which it claimed to have completed fuel breaks on approximately 100 miles of reservation roads in high fire hazard areas. (Tr. 180-198; Exhs. 16-22). These invoices reflected the completion of work allegedly performed in May through October 2001. (Tr. 161-165; Exhs. 16-22). When MTE submitted the final version of these invoices, Defendant Pecore executed a certification as to their accuracy and Defendant Waniger also signed the invoices, indicating that he recommended payment. (Tr. 167-169; Exhs. 16-22).

Each final invoice included either a hand-highlighted or computer-generated map indicating the location of work allegedly performed for each invoice. (Tr. 180-210; Exhs. 16-22). Many of the computer-generated maps showed miles of full or partial brushing that MTE had allegedly accomplished. (Tr. 181-210; Exh. 19, pp. 37-39; Exh. 17, pp. 11-13). When these invoices were presented for payment, Defendant Waniger advised the BIA in writing that partial brushing meant the work was 95% complete. (Tr. 2241-2243; Exh. 17, pp. 3, 41).

Following the submission of these invoices, and consistent with prior directions they had received from the BIA's Midwest Regional Office, Congos and Thomas Magnuson inspected many of the work areas highlighted on the maps attached to these invoices. (Tr. 972-976; Exhs. 77, 78). They completed these inspections in 2002 before any cut vegetation had a chance to re-grow substantially. (Tr. 562-563, 571-577, 972-976).

Congos and Thomas Magnuson's 2002 inspections found that dozens of miles of roads MTE claimed to have brushed to create fuel breaks (and billed in the HFR invoices) were not brushed or were not brushed properly to establish an effective fuel break. (Tr. 563-564, 568-574, 972-976; Exhs. 80-86, 89,105). As presented in the summary maps admitted at trial, these inspections disclosed that approximately 114 of 144 miles (or 79%) of the roads MTE allegedly brushed had not been adequately accomplished. (Tr. 590-595, 628, 631, 635-636, 639, 642, 644, 1163-1168; Exhs. 80-86, 89-90, 105). Congos also determined that approximately 97 of 294 miles (or 34%) of road grading highlighted on MTE's Invoice 202 accomplishment map had not been performed. (Tr. 644; Exh. 89).

In addition to the BIA inspections conducted by Congos and Thomas Magnuson, beginning in July 2002, Special Agent ("SA") Joseph Schwartz, from the Office of the Inspector General for the Department of the Interior ("OIG"), commenced an investigation. (Tr. 1145-1146, 1178). MTE and BIA employees were interviewed. (Tr. 1147). The OIG also issued three subpoenas to MTE beginning in January 2003. (Tr. 1173-1174; Exh. 124). The subpoenas requested that MTE produce a variety of business records, including employees time cards and work summaries, pertaining to the fire work billed to the BIA in 2001 and 2002. (Tr. 1173-1176; Exh. 124). In response to these subpoenas, MTE provided hundreds of thousands of pages of documents to the United States. (Tr. 1176; R. 380, Affidavit of Assistant United States Attorney Chris R. Larsen (hereinafter "Larsen Affidavit"), ¶21).

In late 2005, the United States formally contacted MTE to discuss the results of its investigation. (R. 380, Larsen Affidavit, ¶ 22). Beginning at that time, the United States engaged MTE in discussions regarding the substantive findings of the investigation and attempted to try to resolve its allegations against MTE without further litigation. *Id.* Defendant Waniger was also contacted as a potential subject of the civil investigation and was interviewed. *Id.* Defendant Pecore, through counsel, declined to be interviewed. *Id.*

During most of 2006, discussions with MTE continued and after months of discussions, the United States was advised that the MTE Board had agreed to the terms of a negotiated settlement. (R. 380, Larsen Affidavit, ¶ 23). However, after a change of Board membership in the fall of 2006, the MTE Board withdrew its agreement before a formal agreement had been executed. *Id.* Subsequently, MTE, as well as Waniger and Pecore, were advised that the United States intended to bring suit against them under the False Claims Act and the common law. *Id.* All three Defendants were provided an opportunity to present any facts they wished the United States to consider before suit was filed. *Id.* At Pecore's request, the United States delayed the filing of the lawsuit to provide him additional time to make such a presentation. *Id.* Before filing suit, the United States conferred with representatives of the Menominee Indian Tribe about the potential impact of a civil lawsuit on the Tribe, and consulted as well with appropriate BIA officials. (R. 380, Larsen Affidavit, ¶ 24).

During the investigative phase, MTE asserted that it was entitled to be reimbursed for its actual costs rather than on a fixed cost for each mile of work completed. (R. 380,

Larsen Affidavit, ¶25). However, the investigation confirmed that with the exception of the alleged “re-do work,”<sup>4</sup> MTE submitted invoices that billed based on a fixed cost for the number of miles that had been completed. *Id.* Invoice 200 represented that MTE had cut and established a specific number of miles of fuel break and billed the BIA at a rate of \$450 per mile. (*Id.*; Exh. 15). Although the BIA acknowledged that it would reimburse for actual expenses for work actually performed within the scope of the project, MTE chose to bill the BIA based on a fixed cost for the miles completed. (*Id.*; Exhs. 17-22).

Regardless of the billing methodology, Sean Hart consistently reported and testified at trial that MTE was required, for billing purposes, to accurately document the results of its work (by location and mileage of work done) on work accomplishment maps to justify payment. (R. 380, Larsen Affidavit, ¶26; Tr. 171). If the final MTE invoices and maps, including the “re-do work,” reported the completion (or 95% completion in the case of “partial brushing”) of ten miles of fuel breaks in a particular location, the BIA should have been able to see significant evidence of fuel break work accomplished at those specific locations. *Id.*

Multiple MTE employees were questioned about time records, including Myron Grignon (MTE roads supervisor), Jacci Pubanz (an MTE administrative assistant who prepared the invoices for a time), and Tom Zarda (a member of the roads crew). Mr. Zarda testified at his deposition that he did not personally complete much of the coding on his

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<sup>4</sup>“Re-do work” consisted of forest areas that required additional work after the initial work was invoiced and it was determined that the work initially completed did not meet the standards of the HFR proposal. (Tr. 208-211, 303-304; Exh. 18).

time cards (which was used to bill work to the appropriate contract or “cost center”) -- instead, his supervisor, Myron Grignon, typically inserted those codes for him. (R. 380, Larsen Affidavit, ¶ 27; Tr. 1883-1885). Thus, the employee time cards and work summaries were of limited value in determining whether the work billed to the United States through the BIA was actually performed as represented on the invoices. (R. 380, Larsen Affidavit, ¶ 27). At his deposition, Mr. Zarda also testified that he was never asked to perform work that was designed to create a fuel break. *Id.* Instead, his MTE supervisors simply directed him to “brush fire lanes” for the purpose of ensuring a fire truck could pass without tree branches hitting the truck’s side mirrors, and that he was not given any specific instructions about how to create an adequate fuel break. *Id.* The government’s theory was not that the individual employees failed to perform some kind of work in the forest, but that higher-level MTE employees, including Pecore and Waniger, failed to properly train and instruct them as to how fire work should be accomplished, and then created false maps and invoices to bill the United States for road crew activity that had no real fire benefit, or served some other, non-fire purpose. *Id.*

Shortly before trial and after the close of discovery, in 2009, Pecore and Waniger belatedly hired Ken Sloan, a retired forester, to inspect areas of the forest where work was allegedly completed between 2000 and 2002. (Tr. 1681-1701; R. 380, Larsen Affidavit, ¶ 28). In direct violation of Rule 26 of the Federal Rules of Civil Procedure and the district court’s scheduling orders, that evidence was produced to the Plaintiff after the close of discovery. *Id.* The results of Mr. Sloan’s inspections, conducted years after the events in question, only

confirmed that some cutting occurred at work locations selected by him for examination, regardless of the nature or purpose of the cutting. (Tr. 1747-1750).

In response to Sloan's inspections, Dave Congos and OIG SA Todd Bucci conducted their own inspections of the forest in the days leading up to the trial. (R. 380, Larsen Affidavit, ¶ 29). Their inspections showed that most of the cutting depicted in many of Mr. Sloan's photographs appeared not to have been done as part of any road brushing project. *Id.* The government's 2009 inspections confirmed that most of the cutting identified by Sloan was done for other non-fire purposes, such as pine release cutting, timber access, or that the cutting occurred at dates different than the 2000 or 2001 projects. (Tr. 2319-2323, 2326-2330; Exhs. 193,194).

In its case-in-chief, the Plaintiff called three MTE employees - Matt Duvall, Greg Van Orsow, and Brett Stempa - who each testified that they were instructed by the Defendants to falsify their time cards to reflect that they were performing fire-related functions when they were in fact performing their routine forest-related functions. (R. 380, Larsen Affidavit, ¶ 30; Tr. 411-413, 913-917, 1084-1086). These employees understood that the purpose of this scheme was to draw down the funds under MTE's contract with the BIA to provide fire services in order to supplement MTE's budget for forestry services. (Tr. 411-413, 914-915). Waniger acknowledged that he instructed the employees to falsify information on their time cards, but provided a different rationale for that instruction. (Tr. 2118-2121, 2133-2139). Waniger's rationale was that when MTE sent men to fight fires, internal accounting and the proper allocation of expenses became distorted. (Tr. 2127-

2152). To properly balance their internal accounting, Waniger directed his employees to code “fire duty” for their work for a period of time until the dollars balanced properly.

*Id.*

Throughout the investigation and prosecution of this case, the Plaintiff demonstrated, through the use of digital summary maps, the locations where work was either not done, or was unacceptable for payment. (R. 380, Larsen Affidavit, ¶31). These maps were also created in order to quantify the damages to the United States resulting from the fraud. *Id.* As the investigation and discovery process progressed, the Plaintiff updated its summary maps and modified its damages calculations as new or additional evidence came to its attention, and as the Plaintiff worked to ensure the accuracy of all the individual road segments highlighted on its detailed summary maps. *Id.* The Plaintiff’s summary maps were based on the results of Congos and Thomas Magnuson’s 2002 inspections, which were documented and made available since the commencement of discovery in 2007. *Id.* The Plaintiff’s multiple billing theory remained unchanged. *Id.* At trial, the Plaintiff presented extensive evidence that MTE submitted multiple invoices for overlapping road segments (Tr. 135-154, 161-165, 518-520, 535-562, 567-657, 1147-1152; Exhs. 16-22) and, despite the multiple billings, fuel break work was either not done at all or was unacceptable for payment. (*Id.*; Exhs. 77, 78, 80-86, 89-90, 106).

At the conclusion of the Plaintiff’s evidence, the Defendants moved for judgment as a matter of law. (Tr. 1216-1220). After considering the arguments of both parties, the district court denied the motion. (Tr. 1224-1225). The district court found that there was



sufficient evidence presented to the jury for them to conclude that the claims submitted were false and that the Plaintiff introduced circumstantial evidence that would allow a reasonable jury to conclude that the Defendants knew that the claims they were submitting were false. (Tr. 1222-1223). In denying the motion, the district court noted that the Plaintiff introduced evidence that MTE had budgetary problems, that MTE needed to somehow pay their employees, and that the instructions of how to complete the employee time cards fit with the motive evidence. (Tr. 1223-1224). The district court concluded that under the circumstances it would clearly be improper for the court to take the case from the jury. (Tr. 1224).

After the jury returned a verdict in favor of Pecore and Waniger, the Defendants moved for attorney's fees under the EAJA and sought sanctions against the government pursuant to Rule 37(c)(2) of the Federal Rules of Civil Procedure , which provides that if an answering party fails to admit a fact or principle that is later proven at trial, the requesting party is entitled to the reasonable expenses and fees he incurred in proving that fact. (R. 370).

After full briefing on these issues, the district court concluded that the government's position was substantially justified and denied the Defendants' request for a fee award. (R. 384). Similarly, the district court denied the Defendants' request for sanctions and concluded that the government did not improperly fail to admit the assertions proposed by the Defendants nor did the government improperly fail to supplement its admissions. *Id.*

## SUMMARY OF THE ARGUMENT

The Plaintiff filed a complaint against, in part, Defendants Pecore and Waniger alleging various violations of the FCA. The case proceeded to trial and after the jury returned a verdict in favor of the Defendants, they sought attorney's fees and costs pursuant to the EAJA and sought sanctions against the Plaintiff under Rule 37 of the Federal Rules of Civil Procedure.

The district court did not abuse its discretion when it denied the Defendants' request under the EAJA and found the Plaintiff's position substantially justified. The district court understood and applied the proper allocation of the burden of proof. The district court conducted a thorough and meaningful analysis of the case and found that the Plaintiff had a reasonable basis in fact and law for the facts alleged and the theory propounded. The district court was satisfied that none of the Defendants' arguments undermined the essential component of good faith crucial to its conclusion that the Plaintiff's action was substantially justified.

The district court's decision to deny the Defendants' request for sanctions was reasonable and well within its discretion. The district court found that the Plaintiff was well within its right in refusing to admit particular defense requests to admit as the requests pertained to the case's key dispute and in essence asked the Plaintiff to concede the essence of its case. Furthermore, the district court was unable to conclude that the requests were ever proven at trial since the jury verdict did not turn on accepting as true the matter set forth in the requests to admit.

## ARGUMENT

- A. The district court did not abuse its discretion when it found the position of the government substantially justified.

In the district court, Pecore and Waniger sought an award of fees and expenses under the EAJA, 28 U.S.C. § 2412(d)(1)(A). The EAJA provides that a court “shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). In their motion, the Defendants argued that the government’s position was not substantially justified because the government did not follow its own regulations and failed to fully investigate the claims against them. (R. 371). The Defendants raise these same or similar arguments in their present appeal and posit a new argument as well.<sup>5</sup>

After full briefing on the motion for attorney’s fees, the district court issued its Decision and Order finding the government’s position substantially justified. Because this was not an abuse of discretion, this Court should uphold the decision denying an award of attorney’s fees under the EAJA.

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<sup>5</sup>In their present appeal, Defendants argue for the first time in support of their request for attorney’s fees, that the position of the government was not substantially justified because the false claims case cannot be brought against Tribal employees acting in their official capacity. (Defendants’ brief, pp. 26-27). As the Defendants failed to present this argument to the district court in support of their motion for attorney’s fees, they have waived the argument for purposes of this appeal. *Fednav International, Ltd., v. Continental Insurance Company*, 624 F.3d 834, 841 (7th Cir. 2010) (a party has waived the ability to make a specific argument for the first time on appeal when the party failed to present the specific argument to the district court, even though the issue may have been before the district court in more general terms).

1. The district court correctly understood that the Plaintiff bears the burden of showing by a preponderance of the evidence that its position was substantially justified.

The Defendants argue that the district court erroneously concluded that the Defendants had the burden to prove that the government's position was not substantially justified. (Defendants' brief, p. 22). The Defendants take issue with the district court's application of *U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010), arguing that the case improperly shifts the burden of persuasion to the successful defendant. *Id.* at 25.

In its Decision and Order, the district court noted that the "substantially justified" qualifier in the EAJA allows courts "to award fees in those cases where the government's case was so weak that it would be unjust to require the defendant to foot the bill for his defense." (R. 384, p. 2). The district court also correctly set forth how a court should determine whether the United States' position is substantially justified and the proper allocation of the burden of persuasion. *Id.* The district court understood that its determination of whether to award attorney's fees would need to be done by considering the case in a broad sense "rather than a narrow, line-by-line analysis of the record." *Id.* The district court correctly understood that a fee award should not be made based on "a few isolated missteps by the government," but rather, could be made "if the government engaged in a pattern of misconduct or based the fundamentals of its case on incorrect law or shoddy factual development." *Id.*

Prior to undertaking its analysis of the government's position, the district court stated that it would address each of the Defendants' arguments as to why the government's position was not substantially justified, but did so "keeping in mind that the burden is on the government to meet the EAJA standard." (R. 384, p. 3). While the district court structured its analysis around the arguments raised by the Defendants, the district court identified and applied the correct burden of persuasion.

As further support for its ruling that the government's position was substantially justified, the district court relied upon the finding in *Thouvenot*, 596 F.3d at 382, that "there 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." (R. 384, p. 12). The Defendants argue that as grounds to deny attorney's fees, the district court heavily relied upon this presumption which "conflicts with the thrust and purpose of the EAJA, which specifically places the burden on the Government" and shifts the burden to the successful defendant. (Defendants' Brief, p. 25). It is unclear if Defendants thereby seek reversal of the holding in *Thouvenot* or if this is simply further support for their argument that the district court failed to allocate the burden of persuasion properly.

As previously noted, prior to commencing its analysis of whether the government's position was substantially justified, the district court properly noted that the burden is on the government to meet the EAJA standard. (R. 384, p. 3). After completing its analysis, the district court recognized that the government had a difficult case as it "was attempting to show fraud based on the actions of MTE employees nearly a decade earlier against a

backdrop of confusing billing practices and divergent expectations on all sides.” *Id.* at 11. The district court found that the government had proceeded in good faith and was not dissuaded from that conclusion by the Defendants’ arguments to the contrary. *Id.*

It was only after this determination that the district court applied the holding in *Thouvenot*, that there 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, to the present case. (R. 384, p. 12). The district court noted that it had denied the Defendants’ motion for summary judgment concluding that there were serious questions about the Defendants’ arguments that they were entitled to be paid for actual expenses rather than for miles worked. *Id.* at 13. The district court also noted that it had denied the Defendants’ motion for dismissal at the close of the government’s case and had declined to direct a verdict in the Defendants’ favor at the close of all the evidence. *Id.* The district court reasoned that the rulings reflected its view that the government had presented enough evidence that a reasonable jury might find in favor of the government. *Id.* Thus, this all “strongly suggests that the government had at least a reasonable basis for bringing and litigating this case to verdict.” *Id.*

The holding in *Thouvenot* provided the district court an appropriate, independent ground for its determination that the government’s position was substantially justified. *Thouvenot* does not shift the burden of persuasion under EAJA inappropriately, but merely offers a district court additional guideposts to follow as it conducts its analysis. The *Thouvenot* court noted that district courts must determine whether cases have sufficient

merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion. *Thouvenot*, 596 F.3d at 381-382. Consistent with that determination 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. *Id.* The *Thouvenot* court was concerned that the district court gave no weight to its decisions denying the defendant's motion for summary judgment and denying the motion for judgment as a matter of law at the close of the government's evidence and instead awarded fees solely because the jury's verdict was adverse to the government. *Id.* at 382.

2. After properly allocating the burden of persuasion, the district court thoroughly analyzed the government's litigation position and did not abuse its discretion when it found the position substantially justified.

After setting forth the framework for determining whether the government was substantially justified, the district court structured its decision by addressing each of the Defendants' arguments supporting their claims that the government's position was not substantially justified.

The only question on appeal is whether the district court abused its discretion in finding that the government's position was substantially justified. A district court's conclusion on the question of substantial justification is ordinarily given considerable deference because "the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." *Pierce v. Underwood*, 487

U.S. 552, 560 (1988). In order to determine if the government's position was substantially justified, the district court set forth the analysis as follows:

A position is substantially justified if it has a reasonable basis in law and fact. The government has the burden of establishing that its position was substantially justified, and to do so must show: (1) A reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the theory propounded. EAJA fees may be awarded if the government's pre-litigation conduct . . . or its litigation position are not substantially justified, but the district court is to make only one determination for the entire civil action.

(R. 384, p. 2, quoting *Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006).

The district court carefully and thoroughly conducted this analysis and concluded that the government's position was substantially justified as it had a reasonable basis in law and fact. The district court was not dissuaded from its conclusion by the Defendants' numerous arguments, reiterated in this appeal, and did not abuse its discretion when it found that the government's position was substantially justified.

a. Defendants' government-to-government policy argument

The Defendants argue that the government's failure to follow its own regulations is evidence that its conduct and position were not substantially justified and that the district court abused its discretion by excusing the government of these requirements without providing any valid justification. (Defendants' brief, pp. 28-31). Specifically, the Defendants rely upon BIA policy manuals for their argument that the BIA should have notified the Tribe that it was considering bringing the lawsuit and the BIA should have



asked the Tribe for input and informed it about the implications of such a lawsuit. The Defendants also argue that since this case is primarily a matter of contract performance rather than false claims, the government should have used the administrative contract procedures governed by the Indian Self-Determination Education and Assistance Act before commencing the lawsuit. *Id.* at 31-32.

At the outset, the district court correctly noted that the Defendants' arguments are weakened by the fact that the BIA policy manuals do not have the force of law or regulation. (R. 384, p. 3). The Defendants find fault with the district court for excusing the government from these "requirements," but the policy manuals are not requirements. The district court also noted that the Defendants relied upon cases wherein an agency violated a law or regulation, rather than a policy. *Id.* at 4. Further, the district court found that "it is unclear how an alleged failure to follow policies directing the BIA to consult with tribal officials would have much weight when what's at issue now is the case brought against these *individual* defendants . . . individual citizens who happened to have worked for Menominee Tribal Enterprises." *Id.* (emphasis in original). Accordingly, this argument held little weight for the district court and continues to hold little weight on appeal.

- b. Plaintiff's alleged insufficient basis to assert that the invoices submitted by the Defendants contained false claims.

The Defendants argue that the district court abused its discretion when it failed "to require the Government to establish a substantial factual basis that the defendants 'lied' in any of the invoices submitted by MTE to the BIA or in any of the supporting maps which showed where the fire prevention work was done in the Menominee forest." (Defendants'

brief, p. 22). To the contrary, the district court considered the totality of circumstances and determined that throughout this case, the Plaintiff had a reasonable basis in truth for its allegations of false claims.

The Defendants have argued repeatedly that the Plaintiff's case lacked a sufficient factual foundation because MTE was entitled to bill the HFR projects based on expenses rather than the number of miles of fuel breaks that had been accomplished. Therefore, according to the Defendants, since MTE was billing on a cost basis rather than a per-mile basis, the invoices submitted by the Defendants were not false because they accurately reflected their actual expenses. Furthermore, because MTE never intended the supporting maps to show where work was done on a miles-completed basis, any reliance upon these maps by the Plaintiff was misplaced.

The district court summarized these arguments and considered whether the Plaintiff had a reasonable basis to allege that the invoices were false. The district court noted that while the Defendants had argued throughout the action that they were never claiming to have billed for work on a per-mile basis and the jury at least in part appeared to subscribe to that theory, this did not change the fact that some of the invoices actually submitted by MTE billed on a per-mile basis. (R. 384, pp. 4-5). The submissions claimed to have established a given number of miles of fuel breaks and when David Congos inspected the fuel breaks, he concluded that they were not completed. *Id.* at 5. The district court reasoned that there was ample confusion about the method MTE was using for billing, but

that the dispute over how the invoices should be interpreted did not undermine the Plaintiff's justification for pursuing the case. *Id.*

As the district court found at the summary judgment stage and concluded again in its decision denying the motion for attorney's fees, "even if the Defendants' expense-based view of its billing was entirely correct, that did not entitle it to list areas of work done (by mileage) if those areas were not actually done." *Id.* The district court, after considering the facts of this case, was "satisfied that the government's basis for bringing this lawsuit arose out of the confusing nature of MTE's billing practices rather than any untoward exercise of federal power. The fact remains that government employees used the invoices and maps the Defendants submitted and concluded that work claimed in those documents had not been done." *Id.* The district court properly exercised its discretion when it found that the Plaintiff had a reasonable basis in truth for the facts alleged.

c. Plaintiff's alleged failure to investigate

The Defendants argue that the Plaintiff failed to investigate thoroughly the claim of fraud before filing suit against them, that the Plaintiff's fraud theories collapsed at trial in the face of defense evidence that the Plaintiff ignored, and that instead of searching for the truth, the Plaintiff attempted to suppress exculpatory evidence. (Defendants' brief, p. 23). More specifically, the Defendants offer a litany of examples of the Plaintiff's failure to investigate including ignoring forensic evidence submitted by the defense expert, failing to examine the roads before trial, refusal to evaluate the roads crew's time logs and activity sheets and seeking to exclude from trial evidence of brushing and grading work done in

the forest. *Id.* at 40-41. Though the following arguments do not appear to fit neatly into a “failure to investigate” section, the Defendants further argue that the Plaintiff unreasonably relied upon David Congos’ inspections, that the MTE maps were not false records and that the invoices were based on expenses incurred and “miles treated” rather than miles completed. *Id.* at 41-43.

Though the Defendants painstakingly set forth their arguments, what is lacking is any sense of how the district court abused its discretion when it considered these arguments and found the Plaintiff’s position substantially justified. As noted above, prior to undertaking its analysis of the Plaintiff’s position, the district court stated that it would address each of the Defendants’ arguments as to why the Plaintiff’s position was not substantially justified, but did so “keeping in mind that the burden is on the government to meet the EAJA standard.” (R. 384, p. 3). The district court then proceeded in multiple pages to set forth the Defendants’ particular arguments, including all the allegations associated with their claim that the Plaintiff failed to investigate, and then carefully analyzed each claim as it should – considering the totality of the circumstances and taking a broad approach to the case rather than a narrow, line-by-line analysis of the record. *Id.* at 2.

As the district court succinctly stated, “[a]ny time the government loses a case, the prevailing defendants can claim that the government failed to spend enough time and effort investigating.” *Id.* at 6. The district court found that, overall, the Defendants’ argument that the Plaintiff failed to investigate adequately was “particularly weak” in this

case which involved questions as to whether certain trees were cut and roads were cleared nearly a decade before the trial occurred. *Id.* As to the Defendants' specific allegations that the Plaintiff improperly relied upon David Congos' inspections, the court noted that David Congos' inspections were done soon after the BIA received the invoices in question and that the Plaintiff "could reasonably have concluded that the contemporaneous inspections were the best evidence of fraud . . . that the various sites could have been cleared or cut in the intervening years, which would muddle the evidence and create even more factually complex issues." *Id.*

The district court had particular difficulty with the Defendants' argument that the Plaintiff refused to examine the roads before trial and sought to exclude the Defendants' inspections-based evidence. *Id.* at 7. The Defendants sought to include their inspections-based evidence well after the close of discovery, and the Plaintiff vehemently opposed this late disclosure in violation of the Federal Rules of Civil Procedure. *Id.* The district court explained that it allowed the production of this evidence as

an act of leniency in an effort to ensure a full record and protect the Defendants themselves from the arguably deficient performance of their attorney . . . government's opposition to the evidence was sound, and it was based partly on its position that it had all the evidence it needed, which had not been contested by Defendants' expert until the eve of trial. The Defendants' current objection that the *government* should have conducted a more thorough investigation thus rings distinctly hollow given their own conduct during discovery: if the Defendants themselves did not conduct an on-site investigation until so late in these proceedings, why should the government have done so when it already had Congos' field inspections from years earlier?

*Id.* (emphasis in original).

As to each and every specific allegation that the government failed to investigate, the district court considered the entirety of the case and determined that each allegation was countered by reasonable action by the government. As to the time cards, the district court noted that the government called witnesses to testify that they actually falsified their time cards and “[t]he fact that the jury may have sided with the Defendants does not mean the government was off-base in pursuing this line of argument [that the Defendants committed fraud when they had other MTE employees falsify their time cards to reflect fire-related forestry work] or in failing to investigate every possible explanation for the discrepancies.” *Id.* at 7-8.

The Defendants also argued that the Plaintiff’s changing theories of fraud indicated uncertainty about how it was defrauded, such that its decision to bring this action was not substantially justified. The district court responding to this argument, observed that while the government may have changed its various assessments of how much fraud there had been, from the beginning it was evident that the government actors were convinced they were being billed for work that had not been done. *Id.* Similar to the argument that the Plaintiff’s fraud theories morphed throughout the case, the Defendants argued that the “motive for fraud” theory collapsed at trial. In their present appeal, the Defendants assert that the “motive theory” was “pure bunk” and state that the district court agreed with their argument. (Defendants’ brief, p. 36). A close reading of the decision, however, belies that conclusion.

While the district court viewed this as a reasonably strong argument, it found that “it actually does very little to call into question the government’s justification for pursuing the lawsuit.” (R. 384, p. 9). The district court first noted that the government had a motive theory based on the testimony of MTE employees; the Defendants were attempting to draw down the BIA funding for fire prevention and use those funds for more typical forestry operations. *Id.* Second, as the district court stated, the FCA does not require a motive to defraud, *United States ex rel. Durchholz v. FKW, Inc.*, 189 F.3d 542, 544 (7th Cir. 1999), and the government was merely required to prove that the Defendants had knowledge that their submissions to the government were false. *Id.* Therefore, this argument, like the rest, did not undermine the district court’s conclusion that the government’s position was substantially justified.

d. Defendants’ argument that a contract dispute is not a false claim.

The Defendants final argument is that this was not a false claims case, but rather a contract dispute. (Defendants’ brief, pp. 45-46). Again, the Defendants fail to state with any specificity how the district court abused its discretion when it found that this case was properly initiated and brought to trial.

As the district court aptly noted, the fact that a case involves contract performance does not foreclose FCA liability. (R. 384, p. 10). In a case where performance under the contract is so substandard that it cannot legitimately be called performance at all, an invoice based on such performance may rightly be considered “false.” *Id.* The district court found support for its conclusion in *United States ex rel. Davis v. Dyna Corp.*, 1994 WL

48316 (9th Cir. 1994) where the question of contract performance was whether shipped metal parts had imperfections in them and the government's own inspections and assessment of quality were employed to answer the question. The district court reasoned that

[s]uch questions naturally involve judgment calls about the adequacy of the contractor's performance, but that does not remove the case entirely from the purview of the False Claims Act. Just as there were imperfections in the parts shipped in *Dyna*, here there were imperfections in the work done by MTE's employees. Although some aspects of the case did resemble an action for breach of contract, that does not foreclose liability under the False Claims Act.

*Id.* at 11.

"Between frivolous and meritorious lie cases that are 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person [and hence has a] 'reasonable basis both in law and fact.'" *Thouvenot*, 596 F.3d at 381, quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The district court reasonably concluded that the government's litigation position in this case was substantially justified. Notwithstanding all of the Defendants arguments to the contrary, the district court acknowledged that the government's case was a difficult one as it attempted to show fraud based on MTE employee actions nearly a decade earlier against a backdrop of confusing billing practices and divergent expectations on all sides. (R. 384, p. 11). Yet, the district court after fully assessing the whole of the case, was satisfied that none of the Defendants arguments undermined the essential component of good faith crucial to its conclusion that the government's action was substantially justified. *Id.*



- B. The district court did not abuse its discretion when it denied Defendants' request to sanction the Plaintiff pursuant to Rule 37(c)(2).

The Defendants ask this Court to award them reasonable expenses, including attorney's fees, pursuant to Rule 37(c)(2) of the Federal Rules of Civil Procedure, because they proved facts previously denied by the government. (Defendants' Brief, p. 52). In their motion for attorney's fees, the Defendants requested that the district court impose sanctions upon the Plaintiff pursuant to Rule 37(c)(2), alleging that the Plaintiff failed to admit a fact that was later proven at trial. (R. 370, 371). Specifically, during the discovery phase, the Defendants requested admissions from the Plaintiff concerning expenses incurred by MTE in performing the work billed and that substantial work was done by MTE pursuant to the invoices at issue. *Id.* In response, the Plaintiff argued that its failure to admit on these issues fell within the exceptions to Rule 37, including that the Plaintiff had a reasonable ground to believe that it might prevail on the matter and that there was other "good reason" for the failure to admit. (R. 379).

Under Rule 37, a district judge may require parties to pay reasonable expenses, including attorney's fees, for failure of a party to admit the truth of any matter later proved true. *Insurance Benefit Administrators, Inc. v. Martin*, 871 F.2d 1354, 1360 (7th Cir. 1989). District judges have "almost absolute discretion" under this Rule because there are several grounds under which district judges can deny requests for expenses and attorney's fees and because the rule does not allow such fees as a matter of course. *Id.*, citing *Popeil Bros. v. Schick Electric, Inc.*, 516 F.2d 772, 777 (7th Cir. 1975). Under an abuse of discretion standard, this Court will uphold any exercise of the district court's discretion that could

be considered reasonable, even if this Court might have resolved the question differently. *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999); *Collins v. Illinois*, 554 F.3d 693, 696 (7th Cir. 2009) (this Court reviews all discovery sanctions for abuse of discretion and will uphold a district court's decision so long as it could be considered reasonable).

The district court was well within its discretion in rejecting the Defendants' fee request pursuant to Rule 37. As noted in the district court's decision, in arguing that the government lacked a reasonable ground to fail to admit particular requests, the Defendants reiterated many of the arguments they raised in arguing that the government's position was not substantially justified. (R. 384, p. 14). The first category of requested admissions pertained to whether MTE incurred expenses for work performed pursuant to the applicable HFR proposal. *Id.* The government responded to these requests to admit by denying knowledge sufficient to admit or deny. *Id.* The district court found that the Plaintiff was well within its right in refusing to admit such requests as the requests pertained to the question of whether work was done pursuant to the applicable HFR proposal; essentially the case's key dispute. *Id.* The district court viewed these requests to admit as the Defendants not merely asking the government to stipulate to an undisputed fact, but asking the government "to concede the essence of its case." *Id.* Similarly, the other category of requests for admission concerned whether the work was substantially performed by MTE, once again essentially asking the government to concede that no fraud occurred since the work had been substantially performed. *Id.* at 15.

The district court thoroughly considered the requested admissions along with the Plaintiff's responses and based on the language in the requested admissions coupled with the central issues in this case, concluded that the Plaintiff had a reasonable ground to believe it might prevail on the matter and that belief held through discovery, summary judgment and in advance of trial. *Id.* However, the district court's analysis did not cease at that point. Instead, the district court found an additional reason to reject the Defendants' fee request. The district court noted that fees are justified under Rule 37 only when a matter is proved "true" at trial. *Id.* The Defendants understood that the jury verdict meant that they had proved the assertions contained in their requests to admit, but the district court noted that the jury verdict did not specifically speak to the matters set forth in the Defendants' requests. *Id.* The district court considered that in light of what the Plaintiff needed to prove at trial, the jury could have based its verdict on the Plaintiff's failure to prove that the Defendants acted knowingly and not necessarily on whether the work was substantially done. *Id.* at 15-16. The district court was unable to conclude that the requests for admission were ever proven true at trial since the jury verdict did not turn on accepting as true the matter set forth in the requests to admit. *Id.* at 16.

The district court's decision not to impose sanctions under these circumstances is reasonable and well within the court's discretion and should not be disturbed on appeal.

## CONCLUSION

For the reasons stated herein, this Court should affirm the district court's decision denying the Defendants request for attorney's fees pursuant to the EAJA and request for sanctions under Rule 37 of the Federal Rules of Civil Procedure.

Dated at Milwaukee, Wisconsin, this 27th day of May, 2011.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Lisa T. Warwick

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