IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 19-5023

WILLIAM S. FLETCHER, ET AL.,

PLAINTIFFS-APPELLANTS,

V.

THE UNITED STATES OF AMERICA, ET AL.,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA (CASE NO. 02-CV-427-GFK-JFJ)
HONORABLE GREGORY K. FRIZZELL

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Plaintiffs/Appellants ("Appellants") submit this brief in reply to the Answering Brief of the United States, *et al.*, filed October 8, 2019 (herein the "Government's Brief"). Appellants' Opening Brief, filed June 12, 2019 is called herein "Opening Brief" and all terms defined therein have the same meaning in this reply brief. The Government's appendix is abbreviated "Govt. App." and the Appellants' appendix is again abbreviated "Aplt. App."

INTRODUCTION

The Parties appear to agree there are two remaining questions in this case: 1) Was the United States substantially justified; and 2) Did Appellants incur legal fees? Regarding the first issue, the District Court atomized Appellants' claims into multiple parts, even distilling various parts of the accounting claim into separate concepts. This is inapposite to the authority of this circuit. The District Court diluted the Appellants' claims with various defenses to a point that it could make a finding of substantial justification. Additionally, the District Court mischaracterized Appellants' accounting claim – which was central to the case – in an effort to downplay its central role in the litigation.

Regarding the second issue of whether legal fees were incurred, the District Court took a hard-line look at the express terms of Appellants' engagement agreement with only one of its counsel to determine if Appellants had an obligation to pay over any fee award they would receive. In doing do, the District Court

ignored the holdings of the very cases it relied upon, which held that similar clauses to those found in Appellants' engagement agreement satisfy the requirement to "pay over" fee awards. Moreover, the District Court ignored and excluded evidence supporting an implied obligation to "pay over" fees, going so far as failing to even analyze whether such an implied obligation exists.

Ultimately, the Government's Brief does very little to address the arguments raised by Appellants' in their Opening Brief. Instead, the United States appears content to repeat the District Court's order, instead of addressing the specific arguments raised by Appellants. Even so, there are a few discrete issues Appellants' address in this Reply Brief.

ARGUMENT

I. The United States' Fails To Adequately Address Appellants' Arguments Regarding The Fact That They "Incurred Fees."

A. Appellants Could Not Address Issues Raised Sua Sponte By The District Court.

The United States seeks to avoid the question of the Appellants incurring fees by wrongly claiming that Appellants "did not raise their current contention (such as it is) in the district court" and therefore this Court need not address the issue. *See* Government's Brief at 28. The "contention" the United States is referencing, among other things, the fact that the District Court failed to consider a provision of Appellants' engagement agreement that provided that their counsel

would be entitled to "and any amount awarded as fees" by the district court, Aplt. App. at 1904, 1868, as well as the Tenth Circuit's key case applying *Turner v. Comm'r of Social Sec.*, 680 F.3d 721 (6th Cir. 2012), the case relied on by the Court in making its finding. *See* Government's Brief at 22, 27-28.

To the extent these arguments were not raised below, that is because the District Court made findings in its Order on grounds not presented by the parties, preventing Appellants from raising the arguments below. For instance, much of Appellants' Opening Brief focuses on whether there is an express or implied obligation to pay over awarded attorney's fees to the party's attorney. This was an issue that was not raised by *either* party before the District Court. Rather, it was raised *sua sponte* by the District Court.[1]

In the United States' Consolidated Response to Plaintiffs' Motion for Attorney's Fees and Costs, the United States never argues that an engagement agreement must provide that a client pay over any awarded attorney's fees to the attorney. *See* Aplt. App. at 1493-1496. Instead, the United States focused solely on the contingency nature of Appellants' engagement agreements. *Id*. (see

[1] To the extent that this considered an issue raised for the first time on appeal, this Court's decision to consider issues raised for the first time on appeal is "discretionary and decided on a case by case basis." *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991).

particularly footnote 5 which cited to cases that do not raise the issue of paying over fees).

Appellants could only reply to the arguments presented to them. As such, Appellants focused their argument on the United States' contention that contingency agreements cannot form a basis for an attorney's fee award under EAJA. *See* Aplt. App. at 1842-1843. The District Court – on its own motion – went a different direction, but that does not constitute a waiver by the Appellants.

B. ***The United States Ignores The Factual Context Of*** **Turner v. Comm'r of Social Sec.**

As noted in Appellants' Opening Brief, the attorney representation agreement in *Turner v. Comm'r of Social Sec.* required the plaintiff to pay his counsel only if he received a social security benefits award. 680 F.3d at 723. Since the district court in *Turner* only remanded the case to the agency "without awarding benefits, the court held that [the plaintiff] did not incur attorney's fees." *Id*. The district court was faced with an unsatisfied contingency agreement that had not triggered an obligation to pay counsel by the express provisions of the agreement. *Id*.

In describing the Sixth Circuit's reversal of this decision, the parties in this action agree that the Sixth Circuit found an "obligation to pay over any fee award to [Turner's] attorney." *Turner*, 680 F.3d at 725; Government's Brief at 27. However, the United States ignores *where* the Sixth Circuit found such an

obligation to pay. Turner's representation agreement "relieved Turner of the obligation to pay [the attorney] if they 'did not win the case,' but assigned to [the attorney] any fees that the court may award Turner under the EAJA." *Turner*, 680 F.3d at 722. It is clear that the Sixth Circuit accepted this assignment of fees awarded under EAJA as an "obligation to pay over" even though Turner had been relieved of any obligation to pay his attorney because the event that triggered that obligation had not occurred. *Id*. at 722-725.

The reason this is important, as Appellants noted in their Opening Brief, is because the engagement agreements at issue in this action, even the 2009 agreement, contained provisions providing that Appellants' attorneys would receive both its contingency fee percentage amount "and any amount awarded as fees." Aplt. App. at 1904, 1868.[2] In its Answer Brief, the United States never even touches on this important factor of *Turner*, and instead focuses the entirety of its argument regarding Appellants' contingency clause. *See e.g.* Government's Brief at 25, 29.

[2] The United States also makes the specious and confusing argument that Appellants' reference to this provision of the 2009 agreement in their Opening Brief "does not even contain an argument" and should not be considered by this Court. *See* Government's Brief at 28. Appellants referenced this when discussing the very same holdings of *Turner* addressed here. It is clear to any reasonable reader that Appellants were tying this requirement to pay fees to *Turner*'s holding and the District Courts complete failure to address the provision.

C. ***The United States Fails To Provide Any Evidence That The District Court Considered Implied Obligations To Pay Over Fees.***

The parties agree that a party's duty to pay over fees to their attorney need not be expressly stated in a representation agreement, but can also be implied. *Turner*, 680 F.3d at 725. The District Court failed to consider the Appellants' implied obligation to pay over fees to their lawyers. Indeed, because it does not exist, the United States could not identify any such analysis by the District Court. Specifically, the only part of the District Court's Order that the United States did identify that relates to implied obligations to pay over fees is that the District Court quoted the section of *Turner* that states that such an obligation can be implied. *See* Government's Brief at 29. Of course, that section only supports the Appellant's argument that the District Court's Order should be vacated and reversed.

The United States cannot identify any statement from the District Court where the factual record was analyzed for an implied obligation to pay over fees. Instead, the United States focuses (irrelevantly) on the District Court's failure to address the question of the Appellant's implied obligation to pay their lawyers. *See* Government's Brief at 29-31.

For instance, in response to Appellants' argument that their unsigned 2002 engagement agreement created at least an implied obligation to pay over fees, the United States can only argue that the District Court "declined to consider" the agreement because Mr. Fletcher, more than seventeen years later, could not recall

if he executed the agreement. *See* Government's Brief at 30; Aplt. App. at 1905-1906.[3] Mr. Fletcher did testify that it was his understanding that if he won—which he did—that the United States would have to pay his attorney fees. *See* Aplt. App. at 1405, 1422. Mr. Fletcher also testified that he had that understanding from the initiation of the lawsuit. *See id*. at 1405.

Whatever the District Court's analysis concerning whether the unexecuted agreement provided an *express* obligation, it failed – even refused to address whether the 2002 letter agreement provided the basis of an implied obligation, particularly in light of Mr. Fletcher's testimony that if he won "the United States would pay the attorney fees …. That's my understanding from the initiation of the suit." Aplt. App. at 1405. [4] The unsigned letter was dated just before the initiation of the suit. *Id*. at 1864. Flatly, the District Court never provided an analysis of the implied agreement and the United States cannot point to any such analysis in the record.

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[3] As noted in Appellants' Opening Brief, Mr. Fletcher did recall that he had an agreement with counsel to take this case on a contingency basis, and if successful in the case counsel would seek their attorney fees on Mr. Fletcher's behalf. *See* Appellants' Opening Brief at 44-45.

[4] It must be reiterated, Appellants and their counsel ***were in agreement*** that counsel – and not Appellants themselves – would be entitled to any fees recovered. *See* Appellants' Opening Brief at 39-40. The United States failed to substantively address this reality but, instead and without explanation, bluntly alleged that "the district court did not improperly interject itself" within Appellants' relationship with their legal counsel. Government's Brief at 25 (internal quotations omitted).

A District Court's failure to analyze a key point is an abuse of discretion. As a result, this Court should reverse and remand the District Court's Order with direction that an implied obligation exists for Appellants to pay over any attorney fees awarded by the District Court.

II. The United States' Untenable Substantial Justification Position.

A. *The United States' Misplaced Reliance On* United States v. Johnson.

The United States argues that the District Court's finding of substantial justification "is buttressed by *United States v. Johnson*, 920 F.3d 639 (10th Cir. 2019), *cert. denied sub nom. Smith v. United States*, No. 19-10 (U.S. Oct. 7, 2019)," because in that action this Court adopted a "holistic approach" to determining whether the United States is substantially justified in cases involving multiple claims of relief. *See* Government's Brief at 34-35. Reviewing this Court's opinion in *Johnson*, the United States did little more that review what cases this Court relied upon. *Id*. at 35. An actual analysis of this Court's opinion in *Johnson*, supports Appellants' argument that the District Court erred in finding that the United States was substantially justified.

In *Johnson*, this Court cautioned against an "issue-by-issue analysis," such as that employed by the District Court below. *See Johnson*, 920 F.3d at 649. Appellants' Opening Brief at 23-27. This Court noted that a district court errs "by improperly focusing on the *correctness* of the Government's argument on each

claim for relief rather than properly focusing on whether there was a 'reasonable basis both in law and fact' for the Government's overall *position* in the litigation." *Johnson*, 920 F.3d at 650 (emphasis in original). Instead, a district court should focus "on the reasonableness of [the United States] in bringing about or continuing the litigation." *Id*. at 650 (quoting *Roanoke River Basin Assoc.*, 991 F.2d 132, 139 (4th Cir. 1993)).[5]

Factually in *Johnson*, the United States raised multiple claims for relief against the plaintiffs for their tax liability. *Johnson*, 920 F.3d at 650. The United States only prevailed on one theory of recovery, but recovered the full amount of tax liability. *Id*. This Court held that "the Government took one position in this litigation—that the Decedent's children were liable for the unpaid estate taxes" and since the Government acquired a judgment in the full amount sought, it was substantially justified in its position. *Id*.

Here, after this Court's 2005 remand, Appellants only took one position in the litigation: that they were owed an accounting from the United States, and that such accounting would show breaches of trust, including the distribution of funds to individuals who were not entitled to receive them. *See e.g.* Appellants' Opening

[5] As noted in Appellants' Opening Brief, the United States prolonged this litigation by refusing to consider Appellants' claim for an accounting before Appellants' other breach of trust claims. Appellants' Opening Brief at 29-32. This resulted in years of prolonged litigation—all driven by the United States—regarding whether Appellants had stated a claim upon which relief could be granted. *Id*.

Brief at 29-32 (summarizing Appellants' arguments below that the accounting claim should be heard first to develop breach of trust claims). On this position, with the exception of the breadth of the accounting, Appellants received all the relief they requested. They received the accounting they were seeking, and that accounting showed numerous breaches of trust which they are now prosecuting in the Court of Federal Claims. *See Fletcher, et al. v. United States*, Court of Claims Case No. 19-cv-1246-LAS.[6] The United States was not substantially justified in refusing to account. *See* Aplt. App. at 1912. Accordingly, the District Court's finding that the United States' position was substantially justified should be reversed.

B. ***The Misdistribution Claim Was Subordinate To Appellants' Claim For An Accounting.***

In their Opening Brief, Appellants noted how the District Court incorrectly held that the United States was substantially justified on the "predominate issues" in the litigation because the United States prevailed on "the most heavily litigated

[6] In the Court of Claims Appellants, in addition to two other individuals, have brought numerous breach of trust claims against the United States regarding its trust management. These include, but are not limited to, payment of trust funds to individuals not entitled, underpayment of accrued interest, overpaid gross production taxes to the State of Oklahoma, and misreported costs and expenses charged to the trust. *Fletcher, et al. v. United States*, Court of Claims Case No. 19-cv-1246-LAS, Complaint (Doc. No. 1) at 21-25. These claims are believed to exceed one-hundred million dollars ($100,000,000.00) in damages. *Id*. at 26.

claim" in the litigation:[7] Appellants' argument regarding misdistributed trust funds to individuals who should not receive distributions. *See* Appellants' Opening Brief at 27-29. As explained at length in Appellants' Opening Brief, Appellants consistently sought to have their accounting claim heard *first*, in an effort to better identify their breach of trust claims they intended to raise against the United States, including the "misdistribution claim" the District Court and United States had been preoccupied with. *See* Aplt. Opening Brief at 29-33.

In response, the United States does not address any of the procedural delays *caused by* the United States, nor their refusal to allow the accounting to be addressed first in the litigation, nor the fact that Appellants argued for an accounting at every major hearing before the District Court for over a decade, nor the fact that it was the United States' motions to dismiss that sidetracked this litigation from what the District Court acknowledged was at is essence "one for an accounting." *See* Government's Brief at 36-37; Aplt. App. at 403. Instead, the United States seems to only rely on the fact Appellants can later sue for breach of trust, including their claims of misdistribution, to claim that the accounting was *subordinate* to the misdistribution claim. *See* Government's Brief at 36.

[7] It must be noted, Appellants cannot find any authority indicating that "predominate issues" equates to "the most heavily litigated claim," and neither the District Court, nor the United States, have provided any such authority.

While the United States concedes the bulk of Appellants' argument regarding Appellants' focus on an accounting throughout this action, the United States also ignores what the word "subordinate" means. "Subordinate" is defined as "[d]ependent upon, subservient to, or secondary to some other (chief or principal) thing." *See* OXFORD ENGLISH DICTIONARY (3d Ed. 2012). The United States cites with favor this Court's finding that "Plaintiffs maintained in multiple proceedings that the accounting claim is merely a means to later sue for misdistribution." *See* Government's Brief at 36-37 (quoting *Fletcher v. United States*, 854 F.3d 1201, 1205 (10th Cir. 2017)). If the misdistribution claim was dependent upon the accounting, then it was the misdistribution claim that was subordinate. As such, even under a correct definition of the District Court's wording, the accounting claim was the primary claim prosecuted by the Appellants.

C. ***The United States' Post-Hac Rationalization For Its Conflicting Statements To This Court Contains Even More Conflicting Statements.***

In Appellants' Opening Brief, they identified how the United States made conflicting factual statements on a key issue in this litigation: whether the United States accounted to the Osage Nation. *See* Appellants' Opening Brief at 24-26, 34-36. In responding, the United States spends approximately five pages trying to explain why their counsel gave conflicting responses when pressed by this Court

and the District Court. In doing so, the United States has once again changed its answer.

As noted in Appellants' Opening Brief, when this case returned on remand to the District Court, counsel for the United States argued that *its* contention that the United States accounted to the Osage Nation was incorrect because the Osage Nation did not settle its lawsuit "by receiving an accounting and saying it was acceptable, they settled their claim before an accounting by accepting funds." Appellants' Opening Brief at 35-36 (quoting Aplt. App. at 631-632). In contrast with this statement, the United States now claims that some other accounting occurred as a part of the October 2011 settlement agreement with the Osage Nation, but does not provide detail as to what that accounting was. *See* Government's Brief at 43-44. Appellants are left to wonder when it can accept the United States at its word, or whether it continue to shift sands every time it faces an argument it does not like.[8]

[8] Additionally, this is not the only place in the Government's Brief where the United States makes factually inaccurate statements. For instance, the United States claims that "[i]n addressing the substantial justification issue, however, the court did not refer to its earlier ruling on the parties respective Rule 59(e) motions." *See* Government's Brief at 40. This is in clear contrast to the text of Court's Order that makes clear reference to those rulings. *See* Aplt. App. at 1912. This misrepresentation of fact seems to be the United States' only response to Appellants' argument that the District Court improperly held that the United States was substantially justified because Appellants did not receive all the relief they requested on their accounting claim.

D. The United States Twists The District Court's Atomization Of Claims.

As with their argument regarding the District Court's failure to consider an implied obligation to pay over fees, discussed above, the United States again equates citation with analysis. Regarding the District Court's substantial justification finding, the United States claims that the District Court did not atomize Appellants' claims, but instead treated the case "as an inclusive whole" as required by *Jean*. *See* Government's Brief at 32. However, the United States does not point to any finding of the District Court that supports this finding, instead the United States simply relies on the fact that the District Court cited and quoted *Jean*'s requirement to treat the case as an inclusive whole. *Id*. at 32-35.

Despite claiming that it was reviewing the position of the United States in the case as an inclusive whole, the District Court actually atomized the case, breaking the case down into the discrete claims, then proceeding with a claim-by-claim analysis to see if Appellants won more than they lost. For instance, summarizing its atomized analysis, the District Court found:

> In sum, the government's positions on the voting rights claim, the wrongful distribution claim, and the scope of the accounting were substantially justified, but its position on plaintiffs' entitlement to an accounting was not substantially justified.

Aplt. App. at 1312. This is not treating the case as inclusive whole; it is an atomized scoreboard approach.

Knowing it cannot win on this argument, the United States instead sought to co-opt Appellants' argument regarding atomization of claims, arguing that it is Appellants who seek an atomized review. For instance, in responding to argument that the United States was not substantially justified in its position regarding the duty to account, the United States deflects, arguing that on this issue "Plaintiffs urged the district court to adopt, in effect, an 'atomized' approach to the substantial justification issue." Government's Brief at 35. This occurs again when addressing the unambiguity in said duty to account. *Id*. at 38. And the United States engages again in duplicitous argument by asserting (contrary to its earlier admissions) that the United States had accounted to the Osage Nation – a point it once advanced, then conceded. In any event, this mysterious accounting never was produced, and it took the United States more than 18 months to prepare even a limited accounting in this case, indicating that they are still not being candid, and that their arguments are excuses, not trustworthy analyses of the law and facts. *Id*. at 44.

III. The United States Ignores The Law Regarding How To Determine A Reasonable Fee.

The United States argues that Appellants' time records "deprived the court of an evidentiary basis for determining whether the amount of attorney fees requested was reasonable." Government's Brief at 46.[9] The basis for this

[9] The United States also disputes that the affidavits, by both Appellants' counsel and a retained expert, who all testified that the submitted time records

argument is the United States' misguided belief that a district court need not "sift" through billing records to identify whether the time requested is reasonable. *Id*. at 47-48. However, that argument is inapposite to Supreme Court precedent.

In *Hensley v. Eckerhart*, the case the United States cites for this "no sifting" argument, the Supreme Court explained that, when making a reasonableness determination, a district court may either "identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success" of the applicant. 461 U.S. 424, 436-437 (1983); *see also Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 789-790 (1989); *see also H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (holding that where time could not be apportioned due to insufficient time records then a percentage reduction of hours was not an abuse of discretion). Moreover, this Court has explained that:

> a district court must determine "not just the actual hours expended by counsel, but which of those hours were reasonably expended in the litigation." *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir.1983). In determining reasonableness, the court should ensure that the hours claimed are of the type that would normally be billed to a paying client and are not excessive or duplicative. *Id.* at 554; *see also Mares*

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contained only that time that was necessary for Appellants to prevail in the litigation (*see* Aplt. App. at 1125-1142, 1305), because those affidavits did not specifically cite the exact number of hours expended and simply reflected the time records themselves. *See* Government's Brief at 49-50. The United States does not provide authority to support the contention that there is a requirement that such affidavits contain such specificity, and counsel for Appellants could not locate any authority on the issue either.

> *v. Credit Bureau of Raton,* 801 F.2d 1197, 1202-05 (10th Cir.1986). The court also should deny legal service rates for hours expended by counsel on tasks that are easily delegable to non-professional assistance. *New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co.*, 72 F.3d 830, 835 (10th Cir.1996). In all, the district court must ensure that counsel has exercised sound billing judgment, a task we have compared to a senior partner in a private firm reviewing the billing reports of subordinate attorneys. *Ramos,* 713 F.2d at 555.

Mason v. Okla. Turnpike Authority, 114 F.3d 1198, 1997 WL 311880 at *4 (10th Cir. June 11, 1997).

These requirements for the District Court in determining a reasonable attorney fee are completely counter to the United States' argument that all a district court can do is either: (1) "award the entire amount of fees requested; or (2) deny a fee award." Government's Brief at 47. The question is not a true/false question for the district court, but a question that involves an in-depth analysis in exercising its discretion.

In any event, the Appellants propounded an expert witness on this point, a highly respected attorney from the Hall Estill firm who reviewed the time records in detail, excluded some, and supported the fee request in full, including by addressing the requirements of the law for the application of fee awards. *See* Aplt. App. at 1301-1309. The District Court simply ignored the evidence before it.

Ultimately the District Court refused to do its duty to review Appellants' attorney time records and the related evidence as a part of its reasonableness determination. Neither the District Court, nor the United States, identified any

time records as unreasonable.[10] Accordingly, the District Court's finding that the entirety of Appellants' fee request was unreasonable should be reversed.

CONCLUSION

For the reasons set forth herein and in the Opening Brief, this court should reverse the decision of the District Court regarding the propriety of an attorney's fee award under the EAJA with instructions to award Appellants a reasonable attorney's fee.

[10] The United States attempts to make some sort of argument that Appellants should have only submitted time records for time expended after April 2012 because that was when the District Court dismissed the post-accounting misdistribution claims. *See* Government's Brief at 50. This position ignores the vast amount of time Appellants spent litigating, defending, and advancing their accounting claim before April 2012. *For a summary see* Aplt. Opening Brief at 29-33.

Respectfully submitted,

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Date: October 29, 2019

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I hereby certify that with respect to the foregoing:

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Date: October 29, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, the foregoing motion was electronically filed with the United States Court of Appeals for the Tenth Circuit, and was served upon all counsel of record who are listed as registered on the CM/ECF system.

Date: October 29, 2019

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