UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

United States Department of Housing and Urban Development, Plaintiff, v. Roberta Lenz-O'Brien, Edward O'Brien, and Robert G. Jones, Defendants.	HUDALJ 97-7002-PF Decided: March 6, 1998

Robert G. Jones, Esq.
Susan S. Walker, Esq.
For the Defendant Jones

James L. Anderson, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION AND ORDER
ON APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

This proceeding began on January 28, 1997, when the Government issued a Complaint against Roberta Lenz-O'Brien, Edward O'Brien, and Robert G. Jones charging that they had engaged in a "scheme to improperly profit from HUD's Property Disposition Program" in violation of the Program Fraud Civil Remedies Act ("the Act" or "PFCRA"), 31 U.S.C. §§ 3801-3812. On November 6, 1997, pursuant to a motion from the Government, I issued an Order dismissing the Complaint against all three Defendants. On December 4, 1997, Defendant Robert G. Jones filed an Application for Attorney's Fees and Expenses incurred in this proceeding. The parties filed a series of responsive pleadings, the last on February 9, 1998.[1] The Application will be granted in part and

denied in part.

Defendant Jones' application rests on 5 U.S.C. § 504, commonly referred to as the "Equal Access to Justice Act" ("EAJA"). Subsection (a)(1) of 5 U.S.C. § 504 reads as follows:

> An 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. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The term "substantially justified" means "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). Thus, the "substantial justification standard applied under the EAJA treads a middle ground between an automatic award of fees to the prevailing party and one made only when the government has taken a patently frivolous stand." *Losco v. Bowen,* 638 F.Supp. 1262, 1265 (S.D.N.Y. 1986).

To meet its burden of substantial justification, the government must show a reasonable basis in truth for the facts alleged, a reasonably sound legal theory, and a reasonable connection between the facts alleged and the theory propounded. *See Citizens Council of Delaware County v. Brinegar,* 741 F.2d 584, 593 (3rd Cir. 1984). The Government has not satisfied that burden in the instant case.

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[1]The Government has moved to strike Defendant Jones' "Answer to Government's Response to Defendant's Application for Fees and Expenses" on the ground that the regulations do not authorize the applicant to file an Answer to the Government's Response. Section 14.325(b) of 24 C.F.R. provides that an applicant may request to file "additional written submissions" after filing the Application. The motion will be denied because, although not formally requested, Defendant Jones' additional written submissions were useful in my deliberations on the issues raised by this case.

According to the Complaint, on two occasions Roberta Lenz-O'Brien purchased properties from HUD and resold them at a profit on the same day in back-to-back transactions to other parties who were induced to buy the properties at higher prices by her husband, Edward O'Brien, a real estate agent.[2] Mrs. Lenz-O'Brien did not bring either her own or borrowed money to the closings (which occurred in Defendant Jones' offices); instead she paid for the properties with proceeds from the resales. Paragraphs 34 and 48 of the Complaint set out the gravamen of the Government's case against Defendant Jones: "Pursuant to the scheme, the HUD-1 Settlement Statement, prepared and signed by Jones is false because, contrary to the statement and his certification, at the time of closing Lenz[-O'Brien] did not provide any cash for the [purchase of the] property. In fact, no cash was paid at the time of closing to HUD, yet Jones caused HUD to convey the property to Lenz[-O'Brien]." According to the Government, Defendant Jones falsely stated that Mrs. Lenz-O'Brien paid cash for the properties by checking the "FROM" box on line 303 of the HUD-1, which reads: "CASH (□ FROM) (□ TO) BORROWER."

The Complaint alleges that these false statements on the HUD-1s violated 31 U.S.C. § 3802(a)(2) of the PFCRA. That section provides in relevant part that "[a]ny person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that--(A) the person knows or has reason to know--(i) asserts a material fact which is false, fictitious, or fraudulent ... shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement."

Defendant Jones argues that the statements at issue were true and that the Government's Complaint and arguments on brief arise out of a failure to understand the distinction between a "closing" (when documents are signed) and a "settlement" (when money accounts are settled). He contends that this case involves two instances of a standard "dry closing" in which money changed hands not at the moment of closing, but later, at the time of settlement. In other words, he argues that the statements at issue were not false, because at the time the HUD-1s were prepared, all funds had already been disbursed, including cash indirectly provided by Mrs. Lenz-O'Brien as a result of cash generated by the sales to the ultimate purchasers. According to this argument, Defendant Jones, as settlement agent for HUD, properly and correctly certified that "[t]he HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement."

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[2] "A back-to-back transaction is where the property is legally transferred from one purchaser and then resold or retransferred to a secondary purchaser in the -- normally on the same day, same location . . . [I]t's two transactions occurring on the same property." Deposition of David Childress, Chief of HUD's Property Disposition Branch for the State of Virginia, p. 32.

Rather than attempting to rebut Defendant Jones' argument, the Government maintains that his argument is irrelevant: "Put simply, if Mrs. [Lenz-]O'Brien did not provide the 'cash' as HUD alleges, then the HUD-1 would be false regardless of Mr. Jones [*sic*] distinction." (Response, p. 9) The Government's position on this point is untenable. As noted above, the Complaint charges that Defendant Jones made false statements regarding events "*at the time of closing*," but the HUD-1 on its face speaks as of the time of *settlement*. For example, line 300 of the form states, "CASH AT SETTLEMENT FROM OR TO BORROWER."[3] The HUD-1 appears to be a settlement statement, not a closing statement.

In any event, even if Defendant Jones' distinction between closing and settlement is specious, the record does not support the Government's argument that "if Mrs. [Lenz-]O'Brien did not provide the 'cash' as HUD alleges, then the HUD-1 would be false." The "statements" at issue in this case are not complete English statements made by Defendant Jones. Rather, he checked the "FROM" box in line 303 of the HUD-1, which reads: "CASH (□ FROM) (□ TO) BORROWER." The HUD-1 clearly was designed to document a typical transaction where the buyer mortgages the property. It was not designed for use in all-cash transactions or back-to-back transactions. Yet he was required by contract with HUD to use the HUD-1 to document all transactions for which he was the settlement agent. The Government's charge that Defendant Jones made false statements must be evaluated against this background.

David Childress, an expert from HUD who is sales supervisor of HUD-acquired homes throughout the State of Virginia, testified to the effect that the meaning of a check mark in the "FROM" box is ambiguous. He said that the form does not address the source of cash provided by the buyer. (Deposition, p. 50) Under Mr. Childress' interpretation of the HUD-1, it would be appropriate for the settlement agent to check the "FROM" box in line 303 of the HUD-1 in transactions where the buyer brought "cash" to the transaction directly in the form of a suitcase full of currency, or indirectly in the form of a certified check from a financial institution, or (as was the case here) indirectly in the form of money deposited in the settlement agent's escrow account as a result of previous arrangements to resell the property in a back-to-back transaction.

Inasmuch as the form does not reveal the source of the cash provided by the buyer, it necessarily follows that, contrary to the Government's argument, Defendant Jones did not misrepresent the facts when he checked the "FROM" box in line 303 of HUD-1, thereby indicating that cash came from Mrs. Lenz-O'Brien. Moreover,

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[3]The record contains two versions of the HUD-1 form. The statements at issue appear on the version of the form that consistently identifies the buyer as the "borrower." (Exhibits 3A, 3C)

Mr. Childress testified that as long as funds were available to permit HUD's buyer to close the purchase, the HUD-1, as completed by Defendant Jones, was accurate. (Deposition, p. 48) I must therefore conclude that the Government did not have a reasonable basis in truth to allege that the statements at issue were false; that is, the Government did not have a reasonable basis in truth for the facts alleged.

Furthermore, the Government has failed to articulate a reasonably sound legal theory in this case. It is unclear exactly what legal theory prompted the Government to prosecute the Defendants. The Complaint alleges that the statements at issue were made as part of a "scheme to improperly profit from HUD's Property Disposition Program." But the Government has cited no law, regulation, handbook, or other directive prohibiting the buyer of HUD-owned property from reselling it in a back-to-back transaction at a profit. And the record shows that a HUD official led Defendant Jones to believe that back-to-back transactions were legal. An official authorized to supervise Defendant Jones' work as a settlement agent for HUD told Jones that he did not believe HUD would object if an investor made a profit in a back-to-back purchase and resale of a HUD property. (Affidavit of Larry E. Kirk)

The charge that Defendant Jones made false statements in connection with a scheme to reap improper profits drops out of the Government's theory on brief. The revised theory simply complains that Defendant Jones made false statements in connection with back-to-back transactions where HUD's buyer did not bring her own money to the transactions. But again, the Government has cited no law, regulation, handbook, or other directive prohibiting the buyer of HUD property from paying for it with resale proceeds, whether or not the resale generated a profit.

Whatever theory has shaped the Government's case, it is not reasonably sound because it does not satisfy the materiality requirement in section 3802(a)(2) of the PFCRA. That section prohibits a person from asserting "a *material* fact which is false, fictitious, or fraudulent." (Emphasis supplied) In *United States v. Gaudin*, 515 U.S. 506 (1995), the Supreme Court endorsed a definition of materiality typical in the case law. In *Gaudin* the defendant was charged with criminal misrepresentations on a HUD-1 Settlement Statement. The Court said: "The parties also agree on the definition of 'materiality': the statement must have 'a natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed.'" 515 U.S. at 509, *quoting Kungys v. United States*, 485 U.S. 759, 770 (1988); *see also TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

The Government does not contend that the statements at issue had any real or potential effect on a HUD decision or that the Government suffered any injury. Instead, the Government argues that the materiality requirement is satisfied because the statements

"involved the very consideration for the properties involved. They involved whether or not Mrs. [Lenz-]O'Brien actually paid for [the properties]." (Response, p. 7) The mere fact that the statements at issue "involved" the consideration for the purchase of the properties does not demonstrate materiality. If it did, a misstatement in the amount of the consideration by one dollar would compel the conclusion that the preparer of the statement had falsely asserted a material fact--an obviously indefensible result. Materiality depends not on any inherent characteristic of the statement; rather, it depends on the actual or potential effect of the statement. Even if we assume for purpose of argument that the statements were technically false because they implied that the cash used to purchase the properties came directly from Mrs. Lenz-O'Brien rather than indirectly from the proceeds of her resale of the properties, the record does not show why this implied fact has any significance. The record does not show that any of the Defendants improperly profited as a result of these statements, or that any Defendant caused the Government to suffer any money loss, or run a risk of loss. (HUD's Property Disposition Program is not an insurance program.) Nothing in the record establishes that the statements at issue had either an actual or a potential effect on any decision by HUD, or that the statements had any actual or potential effect on any HUD program, or that HUD relied on the statements for any purpose. In short, it appears that the Government prosecuted this case on the theory that an ambiguously false statement is actionable under the PFCRA irrespective of the statement's effect. That is not a reasonably sound legal theory.

To be sure, the Government has an interest in deterring people from making false claims and false statements, whether or not the statements cause economic loss. But before a maker of false statements may be found liable and become subject to sanctions under section 3802(a)(2) of the PFCRA, the record must show why the Government cares whether or not the statements were false; that is, it must show that the statements had some significance--that they were material. False statements are not *per se* unlawful under the PFCRA.

For the reasons discussed above, I conclude that the Government's litigation position in this case was not substantially justified. In addition, there are no special circumstances in this case that would make the award of fees and expenses unjust.[4]

[4]Contrary to the Government's argument in footnote 6 of its Response, the settlement agreement between HUD and Defendant Jones' two co-defendants does not demonstrate "special circumstances" within the meaning of 5 U.S.C. § 504. The settlement agreement is irrelevant to the merits of Defendant Jones' Application.

Defendant Jones is an attorney. His Application seeks both compensation for the value of his own time spent on the case as well as recovery of fees and expenses charged by attorneys in his firm who represented him during this proceeding. This case therefore presents the question whether a pro se defendant who is an attorney and who prevails in a PFCRA case may recover attorney fees under EAJA.

Section 504(a)(1) of EAJA permits a prevailing party in a proceeding to recover "fees and other expenses incurred," defined in part at 5 U.S.C. § 504 (b)(1)(A) as "reasonable attorney or agent fees." The Act requires a prevailing party seeking fees to submit "an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party." (5 U.S.C. § 504(a)(2)) There are no cases interpreting this language in the Fourth Circuit where the instant case arose. The only reported EAJA case directly on point, *Jones v. Lujan*, 883 F.2d 1031 (D.C.Cir. 1989), concluded that the Act requires an award to a pro se attorney. The majority of the Circuit Court panel interpreted "attorney fees" to include the "opportunity costs" a lawyer incurs when he represents himself, and rejected the argument that when Congress used the word "attorney" it had in mind an agency relationship between two persons. 883 F.2d at 1034-35. The majority dismissed as irrelevant the Government's policy arguments involving "[e]thical and disciplinary considerations, concerns about incentives and the objectivity of pro se attorneys." 883 F.2d at 1036.

Judge Silberman joined in the result because he felt constrained by precedent, but he disagreed with the majority's logic. He reasoned that in plain understanding the phrase "attorney fees" means the fees an attorney charges another person for providing legal services. He also concluded that the legislative history of the statute shows that when Congress used the word "attorney" it contemplated two people in an agency relationship. Noting a hopeless division among the circuit courts regarding the meaning of "attorney fees" in various fee-shifting statutes, Judge Silberman suggested that the Supreme Court review the issue. 883 F.2d at 1036-1038.

The Supreme Court indeed addressed the issue in *Kay v. Ehrler*, 499 U.S. 432 (1991), a case arising under the Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988). The petitioner in that case, a pro se attorney, brought his case under statutory language authorizing "a reasonable attorney's fee as part of the costs" of litigation. A unanimous Supreme Court stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." 499 U.S. 435-36 (footnotes omitted). But the Court did not rest its decision exclusively on the text of the statute or legislative history. Rather, contrary to the *Lujan* court, the Supreme Court found that policy considerations are decisive on this issue. The Court concluded that a rule authorizing awards of counsel fees

to pro se litigants would create a disincentive to employ counsel, in opposition to "the overriding statutory concern" that parties obtain objective, independent counsel. This policy concern applies equally to a pro se attorney.

> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party...[during the course of the litigation]. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

499 U.S. at 437-38 (footnote omitted). Accordingly, in furtherance of statutory policy, the Court upheld the denial of an award of fees by the courts below.

I can find no principled distinction between the meaning of "attorney fees" in EAJA and the meaning of the same phrase in 42 U.S.C. § 1988 as interpreted by the Supreme Court. The Court has said that EAJA is the "counterpart to § 1988 for violation of federal rights by federal employees." *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83, 89 (1991). I therefore conclude that the word "attorney" in EAJA assumes an agency relationship, and that, to paraphrase the Court, "it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award" under EAJA. Furthermore, the policy concerns expressed by the Court in *Kay* apply with much the same force here. The legislative history shows that EAJA "rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988. With public policy at stake, clearly every litigant, including a party attorney, should have the benefit of the advice and advocacy of objective, independent counsel. Compensating an attorney for his or her own time spent litigating pro se under EAJA therefore would be contrary to the public interest.

The D.C. Circuit revisited the attorney fee issue in *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 996 (1993), this time in response to an application for fees by a pro se non-attorney plaintiff under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The court held: "In order to be faithful to the Supreme Court's analysis in *Kay*, we reverse our earlier course and hold that a *pro se* non-attorney may not recover attorney fees under 5 U.S.C. § 552(a)(4)(E)." 993 F.2d at 260. Noting that the D.C. Circuit in *Benavides* expressly declined to rule on the availability of fees to pro se attorneys under FOIA, Defendant Jones argues that *Lujan* is still good law, requiring

an award to him as the prevailing party.[5] Because the instant case arose in the Fourth Circuit, the law of the D.C. Circuit is not controlling, whether or not *Lujan* remains viable. For the reasons set out above, I decline to follow *Lujan.*

Defendant Jones' Application seeks an award of $34,132.05 to recover the value of 278.09 hours of attorney time and $788.80 in expenses, as itemized on an invoice under the letterhead of Jones, Russotto & Walker, PLC. The invoice shows that 196.79 hours of the total are attributable to Defendant Jones' personal efforts. These hours will not be compensated. The remaining hours are divided between two other members of the firm, Susan S. Walker, Esq. (58.05 hours) and Michael A. Stakes, Esq. (23.25 hours). Although only Ms. Walker filed a formal appearance on behalf of Defendant Jones (on September 8, 1997), both attorneys will be compensated for their time spent working on behalf of Defendant Jones. There is no requirement that every attorney in a firm working on a case must make a formal appearance before the firm may be compensated for all of the work performed by members of the firm and their support staff on behalf of a client. Notwithstanding the Government's arguments, there is no evidence in the record that the firm performed unnecessary, duplicative, or inappropriate work on behalf of Defendant Jones.

[5]Defendant Jones incorrectly asserts on brief that the holding in *Kay v. Ehrler* prevents recovery of attorney fees only to pro se *non*-attorneys. (Answer to Government's Response to Defendant's Application for Fees and Expenses, p. 9.)

Jones, Russotto & Walker, PLC, not only represented Defendant Jones, it also represented Defendant Roberta Lenz-O'Brien and Defendant Edward O'Brien. The Application does not request fees and expenses on behalf of the other two defendants. However, the invoice indicates that the firm began working on behalf of the O'Brien defendants as early as September 16, 1997, even though attorneys Walker and Stakes did not make formal appearances in this proceeding on behalf of the O'Briens until October 22, 1997. The invoice manifests numerous occasions when these two attorneys performed work specifically for the O'Brien defendants. To cite just two examples: Attorney Walker's billing entry for October 23, 1997, includes the notation, "discuss revised stipulations with [Attorney Stakes] and determine O'Brien's consent." Most of Attorney Walker's billing entry for 4.50 hours on November 3, 1997, involves settlement negotiations with the Government regarding the O'Brien defendants. Inasmuch as Defendant Jones' Application does not show what portion of the invoiced work was billed to Defendant Roberta Lenz-O'Brien and to Defendant Edward O'Brien, I will assume that each of the three defendants benefited equally from the firm's efforts. Accordingly, Defendant Jones will be compensated for one third of the time spent by attorneys Walker and Stakes on this case beginning September 16, 1997, through and including November 5, 1997. Attorney Stakes apparently did not work on the case before or after that period. Because Attorney Walker's labors before September 16, 1997, and after November 5, 1997, appear to have benefited Defendant Jones exclusively, her hours outside the prescribed period will be fully compensated.

Attorney Stakes' time will be compensated at the requested rate of $95 per hour, and Attorney Walker's time will be compensated at the rate of $125 per hour as sought in the Application and authorized by 5 U.S.C. § 504(b)(1)(A). There is no merit to Government Counsel's argument that the Act and regulations limit compensation to a maximum rate of $75 per hour. In 1996 the Congress amended EAJA and substituted "$125" for "$75" in subsection (b)(1)(A). (Pub.L. 104-121, § 231(b)(1)) Although HUD's regulations apparently have not been changed to reflect this amendment, agency regulations do not supersede an Act of Congress.

Regarding Defendant Jones' claim for expenses, he will be fully compensated for those expenses incurred in connection with this litigation before September 16, 1997, and after November 5, 1997. His claim for expenses incurred during the interim period will be reduced by two thirds for the reasons discussed above.

ORDER

It is hereby ORDERED that:

l. Defendant Robert G. Jones' Application for Attorney Fees and Expenses is granted in part and denied in part;

2. Within 45 days of the date on which this Order becomes final, the Government shall pay Defendant Robert G. Jones a total of $4,169.45, consisting of $3,147.50 for 25.18 hours of work by Susan S. Walker, Esq., $736.25 for 7.75 hours of work by Michael A. Stakes, and $285.70 in expenses; and

3. The Government's motion to strike Defendant Jones' "Answer to Government's Response to Defendant's Application for Fees and Expenses" is denied.

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THOMAS C. HEINZ
Administrative Law Judge