



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**DOCKET NO. 9330**

**PUBLIC DOCUMENT**

**IN THE MATTER OF  
GEMTRONICS, INC., a corporation,**

**and**

**WILLIAM H. ISELY, individually and as the owner of Gemtronics, Inc.**

**COMPLAINT COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO  
RESPONDENTS' APPEAL OF THE DENIAL OF THEIR APPLICATION  
FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES UNDER  
THE EQUAL ACCESS TO JUSTICE ACT**

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## I. INTRODUCTION

In this appeal, Gemtronics, Inc., and its owner, William Isely (collectively “Respondents”), challenge a decision of the Administrative Law Judge (“ALJ”) denying their request for costs and attorney’s fees.<sup>1</sup> This matter stems from the enforcement sweep, “Operation False Cures,” targeting bogus Internet cancer cures. In September 2008, the Federal Trade Commission (“FTC” or “Commission”) issued an administrative complaint alleging that Gemtronics, Inc. (“Gemtronics”) and Mr. Isely had violated Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45, 52, in connection with the advertising and sale of a purported herbal cancer cure, RAAX11,<sup>2</sup> on the Internet website [www.agaricus.net](http://www.agaricus.net). After a trial on the merits, the ALJ dismissed the Commission’s complaint because he determined that Complaint Counsel had not proved by a preponderance of the evidence that Respondents owned or controlled the website [www.agaricus.net](http://www.agaricus.net) or that Respondents participated in the creation or the dissemination of the cancer-cure claims on the website.<sup>3</sup>

Respondents applied for an award of attorney’s fees and other expenses pursuant to the

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<sup>1</sup> This brief uses the following abbreviations for citations:  
EAJA ID - Initial Decision in the EAJA Application  
EAJA IDFF - EAJA Initial Decision Findings of Fact  
IDPAP – Initial Decision in the Prior Adjudicative Proceeding  
IDPAPCOL – Conclusion of Law in the IDPAP  
JX - Joint Exhibit from the Prior Adjudicative Proceeding  
Tr. - Transcript of the Prior Adjudicative Proceeding before the ALJ  
RAB - Respondents’ Appeal Brief

<sup>2</sup> RAAX11 is a liquid product that contains the extract of *agaricus blazei*, a medicinal mushroom, and the extract of *chysobalanus icaco*, a tropical bush.

<sup>3</sup> IDPAPCOL 9 - 12.

Equal Access to Justice Act (“EAJA” or “the Act”).<sup>4</sup> In his Initial Decision on the EAJA application (hereinafter “Application”), the ALJ held that, because the Commission’s position in the Prior Adjudicative Proceeding was substantially justified and had a reasonable basis in law and fact, Respondents were not entitled to an award of attorney fees and other expenses under EAJA.<sup>5</sup>

Respondents’ appeal should be denied and the ALJ’s EAJA Initial Decision should be affirmed for three reasons. First, the Commission’s position in the Prior Adjudicative Proceeding was substantially justified. Second, special circumstances make an award under EAJA unjust in this matter. Third, Respondents seek an award of fees and expenses that are not allowed under EAJA.

Therefore, upon consideration of the record and the arguments of the parties, Complaint Counsel respectfully requests that the Commission affirm the EAJA Initial Decision of the ALJ and deny the Respondents’ appeal.<sup>6</sup>

## **II. STATEMENT OF THE FACTS**

### **A. History and Nature of the Prior Adjudicative Proceeding**

The FTC issued an administrative complaint on September 16, 2008, alleging that Respondents had violated Sections 5(a) and 12 of the FTC Act by making cancer-related claims for the herbal product RAAX11 on the Internet website [www.agaricus.net](http://www.agaricus.net). This case was

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<sup>4</sup> Commission Rules of Practice (“Commission Rule” or “Rule”) § 3.81, *et seq.*, 16 C.F.R. § 3.81, *et seq.*

<sup>5</sup> EAJA IDFF 3, 4.

<sup>6</sup> This Brief also addresses the issues raised in the brief of Amicus Curiae filed by Mr. S. M. Oliva (hereinafter “Amicus”).



brought as part of a joint FTC and Food and Drug Administration (“FDA”) enforcement effort targeting false and unsubstantiated cancer cures advertised on the Internet.<sup>7</sup>

In July 2007, as part of an agency-wide enforcement effort targeting bogus Internet cancer cures, FTC staff began investigating claims on the website [www.agaricus.net](http://www.agaricus.net) that RAAX11 could prevent, treat, and cure many forms of cancer. Evidence obtained during the investigation pointed to Mr. Isely and Gemtronics as the parties responsible for the marketing and the sale of RAAX11 from the website. As noted in greater detail below, the evidence showed that the [www.agaricus.net](http://www.agaricus.net) website listed Mr. Isely as the source for RAAX11 in the United States and that the website was registered to Mr. Isely. Commission staff placed two orders for RAAX11 on the website, which were fulfilled by Mr. Isely under the name Gemtronics from Mr. Isely’s home address. Promotional literature contained in the RAAX11 packages included the same types of cancer-cure claims that were found on the website. Further, corporate records showed that Mr. Isely incorporated Gemtronics, Inc. less than a year before the FTC’s investigation and listed its principal place of business at his residence.

Based on this evidence, in March 2008, the FTC notified Respondents about the cancer-cure claims for RAAX11 on the website and provided Respondents with a proposed federal court complaint and consent. After receiving this notice, Mr. Isely informed Complaint Counsel that he had taken remedial measures to modify the website to address the FTC’s concerns, which suggested that Mr. Isely could, in fact, control the website.<sup>8</sup> In addition, Respondents asserted

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<sup>7</sup> In April 2008, the FDA mailed a “Warning Letter” to Gemtronics, Inc. and Mr. Isely stating, *inter alia*, that because [www.agaricus.net](http://www.agaricus.net) contained claims that RAAX11 could cure, treat, mitigate, or prevent cancer, the product was an unapproved new drug marketed in violation of the federal Food, Drug, and Cosmetic Act. JX 65 is a copy of the FDA’s letter.

<sup>8</sup> JX 66, JX 67.

that the cancer claims for RAAX11 were supported by reliable scientific evidence.<sup>9</sup> The FTC's expert examined Respondents' materials and reported that the data did not support the challenged cancer claims for RAAX11.<sup>10</sup>

In September 2008, the Commission determined that it had reason to believe that Respondents had violated the FTC Act and issued an administrative complaint alleging, *inter alia*, that Respondents had falsely claimed that scientific evidence demonstrated that RAAX11 could cure cancer. The Commission sought an order prohibiting the types of claims challenged in the complaint.

During the course of the litigation, Respondents repeatedly obstructed the legal process by thwarting discovery. In fact, Complaint Counsel had to obtain an order from the ALJ to compel Mr. Isely to sit for his deposition, to respond to interrogatories, and to provide document production. Even despite that order, Respondents continued to withhold requested documents. By withholding such documents, Respondents willfully deprived Complaint Counsel of relevant information that had the potential to impact the duration and outcome of this litigation.

On September 16, 2009, an Initial Decision in the Prior Adjudicative Proceeding was issued by the ALJ which dismissed the Commission's Complaint.<sup>11</sup> This Initial Decision found, among other things, that Complaint Counsel did not prove that Respondents controlled the

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<sup>9</sup> JX 67. Respondents submitted a handful of Internet articles and studies concerning the ingredients in RAAX11.

<sup>10</sup> See JX 1, the Expert Report of Dr. Kucuk. The FTC's expert, Dr. Omer Kucuk, reviewed Respondents' submission and the existing scientific literature in light of the website's cancer claims for the product. Dr. Kucuk found no published scientific literature evaluating RAAX11 nor did he find any competent or reliable literature evaluating the efficacy of the RAAX11 ingredients, *agaricus* and *icaco*, as a cancer prevention, treatment, or cure.

<sup>11</sup> IDPAPCOL 9 - 12.

website [www.agaricus.net](http://www.agaricus.net) or that Respondents disseminated the alleged false advertisements on the website. The Initial Decision in the Prior Adjudicative Proceeding was not appealed and became the Decision of the Commission on November 9, 2009.<sup>12</sup>

**B. History and Nature of Respondents' EAJA Application**

On December 2, 2009, Respondents filed an Application for an award under the Equal Access to Justice Act for costs including attorney's fees and expenses, lost business income and profits, credit card interest, and Mr. Isely's home office expenses.<sup>13</sup> Thereafter, Respondents submitted two supplemental requests on December 23, 2009, and January 20, 2010, for additional attorney fees.<sup>14</sup> In total, Respondents' sought an EAJA award of \$140,305.

On January 6, 2010, Complaint Counsel submitted its Answer in Opposition to Respondents' Application arguing that an award should be denied because the Commission's position in the proceeding was substantially justified,<sup>15</sup> special circumstances make such an award unjust;<sup>16</sup> and Respondents seek an award for fees and expenses not allowed under EAJA.<sup>17</sup>

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<sup>12</sup> Order of the Commission, December 8, 2009. *See* 16 C.F.R. § 3.51(a).

<sup>13</sup> On December 22, 2009, Respondents terminated their counsel's services and have proceeded in this matter *pro se* since that time. *See* Letter to Hon. D. Michael Chappell, December 23, 2009, enclosing December 22, 2009, termination letter to Matthew Van Horn, Esq. Mr. Van Horn, thereafter, submitted his Notice of Withdrawal.

<sup>14</sup> Also on December 23, 2009, Complaint Counsel was served with a copy of Respondents' submission to Judge Chappell entitled "Petition to the Commission for Rulemaking on Maximum Rates for Attorney Fees as Provided Under Rule 3.81(g)" which sought to have a rulemaking to increase Respondents' allowable attorney's fees.

<sup>15</sup> *See* 5 U.S.C. § 504(a)(1) and Rule 3.81(1)(ii).

<sup>16</sup> *See* 5 U.S.C. § 504(a)(1) and Rule 3.81(a).

<sup>17</sup> *See* 5 U.S.C. § 504(a)(3) and Rule 3.81(e)(1)(ii).

Respondents submitted their Reply to the Answer on January 20, 2010.<sup>18</sup>

On April 27, 2010, the ALJ issued an Initial Decision (hereinafter “EAJA Initial Decision”) denying Respondents’ EAJA Application.<sup>19</sup> In the EAJA Initial Decision, the ALJ concluded that although Respondent had demonstrated that they are prevailing parties eligible for an award of attorney fees and other expenses under the EAJA,<sup>20</sup> he nevertheless found that Complaint Counsel had demonstrated that the agency’s position taken in the Prior Adjudicative Proceeding was substantially justified, having a reasonable basis in law and fact.<sup>21</sup> Thus, the ALJ’s decision held that because the Commission’s position was substantially justified, Respondents’ EAJA claim must be denied.

Respondents have now appealed the ALJ’s decision. On appeal, however, Respondents seek a reduced award figure of \$60,050.85. Since this figure is not itemized, Complaint Counsel is unable to determine which portions of their previous claim for an EAJA award that Respondents have abandoned.

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<sup>18</sup> In addition to their EAJA Application and Petition for a Rulemaking, Respondents filed a “Motion to Sanction Complaint Counsel for Her Improper Actions in the Matter of Gemtronics, Inc. and William H. Isely” (“Motion for Sanctions”) with the Court on February 26, 2010. By Order dated April 27, 2010, Respondents’ Motion for Sanctions was denied.

<sup>19</sup> EAJA IDFF 4.

<sup>20</sup> EAJA IDFF 1, 2.

<sup>21</sup> EAJA ID at 12; EAJA IDFF 1 - 4. In the EAJA Initial Decision, the ALJ declined to rule on Complaint Counsel’s arguments that special circumstances make an award unjust and any award should “be reduced or denied [because] the applicant has unduly or unreasonably protracted the proceedings,” under 5 U.S.C. § 504(a)(3) and Rule 3.81(e)(1)(ii). Further, the ALJ noted that “because Respondents are not entitled to any award, whether the Application seeks an unreasonable amount of fees and expenses, or categories of fees and expenses beyond those authorized by the EAJA, as contended by Complaint Counsel, need not, and will not, be addressed.” EAJA ID at 12.

### III. BASIS FOR EAJA APPEAL

#### A. Standard of Review

As required by Commission Rules, the ALJ conducts a hearing, develops the evidentiary record, and issues an initial decision.<sup>22</sup> Upon appeal of that initial decision by a party, or upon the Commission's own initiative, the Commission may review the initial decision *de novo*.

Rule 3.54(a) states:

Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable exercise all the powers which it could have exercised if it had made the initial decision.<sup>23</sup>

Accordingly, the Commission reviews this matter *de novo*.

#### B. The Equal Access to Justice Act

The Equal Access to Justice Act, 5 U.S.C. § 504, provides for an award of attorney fees and expenses to a prevailing party in administrative litigation involving the government.

Commission Rules 3.81, *et seq.*, describe the parties eligible for EAJA awards, how to apply for awards, and the procedures and standards that the Commission will use to make such awards.<sup>24</sup>

Under Rule 3.81, an eligible party will receive an EAJA award when:

It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are

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<sup>22</sup> Rule 3.51, 16 C.F.R. § 3.51.

<sup>23</sup> 16 C.F.R. § 3.54(a).

<sup>24</sup> 16 C.F.R. § 3.81, *et seq.*

sought.<sup>25</sup>

This Rule further states:

The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.<sup>26</sup>

An award to prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make an award unjust.<sup>27</sup>

There is no dispute that, under EAJA, Respondents are prevailing parties and that they are eligible parties. Rather, Respondents challenge the ALJ's determination that the Commission's position in the Prior Adjudicative Proceeding was substantially justified, within the meaning of 5 U.S.C. § 504(a)(1), and that, as a result, they are not entitled to an award of attorney fees and other expenses under 5 U.S.C. § 504 and Commission Rules 3.81, *et seq.*<sup>28</sup>

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<sup>25</sup> Rule 3.81(a)(1)(i), 16 C.F.R. § 3.81(a)(1)(i); *see* 5 U.S.C. § 504(a)(1).

<sup>26</sup> Rule § 3.81(e)(i), 16 C.F.R. § 3.81(e)(i). It is worth noting that Respondents' Application states that "[t]here was reasonable basis in law or fact for Complaint Counsel's complaint" which appears to waive any argument that the Commission's pre-litigation position was not substantially justified. *See* Application at ¶ 10.

<sup>27</sup> Rule § 3.81(e)(ii), 16 C.F.R. § 3.81(e)(ii); *see* 5 U.S.C. § 504(a)(3).

<sup>28</sup> In the EAJA Initial Decision (*see* EAJA ID at 12), the ALJ specifically declined to address Complaint Counsel's arguments regarding the invalidity of Respondents' award claim under 5 U.S.C. § 504(a)(1) and Rule 3.81(a) (special circumstances make an award unjust) and under 5 U.S.C. § 504(a)(3) and Rule 3.81(e)(1)(ii) (any award should be reduced or denied if the applicant has unduly or unreasonably protracted the proceedings). While Complaint Counsel reasserts these arguments herein, albeit in a more truncated manner, these specific objections have been briefed extensively in Complaint Counsel's Answer in Opposition to Respondents' Application, dated January 6, 2010 at 19 - 25; Complaint Counsel's Response in Support of its Answer, dated February 1, 2010; and Complaint Counsel's Amended Attachment A to its Response in Support of its Answer, dated February 3, 2010.

### C. Respondents' Arguments on Appeal

Although not a model of clarity, Respondents' brief appears to make two arguments supporting their appeal – neither of which has any merit. First, Respondents claim that the Commission lacked jurisdiction over the conduct at issue in the underlying proceeding. Second, Respondents argue that the Commission's position in the underlying proceeding was not substantially justified.

Respondents' jurisdictional argument is completely without merit. Respondents cite Section 5(c) of the FTC Act as jurisdictionally controlling. However, Section 5(c) has nothing to do with jurisdiction, let alone the jurisdiction in the Prior Adjudicative Proceeding. Presumably, Respondents meant to cite Section 5(a)(3) of the FTC Act, which they in fact quote in their brief.<sup>29</sup> That section limits the Commission's jurisdiction over unfair methods of competition involving commerce with foreign nations. Nonetheless, the Commission's action against Respondents alleged that they had engaged in unfair or deceptive acts or practices, not unfair methods of competition. Thus, Section 5(a)(3) has no application to the Commission's action against Respondents. Accordingly, Respondents' jurisdictional argument must fail.

Respondents' second argument is also without merit. Respondents claim that the ALJ incorrectly concluded that the Commission's position in the proceeding was substantially justified and therefore, the ALJ should have awarded attorneys fees and expenses to Respondents.

Respondents contend that the EAJA Initial Decision should be rejected because the Commission had no reasonable basis to bring this action against Respondents. To support their

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<sup>29</sup> See RAB at 9 - 10 n.30.

argument, Respondents' brief first relies heavily on two cases in which courts overturned a denial of EAJA fees to prevailing parties. As noted below, these cases are clearly distinguishable from the instant case, and Respondents misinterpret their significance in applying them to this matter.

Respondents cite, *United States v. Hallmark Construction Co.*,<sup>30</sup> to support the proposition that the ALJ erred in finding that the Commission had a reasonable basis to issue its complaint against Respondents. In *Hallmark*, the Appeals Court reviewed whether the trial court abused its discretion in finding that the government's position was substantially justified in denying an EAJA claim to the prevailing defendant. The Appeals Court found "troubling" the trial court's very brief description of its reasoning in denying the EAJA claim in light of that court's underlying decision that the government's case was "arbitrary and capricious." In remanding the case, the Appeals Court, which was unable to determine whether the trial court had abused its discretion, sought a more thorough explanation for the denial of an EAJA award.<sup>31</sup>

The *Hallmark* decision is clearly distinguishable from the instant case. In his EAJA Initial Decision denying Respondents' application, the ALJ wrote a lengthy and well-reasoned opinion that thoroughly examined *all* the evidence throughout the stages of the Commission's proceeding. Specifically, the ALJ found that, although the Commission's complaint was ultimately dismissed for failure of proof after a full evidentiary hearing, there was a genuine dispute regarding the evidence and, therefore, a substantial justification for initiating and

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<sup>30</sup> 200 F.3d 1076 (7th Cir. 2000). See RAB at 15, 16, 36; Amicus at 3 - 4.

<sup>31</sup> 200 F.3d at 1080 - 1081.



proceeding with the action.<sup>32</sup>

Respondents also cite to a Fourth Circuit case, *Hess Mechanical Corp. v. NLRB*,<sup>33</sup> as support. In *Hess*, the Appeals Court set aside the NLRB's denial of EAJA fees finding that the agency's case was notable for its "flimsiness" by going forward with only "a single, uncorroborated affidavit and in the face of a wall of adverse evidence."<sup>34</sup> Unlike the *Hess* case, in the instant case, the FTC proffered a significant amount of evidence. The ALJ's EAJA Initial Decision noted not only the ample amount of evidence proffered by Complaint Counsel, but also the need for an evidentiary hearing on the merits.<sup>35</sup> Accordingly, the decision in *Hess* is not applicable to this case.

In a second, even more untenable, argument contending that Commission had no basis to bring this action,<sup>36</sup> Respondents argue that it was unreasonable for the Commission not to pursue this matter under the Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers Beyond Borders Act ("US SAFE WEB Act").<sup>37</sup> The emphasis on the US SAFE WEB Act is

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<sup>32</sup> EAJA ID at 11 - 12.

<sup>33</sup> 112 F.3d 146 (4<sup>th</sup> Cir. 1997). *See* RAB at 19; Amicus at 6 - 8, 14, 21.

<sup>34</sup> 112 F.3d at 150.

<sup>35</sup> The amicus criticizes the ALJ because, in evaluating whether the Commission's position was substantially justified, the ALJ noted that he had denied Respondents's motion for summary decision. *See* Amicus at 2. Indeed, the fact that the ALJ denied summary decision shows that there was a genuine dispute of fact for trial. 16 C.F.R. § 3.24(a). In *Pierce v. Underwood*, the Supreme Court explained that, under EAJA, the government's position with respect to a proposition is substantially justified "if there is a 'genuine dispute'" as to the proper resolution of that proposition. 487 U.S. 552, 565 (1988).

<sup>36</sup> RAB at 12, 13, 32, 37.

<sup>37</sup> Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (2006) (codified in scattered sections of 15 U.S.C. and 12 U.S.C. § 3412(e)).

misplaced. The US SAFE WEB Act was designed to promote more efficient and effective relationships between the FTC and foreign law enforcers.<sup>38</sup> The Act does not prescribe the manner in which investigations are conducted, it is not an enforcement instrument, and it does not obligate the Commission to investigate potential foreign defendants in lieu of domestic defendants. Further, Respondents' argument is based on the mistaken belief that the Commission would lack jurisdiction over any claims involving www.agaricus.net if that website was based in a foreign country. As noted above, the Commission is not deprived of jurisdiction over unfair or deceptive practices directed from a foreign country into the United States.<sup>39</sup>

In light of the lack of merit to each of Respondents' appeal arguments, the ALJ's EAJA Initial Decision denying Respondents an award of attorney's fees and expenses and finding that the Commission's position in the litigation was substantially justified, should be affirmed.

#### **IV. ARGUMENT**

Respondents are not entitled to an award of attorney's fees and expenses under EAJA because the government's position was substantially justified, even though that position was not ultimately successful. In addition, Respondents' appeal for an EAJA award should be denied because special circumstances make an award unjust;<sup>40</sup> Respondents unduly and unreasonably protracted the proceeding;<sup>41</sup> and Respondents seek an award for fees and expenses not allowed under EAJA.

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<sup>38</sup> See Federal Trade Commission Report to Congress, December 2009, "The US SAFE WEB Act: The First Three Years."

<sup>39</sup> See Section 4 of the FTC Act (defining "commerce"), 15 U.S.C. § 44.

<sup>40</sup> See Rule 3.81(a) and 5 U.S.C. § 504(a)(1).

<sup>41</sup> See Rule 3.81(e)(1)(ii) and 5 U.S.C. § 504(a)(3).

**A. The Commission's Position in the Prior Adjudicative Proceeding Was Substantially Justified**

In denying Respondents' EAJA Application, the ALJ concluded that, on the basis of the administrative record as a whole, the Commission's position in this proceeding was substantially justified and had a reasonable basis in law and fact.<sup>42</sup>

1. Legal Standard for "Substantially Justified"

In order to avoid liability in an EAJA claim, a party must prove that its action was "substantially justified."<sup>43</sup> The phrase "substantially justified" is not defined in EAJA, 5 U.S.C. § 504(a)(1). However, the weight of authority interprets the phrase to mean "justified to a degree that could satisfy a reasonable person" as set forth in *Pierce v. Underwood*, the seminal Supreme Court case that interprets this phrase in the context of civil litigation.<sup>44</sup> Courts have followed this *Pierce* definition when interpreting "substantially justified" in the context of administrative litigation.<sup>45</sup> Further, following the decision in *Pierce*, courts have found the

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<sup>42</sup> EAJA ID at 12.

<sup>43</sup> See 5 U.S.C. § 504(a)(1); Commission Rule 3.81(a)(1)(i) and (e)(1)(i).

<sup>44</sup> 487 U.S. 552, 565-66 (1988). Although the Supreme Court in *Pierce* construed the phrase in the context of another EAJA statute, 28 U.S.C. § 2412(d)(1)(A), the language is identical to that found in 5 U.S.C. § 504(a)(1), the statute at issue in this case. Section 504 of Title 5 provides for an EAJA award in administrative litigation, while Section 2412 of Title 28 provides for an award in connection with civil litigation arising from government action. Both sections of the U.S. Code were enacted together as Sections 203 and 204, respectively, of PL 96-481, 94 Stat. 2325 *et seq.* (Oct. 21, 1980) and both contain similar language. Compare 5 U.S.C. § 504(a)(1) (requiring award "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified . . .") with 28 U.S.C. § 2412(b) (requiring award to prevailing party "unless the court finds that the position of the United States was substantially justified . . .").

<sup>45</sup> See *Inter-Neighborhood Hous. Corp. v. NLRB*, 124 F.3d 115, 120 (2nd Cir. 1997); *Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1233 (9th Cir. 1997); *First Nat'l Monetary Corp. v. CFTC*, 860 F.2d 654, 657 (6th Cir. 1988).

“substantially justified” language of EAJA to be satisfied if there is a “genuine dispute” or “if reasonable people could differ as to the appropriateness of the contested action.”<sup>46</sup>

The fact that the Commission’s complaint was dismissed does not raise the presumption that its position was not substantially justified. Courts have recognized that an award of fees under EAJA is not automatic in every case where a private party prevails over the government, and the fact that the government lost in the underlying litigation does not create a presumption that its position was not substantially justified.<sup>47</sup> As Third Circuit stated in *Morgan v. Perry*, “EAJA is not a ‘loser pays’ statute; rather, courts should limit their inquiries to whether the government’s position was reasonable under the facts and the law.”<sup>48</sup> Further, courts have made clear that under the legal standard of EAJA, the inquiry into reasonableness should not be collapsed into an antecedent evaluation of the merits.<sup>49</sup> Instead, in determining whether the government’s position is substantially justified, a court must arrive at one conclusion that

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<sup>46</sup> *Pierce*, 487 U.S. at 565-566; *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004); *Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992).

<sup>47</sup> *Morgan v. Perry*, 142 F.3d 670, 685 (3d Cir. 1998); *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988); *SEC v. Fox*, 855 F.2d 247, 252 (5th Cir. 1988).

<sup>48</sup> *Morgan v. Perry*, 142 F.3d at 685; see also *Hanover Potato Prods., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993). The amicus argues that public policy supports the grant of Respondents’ Application. Amicus at 14 - 21. In particular, it argues that EAJA was enacted so that individuals and small businesses could be reimbursed for their expenses in defending against “unreasonable government action.” Amicus at 16. Thus, the amicus suggests that the mere fact that Respondents consist of an individual and a small business should be sufficient to justify the grant of their Application. But this argument ignores that Congress did not intend EAJA to enact a policy of loser pays. Thus, so long as the government’s position is substantially justified, even if not ultimately successful, the losing party is not entitled to an award of its attorney’s fees and expenses.

<sup>49</sup> *Morgan v. Perry*, 142 F.3d at 685. See also *Halverson v. Slater*, 206 F.3d 1206, 1212 (D.C. Cir. 2000); *Griffon v. U.S. Department of Health and Human Servs.*, 832 F.2d 51, 52 (5th Cir. 1987).

simultaneously encompasses and accommodates the entire civil action.<sup>50</sup>

2. The Commission had a Reasonable Basis in Law and Fact in the Prior Adjudicative Proceeding

In the Prior Adjudicative Proceeding, Complaint Counsel had ample evidence indicating that Respondents had the ability to control a website that made false and unsubstantiated cancer-related advertising claims for RAAX11. Further, throughout this matter, both pre-complaint and post-complaint, Complaint Counsel had a reasonable basis for its actions.

The FTC amassed considerable evidence that all pointed to Isely and his company, Gemtronics, as the parties responsible for the patently false and unsubstantiated representations made on the website [www.agaricus.net](http://www.agaricus.net) that RAAX11 could prevent, treat and cure a variety of cancers.<sup>51</sup> The website not only contained express cancer-related claims for RAAX11, but also directed consumers to “call Mr. Isely” or call his telephone numbers for product information and ordering.<sup>52</sup> Mr. Isely’s name and telephone numbers were listed throughout the website.<sup>53</sup> In addition, Mr. Isely was the only source listed on the website for product information and ordering for U.S. consumers.<sup>54</sup> Further, the website’s registration listed Mr. Isely at his

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<sup>50</sup> *Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996); *see also Roanoke River Basin Assoc. v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993) (“[W]hen determining whether the government’s position in a case is substantially justified, we look beyond the issue on which the petitioner prevailed to determine, from the totality of the circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation.”).

<sup>51</sup> *See* Exhibits A, B, C and D to the Commission’s Complaint (hereinafter “Complaint Ex. \_\_\_”); JX 1, JX 7.

<sup>52</sup> EAJA ID at 7, 10. *See* Complaint Exs. A and C. *See, e.g.*, JX 7, Complaint Ex. A, “If you are living in the US, just call Mr. Isely and he will explain how it works.”

<sup>53</sup> *See, e.g.*, JX 7, Complaint Ex. A and C.

<sup>54</sup> *See, e.g.*, JX 7, Complaint Ex. A and C; JX 35; JX 38; JX 39.

residential address as the registrar and the administrative, technical, and zone contact.<sup>55</sup>

On January 3, 2008, and again on January 23, 2008, the FTC made undercover purchases of RAAX11 through the website. Both purchases were fulfilled by Mr. Isely, under the name Gemtronics, from Mr. Isely's residence.<sup>56</sup> A purchase confirmation webpage from the second transaction stated: "Your Credit Card is charged using a SSL secured server. On your statement will appear "GEMTRONICS SECURE PAYMENTS."<sup>57</sup> Each package contained a Gemtronics invoice for the purchase which included Respondent Isely's name, telephone number and email address, along with instructions to place future orders with him directly by phone or email.<sup>58</sup> Promotional literature that came in the packages used the name "Gemtronics" and repeated cancer-related claims for RAAX11 that were found on the website.<sup>59</sup> In addition, this promotional literature directed consumers to go to the website [www.agaricus.net](http://www.agaricus.net) for more information or "click on USA sales."<sup>60</sup> A search of the corporate records from the North Carolina Secretary of State's office showed that Mr. Isely had incorporated Gemtronics, Inc., in September 2006, with its principal place of business at Isely's home address.<sup>61</sup>

In March 2008, Complaint Counsel contacted Respondents regarding the website's

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<sup>55</sup> JX 16, JX 17.

<sup>56</sup> *See, e.g.* JX 46; JX 54. Isely admits fulfilling these orders. RAB at 7; Tr. 293.

<sup>57</sup> JX 50.

<sup>58</sup> JX 48, JX 56.

<sup>59</sup> *See* JX 57; JX 59.

<sup>60</sup> *See* JX 57.

<sup>61</sup> JX 13.

alleged false and unsubstantiated advertising claims and sent Respondents a proposed federal court complaint and consent to provide explicit and detailed notice of the FTC's claims and to facilitate possible settlement.<sup>62</sup> In response, in May 2008, Respondents notified Complaint Counsel by two letters that: (1) although Mr. Isely did not have authority to control the website, he had, nonetheless, taken remedial measures to have his name and contact information removed from the website and domain registration; (2) through Mr. Isely's efforts, the challenged cancer claims had been removed from the website; and (3) consumers in the United States could no longer purchase products from the website.<sup>63</sup>

Respondents provided Complaint Counsel with a document showing that, after Respondents had been contacted by the Commission, the domain registration for www.agaricus.net had been changed to another name and no longer contained references to Mr. Isely.<sup>64</sup> Respondents claimed that this document proved that someone other than Respondents controlled the website. However, as the ALJ noted in his EAJA Initial Decision, the fact that Respondents appeared to cause changes to the website's content and registration after being contacted by Complaint Counsel was a reasonable basis for concluding that Respondents had some control over the website.<sup>65</sup> The ALJ further noted that the document left open the question

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<sup>62</sup> Respondent's Appeal Brief contains contradictory assertions that the FTC sent a "Warning Letter" to the website www.agaricus.net (see, e.g., RAB at 6, 12, 36), while Respondents are fully aware, and even acknowledge in their brief, that no such letter was ever sent to the website. See RAB note 55, see also Tr. 359 - 360. As noted, *supra* note 7, a letter from the FDA entitled "Warning Letter" dated April 17 2008, was received by Respondents.

<sup>63</sup> JX 66, JX 67.

<sup>64</sup> JX 66.

<sup>65</sup> EAJA ID at 10 -11.

of who owned or control of the website prior to the change in April 2008.<sup>66</sup>

Respondents' letters also stated that, assuming *arguendo* that Mr. Isely did have control over the website, the challenged RAAX11 claims were supported by reliable, scientific evidence which Mr. Isely was prepared to introduce at trial "through an expert witness."<sup>67</sup> Respondents submitted a handful of Internet articles and studies about the RAAX11 ingredients, which FTC's expert concluded did not support the challenged cancer claims for RAAX11.<sup>68</sup>

After the May 2008 letters, Respondents refused to communicate further with Complaint Counsel, despite Complaint Counsel's requests to Respondents for additional information regarding the website and to discuss resolution of this matter.<sup>69</sup> Given Respondents' refusal to engage in further dialog, Complaint Counsel had no reasonable alternative but to request that the Commission issue a complaint against Respondents Isely and Gemtronics, Inc.

After the issuance of the complaint and during discovery, Complaint Counsel obtained additional evidence indicating that Mr. Isely had previously received notice that [www.agaricus.net](http://www.agaricus.net) was registered him and that he had done nothing to change the registration until contacted by the FTC.<sup>70</sup> As a result of the evidence obtained showing Respondents'

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<sup>66</sup> EAJA ID at 10 - 11 n.7.

<sup>67</sup> JX 67.

<sup>68</sup> *See supra* note 10; JX 1.

<sup>69</sup> *See* Respondents' Application, Exhibit C, the itemized attorney billing statements from Respondents' counsel, Mr. Van Horn. These records confirm that there was no contact with Complaint Counsel after May 31, 2008, until after the issuance of the Commission's Complaint in September 2008. Complaint Counsel's records show no contact from Respondents after May 20, 2008, despite her repeated attempts to speak with Respondents after that date.

<sup>70</sup> JX 12 at 27 - 28; JX 61.



apparent control over the website, Complaint Counsel had a reasonable basis in law and fact for bringing this case and pursuing the litigation.

The ALJ's EAJA Initial Decision examined all of the evidence and correctly concluded that the Commission's position in the Prior Adjudicative Proceeding was substantially justified and had a reasonable basis in law and fact.<sup>71</sup> Accordingly, the ALJ's EAJA Initial Decision should be affirmed and Respondents' EAJA claim denied.

**B. Special Circumstances Make an EAJA Award Unjust**

Under EAJA, the adjudicative officer may deny or reduce an award of fees or expenses to the extent that the party unreasonably protracted the proceedings or if "special circumstances make an award unjust."<sup>72</sup> This provision gives the courts discretion to deny awards where equitable considerations dictate that an award should not be made.<sup>73</sup>

Respondents' actions throughout this matter have unreasonably protracted the proceedings and obstructed the legal process by thwarting Complaint Counsel's discovery efforts. During the litigation, Respondents' actively hindered Complaint Counsel's pursuit of information by failing to make Mr. Isely available for deposition and failing to respond to discovery requests propounded by Complaint Counsel. Because of Mr. Isely's refusal to sit for a deposition and produce discovery, Complaint Counsel had no alternative but to file a

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<sup>71</sup> EAJA ID at 12; EAJA IDFF 3, 4.

<sup>72</sup> 5 U.S.C. § 504(a) and (e), and Rule 3.81(a).

<sup>73</sup> See, e.g., *Oguachuba v. I.N.S.*, 706 F.2d 93 (2nd Cir. 1983) (alien's persistent flouting of immigration law constituted "special circumstances" making an EAJA award unjust); *Wimpy v. Barnhart*, 350 F. Supp.2d 1031 (N.D. Ga. 2004) (special circumstances of late submission of evidence would make an EAJA award unjust).

Motion to Compel. The deposition of Mr. Isely was ultimately taken pursuant to the Court's Order granting Complaint Counsel's Motion to Compel Discovery.<sup>74</sup> However, after being compelled by the Court to produce discovery, Respondents produced only a fraction of the requested documents on the date mandated by the Court and represented that further responsive documents would be forthcoming. Thereafter, when Complaint Counsel sought the additional responsive documents, Respondents represented to Complaint Counsel that all the requested materials had been produced.<sup>75</sup>

It was only at trial, when Mr. Isely testified that he had files of documents at his home evidencing years of Respondents' business transactions and communications,<sup>76</sup> that Complaint Counsel learned that Respondents had not complied with the Court's Order and had, in fact, withheld the vast majority of relevant business documents from Complaint Counsel.<sup>77</sup>

Respondents' Brief makes the specious argument that the "delay in providing discovery [ ] was caused by Complaint Counsel's demanding nonexistent evidence of the records of the Respondent's advertising activities on the website which were non-existent."<sup>78</sup> To the contrary,

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<sup>74</sup> Complaint Counsel's Motion to Compel Answers to Interrogatories, Production of Documents, and Deposition of Respondent Isely was filed on January 22, 2009. The Court Order granting the Motion was issued on January 28, 2009.

<sup>75</sup> See Respondents' Application, Exhibit C App. Respondents' failure to produce documents is evidenced by the fact that, according to the billing statements of Respondents' Counsel, no further production of documents was made to Complaint Counsel after February 3, 2009, the date the Court Ordered for Respondents to respond to discovery.

<sup>76</sup> Tr. 224 - 228.

<sup>77</sup> Tr. 224 - 228. In addition, Respondents subsequently admit that they failed to comply with discovery. See, e.g., RAB at 4, 43.

<sup>78</sup> RAB at 43.

Mr. Isely failed to produce virtually any business records, and at trial, he admitted having boxes at such records at his home.<sup>79</sup>

Respondents' continued failure to produce the requested documents deprived Complaint Counsel and the ALJ of access to relevant, probative, and potentially dispositive evidence relating to the violations alleged in the Commission's complaint. Such evidence could have been influential to an earlier resolution of this case through settlement, voluntary dismissal, or summary disposition. Indeed, this evidence may have impacted the Court's ultimate decision to dismiss the FTC's complaint.

Equitable considerations dictate that an award under EAJA should not be made to Respondents due to their protracting and obstructing the legal process in this case. Therefore, Respondents' request for an award should be denied.

**C. Respondents Seek an Award for Fees & Expenses Not Allowed under EAJA**

In their appeal brief, Respondents seek a revised amount of \$60,050.85 as a "fair settlement" for an EAJA award in this matter, but Respondents fail to indicate how this amount was reached.<sup>80</sup> Although Respondents now seek less than they originally sought, it appears that even this reduced amount is still based on their original Application, which contained numerous unreasonable requests for fees and expenses.<sup>81</sup>

To determine what constitutes a reasonable fee, Respondents bear the burden of establishing the reasonableness of both their entitlement to the hours expended and the hourly

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<sup>79</sup> Tr. 224 - 228. Respondents subsequently admit that they failed to comply with discovery. *See* RAB at 4, 43.

<sup>80</sup> RAB at 42 - 43.

<sup>81</sup> RAB at 42 - 43.

rates.<sup>82</sup> Respondents' application submitted billing statements containing voluminous entries for work performed by the Law Office of Matthew I. Van Horn, PLLC, that were unsupported by adequate documentation,<sup>83</sup> beyond the scope of the proceedings,<sup>84</sup> and for purely clerical and secretarial tasks.<sup>85</sup> Accordingly, Respondents' Application should be rejected in its entirety, or pending their further verification of the questionable fees, any excessive, unnecessary, redundant, or improperly documented fees should be deducted from any potential fee award.

Respondents' Application also included a claim for fees and expenses incurred prior to the issuance of the Commission's complaint, which are not allowable under EAJA.<sup>86</sup> The Act

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<sup>82</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).

<sup>83</sup> Respondents' billing records lacked adequate detail to "access accurately the work that should be compensated and that which is duplicative or excessive of attorney's time records," or to "determine with a high degree of certainty" that the hours billed were reasonable. *Cobell v. Norton*, 407 F. Supp.2d 140, 158 (D.D.C. 2005) (quoting *Sierra Club v. Mullen*, 619 F. Supp. 1244, 1251 (D.D.C. 1985). See also *United Slate Tile & Composition v. G & M Roofing*, 732 F.2d 495, 502 n.2 (6th Cir. 1984); *In re Donovan*, 877 F.2d 982, 995 (D.C. Cir. 1989).

<sup>84</sup> Respondents seek compensation for time spent in activities that are beyond the scope of this proceeding. For example, Respondents seek an award for time spent in dealing with the FDA and with the press, both of which bear no relationship to this matter. See, e.g., *Role Models of America, Inc. v. Brownlee*, 353 F.3d 962, 973 (D.C. Cir. 2004); *In re Meese*, 907 F.2d 1192, 1203 n.19 (D.C. Cir. 1990).

<sup>85</sup> While the Supreme Court has ruled that fees for paralegals are permissible under EAJA, the Court also explained that to recover these fees, the services rendered by the paralegal must be legal in nature, *i.e.*, "factual investigation, locating and interviewing witnesses, assistance with depositions, interrogatories and document production, compilation of statistical and financial data, checking legal citations and drafting correspondence." *Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571 (2008); *Cobell v. Norton*, 407 F. Supp.2d at 156 (quoting *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989)). Clerical tasks, performed by secretarial personnel and other office support staff, are typically considered within the overhead component of a lawyer's fee and are thus non-compensable. *In re Olson*, 884 F.2d 1415, 1426-27 (D.C. Cir. 1989) (*per curiam*).

<sup>86</sup> App., Ex. C.

specifically provides only for the award of expenses “incurred” in connection with an “adversary adjudication.”<sup>87</sup> Commission Rule 3.81(a) similarly states that EAJA provides for the award of fees and expenses to “parties to adjudicative proceedings under Part 3 of this title.” Under EAJA and the Commission’s Rules, pre-complaint investigation is not an adjudicative proceeding. Specifically, EAJA states that an adversary adjudication is “an adjudication under section 554,”<sup>88</sup> and Section 554 states that it applies to adjudications “determined on the record after opportunity for an agency hearing.” Commission investigations clearly fall outside the scope of this phrase.<sup>89</sup> Rule 3.2 defines the nature of Commission adjudicative proceedings, and specifically excludes from the definition pre-complaint activities: “It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings *after the issuance of the complaint . . .*” (Emphasis added.) Further, Commission Rule 3.11(a) states that an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint. Accordingly, Respondents’ Appeal request for fee reimbursement for pre-complaint representation must also be disallowed.

Respondents make an additional request in their brief that is impermissible under EAJA. Respondents seek reimbursement of purported lost business income and profits, credit card

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<sup>87</sup> 5 U.S.C. §504(a)(1).

<sup>88</sup> 5 U.S.C. §504(b)(1)(C)(I).

<sup>89</sup> The term “adjudication” is defined in 5 U.S.C. §551(7) as an “agency process for the formulation of an order.” Investigative efforts are not part of this process, rather, they lead to the decision whether to initiate an adjudication. The “Federal Trade Commission and the other regulatory agencies have two separate functions to perform, investigative and adjudicative.” *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977).

interest, home office expenses, and Mr. Isely's personal travel incurred in the litigation.<sup>90</sup> While courts have been divided on what constitutes expenses under EAJA, they traditionally examine those costs that are customarily billed to a client by an attorney.<sup>91</sup> Here, however, Respondents seek reimbursement for undocumented and unsubstantiated personal expenses purportedly incurred by Mr. Isely.<sup>92</sup> There is no provision in EAJA that allows for an award of Respondents' requests.<sup>93</sup>

Finally, Respondents reiterate their request that the Commission "proceed with rulemaking pursuant to Rule 2.81(g) to raise the award for Attorney Fees to \$225/hr" because of the special abilities of Respondents' counsel in "understanding the operation of website management."<sup>94</sup> Commission Rule 3.81(f)(2) states: "No award for the fee of an attorney or

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<sup>90</sup> RAB at 43.

<sup>91</sup> Compare courts holding expenses such as telephone, postage, and travel should not be reimbursed under EAJA, *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986); *Massachusetts Fair Share v. Law Enforcement*, 776 F.2d 1066, 1069-70 (D.C. Cir. 1985); *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211, 223-24 (D.C. Cir. 1984); *Cobell v. Norton*, 407 F. Supp.2d at 165, with courts holding that these types of expenses are reimbursable if incurred in preparation of adjudication and if customarily charged the client, *Jean v. Nelson*, 863 F.2d 759, 778 (11th Cir. 1988); *Kelly v. Bowen*, 862 F.2d 1333, 1335 (8th Cir. 1988); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2nd Cir. 1986); *International Woodworkers of America, AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985).

<sup>92</sup> Respondents' Application fails to provide adequate documentation to support either the dates incurred, the amounts claimed, or payments for these purported expense claims as required under EAJA. See App., Ex. D.

<sup>93</sup> EAJA provides for an allowance of "expenses incurred" and defines the term to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project . . . and reasonable attorney or agent fees." 5 U.S.C. §504(a)(1), (b)(1)(A).

<sup>94</sup> RAB at 43.

agent under these rules may exceed the hourly rate specified in 5 U.S.C. §504(b)(1)(A).”<sup>95</sup>

The Act places a ceiling of \$125 per hour for attorney’s fees “unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”<sup>96</sup> Respondents have arguably made no claim of, nor shown any support for, any special factor for their attorney that would merit the enhanced attorney’s fees they seek.

**V. CONCLUSION**

For the reasons set forth above, Complaint Counsel respectfully requests that the Commission affirm the ALJ’s EAJA Initial Decision finding that the Commission’s position in the Prior Adjudicative Proceeding was substantially justified, having a reasonable basis in law and fact, and denying any award of attorney fees and other expenses to Respondents under the Equal Access to Justice Act.

Respectfully submitted,



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Dated: July 14, 2010

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<sup>95</sup> Commission Rule 3.81(f)(3) states the factors to consider in determining the reasonableness of the fee sought for an attorney.

<sup>96</sup> 5 U.S.C. § 504(b)(1)(A)(ii).

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I filed and served the attached:

- 1) COMPLAINT COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' APPEAL OF THE DENIAL OF THEIR APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT

The original and twelve paper copies via overnight delivery and one electronic copy via email to:

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., N.W., Room H-159  
Washington, D.C. 20580  
email: [secretary@ftc.gov](mailto:secretary@ftc.gov)


One paper copy via overnight delivery and one electronic copy via email to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., N.W. Room H-112  
Washington, D.C. 20580  
email: [oalj@ftc.gov](mailto:oalj@ftc.gov)

One paper copy via overnight delivery and one electronic copy via email to:

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email: [b.isely@ftpmailbox.com](mailto:b.isely@ftpmailbox.com)

Dated: July 14, 2010

  
Barbara E. Bolton  
Attorney for Complaint Counsel